

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Reauction of Defaulted)
PCS C Block Licenses)
)
Emergency Application for Review)
of Mountain Solutions, Ltd., Inc.)

MEMORANDUM OPINION AND ORDER

Adopted: August 28, 1997

Released: October 29, 1997

By the Commission:

1. Introduction and Executive Summary. On June 11, 1996, Mountain Solutions, Ltd., Inc. ("Mountain Solutions") filed an Emergency Application for Review ("Application for Review") of the decision of the Wireless Telecommunications Bureau ("Bureau") to reauction eighteen (18) defaulted broadband PCS C Block licenses for which the winning bidders failed to submit timely initial down payments.¹ Mountain Solutions requests that the Commission award two of these licenses to it as the second highest bidder for them in the initial broadband PCS C Block auction. Alternatively, Mountain Solutions had requested that the Commission allow only non-defaulting entities that participated in the original C Block auction to participate in the reauction. For the reasons discussed below, we are denying Mountain Solutions' Emergency Application for Review. We agree with the Bureau's decision to reauction the 18 licenses upon which BDPCS, Inc. ("BDPCS") and National Telecom PCS, Inc. ("NatTel") had defaulted in the

¹ See *Public Notice*, "18 Defaulted PCS Licenses to be Reauctioned," DA 96-872 (rel. May 30, 1996). See also Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction filed by BDPCS, Inc., *Order*, DA 96-811 (rel. May 20, 1996); Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction filed by BDPCS, Inc., *Order on Reconsideration*, DA 96-874 (rel. May 30, 1996) (*recon. pending*).

C Block auction.

2. Background. The broadband PCS C Block auction closed on May 6, 1996.² In accordance with the Commission's Rules, winning bidders were required to submit down payments by May 15, 1996.³ Two of the winning bidders, BDPCS and NatTel, failed to submit the required down payments by the May 15, 1996 deadline. On May 30, 1996, the Bureau announced that the Commission would reauction 17 broadband PCS C Block licenses upon which winning bidder BDPCS had defaulted and one broadband PCS C Block license upon which winning bidder NatTel had defaulted.⁴ On June 11, 1996, Mountain Solutions, in addition to the filing before us, filed an emergency motion to stay the reauction of these licenses. The Bureau denied this motion on June 28, 1996.⁵ Mountain Solutions filed an Emergency Motion for Stay with the U.S. Court of Appeals for the District of Columbia Circuit on July 1, 1996. The Court denied the Emergency Motion for Stay on July 2, 1996.⁶ As a result, the Bureau proceeded with the reauction on July 3, 1996, as scheduled. Of the 18 licenses offered in the reauction, Mountain Solutions submitted the winning bids for the Colorado Springs, Colorado and Fort Collins, Colorado BTAs. The reauction concluded on July 16, 1996.⁷

3. In its Application for Review, Mountain Solutions contends that we should reverse the Bureau's decision to reauction the 18 licenses and instead award them to the second highest bidder on the grounds that: 1) granting the licenses to the second highest bidder would best serve the public interest; 2) reauctioning the licenses would delay the award of the C Block licenses and harm the public interest in violation of the Communications Act of 1934, as amended ("Communications Act"); 3) the Commission has acted in an arbitrary and capricious manner in its failure to provide a rationale for reauctioning; and 4) the Commission's refusal to grant the licenses to Mountain Solutions as the second highest bidder is an unconstitutional taking of property without just compensation. There were no responsive pleadings filed thereto.

² See *Public Notice*, "Entrepreneurs' C Block Auction Closes," DA 96-716 (rel. May 8, 1996). See also *News Release*, "Broadband Personal Communications Services 'C Block' Auction Closes" (rel. May 6, 1996).

³ See *Public Notice*, "Entrepreneurs' C Block Auction Closes," DA 96-716 (rel. May 8, 1996).

⁴ See *Public Notice*, "18 Defaulted PCS Licenses to be Reauctioned," DA 96-872 (rel. May 30, 1996).

⁵ See *Emergency Motion for Stay of Mountain Solutions, Ltd., Inc.*, *Order*, DA 96-1061 (rel. June 28, 1996).

⁶ *Mountain Solutions, Ltd., Inc. v. FCC*, D.C. Cir. No. 96-1227 (July 2, 1996). In addition, Mountain Solutions filed a Petition for Review of the Bureau's decision to reauction the licenses. On March 31, 1997, the D.C. Court of Appeals granted the Commission's Motion to Dismiss the petition. See *Mountain Solutions, Ltd., Inc. v. FCC*, 1997 WL 195535 (D.C. Cir.).

⁷ See *Public Notice*, "Entrepreneurs' C Block Reauction Closes," DA 96-1153 (rel. July 17, 1996); *Public Notice*, "Erratum in Public Notice DA 96-1153 Announcing Close of the Entrepreneurs' C Block Reauction" (rel. July 18, 1996).

4. Discussion. We deny Mountain Solutions' Application for Review and affirm the Bureau's decision to reacquire the 18 licenses. Under Section 1.2109(b) of our rules in effect at the time of the "C" Block auction, if a winning bidder failed to remit the required down payment five days after the Commission declared competitive bidding closed, the Commission could offer the license to the second highest bidder or to reacquire the license to existing or new applicants.⁸ The Commission's discretion in this matter is clear from Section 1.2109(b), as well as Commission decisions.⁹ In the *Fifth Report and Order*, we restated this position:

As we stated in the *Second Report and Order*, we believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best course of action is to re-auction the license. *See Second Report and Order* at ¶ 204. . . . *However, if the default occurs within five (5) business days after the bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels.*¹⁰

The licenses at issue became available due to BDPCS's default within five business days after bidding closed. While it was not automatic that reacquire would occur, it was within our discretion to reacquire the licenses rather than offer them to Mountain Solutions, the second highest bidder.¹¹ In the *Fifth Report and Order*, we did suggest that while we retain discretion to determine what steps to take if a default occurs within five business days, we might be particularly inclined to offer the license to the highest losing bidders where "only a small number of relatively low-value licenses are to be re-auctioned and only a short time has passed since the initial auction," since "the cost of running another auction may exceed the benefits." However, this is not the scenario at hand; the licenses at issue are neither a small number nor of low value. The Bureau's action is wholly consistent with the Commission's Rules regarding the circumstances in which reacquire is appropriate, and thus, contrary to Mountain Solutions' argument, was not arbitrary or capricious.

⁸ 47 C.F.R. § 1.2109(b). The number of days prescribed by Section 1.2109(b) was changed to ten business days in February 1997. *See* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Memorandum Opinion and Order and Notice of Proposed Rule Making*, FCC 97-60, 62 Fed.Reg. 13540, at 13542 (rel. February 28, 1997).

⁹ *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 92-253, *Fifth Report and Order*, 9 FCC Rcd. 5222, 5565 (1994) ("*Fifth Report and Order*"); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 92-253, *Second Report and Order*, 9 FCC Rcd. 2348 (1994) ("*Second Report and Order*").

¹⁰ *See also Fifth Report and Order*, 9 FCC Rcd. 5222, 5565 (emphasis added).

¹¹ *See Id.* at n. 55.

5. Furthermore, the particular circumstances in this case demonstrate that the public interest has been best served by reaucting the 18 licenses upon which BDPCS and NatTel had defaulted. In its decision to reauct the 18 licenses, the Bureau noted that "a reauction will rapidly and efficiently assign the licenses."¹² The reauction began on July 3, 1996, less than two months from the license default date, and closed after eight days and twenty-five rounds of bidding.¹³ Thus, reaucting did not significantly delay the award of the licenses or cause competitive harm to the prospective licensees.

6. In addition, we disagree with Mountain Solutions' contention that the Bureau's decision constituted an unconstitutional taking of property without just compensation. Mountain Solutions' status as the second highest bidder does not entitle it to any property right in the licenses. In fact, Section 301 of the Communications Act provides that no license granted pursuant to the Act "shall be construed to create any right beyond the terms, conditions, and periods of the license."¹⁴ Furthermore, courts have long held that licensees have no property interest in their licenses.¹⁵ Consequently, Mountain Solutions, which at most was a prospective licensee, had no property interest in any of the 18 licenses that were the subject of the reauction. As such, the decision to reauction does not and indeed could not violate the Fifth Amendment's prohibition against the taking of private property for public use without just compensation.

7. Alternatively, Mountain Solutions requests that the Commission allow only non-defaulting entities that participated in the original C Block auction to participate in the reauction. We note, as a general matter, that Section 1.2109(b) of the Commission's Rules indicates that new parties would be afforded an opportunity to participate in a reauction scenario.¹⁶ Mountain Solutions particularly requests that the Commission prohibit BDPCS, one of the defaulting parties in the C Block auction, from participating in the reauction on the grounds that its participation would cause irreparable harm to Mountain Solutions and undermine the integrity of the auction process. Since BDPCS did not participate in the reauction, this issue is moot. We further note that Mountain Solutions was able to participate in the reauction and submitted the

¹² See *Public Notice*, "18 Defaulted PCS Licenses to be Reaucted," DA 96-811 (rel. May 30, 1996).

¹³ See *News Release*, "Broadband PCS Entrepreneurs' ('C') Block Reauction Closes" (rel. July 16, 1996).

¹⁴ See 47 U.S.C. § 301.

¹⁵ See, e.g., *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1460 (D.C. Cir. 1985); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

¹⁶ 47 C.F.R. § 1.2109(b).

winning bids for the Colorado Springs, Colorado and Fort Collins, Colorado BTAs.¹⁷

8. ACCORDINGLY, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), that the Emergency Application for Review filed by Mountain Solutions IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹⁷ See *Public Notice*, "Entrepreneurs' C Block Reauction Closes," DA 96-1153 (rel. July 17, 1996); *Public Notice*, "Erratum in Public Notice DA 96-1153 Announcing Close of the Entrepreneurs' C Block Reauction" (rel. July 18, 1996). To date, these licenses have not been issued.