

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

In the Matter of
21st Century Telesis Inc.
Request for Partial Reconsideration of
Public Notice DA 00-2038
Request for Stay
Public Notice DA 00-2038

ORDER

Adopted: December 20, 2000

Released: December 21, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

I. Introduction

1. We have before us a Request for Stay filed by 21st Century Telesis, Inc ("21st Century") of the Auctions and Industry Analysis Division's ("Division") decision denying 21st Century's request for waiver of the Commission's installment payment rule. The Request for Stay also seeks to stay Auction No. 35 with respect to spectrum on which 21st Century was formerly licensed to operate. In addition, we have before us a Petition for Partial Reconsideration ("Petition") of two public notices released by the Wireless Telecommunications Bureau ("Bureau") on September 6, 2000 and September 12, 2000, which set forth the list of C and F block PCS licenses available in Auction No. 35. For the reasons set forth below, we deny both the Request for Stay and the Petition.

1 Request for Stay filed by Thomas Gutierrez and Todd Slamowitz, attorneys for 21st Century, on October 16, 2000.

2 See Letter from Louis Sigalos, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to James M. LaBelle, Chairman and Chief Executive Officer, 21st Century Telesis, Inc., DA 00-1791 (rel. Aug. 7, 2000) ("August 7th Decision").

3 Petition for Partial Reconsideration filed by Thomas Gutierrez and Todd Slamowitz, attorneys for 21st Century, on October 6, 2000 ("Petition").

4 See "C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000," Public Notice, Report No. AUC-00-35-C (Auction No. 35), DA 00-2038 (rel. Sept. 6, 2000) ("September 6th Public Notice"); "Correction to Attachment A," Public Notice, Report No. AUC-00-35-D (Auction No. 35), (rel. Sept. 12, 2000).

II. Background

2. 21st Century was the high bidder on 27 licenses in the broadband PCS C and F block auctions that concluded in 1996 and 1997.⁵ Nineteen of 21st Century's licenses automatically cancelled on January 28, 2000, following its failure to timely submit its July 1999 installment payments for the licenses.⁶ The Division's *August 7th Decision* denied 21st Century's request for waiver of the installment payment rule.⁷ On September 6, 2000, 21st Century filed a Petition for Reconsideration of the *August 7th Decision*.⁸ On the same day, the Bureau released the *September 6th Public Notice*, announcing that Auction No. 35 would start on December 12, 2000. This Public Notice lists the licenses to be auctioned, including licenses for spectrum on which 21st Century was previously licensed to operate.⁹ On October 6, 2000, 21st Century filed the Petition, and on October 16, 2000 it filed the Request for Stay.

III. Discussion

3. Request for Stay. 21st Century bases its Request for Stay on the four-prong test for issuance of a stay set forth in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*¹⁰ Under this test, a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.¹¹ Upon examination of the Request for Stay and as discussed below, we find that 21st Century's arguments fail to meet this standard. We, therefore, deny 21st Century's request.¹²

4. In its Request for Stay, 21st Century raises essentially the same arguments as set forth in its Petition for Reconsideration of the *August 7th Decision*, which the Commission recently denied

⁵ See "Entrepreneur's 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); "D, E, and F Block Auction Closes -- Winning Bidders in the Auction of 1,479 Licenses To Provide Broadband PCS in Basic Trading Areas," *Public Notice*, DA 97-81 (rel. Jan. 15, 1997).

⁶ See 47 C.F.R. § 1.2110(f).

⁷ See Letter from Louis Sigalos, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to James M. LaBelle, Chairman and Chief Executive Officer, 21st Century Telesis, Inc., DA 00-1791 (rel. Aug. 7, 2000).

⁸ See Petition for Reconsideration filed by Thomas Gutierrez and Todd Slamowitz, attorneys for 21st Century, on September 6, 2000.

⁹ *September 6th Public Notice*.

¹⁰ 559 F.2d 841 (D.C. Cir. 1977).

¹¹ *Id.*

¹² See *NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. v. FCC*, No. 00-1402 (D.C. Cir. Nov. 13, 2000) (denying motion for stay of Auction No. 35). We note that a number of other parties have attempted to stay Auction No. 35, but the D.C. Circuit Court has denied such requests. See, e.g., *Allegheny Communications Inc. v. FCC*, No. 00-1524 (D.C. Cir. Dec. 11, 2000); *Urban Comm-North Carolina, Inc. v. FCC*, No. 00-1430 (D.C. Cir. Dec. 4, 2000).

(“*Memorandum Opinion and Order*”).¹³ In the *Memorandum Opinion and Order* adopted before the start date of Auction No. 35, the Commission rejected 21st Century’s challenge to the automatic cancellation of its licenses and upheld the Division’s denial of 21st Century’s request for waiver of the installment payment rule.¹⁴ Because the Commission recently addressed the merits of 21st Century’s arguments regarding the automatic cancellation of its licenses, we do not believe it is necessary to reconsider those arguments again here. For the reasons set forth in the Commission’s *Memorandum Opinion and Order*, we find that 21st Century fails to satisfy the first prong for the issuance of a stay because it has not demonstrated that it is likely to prevail on the merits.

5. Furthermore, we find that 21st Century has failed to demonstrate that it would suffer irreparable harm in the absence of a stay. An injury qualifies as “irreparable harm” only if it is “both certain and great; it must be actual and not theoretical.”¹⁵ Therefore, to demonstrate irreparable harm, 21st Century must provide “proof indicating that the harm [it alleges] is certain to occur in the near future.”¹⁶ 21st Century has supplied no such proof. 21st Century claims that it will suffer irreparable injury from the Commission’s decision to auction spectrum on which it was licensed to operate prior to the cancellation of its licenses. The *September 6th Public Notice* explicitly states that the Commission will return the payments (not including interest) made by winning bidders in Auction No. 35 in the event that such bidders are subsequently required to surrender licenses won to prior applicants or licenses holders as a result of final determinations reached in pending proceedings.¹⁷ Therefore, no irreparable harm will result to any such parties from our conduct of the auction on the scheduled date. 21st Century expresses concern that should a third party win the spectrum on which 21st Century was licensed to operate, even if the matter were subsequently resolved in 21st Century’s favor in litigation, the resulting delay would “force [it] virtually to start its business all over.”¹⁸ We disagree. In our view, 21st Century’s assertion that delay will result absent a stay is purely speculative. Parties participating in the auction are on notice that winning bidders of licenses that are subject to pending proceedings may be required to surrender licenses won should a final decision establish the prior right of another party to those licenses. Thus, 21st Century has not shown any irreparable harm that would warrant a stay.

6. Further, we find that grant of the Request for Stay would not serve the public interest because doing so would defeat the clear policy objective of Section 309(j) of the Communications Act, which requires the Commission to promote the “rapid deployment of new technologies, products and services for the benefit of the public, . . .”¹⁹ If we were to accept 21st Century’s arguments for granting a stay, subsequent spectrum auctions would be at risk of substantial postponement while the Commission and courts review the myriad issues parties raise in attempts to circumvent auctions for their individual purposes. As noted above, 21st Century’s insubstantial arguments on the merits do not warrant the extraordinary relief it seeks. Staying the auction with respect to spectrum on which 21st Century was

¹³ See In the Matter of Licenses of 21st Century Telesis, Inc. For Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, FCC 00-434 (rel. December 21, 2000).

¹⁴ *Id.*

¹⁵ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

¹⁶ *Id.*

¹⁷ *September 6th Public Notice* at 6-7.

¹⁸ Request for Stay at 11.

¹⁹ 47 U.S.C. § 309(j)(3)(A).

licensed to operate prior to its default would simply reward those who fail to make timely payments at the expense of the public interest. Such action would frustrate the business plans of entities that intend to bid on, and pay for, their licenses and, as a result, undermine the integrity of the auction process.

7. Petition for Partial Reconsideration. 21st Century's Petition relies on arguments raised by it in its Petition for Reconsideration of the *August 7th Decision*. The Commission has already rejected those arguments in its *Memorandum Opinion and Order* and, therefore, we deny 21st Century's Petition for the same reasons.²⁰ In addition, 21st Century argues that it should be provided multiple opportunities to present its arguments to the Commission before the spectrum on which it was previously licensed is reauctioned.²¹ We disagree. With the issuance of the *Memorandum Opinion and Order*, 21st Century has had a full opportunity to have its arguments considered by the Commission.

IV. Ordering Clauses

8. For the aforementioned reasons, 21st Century's Request for Stay and Petition for Partial Reconsideration and ARE DENIED. This action is taken pursuant to authority delegated by § 0.131 of the Commission's Rules, 47 C.F.R. § 0.131.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham
Deputy Chief, Wireless Telecommunications Bureau

²⁰ See In the Matter of Licenses of 21st Century Telesis, Inc. For Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, FCC 00-434 (rel. Dec. 21, 2000).

²¹ See Petition at 3.