

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	
Lakeland PCS LLC and Cricket Licensee	)	File No. 0000191738
(Lakeland) Inc. for Assignment of PCS License	)	Public Notice Report No. 597
for Station KNLG741	)	

**SECOND ORDER ON RECONSIDERATION**

**Adopted: November 27, 2000**

**Released: November 27, 2000**

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

**I. Introduction**

1. Pursuant to Section 1.106(b)(1) of the Commission's rules,<sup>1</sup> Lakeland PCS, LLC ("Lakeland") filed a petition for reconsideration<sup>2</sup> of our *October 30 Reconsideration Order*,<sup>3</sup> by which we, *inter alia*, rescinded the *October 13 Order*<sup>4</sup> granting consent to the assignment of one F block PCS license from Lakeland to a Leap Wireless International, Inc. ("Leap") affiliate, Cricket Licensee (Lakeland), Inc. ("Cricket Lakeland").<sup>5</sup> For the reasons stated below, we grant Lakeland's petition for reconsideration.

**II. Background**

2. Lakeland, the assignor in this proceeding, of the F block PCS license for the Lakeland-Winter Haven, Florida BTA, was, as a small business entity, eligible to participate in the Commission's installment payment program. Lakeland executed an installment payment plan note and security agreement for this license. Installment payments for the Lakeland-Winter Haven license were received within the time period

<sup>1</sup> 47 C.F.R. § 1.106(b)(1).

<sup>2</sup> In re Application of Lakeland PCS L.L.C. (File No. 0000191738), Petition for Reconsideration, filed by Lakeland PCS, L.L.C. (filed November 16, 2000).

<sup>3</sup> *In the Matters of Leap Wireless International, Inc. and Nedelco, Inc., et al.*, Order on Reconsideration, DA 00-2452 (rel. Oct. 30, 2000)(CWD/PRB) ("*October 30 Reconsideration Order*").

<sup>4</sup> *In the Matters of Leap Wireless International, Inc. and Nedelco, Inc., et al.*, Memorandum Opinion and Order, DA 00-2311 (rel. Oct. 13, 2000) (CWD/PRB) ("*October 13 Order*"). The *October 13 Order* granted applications involving the transfer of control or assignment of nine PCS licenses to or from Leap or an affiliate of Leap. The grant of the other applications, addressed in the *October 13 Order*, has now become final, and we do not address those applications herein.

<sup>5</sup> *October 13 Order*, ¶ 8; *October 30 Reconsideration Order*, ¶¶ 6, 9.

allowed by the Commission rules, with the exception of the April 30, 1999 installment payment. Under the then applicable installment payment rule, Section 1.2110(f),<sup>6</sup> a licensee had an automatic 90-day period after the installment payment due date during which payment may be submitted (“non-delinquency period”) with a five-percent late fee. If remittance of the missed installment payment and the five-percent late fee were not made before the expiration of the non-delinquency period, the rule provided for a second automatic 90-day period in which to remit payment (“grace period”) and required an additional late fee equal to ten percent of the missed installment payment.<sup>7</sup> Pursuant to these rules, and in order to avoid the automatic cancellation of its license, Lakeland’s April 30, 1999 installment payment should have been made, at the latest, by October 27, 1999, accompanied by a 15-percent late fee. However, the October 19, 1999 payment notice indicated that if the April 30, 1999 installment payment and applicable late fees were not received on or before October 28, 1999, the license would automatically cancel.<sup>8</sup> Lakeland’s payment was not made until October 29, 1999. Since then, Lakeland has timely made its installment payments, after receiving payment notices.

### III. Discussion

3. By this *Second Order on Reconsideration*, we vacate the rescission of the grant of the assignment of station KNLG741 from Lakeland to Cricket Lakeland and reinstate the grant of the assignment of station KNLG741 from Lakeland to Leap’s affiliate Cricket Lakeland (File No. 0000191738) as originally ordered in the *October 13 Order*. We further condition the grant of the application from Lakeland to Cricket Lakeland on compliance with the Commission’s rules and policies regarding the assignment of installment payment obligations and the payment of unjust enrichment. In addition, we clarify that the effective grant date of the application from Lakeland to Cricket Lakeland, is October 13, 2000, as further conditioned herein. The *October 30 Reconsideration Order* is affirmed in all other respects.

4. Under the Commission’s rules in effect at the time, Lakeland’s licenses automatically cancelled when it failed to pay the April 30, 1999 installment payment within the 180 days of the deadline.<sup>9</sup> We emphasize that it is every licensee’s responsibility to ensure that its payments are submitted on time; thus, Lakeland should have been more attentive to its payment obligations.<sup>10</sup> Although

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<sup>6</sup> 47 C.F.R. § 1.2110(f)(4) (1999). The Part 1 rules referenced in this *Second Reconsideration Order* have recently been amended to establish calendar quarterly deadlines for late payment of installment payments (and late fees) by licensees that take advantage of one or both of the automatic late payment periods. See Amendment of Part 1 of the Commission’s Rules-Competitive Bidding Procedures, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and the Fourth Further Notice of Proposed Rulemaking*, FCC 00-274 (rel. August 14, 2000) (“*Recon Part 1 Third Report and Order*”). The amended Part 1 rules became effective on October 30, 2000, 60 days after the date of publication in the Federal Register. 65 Fed. Reg. 52323-01 (Aug. 29, 2000).

<sup>7</sup> 47 C.F.R. § 1.2110(f)(4) (1999).

<sup>8</sup> Petition for Reconsideration, exhibit 4.

<sup>9</sup> 47 C.F.R. § 1.2110(f)(4) (1999).

<sup>10</sup> With respect to the payment notices sent to Lakeland, we note that the Commission was not obligated to provide Lakeland with notification that an installment payment was due. Any notices that were sent to Lakeland, or any other licensee, were mere courtesies. As a Commission licensee, Lakeland was, and is, responsible for making timely payments on the dates set by the Commission’s rules regardless of whether it received a separate payment (continued....)

late payment could not revive an automatically cancelled license,<sup>11</sup> we find that, on the record before us, the circumstances presented here are consistent with previous instances, where, as a result of administrative oversight, we have acknowledged that a constructive waiver of the installment payment deadlines has occurred.<sup>12</sup> In light of the circumstances presented, the Branch believes it would be appropriate to afford Lakeland the same treatment. Accordingly, Lakeland holds its Lakeland-Winter Haven Florida license, PCS Station KNLG741.<sup>13</sup> In light of our decision, we do not need to address the factual inaccuracies and legal insufficiencies contained in Lakeland's petition.

5. With respect to the assignment of installment payments obligations, we further condition the grant of the assignment of station KNLG741 from Lakeland to Cricket Lakeland (File No. 0000191738) on compliance with the Commission's requirements with respect to the assignment of the obligation to make installment payments.

6. With respect to the payment of unjust enrichment, we further condition the grant of the  
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notice. See Letter from Louis Sigalos, Deputy Chief, Auctions & Industry Analysis Division, Wireless Telecommunications Bureau to James A. LaBelle, Chairman and Chief Executive Officer, 21<sup>st</sup> Century Telesis, Inc., DA 00-1791 at n. 11 (rel. August 7, 2000).

<sup>11</sup> Of course even when the license automatically cancels, the former licensee remains obligated for the full amount of the debt. Accordingly, mere acceptance of a payment, by itself, would not constitute a constructive waiver.

<sup>12</sup> See Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., Counsel for Lancaster Communications, Inc., DA 98-2052, 1998 WL 709412 (FCC) (rel. Oct. 9, 1998) (WTB) ("*Lancaster*"); Letter from Amy J. Zoslov, Chief, Auctions & Industry Analysis Division, Wireless Telecommunications Bureau, to Meredith S. Senter, Jr. Esq., Counsel for Cordell Engineering, DA 99-277, 14 FCC Rcd. 5003 (1999) (A&IAD) ("*Cordell*"); and Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Lloyd W. Coward, Esq., Counsel for TE-MCG Consortium, DA 99-258, 14 FCC Rcd 2173 (1999) (WTB) ("*TE-MCG*"); see also Request for Extension of the C and F Block Installment Payments, WT Docket 97-82, 14 FCC Rcd 6080 (1999) (the Commission declined to grant a waiver of the resumption date for C block licensees as the Commission had committed no act that could reasonably be construed as constructively waiving the resumption date; had expressly refused to grant waiver requests of the resumption payment date; and distinguished *Cordell*, *Lancaster*, *TE-MCG* as situations that presented facts indicative of constructive waiver that were not present in Southeast), *aff'd Southeast v. Federal Communications Commission*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. 1999) (*per curiam*); *Mountain Solutions v. Federal Communications Commission*, 197 F. 3d 512 (D.C. Cir. 1999) (in an order affirming the denial of a waiver of the second down payment deadline, the appellate court held that the Commission did not abuse its discretion when it refused to allow a bidder additional time to submit its second down payment). We find that the result here is in accordance with the Commission's obligation to assure comparable treatment of similarly situated parties. *Melody Music, Inc. v. Federal Communications Commission*, 345 F.2d 730 (D.C. Cir. 1965).

<sup>13</sup> We note that, in addition to the one F block PCS license at issue herein, three other F block PCS licenses of Lakeland's affiliate, North Arkansas PCS, L.L.C., and its parent company, Eldorado Communications, L.L.C. (KNLF913 (BTA No. 140); KNLG739 (BTA No. 193); and KNLG740 (BTA No. 194) respectively) are similarly situated, in that the April 30, 1999 installment payment for those licenses was paid on October 29, 1999, after the applicable late payment due date under the Commission's rules in effect at the time. Also, one C block PCS license of Billings PCS Communications, L.L.C., (KNLF770 (BTA No. 014), is similarly situated, in that the April 30, 1999 installment payment for its license was paid on October 29, 1999, after the applicable late payment due date under the Commission's rules in effect at the time. Under our rules, accordingly, the licenses automatically cancelled. However, since payment of the April 30, 1999 installment payment, installment payments on these licenses have been paid within the time period allowed under our rules. We find that the same constructive waiver analysis applies with respect to those four PCS licenses and, accordingly, those four licensees hold those licenses.

assignment of station KNLG741 from Lakeland to Cricket Lakeland on compliance with the Commission's requirements with respect to the payment of unjust enrichment.

#### IV. Ordering Clauses

7. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(I), (j), 309, 310(d), and Sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331 and 1.106, that the grant of the assignment application from Lakeland to Cricket Lakeland (File No. 0000191738) contained in *In the Matters of Leap Wireless International, Inc. and Nedelco, Inc., et al.*, DA 00-2311, IS HEREBY REINSTATED effective October 13, 2000.

8. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), and Sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, that the grant of the assignment application between Lakeland and Cricket Lakeland (File No. 0000191738) IS FURTHER CONDITIONED with respect to the assignment of installment payment obligations. Therefore, we add the following condition to the grant of the applications:

IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), the approval of the assignment of the license to Leap or its affiliate is conditioned upon the execution by assignor, assignee, and the Commission of all Commission loan documents, unless the license being assigned has been paid in full. Unless the license that assignor will assign to the assignee has been paid in full, this approval is conditioned upon the assignor's execution of the applicable financing statements (*i.e.*, the UCC-1 Forms) and payment, on or before the consummation date of the assignment, of all costs associated with the preparation and recordation of the financing statements. In addition, all installment payments must be current on the consummation date. To be current, the installment payment may not be in the non-delinquency period or grace period, and there must be no outstanding fees, including late fees, due to the Commission. No license will be issued to the assignee until the Commission receives notification pursuant to section 24.839(b)(4) of the Commission's rules, 47 C.F.R. § 24.839(b)(4), that all conditions that must be met at or before consummation have been satisfied, including execution of the appropriate financing documents. Failure of the parties to the assignment to comply with any of the financial obligations described above will result in automatic cancellation of the Commission's approval hereunder and in dismissal of the assignment application.

9. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), and Sections 0.331 and 1.106 the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, that grant of the assignment of station KNLG741 from Lakeland to Cricket Lakeland herein IS FURTHER CONDITIONED on compliance with the Commission's requirements with respect to the payment of unjust enrichment.

10. IT IS FURTHER ORDERED, pursuant to Section 1.106, 47 C.F.R. § 1.106, that *In the Matters of Leap Wireless International, Inc. and Nedelco, Inc., et al.*, DA 00-2452, IS VACATED only to the extent indicated herein and AFFIRMED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari  
Chief, Policy and Rules Branch  
Commercial Wireless Division  
Wireless Telecommunications Bureau