

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

In re Applications of)	
)	
ABC Wireless, L.L.C.)	File No. 0000012954
(Markets B052, B273, B338, and B423))	
)	
and)	
)	
ComScape Communications, Inc.)	File No. 0000012971
(Market B474))	

ORDER

Adopted: September 8, 1999

Released: September 8, 1999

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

1. In this Order, we dismiss SouthEast Telephone, Inc.'s (SouthEast) Petition to Hold in Abeyance (Petition) the above-captioned long form applications (FCC Form 601) filed by ABC Wireless, L.L.C. (ABC Wireless) and ComScape Communications, Inc. (ComScape), winning bidders in Auction 22, the C, D, E and F block broadband PCS license auction that closed on April 15, 1999 (Auction 22). SouthEast argues that because of its claims against the Commission pending in the U.S. Court of Appeals for the District of Columbia Circuit (Court of Appeals), the Commission lacks jurisdiction over the subject licenses.¹ For the reasons set forth below, we dismiss the Petition.

2. SouthEast was the winning bidder for the above-captioned markets in the original C block auction, which closed on May 6, 1996.² On October 26, 1998, three days before an installment payment was due, SouthEast filed a request for suspension or waiver of the Commission's default rules and a sixty day payment extension.³ On October 28, 1998, SouthEast filed an Emergency Motion with the Court of Appeals to require the Commission to suspend its default rules, which the Court of Appeals denied.⁴ On October 29, 1998, SouthEast filed a complaint against the Commission with the U.S. District Court for the Eastern District of Kentucky (District Court), alleging that the Commission had breached its contract with SouthEast concerning the terms for its PCS license payments and seeking an injunction to prevent cancellation of its licenses as a result of its default.⁵ The District Court granted SouthEast a temporary

¹ Petition to Hold in Abeyance filed by SouthEast Telephone, Inc., June 3, 1999 (Petition), at 1.

² See *Public Notice*, "Entrepreneurs' C Block Auction Closes," DA 96-716 (rel. May 8, 1996).

³ Waiver Request, filed by SouthEast, October 26, 1998.

⁴ *SouthEast Telephone, Inc. v. FCC*, Case No. 98-1491 (D.C. Cir. Oct. 28, 1998).

⁵ *SouthEast Telephone, Inc. v. United States of America*, Civil Action No. 98-465 (E.D.Ky filed October 29, 1998).

restraining order (TRO) to prevent the Commission from canceling its licenses.⁶ On October 30, 1998, the Commission filed a motion and memorandum in support of the dissolution of the TRO, which the District Court granted on November 5, 1998, in addition to dismissing the case for lack of jurisdiction.⁷ On December 31, 1998, SouthEast appealed the dismissal to the U.S. Court of Appeals for the Sixth Circuit.⁸ The appeal is currently pending.

3. On October 29, 1998, the Commission released an Order denying SouthEast's October 26 waiver request.⁹ On November 4, 1998, SouthEast filed a Petition for Reconsideration and Stay Request, requesting the Commission to stay its default rules and the *Waiver Order* pending review of its Petition for Reconsideration.¹⁰ On November 12, 1998, the Commission released a public notice announcing that SouthEast's licenses would be included in the inventory of Auction 22.¹¹ On November 20, 1998, SouthEast once again sought equitable relief from the Court of Appeals, which the court denied.¹² On March 11, 1999, SouthEast filed a Request for Stay or, In the Alternative, for Withdrawal of Markets from Relicensing Process, requesting that the Commission stay Auction 22 and/or withdraw SouthEast's markets from the Auction 22 inventory (Auction Stay Request).¹³ On April 2, 1999, the Commission denied SouthEast's Petition for Reconsideration and Stay Request and its Auction Stay Request.¹⁴ On April 20, 1999, ABC Wireless and ComScape were announced as the winning bidders for the above-captioned markets.¹⁵ On April 30, 1999, SouthEast appealed the *SouthEast MO&O* to the Court of Appeals.¹⁶ That appeal remains pending. On June 3, 1999, SouthEast filed its Petition.

4. SouthEast argues that upon the filing of its appeal of the *SouthEast MO&O* with the Court of Appeals, the Court of Appeals assumed jurisdiction over its licenses and the Commission therefore lacks the authority to award these licenses to third parties.¹⁷ According to SouthEast, the underlying principles

⁶ Petition at 3.

⁷ *SouthEast Telephone, Inc. v. United States of America*, Civil Action No. 98-465 (E.D.Ky Nov. 4, 1998).

⁸ *SouthEast Telephone, Inc. v. United States of America*, No. 98-1390 (6th Cir. filed Dec. 31, 1998).

⁹ Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, WT Docket No. 97-82, *Order*, 13 FCC Rcd. 22071 (1998) (*Waiver Order*).

¹⁰ Petition for Reconsideration and Stay Request, filed by SouthEast, November 4, 1998.

¹¹ C Block PCS Spectrum Auction Scheduled for March 23, 1999, *Public Notice*, 13 FCC Rcd. 24947 (1998).

¹² *SouthEast Telephone, Inc. v. FCC*, Case No. 98-1555 (D.C. Cir. Dec. 4, 1998).

¹³ Request for Stay or, in the Alternative, for Withdrawal of Markets from Relicensing Process, filed by SouthEast, March 11, 1999.

¹⁴ Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, WT Docket 97-82, *Memorandum Opinion and Order*, 14 FCC Rcd. 6080 (1999) (*SouthEast MO&O*).

¹⁵ C, D, E, and F Block Broadband PCS License Auction Closes, *Public Notice*, 14 FCC Rcd. 6688 (1999).

¹⁶ *SouthEast Telephone, Inc. v. FCC*, Case Nos. 99-1164, 99-1166 (D.C. Cir. filed Apr. 30, 1999).

¹⁷ Petition at 6.

of *FCC v. Pottsville*¹⁸ suggest that the Commission does not have the power to decide a legal question that is pending judicial review.¹⁹ Thus, SouthEast argues, it is improper for the Commission to determine who is entitled to the above-captioned licenses while that same issue is pending appellate review, and the Commission must hold the applications in abeyance until SouthEast's pending appeal is resolved.²⁰

5. We need not consider here the import of *FCC v. Pottsville*, because in any event SouthEast is in error when it contends that, by acting on ABC Wireless's and ComScape's applications, we will be deciding the same issue that is pending appellate review. The issue before the Commission is whether ABC Wireless and ComScape are eligible to hold C block licenses pursuant to section 24.709 of the Commission's rules.²¹ The Court of Appeals, on the other hand, is considering the merits of SouthEast's Petition for Reconsideration and Stay Request and its Auction Stay Request, which focus on the issue of SouthEast's request for waiver of the Commission's default rules. Thus, we reject SouthEast's argument that we lack jurisdiction to act on ABC Wireless's and ComScape's long form applications.

6. ABC Wireless argues that any harm to SouthEast as a result of a grant of its long form application is speculative and that the Commission should proceed with the grant of the licenses.²² The Wireless Telecommunications Bureau (Bureau) has previously indicated that the grant of any auctioned licenses involved in a pending proceeding will be conditioned on the outcome of such pending proceeding.²³ SouthEast asks that we hold the above-captioned applications in abeyance until a pending proceeding is resolved. By protecting any claim SouthEast may have in connection with the above-captioned licenses, the procedure announced by the Bureau in its *December 23 Public Notice* achieves the result sought by SouthEast, and we therefore dismiss its request as moot.²⁴

7. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. . 154(i), and sections 0.331, 1.2108, and 24.830 of the Commission's rules, 47 C.F.R. . 0.331, 1.2108, and 24.830, the Petition to Hold in Abeyance filed by SouthEast Telephone, Inc., on June 3, 1999, in the above-referenced proceedings, IS HEREBY DISMISSED.

¹⁸ *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) (*FCC v. Pottsville*).

¹⁹ Petition at 7.

²⁰ *Id.* at 6-7.

²¹ *See* 47 C.F.R. . 24.709.

²² ABC Wireless, L.L.C. Consolidated Opposition to Petitions, filed June 15, 1999 at 3-4 (ABC Wireless Opposition). In its Comments, ComScape states that it has no objection to the Commission holding its long form application in abeyance during the pendency of SouthEast's Court of Appeals proceeding. However, ComScape does take issue with SouthEast's position on the merits of its appeal, as ComScape does not believe that SouthEast will prevail on the merits. Comments of ComScape Regarding Petition to Hold in Abeyance, filed June 16, 1999.

²³ Auction of C, D, E and F Block Broadband PCS Licenses, *Public Notice*, 13 FCC Rcd. 24540, 24544 (1998) (*December 23 Public Notice*). *See also* Auction of C, D, E and F Block Broadband PCS Licenses, *Public Notice*, DA 99-375 (rel. Feb. 24, 1999) at 4-5.

²⁴ In keeping with our decision to grant the licenses conditioned on the outcome of pending proceedings, we are today issuing a Public Notice announcing that we are prepared to grant the above-captioned license applications following ABC Wireless's and ComScape's full and timely payment of the remaining balance of their winning bids, pursuant to section 1.2109(a) of the Commission's rules. 47 C.F.R. . 1.2109(a).

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari
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