

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

In the Matter of)
)
SoFast Internet Services, Inc.)

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 2006

Released: September 11, 2006

By the Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a petition filed by SoFast Internet Services, Inc. (“SoFast”) on August 25, 2003,¹ seeking reversal of the Commission’s automatic cancellation rule and requesting reinstatement of the authorization of the Broadband Radio Service (“BRS”) license covering the Great Falls, Montana, area (the “Great Falls License”), which SoFast acquired from a previous licensee.² As discussed below, we find that, given the particular circumstances in this case, enforcement of Section 1.2110(g)(4)(iv) of the Commission’s rules, which would result in automatic cancellation of the subject license, serves neither the rule’s purpose nor the public interest. Accordingly, we grant a *nunc pro tunc* waiver of the automatic cancellation provision of Section 1.2110(g)(4)(iv) of the Commission’s rules.³ In order to SoFast with a reasonable amount of time to perform its final remaining payment obligation, and thereby

¹ Petition for Reconsideration, filed on August 25, 2003 (“Petition”). Specifically, SoFast sought reconsideration of a letter sent to SoFast on July 29, 2003, by the former Public Safety and Private Wireless Division (“Division”). In this letter, the Division confirmed the accuracy of information in its licensing database that the Great Falls License had automatically canceled pursuant to Section 1.2110(g) of the Commission’s rules because SoFast had failed to comply fully with the Commission’s installment payment rules. *See* Letter from Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to Alexander & Associates, PS&PWD-LTAB-658 (July 29, 2003) (“Database Letter”). On October 20, 2003, SoFast filed a Supplement to Petition for Reconsideration (“Supplement”).

² On July 29, 2004, the Commission released a Report and Order and Further Notice of Proposed Rulemaking that amended the rules governing the Multipoint Distribution Service (“MDS”) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (“*BRS Report and Order*”). To better reflect the forward-looking vision for these services, the Commission renamed MDS as BRS. Because the new rules are now in effect, we refer to the service by its new name.

³ On December 7, 2005, SoFast filed a request for special temporary authority to operate facilities in Great Falls, Montana, for a period of 180 days “or until such time as the Commission acts on the Petition for Reconsideration regarding the Station.” Request for Special Temporary Authority (filed Nov. 14, 2005). In light of the fact that we are acting today on the Petition, we hereby dismiss the pending requests for special temporary authority as moot. *See* File Nos. 0002694674, 0002694678, and 0002694694.

satisfy the condition on the license, we grant SoFast thirty-one (31) days from the date of this Order to render payment in full pursuant to section 1.2110(g)(4).⁴

2. We note that if SoFast's BTA authorization had not automatically canceled, it would have expired on March 28, 2006. Because the authorization was considered canceled, SoFast was not able to apply for renewal of the BTA authorization within the time frame required under Section 1.949(a) of the Commission's rules.⁵ Once the BTA authorization is restored in the Universal Licensing System ("ULS"), SoFast will be required to apply for renewal of the authorization. We therefore direct SoFast to file an application for renewal of license for the BTA authorization (call sign B171) within sixty (60) days of the release of the Order. On our own motion, we grant a waiver Section 1.949(a) of the Commission's rules to allow consideration of this late-filed renewal application. To accommodate the ULS filing, the renewal application must indicate that it is accompanied by a request for waiver of Section 1.949(a). The request may refer to the waiver grant contained in this *Memorandum Opinion and Order* without further argument.

II. BACKGROUND

A. The Commission's Installment Payment Program

3. When the Commission first adopted competitive bidding rules in 1994, it established an installment payment loan program under which qualified small businesses that won licenses in certain services were allowed to pay their winning bids in quarterly installments over the initial term of the license.⁶ In deciding to offer installment payment loans, the Commission reasoned that in appropriate circumstances such plans would, by reducing the amount of private financing small entities needed in advance of auctions, help to provide opportunities for small businesses to participate in the provision of spectrum-based services.⁷ Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.⁸ The anticipated benefits of these installment loans, however, ultimately did not outweigh their costs and, in 1997, the Commission discontinued the use of installment

⁴ 47 C.F.R. § 1.2110(g)(4). We note as in previous cases that we are not waiving the default provision of the Commission's rules.

⁵ 47 C.F.R. § 1.949(a).

⁶ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2389-91 ¶¶ 231-40 (1994) ("*Competitive Bidding Second Report and Order*"). The first Commission auction for which installment payments were available was Auction No. 2 (218-219 MHz Service), which concluded on July 29, 1994.

⁷ *Id.* at 2389-90 ¶ 233. The goal of providing opportunities for small businesses to participate in the provision of spectrum-based services is set forth at 47 C.F.R. §§ 309(j)(3)(B) & 309(j)(4)(D).

⁸ *See* 47 C.F.R. §§ 1.2110(e)(3)(iii) & (iv) (1994).

payment loans for future auctions.⁹ Entities that were already paying their winning bids for licenses in installments were permitted to continue doing so.¹⁰

4. Certain features of the Commission's installment payment rules have remained the same since their inception. For instance, the rules have always conditioned the grant of licenses upon the full and timely performance of licensees' payment obligations and have provided that, upon a licensee's default, the license cancels automatically and the Commission institutes debt collection procedures.¹¹ The Commission assigns licenses using competitive bidding to promote the public interest objectives of Section 309(j) of the Communications Act, which include the rapid deployment of new technologies and services to the public and the efficient and intensive use of spectrum.¹² Payment of winning bids in compliance with Commission rules is critical to realizing these public interest objectives. As the Commission has previously explained, "Section 309(j) specifically includes a presumption that licenses should be assigned by auction to those who place the highest value on the use of the spectrum. Such entities are presumed to be those best able to put the licenses to their most efficient use. The ability to

⁹ The Commission discontinued the use of installment payments based on its findings that (1) installment payments are not necessary to ensure meaningful opportunities for small businesses to participate successfully in auctions; (2) the Commission must consider all of the objectives of Section 309(j), including the development and rapid deployment of new services for the benefit of the public; (3) filings for bankruptcy by entities unable to pay their winning bids may result in delays in the deployment of service; and (4) requiring the payment of bids in full within a short time after the close of auctions ensures greater financial accountability from applicants. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397-98 ¶¶ 38-39 (1998) ("Part 1 Third Report and Order"). The Commission affirmed this decision in 2000. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and the Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15322 ¶ 55 (2000) ("Part 1 Reconsideration of Third Report and Order"). The last Commission auction for which installment payments were available was Auction No. 11 (broadband PCS F block), which ended on January 14, 1997.

¹⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

¹¹ See, e.g., 47 C.F.R. § 1.2110(e)(4) (1994) and 47 C.F.R. § 1.2110(f)(4) (1998). See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551 (2004). In this Order addressing the inapplicability of 47 C.F.R. § 1.2104 of the Commission's rules to installment payment defaults, the Commission discussed its 1997 decision not to deviate from its license-cancellation-plus-debt-collection rule for installment payment defaults and explained the reasonableness of this decision. Noting that automatic license cancellation is not unique to defaults on installment payments (licenses cancel automatically, for example, when licensees fail to build out in compliance with the Commission's rules, whether they are paying their winning bids in installments or have paid them in full in a lump sum), the Commission explained that its rules are designed to encourage entities that cannot meet their financial obligations to exit the auctions process sooner rather than later in order to avoid delays in licensing spectrum to entities that are able to provide service to the public. Thus, the consequence of withdrawing a high bid during an auction, when a new high bidder can still emerge, is less severe than the consequence of defaulting after the close of an auction. Similarly, the consequence of a post-licensing default, such as an installment payment default or a failure to meet construction or service requirements, is more severe than the consequence of a pre-licensing default because the former could adversely affect service to the public much longer than the latter. *Id.* at 2561-62 ¶¶ 29-31.

¹² See 47 U.S.C. §§ 309 (j)(3)(A) & (D). See also H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580 (finding that "a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.").

make installment payments on a timely basis as a condition of retaining a license is intrinsic to the notion that licensees who cannot make timely payments should lose the presumption. Insisting that licensees demonstrate their ability to pay as a condition to continuing to hold licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.”¹³

5. The Commission has never wavered from the bedrock principle that the full and timely payment of installment payments is necessary to protect the integrity of the Commission’s auction and licensing processes. While the installment payment program was intended to help provide opportunities for small businesses to participate in auctions and spectrum-based services, it was not intended to allow the retention of licenses by parties unable to pay their winning bids and provide service to the public.

6. The Commission’s installment payment grace period rules, however, have evolved over the history of the program. In 1997, the Commission liberalized its installment payment grace period rules for licensees that were already paying their winning bids in installments, providing these licensees with significant advantages they had not previously had. Under the rules adopted in 1994, any licensee whose installment payment was more than 90 days past due was in default, unless the licensee properly filed a grace period request.¹⁴ The rules as amended in 1997, however, provided licensees with an automatic grace period, i.e., a grace period to which they were entitled without having to file a request.¹⁵ The amended rules also entitled all licensees paying in installments to a grace period of 180 days. Thus, if a licensee did not make full and timely payment of an installment, it was automatically granted a 90-day period during which it was allowed to pay the installment along with a 5 percent late fee.¹⁶ If it did not submit the missed installment payment and the 5 percent late fee before the expiration of this 90-day period, the licensee was automatically granted a second 90-day period during which it could remit payment along with an additional late fee equal to 10 percent of the missed payment.¹⁷ A licensee’s failure to make payment, including the associated late fees, by the end of the 180 day period placed it in default.¹⁸

7. In liberalizing its grace period rules, the Commission found that the amended rules eliminated uncertainty for licensees seeking to restructure other debt contingent upon the results of the Commission’s installment payment provisions,¹⁹ and that the added certainty the rules provided to licensees would increase the likelihood that licensees and potential investors would find solutions to

¹³ Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25113, 25123-24 (2000), *reconsideration denied*, Licenses of 21st Century Telesis Joint Venture, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001), *review denied in part, dismissed in part*, *21st Century Telesis Joint Venture v. F.C.C.*, 318 F3d 192 (D.C. Cir. 2003) (“*21st Century Order*”).

¹⁴ 47 C.F.R. § 1.2110(e)(4)(i) & (ii) (1994). Licensees were permitted to request a grace period of 90 to 180 days.

¹⁵ 47 C.F.R. § 1.2110(f)(4)(i) & (ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶¶ 106-07. The amended rules took effect on March 16, 1998.

¹⁶ 47 C.F.R. § 1.2110(f)(4)(i) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

¹⁷ 47 C.F.R. § 1.2110(f)(4)(ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

¹⁸ 47 C.F.R. § 1.2110(f)(4) (iv) (1998).

¹⁹ *Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110.

capital problems before defaults occurred.²⁰ Noting that a grace period is an extraordinary remedy in cases of financial distress and that the rules it adopted are consistent with commercial practice, the Commission declined to provide more than 180 days for licensees to make late payments and rejected the argument that licenses should not cancel automatically upon default.²¹

8. In 2000, the Commission simplified the grace periods for participants by replacing the two 90-day grace periods with two quarterly grace periods.²² This change aligned the schedule for late payments with the quarterly schedule of regular installment payments.²³

B. SoFast

9. SoFast acquired the subject license through assignment. The license was originally offered in November of 1995 in Auction No. 6, an auction of BTA licenses in the BRS. When Auction No. 6 concluded on March 28, 1996, Teewinot Licensing, Inc. (“Teewinot”) was the winning bidder for the Great Falls License.²⁴ Teewinot qualified for installment payments offered to qualified winning bidders in Auction No. 6 and elected to pay for the license under that arrangement.²⁵ The Commission, therefore, granted Teewinot a BRS license for the Great Falls BTA on the condition that Teewinot would timely meet its payment obligations under the installment payment program.²⁶

10. On September 15, 1999, the former Mass Media Bureau consented to the assignment of the Great Falls License from Teewinot to SoFast, provided certain conditions were met.²⁷ As an eligible small business, SoFast assumed Teewinot’s payment obligations under the Commission’s installment payment plan.²⁸ The Commission expressly conditioned its authorization of the assignment upon SoFast’s fulfillment of its obligation, as assignee, to make all installment payments (unless it elected to pay off the debt in full).²⁹ The authorization also contained express conditions requiring SoFast, as

²⁰ *Id.* at 443 ¶ 116.

²¹ *Id.* at 439-40 ¶¶ 109-10; *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15304-05 ¶ 19.

²² 47 C.F.R. § 1.2110(g)(4)(iv) (2000).

²³ *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,310 ¶ 28.

²⁴ “Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas: Down Payments Due April 5, 1996, FCC Form 304s/Statements of Intention Due May 10, 1996,” *Public Notice* (rel. Mar. 29, 1996)(reported in FCC Daily Digest, 1996 FCC LEXIS 1427 (rel. Mar. 29, 1996).

²⁵ See Teewinot Installment Payment Plan Note, License No. MDB171 (Aug. 16, 1996) and Security Agreement, License No. MDB171 (Aug. 16, 1996). Teewinot enjoyed other benefits due to its small business status. As a qualifying small businesses, Teewinot was eligible for a discount of 15% on its winning bid and a reduced down payment (10% of the net bid amount instead of the usual 20%), in addition to the option of paying for its license in installments over the full ten-year term of the license. See 47 C.F.R. § 21.960(b) (1996).

²⁶ See 47 C.F.R. § 1.2110(g)(4) (“A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee’s payment obligations under the installment plan.”); *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391 ¶ 240.

²⁷ Mass Media Bureau Multipoint Distribution Service Applications, *Public Notice*, Report No. D-59-A (Sept. 15, 1999).

²⁸ See 47 C.F.R. § 21.960(b) (1996).

assignee, to “mak[e] all payments that have been in arrears.”³⁰ By letter, Teewinot and SoFast advised the Commission that the assignment had been consummated on December 8, 1999, pursuant to the Commission’s authorization.³¹ At the time of the assignment consummation, a November 1999 installment payment remained outstanding to the Commission.

11. SoFast rendered its first installment payment to the Commission in February 2000 and thereafter began making payments to the Commission utilizing the two quarterly grace periods provided under the rules. However, SoFast repeatedly made payments for principal and interest without also paying the late fees that it owed as a result of its utilizing the two quarterly grace periods. Because of SoFast’s repeated submission of payments that were insufficient to cover its late fees, it eventually defaulted on its payment due on February 28, 2001. According to the Commission’s records, this installment payment needed to be received in full, including all applicable late fees and interest, on or before August 31, 2001, which was the end of the second quarter grace period.³² Although the Commission did receive an installment payment from SoFast on July 11, 2001, that payment was insufficient to cover all applicable late fees that were due and outstanding. Because SoFast’s installment obligations were not fully satisfied by August 31, 2001, within the two calendar quarters permitted under the rules, the Great Falls License automatically canceled on September 1, 2001.³³

12. On August 25, 2003, SoFast filed the instant Petition.³⁴ In its Petition, SoFast contends that it “did not realize that its accountant responsible for paying the FCC the quarterly payments for the Great Falls BTA had not been paying the late fees” and had not made the required payment within the time permitted under the installment payment rules.³⁵ SoFast avers that it did not realize that it had encountered payment problems until it received the Division’s letter of July 29, 2003, confirming the canceled status of the Great Falls License, and that “[i]t immediately reviewed the payments made to the FCC and had its FCC counsel discuss the payments with FCC staff to determine the problem.”³⁶ SoFast goes on to state that the accountant responsible for making its payments to the FCC “embezzled money from SoFast during this period of time and SoFast has fired this accountant and replaced the CEO to

(...continued from previous page)

²⁹ See Consent to Assignment, File No. BMDAL990610XP, dated September 15, 1999. These express conditions were repeated in the cover letter that was used to transmit the assignment authorization to SoFast. See Letter to SoFast Internet Services LLC from Stephen Svab, Attorney, MDS Section, Video Services Division, Mass Media Bureau, to Dawn G. Alexander, Esq., dated September 15, 1999 (“Svab Letter”).

³⁰ The authorization was also conditioned on SoFast’s execution of certain loan and financing documents. See Svab Letter.

³¹ Letter from Dawn G. Alexander, on behalf of Teewinot and SoFast, to Magalie R. Salas, Secretary, Federal Communications Commission (filed Dec. 8, 1999).

³² See 47 C.F.R. § 1.2110(g)(4)(iv).

³³ See *id.*; see also *Part 1 Third Report and Order*, 13 FCC Rcd at 436-38 ¶¶ 106-07. After July 11, 2001, a payment was received on December 4, 2001.

³⁴ Contrary to assertions made in the SoFast Petition, no licenses were canceled by the Database Letter. That letter merely confirmed the status of the Great Falls authorization and associated BRS station licenses in the Commission’s licensing database by stating that a review of the licensing database had been conducted and that the call signs had been canceled pursuant to 47 C.F.R. § 1.2110(g)(4)(iii)-(iv).

³⁵ SoFast states in its Petition that a payment had been submitted on “December 4, 2003.” Petition at 1. We assume that this is a reference to a payment submitted on December 4, 2001.

³⁶ *Id.*

correct this serious problem.”³⁷ SoFast states that it has continued to make payments and that it is “willing to bring its account current by paying all past late fees” if the Commission will reinstate its authorization.³⁸ SoFast argues that the Commission should reinstate the Great Falls License and allow it to continue to provide service to its existing customers in rural areas.³⁹

13. On October 3, 2003, as part of its debt collection obligations,⁴⁰ the Commission sent a letter informing SoFast that under the terms of the loan documents and as a result of its failure to timely pay all required installment payments in full, SoFast’s payment obligations had accelerated and that all outstanding principal, interest, late fees, and other costs and expenses were then immediately due and payable.⁴¹ The letter also advised that any amounts tendered after the acceleration would be applied to the sums owed under the loan.⁴²

14. SoFast filed a Supplement to its Petition on October 10, 2003.⁴³ Attached to the Supplement is a response from SoFast to the Commission’s Debt Acceleration Letter of October 3, 2003. In its Supplement, SoFast requests that the Commission “hold in abeyance its request for full payment and any further debt collection” until after the arguments raised in the Petition are resolved.⁴⁴ SoFast also argues in its Supplement that, because it did not acquire the Great Falls License until December 8, 1999, it was not required to make the installment payment due on November 30, 1999, and its first payment was not due until the end of February 2000. Thus, SoFast argues that the Commission’s records are incorrect. SoFast nonetheless acknowledges that payments were erroneously made without associated late fees, and offers to pay the past due late fees associated with its late payments.⁴⁵

III. DISCUSSION

15. Despite SoFast's characterization of its two pleadings as petitions for reconsideration, we will treat its filings as a request for waiver of the automatic cancellation provisions of Section 1.2110(g)(4)(iv).⁴⁶ To obtain a waiver of the relevant rule provisions, SoFast must show either that (i) the underlying purpose of the applicable rule would not be served, or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable

³⁷ *Id.*

³⁸ *Id.* at 1-2.

³⁹ *Id.* at 2-3.

⁴⁰ 47 C.F.R. § 1.1911

⁴¹ Letter from Mark Reger, Chief Financial Officer, FCC, to SoFast (dated Oct. 3, 2003) (“Debt Acceleration Letter”).

⁴² *Id.* at 2.

⁴³ *See supra* note 1.

⁴⁴ Supplement, Letter Attachment at 1.

⁴⁵ Petition at 1; Letter Attachment to Supplement at 2..

⁴⁶ To the extent that SoFast requests reconsideration of the automatic cancellation of its BTA authorization, which occurred on September 1, 2001, SoFast's 2003 Petition and Supplement were filed late. *See* 47 C.F.R. § 1.106(f).

alternative.⁴⁷ As discussed below, we find that SoFast has made the showing necessary to support granting a waiver of the automatic cancellation provision of the Commission's installment payment rules.

16. In its Supplement, SoFast argues that, since it did not acquire the license until December 8, 1999, its first installment payment for the Great Falls License was not due until February 29, 2000, and therefore there should not have been any late fees associated with this initial payment.⁴⁸ This suggestion, however, fails to acknowledge that a quarterly payment was due for the license on November 30, 1999, while the assignment transaction between Teewinot and SoFast remained executory. As noted above, the Commission conditioned its authorization of the license assignment to SoFast on SoFast's payment of all installment payments, including all payments that had been in arrears.⁴⁹ Therefore, in accordance with the Commission's rules, SoFast's first tendered installment payment in February 2000 was applied to the past due November 1999 payment obligation.⁵⁰ Since SoFast did not make this first installment payment until February 2000, and this payment was not sufficient to cover the applicable late fee that was due because payment was being made during the first quarterly grace period, a deficiency in payment arose.⁵¹ Although the application of the February 29, 2000, payment to the November 30, 1999, past due amount did not cause SoFast to be in default, SoFast eventually defaulted on August 31, 2001, because, as explained above, after February 2000 it made payments utilizing the Commission's two quarterly grace periods that did not cover any of the applicable late fees. We therefore find this aspect of SoFast's argument to be without merit.

17. SoFast concedes in its Petition and its Supplement that it often failed to submit required late fees.⁵² The Commission's installment payment rules are detailed and explicit about late payments. "All licensees that avail themselves of these [two quarter] grace periods must pay the associated late payment fee(s) and the Required Installment Payment prior to the conclusion of the applicable additional quarter grace period(s)."⁵³ Moreover, the consequences of a failure to submit the full amount due, before the end of the second quarter grace period, are unequivocal. "If an eligible entity obligated to make installment payments fails to pay the total Required Installment Payment, interest and any late payment fees associated with the Required Installment Payment within two quarters of the Required Installment Payment due date, it

⁴⁷ 47 C.F.R. § 1.925.

⁴⁸ Letter Attachment to Supplement at 2.

⁴⁹ The Consent to Assignment explicitly required SoFast, as the assignee, to make the installments payment due on November 30, 1999. *See* Consent to Assignment, File No. BMDAL990610XP, dated September 15, 1999; *see also* Svab Letter, dated September 15, 1999.

⁵⁰ 47 C.F.R. § 1.2110(g)(4).

⁵¹ *See supra* paragraph 5. The Commission's installment payment rules require late payments submitted within the first quarter grace period to be accompanied by a 5 percent late fee and late payments submitted within the second quarter grace period to be accompanied by an additional 10 percent late fee. *See* 47 C.F.R. § 1.2110(g)(4)(i) and (ii). SoFast concedes that it often made payments without the required late fees and the Commission's records confirm that the February 2000 payment was such a payment.

⁵² Petition at 1; Letter Attachment to Supplement at 2. The Commission's records confirm SoFast's concessions and demonstrate that installment payments were paid late, thereby incurring late fees that were unpaid.

⁵³ *See* 47 C.F.R. § 1.2110(g)(4)(iii). This same rule provision further specifies the sequence in which any late payments are applied to a licensee's installment payment obligations. "Payments made at the close of any grace period(s) will first be applied to satisfy any lender advances as required under each licensee's 'Note and Security Agreement,' with the remainder of such payments applied in the following order: late payment fees, interest charges, installment payments for the most back-due quarterly installment payment." *Id.*

shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures.”⁵⁴

18. SoFast asserts that it did not realize that its accountant responsible for making the payments had not been paying the late fees and had made a payment late.⁵⁵ Here too, we find that this assertion does not justify a waiver of the automatic cancellation rule. There is nothing unique or unusual regarding SoFast’s alleged employee negligence and/or embezzlement, and the Commission has consistently denied waivers based upon claims of third party negligence.⁵⁶ It is the responsibility of the licensee to ensure that accurate and timely payment of all financial obligations is made to the Commission.⁵⁷ Furthermore, SoFast is responsible for the consequences that flow from the management of its own business affairs, including any alleged negligence or embezzlement by any of its employees.⁵⁸ SoFast itself recognizes that it did not discover the negligence and embezzlement until after the license had automatically canceled on September 1, 2001.⁵⁹

19. We find, however, that based on the particular circumstances of its default, SoFast has demonstrated that the underlying purpose of the automatic cancellation rule would not be served, or would be frustrated, by its application in this instance.⁶⁰ Automatic cancellation of licenses occurs under Section 1.2110(g)(4)(iv) upon a licensee’s failure to timely pay either a required installment payment of a winning bid or an amount assessed as a late fee within two quarters of the related installment payment’s original due date.⁶¹ Nevertheless, the purpose of the Commission’s assessment of installment payment late fees is, while related to the purpose of its fundamental requirement that licensees pay their winning bids in a timely manner, also distinct from that purpose. Requiring the timely payment of winning bids, including both principal and interest when paid in installments, protects the integrity of auctions and the Commission’s licensing process.⁶² Requiring the payment of late fee amounts encourages timeliness in making those underlying payments. As the Commission has stated, it assesses late fees to “provide licensees with adequate financial incentives to make installment payments on time” in a manner

⁵⁴ See 47 C.F.R. § 1.2110(g)(4)(iv).

⁵⁵ Petition at 1.

⁵⁶ See, e.g., Southern Communications Systems, Inc. Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in Cleveland, TN BTA, *Memorandum Opinion and Order*, 15 FCC Rcd 25103, 25107 ¶ 10 (2000) (“*Southern Order*”) (holding that a failure to appropriately organize and manage business arrangements does not justify waiver of the automatic cancellation rule), *further recon. denied*, *Second Memorandum and Opinion*, 16 FCC Rcd 18357 (2001); BDPCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 2330, 2335 ¶ 8 (1997) (holding that a failure of a third party to perform its contractual obligation does not constitute a special circumstance justifying a waiver of the down payment default rule), *review denied sub nom. BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003); PanAmerican Interactive Corp., *Order*, 18 FCC Rcd 15314, 15318 (2003) (holding that a licensee is responsible for the consequences that flow from its business decisions).

⁵⁷ *21st Century Order*, 15 FCC Rcd at 25120 ¶ 16 (It is a licensee’s “obligation to ascertain the correct amount and due date of [an] installment payment.”).

⁵⁸ As a licensee, SoFast is responsible for the actions of its employees. Triad Broadcasting, Inc., *Memorandum Opinion and Order*, 96 FCC 2d 1235, 1242 ¶ 16 (1984), citing James C. Vernon, *Memorandum Opinion and Order*, 30 FCC 2d 456, 457 ¶ 5 (1971) (licensee not excused for rule violation even if possibly deceived by an employee).

⁵⁹ Petition at 1.

⁶⁰ SoFast has an obligation to show as well that grant of such a waiver would serve the public interest. See 47 C.F.R. § 1.925.

⁶¹ 47 C.F.R. § 1.2110(g)(4)(iv).

⁶² See generally *21st Century Order*.

“consistent with standard commercial practice of establishing late fees and developing financial incentives for licensees to resolve capital issues before payment due dates.”⁶³

20. When applied to SoFast’s circumstances, it is uncontested that Section 1.2110(g)(4)(iii)-(iv) results in automatic cancellation of the subject license. Given, however, that the Commission adopted its late fee rules primarily as an incentive to encourage licensees to expedite payment within the authorized payment periods, the circumstances of cases in which the application of those rules results in license cancellation merit special attention.⁶⁴ SoFast asserts that it did not pay late fee-based amounts because of its erroneous belief that its February 29, 2000, payment had been received on a timely basis and thereafter because of its employee’s mistake or misunderstanding of the rules. As explained above, SoFast is responsible for the consequences that flow from its employees’ actions, and the employee conduct it describes does not justify a waiver of the automatic cancellation rule. We do find, however, that SoFast’s consistent submission of its 2000-2001 installment payments within two quarters of their due dates and its consistent post-default payments, coupled with the fact that its default was caused by a failure to remit late fees, indicate that enforcement of the automatic cancellation rule in this case will not serve either the underlying purpose of the late fee rule, which is to encourage timely payment, or the automatic cancellation rule, which, among other things, preserves the integrity of the Commission’s licensing process.

21. The cancellation of the Great Falls License occurred not because SoFast failed to make installment payments within the two quarters permitted under the Commission’s rules, but rather because it did so without paying the associated late fees. In fact, a review of the Commission’s records reveals that from the time of its first payment in February 2000 until the most recent payment it rendered in August 2006, SoFast has consistently made payments to the Commission within the first or second quarter of the payment deadlines that were contemplated in its original note and security agreement.⁶⁵ Considering the Commission’s receipt of SoFast’s July 2001 payment as well as all of its post-default payments from 2001 through 2006, we conclude that enforcing the automatic cancellation rule under such circumstances is not necessary to provide the appropriate incentive to make payment of the amounts owed or to preserve the Commission’s licensing integrity. We further conclude that enforcing Sections 1.2104(g)(4)(iii)-(iv) with respect to amounts equivalent to those assessed as late fees without serving the rule’s underlying purpose would be contrary to the public interest. Doing so would result in automatic cancellation of the license, disrupting the Commission’s prior assignment of the license without achieving any countervailing benefit.

22. We stress, however, that if the facts of this case had provided any indication that SoFast lacked the financial wherewithal or willingness to pay the monies owed toward its debt obligation to the Commission, then it would appear that a waiver would not be justified. Under such circumstances, we may well regard enforcement of the automatic cancellation rule that is triggered by failure to pay late fees alone as a critical element in preserving the integrity of the auctions and licensing processes. Here,

⁶³ *Part 1 Third Report and Order*, 13 FCC Rcd at 439.

⁶⁴ The Commission has taken a much stricter approach with respect to licensees who have failed on a more fundamental level to honor their loan obligations. As discussed more fully below, when a licensee fails to pay the principal and interest that it owes, the Commission has consistently declined to exercise much flexibility in considering waiver requests due to the danger that such flexibility would undermine the bedrock presumption that underlies the integrity of the auctions process as a spectrum allocation tool – *i.e.*, that those who value the spectrum the most are those best able to put the spectrum to its most efficient use and that winning bids are an effective proxy for identifying those who value the spectrum the most.

⁶⁵ With its August 2006 payment to the Commission, SoFast’s outstanding debt obligation is approximately \$5,000.

however, SoFast's repeated and consistent course of payment conduct tends to demonstrate that its failure to make timely payments of amounts equivalent to those owed as late fees resulted from mistake rather than insufficient incentive, unwillingness, or inability to make timely payment.⁶⁶

23. When licensees fail to pay winning bids, or the principal and related interest when paying winning bids in installments, on a timely basis in compliance with the Commission's rules, the presumption that the auction assigned the license to the party that placed the highest value on the license is lost.⁶⁷ Accordingly, in such circumstances, the Commission consistently has denied waiver of automatic cancellation pursuant to Section 1.2110(g)(4)(iv).⁶⁸ Indeed, were this case not centered on amounts equivalent to missed late fees but rather missed installment payments, allegations of mistake and circumstance similar to those raised by SoFast would not distinguish it from prior cases in which we determined that denying relief was essential to safeguarding the integrity of the auctions and licensing processes. In contrast, where the failure to make a timely payment occurs solely with respect to amounts that arise due to the late fee rules, and where the Commission has received, consistently within two quarters, payments toward the outstanding bid obligation, the underlying need for enforcement of the automatic cancellation rule is not as clear-cut or compelling. Accordingly, in such a case we are more inclined to examine whether the licensee's circumstances might justify a waiver of the automatic cancellation rules. As discussed above, the circumstances surrounding SoFast's initial late payment, its subsequent regular 2000-2001 installment payments, and its consistent and continuing post-default payments, all minimize the possibility that SoFast did not comply with the Commission's payment deadlines because of any inability or unwillingness to pay what it owed within the time constraints of the rules. Consequently, SoFast's failure to fully pay the amounts equivalent to the late fees that it was assessed does not, by itself, call into question whether the Commission assigned the license to the party that placed the highest value on the Great Falls License, and whether, therefore, the assignment of the license to SoFast was in the public interest. Accordingly, we conclude that this waiver is in the public interest.

⁶⁶ We stress that SoFast's mistake of fact regarding its late fees would not alone be sufficient to waive the automatic cancellation rule. Moreover, SoFast's mistake of fact could not -- and did not -- relieve it of the obligation to pay the properly assessed amounts, which, as explained herein, must be paid within 31 days of the release of this Order.

⁶⁷ *Id.*, 15 FCC Rcd at 25,123-24.

⁶⁸ See, e.g., *21st Century Order*; Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion & Order*, 15 FCC Rcd 25103 (2000), *further reconsideration denied*, *Second Memorandum Opinion and Order*, 16 FCC Rcd 18357 (2001); Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, 14 FCC Rcd 6080 (1999), *aff'd*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1214855 (D.C. Cir., Nov. 24, 1999); Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment, *Order*, DA 04-20 (released January 8, 2004) (denying waiver to licensee that paid both required installment payment and applicable late fees days after non-payment triggered cancellation); Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. § 1.2110(g)(4)) and Debt Collection Rules (47 C.F.R. §1901 et seq.), DA 03-2368, 18 FCC Rcd 14,695 (2003) (same) (Petition for Reconsideration pending); Pan American Interactive, D.A. 03-2406, 18 FCC Rcd 15,314 (2003); Letter to Messrs. Stephen Diaz Gavin and Paul C. Besozzi, Counsel for U.S. Telemetry Corporation, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 17 FCC Rcd 6442, 6446 (2002).

IV. Conclusion

24. Therefore, for all the reasons stated above, IT IS ORDERED that SoFast has satisfied the standard for a waiver of the automatic cancellation provision of Section 1.2110(g)(4)(iv), *nunc pro tunc*. Moreover, we observe that waiver *nunc pro tunc* serves the public interest by avoiding unnecessary disruption to license assignment made pursuant to public interest objectives.

25. IT IS FURTHER ORDERED that, pursuant to the authority granted in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.2110(g)(4) of the Commission's rules, 47 C.F.R. § 1.2110(g)(4), SoFast must render full payment of any and all outstanding installment debt connected to its license within 31 days from the date of this Order, i.e., by October 12, 2006. In the event SoFast fails to comply with the condition of full and timely payment of its default obligations required by section 1.2110(g)(4), 47 C.F.R. § 1.2110(g)(4), pursuant to the terms of this Order, the applicable notes and security agreements, and the Commission's debt collection procedures, the applicable licenses will cancel.

26. IT IS FURTHER ORDERED that, pursuant to the authority granted in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), SoFast is granted a waiver of Section 1.949(a) of the Commission's rules and must file a renewal application within 60 days of the release of this *Memorandum, Opinion and Order*.

27. IT IS FURTHER ORDERED that the Request for Special Temporary Authority filed by SoFast Internet Services, Inc., on December 7, 2005, IS DISMISSED as moot.

28. This action is taken pursuant to delegated authority granted under provision of Sections 4(i), 5(c)(1) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(1) and 309(j), and Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Margaret Wiener
Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau