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October 23, 1998

Via Hand Delivery

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Mountain Solutions Ltd., Inc.
Fourth Report and Order, WT Docket No. 97-82

Dear Ms. Salas:

On behalf of Mountain Solutions Ltd., Inc. ("MS"), transmitted herewith are an original and four (4) copies of MS' Petition for Reconsideration of the following FCC action: In the Matter of Amendment to the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket 97-82, Fourth Report and Order, rel. August 19, 1998.

If you have any questions with respect to this matter, please do not hesitate to call.

Very truly yours,



Jeanne W. Stockman

Enclosures

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

In the Matter of)
Amendment of the Commission's Rules) WT Docket No. 97-82
Regarding Installment Payment Financing)
for Personal Communications Services (PCS))
Licensees)

To: The Commission

PETITION FOR RECONSIDERATION

Mountain Solutions Ltd., Inc., ("MS"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the Commission's Fourth Report and Order¹ in the above-referenced proceeding. In support thereof, the following is respectfully shown:

BACKGROUND

On October 1, 1998 the FCC released a Memorandum Opinion and Order ("MO&O") denying MS' Application for Review regarding denial of its request for a waiver of the second down payment rule, Section 24.711(a)(2), for several licenses for which MS was the high bidder in the original C block auction.² The MO&O, for the first time, sets forth the FCC's intent to strictly apply

¹In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Fourth Report and Order, rel. August 19, 1998 ("Fourth R&O").

²In 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 Service (PCS) C Block Auction, FCC 98-220, Memorandum Opinion and Order, released Oct. 1, 1998 ("MO&O").

its default payment rules to MS and assess it a default penalty in the amount of the difference between its original bids and whatever bids are received on reauction.³ The Fourth R&O announces terms which will apply to a reauction of C block spectrum. These terms have a direct impact on the bids that are likely to be received on reauction, and consequently on the amount of MS' default payment. MS seeks reconsideration or clarification of the Fourth R&O to specify that it will not be unjustly penalized as a result of Commission post-auction conduct and rule changes that increase the likelihood of low reauction bids and artificially inflate MS' default penalty.

INTERESTED PARTY

MS is an interested party in this proceeding. As explained below, MS is adversely affected by the Fourth R&O to the extent that it enacts rules which will govern a reauction of its licenses, imposes conditions on the reauction which are extremely likely to lower the bids that will be realized for its licenses, and is silent as to whether MS will be expected to make up the difference through strict imposition of default penalty rules. The MO&O, which was released after the Fourth R&O, sets forth, for the first time, the FCC's intent to strictly apply its default penalty rules to MS. Although in the context of this proceeding, Carolina PCS I Limited Partnership ("Carolina") raised the issue of the equity of strictly applying default payment rules, the FCC did not address that issue in the Fourth R&O.⁴ In light of the recently released MO&O and the harm that may befall MS if the default penalty rules are strictly enforced after a reauction conducted pursuant to the Fourth R&O,

³ MO&O ¶ 24. This assumes that the bids on reauction are below MS' original bids. In the extremely unlikely event the reauction bids were to exceed MS' original bids, the amount of the default payment would merely be 3% of MS' original bids. As explained in the Petition, however, all facts indicate that the reauction bids will be much lower than MS' original bids.

⁴Comments of Carolina PCS I Limited Partnership, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking, filed Nov. 13, 1997, at 7-8.

this issue has newly presented itself and, by this Petition, MS respectfully requests that it be addressed in the context of this proceeding.

ARGUMENT

I. THE FOURTH R&O INCREASES THE LIKELIHOOD OF LOW REAUTION BIDS, DIRECTLY AFFECTING AND INCREASING THE DEFAULT PAYMENT THAT WOULD BE OWED BY MS.

A. The Fourth R&O Eliminates Installment Payment Financing for the Reaution.

The Fourth R&O announces that the Commission will proceed to reaution C Block licenses on a cash-only basis, without the financing previously made available to original C block licensees through the FCC's installment payment plan.⁵ As many sources agree, the financing associated with the original C block directly contributed to its large winning bids. Obviously, an entity is going to bid more for a license if its payment can be financed over time, rather than if full payment were due immediately. By eliminating the installment payment plan, the FCC is ensuring that bids on reaution will be significantly lower than those realized during the original auction, increasing the amount of MS' default penalty.

⁵Fourth R&O ¶ 50. The Fourth R&O does specify that certain bidding credits will be available to qualifying C block bidders in lieu of installment payments; however, this fails to provide an adequate substitute for installment payment financing. Installment payment financing allows entities to leverage their funds since they can pay for their licenses over time. This is especially important in the C block auction where the participants are of limited means and therefore dependent on outside financing. Bidding credits fail to provide this same benefit and are unlikely to stimulate the same level of bidding that was present in the original C block auction.

B. Intervening Events Since the Original C Block Auction Also Indicate that Bid Prices Will Be Drastically Lower in the Reauction

The original C block auction will be nearly three years old by the time the reauction announced in the Fourth R&O is scheduled to occur.⁶ Since that time, several events have transpired which indicate that C block spectrum is not worth what it once was. These events include the development of a competitive wireless marketplace, and the outcome of regulatory and judicial proceedings that have affirmed the C block's devaluation. Today, nearly all A and B block licensees have completely built out their major (and even secondary) markets, establishing their brand name and solidifying their market position. This means it will be more difficult for a C block entity to succeed in the marketplace now than it would have been three years ago, lessening the value of C block licenses. The FCC has auctioned additional spectrum, creating a glut in the market and lowering its value. The FCC's Restructuring Proceeding⁷ occurred during this time, signaling that C block licenses were not worth their original bid prices. The GWI Ruling was then released, holding that FCC post-auction conduct, when viewed in its totality, has devalued C block licenses to 16 cents-on-the-dollar such that their transfer constituted a fraudulent conveyance.⁸ In addition to the elimination of

⁶This presents a fundamentally different situation than that of BDPCS, Inc., whose licenses were reauctioned approximately two months after the close of the original C block auction.

⁷See, e.g., In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking, rel. Oct. 16, 1997.

⁸In re GWI PCS, Inc., BK No. 397-39676-SAF-11, Bench Ruling (Bankr. N.D. Tex. 1998) ("GWI Ruling"). Significantly, this figure represents a blended valuation for GWI's licenses which include such major population centers as Atlanta, GA and San Francisco, CA. Thus, it is likely that rural licenses such as MS' may even be worth less. Assuming on reauction that MS' licenses were subject to a 16 cents-on-the-dollar ceiling as a result of the GWI Ruling, strict application of the default penalty rules would result in MS owing a \$20,615,219 default penalty.

installment payment financing, these events also indicate that MS' licenses will yield a dramatically lower price on reauction than they did during the original auction, increasing MS' liability for its default penalty.

C. The Fourth R&O's Exclusion of Bankrupt Licenses from the Reauction Will Further Depress Bids on MS' Licenses

The Fourth R&O's exclusion of bankrupt licenses from the reauction will further depress bids on MS' licenses. Several of MS' licenses are adjacent to the Denver BTA. The C block license for the Denver BTA is currently tied up in bankruptcy, and pursuant to the terms of the Fourth R&O, will be excluded from the reauction. Potential bidders will likely be unable to formulate a financable business plan for MS' rural markets when they do not know when the corresponding urban market license will be available for acquisition and they cannot be assured of obtaining such license in the future. As the Commission has recognized in developing its auction rules for this spectrum, these licenses are highly interdependent and this interdependence directly impacts the value bidders assign specific licenses and markets.⁹ Excluding the most significant markets from the reauction injects a tremendous amount of uncertainty into the bidders' analysis. This uncertainty in the marketplace means lower bid prices and an increased default penalty for MS.

II. DUE TO THE UNIQUE CIRCUMSTANCES OF THIS C BLOCK REAUCTION, IT WOULD BE GROSSLY INEQUITABLE TO STRICTLY APPLY THE DEFAULT PENALTY RULES AND HOLD MS LIABLE FOR THE DIFFERENCE BETWEEN ITS ORIGINAL BID AND THE REAUCTION BID.

The entire complexion of the C block has fundamentally changed between the time the original auction occurred and the reauction which is scheduled in the Fourth R&O. Significantly,

⁹Review of Pioneer's Preference Rules, 75 Rad. Reg. 2d 1088, 1094 (1994) ("highly interdependent licenses should be grouped together and put up for bid at the same time . . . most broadband PCS licenses will be significantly interdependent").

these changes are the result of regulatory actions, such as the Fourth R&O, and other intervening circumstances -- not any action MS has taken. As explained above, all of the events that have occurred indicate that bids in the reauction will be dramatically lower than those in the original auction. It is grossly inequitable and legally unsupportable for the FCC to hold MS liable for the difference between its original bid and the reauction bid when MS is not at all responsible for the regulatory changes or intervening circumstances that have caused the devaluation of its licenses. The FCC's default penalty rules do not contemplate a situation where the underlying rules for the subsequent reauction are fundamentally changed by the FCC in a manner that ensures that the winning reauction bids will be dramatically lower than the original auction bids, thereby increasing the default penalty.¹⁰ To strictly apply the default payment rules here would be an unwarranted imposition of yet another penalty upon entities who can least afford to pay for the Commission's change in auction procedures.

MS is in a very unique situation. It is the only C block licensee who missed its second down payment deadline and was not granted a waiver to allow it to make such payment late and keep its licenses.¹¹ Further, the FCC's Restructuring Proceeding essentially serves as a blanket default penalty waiver to those licensees that walked away from their FCC obligations.¹² To strictly apply

¹⁰The rule changes at issue here were so sweeping that they required numerous series of formal notice-and-comment rulemaking proceedings to be enacted.

¹¹See MO&O ¶ 13 & n.38; 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). Ironically, the very rule MS sought to have waived was changed during the pendency of its Application for Review before the FCC. See MO&O ¶ 12 & n.33.

¹²Interestingly, nearly two-thirds of all C block licensees selected a restructuring option, in essence receiving a waiver of any default penalty. Further, of the seven (7) licensees that

the default penalty rules and hold MS liable for the deficit between its bids and reauction bids singles out MS for disparate treatment that is fundamentally unfair and unjust. The FCC must maintain consistency within the basic framework of its rules for a particular auction in order to assure that no party that participated in the original auction is unduly prejudiced.

CONCLUSION

The Fourth R&O sets forth new rules to be applied to a reauction of C block spectrum which will dramatically decrease the bids realized on reauction. Because the FCC has recently announced its intent to recover the difference between MS' original bids and the reauction bids, the FCC should reconsider or clarify the Fourth R&O to specify that the FCC's default penalty rules will not be strictly applied to MS in these unique circumstances.

Respectfully Submitted,

MOUNTAIN SOLUTIONS LTD., INC.


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Dated: October 23, 1998

received a waiver of the second down payment rule, four (4) elected a restructuring option allowing them, in whole or in part, to walk away from their FCC obligation without being assessed a default penalty.