

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

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

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 2000

Released: July 11, 2000

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by BDPCS, Inc. ("BDPCS") on June 19, 1997. BDPCS seeks review of a May 21, 1997, Order by the Wireless Telecommunications Bureau ("Bureau") denying BDPCS's Petition for Reconsideration of the Bureau's October 28, 1996, Payment Order assessing a default payment against BDPCS with regard to the above-captioned licenses. The Payment Order assessed a default payment against BDPCS in the amount of

1 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, Application for Review (filed June 19, 1997) ("Application for Review").

2 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 97-1066, 12 FCC Rcd. 6606 (WTB 1997) ("Order").

3 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, 11 FCC Rcd. 14399 (WTB 1996) ("Payment Order").

\$67,695,653.23, pursuant to Section 24.704(a)(2) of the Commission's rules.⁴ In its Application for Review, BDPCS requests that its default payment obligation be reduced to \$24,930,564.73, and that it obtain a three year extension of time in which to tender the balance of the default payment.⁵ Subsequently, BDPCS filed two supplements to its Application for Review,⁶ where BDPCS argues that under the Commission's rules, no default payment should be imposed and that it is entitled to a reimbursement of its \$7 million upfront payment.⁷ In the alternative, BDPCS requests that the Commission waive the default payment rule, Section 24.704,⁸ or the default payment.⁹ Finally, BDPCS has offered to withdraw its pending filings in exchange for a reduction in the default payment to \$3.5 million and the release of the remaining \$3.5 million of the original \$7 million upfront payment. For the reasons discussed below, we deny BDPCS's Application for Review. In so doing, we also deny BDPCS's waiver request contained in its Second Supplement to Application for Review.

II. Background

2. On May 6, 1996, the Commission concluded the Broadband PCS C block auction (Auction

⁴ Section 24.704(a)(2) previously provided 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) (1996); *see also*, 47 C.F.R. § 1.2104(g)(2) (1996). Section 1.2104(g), and Section 24.704(a) originally contained the same language. However, in connection with the Commission's adoption of generic auction rules in 1997, the Commission amended § 24.704 to read "See § 1.2104 of this chapter." The language of Section 1.2104(g) itself was only changed to replace the word "penalty" with the word "payment." In all other respects, the rule remained the same. As the rule has not changed, other than the substitution of the word "payment" for the word "penalty," our discussion here is equally applicable to the current version of Section 1.2104.

⁵ Application for Review at 4, Second Supplement to Application for Review at 6-14.

⁶ 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, Supplement to Application for Review (filed October 16, 1998) ("First Supplement to Application for Review"); 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 Waiver and Supplement to Application For Review (filed November 30, 1998) ("Second Supplement to Application for Review"); 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, Settlement Offer (filed November 23, 1999) ("Settlement Offer").

⁷ First Supplement to Application for Review at 2-3.

⁸ 47 C.F.R. § 24.704 (1996).

⁹ Second Supplement to Application for Review at 1-14.

No. 5). BDPCS was the successful high bidder on 17 licenses, with a cumulative total net bid price of \$873,783,912.75. On May 8, 1996, the Commission announced by Public Notice¹⁰ that, pursuant to 47 C.F.R. § 24.711(a)(2), winning bidders would be required to submit their first down payment (five percent of their net winning bids) by May 15, 1996.¹¹ 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 net bid amount, or \$43,689,195.64.¹² Accounting for BDPCS's \$7,000,000 upfront payment, BDPCS was required to remit a down payment in the amount of \$36,689,196.64.¹³

3. On May 15, 1996, BDPCS filed an Emergency Petition seeking a limited waiver of the down payment deadline because of the withdrawal of all of its intended sources of financing.¹⁴ 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., ("QuestCom") had made arrangements with US West Communications ("US West") to receive a bridge loan for the required down payment.¹⁵ 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.¹⁶ 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 an initial public offering with Merrill Lynch as the lead underwriter.¹⁷ BDPCS stated that financing of its payment obligations seemed secure until May 2, four days before the PCS C block auction closed, when it lost its US West bridge loan.¹⁸ In addition, BDPCS noted that four days later, on May 6, Merrill Lynch

¹⁰ See "Entrepreneurs' C block Auction Closes," *Public Notice*, DA 96-716 (rel. May 8, 1996) ("*Closing Public Notice*").

¹¹ 47 C.F.R. § 24.711(a)(2) (1996).

¹² *Payment Order*, 11 FCC Rcd. at 14400 ¶ 2.

¹³ *Id.*

¹⁴ 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 the Emergency Petition).

¹⁵ Emergency Petition at 3.

¹⁶ *Id.*

¹⁷ *Id.* at 3-4.

¹⁸ Emergency Petition at 4; Application for Review at 5.

withdrew as the lead underwriter for QuestCom's initial public offering.¹⁹ Finally, BDPCS claimed that because of the short time remaining before the first down payment was due, it was unable to complete its financing transactions with a substitute financial institution.²⁰ BDPCS stated 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.²¹

4. On May 20, 1996, the Bureau denied BDPCS's request for waiver of the Commission's down payment deadline because BDPCS failed to show that special circumstances warranted a deviation from the general down payment rule, or that such a deviation would serve the public interest.²² On May 22, 1996, BDPCS filed a Petition for Reconsideration of the *Waiver Order*, contending that the Bureau failed to give BDPCS's waiver request the "hard look"²³ required by the Commission's rules and applicable case law.²⁴ 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.²⁵ BDPCS also claimed that the Bureau inappropriately relied upon Commission 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.²⁶ In addition, BDPCS stated that the Bureau did not address, or recognize, the fact that until the week before the close of the auction, BDPCS reasonably believed that it would be capable of meeting its financial obligations.²⁷ On May 30, 1996, the

¹⁹ Emergency Petition at 4; Application for Review at 5.

²⁰ Emergency Petition at 4; BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency C Block, Petition for Reconsideration (filed November 27, 1996), at 4 n.8 ("Petition for Reconsideration").

²¹ Emergency Petition at 5.

²² 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 (WTB rel. May 20, 1996) ("*Waiver Order*"), as modified by *Order on Reconsideration*, DA No. 96-874, 11 FCC Rcd. 12165 (WTB 1996); see 47 C.F.R. § 24.819.

²³ Under the "hard look doctrine" a Court will sustain agency action when it is apparent that the agency took "a hard look" at a party's contentions. See *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

²⁴ BDPCS, Inc., Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction, Petition for Reconsideration (filed May 22, 1996), at 3.

²⁵ *Id.*

²⁶ *Id.* at 3-4.

²⁷ *Id.* at 4-6. BDPCS claimed that the denial of its Emergency Petition reflected a lack of support for small

Bureau denied the Petition for Reconsideration, reaffirming its decision that BDPCS failed to present facts that warranted a deviation from the general rule, and failed to show that the grant of a waiver would be in the public interest.²⁸

5. On May 30, 1996, the Bureau also released a *Public Notice* announcing that the 17 licenses on which BDPCS had defaulted would be offered in a subsequent auction, Auction No. 10.²⁹ On July 16, 1996, Auction No. 10 concluded and bidders other than BDPCS won the 17 licenses on which BDPCS had defaulted.³⁰ On June 28, 1996, BDPCS filed an Application for Review of the Bureau's decision denying the waiver request.³¹ The Commission denied that Application for Review on January 6, 1997.³²

6. On October 28, 1996, the Bureau released the *Payment Order*, assessing BDPCS a default payment in the amount of \$67,695,653.23. The default payment contains two separate payments:

- The first portion of the default payment represents the total difference between BDPCS's winning bids and the amount of the winning bids in Auction No. 10 for those licenses that attracted lower winning bids in Auction No. 10 (cumulatively \$42,765,088.50).³³
- The second portion of the default payment is an additional three percent of the lower of BDPCS's winning bid and the subsequent winning bid for each of the 17 defaulted licenses (cumulatively \$24,930,564.73).³⁴

businesses and therefore was not in the public interest. *Id.*

²⁸ 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 (1996).

²⁹ See "18 Defaulted PCS Licenses To Be Reauctioned; Reauction To Begin July 3rd," *Public Notice*, DA 96-872 (rel. May 30, 1996).

³⁰ 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).

³¹ 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).

³² BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd. 3230 (1997) ("*BDPCS MO & O*").

³³ 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.

³⁴ See *Payment Order*, 11 FCC Rcd. at 14402 ¶ 6; see also, 47 C.F.R. §§ 24.704(a)(2), 1.2104(g) (1996).

- For a total default payment in the amount of \$67,695,653.23.

7. On November 27, 1996, BDPCS filed a Petition for Reconsideration of the *Payment Order*,³⁵ seeking to reduce the amount of the default payment and to obtain a three-year deferral of the payment deadline. On May 21, 1997, the Bureau denied the Petition for Reconsideration, reaffirming its decision that the facts presented by BDPCS did not provide a valid basis for reconsidering the Bureau's imposition of a \$67,695,653.23 default payment on BDPCS.³⁶ In response to the Bureau's denial of its petition, BDPCS filed the Application for Review that is now before us. In its Application for Review, BDPCS raises the same arguments with the Commission that have been previously rejected by the Bureau. In addition, in its supplemental filings, BDPCS argues, under a variety of novel theories, that no default payment should be imposed and that BDPCS is entitled to a reimbursement of its \$7 million upfront payment.³⁷ Finally, BDPCS has offered to withdraw its pending filings in exchange for a reduction in the default payment to \$3.5 million and the release of the remaining \$3.5 million of the original \$7 million upfront payment. For the reasons discussed below, we deny BDPCS's Application for Review³⁸ and its Waiver Request.³⁹

III. DISCUSSION

8. In its Application for Review, BDPCS seeks to have its default payment obligation reduced to
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³⁵ BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency C Block, Petition for Reconsideration (filed November 27, 1996) ("Petition for Reconsideration").

³⁶ *Order*, 12 FCC Rcd. at 6610 ¶ 8.

³⁷ First Supplement to Application for Review at 2-3.

³⁸ Applications for Review must specify, with particularity, the factor or factors that warrant Commission consideration from among the following questions: (1) is the action taken pursuant to delegated authority in conflict with statute, regulation, case precedent, or established Commission policy; (2) does the action involve a question of law or policy that has not previously been resolved by the Commission; (3) does the action involve application of a precedent or policy that should be overturned or revised; (4) was there an erroneous finding as to an important or material question of fact, or (5) did prejudicial procedural error occur. 47 C.F.R. § 1.115(b)(2)(i)-(v). We will not grant an application for review if it relies on questions of fact or law upon which the delegated authority has been afforded no opportunity to pass. 47 C.F.R. § 1.115(c). Subject to §1.106 of our regulations, new questions of fact or law may be presented to the delegated authority in a petition for reconsideration. 47 C.F.R. § 1.115(c).

³⁹ Under the Commission's rules, waivers will not be granted except upon an affirmative showing: (i) 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 (ii) 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. Applicants must also show the lack of a reasonable alternative. 47 C.F.R. § 24.819(a)(1)(i), (ii) (1996).

\$24,930,564.73, which would represent a payment of three percent of the lower of BDPCS's bid or the winning bid when the licenses were subsequently offered for auction, as mandated in Sections 1.2104(g)(2) and 24.704(a)(2) of the Commission's rules.⁴⁰ BDPCS requests that it be excused from paying the remainder of the default payment required in our rules, *i.e.*, the total difference between BDPCS's winning bids and the amount of the winning bids in Auction No. 10 for those licenses that attracted lower winning bids in the subsequent auction (cumulatively \$42,765,088.50). BDPCS reasons that assessment of a default payment of more than \$67 million on a small start-up company would be inequitable and contrary to the public interest.⁴¹ BDPCS makes this argument despite the fact that it defaulted on bids totaling \$873,783,912.75.

9. In its supplemental filings, BDPCS argues that the Commission lacks statutory authority to impose the default payment. Further, BDPCS alters its argument with respect to Sections 1.2104(g)(2) and 24.704(a)(2), and argues that under the Commission's rules no default payment should be imposed and that BDPCS is entitled to a reimbursement of its \$7 million upfront payment.⁴² In addition, BDPCS maintains that the default payment is commercially unreasonable, and violates both the Due Process clause of the Fifth Amendment⁴³ and the Eighth Amendment's prohibition against excessive fines.⁴⁴ Finally, BDPCS has offered to withdraw its pending filings in exchange for a reduction in the default payment to \$3.5 million and the release of the remaining \$3.5 million of the original \$7 million upfront payment.⁴⁵

10. We note here that the First Supplement to the Application for Review and the Second Supplement to the Application for Review are not timely as they are outside the pleading cycle established in Section 1.115 of our rules, which requires Applications for Review and supplements thereto to be filed within 30 days of public notice of the Commission's action on delegated authority.⁴⁶ Further, even if the supplement had been timely filed so that it properly could be considered part of BDPCS's Application for Review, the supplement is also procedurally deficient because it raised new questions of law and seeks a new remedy that were not presented to the Bureau. Section 1.115 (c) of the

⁴⁰ 47 C.F.R. §§ 1.2104(g)(2), 24.704(a)(2) (1996).

⁴¹ Application for Review at 4.

⁴² First Supplement to Application for Review at 2-3.

⁴³ *Bolling v. Sharpe*, 347 U.S. 497 (1954) (the Fifth Amendment's Due Process Clause applicable against the Federal Government is coextensive with the Fourteenth Amendment's Due Process clause applicable against the States).

⁴⁴ Second Supplement to Application for Review at 6-8, 11-14.

⁴⁵ Settlement Offer at 2.

⁴⁶ 47 C.F.R. § 1.115.

Commission's rules states that no application for review will be granted if it relies on questions of law upon which the designated authority had been afforded no opportunity to pass. Thus, the First Supplement to the Application for Review and the Second Supplement to the Application for Review are procedurally deficient and warrant dismissal on their face. Further, as we establish below, even if we assume that the First and Second Supplements to the Application for Review were timely filed, we believe the application for review should be denied on the merits.

11. After careful review of the facts, we find that the Bureau was correct in assessing BDPCS a default payment in the amount of \$67,695,653.23 in accordance with our rules governing defaults by high bidders after the close of an auction. We conclude that the circumstances presented here do not support a reduction in, or waiver of, BDPCS's default payment.

A. The FCC Possesses Authority Under the Communications Act to Impose the Default Payment

12. In its Second Supplement to Application for Review, BDPCS contends that the Commission lacks authority under either Sections 309(j)(4)(B) or 4(i) of the Communications Act to impose a \$67 million default payment.⁴⁷ BDPCS claims that Section 309(j) only authorizes penalties for a "licensee's" failure to perform, and not for a performance failure by a "bidder" in an auction.⁴⁸ Additionally, BDPCS argues that Section 4(i),⁴⁹ which provides the Commission with rule making authority, does not give the Commission substantive authority "to impose commercially unreasonable penalties on auction participants."⁵⁰ As we explain below, we reject BDPCS's argument as it ignores the language and purpose of Section 309(j) of the Communications Act and mischaracterizes the nature of the default payment rule.

13. The Communications Act itself specifically directs the Commission to establish a competitive bidding system and provides that in designing auction methodologies the Commission "shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the . . . development and rapid deployment of new technologies, products, and services for the benefit of the public, . . . promoting economic opportunity and competition . . . recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of the resources"⁵¹ Thus, Congress

⁴⁷ Second Supplement to Application for Review at 9.

⁴⁸ Second Supplement to Application for Review at 9.

⁴⁹ 47 U.S.C. § 4(i), provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

⁵⁰ Second Supplement to Application for Review at 9.

⁵¹ 47 U.S.C. § 309(j)(3).

specifically tasked the Commission with establishing a competitive bidding methodology that promotes a broad range of goals. Implicit in the directive is the authority to establish regulations that protect the integrity of the competitive bidding system. Specifically, when prescribing regulations to implement the auction methodologies, Congress directed the Commission to “include performance requirements, such as appropriate deadlines and penalties for performance failures . . .”⁵² BDPCS argues that this language only applies to licensees, and not to bidders.⁵³ However, the plain text of the statute does not support such a limited interpretation. Thus, as we have previously recognized when enacting the default payment rule, Sections 309(j)(3) and 309(j)(4)(B) provide us with the requisite statutory authority.⁵⁴

14. The broader purpose of Section 309(j) was to create an efficient regulatory regime based on the congressional determination that competitive bidding is the most effective way of allocating resources to their most productive uses.⁵⁵ As the House Committee on Energy and Commerce explained, “[a] carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.”⁵⁶ Our bidding rules are an intrinsic part of the “carefully designed system” Congress tasked the Commission with implementing.

15. In keeping with our statutory mandate, we recognized that “[a]uction designs that award licenses to the parties that value them most highly will best achieve” the goals set forth by Congress.⁵⁷ Accordingly, through our rulemaking process, we established rules to protect the integrity of the auction process. In the *Competitive Bidding Second Report and Order*, we established the requirement of full and timely down payment to ensure that bidders are financially capable of constructing and operating their systems.⁵⁸ We indicated that the down payment provisions in Sections 1.2107(b) and 24.711(a)(2)

⁵² 47 U.S.C. § 309(j)(4)(B).

⁵³ Second Supplement to Application for Review at 9.

⁵⁴ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd. 2348, 2373, note 114 (1994) (“*Competitive Bidding Second Report and Order*”).

⁵⁵ *Nextwave Personal Communications, Inc. v. FCC*, 200 F. 3d 43, at 52 (2nd Cir. 1999), *aff’d* Docket No. 99-5063 (2nd Cir. May 25, 2000).

⁵⁶ See H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580; see also, *Nextwave*, 200 F.3d at 51.

⁵⁷ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. 2348, 2360 ¶ 70; see also, *Nextwave*, 200 F.3d at 52.

⁵⁸ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2382-84 ¶¶ 195-205 (1994); see also *Mountain Solutions Ltd., Inc. v. Federal Communications Commission*, 197 F. 3d 512, 519, note 12 (D.C. Cir. 1999) (upholding the Commission's denial of a request for waiver of the down payment rules)(citing *Competitive Bidding*

of our rules were designed to ensure that the ultimate purpose of the auction, which is to encourage and facilitate the provision of reliable service to the public, is not undermined by winning bidders that lack the financial capability to pay for the license, construct systems, and provide service to the public.⁵⁹ Timely payment of both upfront and down payment obligations is one of the best indicators prior to award of licenses of a bidder's *bona fide* ability to pay.⁶⁰ In fact, the Court of Appeals for the District of Columbia, in affirming a denial of a waiver request, recently noted that the Commission "could reasonably focus on the importance of meeting payment deadlines" and could also "reasonably rely on strict enforcement of the deadlines to provide an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public."⁶¹

16. Similarly, the default payment provisions are critical for maintaining the integrity of the auction process by discouraging insincere bidding and ensuring that licenses end up in the hands of those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.⁶² The announcement of the winning bidder in an auction conducted by the Commission, like the acceptance of high bids in auctions in other settings,⁶³ terminates the bidding and establishes, as of the moment of the acceptance of the high bid, the binding obligation to pay the winning bid price for the licenses.⁶⁴ As the United States Court of Appeals for the Second Circuit recently noted,

Second Report and Order, 9 FCC Rcd. at 2382 ¶ 197).

⁵⁹ *Id.* at 2381; *see also*, *Nextwave*, 200 F.3d at 52.

⁶⁰ *See BDPSCS MO & O*, 12 FCC Rcd. at 3234 ¶ 7; *see also*, *Interactive Video and Data Service (IVDS) Licenses - Requests to Extend Payment Deadline*, *Order*, 10 FCC Rcd. 4520 ¶ 5 (1995).

⁶¹ *Mountain Solutions*, 197 F.3d at 518 (citations omitted).

⁶² *See* 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 Rulemaking*, 13 FCC Rcd. 374, 433-34 ¶ 101 ("*Part 1 Third Report and Order*"); *see also*, *Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses*, *Memorandum Opinion & Order*, 10 FCC Rcd. 12153, 12155 (1995), *recon. denied*, 11 FCC Rcd. 8211, 8216-17 (1996).

⁶³ *See Blossom v. Milwaukee & Chicago R.R. Co.*, 70 U.S. (3 Wall.) 196, 206-07 (1865); *Commodities Recovery Corp. v. United States*, 34 Fed. Cl. 282, 289 (1995) (federal government auctions "are viewed under the same rules pertaining to the formation of contracts generally") (*citing* 1 S. Williston, *Williston on Contracts*, § 29 (3rd ed. 1957)); U.C.C. § 2-328(b) (1990) ("A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner"); *see also*, 7 Am Jur. 2d *Auctions & Auctioneers*, § 16 (1980 & Supp. 1991) (auction is a "declaration of intention to hold an auction at which bids will be received. It is a mere invitation to those attending the sale to make offers by bids. The contract becomes complete only when the bid is accepted, this being ordinarily denoted by the fall of the hammer.")

⁶⁴ *In re Application for Assignment of Broadband PCS Licenses*, FCC No. 98-301, 14 FCC Rcd. 1126, ¶1 (rel. Dec. 23, 1998); *Auction of C, D, E, F Block Broadband PCS Licenses*, *Public Notice*, DA. 98-2604 (rel. Dec. 23, 1998).

a high bidder becomes “obligated to the FCC for the full amount of its winning bid at the close of the . . . auction.”⁶⁵ Whether a payment default or disqualification thereafter breaches the obligation, the winning bidder’s liability remains a function of the high bid and is based on the obligation that was incurred at auction.⁶⁶ Without the default payment rules, a winning bidder might consider adopting a strategy of waiting until the actual license grant before deciding whether or not to accept the license, to the detriment of other bidders and the efficient and fair functioning of the auction process. Given the importance of the down payment requirement, we previously declined to grant BDPCS a waiver of the down payment deadline for the 17 licenses it won in the broadband PCS C block auction.⁶⁷

17. As described in the *Competitive Bidding Second Report and Order*, the default payment rule has two parts.⁶⁸ The first part of the default payment rule, the deficiency portion, applies when a high bidder withdraws before the close of the simultaneous multiple round auction, and when a winning bidder defaults after the close of such an auction. Under either factual situation, the Commission imposes a payment equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission.⁶⁹ However, under the second part of the rule, if a winning bidder defaults after the close of such an auction, the defaulting bidder will be required to pay the penalty contained in the first part of the rule, plus an additional payment of three percent of the winning bid the next time the license is offered by the Commission, or three percent of the amount of the defaulting bidder’s bid, whichever is less.⁷⁰ We added this additional payment for those that withdraw after the auction closed “to provide incentive for bidders wishing to withdraw their bids to do so prior to

⁶⁵ *Nextwave*, 200 F. 3d. at 56.

⁶⁶ After the close of the auction, the winning bidder must file its long-form application for the license grant and await resolution of any petitions to deny or objections to the application. However, under the Commission’s default and disqualification rules, the obligation to pay the winning bid is imposed at the close of the auction, and neither the pendency of the license application, nor the filing of any petition to deny or objection, relieves the winning bidder of that obligation.

⁶⁷ *BDPCS MO & O*, 12 FCC Rcd. at 3238 ¶ 14; see *Mountain Solutions*, 197 F.3d at 518 (“Having established a more lenient payment structure for designated entities, which by definition usually faced problems of accessing financial resources, the Commission could reasonably focus on the importance of meeting payment deadlines to deter such entities from abusing the lenient structure by ‘shop [ping]’ a winning bid in order to obtain financing for a payment.’ The Commission also could reasonably rely on strict enforcement of the deadlines to provide an ‘early warning’ that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public.”) (citations omitted).

⁶⁸ See also previous section and note 4 *supra*.

⁶⁹ 47 C.F.R. § 24.704(a)(1)(1996); *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2373 ¶ 146.

⁷⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2374 ¶ 154.

the close of the auction.” We noted that:

It is appropriate to create such an incentive because a withdrawal that occurs after the auction closes (default) is likely to be more harmful than one that occurs before closing. First, default reduces the efficiency of the assignment process. If withdrawal occurs before the auction closes other bidders will have greater opportunities to revise their bidding strategies to account for the availability of the withdrawn license. Once the auction closes, however, only those licenses on which bidders defaulted (plus any license not sold during the auction) will be put up for re-auction, so other bidders will have little opportunity to revise their strategies. Thus, default would reduce the likelihood that licenses will be assigned to those who value them the most. Second, default imposes extra costs on the government. If a bidder defaults, the government must generally incur the additional expense of re-auctioning the license. In contrast, the administrative cost of announcing a bid withdrawal prior to the close of an auction and accepting additional bids would be minimal.⁷¹

In establishing this rule, we recognized that “[a]llowing bidders to withdraw bids without ever paying a penalty would encourage insincere bidding. Insincere bidding, whether purely frivolous or strategic, distorts the price information generated by the auction process and reduces its efficiency.”⁷² We also addressed the issue of our statutory authority and expressly stated that Section 309(j)(3) and (4)(B) “afford us with ample authority to impose such” payments for bid withdrawal.⁷³

18. Thus, the default payment rules have a regulatory purpose related directly to the Commission’s implementation of the congressional mandate to conduct competitive spectrum auctions. As the Second Circuit noted in *Nextwave*, the Commission gave considerable thought to the problem of how to “deter frivolous or insincere bidding.”⁷⁴ The Commission decided that it would be “critically important to the success of our system of competitive bidding . . . [to] provide strong incentives for potential bidders to make certain of their qualification and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification, and reauction.”⁷⁵

19. In light of the statutory mandate to create a competitive bidding methodology and establish regulations to implement the methodology, the Commission possesses authority to establish rules that

⁷¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2374 ¶ 154.

⁷² *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2373 ¶ 147.

⁷³ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2373, note 114.

⁷⁴ *Nextwave*, 200 F. 3d at 52 (citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2378 ¶ 171).

⁷⁵ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2382 ¶ 197.

protect the integrity of the auction process. As shown above, our rules have a regulatory purpose expressly tied to the statutory mandate. Accordingly, BDPCS's challenge to our authority to institute default payment rules is rejected.

B. Application of the Default Payment Rule

20. In its Application for Review, BDPCS continues to urge that its default obligation be reduced because some of the defaulted licenses attracted higher bids in Auction No. 10.⁷⁶ It argues that gains realized from the subsequent auction of licenses for which the subsequent winning bid was higher than BDPCS's bid should be used to offset losses incurred on those licenses for which the winning bid was lower than the defaulting bid.⁷⁷ In essence, BDPCS is asking to aggregate "gains" on the licenses against losses on all the licenses. BDPCS ignores the fact that each bid was a separate and independent obligation. Thus, BDPCS argues that it should only pay the three percent payment, which amounts to \$24.9 million.⁷⁸ BDPCS disagrees with the Bureau's decision that such a reduction in the default payment would run counter to the purpose of the default payment rule, which is to deter the type of conduct engaged in by BDPCS.⁷⁹ Finally, BDPCS argues that the Commission itself has recognized that any default payment that exceeds the amount of funds the bidder has on deposit is, in and of itself, too severe.⁸⁰

21. In its First Supplement to the Application for Review, BDPCS changes its aggregation argument alleging that the "\$30.6 million gain" from the subsequent auction should be used as an offset in calculating the three percent payment.⁸¹ Thus, the \$24.9 million three percent payment would be offset by the \$30.6 million gain, resulting in a negative amount of \$5.7 million. Having concluded that the default payment is a negative number, BDPCS seeks return of its entire upfront payment. For the reasons we will explain below, BDPCS's original and subsequent arguments are incorrect and are rejected.

22. As detailed above, the default payment rule contains two parts. The first part, the deficiency portion, is applicable to the high bidder that withdraws during the course of the auction, and to a high

⁷⁶ Application for Review at 4.

⁷⁷ *Id.*

⁷⁸ Application for Review at 4.

⁷⁹ *See id.* at 6-7.

⁸⁰ First Supplement to Application for Review at 2 (memorandum attached to filing).

⁸¹ First Supplement to Application for Review at 3-5 (memorandum attached to filing).

bidder that defaults after the auction closes.⁸² The second part of the rule, the three percent payment, is only applicable to the high bidder that defaults after the auction is closed.⁸³ Notably, the *Competitive Bidding Second Report and Order* specifically refers to these two parts as separate penalties the defaulting bidder will be required to pay.⁸⁴

23. As a preliminary matter, the clear reading of the rules does not support BDPCS's aggregation argument. The Commission's default rules contemplate that default payments will be calculated on a license-by-license basis.⁸⁵ Thus, if one bidder defaults on multiple licenses, the total default payment assessed relative to those licenses would be the same as if a different bidder had defaulted on each of the licenses. Further, BDPCS's contention that either of the separate penalties the defaulting bidder is required to pay could be a negative number is unpersuasive. We agree with the Bureau that allowing default payments to be reduced in the manner sought by BDPCS would have the effect of minimizing the impact of our default payment rule.⁸⁶

24. BDPCS's newly raised argument that the first portion of the default payment calculated under the first part of the rule might lead to a negative number is incorrect. As we explained above, the first part of the default payment rule, the deficiency portion of the rule, provides that no "withdrawal penalty"⁸⁷ will be assessed if the subsequent winning bid exceeds the withdrawn bid. Thus, the rule provides that the default payment paid by the winning bidder that defaults after the auction is concluded is subject to a default payment under the first part of the rule, the "deficiency" portion, plus a default payment under the second part of the rule, the additional three percent payment. The default payment rule does not state, as BDPCS contends, that the Commission will add the three percent to the "calculation" made in first part of the rule. Under the interpretation of the default payment rule that

⁸² Section 24.704(a) provides that "A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission." 47 C.F.R. § 24.704(a)(1)(1996).

⁸³ See note 4 above.

⁸⁴ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2373, 2374 ¶¶ 146, 154.

⁸⁵ We note that in our pending rule making to consider further amendment of our competitive bidding rules, we seek comment on whether Section 1.2104(g) of our rules should be amended to provide that where a winning bidder defaults on multiple licenses the default payment will be determined based upon the aggregate winning bid and the aggregate winning bid when the licenses are subsequently offered for auction. See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd. 374 ¶ 188-89 (1997).

⁸⁶ *Order*, 12 FCC Rcd. at 6612 ¶11.

⁸⁷ 47 C.F.R. § 24.702(a)(2). In the revised § 1.2104(g), the rule reads "withdrawal payment."

BDPCS now advances, any time a subsequent auction results in a winning bid that is at least three percent higher than the defaulting bidder's winning bid, the defaulting bidder would owe no default payment at all. Clearly, such a result is contrary to the plain reading of the rule, and the Commission's intent to establish a system that would "deter frivolous or insincere bidding." Further, such a reading of the rule undermines the integrity of the auction process.

25. BDPCS also argues that the Commission itself recognized that any default payment that exceeds the amount of the funds the bidder has on deposit is, in and of itself, too severe.⁸⁸ However, the Commission did not conclude that any default payment that exceeds the amount of funds the bidder has on deposit is, in and of itself, too severe. To the contrary, the Commission merely observed that in some cases, forfeiture of all funds on deposit could be too severe a payment, and for this reason established the two-part default payment.⁸⁹ Thus, the formulated default payment rule allows a bidder the return of any portion of its deposit that exceeds a payment calculated according to the formula. In adopting the two-part default payment rule, the Commission did not conclude that the defaulting bidder should always owe the lesser of the amount on deposit or the payment calculated under the rule. The Commission therefore did not preclude a situation where the payment owed under the adopted default payment rule is greater than the amount of the bidder has on deposit. The language of the rule evidences that the rule was intended to be applied to bidders that might default or be disqualified in different points in the application process, and therefore would have different types or numbers of payments on deposit with the Commission. As the *Competitive Bidding Second Report and Order* makes clear, the payment described in Section 24.704 of our rules is a formula that was devised to ensure that the default payment bears a rational relationship to the harm caused. Accordingly, for the above mentioned reasons, we reject BDPCS's interpretation of our rules.

C. BDPCS's Financial Difficulties Do Not Constitute Grounds For Waiver of the Rules

26. In support of its Application for Review, BDPCS argues that the unexpected unavailability of a bridge loan from US West and the withdrawal of Merrill Lynch as the lead underwriter of (BDPCS parent) QuestCom's initial public offering are "dire" circumstances that warrant waiver of the default payment rule, or the default payment itself, in whole or in part.⁹⁰

27. BDPCS argues that it merits a reduction of its default payment because its financial difficulties began only four days before the close of the C block PCS auction, and because it lost not one, but two expected sources of funding.⁹¹ Additionally, BDPCS cites the loss of its 17 PCS licenses due to

⁸⁸ Second Supplement to Application for Review at 4-5.

⁸⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2382 ¶ 197.

⁹⁰ Application for Review at 6.

⁹¹ Application for Review at 5-6.

its default, along with the assessment of its substantial default payment, as circumstances so "dire" as to be worthy of special consideration.⁹² We find this reasoning somewhat circular. We do not think that assessment of the very payment that BDPCS seeks to have reduced constitutes, in and of itself, a "special" circumstance that necessitates our reduction of such payment. Moreover, with respect to BDPCS's loss of its expected sources of funding, we have previously stated that the failure of a third party to perform its contractual obligations in dealing with an auction applicant cannot constitute a special circumstance justifying waiver of the Commission's rules governing auctions.⁹³ This holds true regardless of whether the rules in question are the down payment rules or default payment rules. A departure from this position would require that the Commission effectively police the private business activities of each bidder.⁹⁴ If BDPCS believes that the position in which it now finds itself is due, in whole or in part, to the wrongful actions of third parties with which it was dealing, then BDPCS could seek an adequate remedy available to it in a court of competent jurisdiction.

28. Furthermore, we continue to believe that BDPCS's efforts to seek back-up financing until the down payment deadline are not circumstances that justify special consideration.⁹⁵ Although BDPCS may have attempted to secure back-up financing and to obtain new sources of funds up until its down payment was due, such conduct does not warrant a reduction of the default payment, because, as we have previously explained, BDPCS could have first withdrawn from all or some markets in the auction and then continued to pursue back-up financing.⁹⁶ BDPCS has admitted that four days prior to the close of the auction, it began to experience financial difficulties, and yet it remained active in the auction. Had BDPCS withdrawn from the auction, and then continued to pursue its back-up financing, it would have been subject to withdrawal payments, which would have been significantly less than the default payment actually assessed.⁹⁷ The three percent payment in the Commission's default payment rule was designed to encourage a bidder in BDPCS's position to withdraw prior to the close of the auction, resulting in less disruption to the auction process.⁹⁸ Although it had sufficient time to withdraw its bids, BDPCS remained in the auction and continued to bid, rather than avail itself of the bid withdrawal option. Under such circumstances we do not find that it would serve the public interest to reduce BDPCS's default payment obligation.

⁹² *Id.* at 6

⁹³ *See BDPCS MO & O*, 12 FCC Rcd. at 3235 ¶ 8.

⁹⁴ *Id.*

⁹⁵ *See Id.*

⁹⁶ *Id.* at 3237 ¶ 13.

⁹⁷ *Id.* at 3236-37 ¶ 11.

⁹⁸ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2374 ¶ 154.

29. We agree with the Bureau's finding that the loss of all intended sources of financing does not diminish BDPCS's financial responsibility under down payment and default payment rules. We have previously recognized that it is critically important to the success of our competitive bidding system that potential bidders understand that a substantial payment will be assessed against them if they default on a balance due.⁹⁹ In seeking to reduce the damages it is obligated to pay as a result of its breach of this underlying obligation, BDPCS would alter the balance between encouraging participation in the auction and providing the redress for default that the Commission struck in establishing the damages provisions set forth in Sections 1.2104(g)(2) and 24.704(a)(2) of our rules. Sections 1.2104(g)(2) and 24.704(a)(2) establish the damages that are incurred in the event the winning bidder breaches its obligation to pay the auction price for the licenses. These rules are central to the integrity of the Commission's auction process and have been strictly enforced.¹⁰⁰

30. The very purpose of the default payment rules is "to provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to discourage default and avoid delays in the deployment of new services to the public that would result from litigation, disqualification, and reauction."¹⁰¹ The default payment rules are intended to encourage bidders to make secondary or back-up financial arrangements to ensure timely payment in the event of unanticipated difficulties.¹⁰² We have previously held, and we reaffirm here, that "the Commission cannot take into account the private business arrangements that an applicant has made to finance its successful bid."¹⁰³ The Commission has been consistent in strictly enforcing this standard, emphasizing that the unanticipated lack of financing is not a special circumstance warranting a deviation from the rule requiring a full and timely down payment.¹⁰⁴ Similarly, we believe that BDPCS has not presented a

⁹⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2382 ¶ 197.

¹⁰⁰ See "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly," *Public Notice*, DA 96-481 (rel. April 4, 1996), 61 Fed.Reg. 16914 (April 18, 1996). After the close of the C-block auction, the Commission and the Wireless Bureau have denied requests for waivers of the rules. See *National Telecom PCS, Inc.*, 12 FCC Rcd. 10163 (1997), petition for recon. den'd, *Petition for Reconsideration Request for Waiver of Bid Withdrawal Payment and Application for Authority to Construct a Personal Communications System on Frequency Block C in American Samoa, Market No. B492, Order on Reconsideration of Memorandum Opinion and Order*, FCC 99-319 (rel. November 2, 1999); *C.H. PCS, Inc.*, 11 FCC Rcd. 22430 (WTB 1996); see also, *Mountain Solutions*, 197 F.3d 512.

¹⁰¹ *Id.*

¹⁰² See *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2383 ¶ 198; see also, *Part 1 Third Report and Order*, 13 FCC Rcd. 374, 433, ¶ 101.

¹⁰³ See *BDPCS MO & O*, 12 FCC Rcd. at 3235 ¶ 8; 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).

¹⁰⁴ See Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, *Memorandum Opinion & Order*, 10 FCC Rcd. 12153, 12155 (1995), recon. denied, 11 FCC Rcd. 8211, 8216-17

special circumstance warranting deviation from the default payment rules.

31. BDPCS also argues that it would be in the public interest to reduce its default payment, because, as BDPCS maintains, it did not act irresponsibly or in bad faith during the auction.¹⁰⁵ However, in affirming our denial of BDPCS's request for waiver of the down payment rule, we made clear that BDPCS's motivation in not withdrawing from the auction on May 2, 1996, was not relevant to our determination that withdrawal was the appropriate option when BDPCS lost its financing.¹⁰⁶ We do not find it necessary at this point to engage in the characterizations that BDPCS suggests, because our default payment rules do not require us to make a specific finding of "bad faith" as a prerequisite to imposition of the full payment specified in Sections 1.2104(g)(2) and 24.704(a)(2) of the Commission's rules.¹⁰⁷ Contrary to BDPCS's assertion, the decision of the Bureau did not rest on a finding of "bad faith" or that BDPCS knew with certainty on May 2, 1996, that it would not have financing.¹⁰⁸ As we explained in our *Waiver Order on Reconsideration*, such a finding is immaterial to our analysis.¹⁰⁹ However, the fact remains that once US West withdrew its financial support, BDPCS at least knew that its financing was uncertain, but refrained from withdrawing its standing high bids and submitted several high bids on one license (License B391) without any assurance that it could meet its payment obligations. When it decided not to withdraw before the close of the auction, BDPCS either knew or should have known of the substantial default payments that ultimately would be imposed on it if it did not secure financing. BDPCS should have been cognizant of the risk that it was assuming by not withdrawing. Regardless of BDPCS's motivations for its actions, its action is the sort our rules are intended to deter. For these reasons, we do not agree with BDPCS that a waiver of its default payment would be in the public interest.

D. The Application of the Default Payment Rule Accords with Due Process

32. In its second supplement to the Application for Review, BDPCS's argues that application of the default payment rule to it violates the Due Process clause of the Fifth Amendment. The Due Process clause of the Constitution requires that notice be given before a payment is imposed.¹¹⁰ BDPCS argues

(1996).

¹⁰⁵ Application for Review at 7.

¹⁰⁶ BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd. 15341, 15347-48 ¶ 10 (1997) ("*Waiver Order on Reconsideration*").

¹⁰⁷ 47 C.F.R. §§ 1.2104(g)(2), 24.704(a)(2) (1996).

¹⁰⁸ See Application for Review at 7.

¹⁰⁹ *Waiver Order on Reconsideration*, 12 FCC Rcd. at 15348 ¶ 12.

¹¹⁰ *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (retroactive application of new construction of statute violated

that the application of the default payment in this instance violated due process as it could not have anticipated, and accordingly had no notice, that the Commission would assess a \$67 million default payment.¹¹¹ As we discussed above, the application of the rule in this case is clearly in accord with the rule's plain reading and our explanation of the rule in the *Competitive Bidding Second Report and Order*.¹¹² Any reasonable individual reading the rules prior to the auction would have been aware of the risks entailed in withdrawing or defaulting on a high bid. Further, as we discussed above, BDPCS's interpretation of the rule is strained and leads to illogical results (*e.g.*, the assessment of a negative payment).¹¹³ Thus, as the application of the rule in this case accords with the rule's plain meaning, and the interpretation offered by BDPCS is unreasonable, notice was given, and the imposition of the default payment comports with the Due Process clause of the Fifth Amendment. Accordingly, BDPCS's argument is rejected.

E. Application of the Default Payment Rule Does Not Violate the Excessive Fines Clause of the Constitution

33. In its Second Supplement to Application for Review, BDPCS argues that the Excessive Fines clause of the Eighth Amendment¹¹⁴ prohibits the imposition of the default payment in this case. The Supreme Court has recognized that a civil penalty may violate the Eighth Amendment's proscription against excessive fines.¹¹⁵ However, to prevail on its argument, BDPCS must not only establish that the default payment is punitive in nature, but also establish that it is grossly disproportionate to the harm caused.¹¹⁶ BDPCS has failed to do so, accordingly, its argument is rejected.

due process).

¹¹¹ Second Supplement to Application for Review at 11-12 (*citing BMW of N. America v. Gore*, 116 S. Ct. 1589 (1996)(punitive damage award in a case between two private parties violates Due Process where there is a disparity between the harm or potential harm suffered and the punitive award, and a disparity between the punitive damage award and the civil penalties authorized or imposed in comparable cases); *Satellite Broadcasting Co. v. FCC*, 824 F. 2d 1, 3 (D.C. Cir. 1987)(where regulations identifying the appropriate place for filing an application are inconsistent and ambiguous, administrative due process prohibits an agency from dismissing an application where a party followed a reasonable application of the rule)).

¹¹² See Section II (B).

¹¹³ See Section II (B).

¹¹⁴ The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8.

¹¹⁵ *Austin v. United States*, 509 U.S. 602 (1993).

¹¹⁶ *United States v. Bajakajian*, 524 U.S. 321, 323 (1998) (adopting the standard of gross disproportionality articulated in the Cruel and Unusual Punishment cases).

34. As the Supreme Court has stated, “at the time of the drafting of the [Eighth] Amendment, the word ‘fine’ was understood to mean a payment to a sovereign as punishment for some offense.”¹¹⁷ Thus, in order to violate the Excessive Fines clause a fine must be punitive in nature.¹¹⁸ BDPCS’s argument fails here as the default payment is not punitive in nature. In fact, as explained at length in the *Competitive Bidding Second Report and Order*, and as noted above, the default payment rule was expressly constructed to be in proportion to the injury caused, thus it is remedial in nature.¹¹⁹ Assuming, however, for the sake of argument, that the default payment could be considered punitive in nature, it is not grossly disproportionate to the harm caused. On the contrary, the default payment is proportionate to the number of licenses and amount of bids that BDPCS defaulted on. Although BDPCS defaulted on bids totaling \$873,783,912.75, the total default payment is only approximately seven percent of that figure. Thus, the default payment is proportionate to the injury occasioned by BDPCS’s default.¹²⁰ Further, as explained above, the payment under the first part of the rule, the deficiency portion of the rule represents a rough estimate of the direct damages suffered. Specifically, the first part of the rule ensures that the Commission will not suffer where the ultimate purchase price paid for a license is less than the high bid made by the defaulting bidder. The second part of the default payment rule, the three percent payment, roughly apportions a commission that would be paid in the secondary market if the high bidder was forced to subsequently offer the license for sale.¹²¹ Accordingly, as the rule is remedial in nature and proportionate to the injury caused, it does not violate the Excessive Fines clause of the Eighth Amendment. Therefore, we reject BDPCS’s argument.

F. The Default Payment Is Commercially Reasonable

35. Finally, BDPCS argues that the default payment is commercially unreasonable and operates as a punitive penalty.¹²² BDPCS is mistaken. As we established above, the default payment is remedial in nature, and accordingly, is authorized under the statute. Thus, the contract law principles cited by

¹¹⁷ *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989).

¹¹⁸ *Austin*, 509 U.S. at 622, n. 14 (“The Clause prohibits only the imposition of “excessive” fines, and a fine that serves purely remedial purposes cannot be considered “excessive” in any event.”)

¹¹⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2374 ¶¶ 152, 155.

¹²⁰ *Cole v. United States Department of Agriculture*, 133 F.3d 803 (11th Cir. 1998) (holding that a 75 percent remedial penalty assessed for above quote tobacco production did not violate the excessive fines clause); *United States v. Dean*, 949 F.Supp. 782, 786 (D.Or.1996)(“Where the amount of restitution is geared directly to the amount of the victim’s loss caused by the defendant’s illegal activity, proportionality is already built into the order.”), *aff’d* *United States v. Dubose*, 146 F.3d 1141 (9th Cir.), *cert. denied*, 119 S.Ct. 430 (1998).

¹²¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2374 ¶ 155.

¹²² Second Supplement to Application for Review at 6, 8 (citing *D.J. Manufacturing Corp. v. United States*, 86 F.3d 1130 (Fed. Cir. 1996)).

BDPCS are not directly applicable. However, even when viewed under the rubric of commercial cases cited by BDPCS, the default payment rule is appropriate and enforceable. Accordingly, we reject BDPCS's argument.

36. When parties enter into a contract, the law allows them to apportion risk through the establishment of a liquidated damages clause.¹²³ A liquidated damages clause will be enforced as long as "the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression."¹²⁴ With that narrow exception, "[t]here is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced."¹²⁵ The reasonableness of the clause is viewed as of the commencement of the contract, and not with twenty-twenty hindsight.¹²⁶ At the time BDPCS entered into the auction, the rules clearly provided for the existence of a default payment. Such default payment approximately functions as a rough estimate for damages suffered by the Commission in the event of default. This rule, similar to liquidated damages clauses, apportions risk in a fair and equitable manner. Further, the rule serves to protect against the tangible injuries suffered by the public in general and other bidders in particular when a bidder engages in frivolous bidding. The fact that BDPCS is dissatisfied with the actual application of the rule to the facts presented here does not make the rule commercially unreasonable or otherwise contrary to basic principles of contract law. Accordingly, BDPCS's argument is rejected.

¹²³ *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947) ("Today the law does not look with disfavor upon 'liquidated damages' provisions in contracts. When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced.")(citations omitted); *D.J. Manufacturing Corp.*, 86 F.3d at 1133 ("By fixing in advance the amount to be paid in the event of a breach, liquidated damages clauses save the time and expense of litigating the issue of damages. Such clauses 'serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable,')(citing *Priebe & Sons*, supra at 411).

¹²⁴ *Wise v. United States*, 249 U.S. 361, 365 (1919); see *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 121 (1907) ("The amount is not so extraordinarily disproportionate to the damage which might result from the [breach] as to show that the parties must have intended a penalty and could not have meant liquidated damages."); *Sun Printing & Publishing Ass'n v. Moore*, 183 U.S. 642, 674 (1902) (except where "the sum fixed is greatly disproportionate to the presumed actual damages," a court "has no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves").

¹²⁵ *Wise*, 249 U.S. at 365.

¹²⁶ See, e.g. *Young Assocs., Inc. v. United States*, 471 F.2d 618, 622 (Ct. Cl. 1973) (a liquidated damages clause will be enforced "if the amount stipulated is reasonable for the particular agreement at the time it is made."); see also, *Higgs v. United States*, 546 F.2d 373, 377 (Ct. Cl. 1976) (standard five percent earnest money forfeiture upheld as reasonable liquidated damages, even though not specifically tailored to a particular contract).

G. Deferral of Payment

37. Finally, BDPCS asks us to reduce its default payment and grant it a three-year deferral of the default payment deadline, because BDPCS cannot pay the \$67,695,653.23 payment at this time.¹²⁷ BDPCS contends that its chances of raising "some or all of the requisite funds" will be enhanced if we grant it the relief that it requests.¹²⁸ Again, we decline to do so because it would significantly reduce the impact of our default payment rule and undermine the integrity of our competitive bidding system. However, we note that BDPCS has, in effect, received a deferral of payment, as the *Payment Order* was originally assessed on October 28, 1996. Accordingly, we agree with the Bureau's reasoning that we would contravene Commission policy if we were to reduce default payment obligations based on a bidder's inability to pay, because such a practice would encourage bidders to bid without secure financial backing.

IV. ORDERING CLAUSES

38. For the reasons discussed above, we hereby deny BDPCS's application for review 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. We also deny BDPCS's waiver request.

39. Accordingly, it is ORDERED that the Application for Review filed by BDPCS, Inc. on June 19, 1997 IS DENIED.

40. It is FURTHER ORDERED that the Waiver Request contained in BDPCS's Second Supplement to Application for Review, filed by BDPCS, Inc. on November 30, 1998 IS DENIED.

41. It is FURTHER ORDERED that the First Supplement to Application for Review filed by BDPCS, Inc. on October 16, 1998, and the Second Supplement to Application for Review filed by BDPCS on November 30, 1998 ARE DISMISSED.

42. It is FURTHER ORDERED that BDPCS is assessed a default payment in the amount of \$67,695,653.23, as computed in Attachment A of the October 28, 1996 *Payment Order*. It is FURTHER ORDERED that payment of \$60,695,653.23 of this amount is to be made in accordance with the instructions set forth in Attachment A to this Order within thirty (30) days from the release of this Order.

¹²⁷ Application for Review at 8.

¹²⁸ *Id.* BDPCS states that it cannot pay the \$67,695,653.23 penalty at this time. *Id.* BDPCS has not, however, indicated that it *could* currently pay the \$24,930,564.73 default payment that it proposes.

43. It is FURTHER ORDERED that this Order SHALL BE sent to the applicant by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

ATTACHMENT A

PAYMENT INSTRUCTIONS

METHOD OF PAYMENT

All payments must be made in U.S. dollars, must be in the form of a Wire Transfer. No personal checks, credit cards payments, or other forms of payment will be accepted. **All payments must be accompanied by a completed FCC Remittance Advice Form (FCC Form 159).**

To submit funds by wire transfer, please supply the following information:

ABA Routing Number: 043000261

Receiving Bank: Mellon Pittsburgh

BNF: FCC/AC--9116106

OBI Field: (Skip one space between each information item)

"AUCTIONPAY"

TAXPAYER IDENTIFICATION NO: (same as FCC Form 159 ,Block 26)

PAYMENT TYPE CODE: (Block # 5);(same as FCC Form 159, Block 20A: "ADFT")

FCC CODE 1: (same as FCC Form 159, Block 23A: "5")

PAYOR NAME: (same as FCC Form 159, Block 2)

LockBox No. 358850

Please fax a completed FCC Form 159 to Mellon Bank at (412) 209-6045 at least one hour before placing the order for the wire transfer (but on the same business day).