

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of)
)
BDPCS, Inc.)
)
)
Emergency Petition for Waiver)
of Section 24.711(a)(2) of the)
Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1997

Released: September 29, 1997

By the Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Reconsideration¹ filed by BDPCS, Inc. ("BDPCS") seeking reconsideration of a Memorandum Opinion and Order² that denied BDPCS's Application for Review of the Order of the Wireless Telecommunications Bureau (the "Bureau") denying BDPCS's request for waiver of the Commission's down payment rule.³ For the reasons discussed below, we deny in part, and grant in part, BDPCS's petition.

¹ BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, Petition for Reconsideration (filed February 5, 1997) ("Petition for Reconsideration").

² See BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, FCC 96-498, ¶ 8 (rel. January 6, 1997) ("*MO&O*").

³ 47 C.F.R. § 24.711(a)(2).

II. BACKGROUND

2. On May 6, 1996, the Commission concluded the Broadband PCS C Block auction.⁴ BDPCS was the successful high bidder on 17 licenses, with a cumulative total bid price of \$873,783,912.75.⁵ On May 8, 1996, the Commission announced by Public Notice that, pursuant to Section 24.711(a)(2) of the Commission's rules, winning bidders would be required to submit their full 10 percent down payment, or if claiming small business status, an initial one-half of their total down payment amount (five percent of their winning bids), by May 15, 1996.⁶ Accordingly, BDPCS, a winning bidder claiming small business status, was required to submit a down payment in the amount of \$36,689,196.00, bringing its total funds on deposit with the Commission to five percent of its total bid amount, or approximately \$43,689,195.00.

3. On May 15, 1996, BDPCS filed an Emergency Petition seeking a limited waiver of the down payment deadline.⁷ BDPCS claimed that a waiver was necessary because of the sudden withdrawal of all of its intended sources of financing.⁸ In its petition, BDPCS detailed a series of events that it argues resulted in its loss of financing. BDPCS stated that its parent company, QuestCom, Inc., had made arrangements with U S West Communications ("USWC") to receive a bridge loan for the required down payment.⁹ BDPCS also stated that QuestCom intended to repay the bridge loan after completing an initial public offering that was to take place while BDPCS's C Block license applications were pending.¹⁰ BDPCS contended that QuestCom continued to search for additional and alternative short-term and permanent financing from several parties. In particular, QuestCom focused on obtaining a loan from a large "Financial Institution"

⁴ See "Entrepreneurs' C Block Auction Closes," *Public Notice*, DA 96-716 (rel. May 8, 1996) ("*Closing Public Notice*").

⁵ *Id.*

⁶ *Id.*; 47 C.F.R. § 24.711(a)(2).

⁷ BDPCS, Inc., Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction (filed May 15, 1996) ("*Emergency Petition*").

⁸ Emergency Petition at 3-4. See also Certification of Robert H. Kyle, CEO and Chairman of the Board of BDPCS, Inc. and QuestCom, Inc., May 15, 1996 (attached to the Emergency Petition).

⁹ Emergency Petition at 3.

¹⁰ *Id.*

and through an initial public offering with Merrill Lynch as the lead underwriter.¹¹ BDPCS stated that financing of its payment obligations seemed secure until May 2, four days before the PCS C Block auction closed, when it lost its USWC bridge loan.¹² In addition, BDPCS noted that four days later, on May 6, Merrill Lynch withdrew as the lead underwriter for QuestCom's initial public offering.¹³ Finally, BDPCS claimed that because of the short time available, it was unable to complete its financing transactions with the "Financial Institution."¹⁴ BDPCS stated that, following the down payment due date, QuestCom selected Bear Stearns to serve as lead investment banker, and now had the financial capability to attract capital for the deployment and operation of its PCS systems.¹⁵

4. On May 20, 1996, the Bureau denied BDPCS's waiver request, on the basis that BDPCS had failed to show that special circumstances warranted a deviation from the general down payment rule, and that such a deviation would serve the public interest.¹⁶ On May 22, 1996, BDPCS filed a Petition for Reconsideration, contending that the Bureau had failed to give BDPCS's waiver request the "hard look" required by the Commission's rules and applicable case law.¹⁷ Specifically, BDPCS contended that the Bureau had ignored the unique facts and circumstances of its case, which, according to BDPCS, included the fact that BDPCS acted with reasonable diligence to meet the down payment deadline, and could not have predicted that it would lose its expected sources of funding shortly before payment was due.¹⁸ BDPCS also claimed that the Bureau had inappropriately relied upon the Commission's IVDS auction waiver decisions that are factually distinguishable from its case because BDPCS, unlike the IVDS bidders, attempted to secure back-up financing and made attempts to raise funds from several

¹¹ *Id.* at 3-4. In its pleadings, BDPCS does not provide the name of the financial institution with which it pursued financing negotiations following USWC's decision not to provide the bridge loan.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 5.

¹⁶ In the Matter of 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).

¹⁷ BDPCS, Inc., FCC Account Number 4158511615, Application for Review of Bureau Order, Petition for Reconsideration (filed May 26, 1996), at 2.

¹⁸ *Id.* at 2-3.

sources.¹⁹ In addition, BDPCS stated that the Bureau had not addressed or recognized the fact that, until the week prior to the close of the auction, BDPCS reasonably believed that it would be capable of meeting its financial obligations.²⁰ On May 30, 1996, the Bureau denied the Petition for Reconsideration, reaffirming its decision that the facts presented by BDPCS failed to warrant a deviation from the general rule, and did not show that the grant of a waiver would be in the public interest.²¹

5. On May 30, 1996, the Bureau also released a Public Notice announcing that the seventeen licenses on which BDPCS had defaulted would be reaucted commencing July 3, 1996.²² On July 17, 1996, the Bureau announced the winning bidders in that reauction.²³ On June 28, 1996, BDPCS filed an application for review of the Bureau's decision in connection with its denial of the waiver request.²⁴ The Commission denied the application for review on January 6, 1997.²⁵

6. On October 28, 1996, the Bureau released an Order assessing BDPCS a default payment in the amount of \$67,695,653.23.²⁶ This amount represents the total difference between BDPCS's winning bids and the amount of the winning bids in the C Block reauction for those licenses which attracted lower winning bids in the reauction (cumulatively \$42,765,088.50),²⁷ plus

¹⁹ *Id.* at 3-4.

²⁰ *Id.* at 4-6. BDPCS claimed that the denial of its Emergency Petition reflected a lack of support for small businesses and therefore was not in the public interest. *Id.*

²¹ Emergency Petition for Waiver of Deadline of Submission of Down Payment for the Broadband PCS C Block Auction filed by BDPCS, Inc., *Order on Reconsideration*, 11 FCC Rcd 12165 at ¶ 7 (1996).

²² See "18 Defaulted PCS Licenses To Be Reaucted; Reauction To Begin July 3rd," *Public Notice*, DA 96-872 (rel. May 30, 1996).

²³ See "FCC Announces Winning Bidders in the Reauction of 18 Licenses to Provide Broadband PCS in Basic Trading Areas: Auction Event No. 10," *Public Notice*, DA 96-1153 (rel. July 17, 1996).

²⁴ BDPCS, Inc., Application for Review - In re Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction (filed June 28, 1996) ("Application for Review").

²⁵ See *BDPCS MO&O*.

²⁶ See BDPCS, Inc, BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, Order, 11 FCC Rcd 14399 (1996) ("*Payment Order*").

²⁷ The high bids in the C block reauction for licenses B008, B036, B089, B133, B347, B358, B395, B407, B447 exceeded the high bids that BDPCS placed on those same licenses in the first C block auction. However, the high bids

an additional three percent of the lower of the two amounts for each of the 17 defaulted licenses (cumulatively \$24,930,564.73).²⁸ On November 27, 1996, BDPCS filed a Petition for Reconsideration of that Order, seeking to reduce the amount of the default payment and to obtain a three year deferral of the payment deadline.²⁹ The Bureau denied this petition on May 21, 1997.³⁰

7. On February 5, 1997, BDPCS filed the petition now before us, a Petition for Reconsideration of the *MO&O*, requesting that the Commission withdraw paragraphs 11, 12, and 13 of the *MO&O*.³¹ The paragraphs at issue read:

11. We also conclude that the Bureau was correct in denying the waiver on the basis that BDPCS admitted that on May 2, 1996, four days prior to the close of the auction, it began experiencing financial difficulties. Nonetheless, BDPCS continued to bid in the auction, and submitted the high bid for several of the licenses on which it ultimately was the high bidder. Under these circumstances, since BDPCS knew its financing was not secure, the appropriate course of action would have been to refrain from bidding and withdraw all high bids until its financing was secure. Indeed, the bid withdrawal period provides a bidder with the option of withdrawing a high bid if it determines that it lacks the funds required to support the bid, such as was the case with BDPCS.

12. The Commission's default payment provisions also encourage a bidder in BDPCS's position to withdraw its bid at the time its financing becomes insecure. The rules governing the Broadband PCS C Block auction provide that the bid withdrawal payment is calculated based upon the difference between the withdrawn bid and the amount of the subsequent winning bid, if the subsequent winning bid is less. Under these rules, no bid withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. If a high bidder defaults after the auction has closed, however, it is required to pay not only the difference between its defaulting bid and the subsequent winning bid for the license, but an additional three percent of its winning bid or the subsequent winning bid, whichever is less. The rules thus encourage bidders to withdraw prior to the close of the

received for licenses B055, B110, B149, B261, B298, B331, B391, and B413 in the reauction were less than the high bids placed by BDPCS on those licenses in the first C block auction.

²⁸ See *Payment Order* at ¶ 6; see also 47 C.F.R. §§ 24.704(a)(2), 1.2104(g).

²⁹ See BDPCS, Inc., Petition for Reconsideration (filed Nov. 27, 1996) ("November 1996 Petition").

³⁰ BDPCS, Inc., *Order*, DA 97-1066 (rel. May 21, 1997).

³¹ Petition for Reconsideration at 2.

auction, thereby resulting in less disruption and damage to the auction process. BDPCS admittedly knew four days before the auction closed that its financing was not secure, and should have withdrawn its bids at that time. In particular, having continued to bid rather than availing itself of the bid withdrawal option, we cannot conclude that the public interest would be furthered by providing BDPCS relief from the consequences flowing from this decision.

13. Finally, BDPCS's reliance upon alleged factual differences between its situation and that involving the IVDS bidders that sought waivers is misplaced. BDPCS takes the position that because it sought alternative financing arrangements, and continued to seek new financing sources until the time payment was due, it is entitled to a waiver and the Bureau was wrong in relying on those cases to deny its request. We note, as an initial matter, that the IVDS cases correctly set forth our view regarding the importance of the down payment requirement and the standard to justify a waiver of the rule. We also note that BDPCS's attempt to secure alternative financing is not the decisive factor here. Instead, the fact remains that BDPCS had time to withdraw its bid when it knew its financing was not secure, but remained in the auction and continued to bid in the hope of obtaining a waiver. BDPCS should have withdrawn from the auction and then continued to pursue back-up financing. We believe BDPCS's conduct was egregious and strongly supports denial of the waiver request.³²

III. ARGUMENTS RAISED BY BDPCS

8. BDPCS states that it accepts the Commission's ultimate decision to deny its waiver request in the *MO&O*, given the lapse of time and BDPCS's request for reduction in its default payment.³³ Rather, BDPCS requests that the Commission delete or withdraw paragraphs 11, 12, and 13 of the *MO&O*, alleging that these paragraphs are "factually incorrect and contrary to the record in this proceeding. . . ."³⁴ In particular, BDPCS argues that these paragraphs make four incorrect assertions. First, BDPCS protests the Commission's conclusion that BDPCS remained in the auction after May 2, 1996, the day it learned that its financing was insecure, "in the hope of obtaining a waiver" of the down payment rule.³⁵ Second, BDPCS contends that the Commission was in error when it intimated that BDPCS continued to place high bids on several licenses after

³² *MO&O* at ¶¶ 11, 12, and 13 (footnotes omitted).

³³ Petition for Reconsideration at 1; *see also* November 1996 Petition.

³⁴ Petition for Reconsideration at 2.

³⁵ *Id.* at 4-5.

May 2.³⁶ Third, BDPCS believes that the Commission incorrectly implied that BDPCS knew as of May 2, 1996, that it would not have financing by the May 15, 1996, down payment deadline.³⁷ Finally, BDPCS argues that the *MO&O* incorrectly suggests that BDPCS could have withdrawn from the auction on May 2, 1996, without penalty.³⁸

IV. DISCUSSION

9. After a careful review of the facts, we conclude that our characterization of BDPCS's bidding activity in the C Block auction warrants clarification. The basis for this clarification, however, does not affect our ultimate decision.³⁹ We will address each of BDPCS's arguments in the order raised.

10. With respect to BDPCS's first argument, the Commission did not state that the only reason BDPCS remained in the auction after May 2, 1996, was because it hoped to obtain a waiver of the down payment rule. The statement conveys that BDPCS would have been required to seek a waiver if it was unable to secure the funds necessary to make the down payment on time, which it subsequently had to do. We acknowledged that BDPCS was looking for alternative sources of money in stating that "BDPCS should have withdrawn from the auction *and then continued* to pursue back-up financing" (emphasis added).⁴⁰ We did not inquire specifically into BDPCS's motivation in not withdrawing from the auction on May 2, and its motivation is not relevant to our determination that withdrawal was BDPCS's best option when it lost its financing. Thus we strike the last seven words of the sentence, so that it now reads: "Instead, the fact remains that BDPCS had time to withdraw its bid when it knew its financing was not secure, but remained in the auction and continued to bid."

11. Second, in stating that after May 2, 1996, "BDPCS continued to bid in the auction

³⁶ *Id.* at 5.

³⁷ *Id.* at 6.

³⁸ *Id.* at 7.

³⁹ We note that the United States Court of Appeals for the District of Columbia Circuit recently upheld our decision to deny the requests of certain Interactive Video Data Service ("IVDS") bidders to waive our down payment rule. The Court observed that the Commission's action was consistent with past practice, citing as an example the *MO&O*. The Court also noted in the IVDS context that our explanations for denying waivers of the down payment requirement (including the principle that "enforcing the down payment requirement ensures that only *bona fide* bidders participate in auctions") were "convincing." *See* Commercial Realty St. Pete, Inc., et al. v. Federal Communications Commission, Nos. 96-1271 & 96-1320 (D.C. Cir. May 22, 1997).

⁴⁰ *MO&O* at ¶ 13.

and submitted the high bid for several of the licenses on which it ultimately was the high bidder," we meant that BDPCS remained active on several licenses. According to our auction procedures, a bidder is considered active in a round if it either submits a new high bid on a license or has the standing high bid on a license.⁴¹ A review of the auction round results reveals that BDPCS submitted several high bids on the St. Cloud, Minnesota, license (License B391) after May 2, and BDPCS held the standing high bid on sixteen other licenses after that date.⁴² We agree that BDPCS bid only on the St. Cloud license after May 2. While we stated that BDPCS submitted new high bids on several licenses, rather than several bids on one license, this discrepancy is not significant. The record demonstrates that BDPCS remained active in the auction and submitted high bids on the St. Cloud license after May 2. In addition, we note there was no activity on any other license during the rounds on and after May 2. BDPCS's bids therefore kept the auction open. Under the circumstances, BDPCS's bidding activity after the loss of financing was apparent is fairly characterized as "egregious."⁴³

12. Third, BDPCS incorrectly characterizes the Commission's statement that BDPCS's "appropriate course of action would have been to refrain from bidding and withdraw all high bids until its financing was secure"⁴⁴ as implying that BDPCS knew it would not have the necessary funds available to meet the May 15 payment deadline. Whether BDPCS knew with certainty that it would not have the funds is immaterial to our analysis. The salient fact is that after USWC withdrew its support on May 2, BDPCS no longer was financially qualified yet chose to both bid on the St. Cloud license and refrain from withdrawing its other standing high bids. We have said repeatedly that auction participants should be financially sound prior to participating in an auction.⁴⁵ We reiterate that an entity should not continue to participate in an auction if its financing falls through during the auction. BDPCS's efforts to find alternative financing when it lost the USWC bridge loan do not diminish the fact that as of May 2, 1996, it remained in the auction without any assurance that it could meet its payment obligations.

13. BDPCS draws an incorrect assumption from the Commission's statement that "the bid

⁴¹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, 5553-54 (1994); FCC Entrepreneurs' Auction - Broadband Personal Communications Services (PCS), Basic Trading Area Licenses Frequency Block C, December 11, 1995, *Supplemental Bidder Package* at 36. See also 47 C.F.R. § 24.703(f).

⁴² See "Record of Bidding Round Results from C Block PCS Auction" <<http://www.fcc.gov/wtb/auedata.html>>.

⁴³ *MO&O* at ¶ 13.

⁴⁴ *Id.* at ¶ 11.

⁴⁵ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2382 (1994) ("*Second Report and Order*").

withdrawal period provides a bidder with the option of withdrawing a high bid if it determines that it lacks the funds required to support the bid. . . ."⁴⁶ According to BDPCS, this statement suggests that BDPCS could have withdrawn on May 2 and faced no negative consequences. Our statement makes no such suggestion. As we stated when we originally adopted the default payment rule, the three percent penalty was designed in part to encourage bidders, if they were to default on certain licenses, to withdraw their bids before the close of an auction, so that other bidders may have an opportunity to bid on those licenses.⁴⁷ Our statement regarding BDPCS's "option of withdrawing" correctly suggests that BDPCS could have minimized its monetary obligations had it withdrawn its high bids prior to the close of the auction. Finally, BDPCS complains that had it withdrawn its standing high bids (as we suggested it should have done), it would have lost its eligibility after using its remaining bidding waivers.⁴⁸ BDPCS appears to believe that a loss of eligibility would work too harsh a result. To the contrary, an activity requirement is necessary in order to prevent an auction from being unduly prolonged. No longer being assured of financing, BDPCS should have dropped out of the auction.⁴⁹

⁴⁶ *MO&O* at ¶ 11.

⁴⁷ *Second Report and Order*, 9 FCC Rcd at 2383.

⁴⁸ Petition for Reconsideration at 7.

⁴⁹ We note that BDPCS has instituted legal action against USWC, claiming that USWC refused to honor its agreement to provide BDPCS with the bridge loan, thereby causing BDPCS to default on its winning bids. (*See* Lynette Luna, *Ex PCS Player Blames Lost Licenses on U.S. West*, RADIO COMMUNICATIONS REPORT, May 5, 1997, at 1). The merits of that legal action are not relevant to the matter now before the Commission.

V. ORDERING CLAUSES

14. For the reasons discussed above, we deny BDPCS's request that the Commission withdraw or delete paragraphs 11, 12, and 13 from *BDPCS, Inc., Memorandum Opinion and Order*, FCC 96-498 (rel. January 6, 1997). We grant the petition only to the extent set forth in paragraph 10 of this Memorandum Opinion and Order.

15. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by BDPCS, Inc. on February 5, 1997, IS DENIED IN PART, AND GRANTED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary