

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Rapid Wireless Ltd.
Request for Waiver of Installment Payment Rules
for Auction No. 7 License

ORDER

Adopted: January 29, 2007

Released: January 29, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. By this Order, we deny the request of Rapid Wireless Ltd. ("Rapid"), for a waiver of the Commission's installment payment rules. Specifically, Rapid sought a two year deferral of its principal installment payments with respect to the 900 MHz Specialized Mobile Radio Service ("SMR") license it won at auction. Rapid was the high bidder for the license in Auction No. 7. As a small business, Rapid was eligible to participate in the Commission's installment payment plan. Grant of the License was conditioned upon Rapid's full and timely performance of its payment obligations. Pursuant to the Commission's rules, Rapid was required to make interest-only payments for the first five years of the license term. Payments of

1 Letter from Douglas Sinclair, President, Rapid Wireless LTD to Susan Donahue, Chief, Revenue and Receivable Operations Group, Office of the Managing Director, dated September 9, 2002 ("Request"). Although this Request was filed with the Office of Managing Director, it seeks regulatory relief from the payment obligations of Section 1.2110 of the Commission's rules. See 47 C.F.R. §§ 1.2110(g) (2002). We therefore treat this request as a waiver of the Commission's installment payment rules.

2 Id. The license at issue is for MTA 37, Jacksonville, FL, and is identified by call sign KNNY390. See "FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas: Down Payments Due April 22, 1996, FCC Form 600S Due April 22, 1996," Public Notice, 11 FCC Rcd 18,599, 18,615 (1996) ("Auction No. 7 Closing Public Notice").

3 See Auction No. 7 Closing Public Notice, 11 FCC Rcd 18,599, 18,615 (1996).

4 See 47 C.F.R. §§ 1.2110(e) and 90.812(a) (1996).

5 47 C.F.R. § 90.812 (1996) ("An MTA license issued to an eligible small business that elects installment payments will be conditioned on the full and timely performance of the license holder's quarterly payments.").

6 47 C.F.R. § 90.812(a)(1) (1996).

interest and principal were amortized over the remaining five years of the license term.⁷ On August 31, 2002, Rapid was scheduled to begin making quarterly installment payments of principal plus interest.⁸ Rapid never made that payment, and on September 9, 2002, submitted the instant Request. On March 1, 2003, the license automatically cancelled.⁹ For the reasons set forth below, we find Rapid's arguments to be without merit.

II. BACKGROUND

A. The Commission's Installment Payment Program

2. When the Commission first adopted competitive bidding rules in 1994, it established an installment payment program under which qualified small businesses that won licenses in certain services were allowed to pay their winning bids in quarterly installments over the initial term of the license.¹⁰ In deciding to offer installment payment plans, the Commission reasoned that in appropriate circumstances such plans would, by reducing the amount of private financing small entities needed in advance of auctions, help to provide opportunities for small businesses to participate in the provision of spectrum-based services.¹¹ Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.¹² When in 1997 the Commission discontinued the use of installment payments for future auctions,¹³ it allowed entities that were already paying for licenses in installments to continue doing so.¹⁴

⁷ *Id.*

⁸ *See Request.*

⁹ 47 C.F.R. § 1.2110(g)(4) (2002).

¹⁰ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2389-91 ¶¶ 231-40 (1994) (“*Competitive Bidding Second Report and Order*”). The first Commission auction for which installment payments were available was Auction No. 2 (218-219 MHz Service), which concluded on July 29, 1994.

¹¹ *Id.* at 2389-90 ¶ 233. The goal of providing opportunities for small businesses to participate in the provision of spectrum-based services is set forth at 47 C.F.R. §§ 309(j)(3)(B) & 309(j)(4)(D).

¹² *See, e.g.*, 47 C.F.R. §§ 1.2110(e)(3)(iii) & (iv) (1994).

¹³ The Commission discontinued the use of installment payments based on its findings that (1) installment payments are not necessary to ensure meaningful opportunities for small businesses to participate successfully in auctions; (2) the Commission must consider all of the objectives of Section 309(j), including the development and rapid deployment of new services for the benefit of the public; (3) filings for bankruptcy by entities unable to pay their winning bids may result in delays in the deployment of service; and (4) requiring the payment of bids in full within a short time after the close of auctions ensures greater financial accountability from applicants. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397-98 ¶¶ 38-39 (1998) (“*Part 1 Third Report and Order*”). The Commission affirmed this decision in 2000. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,322 ¶ 55. The last Commission auction for which installment payments were available was Auction No. 11 (broadband PCS F block), which ended on January 14, 1997.

¹⁴ *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

3. Certain features of the Commission's installment payment rules have remained the same since they were first adopted in 1994. Thus, the rules have always conditioned the grant of licenses upon the full and timely performance of licensees' payment obligations and have provided that, upon a licensee's default, the license cancels automatically and the Commission institutes debt collection procedures.¹⁵ In 1997, however, the Commission liberalized its installment payment grace period rules for those licensees that were already paying their winning bids in installments, providing these licensees with significant advantages they had not previously had. Under the rules adopted in 1994, any licensee whose installment payment was more than 90 days past due was in default, unless the licensee properly filed a grace period request.¹⁶ The rules as amended in 1997, however, provided licensees with an automatic grace period, i.e., a grace period to which they were entitled without having to file a request.¹⁷ The amended rules also entitled all licensees paying in installments to a grace period of 180 days. If a licensee did not make full and timely payment of an installment, it was automatically granted a 90-day period during which it was allowed to pay the installment along with a 5 percent late fee.¹⁸ If it did not submit the missed installment payment and the 5 percent late fee before the expiration of this 90-day period, the licensee was automatically granted a second 90-day period during which it could remit payment along with an additional late fee equal to 10 percent of the missed payment.¹⁹ A licensee's failure to make payment, including the associated late fees, by the end of the second 90-day period placed it in default.²⁰

¹⁵ See, e.g., 47 C.F.R. § 1.2110(e)(4) (1994) and 47 C.F.R. § 1.2110(g)(4) (2002). See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551 (2004). In this Order addressing the inapplicability of 47 C.F.R. § 1.2104 of the Commission's rules to installment payment defaults, the Commission discussed its 1997 decision not to deviate from its license-cancellation-plus-debt-collection rule for installment payment defaults and explained the reasonableness of this decision. Noting that automatic license cancellation is not unique to defaults on installment payments (licenses terminate automatically, for example, when licensees fail to build out in compliance with the Commission's rules, whether they are paying their winning bids in installments or have paid them in full in a lump sum), the Commission explained that its rules are designed to encourage entities that cannot meet their financial obligations to exit the auction process sooner rather than later in order to avoid delays in licensing spectrum to entities that are able to provide service to the public. Thus, the consequence of defaulting after the close of an auction is more severe than the consequence of withdrawing a high bid during an auction, when a new high bidder can still emerge. Similarly, the consequence of a post-licensing default, such as an installment payment default or a failure to meet construction or service requirements, is more severe than the consequence of a pre-licensing default because the former could adversely affect service to the public much longer than the latter. *Id.* at 2561-62 ¶¶ 29-31.

¹⁶ 47 C.F.R. § 1.2110(e)(4)(i) & (ii) (1994). Licensees were permitted to request a grace period of 90 to 180 days.

¹⁷ 47 C.F.R. § 1.2110(f)(4)(i) & (ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶¶ 106-07. The amended rules took effect on March 16, 1998.

¹⁸ 47 C.F.R. § 1.2110(f)(4)(i) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

¹⁹ 47 C.F.R. § 1.2110(f)(4)(ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

²⁰ 47 C.F.R. § 1.2110(f)(4)(iv) (1998).

4. In liberalizing its grace period rules, the Commission found that the amended rules eliminated uncertainty for licensees seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions,²¹ and that the added certainty the rules provided to licensees would increase the likelihood that licensees and potential investors would find solutions to capital problems before defaults occurred.²² Noting that a grace period is an extraordinary remedy in cases of financial distress and that the rules it adopted are consistent with commercial practice, the Commission declined to provide more than 180 days for licensees to make late payments and rejected the argument that licenses should not cancel automatically upon default.²³

5. In 2000, the Commission simplified its grace period rules to provide licensees with two quarters (i.e., two 3-month periods) in which to submit late installment payments and associated late fees, rather than two 90-day periods.²⁴ This change aligned the schedule for late payments with the quarterly schedule of regular installment payments.²⁵ The Commission's grace period rules as amended in 1997 and 2000 remain in effect today.

B. Rapid

6. Rapid won the License in Auction No. 7, which concluded in April of 1996, with a gross bid in the amount of \$300,000. Rapid was eligible for bidding credits as a result of its status as a small business and its net bid amounted to \$255,000.²⁶ Rapid then exercised its option as a small business to participate in the installment payment plan that was made available to qualified winning bidders in Auction No. 7.²⁷ Consistent with the Commission's rules, the grant of the License was conditioned upon Rapid's full and timely performance of its installment payment obligations.²⁸

7. As stated above, if a licensee requires additional time to pay its installment obligation, the Commission's rules provide two quarterly grace periods, subject to late payment

²¹ *Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110.

²² *Id.* at 443 ¶ 116.

²³ *Id.* at 439-40 ¶¶ 109-10; Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,304-05, ¶ 19 (2000) (“*Part 1 Reconsideration of Third Report and Order*”).

²⁴ *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15310 ¶ 28.

²⁵ *Id.*

²⁶ *See Auction No. 7 Closing Public Notice*.

²⁷ *See* 47 C.F.R. §§ 1.2110(e) and 90.812(a) (1996).

²⁸ Section 1.2110(e)(4) (1996) of the Commission's rules expressly provided that “[a] license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's obligations under the installment plan.” *See also* 47 C.F.R. § 90.812 (1996) (“An MTA license issued to an eligible small business that elects installment payments will be conditioned on the full and timely performance of the license holder's quarterly payments.”).

fees, in which it can render a payment.²⁹ If a licensee fails to make an installment payment within that time period, it is considered to be in default, and its license automatically cancels.³⁰ Therefore, in accordance with the Commission's rules, when Rapid failed to make its August 31, 2002 payment with the associated late fees within the two quarterly grace periods, *i.e.*, by February 28, 2003, it was in default, the License automatically canceled on March 1, 2003, and Rapid became subject to debt collection procedures.³¹ Rapid has made no payment on its debt obligation for the License since its default.

III. DISCUSSION

8. In order to obtain a waiver of the automatic cancellation and installment payment rules, Rapid must show either that (i) the underlying purposes of the rules would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances, application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or that it has no reasonable alternative.³² As discussed below, Rapid does not satisfy either prong of the waiver standard.

9. In its one page Request, Rapid seeks a "moratorium of principal payments for two years" beginning with the payment that was due on August 31, 2002.³³ In support of its Request, Rapid makes cursory claims that "economic hardship related to the September 11, 2001 bombings, along with a double dip recession of the U.S. economy," affected the types of industries that it services and "has thrown the whole Wireless industry into tough times."³⁴ Rapid alleges that this made it impossible for it to satisfy the principal portion of its installment payment obligations.³⁵ Accordingly, Rapid requests that it be allowed to pay interest-only payments for two years and principal payments thereafter.³⁶

10. Rapid's arguments fail to satisfy the first prong of the Commission's waiver standard. The Commission's competitive bidding system was designed to serve a number of statutory purposes, including the rapid deployment of new technologies and services to the public

²⁹ 47 C.F.R. § 1.2110(g)(4)(i)-(ii) (2002).

³⁰ 47 C.F.R. § 1.2110(g)(4)(iv) (2002); *see also* Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules, 13 FCC Rcd 18,213-14 (1998) ("*WTB Guidance Public Notice*") ("Any licensee that becomes more than one-hundred eighty (180) days delinquent on an installment payment shall be in default, and the license shall automatically cancel without further action by the Commission. In that event, the debt shall be transferred to the Department of Treasury for collection subject to the Debt Collection Improvement Act of 1996").

³¹ 47 C.F.R. § 1.2110(g)(4)(iv) (2002).

³² 47 C.F.R. § 1.925.

³³ *See Request*.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

and the efficient and intensive use of spectrum.³⁷ Installment payment programs were established to help small entities participate in the competitive bidding process and the provision of spectrum-based services;³⁸ they were not, however, intended to allow the retention of licenses by parties unable to pay for the licenses. Indeed, since the inception of the auctions program, the Commission has endeavored to ensure that the rapid deployment of service and the efficient, intensive use of spectrum are not undermined by entities that lack the financial capacity to pay their winning bids and operate communications systems.³⁹

11. In keeping with this objective, the Commission has determined that strict enforcement of its installment payment rules enhances the integrity of the auction and licensing process.⁴⁰ The automatic cancellation rule specifically safeguards the integrity of the Commission's competitive bidding and licensing process by ensuring that parties that cannot meet their installment payment obligations do not retain licenses won at auction.⁴¹ Precluding winning bidders, or subsequent licensees, from keeping licenses when their winning bids are not paid pursuant to the Commission's rules reduces bidders' incentive to make bids they cannot pay. This in turn increases opportunities for bidders that can pay their bids to win licenses, promotes a fair and efficient licensing process for all auction participants, and maintains the integrity of the Commission's competitive bidding program. By increasing the likelihood that winning bidders will be entities that are able to pay their bids and provide service to the public, the Commission also furthers economic opportunity and competition in the marketplace.⁴²

³⁷ 47 U.S.C. §§ 309 (j)(3)(A) & (D). *See also* H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.A.N. 378, 580 (finding that "a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.").

³⁸ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 229.

³⁹ As noted above, for example, when the Commission amended its grace period rules in 1997, it declined to provide more than 180 days for licensees to make late payments and rejected the argument that licenses should not cancel automatically upon default. *See supra* paragraph 4. *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2381-82 ¶¶ 189-192 (discussing importance of down payments that will ensure that winning bidders are able to pay full amount of their winning bids, rapidly deploy their systems, and operate them in an efficient manner); *id.* at 2390 ¶ 237 (deciding not to allow installment payments for large spectrum blocks in order to avoid delay of service to public that could result from encouraging undercapitalized firms to acquire licenses they lack the resources to finance adequately).

⁴⁰ *See, e.g.,* Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, *Memorandum Opinion and Order*, 15 FCC Rcd 25,103, 25,110-11 ¶ 15 (2000) ("*Southern MO&O*"), *further recon. denied, Second Memorandum Opinion and Order*, 16 FCC Rcd 18,357 (2001); Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,117-18 ¶ 10 (2000) ("*21st Century MO&O*"), *recon. denied*, Licenses of 21st Century Telesis Joint Venture and 21st Century Bidding Corporation for Facilities in the Broadband Personal Communications Services, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001), *petition dismissed in part and denied in part, 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003).

⁴¹ *See 21st Century MO&O*, 15 FCC Rcd at 25,117-18 ¶ 10.

⁴² *See, e.g., id.* at 25,123-24 ¶ 22.

12. Rapid's arguments against strict enforcement of the Commission's installment payment rules are unconvincing. The Commission's general policy of strictly enforcing its installment payment rules does not preclude the grant of waivers in individual cases where the Commission finds that, based on the particular facts of the case, a waiver would serve the purpose of the rules and would be in the public interest. Indeed, where the Commission has found that there is no question as to the licensee's ability to pay its winning bid and that preserving the original license assignment would be in the public interest, it has granted waivers of the automatic cancellation rule.⁴³ Rapid's cursory request for deferral of its payment obligations, and its subsequent failure to render any payment toward its debt since early 2002, however, clearly demonstrate that it is not a licensee that is able to meet its payment obligations.

13. The Commission's rules presume that the entity that bids the most for a license in an auction is the entity that places the highest value on the use of the spectrum, and such entities are presumed to be those best able to put the licenses to their most efficient use for the benefit of the public. However, when licensees that are paying winning bids in installments fail to pay the principal and related interest in compliance with the Commission's rules, the presumption that the auction assigned the license to the party that placed the highest value on the license is lost.⁴⁴ Given Rapid's admitted inability to pay, and its subsequent actions, we cannot conclude that it was the party that valued the Licenses most highly. Under these circumstances, the underlying purpose of the automatic cancellation rule is better served by applying the rule than by waiving its enforcement.

14. Rapid has also failed to present any unique or unusual factual circumstances that would satisfy the second prong of the Commission's waiver standard. The Commission has repeatedly found that circumstances such as those Rapid describes are insufficient grounds for the grant of a waiver of installment payment deadlines. The Commission has made clear that it "cannot take into account the private business arrangements that an applicant has made to finance its successful bid"⁴⁵ and that unanticipated financing difficulties are not a unique circumstance that would warrant a waiver.⁴⁶ Thus, consistent with past decisions, the effects of an economic downturn and a decline in financial markets are not grounds for grant of a waiver of the

⁴³ See, e.g., Leaco Rural Telephone Cooperative, Inc. Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Hobbs, New Mexico Basic Trading Area, MDB191, *Order*, 21 FCC Rcd 1182 (2006); Advanced Communications Solutions, Inc. Request for Waiver of Section 1.2110(g)(4)(iv) and Reinstatement of 900 MHz Specialized Mobile Radio Licenses, *Order*, 21 FCC Rcd 1627 (2006).

⁴⁴ See, e.g., *21st Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22.

⁴⁵ BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, *Memorandum Opinion and Order*, 15 FCC Rcd 17,590, 17,606-07 ¶ 30 (2000).

⁴⁶ See, e.g., *id.*; Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22,071, 22,072 ¶ 4 (1998) ("The challenge of raising capital to finance . . . licenses exists in varying degrees for all licensees and does not constitute 'unique facts and circumstances.'"), *petitions for reconsideration denied*, 14 FCC Rcd 6080 (1999), *aff'd.*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999) (unpublished decision).

Commission's installment payment rules.⁴⁷ As we have observed in the past, in choosing to become a licensee and agreeing to pay by installments, an installment debtor accepts the risk that its assumptions regarding the availability of capital might prove incorrect.⁴⁸

IV. CONCLUSION

15. Rapid has not satisfied the standard for a waiver of the Commission's installment payment deadlines for the License. We therefore find that application of the Commission's installment payment rules in this case will serve rather than frustrate their underlying purpose, is not inequitable or unduly burdensome, and is in the public interest, and we deny Rapid's Request.

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that, pursuant to authority granted in Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(j), Rapid Wireless Ltd.'s Waiver Request dated September 9, 2002, seeking waiver of the Commission's rules governing installment payment deadlines with respect to the License, is DENIED.

17. This action is taken under authority delegated pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Fred B. Campbell, Jr.
Chief, Wireless Telecommunications Bureau

⁴⁷ See Letter to Mr. John Jung, Jung on Jung, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 18 FCC Rcd 14,427, 14,430-31 (2003); Letter to Messrs. Stephen Diaz Gavin and Paul C. Besozzi, Counsel for U.S. Telemetry Corporation, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 17 FCC Rcd 6442, 6446 (2002) ("*U.S. Telemetry Letter*"); Duluth PCS, Inc., and St. Joseph PCS, Inc. Request for Partial Waiver of Section 1.2110(g) of the Commission's Rules, *Order*, 19 FCC Rcd 7137, 7143 (WTB/ASAD 2004).

⁴⁸ *U.S. Telemetry Letter*, 17 FCC Rcd at 6446-47 (holding that a 218-219 MHz licensee's contention that a decline in the financial markets decreased its ability to fund the operation and development of its system and to make installment payments does not justify waiver of the payment rules since the licensee accepted the risk in acquiring the licenses); see also *Southern Communication MO&O*, 15 FCC Rcd at 25,107 ¶ 10 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule).