

DA 98-1524
Adopted: July 29, 1998
Released: July 31, 1998

Mr. Jeffrey L. Timmons
Counsel for OnQue Communications, Inc.
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Ave., N.W., Suite 200
Washington, D.C. 20036-3101

Re: Waiver of June 8, 1998 Election Date for PCS C Block Licensees
to Resubmit Elections with Corrections

Dear Mr. Timmons:

This letter responds to OnQue Communications, Inc.'s ("OnQue") request for a waiver of the June 8, 1998 payment option election deadline for PCS C block licensees.¹ OnQue requests this waiver of the June 8, 1998 deadline to correct its original, defective submission. We find that the facts and circumstances presented by OnQue are sufficiently unique to merit a waiver of the deadline. We also will allow OnQue to begin its repayment obligations ten (10) business days from the release date of this letter, instead of on July 31, 1998. We are not extending the 90-day non-delinquency period beyond the October 29, 1998 date and all other terms of the *Reconsideration Order* remain in effect.² We discuss the specific rationale for this waiver below.

On June 8, 1998, OnQue filed a timely but defective election. OnQue's Election Notice stated that it would disaggregate and resume payment on its Kenewick, Washington license. It specified the return of its other four licenses, located in the Oklahoma City and Dallas MTAs, under Amnesty-Prepayment, using the prepayment credit to pay-down the principal balance on its

¹See Amendment of the Commission's Rules Regarding Installment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, FCC 98-46, 13 FCC Rcd 8345 (1997) (hereinafter "*Reconsideration Order*"); see also "Wireless Telecommunications Bureau Announces June 8, 1998 Election date for Broadband PCS C Block Licensees," *Public Notice*, DA-98-741 (rel. April 17, 1998).

²*Reconsideration Order* at ¶¶ 25-26.

Kenewick, Washington license.³ According to the *Order on Reconsideration*, the prepayment credit associated with the amnesty option may only be used to pre-pay the entire outstanding balance for a license. Therefore, we determined that the election was defective and OnQue was informed of this finding on June 11, 1998.

As a defective filer, OnQue would retain all five of its C block licenses. It would be responsible for the resumption of installment payments on the full amount owed for all five licenses under the terms of its existing loan documents. Any interest accrued since April 1, 1998 would be due by July 31, 1998, with any Suspension Interest due in eight equal quarterly installments, also beginning on July 31, 1998, and continuing on October 29, 1998, and then quarterly thereafter.

On June 23, 1998, OnQue filed a "Petition for Reconsideration and Request for Waiver" with the Commission. It has since filed a "Request for Stay" of the July 31, 1998 payment deadline. OnQue argues that its election was "conditionally defective" and requests the opportunity to refile in the same manner as other licensees in this category.⁴ This argument is flawed, as the conditionally defective licensees did not file inherently defective elections in the nature of OnQue's. Rather, they mistakenly included language in their filings which attempted to force the Commission to follow the findings in the GWI bankruptcy proceeding. These licensees were given the opportunity to delete the objectionable language from their elections in order to submit a clean filing.

The primary basis for OnQue's waiver request is that it misunderstood the rules and lacked competent legal assistance at the time it made its filing. It indicates that it intended to request "Amnesty - Bid" instead of "Amnesty - Prepayment" for its four returned licenses. OnQue bore a responsibility as a licensee for monitoring and following the Commission's and Bureau's orders and releases in this matter. It argues, however, that permitting a resubmission in this case would be consistent with the Commission's overall policy of providing relief to C block licensees that may otherwise be unable to pay installment payments under the original installment plans. Also, since OnQue forfeited all of its \$550,350.00 in downpayment on the four licenses returned under the amnesty plan, it argues that it should be permitted to bid on those four licenses at reauction. Finally, OnQue notes its status as a "small business" with total assets of only \$2,000,000.00 when bidding for the licenses, and annual gross revenues in the two years preceding the auction of less than \$2,000,000.00. OnQue claims that the loss of \$550,350.00 alone represents a significant financial hardship, and the imposition of further payments based upon its defective status would be debilitating.

³KNLF727, BTA 004, Ada, Oklahoma; KNLF728, BTA 019, Ardmore, Oklahoma; KNLF730, BTA 267, McAlester, Oklahoma; and KNLF731, BTA 341, Paris, Texas.

⁴See Public Notice, *Wireless Telecommunications Bureau Announces Broadband Personal Communications Services C Block Elections*, DA 98-1168 (released June 16, 1998).

Pursuant to Section 24.819 of the Commission's Rules (47 C.F.R. 24.819), waiver of a provision of the PCS rules is appropriate only when a party demonstrates either 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 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.⁵

We find that the facts and circumstances cited here are of sufficient novelty to warrant a waiver of the June 8, 1998 election date. First, the C block election process is a unique occurrence which is unlikely to repeat itself in any other context. Second, OnQue's lack of technical assistance at this juncture caused a technical misunderstanding of the Commission's Rules. Third, we do not believe that the defective submission was intended to enhance OnQue's position *vis-a-vis* the other licensees, nor do we find that OnQue intended to delay its ultimate election by submitting a defective submission.

OnQue's waiver request is distinguishable from instances where a waiver would affect the integrity and efficient functioning of the auctions process.⁶ A waiver of the election date to allow OnQue's resubmission changing the election filed from "Amnesty-Prepayment" to "Amnesty-Bid," and a brief delay in the July 31, 1998 repayment deadline still will permit timely closure in this matter and encourage the licensee to meet its obligations to the Commission. A strict application of the election date here would be unduly burdensome for OnQue and cause extreme financial hardship. Although we find that rigid enforcement of the June 8, 1998 deadline would not serve the public interest, we caution OnQue that in the future, it should obtain proper legal assistance or follow the guidance of the Commission's staff prior to proceeding in important licensing matters.

Accordingly, we hereby grant OnQue's request for a waiver of the June 8, 1998 election date, and we will permit the resubmission as stated in OnQue's June 23, 1998 waiver request. We further order that OnQue begin its repayment obligations ten (10) business days from the release date of this letter. This action is taken pursuant to delegated authority under Section 0.331 of the Commission's Rules. 47 C.F.R. 0.331.

Sincerely,

⁵47 C.F.R. § 24.819(a)(1)(i) and (ii). *See also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*citing WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

⁶*See, e.g.,* 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, 3235 ¶ 7 (1997) (*Petition for Review* granted in part for other reasons), 12 FCC Rcd 15341 (1997).

E. Rachel Kazan, Chief
Auction Finance and Market Analysis Branch
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau