

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

In the Matter of)
)
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

Adopted: December 8, 2000

Released: December 21, 2000

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. Introduction

1. The Commission has before it a Petition for Reconsideration,¹ and a Supplement to the Petition² filed by Southern Communications Systems, Inc. (“Southern”). Southern seeks reconsideration of a decision by the Auctions and Industry Analysis Division (“Division”)³ that denied Southern’s request for a waiver⁴ of the Commission’s PCS installment payment rules.⁵ For the reasons set forth below, we affirm the *Waiver Order* and deny Southern’s Petition.

II. Background

2. Southern was a participant and high bidder in the Commission’s PCS broadband C block auction in which it won the Cleveland, Tennessee BTA license. The Commission awarded Southern the license in September 1996. As a small business entity, Southern was eligible to participate in the Commission’s

¹ Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, Petition for Reconsideration, filed November 29, 1999 (“Petition”).

² Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, Supplement for Petition for Reconsideration, filed January 6, 2000 (“Supplement”).

³ Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, DA 99-2375, *Order* (rel. October 29, 1999)(“*Waiver Order*”).

⁴ See Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, filed April 29, 1999. (“*Waiver Request*”).

⁵ 47 C.F.R. § 24.711(b) (1999); 47 C.F.R. § 1.2110 (1999).

installment payment program. After meeting its down payment obligations, Southern began making installment payments on its license. On October 31, 1998, however, Southern failed to remit an installment payment.

3. Pursuant to the applicable installment payment grace period rule, Section 1.2110(f),⁶ a licensee has an automatic 90-day period after the installment payment due date during which payment may be submitted (“non-delinquency period”), with a five percent late fee. If remittance of the missed installment payment and the five percent late fee is not made before the expiration of the non-delinquency period, the rule provides for a second automatic 90-day period in which to remit payment (“grace period”) and requires an additional late fee equal to ten percent of the missed payment.⁷ Pursuant to these rules, and in order to avoid the automatic cancellation of its license, Southern’s October 31, 1998 installment payment should have been made, at the latest, by April 29, 1999, accompanied by a 15 percent late fee.

4. On April 29, 1999, the last possible day to comply with the applicable installment payment grace period rule, Southern filed a Waiver Request seeking a two-day suspension of Section 24.711(b)⁸ of the Commission’s rules. The Waiver Request stated that Southern was unable to wire transfer the installment payment due to the illness of its financial officer.⁹ In the October 1999 *Waiver Order*, which Southern now asks us to reconsider, the Division determined that Southern failed to meet the standards for which a waiver of the Commission’s rules might be granted, and denied its request.¹⁰ Although Southern requested an additional two days to remit payment, Southern actually initiated the transfer of funds to the Commission two business and four calendar days after the April 29, 1999 deadline.¹¹ In addition, Southern only submitted the amount of the original October 31, 1998 installment payment, failing to include the 15 percent late fee.¹²

⁶ 47 C.F.R. § 1.2110(f)(4) (1999). The Part 1 rules referenced in this Order have recently been amended to reflect the use of quarters for implementation of the Commission’s payment deadlines and attendant grace period rules. Amendment of Part 1 of the Commission’s Rules-Competitive Bidding Procedures, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and the Fourth Further Notice of Proposed Rulemaking*, FCC 00-274 (rel. August 14, 2000) (“*Part 1 Third Report and Order Recon*”). These changes have no effect on Southern’s position or the Commission’s evaluation of its arguments. The amended Part 1 rules became effective on October 30, 2000, 60 days after the date of publication in the Federal Register. 65 Fed. Reg. 52323-01 (Aug. 29, 2000).

⁷ 47 C.F.R. § 1.2110(f)(4) (1999). When the Commission abandoned its burdensome policy of reviewing grace period requests on a case-by-case approach and adopted its current rules allowing for two automatic 90 day grace periods, it did not extend the date upon which the payment was due and payable to the Commission. In other words, the last day of the 180 day grace period did not become the due date of the payment.

⁸ 47 C.F.R. § 24.711(b) (the C Block installment payment rules).

⁹ Waiver Request at 2.

¹⁰ *See supra* note 3.

¹¹ Southern’s wire transfer, initiated four calendar days after the late payment deadline, was not received by the Commission until three business and five calendar days after the April 29, 1999, late payment deadline.

¹² *Waiver Order* at 2; *see also* 47 C.F.R. § 1.2110(f)(4) (we note that even had the Division granted Southern’s Waiver Request, Southern failed to remit the full payment amount and would have still lost its license due to the default and automatic license cancellation rules).

III. Discussion

5. Southern contends that the Commission should reconsider the Division's decision in the *Waiver Order* based on four arguments. First, Southern contends that the Division failed to fully and appropriately address its Waiver Request arguments, arguments that it maintains justify the grant of a waiver.¹³ Second, Southern asserts that a 1999 General Accounting Office (GAO) report, released after Southern filed its Waiver Request, provides new information that demonstrates that enforcement of the Commission's rules in this instance is unduly harsh.¹⁴ Third, Southern argues that because the *Waiver Order* notes that Southern had failed to initiate construction, the Division erroneously applied a *de facto* waiver standard in denying Southern's Waiver Request. Fourth, Southern argues that the Commission's denial of its Waiver Request was arbitrary and capricious in light of the decision by the Court of Appeals for the District of Columbia in *Mountain Solutions*,¹⁵ which affirmed a Commission Order denying a request for waiver of the Commission's second down payment deadline.

6. Waiver Standards. Southern argues that the Division failed to appropriately consider and address several facts in the *Waiver Order* that establish that Southern's failure to make a full and timely payment was due to unique or unusual circumstances warranting a waiver of the Commission's rules. However, in both its Waiver Request and subsequent Petition, Southern failed to establish that: (1) the underlying purpose of the rule would not be served, or would be frustrated by its application in this particular case, and that a grant of the requested waiver would be in the public interest; or (2) that the unique or unusual factual circumstances of this particular case render application of the rule inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁶ Thus, as explained below, the Division appropriately denied Southern's Waiver Request.

7. Addressing the first part of the waiver standard,¹⁷ Southern states that a waiver is appropriate in this instance because strict application of the rules would not serve the underlying purpose of the Commission's installment payment rules and would result in a delay in the deployment of service contrary to the public interest.¹⁸ Southern contends that enforcement would actually undermine the purpose of Section 24.711(b) of the Commission's rules,¹⁹ which provide for installment payments in order to facilitate the participation of small businesses.²⁰ Furthermore, Southern argues that in light of the suspension of installment

¹³ Petition at 4.

¹⁴ Petition at 4.

¹⁵ *Mountain Solutions v. FCC*, 197 F.3d 512 (D.C. Cir. 1999) (upholding the Commission's decision, in a PCS licensing matter, to deny a waiver of its rule requiring a winning bidder to timely submit its second down payment in order for the Commission to grant the license).

¹⁶ 47 C.F.R. § 1.925.

¹⁷ *Id.*

¹⁸ Waiver Request at 3; Petition at 7.

¹⁹ 47 C.F.R. § 24.711(b) (1994).

²⁰ Petition at 8.

payments and the regulatory relief provided to C block licensees in the *C Block Restructuring Orders*,²¹ in conjunction with the protection obtained by some former licensees in bankruptcy, enforcement of the Commission's installment payment rules is meaningless.²² We disagree. In attempting to accommodate the needs of the C Block licensees in the *C Block Restructuring Orders*, the Commission reiterated its belief that the ability to make installment payments is evidence of licensees' ability to access the capital necessary to both pay for the licenses and provide service to the public.²³ Having allowed C and F block licensees to defer any installment payments for more than a year, the Commission took the position that it would strictly enforce the resumption deadline, and not permit any further extensions.²⁴ To grant Southern's request here would be unfair to those who complied with the *C Block Restructuring Orders* and made, and are continuing to make, timely and full installment payments as required. Strict enforcement of payment rules enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications and that spectrum is awarded to those qualified bidders who value the spectrum most. Insisting that licensees demonstrate their ability to pay as a condition to holding licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won licenses in the auctions and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.²⁵ Furthermore, Southern's contention that other C block licensees were able to shield their license(s) from the effects of the installment payment rules²⁶ is erroneous. As discussed by the appellate court in *NextWave*, filing for bankruptcy does not prevent the automatic cancellation of a license.²⁷ For the reasons stated above, we believe that Southern has failed to establish that the underlying purpose to the Commission's rules would not be served by application in this instance.

²¹ Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 97-342, 12 FCC Rcd 16436 (1997) ("*C Block Second Report and Order*"); Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998) ("*C Block First Reconsideration Order*"); and Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Second Order on Reconsideration of the Second Report and Order*, FCC 99-66, 14 FCC Rcd 6571 (1999) ("*C Block Second Reconsideration Order*") (collectively, the "*C Block Restructuring Orders*").

²² Petition at 7.

²³ See *C Block First Reconsideration Order*, 8345 FCC Rcd at 8348, ¶ 8.

²⁴ See *C Block Second Report and Order*, 12 FCC Rcd 16436, 16451-16452, ¶ 30; see also *In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments*, *Order*, 13 FCC Rcd 22071 (1998) ("*C Block Extension Order*"), *aff'd on recon*, *In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments*, *Memorandum Opinion and Order*, 14 FCC Rcd 6080 (1999) ("*C Block Memorandum Opinion and Order*"), *aff'd*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999) ("*SouthEast Telephone*").

²⁵ See *In the Matter of Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications, Inc. and NextWave Power Partners, Inc.*, *Petition for Reconsideration*, *In re Settlement Request Pursuant to DA 99-745 For Various Broadband PCS C Block Licenses*, *Order on Reconsideration*, 15 FCC Rcd 17500 (2000) ("*NextWave Order on Reconsideration*").

²⁶ Petition at 7.

²⁷ *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2nd Cir. 1999), *mandate enforced by* 217 F.3d 125 (2nd Cir. 2000), *cert. denied*, 2000 WL 795201 (U.S. Oct. 10, 2000) (No. 99-1980); see also *NextWave Order on Reconsideration*, 15 Fed Rcd 17500 (2000).

8. Addressing the second part of the waiver standard,²⁸ Southern contends that (1) the illness of its financial officer, which prevented the wire transfer of funds on April 29, 1999; (2) the need for additional coordination between Southern and its business partner, Southern Personal Communications, Inc. (“SPC”); and (3) Southern’s inability to ascertain from its own financial records what license payments had been submitted to the Commission, constitute unusual circumstances warranting a waiver of the Commission’s rules.²⁹ We disagree.

9. First, as the Division stated in the *Waiver Order*, something as common as an employee’s illness does not rise to the level of a unique or unusual circumstance, warranting special consideration by the Commission.³⁰ This is particularly true in light of the 180 day grace period Southern had to submit its payment, over and above the initial payment deadline.³¹ In availing itself of the two 90-day grace periods, and electing to wait until the last possible day to submit its payment, Southern bore the risk of routine complications, such as the illness of an employee.³²

10. Second, Southern argues that a lack of coordination between itself and its business partner, SPC, constitutes unusual circumstances for which the Commission should waive its rules. Southern argues that internal problems arising from this lack of coordination prevented Southern from making a timely and accurate installment payment, since the parties were confused as to whether payment had been submitted, and in what amount. Southern and its business partner’s failure to properly organize and manage their business dealings is not a unique circumstance that warrants the granting of a waiver. Finally, in conjunction with its preceding argument, Southern asserts that the inability to ascertain from its own financial records what, if any, license payments had been made establishes a basis for granting a waiver of the Commission’s rules. Indeed, Southern attempts to shift the blame for its own business shortcomings to the Commission.³³ Southern contends that the Commission indicated that although there was no record of payment, the Commission had not yet processed some funds recently transferred by a few licensees. Southern alleges that the Commission noted that the delay in processing of these recently transferred funds was due to the fact that the licensees had either failed to provide the

²⁸ 47 C.F.R. § 1.925.

²⁹ In one sentence of Southern’s Petition, it alleges financial distress as a factor warranting a waiver of the Commission’s rules. Petition at 4. In a subsequent sentence, Southern affirms that it was capable of making the payment on April 29, 1999, and is currently capable of making its payments. Petition at 4. Given these contradictory statements, and the fact that Southern affirms that funds were available (Petition at 4, Waiver Request at 2), we see no need for us to consider the financial distress allegation. Moreover, had Southern clearly articulated financial distress as grounds for waiver, and provided substantiating evidence, it would fail to meet the standards for grant of a waiver under section 1.925 of the Commission’s rules. The installment payment rules are meant to preserve the reliability and integrity of the auction and licensing process by ensuring that the applicants have the necessary financial qualifications, thereby maintaining the goal of awarding licenses to the parties who most value the spectrum and providing expeditious service to the public. See paras 7 and 15 below. Thus, grant of a waiver based upon financial distress would undermine the purpose of the rule. Additionally, Southern failed to mention its financial distress in the original Waiver Request, or explain why it failed to mention it. Thus, review here, as an initial matter, would be inappropriate. See 47 C.F.R. § 1.106(c).

³⁰ *Waiver Order* at 2.

³¹ *Id.*

³² Petition at 3.

³³ Petition at 2-3.

appropriate forms or provided incorrect information.³⁴ Nothing in the Commission's statements, as alleged by Southern, would have caused a licensee to be confused as to its payment obligations. The inability of a licensee to obtain up to the minute information from the Commission regarding the processing of payments does not relieve a licensee of the responsibility to manage its own financial records. Thus, Southern's attempt to shift the blame for its failure to maintain a complete and accurate accounting system does not meet the Commission's waiver standards. We affirm the Division's findings in the *Waiver Order* and again note that Southern has failed to demonstrate that it was subject to unique or unusual circumstances that warrant a waiver of the Commission's installment payment rules.

11. GAO Report. Southern further contends that the issuance of a 1999 GAO report that critiqued the Commission's handling of annual regulatory fee payments establishes a basis for reconsideration of the *Waiver Order*.³⁵ Southern asserts that the GAO report demonstrates the Commission's failure to enforce uniformly license payment obligations; and therefore, strict application of the installment payment rules in this instance is "unduly harsh."³⁶ We disagree. As an initial matter, the Commission's monitoring of regulatory fee collections is unrelated to the installment payment rules and the underlying purpose that they serve. The underlying purpose of regulatory fees is to recover the costs that the Commission incurs in carrying out enforcement, policy, rulemaking, and user information activities.³⁷ In contrast, the underlying purpose of the installment payment rules is to preserve the reliability and integrity of the auction process and licensing process by ensuring that the applicants have the necessary financial qualifications, thereby maintaining the goal of awarding licenses to the parties who most value the spectrum, thus providing expeditious service to the public.³⁸ Furthermore, the Commission operates under a statutory mandate that provides for the assignment of spectrum licenses through competitive bidding.³⁹ Implicit in this statutory directive is the Commission's obligation to establish rules and regulations that protect the integrity of the competitive bidding system. The Commission's position that the integrity of the auction process is largely dependent upon having winning bidders and licensees promptly meet their payment obligations has been widely disseminated and is well known.⁴⁰ Therefore, enforcement of the Commission's installment payment rules is consistent with both the Commission's statutory

³⁴ Petition at 3.

³⁵ Petition at 5 (citing United States General Accounting Office, Report to the Chairman, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, U.S. Senate, and Telecommunications. FCC Does Not Know if All Required Fees are Collected, GAO/RCED-99-219 (August 1999) ("GAO Report")).

³⁶ Waiver Request at 6.

³⁷ 47 U.S. C. 159(a); Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, FCC No. 00-240 (rel. July 10, 2000).

³⁸ See *NextWave Order on Reconsideration*, 15 FCC Rcd 17500, at ¶ 11.

³⁹ See 47 U.S.C. § 309(j).

⁴⁰ See Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction, *Public Notice*, Mimeo 54270 (rel. June 8, 1995) ("*PCS Grace Period Public Notice*") (clarified grace period rule in the context of Personal Communications Services C block auction); Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying by Installment Payments, *Public Notice*, DA 95-1617, 10 FCC Rcd 10724 (WTB 1995) ("*IVDS Grace Period Public Notice*"); see also Mountain Solutions Ltd., Inc. Emergency Petition for Waiver of Section 24.711 (A)(2) of the Commission's Rules Regarding Various BTA Markets in the Broadband Personal Communications Services (PCS) C Block Auction, *Memorandum Opinion and Order*, FCC 98-220, 13 Fed Rcd 21983 (1998), *aff'd*, 197 F.3d 512, 519.

mandate and its practice.⁴¹ Southern's argument incorrectly assumes that a critique of the Commission's enforcement of fee payments renders enforcement of installment payment rules arbitrary or harsh. Thus, there is nothing in the GAO report that provides a basis for reconsideration of the Division's *Waiver Order*.

12. De Facto Waiver Standard. Southern also argues that in denying its waiver request, the Division "relied primarily on the fact that construction had not yet begun," erroneously applying a *de facto* waiver standard.⁴² However, Southern mischaracterizes the language of the *Waiver Order*, which noted the fact that construction had not yet begun was an "*additional contributing factor* that further mitigated any harm or burden imposed upon Southern," in applying the full and timely payment requirements.⁴³ The fact that Southern had not begun build-out on its license was not a criterion upon which the Division based its decision to deny the Waiver Request.⁴⁴ Southern's Waiver Request was denied because it failed to meet the Commission's standards for granting a waiver of our rules.⁴⁵ Thus, the mere observation of a factor that further mitigated any loss to Southern as a result of the loss of its license did not create a *de facto* waiver standard and does not provide a basis for reconsidering the Division's *Waiver Order*.

13. Mountain Solutions. Lastly, Southern argues that the waiver standard articulated by the appellate court in *Mountain Solutions* requires waiver of the installment payment rules in this instance.⁴⁶ In *Mountain Solutions*, the appellate court affirmed the Commission's denial of a request for waiver of its down payment rules⁴⁷ and upheld the Commission's reasoning that the down payment rules serve to discourage insincere or financially unqualified bidders from waiting until after the close of an auction to arrange financing.⁴⁸ In reaching this decision, the appellate court distinguished earlier cases in which the Commission had granted partial waivers of missed second down payments. As highlighted by the appellate court, the Commission waived its second down payment rules where failure to pay was based on inadvertent error and where a bidder had immediately remitted payment and evidenced an ability to pay at the time of the original

⁴¹ *NextWave Order on Reconsideration*, 15 FCC Rcd 17500, at ¶ 11.

⁴² Petition at 8-10.

⁴³ *Waiver Order* at 2 (emphasis added).

⁴⁴ Although the Commission did not use build-out as a basis for its decision in the particular circumstances presented here, the absence of this criterion does not preclude the Commission from, where appropriate, considering build-out or service in the context of a particular request for relief. See, e. g. In the Matter of Ivan Brisbin (Call Sign WPCB813), Request for Waiver of Section 90.149(a) of the Commission's Rules, *Order on Reconsideration*, 15 FCC Rcd 724 (2000)(CWD) (granting waiver of section 90.149(a) of the Commission's rules and allowing reinstatement of an expired SMR license where, although the licensee failed to file a timely renewal application, the licensee timely constructed the license and was providing service); In the Matter of Elliot Acosta (Call Sign WPCM508), Request for Waiver of 90.149(a) of the Commission's Rules, *Order*, 15 FCC Rcd 727 (2000)(CWD) (granting waiver of section 90.149(a) of the Commission's rules and allowing reinstatement of an expired SMR license where, although the licensee failed to file a timely renewal application, the licensee timely constructed the license and was providing service).

⁴⁵ *Waiver Order* at 2. Again, we note that even had the Division granted Southern's Waiver Request, Southern failed to remit the full payment amount by failing to pay the 15% penalty for late payment and would have still lost its license due to the default and automatic license cancellation rules. 47 C.F.R. § 1.2110.

⁴⁶ Supplement at 1-3.

⁴⁷ *Mountain Solutions*, 197 F. 3d at 523.

⁴⁸ *Id.*, at 518.

deadline.⁴⁹ Southern suggests that the facts presented in its petition are analogous to such cases, and that it should be held to a similar waiver standard. The arguments presented by Southern lack merit as Southern ignores the fact that, as we explain below, the function, purpose, and corresponding burdens imposed by the second down payment rule differs from the function, purpose, and corresponding burdens imposed by the installment payment rule. Accordingly, the alleged similarities to the facts presented by those cases are not relevant to this inquiry and do not justify a waiver of the Commission's installment payment rules.⁵⁰

14. The circumstances that satisfy the standards for waiver of the down payment rules will not necessarily satisfy the standards for waiver of the installment payment rules. Southern's argument fails to recognize that because Southern and Mountain Solutions requested the waiver of two different rules, the Commission evaluated the waiver requests in light of the different provisions and underlying purposes of those rules. Mountain Solutions, and the parties for whom the Commission granted partial waivers, requested waivers of the second down payment deadline for which they had only 5 days to remit payment. Our purpose in allowing a short time period for submission of down payments is to prevent the post auction shopping of licenses.⁵¹ Accordingly, the Commission found that the public interest would not be served by rigid application of the short second down payment deadline, and granted a partial waiver where a winning bidder demonstrated inadvertence and an ability to pay at the time of the payment deadline.

15. In contrast, Southern requested a waiver of an installment late payment deadline, which provided an additional 180 days after the original payment due date during which to remit payment. In adopting two consecutive 90-day grace periods (180 days) and requiring late payment fees from installment payment licensees that pay after the original due date, we intended to provide licensees with adequate financial incentives to make installment payments on time, and allow licensees experiencing financial difficulties a specific amount of time within which to pursue private market solutions to their financing difficulties.⁵² The two 90 day payment grace periods were not intended to be used as a matter of course.⁵³ As we noted with respect to the late payment date set for the resumption of C and F block installment payments, "[n]o matter what deadline we establish, it is inevitable that some licensees will seek more time to pay."⁵⁴ This is equally true in these circumstances. For this reason, the Commission provided the two consecutive 90-day payment grace periods (180 days) to allow a

⁴⁹ *Id.* at 515.

⁵⁰ *See supra* paras 5-9.

⁵¹ In the Matter of Implementation of Section 309(j) of the Communications Act, FCC 94-61, *Second Report and Order*, 9 FCC Rcd 2348, 2382 (1994); *Mountain Solutions*, 197 F.3d at 518. Even though the Commission revised this rule to provide for a late payment period (10 days) with accompanying late payment fee, the time allowed is still relatively short, in keeping with the purpose of the rule. *See* Amendment of Part 1 of the Commission's Rules-Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket 97-82, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374 at 434, ¶ 93 (1997) ("*Part 1 Third Report and Order*"); 47 C.F.R. § 1.2110(f)(2).

⁵² *Part 1 Third Report and Order* 13 FCC Rcd at 439-440, ¶ 110.

⁵³ *Id.*, at 438, ¶ 107 ("We also believe that licensees should be working to obtain the funds necessary to meet their payment obligations before they are due and, accordingly, that the non-delinquency and grace periods we adopt should be used only in extraordinary circumstances.").

⁵⁴ *C Block First Reconsideration Order*, 13 FCC Rcd at 8345, ¶ 24. The Commission subsequently denied requests for waiver of the resumption payment late payment deadline. *See C Block Second Reconsideration Order*, 13 FCC Rcd 22071, *aff'd on recon*, *C Block Memorandum Opinion and Order*, 14 FCC Rcd 6080, *aff'd*, *SouthEast Telephone*, No. 99-1164.

licensee sufficient time to resolve payment problems, whether they are the result of internal mistakes, such as those alleged by Southern, or resulting from a need for additional financing.⁵⁵ Given the Commission's emphasis on the importance of timely payment, a prudent licensee would secure financing or take the necessary steps to submit payment before the late payment deadline, instead of waiting until the last day before automatic license cancellation to submit a request for waiver. In light of the ample 180 day period that Southern had to submit payment, to allow for further delay would only serve to undermine the purpose behind enforcement of the Commission's payment deadlines, which we decided is best served by strict enforcement after the expiration of the 180-day period.⁵⁶ Thus, instances where the Commission granted a partial waiver of the second down payment rule, as discussed by the appellate court in *Mountain Solutions*, fail to provide a basis for reconsideration of the Division's *Waiver Order*.

III. Conclusion

16. The Commission affirms the Division's decision as stated in the October 1999 *Waiver Order*. Southern failed to present facts that meet the Commission's waiver standards.⁵⁷ In addition, for the reasons stated above, we believe that Southern, through its Petition and Supplement has failed to present facts that warrant reconsideration⁵⁸ of the Division's *Waiver Order*.

17. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the petition filed by Southern Communications Systems, Inc., for reconsideration of the Division's decision to deny Southern's request for waiver of 47 C.F.R. § 24.711(b), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁵⁵ *Part 1 Third Report and Order*, 13 FCC Rcd at 439-440, ¶110.

⁵⁶ *NextWave Order on Reconsideration* 15 FCC Rcd 17500, at ¶ 15; Letter to James A. LaBelle, Chairman and Chief Executive Officer, 21st Century Telesis, Inc., from Louis Sigalos, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 00-1791, at 4 (rel. August 7, 2000).

⁵⁷ 47 C.F.R. § 1.925.

⁵⁸ 47 C.F.R. § 1.106 (c) - (d).

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Southern Communications Systems, Inc., Request for Limited Waiver.

I respectfully dissent from the Commission's decision to deny Southern's waiver request. Under 47 C.F.R. §1.925 (b)(3), the Commission may grant a waiver if the underlying purpose of the rule would not be served by application in the present case and the waiver would be in the public interest. Here, in order to make its installment payment, Southern requested a two-day waiver of the Commission's installment payment rule.⁵⁹ I would have granted the waiver. There is no doubt that Southern should have had a back up plan to allow for timely payment of these funds. There is also no doubt that failure to make a timely payment results in the automatic cancellation of a license under our rules. Nonetheless I fear that ease of administration and litigation concerns have trumped the public interest and equity for Southern in this case.

Although I have never supported the Commission's role as a lender in the C Block, the Commissioner as a creditor and a regulator understandably requires timely payment. In this regard, the Commission's rules allow for a 180-day grace period for license payment with certain penalties. Here Southern unfortunately stretched that time to its very limit – and was unable to make its payment on the 180th day.

Nonetheless, Southern did file a timely waiver request on the 180th day. In addition, it appears that Southern did have the funds available to make the payment. Southern subsequently placed those funds and the succeeding payment in escrow. I believe the waiver request filed within the grace period and evidence of an immediate ability to pay argue strongly for a waiver in this case. The underlying purpose of the payment rule is to ensure that responsible licensees make regular and prompt payment. Here there is no evidence that Southern was attempting to shirk that responsibility – to the contrary, Southern's every effort from the cancellation date forward seemed to indicate a substantial interest in paying the sums due.

I also believe that a waiver is in the public interest. Had we quickly granted the original two-day waiver request when it was filed twenty months ago, Southern could be well on its way to providing service in the underserved Cleveland TN BTA. Instead, the license has remained fallow for twenty additional months – and will only be re-auctioned this week – after which, up to another five years will pass before any service may be provided. In my view, I will gladly trade a brief delay in payment for two years of additional service.

Finally I understand that a case-by-case evaluation of waiver requests is a difficult and time-consuming task. I also understand that some believe waivers of this kind would undermine the FCC's litigation position in various cases. However appealing bright line rules may be for administrative efficiency and litigation strategy, I do not believe those interests should prevent us from looking carefully at the individual equities of a given case. Here Southern has not disputed its obligation. Southern filed a waiver request within the grace period. Southern had the resources to pay and does not appear to have been gaming our rules. Southern was in the best position to provide prompt service to the public. Thus, under these circumstances, I believe granting Southern's waiver would have served the public interest.

⁵⁹ 47 CFR § 24.711(b); *see* ¶ 4 of the Order, citing to Southern's Waiver Request.