



Federal Communications Commission
Washington, D.C. 20554

May 21, 2003

DA 03-1752

Gerald S. Rourke, Esq.
7501 Hackamore Drive
Potomac, MD 20854

Re: Tel-Com Wireless Cable TV Corp.

Dear Mr. Rourke:

This letter responds to your April 29, 1999 and May 14, 1999 letters (collectively referred to herein as "Waiver Requests") filed on behalf of Tel-Com Wireless Cable TV Corporation ("Tel-Com").¹ For the reasons set forth below, we deny Tel-Com's Waiver Requests.

Tel-Com was the winning bidder for three Basic Trading Area (BTA) licenses² in the Commission's Multipoint Distribution Service Auction (Auction No. 6), which closed on March 28, 1996.³ On May 23, 1997, the Video Services Division ("Division") of the Mass Media Bureau issued an Order assessing an interim default payment against one of the three licenses for which Tel-Com was a winning bidder.⁴ On July 25, 1997, the Division issued a Public Notice conditionally granting the remaining two BTA authorizations to Tel-Com subject to the Commission's installment payment rules, including the execution of the required promissory

¹ Letter from Gerald S. Rourke, Esq., Counsel for Tel-Com Wireless Cable TV Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission, dated April 29, 1999 ("*April 29th Letter*"); Letter from Gerald S. Rourke, Esq., Counsel for Tel-Com Wireless Cable TV Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission, dated May 14, 1999 ("*May 14th Letter*"). On March 17, 1999, Tel-Com Wireless Cable TV Corporation changed its name to Fifth Avenue Channel Corp. See Letter from Adam Taylor, Chief Operating Officer, 5th Avenue Channel Corp., to Secretary, Federal Communications Commission, dated May 18, 1999.

² The three BTA licenses were B466 (Wausau, Wisconsin), B432 (Stevens Point, Wisconsin) and B189 (Hickory, North Carolina).

³ "Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas," *Public Notice* (rel. March 29, 1996).

⁴ Tel-Com defaulted on its second down payment for the Hickory, North Carolina license. See In the Matter of Tel-Com Wireless Cable TV Corporation, BTA No. B189 Multipoint Distribution Service, *Order*, 12 FCC Rcd 6747 (1997) ("*Tel-Com Wireless Order*"). The Commission has distinguished defaults at the initial down payment deadline from those that arise later in the post auction process. See TPS Utilicom, Inc. Request for Waiver of Sections 1.2109 and 1.2107 of the Commission's Rules Regarding BTA043, BTA127, BTA215, and BTA330, *Order on Reconsideration*, DA 03-480 (rel. Feb. 21, 2003); TPS Utilicom, Inc. Request for Waiver of Sections 1.2109 and 1.2107 of the Commission's Rules Regarding BTA043, BTA127, BTA215, and BTA330, *Order*, 16 FCC Rcd 14,835 (2001).

notes and security agreements.⁵ By a July 24, 1998 letter, the Commission provided Tel-Com with the required loan documentation, execution instructions, and installment payment plan for the licenses.⁶ Pursuant to the rules, Tel-Com needed to return fully executed loan documents to the Commission and to pay its required installment payments by April 29, 1999.⁷

On April 29, 1999, Tel-Com submitted its initial waiver request and attached two checks purporting to satisfy its installment payment obligations.⁸ Specifically, Tel-Com alleged that it sought waiver of Section 21.959(a) of the Commission's rules to ensure that the Commission would not apply the funds submitted as installment payments to satisfy Tel-Com's outstanding default obligation.⁹ Notably, Tel-Com placed a restrictive condition on the back of each of the checks indicating that the Commission's endorsement constituted the grant of the waivers requested.¹⁰ In its filing, Tel-Com also acknowledged that it had not provided the Commission with the required executed promissory notes or security agreements.¹¹ The Commission subsequently returned the checks to Tel-Com, explaining that because of the restrictive endorsements the checks could not be processed to satisfy Tel-Com's installment payment obligations.¹² Tel-Com filed a letter on May 14, 1999, explaining that it would resubmit its required installment payments along with executed loan documentation upon the Commission's grant of its April 29, 1999 waiver request.¹³ To date, the Commission has not received any executed loan documentation nor any acceptable installment payments for the subject licenses.

⁵ "FCC Announces Grant of MDS Authorizations," *Public Notice*, Report No. D-941-A (rel. July 25, 1997).

⁶ See *April 29th Letter* at 1.

⁷ 47 C.F.R. § 1.2110 (f)(3) (1998).

⁸ Tel-Com filed the checks with Commission instead of the Mellon Bank, stating that on account of "the unusual circumstances of this case there may be no purpose in Tel-Com making these payments if a waiver is not granted." *April 29th Letter* at 1.

⁹ *Id.* Under the Commission's rules, a bidder that withdraws a high bid during the course of an auction is subject to a bid withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the subsequent winning bid. If a high bid is withdrawn on a license that remains unsold at the close of the auction, the withdrawing bidder will be required to make an interim payment equal to three percent (3%) of the net amount of the withdrawn bid. This payment amount is deducted from any upfront payments or down payments the bidder has deposited with the Commission. 47 C.F.R. § 1.2104(g)(2) (1998).

¹⁰ The restrictive condition placed on each check stated in pertinent part that "endorsement or deposit of this check constitutes grant of a waiver of Sec. 21.959(a) of FCC rules."

¹¹ *April 29th Letter* at 1 ("[t]he Installment Payment Plan Notes and Security Agreements for Wausau and Stevens Point have been executed by Tel-Com and will be delivered to the Treasury Department in Homewood, Alabama, promptly upon grant of the requested waiver by the Commission.")

¹² See Letter from Gerald S. Rourke, Esq., to Regina Dorsey, Chief, Billings and Collections, Federal Communications Commission, dated May 13, 1999 ("*May 13th Letter*").

¹³ *May 14th Letter* at 1.

Tel-Com's waiver requests allege that it was concerned that Section 21.959(a) of the Commission's rules could be interpreted to mean that funds submitted to cover an installment payment for one market could be applied towards an outstanding default obligation in another market.¹⁴ In the instant matter, however, Tel-Com had sufficient funds on deposit to satisfy the initial 3% default payment assessed by the Division.¹⁵ Under the rules, and as noted in the *Tel-Com Wireless Order*, no further default payment could be calculated by the Commission until a subsequent auction.¹⁶ Additionally, and as also explained in the *Tel-Com Wireless Order*, if in a subsequent auction the license at issue received a winning bid greater than Tel-Com's then there would be no additional default payment owed beyond what had been previously assessed.¹⁷

In order for the Commission to grant a waiver of its rules, one of two tests must be met. A waiver may be granted if the underlying purpose of the rules would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest.¹⁸ A waiver may also be granted where the unique or unusual factual circumstances of the case are such that an application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or the applicant had no reasonable alternative.¹⁹ Tel-Com does not claim that its requests satisfy the Commission's waiver standard, and we find that Tel-Com has not met either of these tests.

The public interest is not served by the attempted manipulation of the Commission's rules and procedures. Setting aside the issue of whether a rule waiver was necessary, Tel-Com was not at liberty to withhold its loan documentation or the required installment payments in exchange for the grant of its request. Doing so does not support the underlying purpose of the Commission's rules nor does it serve the public interest. Even assuming, however, that Tel-Com needed a waiver to ensure that the proffered funds would be applied towards its installment payment obligations, the Commission's rules are non-negotiable. Tel-Com wholly failed to comply with the installment payment rules by withholding the required loan documentation and restricting the endorsement of its purported installment payments as leverage to obtain its requested rule waiver.

¹⁴ *April 29th Letter* at 2; *May 14th Letter* at 1.

¹⁵ *Tel-Com Wireless Order*, 12 FCC Rcd at 6749, ¶ 5; *but see* In the Matter of C.H. PCS, Inc., BTA No. B347 Frequency Block C, *Order*, 11 FCC Rcd 22,430 (1996) (applying funds on deposit to outstanding default obligation).

¹⁶ *Tel-Com Wireless Order*, 12 FCC Rcd at 6749, ¶ 5.

¹⁷ *Id.*

¹⁸ 47 C.F.R. § 1.925 (2002).

¹⁹ *Id.*

Mr. Gerald S. Rourke, Esq.
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There is also nothing unique, unusual or unduly burdensome in the facts presented by Telecom's request. Rather than comply with our rules, Tel-Com fully admits in its pleadings that it purposefully withheld its required loan documentation and took deliberate action to ensure that the Commission could not deposit its purported payments without granting its requested waiver.²⁰ Tel-Com certainly had reasonable alternatives to attempting to avoid the Commission's rules and processes, and it bears the risk of having proceeded in such a manner. The Commission's rules clearly state that the failure to make a timely payment results in the automatic cancellation of a license.²¹

Tel-Com failed to meet both of the specified conditions associated with the grant of the licenses. At the time of Tel-Com's Waiver Requests, section 1.2110(f)(3) of the Commission's rules specifically conditioned the grant of a license and participation in the installment payment plan upon the execution of a promissory note and security agreement.²² Furthermore, Tel-Com's failure to execute the required loan documentation does not alter the binding obligation it made as the winning bidder in Auction No. 6. Pursuant to section 1.2110(f)(4) of the Commission's rules, the failure to submit an installment payment by the last day of a 180 day grace period resulted in the automatic cancellation of a license without further action by the Commission.²³ In accordance with the Commission's rules, Tel-Com is in default and the licenses automatically cancelled for failure to pay the installment payment obligations by April 29, 1999.²⁴

Accordingly, Tel-Com's Waiver Requests are denied. This action is taken pursuant to authority delegated by Sections 0.331 and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925.

Sincerely,

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

²⁰ See May 13th Letter.

²¹ 47 C.F.R. § 1.2110(g)(3) (1998).

²² *Id.*

²³ 47 C.F.R. § 1.2110(f)(4) (1998).

²⁴ Tel-Com Wireless is subject to the Commission's debt collection procedures under the Debt Collection Improvement Act. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, Chapter 10, 110 Stat. 1321, 1321-358 - 1321-381 (1996). To date, the Commission has sent Tel-Com two demand letters to collect the funds owed but those letters have been returned to the Commission as undeliverable.