

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington D.C. 20554

In the Matter of )  
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BDPCS, Inc. )  
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BTA Nos. B008, B036, B055, B089 )  
B110, B133, B149, B261, B298, B331 )  
B347, B358, B391, B395, B407, B413, )  
and B447, Frequency Block C )

**ORDER**

Adopted: May 21, 1997

Released: May 21, 1997

By the Acting Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. The Bureau has before it a Petition for Reconsideration filed by BDPCS, Inc.

("BDPCS")<sup>1</sup>, seeking reconsideration of an Order<sup>2</sup> by the Acting Chief of the Wireless Telecommunications Bureau ("Bureau") that assessed BDPCS a default payment on the above-captioned licenses in the amount of \$67,695,653.23, pursuant to Section 24.704(a)(2) of the Commission's rules.<sup>3</sup> For the reasons discussed below, we deny BDPCS's petition.

## II. BACKGROUND

2. On May 6, 1996, the Commission concluded the Broadband PCS C Block auction. BDPCS was the successful high bidder on 17 licenses, with a cumulative total bid price of \$873,783,912.75. On May 8, 1996, the Commission announced by Public Notice<sup>4</sup> that, pursuant to 47 C.F.R. § 24.711(a)(2), winning bidders would be required to submit their full 10 percent down payment, or if claiming small business status, an initial one-half of their total down payment amount (five percent of their winning bids), by May 15, 1996.<sup>5</sup> Accordingly, BDPCS, a winning bidder claiming small business status, was required to bring its total funds on deposit with the Commission to five percent of its total bid amount, or approximately \$43,689,195.00. Accounting for BDPCS's upfront payment, BDPCS was required to remit a down payment in the amount of \$36,689,196.00.

3. On May 15, 1996, BDPCS filed an Emergency Petition seeking a limited waiver of the down payment deadline, claiming that a waiver was necessary because of the sudden withdrawal

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<sup>1</sup> BDPCS, Inc., In the Matter of BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, Petition for Reconsideration (filed November 27, 1996) ("Petition for Reconsideration").

<sup>2</sup> See BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, *Order*, 11 FCC Rcd 14399 (1996) ("*Payment Order*").

<sup>3</sup> Section 24.704(a)(2) provides that "[i]f a winning bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in paragraph (a)(1) of this section plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission." 47 C.F.R. § 24.704(a)(2).

<sup>4</sup> See "Entrepreneurs' C Block Auction Closes," *Public Notice*, DA 96-716 (rel. May 8, 1996) ("*Closing Public Notice*").

<sup>5</sup> 47 C.F.R. § 24.711(a)(2).

of all of its intended sources of financing.<sup>6</sup> In its petition, BDPCS detailed a series of events that it claims resulted in its loss of financing. BDPCS claimed that its parent company, QuestCom, Inc., had made arrangements with US West Communications ("USWC") to receive a bridge loan for the required down payment.<sup>7</sup> BDPCS also claimed that QuestCom intended to repay the bridge loan after completing an initial public offering that was to take place while BDPCS's C Block license applications were pending.<sup>8</sup> BDPCS contended that QuestCom continued to search for additional and alternative short-term and permanent financing from several parties. In particular, QuestCom focused on obtaining a loan from a large "Financial Institution" and through an initial public offering with Merrill Lynch as the lead underwriter.<sup>9</sup> BDPCS states that financing of its payment obligations seemed secure until May 2, four days before the PCS C Block auction closed, when it lost its USWC bridge loan.<sup>10</sup> In addition, BDPCS notes that four days later, on May 6, Merrill Lynch withdrew as the lead underwriter for QuestCom's initial public offering.<sup>11</sup> Finally, BDPCS claims that because of the short time available, it was unable to complete its financing transactions with the "Financial Institution."<sup>12</sup> BDPCS states that, after the down payment deadline, QuestCom selected Bear Stearns to serve as lead investment banker, thereby giving BDPCS the financial capability to attract capital for the deployment and operation of its PCS systems.<sup>13</sup>

4. On May 20, 1996, the Bureau denied BDPCS's waiver request because BDPCS had failed to show that special circumstances warranted a deviation from the general down payment

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<sup>6</sup> BDPCS, Inc., Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction (filed May 15, 1996), at 3-4 ("Emergency Petition"). *See also* Certification of Robert H. Kyle, CEO and Chairman of the Board of BDPCS, Inc. and QuestCom, Inc., May 15, 1996 (attached to May 15, 1996 Emergency Petition).

<sup>7</sup> Emergency Petition at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 3-4. In its pleadings, BDPCS does not provide the name of the financial institution with which it pursued financing negotiations following USWC's decision not to provide the bridge loan.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 5.

rule, or that such a deviation would serve the public interest.<sup>14</sup> On May 22, 1996, BDPCS filed a Petition for Reconsideration of the *Order*, contending that the Bureau failed to give BDPCS's waiver request the "hard look" required by the Commission's rules and applicable case law.<sup>15</sup> Specifically, BDPCS contended that the Bureau ignored the unique facts and circumstances of its case. According to BDPCS, these circumstances included the fact that BDPCS acted with reasonable diligence to meet the down payment deadline, and that BDPCS could not have predicted that it would lose its expected sources of funding shortly before payment was due.<sup>16</sup> BDPCS also claimed that the Bureau inappropriately relied upon the Commission's IVDS auction waiver decisions that are factually distinguishable from its case because BDPCS, unlike the IVDS bidders, attempted to secure back-up financing and made attempts to raise funds from several sources.<sup>17</sup> In addition, BDPCS stated that the Bureau did not address or recognize the fact that until the week prior to the close of the auction, BDPCS reasonably believed that it would be capable of meeting its financial obligations.<sup>18</sup> On May 30, 1996, the Bureau denied the Petition for Reconsideration, reaffirming its decision that the facts presented by BDPCS failed to warrant a deviation from the general rule, and did not show that the grant of a waiver would be in the public interest.<sup>19</sup>

5. On May 30, 1996, the Bureau released a *Public Notice* announcing that the 17 licenses on which BDPCS had defaulted would be reaucted commencing July 3, 1996.<sup>20</sup> On July 17, 1996, the Bureau announced the winning bidders in that reauction.<sup>21</sup> All 17 licenses on which BDPCS defaulted were won by other bidders in the reauction.

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<sup>14</sup> 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*, DA 96-811 (rel. May 20, 1996).

<sup>15</sup> BDPCS, Inc., Petition for Reconsideration (filed May 26, 1996), at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3-4

<sup>18</sup> *Id.* at 4-6. BDPCS claimed that the denial of its Emergency Petition reflected a lack of support for small businesses and therefore was not in the public interest. *Id.*

<sup>19</sup> Emergency Petition for Waiver of Deadline of Submission of Down Payment for the Broadband PCS C Block Auction filed by BDPCS, Inc., *Order on Reconsideration*, 11 FCC Rcd 12165 at ¶ 9 (1996).

<sup>20</sup> See "18 Defaulted PCS Licenses To Be Reaucted; Reauction To Begin July 3rd," *Public Notice*, DA 96-872 (rel. May 30, 1996).

<sup>21</sup> See "FCC Announces Winning Bidders in the Reauction of 18 Licenses to Provide Broadband PCS in Basic Trading Areas: Auction Event No. 10," *Public Notice*, DA 96-1153 (rel. July 17, 1996).

6. On October 28, 1996, the Bureau released the Payment Order, assessing BDPCS a default payment in the amount of \$67,695,653.23. This amount represents the total difference between BDPCS's winning bids and the amount of the winning bids in the C Block reauction for those licenses which attracted lower winning bids in the reauction (cumulatively \$42,765,088.50),<sup>22</sup> plus an additional three percent of the lower of the two amounts for each of the 17 defaulted licenses (cumulatively \$24,930,564.73).<sup>23</sup> On November 27, 1996, BDPCS filed a Petition for Reconsideration of the Payment Order, seeking to reduce the amount of the default payment and to obtain a three year deferral of the payment deadline.

### III. ARGUMENTS RAISED BY BDPCS

7. BDPCS offers four arguments in support of its petition. First, BDPCS reiterates that it "could not have avoided the severe financial distress caused by the unexpected unavailability of a bridge loan . . . and the withdrawal of Merrill Lynch as the lead underwriter of (BDPCS parent) Questcom's initial public offering."<sup>24</sup> BDPCS reasons that under these unique circumstances, assessing a small start-up company such a large default payment would be inequitable. Second, BDPCS argues that its defaulted licenses were reauctioned by the Bureau for a net gain of \$30,653,304.05, and in light of this, the \$67,695,653.23 default payment (nearly twice the amount of the net gain from reauction) assessed by the Bureau is unjustified. Third, BDPCS believes that a default payment of \$24,930,564.73 is more appropriate because BDPCS will find raising the necessary funds for the current obligation "impossible."<sup>25</sup> BDPCS contends that its existing assets and revenues are not sufficient to cover the current default payment, and bankruptcy will result if compelled to do so.<sup>26</sup> Finally, BDPCS urges the Bureau to grant it three years to make a reduced payment, to afford time to raise the funds.<sup>27</sup>

### IV. DISCUSSION

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<sup>22</sup> The high bids in the C block reauction for licenses B008, B036, B089, B133, B347, B358, B395, B407, B447 exceeded the high bids that BDPCS placed on those same licenses in the first C block auction. However, the high bids received for licenses B055, B110, B149, B261, B298, B331, B391, and B413 in the reauction were less than the high bids placed by BDPCS on those licenses in the first C block auction.

<sup>23</sup> See *Payment Order* at ¶ 6; see also 47 C.F.R. §§ 24.704(a)(2), 1.2104(g).

<sup>24</sup> *Petition for Reconsideration* at 5-6.

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *Id.* at 7-8.

<sup>27</sup> *Id.* at 8.

8. After careful review of the facts, there appears to be no valid basis for reconsidering the Bureau's imposition of a \$67,695,653.23 default payment on BDPCS. The fact that BDPCS lost all sources of funding does not diminish its financial responsibility under the Commission's rules. The default payment rules clearly articulate the obligations of a defaulting bidder. A defaulting bidder is required to pay the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission (so long as the subsequent winning bid is less than the amount bid), plus an additional payment equal to three percent of the defaulter's bid or the subsequent winning bid, whichever is less.<sup>28</sup> In the event that a license is reaucted for an amount greater than or equal to the defaulted bid, the total default payment is equal to three percent of the defaulted bid.<sup>29</sup>

9. We continue to believe that BDPCS's efforts to seek back-up financing until the down payment deadline do not constitute circumstances that would warrant special consideration. Indeed, the Commission has recently reaffirmed this policy.<sup>30</sup> The Commission has stated previously that "it is critically important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial penalty assessed if they . . . default on a balance due."<sup>31</sup> This approach is necessary "so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction."<sup>32</sup> Furthermore, the Commission has made clear that it is not responsible for the private business arrangements that an applicant has made to finance its successful bid,<sup>33</sup> nor can it "police the private business activities of each bidder."<sup>34</sup>

10. The fact that some of the defaulted licenses attracted higher bids in the C Block reauction does not reduce BDPCS's overall obligation. Bidders cannot seek relief simply because

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<sup>28</sup> 47 C.F.R. §§ 24.704(a)(2), 1.2104(g).

<sup>29</sup> *Id.*

<sup>30</sup> See BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, FCC 96-498, ¶ 8 (rel. January 6, 1997) ("*BDPCS MO & O*").

<sup>31</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2382 (1994) ("*Second Report and Order*").

<sup>32</sup> *Id.*

<sup>33</sup> Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd. 6384, 6385 (CAB 1994) (*IVDS Waiver Order*), *review denied*, 10 FCC Rcd 12153, 12155 (1995), *recon. denied*, 11 FCC Rcd 8211, 8216-17 (1996).

<sup>34</sup> *BDPCS MO & O* at ¶ 8.

gains made on some licenses offset losses incurred on others. In adopting our default payment rules, the Commission said that the payment must be "high enough to deter unwanted conduct."<sup>35</sup> Accordingly, we set the default payment as the difference between the defaulter's high bid and the bid received the next time that license is offered. Additionally, the three percent payment (i.e., three percent of the subsequent winning bid, or three percent of the defaulter's bid if the subsequent bid exceeds it) is designed to "encourage bidders, if they are to withdraw their bids, to do so before bidding ceases."<sup>36</sup>

11. The default rules contemplate that this calculation will be made on a license-by-license basis. As the Commission has stated, bidders should have secure financing before placing bids in an auction. In addition, when BDPCS became aware, before the C Block auction closed, that it had lost its financial backing, the proper course of action was "to refrain from bidding and withdraw all high bids until its financing was secure."<sup>37</sup> The Commission designed the default payment rule as a deterrent to the sort of behavior exhibited by BDPCS. As such, a reduction in the default payment is not warranted in order to reflect reaction gains. Doing so would only serve to minimize the impact of our rules.

12. BDPCS urges the Commission to reduce its default payment because the sheer size of it renders payment impossible. BDPCS suggests that reducing the payment would be consistent with the Commission's policy of adjusting or even eliminating otherwise applicable forfeiture amounts where the licensee is unable to pay the specified amount.<sup>38</sup> If the Commission were to reduce default payments based on a bidder's inability to pay, that would serve only to encourage bidders to bid without secure financial backing and contravene Commission policy. The Commission's rules are intended to prevent bidders from bidding when not securely financed.<sup>39</sup> Secondly, BDPCS argues that the Commission's forfeiture authority under Section 503(b) of the Communications Act supports consideration of its ability to pay in setting its default payment amount.<sup>40</sup> This argument is also misplaced. The Commission's authority to impose default

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<sup>35</sup> *Second Report and Order* at 2382.

<sup>36</sup> *Id.* See also 47 C.F.R. § 1.2104(g)(2).

<sup>37</sup> *BDPCS MO & O* at ¶ 11.

<sup>38</sup> *Petition for Reconsideration* at 8.

<sup>39</sup> See *supra* ¶ 9.

<sup>40</sup> Under Section 503(b)(2)(D) of the Communications Act, when the Commission is determining the amount of a forfeiture penalty, it has an obligation to "take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. § 503(b)(2)(D). See also *Standards for Assessing Forfeitures, Policy*

payments arises from Section 309(j), in which the Commission is directed to "include performance requirements, such as appropriate deadlines and penalties for performance failures. . . ." <sup>41</sup> BDPCS's argument is thus inapposite to an analysis of bid default payments.

13. Finally, we reject BDPCS's request that the Commission grant a three year deferral of the default payment deadline. The impact of the default payment rule would be significantly reduced if we were to defer the due date.

#### V. ORDERING CLAUSES

14. For the reasons discussed above, we will deny BDPCS's petition for reconsideration of the Commission's default payment order in connection with BDPCS's failure to submit the required down payment for the seventeen licenses it won in the broadband PCS C Block auction.

15. Accordingly, it is ORDERED that the Petition for Reconsideration filed by BDPCS, Inc. IS DENIED.

16. It is FURTHER ORDERED that BDPCS must submit a default payment in the amount of \$67,695,653.23 within 30 days from the release of this Order. The instructions for making this payment are contained in the October 28, 1996 Payment Order. This action is taken pursuant to delegated authority, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Daniel B. Phythyon  
Acting Chief, Wireless Telecommunication Bureau

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*Statement*, 6 FCC Rcd 4695 (1991), modified in part on recon. 7 FCC Rcd 5339 (1992); *revised* 8 FCC Rcd 6215 (1993).

<sup>41</sup> 47 U.S.C. § 309(j)(4)(B).