

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of)
National Telecom PCS, Inc.)
Petition for Reconsideration)
Request for Waiver of Bid Withdrawal)
Payment and Application for Authority to)
Construct a Personal Communications)
System on Frequency Block C in)
American Samoa, Market No. B492)

ORDER ON RECONSIDERATION OF
MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1999

Released: November 2, 1999

By the Commission:

INTRODUCTION

1. The Commission has before it a Petition for Reconsideration1 of its previous denial of two Applications for Review filed by National Telecom PCS, Inc. ("NatTel").2 NatTel requests reconsideration of the Commission's 1997 MO&O affirming the Wireless Telecommunications Bureau's ("Bureau"): (1) rejection of NatTel's Request for Waiver of the Commission's bid withdrawal payment rule; (2) dismissal of NatTel's long-form application (FCC Form 600) for License B-492 (American Samoa); and (3) assessment of a default payment for the B-492 license.3 For the reasons discussed below, we deny NatTel's Petition.

1 National Telecom PCS, "Request for Waiver of Bid Withdrawal Payment and Application for Authority to Construct a Personal Communications System on Frequency Block C in American Samoa, Market No. B-492, FCC 97-192," Petition for Reconsideration (filed July 21, 1997) ("Petition").

2 National Telecom PCS, Inc., Memorandum Opinion and Order, 12 FCC Rcd 10,163 (1997) ("1997 MO&O"). See also National Telecom PCS, Inc., Request for Waiver of Bid Withdrawal Payment and Application for Authority to Construct a Personal Communications System on Frequency Block C in American Samoa, Market No. B-492, Application for Review (filed June 7, 1996) ("First Application for Review"); National Telecom PCS, Inc., BTA Nos. B114, B476, and B492, Frequency Block C, Application for Review (filed Dec. 10, 1996) ("Second Application for Review") (collectively, "Applications for Review").

3 See Petition at 3; 47 C.F.R. §§ 1.2104(g), 24.704.

BACKGROUND

1. NatTel was a participant in the Broadband PCS C block auction that concluded on May 6, 1996.⁴ During the course of the auction, NatTel withdrew high bids for License B-114 (Dodge City, Kansas) and License B-476 (Williston, North Dakota).⁵ NatTel submitted the winning bid for License B-492 (American Samoa).⁶ In its *1996 Public Notice*, the Bureau announced that by May 15, 1996, winning bidders were required to remit the appropriate down payment for the licenses they had won and any bid withdrawal payments due to the Commission.⁷ The *1996 Public Notice* identified NatTel as the winning bidder on License B-492, owing a five percent down payment of \$20,550.04 and bid withdrawal payments of \$78,375 for License B-114 and \$23,245 for License B-476.⁸ Prior to the auction, NatTel had submitted an upfront payment of \$50,000. Accordingly, NatTel was required to supplement its upfront payment with an additional deposit of \$81,070 to comply with the Commission's bid withdrawal and down payment requirements.⁹

2. NatTel failed to submit its required payment on May 15, 1996, instead filing a request for waiver of the Commission's bid withdrawal payment rule.¹⁰ The Bureau subsequently denied the waiver request, found NatTel in default, dismissed its long-form application, and assessed a default payment.¹¹ NatTel filed its Applications for Review on June 7, 1996 and December 10, 1996, respectively. The Commission released its *1997 MO&O* on June 19, 1997, denying the Applications for Review and affirming the Bureau's actions.¹² On July 21, 1997, NatTel filed a Petition for Reconsideration of the Commission's decision.

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

⁵ *Id.*; see also *1997 MO&O* at 10,164, ¶ 2.

⁶ See *1996 Public Notice*; *1997 MO&O* at 10,164, ¶ 2.

⁷ See *1996 Public Notice*; *1997 MO&O* at 10,164, ¶ 2.

⁸ See *1996 Public Notice*; *1997 MO&O* at 10,164, ¶ 2.

⁹ See *1996 Public Notice*; *1997 MO&O* at 10,164, ¶ 2.

¹⁰ National Telecom PCS, Inc., "Application of National Telecom PCS, Inc. for Authority to Construct and Operate a CMRS Station in the C Block PCS Band," Request for Waiver, (filed May 15, 1996) ("Waiver Request"). See also 12 FCC Rcd at 10,165, ¶ 3.

¹¹ See National Telecom PCS, Inc., Request for Waiver of Bid Withdrawal Payment, *Order*, 11 FCC Rcd 12158 (1996) ("*Order*"). The Commission subsequently auctioned the license on which NatTel had defaulted. 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). The Bureau later assessed specific default and withdrawal payments, in the amount of \$245,858.50 for the default payment on License B492 and a total withdrawal payment of \$101,620.00 for Licenses B114 and B476. See National Telecom PCS, Inc., BTA Nos. B114, B476, and B492, Frequency Block C, *Order*, 11 FCC Rcd 14,605 (WTB 1996).

¹² *1997 MO&O*, 12 FCC Rcd at 10163. See also n. 2, *supra*.

DISCUSSION

3. NatTel cites Section 1.106 (c) of the Commission's rules as the basis for filing the Petition, claiming that circumstances have changed since the filing of the Applications for Review.¹³ NatTel claims as its "changed circumstances" the May 23, 1997 release of a Bureau *Order* granting the bid withdrawal payment waiver request of Rapid Wireless, Ltd. ("Rapid Wireless").¹⁴ NatTel states that the Bureau permitted Rapid Wireless to file its waiver request on the day that its payment was due without requiring submission of its bid withdrawal payment in combination with a first down payment.¹⁵ Therefore, NatTel argues, the Bureau's *Rapid Wireless Order* is inconsistent with the Commission's decision to affirm the Bureau's finding that NatTel defaulted under the Commission's rules.¹⁶ Accordingly, NatTel concludes that it has received "discriminatory treatment" compared to Rapid Wireless.¹⁷ NatTel also alleges "discriminatory treatment" in light of a line of Bureau decisions regarding waiver of second down payment deadlines released February 4, 1997,¹⁸ and an order providing installment payment relief for C block licensees released March 31, 1997.¹⁹

4. We find as a procedural matter that NatTel has failed to meet its burden for demonstrating "changed circumstances" within the meaning of Section 1.106(c). This section states that a petition for reconsideration that relies on facts not previously presented to the Commission or the staff may be granted only where the stated facts have changed since the last opportunity to present such matters or if the petitioner failed to uncover such facts through due diligence; or if the Commission finds that reconsideration is in the public interest.²⁰ The facts and circumstances surrounding NatTel's request, however, have not changed. NatTel's arguments are based rather on assertions that recent Bureau and Commission precedent is

¹³ Petition at 3; *see also* 47 C.F.R. § 1.106(c).

¹⁴ Rapid Wireless, Ltd., *Order*, 12 FCC Rcd. 6679 (WTB 1997) ("*Rapid Wireless Order*").

¹⁵ Petition at 4-5.

¹⁶ Petition at 4; 47 C.F.R. §§ 1.2104(g), 74.204.

¹⁷ Petition at 4.

¹⁸ *See* Cenkan Tower, L.L.C., *Order*, 12 FCC Rcd 1516 (WTB 1997); The Wireless, Inc., *Order*, 12 FCC Rcd 1821 (WTB 1997); Roberts-Roberts, *Order*, 12 FCC Rcd 1825 (WTB 1997); Southern Communications Systems, Inc., *Order*, 12 FCC Rcd 1532 (WTB 1997); RFW, Inc., *Order*, 12 FCC Rcd 1536 (WTB 1997); MFRI, Inc., *Order*, 12 FCC Rcd 1540 (WTB 1997); Wireless Telecommunications Company, *Order*, 12 FCC Rcd 1544 (WTB 1997); CSS Communications, Co., *Order*, 12 FCC Rcd 1507(WTB 1997) (collectively "*Second Down Payment Orders*").

¹⁹ *See* Installment Payments for PCS Licenses, *Order*, 12 FCC Rcd 17,325 (WTB 1997) ("*Initial C Block Relief Order*").

²⁰ *See* 47 C.F.R.. § 1.106(c).

inconsistent with the treatment of its case. We disagree and, as discussed below, find these precedents can be distinguished from NatTel's case and provide no basis for reconsideration of our earlier decision.²¹

5. NatTel's argument that, in light of the *Rapid Wireless Order*, it has received disparate treatment in the handling of its waiver request is misguided. Although both NatTel and Rapid Wireless filed withdrawal payment waiver requests on the day their down payments and withdrawal payments were due, the circumstances of the two cases were different, and the contrasting results stemmed from those differences. The Bureau granted Rapid Wireless' waiver request on the merits pursuant to the Commission's decisions in the *Atlanta Trunking Orders*.²² In the *Atlanta Trunking Orders* and similar cases, the Commission determined that its remote bidding system, which placed a zero in the bid submission field, may have contributed to auction participants' placing erroneous bids. Rapid Wireless' conduct in submitting its mistaken bid was innocent, while the Commission found that NatTel bore sole responsibility for its erroneous submission.²³

6. To the extent that NatTel and Rapid Wireless filed their waiver requests on their respective first down payment deadlines, each had run the same type of risk that if their waiver requests were denied, they could be in default for failure to pay the disputed withdrawal payment amounts on the down payment deadline.²⁴ As we noted in the 1997 *MO&O*, the reasons for our policy concerning the timing of bid withdrawal waiver requests is clearly related to the functioning of the auction process. Were we to waive the deadline for bid withdrawal payments until the Commission decides bid withdrawal waiver requests submitted on the down payment deadline, in effect we would be granting, without due consideration, waivers or extensions of the first down payment deadlines.²⁵ As explained above, however, because of the different circumstances under which NatTel and Rapid Wireless made their bid withdrawals, Rapid Wireless' waiver request ultimately was granted, while NatTel's was denied.

²¹ In the 1997 *MO&O*, the Commission rejected NatTel's argument that the Commission should have reduced its bid withdrawal payment. 1997 *MO&O*, 12 FCC Rcd at 10,172. Pursuant to 47 C.F.R. § 1.106(b)(3), we dismiss NatTel's Petition with respect to this argument because NatTel merely repeats its previous argument without relying on new facts or changed circumstances. See Petition at 9-10.

²² Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Request to Waive Bid Withdrawal Provisions, *Memorandum, Opinion and Order*, 11 FCC Rcd 17,189 (1996) and Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Request to Waive Bid Withdrawal Provisions, *Memorandum, Opinion and Order*, 12 FCC Rcd 6382, ¶ 8 (1997) ("*Atlanta Trunking Orders*"). See also "Comment Sought on Requests to Waive Bid Withdrawal Payments," *Public Notice*, 11 FCC Rcd 22,131 (WTB 1996).

²³ 1997 *MO&O* at 10,172.

²⁴ See 1996 *Public Notice*. See also "FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas," *Public Notice*, 11 FCC Rcd 18,599, *correction*, 11 FCC Rcd 18,637 (WTB 1996); "Default Payment Rules," *Public Notice*, 11 FCC Rcd 10,853 (1996).

²⁵ See BDPCS, Inc., Emergency Petition for Waiver of Section 24.711 (a) (2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd. 3230 (1997).

7. NatTel cites to the *Algreg MO&O* to support its contention that the Commission must give clearer notice of the default rules to applicants and bidders than was available in the *1996 Public Notice*.²⁶ In the *Algreg MO&O*, the Commission determined that "explicit notice" of the meaning of "ownership interest" was necessary given the severity of the sanctions and the ambiguity created by a similar rule with less severe sanctions.²⁷ No similar rule giving rise to an ambiguity of the nature of the rule in the *Algreg MO&O* exists here. Moreover, the Commission addressed NatTel's arguments concerning the assessment of the bid withdrawal payment and the propriety of the timing issue in the *1997 MO&O*.²⁸ We found that the *1996 Public Notice*, in conjunction with the Commission's rules, was unambiguous.²⁹

8. NatTel further argues that the Commission has in the past year granted relief to a "plethora of applicants/licensees" seeking relief from payment obligations.³⁰ A number of the cases cited by NatTel are inapposite because they involve instances in which the licensees have missed second down payment deadlines as a result of inadvertence or administrative error, and demonstrated that, as of the deadline, they had the funds on hand necessary to cover their payments.³¹ The Bureau also has distinguished between first and second down payment cases, recognizing that unlike the upfront and first down payments, the second down payment does not affect the timing of the auction or the Commission's review of the applicant's qualifications.³² Accordingly, NatTel's situation is distinguishable because it failed to make its first down payment, did not commit an inadvertent error, and did not attempt to demonstrate that it had funds available to cover the payment due.³³

9. We find equally unconvincing NatTel's attempt to compare its situation to C block licensees availing themselves of our financial restructuring options.³⁴ The Commission has stated unequivocally that

²⁶ *Algreg Cellular Engineering, et. al, Memorandum, Opinion and Order*, 12 FCC Rcd 8148, 8161, ¶¶ 31-33 (1997) ("*Algreg MO&O*"). The Commission released this decision on June 3, 1997, the same day that it adopted the *1997 MO&O*.

²⁷ *Id.*

²⁸ 12 FCC Rcd at 10,171, ¶¶ 14-15.

²⁹ *Id.*

³⁰ Petition at 8. *See also* cases cited at note 18, *supra*.

³¹ Petition at 8. *See also* cases cited at note 18, *supra*; Carolina PCS, *Memorandum, Opinion and Order*, 12 FCC Rcd 22,938 (1997)

³² Longstreet Communications International, Inc., 12 FCC Rcd at 1551, ¶ 8.

³³ *Id.*

³⁴ *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998).

the strict enforcement of first down payment deadlines is essential to protect the integrity of the auctions process by preventing insincere bidding and to determine the financial qualification of a new licensee to provide communications services.³⁵ In contrast to NatTel, entities facing installment payment difficulties met their down payment obligations, became licensees, and signed note and security agreements with the Commission.³⁶ NatTel failed to make the initial financial commitment necessary to reach that stage of the payment process. In failing to comply with the Commission's rules at this most basic level, NatTel has shown that it lacks the essential qualifications of a Commission licensee.

ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed July 21, 1997, by NatTel IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

³⁵ Mountain Solutions Ltd., Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets in the Broadband Personal Communications Services (PCS) C Block Auction, *Memorandum Opinion and Order*, 13 FCC Rcd 21,983, ¶ 23 (1998).

³⁶ *Id.*