



Federal Communications Commission
Washington, D.C. 20554

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DA 04-601

Via Certified Mail, Return Receipt Requested

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Dear Messrs. Irwin and Hardy,

This letter responds to the Petition filed by MBO Wireless, Inc. ("MBO")¹, requesting a waiver of the rule that requires the automatic cancellation of MBO's Personal Communications Services ("PCS") licenses KNLF591 (BTA 433) and KNLF925 (BTA 311).² But for our action today, MBO's licenses would, by operation of Section 1.2110(g)(4)(iv) of the Commission's rules, be deemed automatically cancelled as of January 31, 2001, because MBO failed to pay the amounts equivalent to those assessed as late fees by the deadline established under subsections (iii) and (iv) of Section 1.2110(g)(4) of the Commission's rules. Given the unique circumstances of this case, however, we have determined that strict application of this Section to establish a deadline that would result in license cancellation serves neither the rule's underlying purpose nor the public interest. Accordingly, for reasons detailed further below, we waive Section 1.2110(g)(4) of the Commission's rules, *nunc pro tunc*, with respect to the January 31, 2001, deadline for those amounts that would otherwise have triggered the automatic cancellation of MBO's licenses, and we extend that deadline to March 14, 2001, the date MBO paid the amounts at issue.

Background

MBO requests relief with respect to two PCS licenses. MBO placed winning bids for the two licenses in Auction Nos. 5 and 11, respectively.³ In those two auctions, MBO qualified as a designated entity eligible to pay its high bids in installment payments pursuant to the Commission's rules.⁴ In its Petition, MBO acknowledges that it owed the Commission installment payments due July 31, 2000 for each of the licenses.⁵ MBO asserts that it forwarded certified checks in the amount of those payments on

¹ MBO Wireless, Inc., PCS C Block License KNLF591, BTA433, Stillwater, Oklahoma, PCS F Block License KNLF925, BTA311, Muskogee, Oklahoma, *Petition For Reinstatement of Licenses and Request For Waiver of Section 1.2110(g)(4) of the Commission's Rules*, filed April 26, 2001 ("Petition").

² 47 C.F.R. § 1.2110(g)(4).

³ *See* *Entrepreneurs' C Block Auction Closes, Public Notice*, DA 96-716 (rel. May 8, 1996); *D, E, and F Block Auction Closes, Public Notice*, DA 97-81 (rel. Jan. 15, 1997).

⁴ Petition at 3; *see* 47 C.F.R. §§24.709, 24.711, 24.716, and 24.720.

⁵ Petition at 3-4 (MBO states that its bank debited its accounts for the checks on August 8, 2000). Letter to Thomas Sugrue, Chief of the Wireless Bureau from David Irwin, Counsel for MBO dated December 5, 2001.

July 28, 2000.⁶ However, MBO does not dispute that the Commission received those payments after the July 31, 2000 due date.⁷ Accordingly, MBO also does not dispute that the Commission properly assessed MBO late fees on those payments.⁸ MBO admits that following the payments the Commission received shortly after the July 31, 2000 due date, for more than two quarters MBO made no payments toward the outstanding amounts that remained as a result of the assessed late fees.⁹ Because MBO did not make payments for over two quarters toward these outstanding amounts (*i.e.*, an amount equivalent to the late fees assessed when MBO missed its July 31, 2000, deadline), the licenses cancelled pursuant to Section 1.2110(g)(4)(iv) of the Commission's rules.¹⁰ MBO now requests that the Commission waive Section 1.2110(g)(4).¹¹

⁶ Petition at 3.

⁷ Petition at 4.

⁸ See 47 C.F.R. §1.2110(g)(4); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 437 (1997) (“the late fees we adopt will accrue on the next business day following the payment due date[.]”) Because MBO's first late fees accrued as soon as the July 31, 2000, payments became overdue – *i.e.*, on August 1, 2000 – once the Commission received MBO's July 31st payments (in early August), the Commission's accounting rule called first for the application of those monies to discharge the late fees that accrued on August 1, and then for the application of the remaining amount to the interest and installment payments due on July 31. See 47 C.F.R. § 1.2110(g)(4)(iii). This remaining amount was insufficient to pay the entire July 31st installment payment obligation; MBO was short by the amount of the late fees. This accounting dynamic continued through the January 31, 2001, date of automatic cancellation, when the rules would call for MBO's licenses to be cancelled automatically for failure to pay an amount equal to the late fees assessed for failure to make the July 31, 2000, payment on time. While this amount is not – as an accounting matter – technically classified as late fees, we consider the basic issue here to be one of automatic cancellation stemming from the late fee rules. Accordingly, in adjudicating MBO's request for waiver, we will examine the underlying purpose of the rules that result in cancellation of license for failure to pay late fees, rather than the broader concerns that led the Commission to mandate automatic cancellation for a licensee's failure to make timely payment of its interest and installment obligations.

⁹ Subsequent required installment payments came due for the licenses on October 31, 2000 and January 31, 2001. MBO elected to defer making those subsequent payments, allegedly believing (mistakenly) that its prior July 31, 2000 payments had been timely and therefore no amounts were outstanding with respect those prior payments. Commission rules permitted MBO to defer any payment with respect to the required installment payment originally due on October 31, 2000 until April 30, 2001, subject to MBO's payment of additional amounts assessed as late fees. See 47 C.F.R. §1.2110(g)(4). Although the Commission listed amounts assessed as late fees in connection with the payments due July 31, 2000 in notices regarding payments due October 31, 2000, MBO asserts that it never received those notices. Petition at 4. MBO admits receiving a notice regarding the payments due January 31, 2001 that referenced amounts assessed as late fees in connection with payments due July 31, 2000. *Id.* However, MBO asserts that it believed those notices were in error with respect to those amounts. *Id.*

¹⁰ 47 C.F.R. § 1.2110(g)(4)(iv). MBO has sought and obtained special temporary authority to continue offering service covered by the licenses while awaiting resolution of the pending Petition. See MBO Wireless, Inc. Requests for Special Temporary Authority to Operate PCS F Block License KNLF925, BTA311, Muskogee, Oklahoma and PCS C Block License KNLF591, BTA433 Stillwater, Oklahoma, DA 01-1401, *Order*, 16 FCC Rcd 12,390 (2001) (“MBO STA Order”), *extension granted*, MBO Wireless, Inc. Requests for Extension of Special Temporary Authority to Operate PCS F Block License KNLF925, BTA311, Muskogee, Oklahoma and PCS C Block License KNLF591, BTA433 Stillwater, Oklahoma, DA 01-2938, *Order*, 16 FCC Rcd 22,453 (2001), *extension granted*, DA 02-1428, *Order*, 17 FCC Rcd 11,257 (2002), *extension granted*, MBO Wireless, Inc. Requests for Extension of Special Temporary Authority to Operate PCS F Block License WPSM237 (formerly KNLF925), BTA311, Muskogee, Oklahoma and PCS C Block License WPSM240 (formerly KNLF591), BTA433

Discussion

To obtain a waiver of the Commission's rules, MBO must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.¹²

Recognizing that small business licensees qualifying to pay winning bids for licenses over time may encounter financial difficulties over a lengthy payment period, Commission rules expressly permit such licensees to defer making required installment payments for up to two consecutive quarters after the relevant payment's original due date.¹³ However, licensees that take advantage of these automatic grace periods must pay an additional late fee. If the full amount of the required installment payment is not received before its original due date but within the first quarter after it, the licensee must pay an additional five percent (5%) of the required installment payment.¹⁴ If the full amount of the required installment payment is received after the first but within the second quarter following its original due date, the licensee must pay an additional ten percent (10%) of the required installment payment.¹⁵ The Commission assesses these late fees to "provide licensees with adequate financial incentives to make installment payments on time" in a manner "consistent with standard commercial practice of establishing late fees and developing financial incentives for licensees to resolve capital issues before payment due dates."¹⁶ Requiring licensees to pay amounts assessed as late fees is thus related to -- yet distinct from -- the fundamental requirement that licensees pay their winning bids pursuant to the Commission's rules. Requiring payment of winning bids, both principal and interest when paid in installments, protects the integrity of the auction and the Commission's licensing process.¹⁷ Requiring payment of late fee amounts encourages timeliness in making those underlying payments. As with failure to pay the required installment payment of a winning bid,

Stillwater, Oklahoma, DA 02-3498, *Order*, 17 FCC Rcd 25,318 (2002), *extension granted*, Federal Communications Commission, Universal Licensing System (<http://wireless.fcc.gov/uls/>), Application File Nos. 0001351410 (WPSM237) and 0001351428 (WPSM240), granted June 25, 2003, *extension granted*, Federal Communications Commission, Universal Licensing System (<http://wireless.fcc.gov/uls/>), Application File Nos. 0001521558 (WPSM237) and 0001521787 (WPSM240), granted November 21, 2003.

¹¹ Petition at ii.

¹² 47 C.F.R. § 1.925.

¹³ 47 C.F.R. § 1.2110(g)(4).

¹⁴ 47 C.F.R. § 1.2110(g)(4)(i).

¹⁵ 47 C.F.R. § 1.2110(g)(4)(ii).

¹⁶ *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, Third Report and Order, 13 FCC Rcd 374, 439 (1997).

¹⁷ *See, generally*, Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113 (2000), *reconsideration denied*, Licenses of 21st Century Telesis Joint Venture, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001), *review denied in part, dismissed in part*, *21st Century Telesis Joint Venture v. F.C.C.*, 318 F3d 192 (D.C. Cir. 2003).

failure to pay amounts assessed as late fees within two quarters of the related installment payment's original due date results in automatic cancellation of the license pursuant to Section 1.2110(g)(4)(iv).¹⁸

When applied to MBO's circumstances, these rules result in automatic cancellation of the subject licenses. MBO did not pay the required installment payments due on July 31, 2000. Accordingly, MBO could have paid the full amount of the required installment payments within the next quarter, provided that it also paid five percent (5%) of the required installment payments as a late fee, or within the quarter after that, provided that it also paid an additional ten percent (10%) of the required installment payments as an additional late fee. The Commission received MBO's required installment payments a few days late. Subsequently, MBO elected to defer making its next two required installment payments, originally due October 31, 2000 and January 31, 2001. Consequently, MBO made no payment during the two quarters following July 31, 2000 that could have been applied toward the amounts equivalent to the late fees assessed when MBO missed the July 31, 2000 payment deadline.¹⁹ As a result, on February 1, 2001, following the expiration of the automatic grace period of two quarters for assessed amounts equivalent to the late fees arising from MBO's slight delay in making its July 31, 2000, payments, the licenses automatically cancelled.

Given that the Commission adopted the late fee rules primarily as an incentive to encourage licensees to expedite payment within the authorized payment time frames, the circumstances regarding the imposition of the late fee merits special attention when the application of those rules results in license cancellation.²⁰ MBO asserts that it did not pay the late fee-based amounts that resulted from its late-paid July 31, 2000 installment solely because of its admittedly erroneous belief that its July 31, 2000 payments had been received on a timely basis.²¹ As MBO acknowledges, the Commission has held unequivocally that "it is the responsibility of a licensee to ensure that installment payments are timely made and that it is not the duty of the Commission to inform a licensee that payments have been missed or that a license has been terminated."²² Accordingly, MBO's asserted misunderstanding cannot, without more, relieve it of its obligations under the Commission's rules. However, had MBO's mistaken belief been correct, it would have had an additional quarter, or until April 30, 2001, to pay the October 31, 2000 and January 31, 2001 required installment payments, together with all outstanding amounts assessed as late fees. In

¹⁸ 47 C.F.R. § 1.2110(g)(4)(iv).

¹⁹ Petition at 4.

²⁰ We have taken a much stricter approach with respect to licensees who have failed on a more fundamental level to honor their loan obligations. As discussed more fully below, when a licensee's payment failure involves the core of its bid obligation – the principal and interest that it owes – the Commission has consistently declined to exercise much flexibility except within the rulemaking context (and very little flexibility at that), due to the dangers that such flexibility presents to the bedrock presumption that underlies the integrity of the auctions process as a spectrum allocation tool – *i.e.*, that those who value the spectrum the most, as demonstrated by *bona fide* high bids, are presumed to be those best able to put that spectrum to its most efficient use. If the Commission were to exercise much flexibility in relieving bidders from their bid obligations, then the bid would cease to operate as an effective proxy for identifying those who value the spectrum the most, thereby undermining the presumption that the high bidder is best able to put the spectrum to its most efficient use.

²¹ Petition at 4.

²² Petition at 9 (citing Lakeland PCS LLC and Cricket Licensee (Lakeland) Inc. for Assignment of PCS License for Station KNLG741, *Second Order on Reconsideration*, 15 FCC Rcd 23,733, ¶4 (2000)).

fact, when MBO made its next payment on March 14, 2001, prior to what MBO mistakenly believed to be its deadline, MBO requested a statement of all amounts then-outstanding in connection with the installment payment plan for both licenses and paid the full amount, including all amounts assessed as late fees.²³

The circumstances of MBO's July 31, 2000 payments indicates that an application of the deadline for amounts equivalent to the late fees that resulted from the late-paid July 31, 2001 installment does not serve the deadline's underlying purpose of encouraging timely payment. Considering the Commission's receipt of MBO's payment of amounts originally due July 31, 2000 within a few days of that date and MBO's March 14, 2001 payment of all amounts then-outstanding, we conclude that enforcing the deadline for payment of amounts assessed as late fees in connection with the payments due July 31, 2000 is not necessary to provide the appropriate incentive to make timely payment of those amounts. If, however, the facts of this case had provided any indication that MBO lacked the financial wherewithal, basic responsibility or willingness to pay the equivalent of the late fees by the January 31, 2001, deadline, then it would appear that a waiver would not be justified. Under such circumstances, we may well regard enforcement of the aspect of the automatic cancellation rule that can be triggered by failure to pay late fees alone as a critical element in preserving the integrity of the auctions process. Here, however, MBO's course of conduct tends to demonstrate that MBO's failure to make timely payments of the amounts at issue resulted from MBO's mistake rather than insufficient incentive, unwillingness, or inability to make timely payment.²⁴

Just as importantly, with respect to granting a waiver,²⁵ enforcing the deadline of Section 1.2104(g)(4)(iii) with respect to amounts assessed as late fees without serving the rule's underlying purpose would be contrary to the public interest. Doing so would result in automatic cancellation of the licenses, disrupting the Commission's prior assignment of the licenses based on MBO's competitive bids for the licenses without achieving any countervailing benefit. The Commission assigns licenses using competitive bidding to promote the public interest objectives of Section 309(j) of the Communications Act.²⁶ Payment of winning bids in compliance with Commission rules is critical to realizing those public interest objectives. As the Commission has stated previously:

Section 309(j) specifically includes a presumption that licenses should be assigned by auction to those who place the highest value on the use of the spectrum. Such entities are presumed to be those best able to put the licenses to their most efficient use. The ability to make installment payments on a timely basis as a condition of retaining a license is intrinsic to the notion that licensees who cannot make timely payments

²³ Petition at 5.

²⁴ We stress that MBO's mistake of fact regarding late fees assessed in connection with payments originally due July 31, 2000, alone would not be sufficient to waive the deadline. Moreover, MBO's mistake of fact could not -- and did not -- relieve it of the obligation to pay the properly assessed amounts, as it did on March 14, 2001. Furthermore, this decision does not turn on fact that MBO eventually made a full payment after the payment deadline had passed. Such a late payment, or an offer of such a late payment, does not, and cannot, redeem a default.

²⁵ See 47 C.F.R. § 1.925.

²⁶ See 47 U.S.C. § 309(j)(3).

should lose the presumption. Insisting that licensees demonstrate their ability to pay as a condition to continuing to hold licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.²⁷

When licensees fail to pay winning bids, or the principal and related interest when paying winning bids in installments, on a timely basis in compliance with the Commission's rules, the presumption that the auction assigned the license to the party that placed the highest value on the license is lost.²⁸ Such circumstances raise the prospect that the defaulting licensee outbid others simply by bidding regardless of its ability to pay. If so, then the auction did not assign the license the party "best able to put the license[] to [its] most efficient use." Accordingly, in such circumstances, the Commission consistently has denied waiver of automatic cancellation pursuant to Section 1.2110(g)(4)(iv).²⁹ Indeed, were this case not centered, at heart, around missed late fees but rather missed installment payments, allegations of mistake and circumstance similar to those raised by MBO here would not distinguish it from prior cases in which we determined that denying relief was essential to safeguarding the integrity of the auctions process. In contrast, where the failure to make a timely payment occurs just with respect to amounts that arise due to the late fee rules, the underlying need for strict enforcement of the automatic cancellation rule is not as clear-cut or compelling. Accordingly, in such a case we are more inclined to examine whether the licensee's circumstances might justify a waiver of the automatic cancellation rules. As discussed at greater length above, the circumstances surrounding MBO's initial late payment, its subsequent confusion in mistakenly overlooking the imposition of the late fees, and its full payment on March 14, 2001, all minimize the possibility that MBO did not comply with the Commission's payment deadlines because of any inability or unwillingness to pay what it owed within the time constraints of the rules. Consequently, MBO's untimely payment of the amounts equivalent to the late fees that were assessed when it missed the July 31, 2000, payment deadline does not, by itself, call into question whether the Commission's auction assigned the licenses to the party that placed the highest value on the licenses, and whether, therefore, the

²⁷ Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,123-24 (2000), *reconsideration denied*, Licenses of 21st Century Telesis Joint Venture, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001), *review denied in part, dismissed in part, 21st Century Telesis Joint Venture v. F.C.C.*, 318 F3d 192 (D.C. Cir. 2003).

²⁸ *Id.*, 15 FCC Rcd at 25,123-24.

²⁹ *See, e.g.*, Licenses of 21st Century Telesis, *supra*, Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion & Order*, 15 FCC Rcd 25103 (2000), further reconsideration denied, Second Memorandum Opinion and Order, 16 FCC Rcd 18,357 (2001); Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, 14 FCC Rcd 6080 (1999), *aff'd*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1214855 (D.C. Cir., Nov. 24, 1999); Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment, *Order*, DA 04-20 (released January 8, 2004) (denying waiver to licensee that paid both required installment payment and applicable late fees days after non-payment triggered cancellation); Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. § 1.2110(g)(4)) and Debt Collection Rules (47 C.F.R. §1901 et seq.), DA 03-2368, 18 FCC Rcd 14,695 (2003) (same) (Petition for Reconsideration pending); Pan American Interactive, D.A. 03-2406, 18 FCC Rcd 15,314 (2003); Letter to Messrs. Stephen Diaz Gavin and Paul C. Besozzi, Counsel for U.S. Telemetry Corporation, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 17 FCC Rcd 6442, 6446 (2002).

assignment of the licenses to MBO was in the public interest. Accordingly, we conclude that this waiver is in the public interest.

Conclusion

For the foregoing reasons, we have determined that MBO has satisfied the standard for a waiver of the Section 1.2110(g)(4), *nunc pro tunc*, with respect to the January 31, 2001, deadline for those amounts (equaling the late fees incurred on August 1, 2000), which would otherwise have triggered the automatic cancellation of MBO's licenses, and we hereby extend that deadline to March 14, 2001, the date MBO paid the amounts at issue. Moreover, we observe that waiver *nunc pro tunc* of the January 31st deadline serves the public interest by avoiding unnecessary disruption to license assignments made pursuant to public interest objectives. In light of the *nunc pro tunc* effect of the waiver, coupled with MBO's March 14, 2001, payment, we conclude that the provisions of Section 1.2110(g)(4) have not triggered the automatic cancellation of MBO's licenses with respect to the events described in this action.

This action is taken pursuant to Section 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.³⁰

Sincerely,

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

³⁰ 47 C.F.R. § 0.331.