

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of)
)
BDPCS, Inc.)
)
)
Emergency Petition for Waiver)
of Section 24.711(a)(2) of the)
Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1996

Released: January 6, 1997

By the Commission:

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The Commission has before it an Application for Review filed on June 28, 1996 by BDPCS, Inc. ("BDPCS")¹, seeking review of Orders² by the Chief of the Wireless

¹ BDPCS, Inc., Application for Review - In re Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction (filed June 28, 1996) ("Application for Review").

² See 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) ("*Order*"); 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*, DA 96-874 (rel. May 30, 1996) ("*Order on Reconsideration*").

Telecommunications Bureau ("Bureau") that denied BDPCS's Emergency Petition³ and its subsequent Petition for Reconsideration⁴ seeking a waiver of the general down payment rule contained in Section 24.711(a)(2) of the Commission's rules.⁵ For the reasons discussed below, we deny BDPCS's Application for Review.

II. BACKGROUND

2. On May 6, 1996, the Commission concluded the Broadband PCS C Block auction.⁶ BDPCS was the successful high bidder on seventeen licenses, with a cumulative total bid price of \$873,783,912.75.⁷ On May 8, 1996, the Commission announced by *Public Notice*⁸ that, pursuant to Section 24.711(a)(2) of the Commission's rules, winning bidders would be required to submit their full ten 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, 1996.⁹ Accordingly, BDPCS, a winning bidder claiming small business status, was required to remit a down payment in the amount of \$36,689,196.00, bringing its total funds on deposit with the Commission to five percent of its total bid amount, or approximately \$43,689,195.00.

3. On May 15, 1996, BDPCS filed an Emergency Petition seeking a limited waiver as to the time it must submit its down payment as required by Section 24.711(a)(2). BDPCS claimed that a waiver was necessary because of the sudden withdrawal of all of its intended sources of financing.¹⁰ In its petition, BDPCS detailed a series of events that allegedly 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

³ BDPCS, Inc., Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction (filed May 15, 1996) ("Emergency Petition").

⁴ BDPCS, Inc., Petition for Reconsideration (filed May 22, 1996) ("Petition for Reconsideration").

⁵ Section 24.711(a)(2) provides that "[e]ach winning bidder shall make a down payment equal to ten percent of its winning bid (less applicable bidding credits); a winning bidder shall 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, and the remainder of the down payment (five percent) shall be paid within five business days after the application required by § 24.809(b) is granted." 47 C.F.R. § 24.711(a)(2).

⁶ See "Entrepreneurs' C Block Auction Closes," *Public Notice*, DA 96-716 (rel. May 8, 1996).

⁷ *Id.*

⁸ *Id.*

⁹ 47 C.F.R. § 24.711(a)(2).

¹⁰ Emergency Petition at 3-4. 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)

payment.¹¹ 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.¹² 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.¹³ 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.¹⁴ In addition, BDPCS notes that four days later, on May 6, Merrill Lynch withdrew as the lead underwriter for QuestCom's initial public offering.¹⁵ Finally, BDPCS claims that because of the short time available, it was unable to complete its financing transactions with the "Financial Institution."¹⁶ BDPCS states that, following the down payment due date, QuestCom selected Bear Stearns to serve as lead investment banker, and now had the financial capability to attract capital for the deployment and operation of its PCS systems.¹⁷ On May 20, 1996, the Bureau denied BDPCS's waiver request, holding that BDPCS had failed to show that special circumstances warranted a deviation from the general down payment rule, and that such a deviation would serve the public interest.

4. On May 22, 1996, BDPCS filed a Petition for Reconsideration of the *Order*, contending that the Bureau had failed to give BDPCS's waiver request the "hard look" required by the Commission's rules and applicable case law.¹⁸ 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.¹⁹ 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-

¹¹ Emergency Petition at 3.

¹² *Id.*

¹³ *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.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 5.

¹⁸ Petition for Reconsideration at 3.

¹⁹ *Id.*

up financing and made attempts to raise funds from several sources.²⁰ 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 the FCC's financial requirements of a PCS high bidder."²¹ 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.²²

5. On May 30, 1996, the Bureau released a *Public Notice* announcing that the seventeen licenses on which BDPCS had defaulted would be reaucted commencing July 3, 1996.²³ On July 17, 1996, the Bureau announced that the reauction of the licenses was complete.²⁴

III. ARGUMENTS RAISED BY BDPCS

6. BDPCS makes the same arguments to the Commission that were previously rejected by the Bureau. BDPCS repeats its allegation that the Bureau failed to address the facts presented by BDPCS and that instead the Bureau relied upon factually distinguishable IVDS cases.²⁵ BDPCS again alleges that its facts present a different situation from the IVDS cases because it has shown that (1) it developed alternative financing plans and (2) it attempted to raise the necessary funds from new sources until the very minute the funds were due to be paid.²⁶ Further, BDPCS alleges that the Bureau inappropriately relied upon an unattested letter from USWC in which USWC disclaimed any obligation to fund BDPCS as proof that BDPCS's inability to meet its initial down payment was not unexpected.²⁷ BDPCS states that the Bureau ignored the fact that until four days prior to the close of the auction, BDPCS reasonably believed it would be capable of meeting the Commission's financial requirements, and that its financial problems were caused

²⁰ *Id.* at 3-4

²¹ *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.*

²² *Order on Reconsideration* at ¶ 9.

²³ See "18 Defaulted PCS Licenses To Be Reaucted; Reauction To Begin July 3rd," *Public Notice*, DA 96-872 (rel. May 30, 1996).

²⁴ 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).

²⁵ *Id.* at 3-4.

²⁶ *Id.*

²⁷ *Id.* at 4.

by circumstances that could not be predicted.²⁸ Further, BDPCS again argues that the Bureau violated the "hard look" standard, claiming that it summarily denied the request without inquiry or analysis.²⁹

IV. DISCUSSION

7. After careful review of the facts, we find that the Bureau was correct in concluding that the circumstances presented here do not support BDPCS's request for a limited waiver of its down payment obligation. In the *Second Report and Order* in the competitive bidding docket, we established the requirement of a full and timely down payment to ensure that bidders are financially capable of constructing and operating their systems.³⁰ 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, construct systems, and provide service to the public.³¹ We also stated that one of the best indicators of a bidder's financial ability, at least in the initial stages of the award of licenses, remains the timely payment of both upfront and down payment obligations.³² Given the importance of the down payment requirement, a waiver is appropriate only where "the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that the grant of the waiver is otherwise in the public interest," or "[t]hat the unique facts and circumstances of a particular case render the rule inequitable, unduly burdensome or otherwise contrary to the public interest."³³

²⁸ *Id.* at 3-5.

²⁹ *Id.* at 5-6, citing *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

³⁰ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2382-84. (*Second Report and Order*). See also In re C.H. PCS, Inc. - Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Order*, DA 96-1273 (rel. August 9, 1996).

³¹ See *Second Report and Order*, 9 FCC Rcd at 2381.

³² *Id.*; See also, In the Matter of Interactive Video and Data Service (IVDS) Licenses - Requests to Extend Payment Deadline, *Order*, 10 FCC Rcd 4520 (1995).

³³ 47 C.F.R. § 24.819(a)(1).

8. We also conclude that while BDPCS appears to have attempted to secure back-up financing and to obtain new sources of funds up until the time payment was due, that conduct does not create the special circumstances necessary to warrant the grant of a waiver. We have stated previously that in order to maintain the integrity of the auction process, and to ensure the efficient provision of services to the public, auction participants are held to certain obligations, such as meeting relevant financial deadlines.³⁴ We also have stated that inherent in this responsibility placed upon auction participants is the notion that the Commission cannot take into account the "private business arrangements that an applicant has made to finance its successful bid."³⁵ We have held 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.³⁶ We reaffirm that position here, and state that any departure from this position would require that the Commission effectively police the private business activities of each bidder. That function is not, nor should it be, within the mandate of the Commission's powers.

9. Contrary to BDPCS's claim, it was not necessary for the Bureau to detail and analyze all of the events leading to BDPCS's default in order to meet the "hard look" standard required under *Wait Radio*. The "hard look" standard requires the Bureau to give a request for waiver a "hard look," as opposed to a perfunctory denial, by articulating with clarity and precision its findings and the reasons for its decision.³⁷ The Orders indicate that the Bureau reviewed all of the facts presented and balanced those facts against the purpose of the down payment rule and its impact upon the efficiency and integrity of the auction process. For example, in its *Order*, the Bureau noted that for more than one month, BDPCS had substantial notice that the C Block auction was coming to a close and that the initial down payment obligation would soon become due.³⁸ The Bureau noted, *inter alia*, that almost all of the 89 winning bidders were able to secure financing in order to satisfy their down payment obligation, and that the Bureau was not persuaded that BDPCS's last minute difficulties in arranging financing justified a waiver of the

³⁴ See In the Matter of Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, FCC 96-271 (rel. July 11, 1996). See also *Second Report and Order*, 9 FCC Rcd at 2382.

³⁵ See In re Requests for Waivers in the First Auction of 594 Interactive and Video Data Service Licenses, *Order*, 9 FCC Rcd 6384, 6385 (1994) ("Requests for Waivers Order").

³⁶ See In re Emergency Petition for Waiver of Deadline for Submission of Upfront Payments for Broadband PCS Auction filed by Personal Communications Corporation, *Order*, DA 95-37 at ¶ 4 (rel. January 12, 1995). See also In re Interactive Video and Data Service (IVDS) Licenses Requests to Extend Payment Deadline, *Order*, DA 95-907, (rel. April 28, 1995) at ¶ 6.

³⁷ *Wait Radio v. FCC*, 418 F.2d at 1157.

³⁸ *Order* at ¶ 6.

general rule.³⁹ The Bureau further stated that "[t]he Commission . . . cannot be responsible for the private business arrangements that an applicant has made to finance its successful bid."⁴⁰

10. In this regard, we also reject BDPCS's contention that the Bureau placed too much emphasis upon the unattested USWC letter. The Bureau stated that the Commission could not be responsible for the difficulties that BDPCS faced in negotiations with USWC.⁴¹ Among other things, the Bureau noted that USWC disputed the accuracy of BDPCS's description of its negotiations and that this letter undermines BDPCS's contention that its inability to come up with the down payment was caused by circumstances that could not be predicted.⁴² This letter raised an issue as to whether BDPCS should have legitimately relied upon USWC as a source of financing for its down payment, and thus whether its failure to obtain the appropriate financing was unexpected. The fact that the letter was unattested merely goes to the weight to be accorded the letter, and not whether it is properly part of the record. Although it was part of the information reviewed by the Bureau, the Bureau did not indicate that this information, in and of itself, was the sole, or even the primary basis for its decision. Rather, the Bureau relied upon an aggregate of facts in reaching its decision. We thus reject BDPCS's contention on this point.

11. We also conclude that the Bureau was correct in denying the waiver on the basis that BDPCS admitted that on May 2, 1996, four days prior to the close of the auction, it began experiencing financial difficulties. Nonetheless, BDPCS continued to bid in the auction, and submitted the high bid for several of the licenses on which it ultimately was the high bidder.⁴³ Under these circumstances, since BDPCS knew its financing was not secure, the appropriate course of action would have been to refrain from bidding and withdraw all

³⁹ In the *Order*, the Bureau noted a letter sent by USWC that contends that BDPCS's description of its negotiations with USWC are "inaccurate." *Order* at ¶ 4, n.7. USWC states that "it never had any obligation to fund any of BDPCS's down payment obligations to the FCC." See Letter to Reed Hundt, Chairman, FCC from Solomon D. Trujillo, President & CEO, U.S. West.

⁴⁰ *Order* at ¶ 6, citing *Requests for Waiver Order*, 9 FCC Rcd at 6385.

⁴¹ *Id.*

⁴² *Id.* at ¶ 9. The Bureau also rejected BDPCS's argument that the denial of its waiver request is inconsistent with the Commission's goals to promote the participation of small businesses in the PCS business. The Bureau noted that BDPCS did not provide any support for this proposition and that, contrary to its contention, the Commission's rules adopted for the C block auction adequately furthers its goals to promote small business opportunities in PCS. *Id.*

⁴³ See "Record of Bidding Round Results from C Block PCS Auction," Internet address: www.fcc.gov/wtb/aucdata.html.

high bids until its financing was secure. Indeed, the bid withdrawal period provides a bidder with the option of withdrawing a high bid if it determines that it lacks the funds required to support the bid, such as was the case with BDPCS.

12. The Commission's default payment provisions also encourage a bidder in BDPCS's position to withdraw its bid at the time its financing becomes insecure.⁴⁴ The rules governing the Broadband PCS C Block auction provide that the bid withdrawal payment is calculated based upon the difference between the withdrawn bid and the amount of the subsequent winning bid, if the subsequent winning bid is less.⁴⁵ Under these rules, no bid withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid.⁴⁶ If a high bidder defaults after the auction has closed, however, it is required to pay not only the difference between its defaulting bid and the subsequent winning bid for the license, but an additional three percent of its winning bid or the subsequent winning bid, whichever is less.⁴⁷ The rules thus encourage bidders to withdraw prior to the close of the auction, thereby resulting in less disruption and damage to the auction process. BDPCS admittedly knew four days before the auction closed that its financing was not secure, and should have withdrawn its bids at that time. In particular, having continued to bid rather than availing itself of the bid withdrawal option, we cannot conclude that the public interest would be furthered by providing BDPCS relief from the consequences flowing from this decision.

13. Finally, BDPCS's reliance upon alleged factual differences between its situation and that involving the IVDS bidders that sought waivers is misplaced. BDPCS takes the position that because it sought alternative financing arrangements, and continued to seek new financing sources until the time payment was due, it is entitled to a waiver and the Bureau was wrong in relying on those cases to deny its request. We note, as an initial matter, that the IVDS cases correctly set forth our view regarding the importance of the down payment requirement and the standard to justify a waiver of the rule. We also note that BDPCS's attempt to secure alternative financing is not the decisive factor here. Instead, the fact remains that BDPCS had time to withdraw its bid when it knew its financing was not secure, but remained in the auction and continued to bid in the hope of obtaining a waiver. BDPCS should have withdrawn from the auction and then continued to pursue back-up financing. We believe BDPCS's conduct was egregious and strongly supports denial of the waiver request.

⁴⁴ See *Second Report and Order*, 9 FCC Rcd at 2382. See also 47 C.F.R. §§ 24.704(a)(1), (2).

⁴⁵ See 47 C.F.R. § 24.704(a)(1).

⁴⁶ *Id.*

⁴⁷ See 47 C.F.R. § 24.704(a)(2).

V. ORDERING CLAUSES

14. For the reasons discussed above, we hereby deny BDPCS's request for a waiver of the Commission's down payment rules for its failure to meet the standards required by Section 24.819(a)(1).

15. Accordingly, IT IS ORDERED that the Application for Review filed by BDPCS, Inc., on June 28, 1996 IS DENIED.⁴⁸

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

⁴⁸ On October 25, 1996, the Bureau adopted an Order formally finding BDPCS in default on its down payment obligations and setting forth the amount of BDPCS's default payment. *See In re 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*, DA 96-1768 (rel. October 28, 1996).