

DA 98-1525
Adopted: July 29, 1998
Released: July 31, 1998

Mr. Tyrone Brown
Senior Vice President, ClearComm L.P.
1750 K Street, N.W.
Washington, D.C. 20006

Re: Waiver of June 8, 1998 Election Date for PCS C Block Licensees
to Resubmit Elections with Corrections

Dear Mr. Brown:

This letter responds to ClearComm L.P.'s ("ClearComm") request for a waiver of the June 8, 1998 payment option election deadline for PCS C block licensees.¹ ClearComm requests this waiver because it claims that its June 8, 1998 election contained inadvertently erroneous information. ClearComm asserts that its errors resulted from reliance on the May 18, 1998 Public Notice containing "Frequently Asked Questions" about the *Reconsideration Order*.² ClearComm apparently failed to review the *Erratum to the FAQs*, released ten (10) days before the election, as well as the comprehensive explanation of the payment options contained in the *Reconsideration Order*. We find that the facts and circumstances presented by ClearComm are sufficiently unique to merit a waiver of the deadline. We also will allow ClearComm to begin its repayment obligations ten (10) business days from the release date of this letter, instead of on July 31, 1998.

¹See Amendment of the Commission's Rules Regarding Installment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, FCC 98-46, 13 FCC Rcd 8345 (1997) (hereinafter "*Reconsideration Order*"); see also "Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees," *Public Notice*, DA-98-741 (rel. April 17, 1998).

²See *Public Notice*, DA 98-947, "Frequently Asked Questions Regarding the Order on Reconsideration of the Second Report and Order Concerning the Broadband Personal Communications Services (PCS) C and F Block Installment Payment Plans," released May 18, 1998; and *Public Notice*, DA 98-1022, "Erratum to Frequently Asked Questions Regarding the Order on Reconsideration of the Second Report and order Concerning the Broadband Personal Communications Services (PCS) C and F Block Installment Payment Plans," released May 29, 1998 (hereinafter "*Original FAQs*" and "*Erratum to FAQs*").

We are not extending the 90-day non-delinquency period beyond the October 29, 1998 date and all other terms of the *Reconsideration Order* remain in effect.³ We discuss the specific rationale for this waiver below.

On June 8, 1998, ClearComm filed a timely election, opting to use different payment plans in accordance with the *Reconsideration Order*.⁴ ClearComm elected amnesty with prepayment credit for its licenses in the Los Angeles-San Diego, Louisville-Lexington-Evansville, and Spokane-Billings MTAs; disaggregation with resumption of payments for its licenses in the Puerto Rico-U.S.-Virgin Islands MTA; and disaggregation with prepayment for licenses in the San Francisco MTA including returning the four BTAs (Eureka, CA (B134), Fresno, CA (B157), Reno, NV (B372) and Visalia-Porterville-Hanford, CA (B458)) under the affordability exception to the disaggregation and prepayment option.⁵ The result of ClearComm's June 8, 1998 election was that a \$6,242,809.13 prepayment credit that could have been applied toward prepayment of additional licenses was "left on the table."

On June 30, 1998, ClearComm submitted an "Election Notice Correction to Conform to FCC Rules" ("*ClearComm's Correction*"). Therein, ClearComm claims that its June 8, 1998 election notice relied upon statements in the *Original FAQs* that were subsequently revised in the *Erratum to FAQs*. The *Original FAQs* indicated that "[i]f [a C Block licensee] surrender[s] a license under the affordability exception, [the licensee] do[es] not receive any credit for [its] down payment on that license."⁶ The *Erratum to FAQs* stated that the *Original FAQs* were incorrect and advised that "[p]repayment credit includes a 70 percent credit for [a licensee's] down payment on any license [it] surrender[s] under the affordability exception."⁷ Although the Commission's *Order on Reconsideration* correctly stated the formula contained in the *Erratum to FAQs*, ClearComm erroneously relied upon the *Original FAQs'* formula. Based on its reading of the *Original FAQs*, ClearComm states that it was unaware that licensees would receive prepayment credit from the down payment associated with the spectrum returned to the Commission by licensees using the "affordability" exception under the prepayment option.

In addition to its erroneous reliance on the *Original FAQs*, ClearComm argues that prepayment of the disputed BTAs is the only option permissible under Commission rules or that is mathematically feasible. According to ClearComm, its only option was to prepay the disaggregated license acquisition costs for the Eureka, CA BTA and the Visalia, CA BTA.

³*Reconsideration Order* at ¶¶ 25-26.

⁴See Letter from Tyrone Brown to Office of the Secretary, Federal Communications Commission, and attached spreadsheet, delivered by hand June 8, 1998.

⁵*Id.*

⁶See *ClearComm's Correction* at p. 2 and *Original FAQs* at p. 9.

⁷*ClearComm Correction* at p. 2 and *Erratum to FAQs* at p. 2 .

We agree in many respects with ClearComm's analysis of its election, and find that its June 8, 1998 submission was defective. The *Reconsideration Order* specified that when electing under the affordability option, licensees must prepay as many BTA licenses in the MTA as the prepayment credit will allow.

Pursuant to Section 24.819 of the Commission's Rules (47 C.F.R. § 24.819), waiver of a provision of the PCS rules is appropriate only when a party demonstrates either that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest, or that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest.⁸

We find that the facts and circumstances cited here are of sufficient novelty to warrant a waiver of the June 8, 1998 election. First, the C block election process is a unique occurrence which is unlikely to repeat itself in any other context. Second, ClearComm's submission reflects its erroneous reliance on the *Original FAQs*, which contained faulty information. Third, we do not believe that the erroneous submission was intended to enhance ClearComm's position *vis-a-vis* the other licensees, nor do we find that ClearComm intended to delay its ultimate election by submitting an erroneous submission.

This waiver request is distinguishable from instances in which a waiver would affect the integrity and efficient functioning of the auctions process.⁹ A waiver in the election date allowing the changes indicated in *ClearComm's Correction* and a brief delay in the July 31, 1998 repayment deadline will still permit timely closure in this matter and encourage the licensee to meet its obligations to the Commission. A strict application of the election date here would be unduly burdensome for ClearComm and cause extreme financial hardship. Although we find that rigid enforcement of the June 8, 1998 deadline would not serve the public interest, we caution ClearComm and its counsel that in the future, it should rely upon the Commission's Orders as a primary source of information, and keep current with all Commission and Bureau releases.

Accordingly, we hereby grant ClearComm's request for a waiver of the June 8, 1998 election date, and we accept the resubmission based upon ClearComm's June 30, 1998 *Correction*. We further order that ClearComm begin its repayment obligations ten (10) business days from the release date of this letter. This action is taken pursuant to delegated authority under Section 0.331 of the Commission's Rules, 47 C.F.R. 0.331.

⁸47 C.F.R. § 24.819(a)(1)(i) and (ii). *See also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

⁹*See, e.g.,* 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, 3235 ¶ 7 (1997) (*Petition for Review* granted in part for other reasons), 12 FCC Rcd 15341 (1997).

Sincerely,

E. Rachel Kazan, Chief
Auction Finance and Market Analysis Branch
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

cc: Robert Pettit, Esq.
Wiley, Rein & Fielding