

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

In the Matter of)
)
Mountain Solutions LTD, Inc.)
Request for Waiver of)
Section 24.711(a)(2) of the)
Commission's Rules Regarding)
Market Nos. B053, B168, B172, B187)
B188, B224, B247, B275, B366, and B381)

ORDER

Adopted: April 28, 1997

Released: April 28, 1997

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. By this Order, we deny the Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's rules¹ and associated Motion to Enter into Consent Decree, filed by Mountain Solutions LTD, Inc. ("Mountain Solutions"), a winning bidder for ten licenses in the broadband Personal Communications Services ("PCS") C block auction.²

¹ 47 C.F.R. § 24.711(a)(2).

² Mountain Solutions's Emergency Petition for Waiver, filed September 24, 1996 ("Waiver Petition"); Mountain Solutions's Supplement to Emergency Petition for Waiver and Motion to Enter into Consent Decree, filed October 17, 1996 ("Supplemental Petition"); Mountain Solutions's Second Supplement to Emergency Petition for Waiver, filed February 12, 1997 ("Second Supplement"). Mountain Solutions was the successful bidder for the following markets: Bozeman, MT (B053), Grand Junction, CO (B168), Greeley, CO (B172), Hays, KS (B187), Helena, MT (B188), Kalispell, MT (B224), Lawrence, KS (B247), Manhattan-Junction City, KS (B275), Pueblo, CO (B366), and Rock Springs, WY (B381).

II. BACKGROUND

2. On May 6, 1996, the Commission concluded the broadband PCS C block auction. Mountain Solutions was the winning bidder for Licenses B053, B168, B172, B187, B188, B224, B247, B275, B366, and B381.³ Pursuant to Section 24.711(a)(2) of the Commission's rules, winning bidders are required to submit a 10 percent down payment on licenses won at auction. Each winning bidder must bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five business days after the auction closes, with the remainder of the down payment (five percent) to be paid within five business days after the application required by § 24.809(b) is granted. Mountain Solutions made the first 5 percent down payment on the required due date; the second 5 percent down payment was due on September 24, 1996.⁴ In lieu of making this payment, Mountain Solutions filed the Waiver Petition seeking additional time to secure its financing to make its second 5 percent down payment.

3. On October 18, 1996, the Wireless Telecommunications Bureau ("Bureau") issued a Public Notice seeking comment on the issues raised in the Waiver Petition, as well as on similar waiver requests of the second down payment deadline filed by winners in various auctions.⁵ Several commenters, some with a financial interest in Mountain Solutions, support Mountain Solutions's waiver request, contending that a waiver would be consistent with Congress's goal of encouraging participation of small entities in spectrum auctions. One commenter, Liberty Cellular, Inc., supports denial of the Waiver Petition, contending that the Bureau should strictly adhere to the Commission's rules in order to promote and maintain the integrity of the auction process.⁶

4. During the pendency of these proceedings, Mountain Solutions filed the Supplemental Petition, in which it (1) stated that it had secured the necessary financing to make its second down payment; (2) reiterated its request to make the second down payment late; and (3) proposed, in the alternative, to enter into a consent decree with the Commission to submit its down payment late, along with a late fee. Finally, in a Second Supplement, Mountain Solutions

³ See Public Notice, "Entrepreneurs' C Block Auction Closes: FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas," DA 96-716 (released May 8, 1996).

⁴ See Public Notice, "FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA Licenses; Final Down Payment Due by September 24, 1996," 11 FCC Rcd 11316 (1996).

⁵ See Public Notice, Pleading Cycle Established for Waivers of Down Payment Rules in the Broadband Personal Communications Services C Block, 900 MHz Specialized Mobile Radio, and Multipoint Distribution Service Auctions, 11 FCC Rcd 13145 (1996) (establishing a comment deadline of Oct. 28, 1996, and a reply comment deadline of Nov. 1, 1996). In response, we received 32 comments and 10 reply comments.

⁶ Liberty Cellular's Opposition to Emergency Petition for Waiver, filed October 28, 1996.

cites, in support of its waiver request, the Commission's decisions in various Orders that granted waiver requests of auction winners who failed to timely submit their second down payment, and offers to tender "an irrevocable letter of credit" for the payments owed.⁷

III. DISCUSSION

5. Pursuant to 47 C.F.R. § 24.819, waiver of a provision of the PCS rules is appropriate only when a party demonstrates either that 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 that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest.⁸ In its submissions, Mountain Solutions raises four principal arguments to support its waiver request. First, Mountain Solutions contends that its timely payment of the first down payment is "evidence of its intention and ability to fulfill its obligations," and that this fact differentiates the circumstances of this case from those situations where the Commission has denied waivers to bidders who failed to make even their first down payment.⁹ Second, Mountain Solutions contends that its investors ceased financial discussions with Mountain Solutions out of concern that they would violate the Commission's anti-collusion rule.¹⁰ Third, Mountain Solutions claims that its failure to make its second down payment on time also was a result of the Commission's decision not to offer it certain defaulted C block licenses on which it was the second highest bidder. Mountain Solutions claims that it was required to expend its funds to participate in the reauction of those licenses.¹¹ Fourth, Mountain Solutions argues that if not

⁷ Second Supplement at 4 (citing, *inter alia*, Wireless Telecommunications Company Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B411, *Order*, DA 97-256 (released Feb. 4, 1997), in which the Bureau partially granted the waiver request of a C block auction winner that failed to submit its second down payment on time due to administrative error). Liberty Cellular filed a reply to the Second Supplement wherein it indicated its opposition to granting Mountain Solutions's waiver request, to which Mountain Solutions responded. *See* Liberty Cellular's Reply to Second Supplement to Emergency Petition for Waiver, filed February 28, 1997; Mountain Solutions's Response to Reply of Liberty Cellular, filed March 12, 1997. In light of our decision in this matter, we find it unnecessary to address each of Liberty Cellular's arguments and Mountain Solutions's responses.

⁸ 47 C.F.R. § 24.819(a)(1)(i) and (ii). *See also* *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

⁹ Supplemental Petition at 5.

¹⁰ *Id.* at 2.

¹¹ Reply of Mountain Solutions, filed November 1, 1996, at 7.

granted a waiver, it will face default and that the Commission will have to reactivate its licenses, thereby further delaying deployment of service.¹²

6. We find unpersuasive Mountain Solutions's claim that unique facts or circumstances exist here to warrant a waiver of our down payment rule. Rather, we believe that the circumstances here constitute the type of situation that the Commission specifically intended to avoid when it adopted a strict down payment rule, *i.e.*, having bidders win licenses and then proceed to shop those licenses in order to obtain financing.¹³ The Commission recently confirmed that the "upfront and down payment provisions in Section 24.711 of the Commission's rules are designed to ensure that the ultimate purpose of the auction -- encouraging and facilitating the provision of reliable service to the public -- is not undermined by winning bidders who lack the financial capability to pay for the license"¹⁴ Timely payments are a necessary indicator to the Commission that the winning bidder is financially able to meet its obligations on the license and intends to use it for the provision of service to the public. The failure to secure financing does not serve as a justification for a waiver.

7. Mountain Solutions's attempt to differentiate its failure to make a second down payment from other applicants' failure to make a first down payment is equally unpersuasive. The Commission has consistently denied requests for waiver of first down payment deadlines.¹⁵ Such payments are crucial in indicating to the Commission the sincerity of the bidder as well as its ability to meet its obligations. The overall effect of waiving down payment deadlines for parties that do not have the funds to meet such deadlines would be a disruption to the auction process and a delay in service to the public generally. Indeed, we have not granted a request 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. We have granted partial relief to licensees only where a delay in making payment on the payment due date and the failure to make payment was either inadvertent or due to miscalculation or administrative complications.¹⁶ Mountain Solutions's failure to make

¹² Waiver Petition at 5-6.

¹³ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-252, Second Report and Order, 9 FCC Rcd 2348, 2382 (1994).

¹⁴ BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, FCC 96-498 (released Jan. 6, 1997) at ¶ 7 ("*BDPCS Order*").

¹⁵ See, *e.g.*, *BDPCS Order*; C.H. PCS, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Order*, 11 FCC Rcd 9343 (1996).

¹⁶ See, *e.g.*, RFW, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B230, *Order*, DA 97-254 (rel. February 4, 1997); MFRI, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B435, *Order*, DA 97-255 (rel. February 4, 1997); Roberts-Roberts &

its payment resulted from a lack of funds, not miscalculation, inadvertence or administrative complications.

8. We further reject Mountain Solutions's contention that its investors' confusion about the anti-collusion rule justifies a waiver. Mountain Solutions should have secured its financing prior to the close of the auction, not nearly four months after its close when the Public Notice regarding the anti-collusion rule was released (*i.e.*, August 28, 1996). The Commission has clearly stated that the ability to make timely payments is the responsibility of auction winners, and that "the failure of a third party to perform its contractual obligations in dealing with an auction applicant cannot constitute a special circumstance justifying a waiver of the Commission's down payment rules."¹⁷ The Commission has also made clear that it is not responsible for the private business arrangements that an applicant has made to finance its successful bid.¹⁸

9. We also reject Mountain Solutions's contention that its waiver request is warranted because it was compelled to divert funds for its second down payment to finance its participation in the C block reauction.¹⁹ The responsible course of action for Mountain Solutions was not to participate in the C block reauction, or to withdraw from it, if there were any question about its financing. As the Commission has noted, "[i]f an applicant is unsure of its financing, it seems that the more appropriate course would be to not bid or to not bid in excess of the commitments of which it was reasonably certain."²⁰

Associates, LLC, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets, *Order*, DA 97-252 (rel. February 4, 1997); Southern Communications Systems, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B085, *Order*, DA 97-253 (rel. February 4, 1997); Wireless Telecommunications Company, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B411, *Order*, DA 97-256 (rel. February 4, 1997); Longstreet Communications International, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B012, *Order*, DA 97-257 (rel. February 4, 1997).

¹⁷ *BDPCS Order* at ¶ 8 (Commission denied a bidder's waiver request on its first down payment premised upon the failure of a third party financial arrangement).

¹⁸ Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd. 6384, 6385 (CCB 1994) (*IVDS Waiver Order*), *review denied*, 10 FCC Rcd 12153, 12155 (1995), *recon. denied*, 11 FCC Rcd 8211, 8216-17 (1996).

¹⁹ On July 3, 1996, the Bureau reaucted 18 C block licenses for which the required first down payments were not received from the winning bidders (BDPCS, Inc., and National Telecom PCS, Inc). Those licenses were deemed in default by the Bureau. *See Public Notice*, "18 Defaulted PCS Licenses to be Reaucted; Reauction to Begin July 3," DA 96-872 (released May 30, 1996).

²⁰ *IVDS Waiver Order*, 9 FCC Rcd at 6385.

10. We are not persuaded by Mountain Solutions's contention that its waiver request is warranted in order to avoid a default and reauction, which would result in a delay in the deployment of PCS services to the public.²¹ As noted above, our payment rules are designed to ensure that auction winners have the necessary resources to deploy services quickly. Mountain Solutions's failure to make the required payments indicates that it is not in a position to provide new services expeditiously.

11. We also reject Mountain Solutions's attempt to liken its situation to other C block applicants who received partial waivers from the Bureau.²² Similar treatment would be warranted if Mountain Solutions had presented facts similar to those of the C block winners whose waivers were partially granted. The other C block winners made late payments and filed waiver requests indicating that they were financially qualified at the time the second down payment was due, and, but for an administrative error on their part, the payment would have been timely submitted.²³ Mountain Solutions had not finalized its financing at the time the second down payment was due, as its own filings acknowledge.²⁴ For the same reason, we reject the alternative proposed in the Supplemental Petition for Mountain Solutions to submit its down payment late, along with a late fee. Allowing such a payment would run counter to our oft-stated policy that down payment deadlines must be taken seriously. Indeed, if we were to merely require Mountain Solutions to pay a late fee where its delay was due solely to its lack of financing, in contrast to a delay caused by a minor delinquency, we would in effect encourage bidders to bid on licenses without first having secured the requisite financing. Finally, Mountain Solutions's offer of a letter of credit must also be rejected. Under our rules, a letter of credit in lieu of an actual down payment would not satisfy Mountain Solutions's down payment obligation.²⁵

12. For the reasons stated above, both Mountain Solutions's Emergency Petition for Waiver and Motion to Enter into Consent Decree ARE HEREBY DENIED. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.

²¹ We have generally succeeded in rapidly reauctioning defaulted C block licenses. *See Public Notice*, "18 Defaulted PCS Licenses to be Reauctioned. Reauction to Begin July 3," DA 96-872 (rel. May 30, 1996).

²² Second Supplement at 7-8.

²³ *See, e.g., Orders* cited *supra* footnote 16.

²⁴ *See, e.g., Waiver Petition* at 2.

²⁵ *See* 47 C.F.R. §§ 1.2107(b) and 24.711(a)(2). *See also* Second Report and Order, *supra* n. 13, at ¶¶ 182-83 (rejecting the use of letters of credit for upfront payments).

FEDERAL COMMUNICATIONS COMMISSION

Daniel B. Phythyon
Acting Chief, Wireless Telecommunications Bureau