

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

In the Matter of)
Southern Communications Systems, Inc.)
Request for Limited Rule Waiver to Comply with)
PCS Installment Payment for C Block License in)
the Cleveland, TN BTA)

SECOND MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2001

Released: October 12, 2001

By the Commission:

I. INTRODUCTION

1. We have before us a petition filed by Southern Communications Systems, Inc. ("Southern") seeking further reconsideration of the Commission's denial of its request for waiver of the installment payment rules. For the reasons below, we deny Southern's petition.

II. BACKGROUND

2. Southern was the high bidder for the Cleveland, Tennessee BTA license in Auction No. 5, the Commission's initial broadband PCS C block auction. The Commission awarded the license to

1 Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, Petition for Further Reconsideration (filed Jan. 22, 2001) ("Further Reconsideration Petition").

2 See Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, Memorandum Opinion and Order, 15 FCC Rcd 25,103 (2000) ("MO&O"); Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, Order, 15 FCC Rcd 8387 (2000) (rel. Oct. 29, 1999) ("Waiver Order").

3 See Entrepreneurs' C Block Auction Closes: FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas: Auction Event No. 5, Public Notice, DA 96-716 (rel. May 8, 1996) ("Auction No. 5 Winning Bidders Public Notice").

Southern in September 1996.⁴ Southern participated as a small business in the Commission's installment payment program.⁵ After meeting its down payment obligations, Southern began making installment payments on its license. However, Southern failed to timely remit the installment payment due on October 31, 1998.⁶

3. Pursuant to the applicable installment payment grace period rule, Section 1.2110(f),⁷ Southern had an automatic 90-day period ("non-delinquency period") after the installment payment due date during which payment could have been submitted with a five percent late fee. If Southern failed to remit the missed installment payment and the five percent late fee before the expiration of the non-delinquency period, the rule provided for a second automatic 90-day period ("grace period") in which to remit payment and required an additional late fee equal to ten percent of the missed payment.⁸ Pursuant to these rules, and in order for Southern to avoid the automatic cancellation of its license, Southern's October 31, 1998 installment payment had to have been received, at the latest, by April 29, 1999, accompanied by a 15 percent late fee.⁹

4. On April 29, 1999, the last possible day to comply with the applicable installment payment grace period rule, Southern filed a waiver request seeking a two-day suspension of Section 24.711(b)¹⁰ of the Commission's rules.¹¹ The Waiver Request stated that Southern was unable to wire transfer the

⁴ See FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA Licenses: Final Down Payment due by September 24, 1996, *Public Notice*, 11 FCC Rcd 11,316, 11,327 (1996).

⁵ See *Auction No. 5 Winning Bidders Public Notice*.

⁶ See Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, Petition for Reconsideration, at Summary, 3 (filed Nov. 29, 1999) ("Reconsideration Petition").

⁷ 47 C.F.R. § 1.2110(f)(4) (1999). The Part 1 rules referenced in this Order were amended effective October 30, 2000 to reflect the use of quarters for implementation of the Commission's payment deadlines and attendant grace period rules. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and the Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 15,293 (2000); 65 Fed. Reg. 52323-01 (Aug. 29, 2000). These changes have no effect on Southern's position or the Commission's evaluation of its arguments.

⁸ 47 C.F.R. § 1.2110(f)(4) (1999). When the Commission abandoned its burdensome policy of reviewing grace period requests on a case-by-case approach and adopted its current rules allowing for two automatic 90 day grace periods, it did not extend the date upon which the payment was due and payable to the Commission. In other words, the last day of the 180-day grace period did not become the due date of the payment. 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 Rule Making*, 13 FCC Rcd 374, 434-42, ¶¶ 103-113 (1998); see also Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules, *Public Notice*, 13 FCC Rcd 18,213 (1998).

⁹ 47 C.F.R. § 1.2110(f)(4) (1999).

¹⁰ 47 C.F.R. § 24.711(b).

¹¹ See Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA (filed April 29, 1999) ("Waiver Request").

installment payment due to the illness of its financial officer.¹² Southern then wired funds to the Commission, initiating the wire transfer, Southern later stated, on May 3, 1999,¹³ two business and four calendar days after the April 29, 1999 deadline. The Commission received the funds three business and five calendar days after the deadline.¹⁴ Southern submitted only the amount of the original October 31, 1998 installment payment, failing to include the 15 percent late fee.¹⁵ In October 1999, the Auctions and Industry Analysis Division (“Division”) denied Southern’s Waiver Request, determining that Southern had failed to meet the standards for grant of a waiver of the Commission’s rules.¹⁶ Southern claims to have, on some unspecified date, created an escrow account containing sufficient funds to bring its account current.¹⁷

5. On November 29, 1999, Southern filed a petition for reconsideration of the Division’s denial of its waiver request (“Reconsideration Petition”)¹⁸ and supplemented its petition on January 6, 2000 (“Reconsideration Petition Supplement”).¹⁹ Southern argued that the Division had failed to address its waiver request arguments fully and appropriately. The Commission denied the Reconsideration Petition and affirmed the Division’s *Waiver Order*.²⁰ On January 22, 2001, Southern filed the instant Further Reconsideration Petition.²¹

III. DISCUSSION

6. Southern offers three bases for its Further Reconsideration Petition: first, that the Commission’s treatment of Southern was inconsistent with the treatment of a similarly situated F block licensee; second, that the public interest would have been better served by grant of Southern’s Waiver Request or its Reconsideration Petition; and, third, that the Commission’s denial of its Reconsideration

¹² Waiver Request at 2.

¹³ Further Reconsideration Petition at 4.

¹⁴ See *MO&O*, 15 FCC Rcd 25,104, n.11.

¹⁵ *Waiver Order*, 15 FCC Rcd 8387-88, ¶ 2; Further Reconsideration Petition at 4; Reconsideration Petition at 3. Southern indicated that the payment was actually made by Southern Personal Communications, Inc. (“SPC”), then on file as the proposed assignee of Southern’s license. Further Reconsideration Petition at 3-4; Reconsideration Petition at 2-3; see Waiver Request at 2. Southern further indicated that SPC failed to include late fees because SPC thought that it was making the April 1999 payment, believing that the then-overdue October 1998 and January 1999 payments had already been made. *Id.* As the Commission stated in the *MO&O*, the failure of Southern and its business associate to organize and manage their business dealings properly is not a unique circumstance for which the Commission would grant a waiver. *MO&O*, 15 FCC Rcd 25,107-108, ¶ 10; see 47 C.F.R. § 1.925.

¹⁶ See *Waiver Order*, 15 FCC Rcd 8387-89.

¹⁷ See Further Reconsideration Petition at 4, 8; Reconsideration Petition at 3, 6, 10-11.

¹⁸ Reconsideration Petition.

¹⁹ Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, Supplement for Petition for Reconsideration (filed Jan. 6, 2000) (“Reconsideration Petition Supplement”).

²⁰ See *MO&O*, 15 FCC Rcd 25,103.

²¹ See *supra*, n.1.

Petition was prompted primarily by the Commission's anticipation of revenues from Auction No. 35.²²

7. Inconsistent Treatment. Southern contends that the Commission's denial of its Reconsideration Petition was inconsistent with the decision in *Lakeland*,²³ an order released by the Policy and Rules Branch ("Branch") of the Wireless Telecommunications Bureau's Commercial Wireless Division, shortly before release of the *MO&O*.²⁴ In that case, Lakeland, an F block PCS licensee, failed to make its April 30, 1999 installment payment by the due date or during the subsequent non-delinquency and grace periods.²⁵ The October 19, 1999 payment notice indicated that the final day of the grace period was October 28, 1999, when actually it was October 27, 1999. Lakeland made its payment, including late fees, on October 29, 1999, two days after the end of the grace period. Subsequently, Lakeland made all of its installment payments.²⁶ After the Branch rescinded an order granting consent to an assignment of Lakeland's license, Lakeland sought reconsideration. The Branch found that the circumstances in *Lakeland* were consistent with previous instances where, as a result of administrative oversight, a constructive waiver of installment payment deadlines had occurred.²⁷ Consequently, notwithstanding Lakeland's failure to meet its installment payment deadline, the Branch, in a second order on reconsideration, vacated its earlier rescission of, and reinstated, grant of Lakeland's application to assign its F block license to another party.²⁸

8. Southern contends that it and Lakeland were "similarly situated" and that, accordingly, denial of Southern's waiver request is arbitrary and capricious.²⁹ Southern ignores the fact that, in the instant matter, the Commission did not act in a way that reasonably could have been construed as waiving the April 29, 1999, late payment deadline. Moreover, Southern, unlike Lakeland, did not pay the full amount due when it made its post-deadline payment. Accordingly, the *Lakeland* decision does not provide a basis for altering the decision in the *MO&O*.³⁰

9. Public Interest. Southern maintains that the public interest would have been better served had its waiver request been granted, arguing that service in the Cleveland, Tennessee, BTA would have been provided at least two years earlier than it otherwise will be. We find this argument unconvincing. By requiring licensees to pay on time and in full, we preserve the reliability and integrity of the

²² Auction No. 35, an auction of C and F block broadband licenses representing spectrum that had been previously auctioned, was the Commission's fifth auction of C and/or F block broadband PCS licenses.

²³ Lakeland PCS LLC and Cricket Licensee (Lakeland) Inc. for Assignment of PCS License for Station KNLG741, *Second Order on Reconsideration* 15 FCC Rcd 23,733 (CWD 2000) ("*Lakeland*").

²⁴ Further Reconsideration Petition at 6-11.

²⁵ See *Lakeland*, 15 FCC Rcd 23,733-34, ¶ 2.

²⁶ See *id.*, 15 FCC Rcd 23,734-35, ¶ 4.

²⁷ See *id.*, 15 FCC Rcd 23,734-35, n.12 and accompanying text.

²⁸ See *id.*, 15 FCC Rcd 23,733, ¶ 1, 23,734-35, ¶ 4, 23,736, ¶ 7.

²⁹ Further Reconsideration Petition at 6-11.

³⁰ See *Southeast Telephone, Inc. v. FCC*, 1999 WL 1215855 (D.C. Cir. November 24, 1999) (unpublished opinion), *aff'g per curiam* Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, 14 FCC Rcd 6080 (1999).

Commission's auction licensing program and thereby encourage rapid service to the public throughout the nation. As such, we believe that enforcing the Commission's payment rules against Southern serves the public interest better than relying on the wholly unsubstantiated possibility that Southern might have provided service in its license area sooner than the successor licensees will.³¹

10. Southern also suggests that the availability of sufficient funds to bring its account current merits a waiver of the installment payment deadline, citing *Carolina PCS*, a decision in which the Commission granted a partial waiver of a second down payment deadline.³² Southern made this same argument in its Reconsideration Petition Supplement,³³ relying there on, *inter alia*, *Mountain Solutions*³⁴ and *Carolina PCS*;³⁵ and the Commission considered and rejected this argument in the *MO&O*.³⁶ Pursuant to Section 1.106(k)(3) of the Commission's rules, we dismiss this aspect of the Further Reconsideration Petition as repetitious.³⁷

11. Anticipation of Revenues. Southern argues that in deciding not to grant its Reconsideration

³¹ See Licenses of 21st Century Telesis, Inc. For Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,126-27 ¶¶ 28-29 (2000) (Commission refuses to grant reinstatement of an automatically cancelled license to petitioner claiming the ability to provide service more quickly than any future licensee.). More than one successor licensee is likely for the spectrum at issue, because the Cleveland, Tennessee, BTA was divided into three licenses prior to Auction No. 35. See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16,266, 16,267-69, ¶ 2, 16,272-75, ¶¶ 11-15 (2000); Wireless Telecommunications Bureau Grants Three C and F Block Broadband Personal Communications Services (PCS) Licenses, *Public Notice*, DA 01-2217, Att. A1 (rel. Sept. 21, 2001); Wireless Telecommunications Bureau Announces It Is Prepared to Grant Forty-Five C and F Block Broadband Personal Communications Services (PCS) Licenses Upon Full and Timely Payment, *Public Notice*, DA 01-2216, Att. A1 at 1 (Sept. 21, 2001); C and F Block Broadband PCS Auction Closes: Winning Bidders Announced, *Public Notice*, 16 FCC Rcd 2339, 2349 (2001).

³² See Further Reconsideration Petition at 8, citing Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding BTA Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Frequency Block C, *Memorandum Opinion and Order*, 12 FCC Rcd 22,938 (1997) ("*Carolina PCS*") (The Commission granted an application for review of a Wireless Telecommunications Bureau order denying waiver of the Commission's second down payment deadline for PCS C block licenses and granted a partial waiver of the second down payment deadline.).

³³ Reconsideration Petition Supplement at 1-4.

³⁴ *Id.* at 1-4, citing *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999) ("*Mountain Solutions*") (upholding the Commission's decision, in a PCS licensing matter, to deny a waiver of its rule requiring a winning bidder to timely submit its second down payment in order for the Commission to grant the license).

³⁵ *Id.* at 2, citing *Carolina PCS*, 12 FCC Rcd 22,938, 22,944.

³⁶ See *MO&O*, 15 FCC Rcd at 25,107, n.29, 25,109-11, ¶¶ 13-15.

³⁷ See 47 C.F.R. § 1.106(k)(3). See also, e.g., *Achernar Broadcasting Company*, 16 FCC Rcd 4341, 4342-43, ¶ 4 (2001) ("[T]he Commission's rules do not contemplate the filing of repetitious petitions for reconsideration."); *Warren Price Communications, Inc.*, *Memorandum Opinion and Order*, 7 FCC Rcd 6850, ¶ 2 (1992) ("It is well established that reconsideration will not be granted to debate matters upon which we have already deliberated and spoken.").

Petition, the Commission was “motivated principally” by the auction revenue potential of the spectrum formerly licensed to Southern and that the Commission therefore violated Section 309(j)(7) of the Communications Act.³⁸ The restrictions of Section 309(j)(7) are inapposite here. Section 309(j)(7)(A) prohibits the Commission from assigning a band of frequencies to a particular use, and from prescribing related regulations, based on the expectation of auction revenues; while, Section 309(j)(7)(B) restricts the Commission from prescribing regulations pertaining to alternative payment schedules and methods of calculation “solely or predominantly” on the expectation of auction revenues.³⁹ The provision does not apply to a decision regarding whether to waive an established payment requirement for an individual licensee. Furthermore, Southern’s argument is flawed even apart from the overriding statutory obstacle. Its contention here is completely at odds with the contention it made in its Reconsideration Petition that the “Commission is likely to obtain a substantially lower auction price [than Southern’s] if it reauctions the Cleveland, TN BTA license.”⁴⁰ Finally, Southern’s claim is factually unsupported. Southern merely notes that the *MO&O* was “issued on the eve of the C-Block reauction”⁴¹ and overlooks that the original denial of its Waiver Request occurred more than a year before commencement of Auction No. 35.⁴²

³⁸ Further Reconsideration Petition at 4-5.

³⁹ Section 309(j)(7) reads, in relevant part, as follows:

(7) Consideration of revenues in public interest determinations. –

(A) Consideration prohibited. – In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited. – In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

* * *

47 U.S.C. § 309(j)(7). *See* *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 692 (D.C. Cir. 2001).

⁴⁰ Reconsideration Petition at Summary; *see id.* at 7 (“To the extent the Commission reauctions Southern’s license, the public interest will not be served because the Commission should assume a substantially smaller auction price. . . . The Commission has met with disappointingly low reauction results for C-Block PCS licensees.”)

⁴¹ Further Reconsideration Petition at 4-5.

⁴² The *Waiver Order* was adopted and released on October 29, 1999. The *MO&O* was adopted on December 8, 2000 and released on December 21, 2000. Auction No. 35 began on December 12, 2000 and closed on January 26, 2001.

IV. ORDERING CLAUSE

12. Accordingly, for the foregoing reasons, 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 Further Reconsideration Petition filed by Southern IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary