

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

In the Matter of )  
 )  
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**

**Adopted: December 22, 1997**

**Released: December 24, 1997**

**By the Commission:**

**I. INTRODUCTION**

1. The Commission has before it an Application for Review<sup>1</sup> filed by Carolina PCS I Limited Partnership ("CPCSI") seeking review of a Wireless Telecommunications Bureau ("Bureau") Order.<sup>2</sup> The *Order* denied CPCSI's Petition<sup>3</sup> for waiver of the Commission's down payment rule.<sup>4</sup> CPCSI was a winning bidder for nine licenses in the broadband Personal Communications Services (PCS) C block auction. Based on the record in this proceeding, we

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<sup>1</sup> Carolina PCS I Limited Partnership, Request for Waiver of § 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B312, B335 and B436, Application for Review, filed May 28, 1997 ("Application for Review").

<sup>2</sup> Carolina PCS I Limited Partnership, Request for Waiver of § 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, *Order*, DA 97-890 (rel. April 28, 1997) (*Order*).

<sup>3</sup> Emergency Petition for Waiver of § 24.711(a)(2) of the Commission's Rules, filed September 24, 1996 ("Petition"); Supplement to Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, filed October 4, 1996 ("Supplemental Petition").

<sup>4</sup> See 47 C.F.R. § 24.711(a)(2).

conclude that the CPCS I Application for Review should be granted and that CPCS I is entitled to a partial waiver of Section 24.711(a)(2) of our Rules.

## II. BACKGROUND

2. On May 6, 1996, the Commission concluded the broadband PCS C block auction. CPCS I was the winning bidder for licenses B016 (Andersen, SC), B072 (Charleston, SC), B091 (Columbia, SC), B147 (Florence, SC), B177 (Greenville-Spartanburg, SC), B178 (Greenwood, SC), B312 (Myrtle Beach, SC), B335 (Orangeburg, SC), and B436 (Sumter, SC).<sup>5</sup> Pursuant to Section 24.711(a)(2) of the Commission's Rules, winning bidders that are small businesses are required to submit a ten percent down payment on licenses won at auction. Each winning bidder must bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five business days after the auction closes, with the remainder of the down payment (five percent) to be paid within five business days after the application required by Section 24.809(b) is granted.

3. CPCS I made the first five percent down payment by the required due date.<sup>6</sup> The second five percent down payment was due by September 24, 1996.<sup>7</sup> In lieu of making this payment, CPCS I filed the Petition, seeking additional time to secure its financing to make the payment. Specifically, CPCS I requested an extension of time to submit the second five percent down payment until such time as all C block licensees are subject to the same down payment deadline. In its Supplemental Petition, CPCS I requested, in the alternative, a thirty-day extension of time in which to make the second down payment.

4. In support of its waiver request, CPCS I contended that applying a different down payment deadline to five C block licensees with contested applications significantly promotes one class of C block licensees to the detriment of the others.<sup>8</sup> CPCS I also argued that three actions taken by the Commission during the pendency of CPCS I's applications created an unfavorable

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<sup>5</sup> See *Public Notice*, "Entrepreneurs' C Block Auction Closes: FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas," DA 96-716 (rel. May 8, 1996).

<sup>6</sup> See *Order* at 2. CPCS I paid \$2,133,004.57 covering its first down payment on all of the licenses won. *Id.* at 2, n. 4.

<sup>7</sup> See *Public Notice*, "FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA Licenses; Final Down Payment Due by September 24, 1996," 11 FCC Rcd 11316 (1996). CPCS I owed a total of \$4,633,005.00 as its second down payment. *Order* at 2, n. 5.

<sup>8</sup> Petition at 2. Five applicants -- NextWave Personal Communications, Inc. (NextWave), Pocket Communications Inc., PCS 2000 L.P., GWI PCS, Inc., and Meretel Communications, L.P. -- with contested applications were not included in the first wave of C block licensing, pending resolution of petitions to deny.

investment climate with respect to financing C block entities and significantly impaired CPCSIs ability to secure its financing: (1) the Commission's modification of the PCS-cellular spectrum cap to allow incumbent cellular carriers to obtain 20 MHz of broadband PCS spectrum; (2) the three month delay in granting uncontested C block applications after these applications were ripe for grant; and (3) the commencement of the D, E, and F block auction.<sup>9</sup> CPCSI further alleged that a waiver of the second down payment deadline for C block licensees is distinguishable from waivers of the first down payment deadline because all C block winners were subject to the same rules in effect when the auction began, whereas some C block entities now have more time than others to raise capital.<sup>10</sup> CPCSI also asserted that absent a waiver, it would go into default and the Commission would be forced to conduct a reauction of its licenses, delaying the introduction of PCS in the South Carolina markets.<sup>11</sup> Further, CPCSI argued that, if it were subject to default payments, it might be forced into bankruptcy.<sup>12</sup>

5. The Bureau subsequently sought comment on the manner of treating auction winners who missed their second down payment deadline.<sup>13</sup> The Bureau received 32 comments and 10 reply comments in response to the October 18, 1996 Public Notice. No commenting party specifically opposed or commented on CPCSI's waiver request.

6. On April 28, 1997, the Bureau denied the CPCSI Waiver Petition. The Bureau first rejected the CPCSI claim that a waiver was justified because actions by the Commission had created an unfavorable financial environment. Not only was this claim unsupported by factual evidence, the Bureau stated, but it was improper for CPCSI's financing to be dependent upon future events.<sup>14</sup> Second, the Bureau was unpersuaded by the CPCSI argument that its failure to make a second down payment was somehow different from the failure to make an initial down payment. The Bureau concluded that both failures, if excused, would be disruptive to the auction process and delay the delivery of service to the public.<sup>15</sup> The Bureau stated that it had not granted

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<sup>9</sup> *Id.* at 2-4; Supplemental Petition at 1-2.

<sup>10</sup> Supplemental Petition at 4.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.*

<sup>13</sup> See *Public Notice*, "Pleading Cycle Established for Waivers of Down Payment Rules in the Broadband Personal Communications Services C Block, 900 MHz Specialized Mobile Radio, and Multipoint Distribution Service Auctions," 11 FCC Rcd 13145 (1996).

<sup>14</sup> *Order* at 4, ¶ 6.

<sup>15</sup> *Id.* at 4, ¶ 7.

an extension of a down payment deadline for a license won through competitive bidding in any case where the party requesting the extension did not have the funds on hand on the date of the payment deadline.<sup>16</sup> The Bureau likewise rejected the contention that other C block applicants whose applications were subject to petitions to deny enjoyed an advantage, concluding that, to the contrary, the petitions to deny could have raised issues that disqualified the applicants or impaired their ability to maintain and/or secure financing.<sup>17</sup> Finally, the Bureau rejected the argument that CPCSI's waiver request was warranted in order to avoid default and reauction. Noting that the integrity of the auction process depends upon timely payment of down payments, the Bureau stated that it had expeditiously reauctioned licenses in the past and could do so again.<sup>18</sup>

7. On May 28, 1997, CPCSI filed this Application for Review with the Commission. CPCSI filed a supplement to its Application for Review on June 25, 1997.<sup>19</sup> The First Supplement contains affidavits that, contrary to the Bureau's finding, purport to establish that sufficient funds were available to CPCSI to make the second down payment on or about September 24, 1996, the deadline for submitting the second five percent down payment.<sup>20</sup> On July 31, 1997, CPCSI filed a second supplement to the Application for Review, stating that it had deposited in an escrow account sufficient funds to make the second down payment.<sup>21</sup> On October 15, 1997, CPCSI filed a third supplement, demonstrating the continued availability of escrowed funds "in an amount sufficient to cover CPCSI's second down payment obligation until December 31, 1997."<sup>22</sup>

### III. ARGUMENTS OF CPCSI

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<sup>16</sup> *Id.* at 4-5, ¶ 7.

<sup>17</sup> *Id.* at 5, ¶ 7.

<sup>18</sup> *Id.* at 5, ¶ 8.

<sup>19</sup> Carolina PCS I Limited Partnership, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B312, B336 and B436, Supplement to Application for Review, filed June 25, 1997 ("First Supplement").

<sup>20</sup> *Id.* at 3 (affidavit of Nancy A. Truitt, Vice President and Trust Officer of NationsBank, N.A.); *id.* at 4 (affidavit of Charles F. Harry, III).

<sup>21</sup> Carolina PCS I Limited Partnership, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B312, B336 and B436, Second Supplement to Application for Review, filed July 31, 1997 ("Second Supplement") at 1.

<sup>22</sup> Carolina PCS I Limited Partnership, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B312, B336 and B436, Third Supplement to Application for Review, filed October 15, 1997 ("Third Supplement") at 1.

8. CPCS I raises three principal arguments in its Application for Review. First, CPCS I claims the Bureau applied its payment rules more strictly to CPCS I than to other C block licensees.<sup>23</sup> CPCS I argues that the Bureau has in the past relaxed payment rules in recognition of financial difficulty, citing as an example, the *Order* that suspended installment payments for all C block licensees.<sup>24</sup>

9. CPCS I observes that in the *Part 1 Notice*,<sup>25</sup> the Commission changed the general auction rules to require submission of the second down payment ten, rather than five, days after the issuance of a public notice indicating that the Commission is prepared to award licenses, and sought comment on allowing late payments, subject to a late fee.<sup>26</sup> CPCS I also notes that the *Part 1 Notice* sought comment on a proposal to require down payment from all applicants at the same time, regardless of pending petitions to deny.<sup>27</sup> CPCS I states that sufficient funds to satisfy its second down payment obligation remained available for a full five-week period beyond the September 24, 1996 payment due date. According to CPCS I, the funds were not released during that period because there was no indication that the Commission would accept such late funds. CPCS I also states that, under the Commission's Rules, any such funds could now be applied by the Commission to offset any penalties imposed on CPCS I for its failure to make a timely second down payment.<sup>28</sup>

10. In its second principal argument, CPCS I contends that the *Order* "fails to provide a reasoned analysis for its conclusion."<sup>29</sup> In particular, CPCS I argues that the Bureau did not adequately distinguish between first and second down payments.<sup>30</sup> CPCS I asks what criteria the Bureau will use when deciding whether a payment delinquency is minor.<sup>31</sup> CPCS I also reiterates

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<sup>23</sup> Application for Review at 5-14.

<sup>24</sup> *Id.* at 5 and n. 7 (citing Installment Payments for PCS Licenses, *Order*, DA 97-649 (rel. March 31, 1997)).

<sup>25</sup> Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 5686 (1997) (*Part 1 Notice*).

<sup>26</sup> Application for Review at 9 (citing *Part 1 Notice*, 12 FCC Rcd at 5696-97 and 5720-21, ¶¶ 14 and 61).

<sup>27</sup> *Id.* (citing *Part 1 Notice*, 12 FCC Rcd at 5721-22, ¶ 65).

<sup>28</sup> First Supplement at 1-2.

<sup>29</sup> Application for Review at 14-22.

<sup>30</sup> *Id.* at 14-15, 21.

<sup>31</sup> *Id.* at 17.

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several of the points it raised in the Petition, including its contention that the Commission actions concerning PCS mentioned above chilled the PCS investment climate.<sup>32</sup>

11. Finally, CPCSI argues that the Bureau's denial of the Petition harms all C block licensees. CPCSI contends that another reaaction of C block licenses will yield lower bids, thereby devaluing all C block licensees "in the eyes of the investment community."<sup>33</sup> No party opposed CPCSI's application.

#### IV. DISCUSSION

12. A waiver of our 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."<sup>34</sup> On the record presented in this proceeding, we find unique circumstances that warrant a partial waiver of our down payment rule in order to avoid a result that is contrary to the public interest.

13. In the *Second Report and Order* in the Competitive Bidding docket, we established general rules and procedures to be used for all auctionable services. In establishing the timing of down payments, we noted that this requirement would also deter defaults by discouraging financially unqualified bidders who might "shop" a winning bid in order to obtain financing for a down payment.<sup>35</sup>

14. The Bureau found that CPCSI did not have the funds on hand on the date the second down payment was due. However, CPCSI, in its First Supplement, offered affidavits to support its assertion that it had access to adequate funds to meet its second down payment obligation on or about September 24, 1996. Although sufficient funds were available, CPCSI states that its investors would not release those funds based on advice that the Commission would not accept a late payment.<sup>36</sup> Based on its affidavit, it appears that CPCSI had a firm financial commitment

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<sup>32</sup> *Id.* at 19.

<sup>33</sup> *Id.* at 22-23.

<sup>34</sup> *See* 47 C.F.R. § 24.819(a)(1)(i) and (ii).

<sup>35</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2381-82, ¶ 192 (1994).

<sup>36</sup> First Supplement at 4 (affidavit of Charles F. Harry, III).

from its lending institution equal to the amount of its second down payment on or about September 24, 1996 -- a situation indicative of financial viability.<sup>37</sup>

Likewise, by placing sufficient funds in escrow to meet its financial obligations, CPCSI shows a continuing financial viability and adequate financial qualifications, to provide telecommunications service to the public. In light of this information, it does not appear that the purposes for which the second down payment rule were developed will be frustrated by partial waiver of the rule in this instance.

15. According to the record, prior to the second down payment, CPCSI made all previously required auction payments on time and in full. In addition, CPCSI maintains that it currently has sufficient funds in an escrow account to meet its second down payment obligation. It failed to make payment because of investor uncertainty about the terms under which a payment might be accepted. It is also evident that CPCSI would have been willing to make the second down payment late had it known such payment would have been accepted by the Commission with a late payment fee. We note that the precedential cases on accepting late payments were adopted by our Bureaus after the actions occurred that here are under review.<sup>38</sup> In the interest of fairness, therefore, we will grant relief on this basis. We therefore conclude that, under these limited circumstances, a strict application of the down payment deadline specified in Section 24.711(a)(2) of our Rules would be contrary to the public interest. Rather, permitting CPCSI to

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<sup>37</sup> *Id.* at 3 (affidavit of Nancy A. Truitt).

<sup>38</sup> We note that the Video Services Division, Mass Media Bureau, imposed a five percent late fee in situations where second down payments were not timely made in full due to miscalculation, inadvertence or administrative complications. *See* In the Matter of Pacific Wireless Cable, Inc., BTA No. B490, Guam, Multipoint Distribution Service, Request for Waiver of Section 21.955(b), *Order*, 12 FCC Rcd 9767 (Video Ser. Div. 1997); In the Matter of Paradise Cable, Inc., Sarasota-Bradenton, Florida, B408 Multipoint Distribution Service Request for Waiver of Section 21.955(b), DA 97-1423, *Order* (Video Ser. Div.) (rel. July 8, 1997). The Wireless Telecommunications Bureau has followed a similar course. *See* In the Matter of AMK International, Inc. and Mobilecall, Inc., *Order*, 12 FCC Rcd 1511 (Wireless Tel. Bur. 1997); In the Matter of CSS Communications, Co., *Order*, 12 FCC Rcd 1507 (Wireless Tel. Bur. 1997); In the Matter of Cenkan Towers, L.L.C. Request for Waiver of Section 90.811 of the Commission's Rules regarding Various MTA Markets, *Order*, 12 FCC Rcd 1516 (Wireless Tel. Bur. 1997); In the Matter of Electronic SMR Communication Services, *Order*, 12 FCC Rcd 1520 (Wireless Tel. Bur. 1997); In the Matter of Hickory Telephone Company, Inc., *Order*, 12 FCC Rcd 1528 (Wireless Tel. Bur. 1997); In the Matter of Independence Excavating, Inc., *Order*, 12 FCC Rcd 1524 (Wireless Tel. Bur. 1997); In the Matter of Longstreet Communications International, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules regarding Market No. B012, *Order*, 12 FCC Rcd 1549 (Wireless Tel. Bur. 1997); In the Matter of MFRI, Inc. Request for Waiver of Section 24.711 (a)(2) of the Commission's Rules regarding Market No. B435, *Order*, 12 FCC Rcd 1540 (Wireless Tel. Bur. 1997); In the Matter of Roberts-Roberts & Associates, LLC, *Order*, 12 FCC Rcd 1825 (Wireless Tel. Bur. 1997); In the Matter of Southern Communications Systems, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules regarding Market No. B085, *Order*, 12 FCC Rcd 1532 (Wireless Tel. Bur. 1997); In the Matter of The Wireless, Inc., *Order*, 12 FCC Rcd 1821 (Wireless Tel. Bur. 1997); and In the Matter of Wireless Telecommunications Company Request for Waiver of Section 24.711 (a)(2) of the Commission's Rules regarding Market No. B411, *Order*, 12 FCC Rcd 1544 (Wireless Tel. Bur. 1997).

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make a late payment in these circumstances is the best way to secure initiation of telecommunications services to the public.

16. We do not believe that CPCSI is entitled to a total waiver of the down payment rules, however. It is the applicant's responsibility to meet the Commission's requirements and ascertain actual availability of funds to comply with specified deadlines throughout the auction process. We take seriously the requirement that license winners meet our down payment deadlines because of its direct impact upon the integrity of the auction process and our need to swiftly assess the qualifications of licensees in order to ensure the rapid deployment of telecommunications services for the public. We conclude that CPCSI should be subject to a late fee equal to five percent of the \$4,633,005.00 second down payment (i.e., \$231,650.25) that was not timely paid. This amount is commercially reasonable and underscores the importance of making timely auction payments.<sup>39</sup> Finally, we note that if CPCSI becomes a licensee, it will receive the same treatment as that afforded other C block licensees with respect to installment payments.<sup>40</sup>

17. We emphasize that our decision in this case does not mean we will routinely waive second down payment deadlines under other circumstances. As we have previously observed with regard to first down payments, "the down payment deadline is essential to ensure the integrity of our auctions process by preventing insincere bidding."<sup>41</sup>

## V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that the Application for Review of Carolina PCS I Limited Partnership IS GRANTED.

19. IT IS FURTHER ORDERED that the Request for Waiver of Carolina PCS I Limited Partnership IS GRANTED IN PART, and 47 C.F.R. 24.711(a)(2) of the Commission's Rules HEREBY IS PARTIALLY WAIVED.

20. IT IS FURTHER ORDERED that Carolina PCS I Limited Partnership is directed, within ten days following release of this Order, to meet its current second down payment

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<sup>39</sup> *Id.*

<sup>40</sup> *See In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-342 (rel. Oct. 16, 1997), ¶ 2 and ¶ 21, n. 44.

<sup>41</sup> *See In the Matter of Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, Memorandum Opinion and Order*, 10 FCC Rcd 12153, 12155 (1995), *recon. denied*, 11 FCC Rcd 8211 (1996), *aff'd.*, *Commercial Realty St. Pete, Inc., v. Federal Communications Commission*, 1997 WL 358223 (D.C. Cir. 1997) (unpublished).

obligation by submitting to the Commission \$4,633,005.00 plus an additional five percent late payment fee of \$231,650.25, for a total of \$4,864,655.25.

21. IT IS FURTHER ORDERED that the Wireless Telecommunications Bureau IS DIRECTED TO GRANT the licenses for B016 (Andersen, SC), B072 (Charleston, SC), B091 (Columbia, SC), B147 (Florence, SC), B177 (Greenville-Spartanburg, SC), B178 (Greenwood, SC), B312 (Myrtle Beach, SC), B335 (Orangeburg, SC), and B436 (Sumter, SC), conditioned upon receipt of the above-referenced payment and upon other terms and conditions generally appropriate to similarly situated applicants.

22. 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