



Federal Communications Commission
Washington, D.C. 20554

DA 01-2266

October 2, 2001

James A. Stenger, Esq.
Troutman Sanders LLP
401 Ninth Street, N.W.
Washington, D.C. 20004-2134

Re: Grace Period Request Letter for Allen Leeds

Dear Mr. Stenger:

This letter responds to your letter¹ on behalf of your client Allen Leeds ("Leeds") requesting a six-month grace period ("grace period request") in regard to the installment payments for two Multipoint Distribution Service ("MDS") licenses.² Leeds also requests a refund from the Commission, alleging that the monies it paid were more than the "market value" of the licenses.³ For the reasons set forth below, we deny the requests.

On August 16, 1996, the Commission granted Leeds two MDS licenses on which it was the high bidder in Auction No. 6. As a small business, Leeds was eligible to participate in the Commission's installment payment plan for MDS licenses.⁴ Once its licenses were awarded, Leeds was required to make its initial quarterly installment payments on or before November 30, 1996.⁵ After grant of the licenses, only one installment payment was made on each license.⁶ Specifically, Leeds submitted the November

¹ Letter from James A. Stenger, Ross & Hardies, Counsel for Allen Leeds, to Mark Rosetti, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated August 29, 1997 ("Grace Period Request").

² Leeds was the high bidder on the Lexington, Kentucky (B252) and Rockford, Illinois (B380) Basic Trading Areas ("BTAs") in the MDS auction that concluded on March 28, 1996. See "Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas: Down Payments Due April 5, 1996, FCC Form 304s/Statements of Intention Due May 10, 1996," *Public Notice* (rel. March 29, 1996); "FCC Announces Grant of MDS Authorizations," *Public Notice*, Report No. D-871, 1996 WL 469184 (F.C.C.) (rel. August 16, 1996).

³ Grace Period Request at 2-4.

⁴ 47 C.F.R. § 21.960(b) (1996).

⁵ 47 C.F.R. § 1.2110(e)(3) (1996); Note and Security Agreement for MDB380 (Rockford, IL BTA) at 1; Note and Security Agreement for MDB252 (Lexington, KY BTA) at 1.

⁶ Grace Period Request at 2.

30, 1996 installment payments on December 27, 1996.⁷ The next installment payments were due on February 28, 1997.⁸ Leeds failed to make the payments, and no subsequent payments were made on either license.⁹ Leeds requested a grace period by letter dated August 29, 1997.¹⁰

At the time that the grace period request was filed, Section 21.960(b)(4)(i) of the Commission's rules provided that in the event a license holder is more than ninety days delinquent on any installment payment, its license would cancel automatically.¹¹ If, during the first ninety days following any missed installment payment, a licensee required financial assistance, the rules allowed the licensee to request that the Commission grant a three (3) to six (6) month grace period, during which no installment payments need be made.¹² Because the second installment payment on each license was due on February 28, 1997, Leeds had ninety days after that date, until May 30, 1997, to submit the payments or a grace period request. Leeds failed to do so and its licenses cancelled automatically pursuant to the rule. The Commission did not receive a request for a grace period until August 27, 1997, three months after the licenses cancelled automatically.

Leeds claims that Commission staff extended the second payment deadline until May 30, 1997 (therefore, extending the grace period filing deadline until August 1997).¹³ However, Leeds does not offer any details or documentation that support its claim. Rather, Leeds submitted correspondence that suggests that its counsel did not understand that the Commission's rules then in effect allowed a licensee to pay an installment payment within 90 days of the original due date.¹⁴ Even assuming, as claimed by Leeds, that Commission staff stated that the deadline had been extended, such advice would have been contrary to the rule and the Commission would not be bound by it.¹⁵ Therefore, Leeds's request for a grace period is denied as untimely.

⁷ Undated document entitled "Payment History for MDB380 (Rockford, IL BTA)" with Attachments A-F submitted by Leeds ("Rockford Payment History"); Undated document entitled "Payment History for MDB252 (Lexington, KY BTA)" with Attachments A-F submitted by Leeds ("Lexington Payment History").

⁸ Note and Security Agreement for MDB380 at 1; Note and Security Agreement for MDB252 at 1.

⁹ Rockford Payment History; Lexington Payment History.

¹⁰ Grace Period Request at 2.

¹¹ 47 C.F.R. §§ 21.960(b)(4)(i), 1.2110(e)(4)(ii) (1996). In addition, where a licensee has defaulted on its installment payment obligations and the license has accordingly cancelled automatically, the licensee will be subject to debt collection procedures. In the Matter of Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000).

¹² 47 C.F.R. § 21.960(b)(4)(ii) (1996). The Commission's rules did not provide for the two 90 day automatic grace periods for licensees making installment payments until 1998. In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services ("PCS") Licenses, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998); 47 C.F.R. § 1.2110(f)(4) (1998).

¹³ Rockford Payment History, Attachment D (Letter from Amy L. Brett, Ross & Hardies, to Mr. Allen Leeds (Feb. 24, 1997)).

¹⁴ *Id.*

¹⁵ *Office of Personnel Management v. Richmond*, 497 U.S. 1046 (1990) (there can be no estoppel against the Federal Government where an employee has given erroneous oral or written advice contrary to statute); In the

Additionally, in its Grace Period Request, Leeds requests that the Commission reduce the amount of its obligation for the two licenses.¹⁶ Leeds contends that the high number of incumbent MDS providers in the Lexington and Rockford markets rendered the value of the licenses far less than the amount it bid for those markets. At the close of the auction, the winning bidder becomes obligated to the Commission for the full amount of winning bid.¹⁷ Allowing bidders to adjust their bids post-auction would encourage insincere bidding and therefore interfere with the Commission's goal to ensure that licenses are auctioned to those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.¹⁸ Accordingly, Leeds' request to adjust its net high bids after the auction and receive a corresponding refund of funds previously paid to the Commission is denied.

For the reasons detailed above, Leeds's requests for a grace period and for a refund of its payments ARE DENIED.

This action is taken pursuant to sections 1, 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309(j) and the authority delegated pursuant to section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

Sincerely,

Matter of Request for Review of the Decision of the Universal Service Administrator by Merced Union High School District, Merced, California, *Order*, DA 00-1887, ¶ 7 (rel. Aug. 18, 2000) (CCB) (applying *O.P.M. v. Richmond* to the Commission's rules and procedures); In re Mary Ann Salvatoriello, *Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4707-08, ¶ 22 (1991) (applying *O.P.M. v. Richmond* to the Commission's rules and procedures).

¹⁶ Grace Period Request Letter at 2-4.

¹⁷ *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 at 52 (2nd Cir. 1999), *cert. denied*, 2000 WL 795201 (a high bidder becomes "obligated to the FCC for the full amount of winning bid at the close of the . . . auction"); Application for Assignment of Broadband PCS Licenses, *Order*, FCC No. 98-301, 14 FCC Rcd. 1126, ¶1 (1998) (affirming the Wireless Telecommunications Bureau's requirement that assignees execute certain documents, including assignment and assumption agreements, and noting that the licensee's binding obligations to repay the original bid price for the licenses was incurred upon acceptance of the high bid); *see also* FCC Auction, Multipoint and/or Multichannel Distribution Service (MDS) Authorizations for Basic Trading Areas, November 13, 1995, Bidder Information Package at 21-22 (rel. Sept. 15, 1995) (stating that potential bidders should carefully consider the extent to which MDS spectrum is encumbered in developing their business plans and bidding strategies for the auction); "Reminder To Auction Participants: Exercise Caution in Submitting Bids and Make Use of Available Safeguards," *Public Notice*, DA 96-146 (rel. Feb. 7, 1996) (bidders are fully responsible for any errors made during the bidding process).

¹⁸ *Cf.*, In the Matter of Two Way Radio of Carolina, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 12035 (1999) (denying a winning bidder's post-auction request for a more favorable bidding credit that would have reduced the bidder's obligation); *aff'd.*, In the Matter of Two Way Radio of Carolina, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 11442 (2000).

James A. Stenger
October 2, 2001
Page 4

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