

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

In the Matter of )  
 )  
Licenses of )  
21<sup>st</sup> Century Telesis Joint Venture and )  
21<sup>st</sup> Century Bidding Corporation )  
For Facilities in the )  
Broadband Personal Communications Services )  
 )  
Petition for Reconsideration )

ORDER ON RECONSIDERATION

Adopted: September 10, 2001

Released: September 21, 2001

By the Commission:

I. INTRODUCTION

1. We have before us a petition for further reconsideration<sup>1</sup> filed by 21<sup>st</sup> Century Telesis Joint Venture and 21<sup>st</sup> Century Bidding Corporation (collectively “21<sup>st</sup> Century”). 21<sup>st</sup> Century seeks reconsideration of a *Memorandum Opinion and Order*, in which the Commission affirmed the denial of 21<sup>st</sup> Century’s requests for extension of an installment payment deadline or for a waiver of the installment payment rules and denied 21<sup>st</sup> Century’s motion to file an untimely supplement to its initial petition for reconsideration.<sup>2</sup> For the reasons set forth below, we affirm the *Memorandum Opinion and Order* and deny 21<sup>st</sup> Century’s Further Reconsideration Petition.

II. BACKGROUND

2. 21<sup>st</sup> Century participated in the initial broadband PCS C block auction (“Auction No. 5”) and the broadband PCS D, E, and F block auction (“Auction No. 11”). At the close of Auctions No. 5 and No. 11, 21<sup>st</sup> Century was the high bidder for thirteen C block licenses and for six F block Licenses.<sup>3</sup> The

<sup>1</sup> In Re Licenses of 21<sup>st</sup> Century Telesis Joint Venture and 21<sup>st</sup> Century Bidding Corp. For Facilities in the Broadband Personal Communications Services in the C and F Blocks, Petition for Reconsideration (filed Jan. 22, 2001) (“Further Reconsideration Petition”).

<sup>2</sup> Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25113 (2000) (“*Memorandum Opinion and Order*”).

<sup>3</sup> See “Entrepreneur’s C Block Auction Closes: FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas,” *Public Notice*, DA 96-716 (rel. May 8, 1996); “D, E, and F Block Auction Closes -- Winning Bidders in the Auction of 1,479 Licenses To Provide Broadband PCS in Basic Trading Areas,” *Public Notice*, DA 97-81 (rel. Jan. 15, 1997).

Commission conditionally granted the nineteen licenses to 21<sup>st</sup> Century in 1996 and 1997.<sup>4</sup>

3. 21<sup>st</sup> Century participated in the Commission's installment payment program as a small business.<sup>5</sup> Each of 21<sup>st</sup> Century's C and F block licenses was conditioned explicitly on full and timely payment of all installments.<sup>6</sup> Each license stated that "failure to comply with this condition will result in the automatic cancellation of this authorization."<sup>7</sup> Under its installment payment plan, beginning in 1999, 21<sup>st</sup> Century's installment payments on each license came due "on each January 31, April 30, July 31 and October 31" until paid in full.<sup>8</sup>

4. Pursuant to the applicable installment payment grace period rule, Section 1.2110(f)<sup>9</sup>, 21<sup>st</sup> Century had an automatic 90-day period ("non-delinquency period") after the installment payment due date, during which payment could have been submitted with a five percent late fee. If 21<sup>st</sup> Century failed to remit the missed installment payment and the five percent late fee before the end of the non-delinquency period, the rule provided for a second automatic 90-day period ("grace period") in which to remit payment and required an additional late fee equal to ten percent of the missed payment. Pursuant to these rules, and in order to avoid the automatic cancellation of its licenses, 21<sup>st</sup> Century's July 31, 1999 installment payment had to have been received, at the latest, by January 27, 2000, accompanied by a 15 percent late fee.

---

<sup>4</sup> See "FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA Licenses," *Public Notice*, DA 96-1553 (rel. Sept. 17, 1996); "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883 (rel. Apr. 28, 1997).

<sup>5</sup> See 47 C.F.R. § 24.711(b) (1995) (C block); 47 C.F.R. 24.716(b) (1996) (F block).

<sup>6</sup> E.g., License PBB103C at 2 ("This authorization is conditioned upon the full and timely payment of all monies due pursuant to Sections 1.2110 and 24.711 [for C block licenses, 24.716 for F block licenses] of the Commission's Rules and the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of this authorization.")

<sup>7</sup> *Id.* 21<sup>st</sup> Century executed a promissory note and security agreement for each license that it received. See, e.g., Installment Payment Plan Note, License PBB103C at 3 (executed by 21<sup>st</sup> Century Telesis Joint Venture, November 26, 1996) ("Note") ("[21<sup>st</sup> Century] hereby acknowledges that the Commission has issued [21<sup>st</sup> Century] the above referenced License pursuant to the Communications Act of 1934, as amended, that is conditioned upon full and timely payment of financial obligations under the Commission's installment payment plan, as set forth in the then-applicable orders and regulations of the Commission, as amended . . ."); Security Agreement, License No. PBB103 at ¶8 (executed by 21<sup>st</sup> Century Telesis Joint Venture, December 9, 1996) ("Security Agreement") ("If an Event of Default shall occur . . . the License shall be automatically canceled pursuant to 47 C.F.R. §1.2110.").

<sup>8</sup> See, e.g., First Modification of Installment Payment Plan Note and Security Agreement For Broadband PCS C Block, Original License No.: PBB103C, Modified License No. PBB103C1 at 4 (by 21<sup>st</sup> Century Telesis Joint Venture, July 21, 1998) ("First Modification").

<sup>9</sup> 47 C.F.R. § 1.2110(f)(4) (1999). The Part 1 rules referenced in this Order were 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*, 15 FCC Rcd 15293 (2000) ("Part 1 Third Report and Order Recon.") These changes have no effect on the Commission's evaluation of 21<sup>st</sup> Century's arguments.

5. 21<sup>st</sup> Century admits that it did not submit its July 1999 installment payments by January 27, 2000, the last day of the second 90-day grace period. As a result of 21<sup>st</sup> Century's failure to make its July 31, 1999 installment payments by January 27, 2000, its licenses automatically cancelled without further action by the Commission.<sup>10</sup> 21<sup>st</sup> Century did not seek an extension of the installment payment deadlines and waiver of the automatic cancellation rule until after the final late payment deadline had passed and its licenses had automatically cancelled.

6. After the final late payment deadline had passed and beginning on February 2, 2000, 21<sup>st</sup> Century filed three letters with the Commission (the "Letter Requests"), requesting an extension of time to make installment payments or, alternatively, requesting waiver of the Commission's installment payment rules.<sup>11</sup>

7. On August 7, 2000, the Auctions and Industry Analysis Division ("Division") denied 21<sup>st</sup> Century's requests.<sup>12</sup> Addressing 21<sup>st</sup> Century's claims that it had not received timely notification from the Commission regarding its July 31, 1999 payment, the Division observed that 21<sup>st</sup> Century had sufficient notice of the applicable deadlines from the Commission's rules, the licenses, and installment payment plan notes that 21<sup>st</sup> Century had executed.<sup>13</sup> The Division concluded that 21<sup>st</sup> Century had not demonstrated circumstances justifying a waiver of the Commission's rules.<sup>14</sup>

8. On September 6, 2000, 21<sup>st</sup> Century filed a petition for reconsideration of the *Division Order*.<sup>15</sup> Over two months later, on November 9, 2000, 21<sup>st</sup> Century filed a motion for leave to file a

---

<sup>10</sup> 47 C.F.R. § 1.2110(f)(iv) (1999).

<sup>11</sup> Letter from James A. LaBelle to Magalie Roman Salas, February 2, 2000 ("February 2<sup>nd</sup> Letter"); Letter from James A. LaBelle to Magalie Roman Salas, April 25, 2000 ("April 25<sup>th</sup> Letter"); Letter from James A. LaBelle to Magalie Roman Salas, July 25, 2000 ("July 25<sup>th</sup> Letter"). Though the letters do not cite the rule 21<sup>st</sup> Century requests be waived, it appears from the content of the letters that 21<sup>st</sup> Century seeks waiver of 47 C.F.R. § 1.2110(f), which governs the timing of installment payments, the definition of default, and the consequences of default.

<sup>12</sup> Letter from Louis Sigalos, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to James M. LaBelle, 15 FCC Rcd 14814 (2000) ("*Division Order*").

<sup>13</sup> *Division Order* at 3.

<sup>14</sup> *Division Order* at 3-4.

<sup>15</sup> In Re Licenses of 21<sup>st</sup> Century Telesis, Inc. For Facilities in the Broadband Personal Communications Systems in the C and F Blocks, Petition for Reconsideration (filed September 6, 2000) ("Reconsideration Petition"). 21st Century Joint Venture and 21st Century Bidding Corporation, the relevant licensees, filed the waiver request and clearly would have been appropriate parties to file the Reconsideration Petition. February 2 Letter (waiver request), 47 C.F.R. sec. 1.106(b) (parties that may seek reconsideration). However, counsel filed the Reconsideration Petition in the name of 21st Century Telesis, Inc. A review of the licensees' long form applications, coupled with oral representations from counsel, indicates that 21st Century Telesis, Inc. not only had an ownership interest in the licensees (it is a partner in the parent licensee) but also exclusively managed 21st Century Joint Venture and its wholly owned subsidiary 21st Century Bidding Corporation. Form 601, filed May 22, 1996, by 21st Century Joint Venture, File No. 00443CWL96 & Form 601, filed January 30, 1997, by 21st Century Bidding Corp., File No. 00171CWL97. Given these representations, it appears clear that 21st Century Telesis, Inc. actually filed the Reconsideration Petition on behalf of the licensees, and thus the filing of the Further Reconsideration Petition in the name of the licensees presents no standing issue. See 47 C.F.R. sec. 1.106(b).

(continued....)

supplement to the petition for reconsideration<sup>16</sup> and a supplement to the petition.<sup>17</sup>

9. The Commission denied the Reconsideration Petition and affirmed the *Division Order* in the *Memorandum Opinion and Order*, which was released on December 21, 2000.<sup>18</sup> In the *Memorandum Opinion and Order*, the Commission denied 21<sup>st</sup> Century's Motion on the ground that the Supplement was untimely, and declined to address the arguments in the Supplement.<sup>19</sup> On January 22, 2001, 21<sup>st</sup> Century filed the instant Further Reconsideration Petition.

### III. Discussion

10. 21<sup>st</sup> Century offers several bases for its Further Reconsideration Petition: first, that the Commission erred in stating that 21<sup>st</sup> Century's Letter Requests were untimely; second, that the Commission erred in declining to address the Supplement; third, that the automatic cancellation rule deprives 21<sup>st</sup> Century of property without due process of law in violation of the Fifth Amendment of the United States Constitution;<sup>20</sup> fourth, that the automatic cancellation rule conflicts with Section 312(c) of the Communications Act of 1934;<sup>21</sup> fifth, that the automatic cancellation rule is arbitrarily enforced; sixth, that 21<sup>st</sup> Century did not receive full and explicit notice of its payment obligations; and, seventh, that reinstating 21<sup>st</sup> Century's cancelled licenses would serve the public interest.

#### A. Timing Of 21<sup>st</sup> Century's Letter Requests And Reconsideration Petition

11. In arguing for further reconsideration, 21<sup>st</sup> Century makes several erroneous arguments relating to the proper procedure for seeking a waiver of the Commission's automatic cancellation rules. Although the Commission decided 21<sup>st</sup> Century's Letter Requests and Reconsideration Petition on the merits, rather than on the procedural issue of their timing, we will take this opportunity to reiterate the proper procedure by addressing 21<sup>st</sup> Century's arguments regarding the timing of its filings.

(Continued from previous page) \_\_\_\_\_

In addition, on the same date that 21<sup>st</sup> Century Telesis, Inc. filed the Reconsideration Petition, the Wireless Telecommunications Bureau released a public notice, announcing the auction of C and F block PCS licenses, scheduled to begin December 12, 2000 ("Auction 35"). "C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000," *Public Notice*, DA 00-2038 (rel. Sept. 6, 2000). The public notice set forth an inventory of spectrum to be auctioned subject to the outcome of any pending matters, including spectrum associated with licenses previously held by 21<sup>st</sup> Century. Auction 35 began on December 12, 2000 and concluded on January 26, 2001. *See* "C and F Block Broadband PCS Auction Closes; Winning Bidders Announced; Down Payments Due February 12, 2001, FCC Forms 601 and 602 Due February 12, 2001; Ten-Day Petition to Deny Period," *Public Notice*, DA 01-211 (rel. Jan. 29, 2001).

<sup>16</sup> In Re Licenses of 21<sup>st</sup> Century Telesis, Inc. For Facilities in the Broadband Personal Communications Service in the C and F Blocks, Motion for Leave to File Supplement to Petition for Reconsideration (filed November 9, 2000) ("Motion").

<sup>17</sup> In Re Licenses of 21<sup>st</sup> Century Telesis, Inc. For Facilities in the Broadband Personal Communications Service in the C and F Blocks, Supplement to Petition for Reconsideration (filed November 9, 2000) ("Supplement").

<sup>18</sup> *See, generally, Memorandum Opinion and Order.*

<sup>19</sup> *Id.* at n.4.

<sup>20</sup> U.S. Const. amend. V.

<sup>21</sup> 47 U.S.C. § 312(c).

12. 21<sup>st</sup> Century asserts that the Commission erred in stating that 21<sup>st</sup> Century's Letter Requests were untimely. In the *Memorandum Opinion and Order*, the Commission stated that post-cancellation requests for waiver may be appropriate only in extraordinary circumstances.<sup>22</sup> The limited circumstances under which errors by the Commission may warrant such relief does not change the fact that 21<sup>st</sup> Century's post-cancellation waiver requests were untimely.<sup>23</sup> In stark contrast to all of the cases cited by 21<sup>st</sup> Century, the Commission did not accept payment from 21<sup>st</sup> Century after the expiration of the 180-day late payment deadline.<sup>24</sup> 21<sup>st</sup> Century also asserts that waiver requests should be allowed post-cancellation because the Commission and the licensee may be unaware of when a license automatically cancels.<sup>25</sup> In the instant case, however, there is no doubt that 21<sup>st</sup> Century knew the relevant payment deadline and that failing to meet it would trigger the automatic cancellation rule.<sup>26</sup>

13. 21<sup>st</sup> Century also takes issue with the Commission's observation that 21<sup>st</sup> Century filed its Reconsideration Petition seven months after the date of cancellation.<sup>27</sup> 21<sup>st</sup> Century misreads the *Memorandum Opinion and Order*. In the *Memorandum Opinion and Order*, the Commission found that the Reconsideration Petition, like the Letter Requests, was untimely with respect to the cancellation of the licenses. The Commission did not, however, find or even suggest that the Reconsideration Petition was untimely for purposes of seeking reconsideration of the *Division Order*.<sup>28</sup>

14. 21<sup>st</sup> Century further errs in its insistence that the *Division Order* cancelled its licenses. As noted in the *Memorandum Opinion and Order*, the licenses previously had cancelled automatically and the *Division Order* denied 21<sup>st</sup> Century's post-cancellation request for waiver of the automatic cancellation rule.<sup>29</sup> 21<sup>st</sup> Century contends that the *Division Order* determined that 21<sup>st</sup> Century was in default and that such a determination was prerequisite before the licenses could cancel.<sup>30</sup> However, the Commission's rules

---

<sup>22</sup> *Memorandum Opinion and Order* at ¶8.

<sup>23</sup> For example, in each of the cases cited by 21<sup>st</sup> Century, the factual circumstances created the possibility that acceptance of post-cancellation payments could have been construed as a waiver of missed payment deadlines. See Further Reconsideration Petition at 2-3, nn. 2 & 4 (citing Lakeland PCS LLC and Cricket Licensee (Lakeland) Inc. for Assignment of PCS License for Station KNLG741, *Second Order on Reconsideration*, 15 FCC Rcd 23733 (2000) ("*Lakeland PCS*"); Letter from Amy J. Zoslov, Chief, Auctions & Industry Analysis Division, Wireless Telecommunications Bureau, to Meredith S. Senter, Jr., Esq., Counsel for Cordell Engineering, DA 99-277, 14 FCC Rcd 5003 (1999); Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Lloyd W. Coward, Esq., Counsel for TE-MCG Consortium, DA 99-258, 14 FCC Rcd 2173 (1999); Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., Counsel for Lancaster Communications, Inc., DA 98-2052, 1998 WL 709412 (1998)).

<sup>24</sup> As further noted in *Lakeland PCS*, even when a license automatically cancels, the former licensee remains obligated to pay its debt. Accordingly, mere acceptance of a payment after cancellation would not constitute a constructive waiver of the automatic cancellation rule. See *Lakeland PCS* at n.11.

<sup>25</sup> Further Reconsideration Petition at 3.

<sup>26</sup> See *Memorandum Opinion and Order* at ¶16.

<sup>27</sup> Further Reconsideration Petition at 2, (quoting *Memorandum Opinion and Order* at ¶8).

<sup>28</sup> See *Memorandum Opinion and Order* at ¶8, n.17.

<sup>29</sup> See *Memorandum Opinion and Order* at ¶¶5 and 8.

<sup>30</sup> Further Reconsideration Petition at 4-5, citing 47 C.F.R. § 1.2110(e)[sic (f)](4)(iv) (1999).

plainly provide that 21<sup>st</sup> Century was in default when it failed to make its payment within 180 days, well before the Division released the *Division Order*.<sup>31</sup>

15. Ultimately, 21<sup>st</sup> Century's arguments that its Letter Requests were timely or that the Commission considered its Reconsideration Petition to be untimely are irrelevant to any reconsideration of the *Memorandum Opinion and Order*. In the *Memorandum Opinion and Order*, the Commission elected to address the merits of 21<sup>st</sup> Century's Letter Requests because the *Division Order* then under review had done so.<sup>32</sup> The Commission did not rely upon the timing of either the Letter Requests or the Reconsideration Petition in reaching its decision to affirm the *Division Order* and deny the requests for waiver. Accordingly, even if 21<sup>st</sup> Century could show any error in the analysis of the timing of its Letter Requests or its Reconsideration Petition, that would not provide any grounds for reconsidering the *Memorandum Opinion and Order*.

### B. 21<sup>st</sup> Century's Untimely Arguments

16. 21<sup>st</sup> Century next argues that the Commission erred in not considering 21<sup>st</sup> Century's untimely Supplement to its Reconsideration Petition.<sup>33</sup> 21<sup>st</sup> Century further reiterates the substance of its untimely arguments in its Further Reconsideration Petition. In its Motion, 21<sup>st</sup> Century asserted that the Supplement demonstrates that the Commission's automatic cancellation rule violates the Fifth Amendment to the United States Constitution by taking property without due process of law. The Supplement claimed that the Constitution requires the Commission to provide 21<sup>st</sup> Century with a notice and hearing, similar to the notice and hearing provided to licensees whose licenses are revoked.<sup>34</sup> 21<sup>st</sup> Century contends that the Commission must consider the constitutional arguments raised in the Supplement, regardless of the fact that it was untimely filed.<sup>35</sup>

---

<sup>31</sup> 47 C.F.R. § 1.2110(f)(4)(iii) (1999) ("If an eligible entity is more than one hundred and eighty days (180) days delinquent in any payment, it shall be in default[.]"); see 47 C.F.R. § 1.2110(f)(4)(iv) (1999)(if a licensee fails to make payment by the close of the automatic grace period, "it shall be declared in default, its license will automatically cancel, and will be subject to debt collection procedures."); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 437 ¶107 (1997)(*Part 1 Third Report and Order*) ("If ABC Corp. does not remit the required \$115,000 by August 29 (the end of the 90-day grace period [following the 90-day non-delinquency period]), then *it will be considered in default and its license will automatically cancel on August 30 without further action by the Commission.*" (emphasis added)) (adopting relevant rules); "Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules," *Public Notice*, DA 98-1897 (rel. Sept. 18, 1998) ("Any licensee that becomes more than one-hundred and eighty (180) days delinquent on an installment payment *shall be in default, and the license shall cancel automatically without further action by the Commission.*" (emphasis added))(using ABC Corp. example similar to that in *Part 1 Third Report and Order*).

<sup>32</sup> *Memorandum Opinion and Order* at ¶8.

<sup>33</sup> Further Reconsideration Petition at 5-7.

<sup>34</sup> See 47 U.S.C. § 312(c).

<sup>35</sup> See Motion at 1-2 (citing *Graceba Total Communications, Inc. v. Federal Communications Commission*, 115 F.3d 1038 (D.C. Cir. 1997) and *Meredith Corporation v. Federal Communications Commission*, 809 F.2d 863 (D.C. Cir. 1987)); Further Reconsideration Petition at 7 (citing *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994), as well as *Graceba* and *Meredith*).

17. 21<sup>st</sup> Century misreads the relevant precedent regarding the Commission's duty to hear constitutional claims. The cases 21<sup>st</sup> Century cites in fact have held that the Commission has an obligation to consider only *properly presented* constitutional claims.<sup>36</sup> Other precedent underscores 21<sup>st</sup> Century's error.<sup>37</sup> 21<sup>st</sup> Century did not present its constitutional claims properly, *i.e.*, within the time allowed for its initial waiver requests or its Reconsideration Petition, when such claims could and should have been raised.<sup>38</sup> Accordingly, we have no obligation to consider those claims at this stage of the proceeding and decline to do so.

18. By statute, Congress has limited our power to consider petitions for reconsideration to those filed within a specific time period.<sup>39</sup> By rule, we have discretion to hear late-filed supplements to timely filed petitions if a petitioner presents adequate grounds for us to do so.<sup>40</sup> Given the statutory restrictions on our jurisdiction to hear petitions for reconsideration, we are not inclined to exercise our discretion to hear late-filed supplements when a petitioner offers no plausible explanation as to why supplemental arguments were not made in an initial petition.<sup>41</sup> 21<sup>st</sup> Century has never explained why it failed to argue in its Letter Requests or its Reconsideration Petition that the automatic cancellation rule violates the Fifth Amendment to the United States Constitution, as it argues in the Motion and Supplement, or Section 312(c) of the Communications Act of 1934, as it argues in the Further Reconsideration Petition. Instead, it simply presented these arguments as new matters in its Motion, Supplement and the Further Reconsideration Petition.<sup>42</sup> Considering these arguments, which plainly were available when 21<sup>st</sup> Century made its Letter Requests and filed its Reconsideration Petition, thwarts procedures designed to bring a prompt and final resolution to matters before us. Under these circumstances, we reaffirm the denial of the Motion and decline to consider the Supplement, as well as the untimely arguments reiterated in the Further

---

<sup>36</sup> See *Graceba Total Communications, Inc. v. Federal Communications Commission*, 115 F.3d 1038, 1041-42 (D.C. Cir. 1997) (Commission is obligated to consider "*properly presented* constitutional claims") (emphasis added); *Meredith Corporation v. Federal Communications Commission*, 809 F.2d 863, 869 n. 6 (D.C. Cir. 1987) ("It is also clear, we believe, that the Commission within its discretion could have denied Meredith leave to file [its constitutional argument] because of procedural defects.")

<sup>37</sup> See *Northwestern Indiana Telephone Company, Inc. v. Federal Communications Commission*, 872 F.2d 465, 471 (D.C. Cir. 1989) ("In [*Meredith's*] context, this court held that an agency could not ignore a *properly presented* constitutional claim advanced in an enforcement proceeding. [*Meredith*] at 869-70. Here, in contrast, the FCC reasonably *declined* to address new arguments on remand." (emphasis in original)).

<sup>38</sup> The Further Reconsideration Petition cites an additional case for the proposition that a party may challenge the constitutionality of a rule being enforced against it even though the party did not challenge the rule's constitutionality when the rule was adopted. See Further Reconsideration Petition at 7 (citing *JEM Broadcasting Co., Inc.*). This unremarkable proposition has no bearing on 21<sup>st</sup> Century's failure to timely raise its constitutional arguments when it originally sought waiver or when it subsequently filed its Reconsideration Petition.

<sup>39</sup> 47 U.S.C. § 405; see *Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (1986) (narrowly construing court created "extraordinary circumstances" exception to statutory time limit for filing petitions for reconsideration).

<sup>40</sup> 47 C.F.R. § 1.106(f) ("No supplement or addition to a petition for reconsideration . . . filed after expiration of the 30 day period [for filing the petition] will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor.")

<sup>41</sup> This is in keeping with the general requirement parties present all available facts and arguments in order to avoid wasteful or duplicative proceedings. See, e.g., 47 C.F.R. § 1.106(b).

<sup>42</sup> See, generally, Motion and Further Reconsideration Petition.

Reconsideration Petition.<sup>43</sup>

### C. 21<sup>st</sup> Century's Repetitious Arguments

19. Finally, 21<sup>st</sup> Century repeats arguments previously considered and rejected in the *Memorandum Order and Opinion*, specifically that the automatic cancellation rule is arbitrarily enforced, that 21<sup>st</sup> Century was not afforded full and explicit notice of its payment obligations, and that the public interest compels reinstatement of 21<sup>st</sup> Century's cancelled licenses.<sup>44</sup> 21<sup>st</sup> Century has not presented any new facts that warrant reconsidering the Commission's prior decision. The Commission's rules permit petitions for reconsideration to rely on facts not previously presented in only three circumstances.<sup>45</sup> 21<sup>st</sup> Century presents various facts in the Further Reconsideration Petition, which, though previously available to 21<sup>st</sup> Century, did not appear in its Letter Requests or its Reconsideration Petition.<sup>46</sup> However, 21<sup>st</sup> Century has made no effort to show that any of these facts meet the requirements of the rules governing petitions for reconsideration. Furthermore, given the various notices that 21<sup>st</sup> Century had of its payment obligations, 21<sup>st</sup> Century's restatement of its initial legal arguments<sup>47</sup> in the Further Reconsideration Petition does not persuade us that the Commission erred by enforcing the automatic cancellation rule and denying reinstatement of the licenses.<sup>48</sup>

---

<sup>43</sup> In light of the discussion above, 21<sup>st</sup> Century's argument that the *Memorandum Opinion and Order* did not adequately address the Motion is moot. See Further Reconsideration Petition at 5-7. Accordingly, we need not address that argument.

<sup>44</sup> Further Reconsideration Petition at 13-25. See *Memorandum Opinion and Order* at ¶¶15-16 (notice argument); ¶¶17-20, 26 (consistent enforcement argument), and ¶¶28-29 (public interest argument). In its Reconsideration Petition, 21<sup>st</sup> Century argued that the Commission's payment notices were not sufficient to constitute adequate notice under the Administrative Procedures Act and the Fifth Amendment of the United States Constitution. See Reconsideration Petition at 8-12. 21<sup>st</sup> Century's Reconsideration Petition did not assert that the Commission's automatic cancellation rules violated 21<sup>st</sup> Century's Fifth Amendment rights.

<sup>45</sup> 47 C.F.R. § 1.106(c). First, new facts may be relied on if they relate to events that occurred or circumstances that changed since the last opportunity to present such matters. 47 C.F.R. § 1.106(c)(1) (incorporating 47 C.F.R. § 1.106(b)(2)(i)). Second, new facts may be relied on if they were unknown to the petitioner until after the last opportunity to present such matters and the petitioner could not have learned of them, through the exercise of ordinary diligence, prior to such opportunity. 47 C.F.R. § 1.106(c)(1) (incorporating 47 C.F.R. § 1.106(b)(2)(ii)). Third, and finally, new facts may be relied upon if we determine that consideration of the new facts is required in the public interest. 47 C.F.R. § 1.106(c)(2).

<sup>46</sup> For example, 21<sup>st</sup> Century submits data regarding 1998 and 1999 payment notices in its Further Reconsideration Petition. See Further Reconsideration Petition, Exhibit 1. This information obviously was available to 21<sup>st</sup> Century prior to the time of its Letters Requests and its Reconsideration Petition.

<sup>47</sup> As in its Reconsideration Petition, 21<sup>st</sup> Century discusses a pending proceeding involving Airadigm Communications, Inc. ("Airadigm") in the Further Reconsideration Petition. See, e.g., Further Reconsideration Petition at 13-15. That proceeding remains pending, as it was at the time of the *Memorandum Order and Opinion*. We see no reason to depart from the prior conclusion that it is premature to compare that proceeding and our handling of this case. See *Memorandum Opinion and Order*, ¶26.

<sup>48</sup> In the *Memorandum Opinion and Order*, the Commission concluded that the public interest would be best served in this case by auctioning new licenses for the spectrum at issue and not permitting licensees to re-negotiate payment terms. *Memorandum Opinion and Order*, ¶29. The Commission has proceeded accordingly. See *supra* at n.15, regarding the auction that concluded following release of the *Memorandum Opinion and Order*.



20. In place of new facts warranting reconsideration, 21<sup>st</sup> Century attempts to rely on a new decision, *Lakeland PCS*, that was released by the Policy and Rules Branch (“Branch”) of the Wireless Telecommunications Bureau’s Commercial Wireless Division shortly before the Commission released the *Memorandum Opinion and Order*.<sup>49</sup> However, the *Lakeland PCS* decision did not create new authority as it did not depart from prior rules or precedent. In *Lakeland PCS*, an F block PCS licensee failed to make its April 30, 1999 installment payment within 180 days of the payment due date.<sup>50</sup> An October 19, 1999 payment notice indicated that the final day of the 180-day period was October 28, 1999, when actually it was October 27, 1999. Lakeland made its payment, including late fees, on October 29, 1999, two days after the end of the grace period. Subsequently, Lakeland made all of its installment payments on time.<sup>51</sup> In light of Lakeland’s failure to meet the deadline, the Branch initially rescinded an order granting consent to an assignment of Lakeland’s license. Lakeland then sought reconsideration. On further reconsideration, the Branch found that Lakeland’s circumstances were consistent with previous instances where, as a result of administrative oversight, a constructive waiver of installment payment deadlines had occurred.<sup>52</sup> Consequently, notwithstanding Lakeland’s failure to meet its installment payment deadline, the Branch, in a second order on reconsideration, vacated the earlier rescission of, and reinstated, the grant of Lakeland’s application to assign its F block license to another party.<sup>53</sup>

21. In this case, in contrast to the circumstances in *Lakeland PCS*, the Commission did not act in a way that could have been construed as waiving the January 27, 2000, late payment deadline. Accordingly, *Lakeland PCS* does not provide a basis for reconsidering the *Memorandum Order and Opinion*.

22. Contrary to 21<sup>st</sup> Century’s arguments, the history of 21<sup>st</sup> Century’s prior payments on its licenses is irrelevant to the treatment of 21<sup>st</sup> Century’s unquestionable failure to make any payment within 180 days of the due date for its July 31, 1999 payment.<sup>54</sup> 21<sup>st</sup> Century contends that it received constructive waivers when it previously paid the amounts on past payment notices because those payments in fact underpaid the actual amount due. 21<sup>st</sup> Century argues that the automatic cancellation rule should have been, but was not, triggered by these purported underpayments. This argument is flawed. Even assuming, for the sake of argument, that 21<sup>st</sup> Century previously received constructive waivers<sup>55</sup> and that the facts surrounding the July 31<sup>st</sup> payment were similar to those previous circumstances,<sup>56</sup> the Commission

---

<sup>49</sup> Further Reconsideration Petition at 11-12.

<sup>50</sup> See *Lakeland PCS*, ¶2.

<sup>51</sup> See *Lakeland PCS*, ¶4.

<sup>52</sup> See *Lakeland PCS*, n.12 and accompanying text.

<sup>53</sup> See *Lakeland PCS*, ¶¶1, 4, 7.

<sup>54</sup> Furthermore, 21<sup>st</sup> Century executed notes expressly providing that any waiver by the Commission on one occasion shall not be deemed a waiver of the obligation to make full and timely payment on any future occasion. Note at 4.

<sup>55</sup> Pursuant to the Commission’s rules, 21<sup>st</sup> Century’s payments were applied to its oldest obligations before current obligations. Consequently, its payments, even if less than the full amount actually due, could have averted cancellation by averting an outstanding debt that was more than 180 days old. Thus, it is unclear that 21<sup>st</sup> Century ever received the purported constructive waivers that it claims.

<sup>56</sup> The factual circumstances surrounding the payment due July 31, 1999 are completely different. With respect to that payment, 21<sup>st</sup> Century unquestionably made no payment before the 180-day period expired. (continued....)

is not required to repeat past errors underlying any such constructive waivers.<sup>57</sup> Here, the Commission promptly and properly advised 21<sup>st</sup> Century how the rules applied and that 21<sup>st</sup> Century's licenses were cancelled. 21<sup>st</sup> Century's payment history provides no basis for altering that correct conclusion.

23. 21<sup>st</sup> Century knew the deadline for its July 31, 1999 installment payments.<sup>58</sup> Pursuant to the Commission's published rules and 21<sup>st</sup> Century's Notes and Security Agreements, failure to pay within the 180-day period that ran on January 27, 2000 resulted in default. The Commission's rules, 21<sup>st</sup> Century's licenses, and the express terms of the Notes and Security Agreements each gave clear notice that upon default the licenses would cancel automatically. 21<sup>st</sup> Century's belated, conditional proffer of third-party funds<sup>59</sup> does not change the underlying fact that 21<sup>st</sup> Century did not (and apparently could not<sup>60</sup>) make installment payments in accordance with the Commission's rules and the undisputed payment schedule. The Commission consistently has denied requests for relief in such circumstances,<sup>61</sup> and we reaffirm the decision to deny 21<sup>st</sup> Century's request for a waiver of the payment deadline or reinstatement of its licenses.

(Continued from previous page) \_\_\_\_\_

Moreover, unlike circumstances in which 21<sup>st</sup> Century paid amounts on payment notices, 21<sup>st</sup> Century unquestionably knew that its failure to make any payment with 180 days would result in automatic cancellation of its licenses.

<sup>57</sup> *SouthEast Telephone v. Federal Communications Commission*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999), *aff'ing* Request 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).

<sup>58</sup> First Modification at 4.

<sup>59</sup> See February 2<sup>nd</sup> Letter, Attachment at 1. In the Attachment, Merrill Lynch stated that it held a third-party's funds for 21<sup>st</sup> Century's benefit but that it had been directed "not to wire the funds until the FCC provides assurance that the funds will be accepted and that the associated licenses of 21<sup>st</sup> Century Telesis, Inc. are not cancelled."

<sup>60</sup> February 2<sup>nd</sup> Letter at 2 ("While the Board and Officers of 21<sup>st</sup> Century have worked diligently to finalize [third-party financing] commitments, we were unable to ensure that wire transfers would be received at Mellon Bank [the FCC's bank] by Thursday afternoon, January 27, 2000."). A licensee's inability to satisfy its payment obligations bears directly on its qualifications to hold a license. See *Memorandum Opinion and Order*, ¶¶17-20. For example, the Commission has not granted requests for an extension of a down payment deadline for a license won through competitive bidding in any case where it appeared that the party requesting the extension did not have the funds on hand on the date of the payment deadline. See *Mountain Solutions, Ltd, Inc. v. Federal Communications Commission*, 197 F.3d 512, 516 (D.C. Cir. 1999) (quoting *Mountain Solutions Ltd., Inc., Request for Waiver of Section 24.711(a) (2) of the Commission's Rules*, 12 FCC Rcd 5904, ¶¶ 6-7 (1997)).

<sup>61</sup> See, e.g., In the matter of Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses, *Order on Reconsideration*, 15 FCC Rcd 17500 (2000); 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* (rel. December 21, 2000); 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), *aff'd*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1214855 (D.C. Cir., Nov. 24, 1999).

**V. Ordering Clauses**

24. Accordingly, for the foregoing reasons, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), 309(j), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), and 405, the petition for further reconsideration filed by 21<sup>st</sup> Century IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary