



Federal Communications Commission
Washington, D.C. 20554

April 22, 2003

DA 03-1189

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Dear Mr. Gutierrez:

This order grants the request of Poplar PCS-Central, LLC (“Poplar”) for a waiver of the deadline for Eligible Auction 35 Winners¹ to request both the dismissal of their pending Auction No. 35 long-form applications for licenses for NextWave/Urban Comm Spectrum and a refund of their down payments for those licenses still remaining on deposit with the Commission.² As we explain below, we take this action despite Poplar’s failure to meet the Commission’s waiver standard, for reasons other than those set forth by Poplar.

Background. In January 2001, the Commission concluded an auction of 422 broadband C and F block Personal Communications Service (“PCS”) licenses (“Auction No. 35”). The spectrum associated with 259 of the licenses had originally been licensed to NextWave or to Urban Comm, each of which, after having been awarded its licenses, filed for bankruptcy and then defaulted on its license payments. In the Commission’s view at the time, NextWave’s and Urban Comm’s licenses had automatically cancelled upon the licensees’ respective defaults, and, accordingly, the Commission offered new licenses for the NextWave/Urban Comm Spectrum in Auction No. 35. After close of the auction, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) ruled that Section 525(a) of the Bankruptcy Code³ prevented the Commission from revoking NextWave’s licenses for its post-bankruptcy default.⁴ Pursuant to the appellate court’s mandate, the Commission restored NextWave’s licenses to active status.⁵

¹ An “Eligible Auction 35 Winner” is a winning bidder in Auction No. 35 that, as of November 14, 2002, had pending with the Commission one or more applications for licenses of spectrum that had previously been licensed to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively “NextWave”) or Urban Comm-North Carolina, Inc. (“Urban Comm”), and was subject to the NextWave litigation (“NextWave Spectrum”) or Urban Comm proceedings (collectively, “NextWave/Urban Comm Spectrum”).

² Poplar PCS-Central, LLC, Report [sic] for Waiver, filed January 7, 2003 (“Waiver Request”). Poplar filed its request electronically in the Commission’s Universal Licensing System as an amendment to its pending Auction No. 35 long-form application (FCC Form 601).

³ 11 U.S.C. § 525(a).

⁴ NextWave Personal Communications Inc. v. FCC, 254 F.3d 130 (D.C. Cir. 2001).

⁵ Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave Personal Communications Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation, *Public Notice*, 16 FCC Red 15,970 (WTB 2001).

In response to requests by certain Eligible Auction 35 Winners, the Commission, on November 14, 2002, released its *Final Refund Order*, pursuant to which Eligible Auction 35 Winners were able to receive a refund of their remaining down payments for those licenses and a full release from all associated payment obligations.⁶ To obtain this relief, a winning bidder was required, within 45 days of the release of the *Final Refund Order* (in other words, by December 30, 2002), to request dismissal of its pending long-form applications for all licenses it had won for NextWave/Urban Comm Spectrum and also to request a refund of all funds on deposit associated with those applications.⁷ An applicant requesting this relief was also required to coordinate with, and obtain the approval of, the Department of Justice (DOJ).⁸ All Eligible Auction No. 35 Winners, except for Poplar, filed timely requests for the relief offered in the *Final Refund Order*.⁹

On January 7, 2003, Poplar filed its request for a waiver of the December 30, 2002, deadline, as well as its request for dismissal of its application for a license for NextWave spectrum.¹⁰ On January 27, 2003, the United States Supreme Court affirmed the D.C. Circuit's decision that the automatic cancellation of NextWave's licenses was not permitted under the Bankruptcy Code.¹¹

Discussion. In its waiver request, Poplar explains that "well within 45 days of the date of the Public Notice release," it filed with DOJ the papers necessary for coordination with that agency.¹² Poplar further states that it had been awaiting DOJ approval before filing its refund request with the Commission

⁶ Disposition of Down Payment and Pending Applications By Certain Winning Bidders in Auction No. 35; Requests for Refunds of Down Payments Made In Auction No. 35, WT Docket No. 02-276, *Order and Order on Reconsideration*, 17 FCC Rcd 23,354 (2002) ("*Final Refund Order*"). Pursuant to an earlier order, the Commission had already allowed Eligible Auction No. 35 Winners to receive a refund of 85 percent of their down payments for licenses for NextWave/Urban Comm Spectrum. *See* Requests for Refunds of Down Payments Made In Auction No. 35, *Order*, 17 FCC Rcd 6283 (2002).

⁷ *Final Refund Order*, 17 FCC Rcd at 23,363-64 ¶ 13, 23,368 ¶ 21, 23,372 (2002).

⁸ *Id.* at 17 FCC Rcd 23,368 ¶ 22, 23,372-73.

⁹ *See* Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for 5 C and F Block Broadband Personal Communications Services (PCS) Licenses, *Public Notice*, 18 FCC Rcd 3368 (WTB 2003); Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for Five C and F Block Broadband Personal Communications Services (PCS) Licenses, *Public Notice*, 17 FCC Rcd 26,185 (WTB 2002); Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for 49 C and F Block Broadband Personal Communications Services (PCS) Licenses, *Public Notice*, 17 FCC Rcd 25,263 (WTB 2002); Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for 33 C and F Block Broadband Personal Communications Services (PCS) Licenses, *Public Notice*, 17 FCC Rcd 24,761 (WTB 2002); Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for 156 C and F Block Broadband Personal Communications Services (PCS) Licenses, *Public Notice*, 17 FCC Rcd 24,492 (WTB 2002); Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for 12 C and F Block Broadband Personal Communications Services (PCS) Licenses, *Public Notice*, 17 FCC Rcd 23,939 (WTB 2002).

¹⁰ As it did the Waiver Request, Poplar filed its dismissal request electronically in the Commission's Universal Licensing System as an amendment to its pending Auction No. 35 long-form application (FCC Form 601).

¹¹ *FCC v. NextWave Personal Communications Inc.*, 123 S. Ct. 832 (2003) ("*NextWave*").

¹² Waiver Request at 1.

but that such approval had not been granted by the 45-day deadline.¹³ According to Poplar, it missed the deadline because “[a]n oversight of the filing procedures resulted in Poplar Central failing to timely file its Dismissal Request with the Commission.”¹⁴ Poplar argues that the facts in this case are unique, for the reason that “DOJ normally approves its form settlement agreement quickly.”¹⁵ Poplar also claims that grant of its waiver request would serve the public interest, because it would allow Poplar to use its Auction No. 35 deposits “to focus its build-out on the predominately rural licenses held by its affiliates, which will ultimately ensure service to areas clearly lacking wireless service.”¹⁶

Under Section 1.925 of the Commission’s rules, the Commission may grant a waiver request if it is shown that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

We do not believe that Poplar has made a sufficient showing to meet the waiver standard. Specifically, we do not find Poplar’s “oversight of filing procedures” to be a unique circumstance that would justify a waiver. Nor do we believe that Poplar’s delay based on its expectation of speedy approval by DOJ provides any basis for a waiver. The Commission established a 45-day deadline for filing the requests for dismissal of applications and for refunds of deposits. The Commission did not make coordination with, and approval by, DOJ a prerequisite to filing these requests, nor did it set a deadline for such coordination and approval. Poplar, thus, had no reasonable basis on which to delay filing its dismissal and refund requests. As we have stated previously, “[w]e do not regard . . . unfounded expectations as unique circumstances that warrant waiver of the filing deadline.”¹⁷

We are similarly unpersuaded by Poplar’s assertion that its Auction No. 35 deposits, if refunded, would help finance build-out in rural areas. Under Section 1.925(b)(3) of the Commission’s rules, an argument that a waiver would be in the public interest is not sufficient grounds for a grant unless the applicant also shows that grant would be consistent with the purpose of the rule(s) or that unique or unusual circumstances are involved.¹⁸ Poplar has made no such showing.

Nevertheless, we believe that the circumstances in this case warrant a waiver of the deadline for Poplar to file its dismissal and refund requests. The Supreme Court’s decision in *NextWave*, handed down after the Poplar filed its waiver request, establishes conclusively that the Commission cannot grant Poplar the licenses for NextWave Spectrum it won in Auction No. 35. We note that prior to Auction No. 35, the Bureau stated that it would return the payments made by winning bidders in the event that those bidders were subsequently required to surrender their licenses to prior applicants or license holders as a

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 2.

¹⁷ See letter order from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau to Office of the Chief Technology Officer, Government of the District of Columbia, 17 FCC Rcd 16,301, 16,302 (AIAD 2002).

¹⁸ See Application of Aircom Consultants, Inc., *Order on Reconsideration*, 18 FCC Rcd 1806, 1810-11 ¶ 12 (PSPWD 2003); 47 C.F.R. § 1.925(b)(3).

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result of final determinations reached in pending proceedings.¹⁹ The Bureau explained that returning payments under these circumstances would further the goals of Section 309(j) of the Communications Act²⁰ to hasten the development and deployment of new technologies and services and to promote competition for the benefit of the public:

Returning payments to winning bidders if licenses won are later determined to be unavailable due to subsequent resolution of other proceedings furthers these vital public interest goals by reducing uncertainty in the licensing process and encouraging auction participants to bid on licenses regardless of whether they are subject to pending proceedings. Retaining payments under the circumstances could have a chilling effect on participation in Auction No. 35 and would therefore undermine our efforts to encourage more efficient use of the spectrum.²¹

We believe that this rationale is equally applicable in the instant case where a final determination reached in a pending proceeding makes it impossible to grant a license to an auction winner. Moreover, as Poplar explains, except for meeting the filing deadline, it has complied with all procedures established in the *Final Refund Order* for obtaining a refund of Auction No. 35 deposits.²² The combination of these factors persuades us that we should waive the filing deadline.

Conclusion. For the reasons above, we grant Poplar's Waiver Request. We take this action pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended,²³ and pursuant to authority delegated by Section 0.331 of the Commission's rules.²⁴

Sincerely,

Margaret W. Wiener, Chief
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

¹⁹ C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000, *Public Notice*, 15 FCC Rcd 19,485, 19,493-94 (WTB 2000) ("*Procedures Public Notice*").

²⁰ 47 U.S.C. § 309(j).

²¹ *Procedures Public Notice*, 15 FCC Rcd at 19,494.

²² See Waiver Request at 1.

²³ 47 U.S.C. §§ 154(i), 303(r), and 309(j).

²⁴ 47 C.F.R. § 0.331.