

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
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

Adopted: September 3, 1998

Released: October 1, 1998

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review¹ filed by Mountain Solutions Ltd., Inc. ("Mountain Solutions") seeking review of a Wireless Telecommunications Bureau

¹ Mountain Solutions Ltd., Inc. Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets, Application for Review (filed May 28, 1997) ("Application for Review").

("Bureau") Order.² The *Order* denied the Mountain Solutions Emergency Petition for Waiver³ of the Commission's down payment rule.⁴ Mountain Solutions was a winning bidder for ten licenses in the broadband Personal Communications Services ("PCS") C block auction. For the reasons discussed below, we deny the Application for Review.

II. BACKGROUND

2. On May 6, 1996, the Commission concluded the broadband PCS C block auction. Mountain Solutions was the winning bidder for Licenses B053 (Bozeman, MT), B168 (Grand Junction, CO), B172 (Greeley, CO), B187 (Hays, KS), B188 (Helena, MT), B224 (Kalispell, MT), B247 (Lawrence, KS), B275 (Manhattan-Junction City, KS), B366 (Pueblo, CO), and B381 (Rock Springs, WY).⁵ Section 24.711(a)(2) of the Commission's rules required winning bidders to submit a ten percent down payment on licenses won at auction. Each winning bidder had to bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five business days after the auction closed, with the remainder of the down payment (five percent) paid within five business days after the application required by Section 24.809(b) was conditionally granted. Mountain Solutions made the first five percent down payment on the required due date;⁶ the second five percent down payment was due on September 24, 1996.⁷ Instead of making this payment, Mountain Solutions filed a waiver petition seeking additional time to secure financing to make its second five percent down payment.⁸

² Mountain Solutions Ltd., Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B053, B168, B172, B187, B188, B224, B247, B275, B366, and B381, *Order*, DA 97-891 (rel. April 28, 1997) ("Order").

³ The Mountain Solutions Emergency Petition for Waiver, filed September 24, 1996 ("Waiver Petition"); the Mountain Solutions Supplement to Emergency Petition for Waiver and Motion to Enter into Consent Decree, filed October 17, 1996 ("Supplemental Petition"); Reply of Mountain Solutions, Ltd., Inc., filed November 1, 1996 ("Reply"); the Mountain Solutions Second Supplement to Emergency Petition for Waiver, filed February 12, 1997 ("Second Supplement").

⁴ See 47 C.F.R. § 24.711(a)(2).

⁵ See "Entrepreneurs' C Block Auction Closes: FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas," *Public Notice*, DA 96-716 (rel. May 8, 1996).

⁶ See *Order* at 2, ¶ 2.

⁷ See "FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA Licenses; Final Down Payment Due by September 24, 1996," *Public Notice*, 11 FCC Rcd 11316 (1996).

⁸ *Order* at 2, ¶ 2.

3. On October 17, 1996, Mountain Solutions filed a supplemental petition, in which it (1) stated that it had secured the necessary financing to make its second down payment; (2) reiterated its request to make the second down payment late; and (3) proposed, in the alternative, to enter into a consent decree with the Commission to submit its down payment late, along with a late fee.⁹ In a second supplement, dated February 12, 1997, Mountain Solutions cited, in support of its waiver request, the Bureau's decisions in various Orders that granted waiver requests of auction winners that failed to timely submit their second down payment, and offered to tender "an irrevocable letter of credit" for the payments owed.¹⁰

4. Mountain Solutions raised four principal arguments to support its waiver request. First, Mountain Solutions contended that its timely submission of the first down payment is "evidence of its intention and ability to fulfill its obligations," and that this fact differentiates the circumstances of this case from those situations in which the Commission has denied waivers to bidders that failed to make even their first down payment.¹¹ Second, Mountain Solutions contended that its investors ceased financial discussions with Mountain Solutions out of concern that they would violate the Commission's anti-collusion rule in the D, E, and F block auction which went into effect August 1, 1996, the short-form application deadline for the D, E and F block auction.¹² According to Mountain Solutions, a Public Notice clarifying application of the anti-collusion rule in that auction led its investors to make this decision.¹³ In essence, Mountain Solutions argues that, because it filed a short-form application in the D, E, and F block auction, prospective investors in its C block licenses were reluctant to talk with Mountain Solutions for fear of contravening the D, E, and F block auction anti-collusion rule.¹⁴ Mountain Solutions,

⁹ See Supplemental Petition at 3-4.

¹⁰ Second Supplement at 4 (citing, *inter alia*, Wireless Telecommunications Company Request for Waiver of Section 24.711(a)(2) of the Commission's Rules regarding Market No. B411, *Order*, 12 FCC Rcd 1544 (Wireless Tel. Bur. 1997) ("WTC").

¹¹ Supplemental Petition at 5.

¹² *Id.* at 1-2. See also "Short-Form Filing Deadline Extended to August 1, 1996, for Auction of Broadband Personal Communications Service (D, E, and F Blocks)," *Public Notice*, 11 FCC Rcd 8799 (Wireless Tel. Bur. 1996) (extending short-form application deadline from July 31, 1996 to August 1, 1996 to permit the Commission to perform maintenance in order to correct a technical difficulty with the auction electronic filing system).

¹³ See "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E and F Block Bidders," *Public Notice*, 11 FCC Rcd 10134 (Wireless Tel. Bur. 1996). Mountain Solutions, at that time, had filed a short-form application to participate in the D, E and F block auction.

¹⁴ See "Auction of Broadband Personal Communications Service (D, E, and F Blocks)," *Public Notice*, 11 FCC Rcd 9193 (Wireless Tel. Bur. 1996) (listing Mountain Solutions as a short-form applicant).

however, fails to offer evidence indicating with which D, E, and F block applicants its potential C block investors had financial relationships. Third, Mountain Solutions claimed that its failure to make its second down payment on time also was a result of the Commission's decision not to offer it certain defaulted C block licenses on which it was the second highest bidder. Mountain Solutions claims that it was required to expend its funds to participate in the reauction of those licenses.¹⁵ Fourth, Mountain Solutions argued that if not granted a waiver, it would face default and that the Commission would have to reauction its licenses, thereby further delaying deployment of service.¹⁶

5. On October 18, 1996, the Bureau issued a Public Notice seeking comment on the issues raised in the Waiver Petition, as well as on similar waiver requests of the second down payment deadline filed by winners in various auctions.¹⁷ Several commenters, some with a financial interest in Mountain Solutions, supported the Mountain Solutions waiver request, contending that a waiver would be consistent with Congress' goal of encouraging participation of small entities in spectrum auctions. One commenter, Liberty Cellular, Inc., opposed the Waiver Petition, contending that the Bureau should strictly adhere to the Commission's rules in order to promote and maintain the integrity of the auction process.¹⁸

6. On April 28, 1997, the Bureau denied the Mountain Solutions waiver request, finding that Mountain Solutions had failed to meet the standards required to justify such a waiver.¹⁹ The Bureau was unpersuaded by Mountain Solutions' attempt to differentiate the failure to make a second down payment from the failure to make a first down payment. The Bureau noted that it has consistently denied waivers in both situations, particularly where it appeared that the party did not have the funds on hand on the date of the payment deadline.²⁰ The Bureau likewise rejected Mountain Solutions' argument that confusion among its investors regarding the anti-collusion rule

¹⁵ Reply at 7.

¹⁶ Waiver Petition at 5-6.

¹⁷ See "Pleading Cycle Established for Waivers of Down Payment Rules in the Broadband Personal Communications Services C Block, 900 MHz Specialized Mobile Radio, and Multipoint Distribution Service Auctions," *Public Notice*, 11 FCC Rcd 13145 (Wireless Tel. Bur. 1996) (establishing a comment deadline of Oct. 28, 1996, and a reply comment deadline of Nov. 1, 1996). In response, the Bureau received thirty-two comments and ten reply comments.

¹⁸ Liberty Cellular's Opposition to Emergency Petition for Waiver, filed October 28, 1996.

¹⁹ *Order*.

²⁰ *Id.* at 4, ¶ 7.

justified a waiver. Mountain Solutions, the Bureau concluded, should have secured its financing prior to the close of the auction, not four months after the auction closed, when a Public Notice clarifying the applicability of the anti-collusion rule in the upcoming D, E and F block auction, was released.²¹

7. Third, the Bureau rejected the contention that Mountain Solutions was compelled to divert funds from its second down payment to finance its participation in the C block reauction.²² The Bureau likewise dismissed the argument that a waiver is justified in order to avoid a default and reauction, which would result in a delay in the deployment of PCS services to the public.

8. The Bureau next rejected the Mountain Solutions request for "similar treatment" to that afforded certain other C block licensees that had received partial waivers for failure to make second down payments. These licensees, the Bureau concluded, had access to sufficient financing at the time the second down payment was due, and their failure to make the down payments in full was due solely to inadvertence, miscalculation or administrative complications. The Bureau likewise rejected proposals by Mountain Solutions to either now make the payment in full together with a late fee or to retain this amount in a letter of credit pending Commission consideration, because Mountain Solutions lacked financial qualification at the time the second down payment was due.²³ On May 28, 1997, Mountain Solutions filed an Application for Review of the Order, seeking relief from the Commission.

III. ARGUMENTS RAISED BY MOUNTAIN SOLUTIONS

9. Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.²⁴ The Commission may grant the application for review in whole or in part, or it may deny the application with or without specifying reasons therefor.²⁵ The filing of an application for review is a condition precedent to judicial review of any action taken pursuant to delegated authority.²⁶

²¹ *Id.* at 5, ¶ 8.

²² *Id.* at 5-6, ¶ 9.

²³ *Id.* at 6, ¶ 11.

²⁴ 47 C.F.R. § 1.115(a). *See also* 47 C.F.R. § 0.331(c).

²⁵ *Id.*, § 1.115(g).

²⁶ *Id.*, § 1.115(k).

10. Mountain Solutions argues generally that it is entitled to a waiver of Section 24.711(a)(2) of the Commission's rules because either (1) the underlying purpose of the rule is not served or would be frustrated by its application in this case, and grant of the waiver is otherwise in the public interest or (2) the unique facts and circumstances of this case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest.²⁷ A waiver of the Commission's rules may be granted upon application or by the Commission on its own motion. Requests for waivers must contain a statement of reason sufficient to justify a waiver and may be granted only upon an affirmative showing of entitlement pursuant to the rule.²⁸

11. In its Application for Review, Mountain Solutions makes several arguments which it originally raised in the Petition for Waiver, and new arguments as well. Mountain Solutions believes that the purpose of the Commission's down payment rule (*i.e.*, to deter default and ensure that winning bidders are sincere and financially sound) is not served by denying its waiver, and that timely submission of the first, not the second, down payment fulfills this purpose.²⁹ Mountain Solutions believes that its sincerity and commitment to service is demonstrated by its first down payment of \$1.2 million.³⁰ Mountain Solutions states that it experienced difficulty in accessing capital, and contends that the Bureau's denial of the waiver request contravenes the intent of Congress that the Commission be flexible with small business auction participants.³¹

12. Mountain Solutions makes several public interest arguments as well. Mountain Solutions believes that because it is a small, women-owned business, the public interest would be served by granting the waiver.³² Mountain Solutions argues that the public interest is not served if a rule is enforced when simultaneously pending before the Commission is a Notice of Proposed Rule Making that would change that rule.³³ Mountain Solutions believes that the Commission has

²⁷ *Id.*, § 24.819(a)(1).

²⁸ *Id.*

²⁹ Application for Review at 14.

³⁰ *Id.* at 15.

³¹ *Id.*

³² *Id.* at 16.

³³ *Id.* at 16-17. Mountain Solutions refers to Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 5686 (1997) ("Part 1 Notice"). In this proceeding, the Commission sought comment on a proposal to permit submission of second down payments by as many as ten business days late, along with a late fee. *Id.* at 5720-

frustrated the participation of small businesses in spectrum auctions by allowing the introduction of unlawful foreign money into the auction, causing "inflated prices."³⁴ Mountain Solutions describes how difficult the task of raising funds became after it filed its petition for waiver, due to the fact that the investors were uncertain about the status of the licenses following the payment deadline.³⁵

13. Mountain Solutions contends that it has been treated differently from similarly situated parties, thereby making denial of the waiver request an arbitrary and capricious action.³⁶ It notes that the Bureau has granted waiver requests to other parties when the rule in question was facing revision in concurrent proceedings.³⁷ Mountain Solutions states that the grant of waivers to various C block high bidders that submitted late second down payments also constitutes unequal treatment.³⁸ Likewise, Mountain Solutions notes that one C Block licensee

21, ¶ 61. The Commission thereafter adopted this rule, amending 1.2109(a) of its rules to permit winning bidders that are required to make final payment on their licenses within a certain period of time as announced by Public Notice to submit their payment ten business days after the payment deadline, provided that they also pay a late fee equal to five percent of the amount due. *See* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 429 (1997) ("Part 1, Third Report and Order"), ¶ 94.

³⁴ Application for Review at 18.

³⁵ *Id.*

³⁶ *Id.* at 22.

³⁷ *Id.*

³⁸ *See* AMK International, Inc. and Mobilecall, Inc., *Order*, 12 FCC Rcd 1511 (Wireless Tel. Bur. 1997); In the Matter of CSS Communications, Co., *Order*, 12 FCC Rcd 1507 (Wireless Tel. Bur. 1997); Cenkan Towers, L.L.C. Request for Waiver of Section 90.811 of the Commission's Rules regarding Various MTA Markets, *Order*, 12 FCC Rcd 1516 (Wireless Tel. Bur. 1997) ("Cenkan Towers"); Electronic SMR Communication Services, *Order*, 12 FCC Rcd 1520 (Wireless Tel. Bur. 1997); Hickory Telephone Company, Inc., *Order*, 12 FCC Rcd 1528 (Wireless Tel. Bur. 1997); Independence Excavating, Inc., *Order*, 12 FCC Rcd 1524 (Wireless Tel. Bur. 1997); Longstreet Communications International, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules regarding Market No. B012, *Order*, 12 FCC Rcd 1549 (Wireless Tel. Bur. 1997); MFRI, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules regarding Market No. B435, *Order*, 12 FCC Rcd 1540 (Wireless Tel. Bur. 1997); Roberts-Roberts & Associates, LLC, *Order*, 12 FCC Rcd 1825 (Wireless Tel. Bur. 1997); Southern Communications Systems, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules regarding Market No. B085, *Order*, 12 FCC Rcd 1532 (Wireless Tel. Bur. 1997); The Wireless, Inc., *Order*, 12 FCC Rcd 1821 (Wireless Tel. Bur. 1997); and WTC, *supra*. We note that the Video Services Division, Mass Media Bureau, imposed a five percent late fee in situations where second down payments were not timely made in full due to miscalculation, inadvertence or administrative complications. *See* Pacific Wireless Cable, Inc., BTA No. B490, Guam,

received a waiver of the bid withdrawal rule for a mistaken bid despite allegations of misrepresentation and lack of candor with the Commission by the bidder.³⁹ Finally, Mountain Solutions notes that the Bureau has afforded preferential treatment to all C and F block licensees by suspending payments of installment payments.⁴⁰ As a result, Mountain Solutions believes that the Commission has violated its constitutional rights to due process and equal protection.

IV. DISCUSSION

14. A waiver of the Commission's 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."⁴¹ On the record presented in this proceeding, the Commission does not find unique circumstances that warrant a waiver of our down payment rule. Indeed, we conclude that application of the down payment rule in this case serves exactly the purpose of Section 24.711, by avoiding the possibility of insincere bidding and participation in the auction process by companies lacking the financial qualifications to construct viable PCS systems. Our second down payment deadline is critical to our licensing process. Without firm evidence that Mountain Solutions had the money at the time it was due, we are unwilling to depart from our rules here. We also have a strong public interest in holding onto licenses for reauction in such cases, because there is no question of our claim to the license.⁴²

15. We reject Mountain Solutions' argument that it is not receiving treatment similar to that afforded other license applicants seeking waivers of payment deadlines. Unlike situations in which the Commission has afforded relief, *e.g.*, the Carolina PCS I Limited Partnership (CPCSI)

Multipoint Distribution Service, Request for Waiver of Section 21.955(b), *Order*, 12 FCC Rcd 9767 (Video Ser. Div. 1997); Paradise Cable, Inc., Sarasota-Bradenton, Florida, B408 Multipoint Distribution Service Request for Waiver of Section 21.955(b), DA 97-1423, *Order* (Video Ser. Div.) (rel. July 8, 1997).

³⁹ See Application for Review at 4 (citing PCS 2000, *Memorandum Opinion and Order*, PCS 2000, L.P., For Broadband C Block Personal Communications Service Facilities, 12 FCC Rcd 1681 (1997)).

⁴⁰ *Id.* at 5.

⁴¹ See 47 C.F.R. § 24.819(a)(1)(i) and (ii).

⁴² *FCC Report to Congress on Spectrum Auctions*, Federal Communications Commission, Wireless Telecommunications Bureau, WT Docket No. 97-150, FCC 97-353 (rel. October 9, 1997) ("Report to Congress"), pp. 30, 39. See also *In Re GWI PCS1, Inc., et al.*, Case No. 397-39676-SAF-1 (Bankr. N.D. Tex.) (pending).

case,⁴³ Mountain Solutions has failed to demonstrate its financial viability at the time its second down payment obligation was due. Indeed, on the day its second down payment was due, Mountain Solutions requested an additional 30 days to meet its obligation to the Commission.⁴⁴ CPCSI demonstrated financial viability based upon the fact that it had access to adequate funds at the time its second down payment obligation was due.⁴⁵

16. Even considering Mountain Solutions' offer to obtain an irrevocable letter of credit to pay the Commission the full amount of the second down payment plus a five percent late fee in exchange for award of its licenses, we are not persuaded that Mountain Solutions is being treated differently than other licensees that sought payment deadline waivers from the Commission.⁴⁶ In other instances where we have partially granted a payment deadline waiver request, the petitioner receiving relief had the money at the time it was due. In some cases, such petitioners also demonstrated their continuing financial viability by setting aside funds in an escrow account or maintaining funds on deposit with the Commission that were sufficient to meet their financial obligations.⁴⁷ Sufficient funds beyond the control of these licensees were available to satisfy their payment obligations to the Commission. Mountain Solutions, however, only has proposed tendering an irrevocable letter of credit to satisfy its payment obligations. Mountain Solutions'

⁴³ See Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding BTA Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Frequency Block C, 12 FCC Rcd 22938 (1997) ("CPCSI").

⁴⁴ Waiver Petition at 3.

⁴⁵ *CPCSI*, 12 FCC Rcd at 22944, ¶ 14. CPCSI offered affidavits to support its assertion that it had access to adequate funds to meet its second down payment obligation on or about September 24, 1996. Although, according to CPCSI, sufficient funds were available to it, CPCSI stated that its investors would not release those funds based on advice that the Commission would not accept a late payment. Based on its affidavit, the Commission concluded that it appeared CPCSI had a firm financial commitment from its lending institution equal to the amount of its second down payment on or about September 24, 1996 -- a situation indicative of financial viability. *Id.* See also *Metricom, Inc.'s Request for Waiver of Section 27.208(a) of the Commission's Rules for Wireless Communications Service Markets: ME30A, ME45A, ME46A, RE01D, RE05C, RE05D, RE06C and RE06D*, *Order*, 13 FCC Rcd 890, 892 (Wireless Tel. Bur. 1998), ¶ 7 (no question of ability to make final payment); *Magnacom Wireless, L.L.C., Request for Waiver of Section 24.716(a)(2) of the Commission's Rules, File Nos. 00105CWL97, 00878CWL97 through 00889CWL97*, *Order*, 13 FCC Rcd 766, 768 (Wireless Tel. Bur. 1998), ¶ 7 (the facts indicate that Magnacom was financially qualified at the time its second down payment was due).

⁴⁶ See Second Supplement at 4.

⁴⁷ See *CPCSI*, 12 FCC Rcd at 22944, ¶ 14 (CPCSI, a PCS C block licensee, placed sufficient funds in an escrow account to fund its second down payment financial obligations); see also *Cenkan Towers*, 12 FCC Rcd at 1518, ¶ 7 (Cenkan Towers, a 900 MHz specialized mobile radio licensee, maintained sufficient funds on deposit at the Commission to satisfy its second down payment obligations).

offer to pay an obligation is not the same thing as actually relinquishing control of the funds to make the payment by placing the funds in escrow with a financial institution or on deposit with the payee. We find this to be another distinction between Mountain Solutions' request for a payment deadline waiver and the waiver requests of other licensees that were granted relief.

17. Section 309(j)(5) requires financial qualification for grants of licenses to applicants selected through competitive bidding.⁴⁸ In the *Second Report and Order* in the competitive bidding docket, we established general rules and procedures to be used for all auctionable services.⁴⁹ The down payments are a means of evaluating the financial qualifications of a bidder and it is important to determine this status early.⁵⁰ In establishing the timing of down payments, we noted that this requirement would also deter defaults by discouraging financially unqualified bidders that might "shop" a winning bid in order to obtain financing for a payment.⁵¹ The integrity and functioning of the auction process is dependent upon winning bidders meeting their down payment obligations on time.⁵² Timeliness of such payments is a necessary indication to the Commission that the winning bidder is financially able to meet its obligations on the license and intends to use the license for the provision of service to the public. Indeed, failure to make a timely down payment constitutes a significant early warning for the Commission in determining whether to grant the license.

18. We are unpersuaded that the failure to submit a second down payment -- having submitted the first down payment -- is somehow different from the cases in which the Bureau

⁴⁸ See 47 U.S.C. § 309(j)(5) (referencing, among other things, 47 U.S.C. § 308(b), which conditions license grant upon meeting financial qualifications specified by the Commission).

⁴⁹ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994) ("Competitive Bidding Second Report and Order").

⁵⁰ *Report to Congress* at 30. (If an auction winner fails to make one of its initial required down payments, it is in default and the Commission can either reauct the licenses in question or offer them to the second highest bidder.) See also 47 C.F.R. § 1.2109(b). In adopting down payment provisions for Broadband PCS the Commission endorsed the philosophy of the *Second Report and Order* stating that such a rule is appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5562-5563 (1994) ("Fifth Report and Order"), ¶¶ 72-73. *Part 1, Third Report and Order*, 13 FCC Rcd at 430, ¶ 96 ("the strict enforcement of payment deadlines enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications").

⁵¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2381-2382, ¶ 192.

⁵² *Part 1, Third Report and Order*, 13 FCC Rcd at 430, ¶ 96. We noted our belief that the *bona fide* ability to pay demonstrated by a timely initial down payment is essential to a fair and efficient auction process.

refused to grant a waiver for failure to submit the first down payment. The purpose of the second down payment rule is to ensure the financial viability of a license winner and to provide an indication as to the capability of the winning bidder to actually build out its system. This is the last payment that is required before the Commission grants the license and proceeds with installment payments under a note and a security agreement. It is important that financial viability be clearly demonstrated before we grant the license because the Commission runs the risk of bankruptcy tying up the license.⁵³ Thus, we think it important to uphold application of the rule in this instance. As the Bureau pointed out, if we grant a waiver under these circumstances, a winning bidder will be less likely to make sincere bids in the auction, relying instead on the possibility of "shopping" its licenses once the auction closes. In amending our rules to permit licensees ten additional days within which to meet their second down payment deadline, the Commission recognized that applicants need additional flexibility to overcome unexpected or unforeseeable difficulties when trying to arrange financing and make substantial payments under strict deadlines.⁵⁴ In past instances where the second down payment deadline was waived, the Bureau recognized the licensee's good faith and ability to pay as evidenced by its timely remittance of all earlier payments and prompt action to cure the delinquency.⁵⁵ In this case, however, not only did Mountain Solutions request an additional 30 days to secure its financing -- and thus evidence its lack of access to financial resources at the time its second down payment was due -- but it also failed to take steps to remit the funds to the Commission once they were presumably obtained. In addition, we note that Mountain Solutions participated in the C block reauction, which closed July 16, 1996, winning two licenses.⁵⁶ As a result, Mountain Solutions expended funds that could have been used to meet its second down payment obligation for licenses won in the C block auction.

19. Mountain Solutions asserts that because it is a small, women-owned business, the public interest would be enhanced by granting the waiver. Mountain Solutions contends because the Commission proposed to change its rules in order to accommodate other C block bidders, it is

⁵³ See letter from Chairman Reed E. Hundt to The Honorable Pete Domenici and The Honorable John R. Kasich, dated July 25, 1997 (regarding legislation to clarify certain issues relating to potential bankruptcies by Commission C block licensees). See also letters from Chairman Hundt to The Honorable John McCain and The Honorable Ernest F. Hollings, dated September 17, 1997, and letter from Chairman Hundt and Commissioners James Quello, Susan Ness and Rachelle Chong, dated September 17, 1997 to The Honorable Orrin G. Hatch and The Honorable Patrick J. Leahy, dated September 17, 1997 (same).

⁵⁴ *Part 1, Third Report and Order*, 13 FCC Rcd at 429, ¶ 94.

⁵⁵ *Id.*, 13 FCC Rcd at 428-429, ¶¶ 93 and 94.

⁵⁶ See "Entrepreneurs' C Block Reauction Closes," *Public Notice*, 11 FCC Rcd 8183 (1996). Mountain Solutions won licenses PBB-89C (Colorado Springs, Colorado) and PBB-149C (Fort Collins, Colorado) in the C block reauction.

entitled to relief, as was afforded C block bidders that failed to timely make their second down payments in full.⁵⁷ Specifically, Mountain Solutions argues that the Bureau applied proposed rule changes for the benefit of certain C block bidders and a more flexible second down payment rule for various C block licensees. Mountain Solutions further argues that a number of C block licensees that have faced difficulties in meeting their installment payment obligations have received special treatment from the Commission in their efforts to meet such financial obligations. Mountain Solutions concludes it is entitled to similar treatment as a matter of fairness, due process and equal protection.

20. We disagree that Mountain Solutions' small business status entitles it to a waiver. In the C block auction, all of the participants were designated entities, receiving special preferences. Therefore, we see no reason why Mountain Solutions' status as a small business, *per se*, entitles it to any form of relief. The Commission has fulfilled its statutory mandate to afford small businesses an opportunity to participate in spectrum auctions by making bidding credits and installment payment plans available to such entities in the C block auction.⁵⁸ Neither its mandate to provide opportunities for small businesses nor its finding that small businesses have difficulty obtaining capital requires the Commission to waive payment deadlines for small businesses in this instance.⁵⁹

21. Although the Bureau granted partial waivers to a number of C block bidders that were either late in making their second down payments, or failed to make such down payments in full,⁶⁰ such entities had not met their second down payment obligations because of inadvertence, miscalculation or other administrative complication, rather than because they lacked sufficient funds to make the payment. In this case, however, Mountain Solutions lacked access to funds, and thus evidenced financial inability at the time payment was due.⁶¹ Mountain Solutions was not

⁵⁷ As discussed in n. 33, *supra*, the Commission subsequently amended its rules to permit winning bidders required to make final payment on their licenses within a certain period of time as announced by Public Notice to submit their payment ten business days after the payment deadline, provided that they also pay a late fee equal to five percent of the amount due.

⁵⁸ See 47 C.F.R. 24.712 (bidding credits); 47 C.F.R. 24.711(b) (installment payment plans). These provisions were subsequently amended by the Commission. See *Part 1, Third Report and Order*, 13 FCC Rcd at 530-531, Appendix D.

⁵⁹ See *Styles Interactive, Inc. Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline, Memorandum Opinion and Order*, 12 FCC Rcd. 17987, 17991-17992, ¶ 7 (1997).

⁶⁰ See n. 38 *supra*.

⁶¹ Waiver Petition at 2.

"similarly situated" to the other C block licensees for which the Bureau has granted partial waivers.

22. We also reject Mountain Solutions' contention that its investors' confusion about the anti-collusion rule, in connection with the soon-to-begin D, E and F block auction, which, according to Mountain Solutions, caused a discontinuation of negotiations with its investors, justifies a waiver. We agree with the Bureau that Mountain Solutions should have arranged its financing prior to the close of the auction and that failure to do so indicates that Mountain Solutions may have planned to "shop" its licenses at the close of the auction. Any confusion by Mountain Solutions' investors that may have inhibited the negotiation of additional financing is irrelevant for purposes of our analysis in this case. Further, Mountain Solutions does not identify in which D, E, and F block applicants its investors had financial interests, nor does Mountain Solutions identify on which markets such entities planned to bid.

23. We likewise reject Mountain Solutions' argument that it is entitled to relief because the Commission has subsequently addressed requests by C and F block licensees for assistance in meeting their installment payment obligations.⁶² Unlike these licensees, Mountain Solutions failed to make its second down payment, due September 24, 1996. Down payment deadlines are essential to protect the integrity of our auctions process by preventing insincere bidding and to determine the financial qualification of a new licensee to provide communications services. In contrast to Mountain Solutions, entities facing installment payment difficulties had met their second down payment obligations, became licensees, and signed note and security agreements with the Commission. Because Mountain Solutions failed to meet the fundamental and preliminary step of a ten percent down payment, we reject its argument on this issue.⁶³

24. The Commission's rules provide that when a winning bidder defaults on a license, the bidder becomes subject to a default payment equal to the difference between the amount bid and the winning bid the next time the license is offered by the Commission, plus a payment equal to

⁶² 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 16436 (1997); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, FCC 98-46, *Order on Reconsideration of the Second Report and Order* (rel. March 24, 1998). Shortly before Mountain Solutions filed its Application for Review, the Bureau had suspended the deadline for payment of installment payments by C block licensees. See *Installment Payments for PCS Licenses, Order*, 12 FCC Rcd 17325 (Wireless Tel. Bur. 1997).

⁶³ As we observed in the *Part 1, Third Report and Order*, our rules permit reauctioning of a defaulted license or offering it to the other highest bidders (in descending order) at their final bids, within a short period of time. *Part 1, Third Report and Order*, 13 FCC Rcd at 430, ¶ 96; 47 C.F.R. § 1.2109(c).

three percent of the subsequent winning bid or the amount bid, whichever is lower.⁶⁴ Specifically, the payment is either the difference between the licensee's net winning bid and the subsequent net winning bid or the difference between the licensee's gross winning bid and the subsequent gross winning bid, whichever is less. If either bid amount is subject to a bidding credit, the three percent penalty will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the payment. Thus, if gross bids are used to calculate the payment, the three percent will be applied to the gross amount of the subsequent winning bid or the gross amount of the defaulting bid, whichever is less.⁶⁵ In the *Fifth Report and Order*, the Commission stated that when the default payment cannot be determined, the Commission may assess an initial default payment "of up to 20 percent" of the defaulting bidder's winning bid.⁶⁶ As we noted in the *Part 1, Third Report and Order*, we will assess an initial default deposit of between three percent and twenty percent of the defaulted bid amount where a winning bidder or licensee defaults and the defaulted license has yet to be reauctioned. Once the license has been reauctioned by the Commission, and the total default payment can be determined, the Commission will either assess the balance of the appropriate default payment or refund any amounts due as necessary.⁶⁷ Finally, the Commission's payment rules provide that, if a defaulting bidder does not submit the default payment assessed by the Commission in the time required, any amounts overdue "will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission."⁶⁸

25. Because the licenses at issue in this proceeding have not been reauctioned, and thus we cannot determine the full amount of the default payment, we will assess a deposit toward the default payment ultimately owed by Mountain Solutions. Although the Commission provided that this deposit amount may be as high as twenty percent of the bid price on which Mountain Solutions defaulted, if the licenses are reauctioned for an amount greater than Mountain Solutions' bids for the licenses, the default payment due will be only three percent of Mountain Solutions' defaulted bid. Consequently, a three percent payment is the minimum amount which Mountain Solutions could owe, even under the most favorable circumstances. We therefore require an

⁶⁴ 47 C.F.R. § 24.704(a)(2) and 1.2104(g)(2).

⁶⁵ *Id.*

⁶⁶ See *Fifth Report and Order*, 9 FCC Rcd at 5563, ¶ 73, n. 51; Public Notice, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481 (April 6, 1996). See also C.H. PCS, Inc., BTA No. B347, Frequency Block C, *Order*, 11 FCC Rcd 22430 (Wireless Tel. Bur. 1996) (assessing an initial default deposit equal to three percent of the total default payment).

⁶⁷ *Part 1, Third Report and Order*, 13 FCC Rcd at 434, ¶ 102.

⁶⁸ 47 C.F.R §§ 24.704(a)(2), 1.2104(g).

initial deposit of three percent of Mountain Solutions' defaulted bids for the licenses, or \$736,257.78 (three percent of Mountain Solutions' net winning bid for the ten C block licenses). Pursuant to Sections 24.704(a)(2) and 1.2104(g) of the Commission's rules, Mountain Solutions' first down payment of \$1,227,096.30 for the licenses has been applied to this initial default payment. If additional payment is required, following the reauction of licenses, a second order will assess such payment. If Mountain Solutions fails to remit this amount in its entirety within the time required, any amounts overdue will be deducted from any upfront payments or down payments which Mountain Solutions currently has on deposit with the Commission.

V. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that, under the authority of Section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Mountain Solutions Ltd., Inc. on May 28, 1997, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary