

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Requests for Extension of the Commission's	)	WT Docket No. 97-82
Initial Non-Delinquency Period for	)	
C and F Block Installment Payments	)	

**ORDER**

**Adopted: October 29, 1998**

**Released: October 29, 1998**

By the Commission: Commissioner Kennard issuing a statement. Commissioners Furchtgott-Roth and Tristani dissenting in part and issuing a joint statement.

1. On July 31, 1998, broadband PCS C and F block licensees were required to resume making installment payments on their licenses.<sup>1</sup> However, in accordance with the *Order on Reconsideration of the Second Report and Order ("Reconsideration Order")*,<sup>2</sup> licensees that failed to meet the July 31, 1998, deadline may submit their payment on or before October 29, 1998, without being considered delinquent, if they pay a 5 percent late payment fee. Several licensees have filed requests seeking a waiver of the October 29, 1998, deadline for late payments. For the reasons stated below, we deny these requests.

2. Airadigm Communications, Inc. ("Airadigm") asks the Commission to suspend its installment payment for 12 months.<sup>3</sup> Airadigm claims that, without a waiver of the Commission's rules, its inability to fulfill both its obligation to the Commission and its obligation to its principal creditor will threaten the provision of service to its customers and the expansion of its system.<sup>4</sup> Urban Comm-North Carolina, Inc. ("Urban Comm") argues that, due to the collapse of financial markets after the issuance of the *Reconsideration Order*, the Commission should extend the non-

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<sup>1</sup> "Wireless Telecommunications Bureau Announces 1998 Election Date for Broadband PCS C Block Licensees; Payments for C and F Block Licensees Resume July 31, 1998," *Public Notice*, DA 98-741 (released April 17, 1998).

<sup>2</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998).

<sup>3</sup> Airadigm Request for Rule Waiver at 3 (seeking a partial waiver of 47 C.F.R. § 24.711(b) and a waiver of § 1.2110(f)(4)). In light of our denial of Airadigm's request, and as requested by Airadigm, we will return Airadigm's supplemental pleading containing privileged and confidential information.

<sup>4</sup> *Id.* at 2.

delinquency period another 180 days.<sup>5</sup> In addition, 21st Century Telesis Joint Venture and its wholly-owned subsidiary, 21st Century Bidding Corp. (collectively, "21st Century") seek an extension until January 31, 1999, for the resumption of their installment and accrued interest payment obligations.<sup>6</sup> 21st Century asserts that it needs more time to finalize negotiations for capital placement in light of recently discovered problems with its original capitalization plan.<sup>7</sup> SouthEast Telephone, Inc. ("SouthEast Telephone") requests relief through December 31, 1998, in order to allow it time to receive anticipated funding.<sup>8</sup> Funding delays also caused Wireless Ventures, Inc. to seek an extension until December 13, 1998, or whatever time period the Commission provides to other C block licensees that also are seeking waivers.<sup>9</sup> Finally, Personal Communications Network, Inc. ("PCN") asks for a two-week grace period to accommodate last-minute delays with a needed stock subscription.<sup>10</sup>

3. We decline to waive the October 29, 1998, late payment deadline in response to the individual situations presented. In order for a waiver of the PCS rules to be granted, one of two tests must be met. The entity requesting a waiver must demonstrate either that: (1) "the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest" or (2) "the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest."<sup>11</sup>

4. Although the specific concerns raised by each petitioner vary, all revolve around the same theme -- the inability to raise capital. The challenge of raising capital to finance C and F block licenses exists in varying degrees for all licensees and does not constitute "unique facts and circumstances." In formulating, as well as reconsidering, the restructuring options, the Commission addressed the challenges of raising capital. Further, we do not believe that the underlying purpose of our rules would be frustrated by their application here or that it would serve the public interest to

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<sup>5</sup> Urban-Comm Petition for Extension of Interest Payment Date at 2 (although Urban-Comm appears to be seeking an extension on behalf of all C block licensees, we will treat Urban-Comm's petition as an individual waiver request because the time period for making global requests has expired).

<sup>6</sup> 21st Century Emergency Petition at 3 (seeking a waiver of 47 C.F.R. § 1.2110(f)(4)(iii)). We note that 21st Century's request is rendered moot because it submitted its payment on October 28, 1998.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> SouthEast Telephone Emergency Request at 1, 6 (seeking a waiver of 47 C.F.R. § 1.2110(f)(4)(iii)).

<sup>9</sup> Wireless Ventures, Inc. Emergency Request for Waiver at 2 (seeking a waiver of the automatic cancellation provisions of 47 C.F.R. § 1.2110(f)).

<sup>10</sup> PCN Request for Grace Period and Waiver of Rule 1.2110(f)(4)(iii) & (iv) at 1.

<sup>11</sup> *See* 47 C.F.R. § 24.819.

delay their enforcement. As we stated in the *Reconsideration Order*, "[n]o matter what deadline we establish, it is inevitable that some licensees will seek more time to pay."<sup>12</sup>

5. Although we are sympathetic to the difficulties certain licensees are facing in securing capital, the Commission made it clear that it "will not entertain any requests for an extension" beyond the 60-day non-delinquency period that originally was established for initial payments not submitted by the payment resumption date for C and F block licensees.<sup>13</sup> Further, we ratified a firm deadline for late payments in the *Reconsideration Order*.<sup>14</sup> Despite the fact that our rules, as amended effective March 16, 1996, allow an automatic grace period for installment payments not made within a non-delinquency period,<sup>15</sup> we determined that such a grace period is not appropriate for the initial July 31 payment.<sup>16</sup> First, licensees have already enjoyed a payment suspension since the spring of 1997.<sup>17</sup> Second, in the *Reconsideration Order*, we provided additional relief by extending to 90 days the original 60-day non-delinquency period for initial payments. A further extension of the non-delinquency period would only serve to undermine the Commission's enforcement of its payment deadlines. Therefore, licensees that failed to make payment by July 31, 1998, and fail to make full payment by October 29, 1998, including the 5 percent late payment fee, will be subject to the automatic cancellation of their licenses.<sup>18</sup>

6. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the requests filed by Airadigm Communications, Inc., Urban Comm-North Carolina, Inc., SouthEast Telephone, Inc., Wireless Ventures, Inc., and Personal Communications Network, Inc. for a waiver of the October 29, 1998, late payment deadline for C and F block licensees are DENIED and the waiver

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<sup>12</sup> *Reconsideration Order*, 13 FCC Rcd at 8354 para. 24.

<sup>13</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436, 16,451 para. 30 (1997). See also 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 Rule Making*, 13 FCC Rcd 374, 441 para. 112 (1997) (reiterating that extension requests will not be entertained).

<sup>14</sup> *Reconsideration Order*, 13 FCC Rcd at 8355 para. 26.

<sup>15</sup> See 47 C.F.R. § 1.2110(f)(4)(ii).

<sup>16</sup> *Reconsideration Order*, 13 FCC Rcd at 8355 para. 26.

<sup>17</sup> Installment payments were suspended for C block licensees on March 31, 1997, and for F block licensees on April 28, 1997. See Installment Payments for PCS Licenses, *Order*, 12 FCC Rcd 17,325 (WTB 1997); "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883 (released April 28, 1997) at 2.

<sup>18</sup> See "Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules," *Public Notice*, DA 98-1897 (released September 18, 1998). We note that on October 28, 1998, the D.C. Circuit denied an emergency motion filed by SouthEast Telephone seeking a stay of the license cancellation deadline. *SouthEast Telephone, Inc. v. FCC*, No. 98-1491 (Order of October 28, 1998).

request filed by 21st Century Telesis Joint Venture and 21st Century Bidding Corp. is DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

SEPARATE STATEMENT OF CHAIRMAN WILLIAM KENNARD ON  
C BLOCK RESUMPTION OF PAYMENT WAIVER DENIALS

I am sympathetic to the communities being served by the six PCS providers that have requested a waiver of the October 29 deadline for late payment for C block licenses. I am especially moved by the desire of some of these providers to serve previously underserved communities, including areas inside Native American reservations. However, the Commission has done the right thing by denying these requests. We have stated unequivocally that we would not entertain any extensions of this payment deadline. When these companies won licenses in the Commission's C block auction they knew they would eventually have to pay what they bid. These companies have not had to make any payments for their licenses since March of 1997 -- over a year and a half ago. The time to fulfill the commitments they made to the U.S. Treasury is now.

The bottom line is we need to have an even playing field. There are many small businesses that made their payments on the original payment date of July 31, and we anticipate many more making their payments today. It is simply not fair to give these six companies special treatment.

We have said from the beginning of the auction program that the Commission's job is to create opportunities, not to guarantee successes. We have done our job. Now it is up to these companies to develop successful businesses.

**Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani,  
Dissenting in Part**

In the Matter of  
Requests for Extension of the Commission's Initial Non-Delinquency Period  
for C and F Block Installment Payments

By its actions today, the Commission majority disregards licensees who are fulfilling the Commission's Section 309(j)<sup>1</sup> mandate that the spectrum be used to deliver service to the public, including those residing in underserved rural areas.

This Order issues a blanket denial of six requests for waiver of the October 29, 1998, late payment date for C and F Block licensees. The majority finds that the concerns raised by each petitioner "all revolve around the same theme -- the inability to raise capital." It then concludes: "The challenge of raising capital to finance C and F block licenses exists in varying degrees for all licensees and does not constitute 'unique facts and circumstances.'" On this depth of analysis, the majority denies all of the requests. We respectfully dissent in part from this decision because we believe that two of the requests satisfy the Commission's standard for granting a waiver.

Our rules provide that the Commission may grant waiver requests if "the underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest," or if "the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest."<sup>2</sup> As this standard refers to a rule's "application in a particular case," as well as to the "unique facts and circumstances of a particular case," we believe that these requests warrant a hard look and due consideration of the specific facts presented in the pleadings.

The majority is correct that, in establishing the payment resumption date in the *C Block Reconsideration Order*,<sup>3</sup> we departed from our standard payment rules governing all services. That date was subsequently set for July 31, 1998, with a one time non-delinquency period of 90 days (with a 5% late fee). Hence, in order to avoid default and automatic license cancellation, those payments are due today, October 29, 1998. In contrast, our standard payment rules provide for a 90-day non-delinquency period, followed by a 90-day grace period, each with corresponding late fee.<sup>4</sup> In the *C Block Reconsideration Order*, we declined to apply those provisions for the initial resumption of payments on the premise that the licensees already had received a year of suspension of payments. However, the decision not to apply a 90-day grace period across the board for all C block licensees does not -- and

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<sup>1</sup> 47 U.S.C. § 309(j).

<sup>2</sup> 47 C.F.R. § 24.819 (1997).

<sup>3</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998) ("*C Block Reconsideration Order*").

<sup>4</sup> 47 C.F.R. § 1.2110(f)(4)(i),(ii).

should not -- mean that we summarily reject a request for a limited extension of the payment obligation upon an individualized showing that such action would be in the public interest.

In this regard, we find the majority's disposition of two of today's waiver requests to be particularly disconcerting. Airadigm Communications, Inc., holds 13 C Block licenses in largely rural Wisconsin and was the first non-pioneer's preference licensee to begin offering service. It has invested over \$100 million in its markets, has built-out its facilities to cover one million people (over 1/3 of its licensed population), and currently has over 7,000 subscribers. Many of these subscribers live on the Oneida Indian Reservation, an area which never before had received wireless coverage. Airadigm also provides service for the tribe's public safety operations, so that the tribe's police force, for the first time, has mobile telecommunications. Airadigm consistently has complied with our rules, successfully making both first and second downpayments, as well as being one of the few C Block licensees submitting a first installment payment after the Commission suspended payments on March 31, 1997. These past payments to the Commission total more than \$8 million. Airadigm now requests a six-month deferral of its \$2.3 million second installment payment, pending a cash infusion from a sale and lease-back of its towers, as well as a second round of private financing.

SouthEast Telephone, Inc., holds 6 C Block licenses in rural Kentucky. SouthEast initiated service on October 1. It plans to offer both mobile and local loop service to an area with telephone penetration of only 80-90%, well below the national average. SouthEast's present construction covers 15% of their licensed population, and it is constructing sites to double its total within the next month. After substantial delay on a pro forma transfer which was approved by the Commission in January of this year, SouthEast successfully obtained financing which has allowed it to contract for its remaining buildout. SouthEast also successfully made its first and second down payments. It now seeks a two-month deferral of approximately \$400,000, pending a cash infusion from private investors based on service milestones, as well as a sale and lease-back of its towers, both of which are expected to occur in the next 60 days.

We believe that the facts of these particular cases meet at least the second prong of the waiver standard, and that strict application of the payment deadline and the default and automatic cancellation rules here would be "inequitable, unduly burdensome, or otherwise contrary to the public interest." Section 309(j) mandates that we protect the public interest in the use of the spectrum and promote several goals. Among them are two critical goals implicated here: (1) "the development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas," and (2) "recovery for the public of a portion of value of the public spectrum resource."<sup>5</sup> We believe that these goals require balancing, that neither is to take absolute precedence over the other, and that granting a temporary waiver in these cases ultimately would best serve both objectives.

Here we have two licensees providing valuable service to previously unserved, or underserved, areas. Both are experiencing temporary financial difficulty, and have asked for a brief window of time to remedy their shortfall. Both have essentially demonstrated their broader viability and their commitment to providing service to the public. Both have a prior history of

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<sup>5</sup> 47 U.S.C. §309(j)(3)(A),(C).

successful compliance with our payment deadlines. Both have provided significant detail regarding their current finances, their private creditor arrangements, and their sources of expected capital which would allow them meet their obligation after a short deferral. And both have requested extensions for limited periods of time (2 months and 6 months), tailored to their expected infusions of capital.

In the past, the Commission has recognized the occasional need for flexibility in our installment payment program. Indeed, that is why our standard rules provide for automatic non-delinquency and grace periods totalling 180 days. We have consistently distinguished between the upfront and down payments, on the one hand, and installment payments, on the other. Timely down payments, we have found, are a critical indicator of a licensee's financial health and ability to construct its system and, ultimately, to provide service to the public. Thus, we have granted waivers of the down payment rules only in extremely limited circumstances. But with installment payments, we have recognized the fluctuations inherent in business cycles and the occasional need for flexibility. The fact that these extensions are provided automatically, by rule, rather than by individual showing of exigent circumstances, only underscores this point. Where a licensee has demonstrated its viability through its down payments and has substantially built-out its system, some limited form of flexibility upon a showing of unique facts and circumstances is all the more warranted.

It may be said that these licensees simply have chosen to pay other creditors before the FCC, and that we should not countenance such a result. As the Commission has noted in previous decisions on the C and F Block installment payment program, we find ourselves in the difficult position of being both regulator and lender to our licensees. If, in our latter role, we had the freedom to behave as commercial lenders, we could use many tools to restructure the loans of debtors in financial straits. We could raise interest rates or secure additional collateral, for example. The Commission has very little latitude, however, to work with its debtors. Indeed, the only flexibility we have is to grant extensions of payment deadlines. We must not let a fear of "opening the floodgates" deter us from applying judgment to individual cases. Nor must we become so unyielding in our financial role that we undermine our paramount charge of ensuring that the spectrum is used in the public interest.

Finally, these licensees may actually survive -- that is, make their installment payment and keep their licenses by risking their future financing and future stability -- without an extension of the payment deadline. We would be willing to take this "risk" of misjudging the licensees' ability to pay because we believe there is far greater risk for the Commission to deny the extension and watch a successful C Block licensee lose its license and a community of Americans once again become unserved.

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