

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

DA 96-874

In the Matter of)
)
Emergency Petition for Waiver)
of Deadline for Submission of)
Down Payment for the Broadband PCS)
C Block Auction filed by BDPCS, Inc.)

ORDER ON RECONSIDERATION

Adopted: May 30, 1996

Released: May 30, 1996

By the Chief, Wireless Telecommunications Bureau

1. On May 22, 1996, BDPCS, Inc. (BDPCS) filed a Petition for Reconsideration (Petition)¹ of an *Order*² issued by the Wireless Telecommunications Bureau (Bureau) denying BDPCS's Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules,³ governing the deadline for submission of down payments for the broadband PCS C block⁴ auction. For the reasons stated below, BDPCS's Petition is denied.

2. Background. On May 15, 1996, BDPCS filed an Emergency Petition for Waiver seeking an extension of time to submit the down payment required under Section 24.711(a)(2) of the Commission's Rules.⁵ BDPCS argued that, although it had made arrangements to satisfy its down payment obligations, they unexpectedly fell through at the last minute and it could not secure alternate financing by the May 15, 1996 down payment deadline.⁶ BDPCS requested a 30-

¹ Petition for Reconsideration (Petition) filed by BDPCS, Inc. on May 22, 1996.

² *Order*, Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C block auction filed by BDPCS, Inc., DA 96-811 (rel. May 20, 1996) (*Order*).

³ 47 C.F.R. § 24.711(a)(2).

⁴ The C block encompasses the 1895-1910 MHz band paired with 1975-1990 MHz band.

⁵ 47 C.F.R. § 24.711(a)(2).

⁶ Emergency Petition for Waiver filed by BDPCS, Inc. on May 15, 1996 at 2.

day extension to make its \$36,689,196 down payment.⁷

3. On May 20, 1996, the Bureau issued an *Order* denying BDPCS's Emergency Petition for Waiver.⁸ The *Order* held that BDPCS had not made the showing required under Section 24.819(a)(1) of the Commission's Rules⁹ to justify grant of a waiver. The Bureau found that BDPCS had not shown that special circumstances warranted a deviation from the general rule and that such a deviation would serve the public interest.¹⁰

4. BDPCS's Petition for Reconsideration. In its Petition, BDPCS argues that we failed (1) to consider adequately the merits of its waiver request and (2) to establish a basis for denying its request.¹¹ More specifically, BDPCS alleges that the Bureau failed to give its request the "hard look" required by *WAIT Radio v. FCC*.¹² It contends that the Bureau "summarily denied the request without inquiry or analysis" and failed to take into consideration the unique facts and circumstances surrounding its inability to submit a timely down payment.¹³ It also argues that the Bureau ignored evidence presented that BDPCS had a "reasonable basis" to believe that it would be able to submit the down payment and that its inability to meet its down payment obligation resulted from "circumstances that could not be predicted."¹⁴ BDPCS objects to the Bureau's statement that BDPCS's failure to submit a timely down payment gave reason to doubt its ability to fulfill the additional down payment, installment payment and build-out obligations.¹⁵ BDPCS claims that the Bureau effectively held it to a different financial standard than other C block bidders because it alone was required to demonstrate that it would have sufficient funds on hand to fulfill its future payment obligations. Finally, BDPCS argues that the Bureau failed to consider "established FCC policy" countenancing a "flexible approach" toward designated entities experiencing financial distress.¹⁶

⁷ *Id.* at 7. At the conclusion of the C block auction, BDPCS was the high bidder on 17 licenses with total net bids of \$873,783,912.75. To comply with the Commission's down payment requirement, BDPCS was obligated to supplement its \$7 million upfront payment with an additional deposit of \$36,689,196.

⁸ *Order*.

⁹ 47 C.F.R. § 24.819(a)(1).

¹⁰ *See Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

¹¹ Petition at 2.

¹² 418 F.2d 1153, 1157.

¹³ Petition at 3.

¹⁴ *Id.* at 5.

¹⁵ *Id.* citing *Order* at ¶ 7.

¹⁶ *Id.* at 6.

5. Discussion. We strongly disagree with BDPCS's contention that the Bureau failed to consider adequately the merits of the waiver request. The speed with which the Bureau addressed BDPCS's request is not reflective of the level of review given to the filing. Rather, it reflects the Bureau's desire to respond expeditiously to "emergency" requests and in instances where winning bidders fail to submit their required down payments.¹⁷ We also believe that we adequately reviewed the merits of the request under *WAIT Radio*. *WAIT Radio* requires the Commission to give a waiver request a "hard look" and not a perfunctory denial.¹⁸ In resolving waiver requests, however, the Commission is not required to "author an essay for the disposition of each application."¹⁹ Rather, it must provide a sufficient explanation so that parties may understand the basis of the decision.²⁰

6. The Bureau provided a reasoned explanation for its denial of BDPCS's waiver request in the *Order*. The *Order* considered the purpose of the down payment rule and the factual circumstances surrounding BDPCS's inability to comply with it. Noting that the rule is designed to ensure that auction winners have the financial ability to complete payment for the license and to pay for the costs of constructing a broadband PCS system, the *Order* found that the grant of a waiver would not be in the public interest. It also relied on Commission precedent in which similarly-situated parties were denied their requests to extend or waive payment deadlines.²¹

7. We remain unpersuaded that the particular circumstances surrounding BDPCS's failure to comply with the down payment requirement warrant a deviation from the general rule. Section 24.819(a)(1) of the Commission's Rules provides that a waiver of Part 24 of the Commission's Rules is appropriate when a petitioner demonstrates that (1) the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case and that grant of the waiver is otherwise in the public interest; or (2) the unique facts and circumstances of a particular case render the rule inequitable, unduly burdensome or otherwise contrary to the public interest, and there is no reasonable alternative.²²

8. As the *Order* noted, BDPCS had ample notice that the auction was coming to a close

¹⁷ See *Public Notice*, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules -- Bureau to Re-auction Licenses Quickly," DA 96-481 (April 4, 1996).

¹⁸ 418 F.2d at 1157.

¹⁹ *Id.* at 1157, n. 9.

²⁰ See e.g., *Adams Telecom, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1995) (FCC dismissal letters and order providing only brief explanations of why applications failed to satisfy requirements upheld as sufficient because parties could understand the basis of the decision).

²¹ See e.g., Letter to Jeffrey J. Pepin, United Wireless from Kathleen O'Brien Ham, Chief, Auctions Division (Dec. 12, 1995); *Order*, In the Matter of Interactive Video and Data Service Licenses Requests to Extend Payment Deadline, 10 FCC Rcd 4520 (1995).

²² 47 C.F.R. § 24.819(a)(1).

and its down payment obligation would soon become due. In this connection, we indicated that the down payment obligation was BDPCS's responsibility, and that, consistent with Commission precedent, the Bureau could not be responsible for the difficulties it faced in its negotiations with U.S. West Communications (USWC).²³ We also noted that 87 of the 89 auction winners were able to secure financing in order to satisfy the down payment obligations when they became due.²⁴ Moreover, the *Order* noted that USWC disputed the accuracy of BDPCS's description of its negotiations.²⁵ According to USWC, it "never had any obligation to fund any of BDPCS's down payment obligation to the FCC."²⁶ Nevertheless, BDPCS urges us to believe that it acted with "reasonable diligence" to meet the down payment deadline²⁷ and that it had a "reasonable basis to believe it possessed adequate funding for the submission of the initial down payment."²⁸ USWC's letter undermines BDPCS's contention that its inability to come up with the down payment "was caused by circumstances that could not be predicted."²⁹ Because BDPCS failed to meet its initial down payment requirement, we continue to have reason to doubt that BDPCS would be able to fulfill its additional down payment, installment payment and build-out obligations. Consequently, we are not persuaded that under these circumstances, a waiver should be granted.

9. In its Petition, BDPCS makes additional arguments in an effort to bolster its waiver request. First, BDPCS argues that the Bureau held it to a different financial standard than other C block winning bidders. Specifically, BDPCS contends the Bureau effectively required it, and not other winning bidders, to have sufficient funds by May 15, 1996 to meet all of its future financial obligations.³⁰ We did not hold BDPCS to a different financial standard. Rather, we concluded that BDPCS's failure to submit a timely down payment indicated that BDPCS may not be able to fulfill its future down payment, installment payment and build-out obligations.³¹ Second, BDPCS argues that the Commission's policy of a "flexible approach" toward designated entities experiencing financial distress necessitates the grant of a waiver to BDPCS.³² In a *Public Notice*

²³ *Order* at ¶ 6, citing *Order*, In re Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, 9 FCC Rcd 6384, 6385 (1994).

²⁴ *Order* at ¶ 6.

²⁵ *Order* at fn. 7.

²⁶ Letter to Reed Hundt, Chairman, FCC from Solomon D. Trujillo, President & CEO, US West (May 17, 1996).

²⁷ Petition at 3.

²⁸ *Id.* at 5.

²⁹ Petition at 5.

³⁰ Petition at 5.

³¹ *Order* at ¶ 7.

³² Petition at 6.

released by the Bureau on June 8, 1995,³³ the Bureau described the process by which the Commission could grant a "grace period" to licensees that fall behind on their installment payments. The *Public Notice* cited the Commission's *Second Report and Order* in the Competitive Bidding Docket for authority to grant such grace periods.³⁴ While the *Second Report and Order* allows for the grant of grace periods for missed installment payments, it makes no such allowance for missed down payments.³⁵ Consequently, the Commission's "flexible approach" toward designated entities is inapposite to the circumstances underlying BDPCS's waiver request. Lastly, BDPCS argues, for the first time, that denial of its waiver request is inconsistent with the FCC's goals to promote the participation of small businesses in the PCS business. Significantly, BDPCS did not provide any support for this proposition. Moreover, we believe that the rules which the Commission has adopted for the C block adequately furthers its goals to promote small business opportunities in PCS and BDPCS's specific circumstances do not demonstrate otherwise.

ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by BDPCS on May 22, 1996, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Michele C. Farquhar
Chief, Wireless Telecommunications Bureau

³³ *Public Notice*, "Wireless Telecommunications Bureau Staff Responds to Questions about the Broadband PCS C Block Auction" (rel. June 8, 1995).

³⁴ See *Second Report and Order* in PP Docket 93-253, FCC 94-61, 9 FCC Rcd 2348 (1994) at ¶ 240.

³⁵ *Id.*