

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

In the Matter of )
)
CommNet Communications Network, Inc. )
)
Request for Waiver and for Reinstatement of the )
900 MHz Specialized Mobile Radio Service T )
Block License for MTA007, Dallas-Fort Worth, )
KNNX959 )
)

ORDER

Adopted: May 9, 2007

Released: May 9, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we deny the request of CommNet Communications Network, Inc. ("CommNet"), for a waiver of the Commission's installment payment rules and the reinstatement of the 900 MHz Specialized Mobile Radio ("SMR") Service T block license for the Dallas-Fort Worth major trading area ("MTA"), MTA007, call sign KNNX959 (the "License").

II. BACKGROUND

A. The Commission's Installment Payment Program

2. When the Commission first adopted competitive bidding rules in 1994, it established an installment payment 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.

1 Waiver - Expedited Action Requested; Request for Reinstatement, filed by CommNet Communications Network, Inc., on Sept. 22, 2004 ("Waiver and Reinstatement Request").

2 47 C.F.R. § 1.2110(g)(4)(iv).

3 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 (continued....)

deciding to offer installment payment plans, 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.<sup>4</sup> Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.<sup>5</sup> When in 1997 the Commission discontinued the use of installment payments for future auctions,<sup>6</sup> it allowed entities that were already paying for licenses in installments to continue doing so.<sup>7</sup>

3. Certain features of the Commission's installment payment rules have remained the same since they were first adopted in 1994. Thus, 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.<sup>8</sup> In 1997, however, the Commission liberalized its installment payment grace period rules (Continued from previous page) \_\_\_\_\_ first Commission auction for which installment payments were available was Auction No. 2 (218-219 MHz Service), which concluded on July 29, 1994.

<sup>4</sup> *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 U.S.C. § 309(j)(3)(B), (4)(D).

<sup>5</sup> See 47 C.F.R. § 1.2110(e)(3)(iii), (iv) (1994).

<sup>6</sup> 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) of the Communications Act, 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 Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,322 ¶ 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.

<sup>7</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>8</sup> 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) (“*Part 1 Third Order on Reconsideration of the Third Report and Order*”). In this order addressing the inapplicability of section 1.2104 of the Commission's rules, 47 C.F.R. § 1.2104, 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 terminate 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 auction 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 defaulting after the close of an auction is more severe than the consequence of withdrawing a high bid during an auction, when a new high bidder can still emerge. 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 (continued....)

for those 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> A licensee's failure to make payment, including the associated late fees, by the end of the second 90-day period placed it in default.<sup>13</sup>

4. 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,<sup>14</sup> and that the added certainty the rules provided to licensees would increase the likelihood that licensees and potential investors would find solutions to capital problems before defaults occurred.<sup>15</sup> Noting that a grace period is an extraordinary form of relief 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.<sup>16</sup>

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because the former could adversely affect service to the public much longer than the latter. *Id.* at 2561-62 ¶¶ 29-31.

<sup>9</sup> 47 C.F.R. § 1.2110(e)(4)(i), (ii) (1994). Licensees were permitted to request a grace period of 90 to 180 days.

<sup>10</sup> *Id.* § 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.

<sup>11</sup> 47 C.F.R. § 1.2110(f)(4)(i) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>12</sup> 47 C.F.R. § 1.2110(f)(4)(ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>13</sup> 47 C.F.R. § 1.2110(f)(4)(iv) (1998). These rules were amended in 2000 to provide licensees with two quarters (i.e., two 3-month periods), rather than two 90-day periods, in which to submit late installment payments and associated late fees. *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,310 ¶ 28. This change aligned the schedule for late payments with the quarterly schedule of regular installment payments.

<sup>14</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110.

<sup>15</sup> *Id.* at 443 ¶ 116.

<sup>16</sup> *Id.* at 439-40 ¶¶ 109-10; *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,304-05 ¶ 19.

## B. CommNet

5. CommNet won the License in the Commission's first 900 MHz SMR auction, Auction No. 7.<sup>17</sup> As a small business under section 90.814(b)(1)(i) of the Commission's rules,<sup>18</sup> CommNet was eligible to, and elected to, pay for the License over its ten-year term using the installment payment plan available to small businesses that won licenses in Auction No. 7.<sup>19</sup> Grant of the License was conditioned upon CommNet's full and timely performance of its payment obligations.<sup>20</sup> CommNet was scheduled to make interest-only payments for the first five years of the license term; payments of interest and principal were to be amortized over the remaining five years.<sup>21</sup>

6. CommNet chose to participate in the Commission's Auction Installment Payment ("AIP") program to make its installment payments. Under this program, intended to facilitate and expedite installment payments, a licensee provides certain financial information to the Commission and to Mellon Bank, the financial institution responsible for processing installment payments owed to the Commission. The licensee may then call Mellon Bank and authorize the initiation of a payment from the licensee's designated account.<sup>22</sup>

7. Under its installment payment schedule, CommNet was required to begin making quarterly installment payments of both interest and principal on November 30, 2001. On November 21, 2001, CommNet sent a letter to the Auctions and Industry Analysis Division, the predecessor of the Auctions and Spectrum Access Division, requesting a waiver of the Commission's installment payment rules in the form of a one-year suspension of its obligations to make installment payments on the License.<sup>23</sup> In this 2001 Waiver Request, CommNet claimed that a downturn in economic conditions coupled with a lack of financial participation by lenders in the telecommunications industry had decreased its ability to fund the operation and development of its system and to make its installment payments.<sup>24</sup> The Auctions and Industry Analysis Division denied CommNet's request, finding that the financial difficulties CommNet

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<sup>17</sup> See FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas, *Public Notice*, 11 FCC Rcd 18,599 (1996).

<sup>18</sup> 47 C.F.R. § 90.814(b)(1)(i) (1995).

<sup>19</sup> *Id.* § 90.812 (1995).

<sup>20</sup> *See id.* § 90.812(a) (1995).

<sup>21</sup> *See id.* § 90.812(a)(1) (1995).

<sup>22</sup> While the licensee may specify the date that Mellon Bank processes the licensee's payment to the Commission, under AIP program procedures, the earliest the licensee's installment payment account with the Commission will be credited is the business day following the telephone authorization. *See* AIP brochure.

<sup>23</sup> Letter from Delaney M. DiStefano, Counsel for CommNet Communications Network, Inc., to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (Nov. 14, 2001) ("2001 Waiver Request").

<sup>24</sup> *Id.* at 2-3.

had described did not constitute a basis for grant of a waiver of the Commission's installment payment rules.<sup>25</sup>

8. CommNet did not seek reconsideration of this denial and continued to make quarterly installment payments, including late fees, until the payment due on November 30, 2003 (the "November 2003 payment"). In making this payment, CommNet attempted to avail itself of the entire grace period available under the Commission's rules, i.e., two quarters. Because the last day of the second quarter of the grace period, May 31, 2004, fell on Memorial Day, the Commission considered payments timely if the Commission received them no later than June 1, 2004. On May 27, 2004, CommNet initiated the AIP procedure for making its November 2003 payment, including late fees.<sup>26</sup> On June 2, 2004, CommNet received an insufficient funds notice from Wells Fargo Bank, the institution from which CommNet had authorized Mellon Bank to withdraw installment payments.<sup>27</sup> On June 2, 2004, CommNet again initiated the payment, which the Commission received on June 3, 2004. However, because CommNet had by then missed the grace period deadline, the License had already canceled automatically, and CommNet had become subject to debt collection procedures, pursuant to the Commission's rules.<sup>28</sup> Since its submission of the payment received on June 3, 2004, CommNet has made no further payment on its remaining debt obligation.

9. In its Waiver and Reinstatement Request, CommNet argues that it attempted to meet its payment obligations in good faith but that its first attempt to make the November 2003 payment failed because it had mistakenly deposited the funds needed to cover the payment not into its Wells Fargo Bank account, the account it had designated for AIP program payments, but rather into an account with another bank.<sup>29</sup> According to CommNet, the error occurred, in part, because CommNet's bookkeeper had left the company in April 2004 "due to economic circumstances"<sup>30</sup> and had not yet been replaced, leaving an inexperienced individual responsible for making the November 2003 payment.<sup>31</sup> As discussed below, CommNet also makes a number of other arguments in support of its request, including that the Commission should consider CommNet's good faith efforts to meet its payment obligations<sup>32</sup> and that the value of the License has decreased since Auction No. 7.<sup>33</sup>

### III. DISCUSSION

10. To obtain a waiver of the automatic cancellation rule, CommNet must show either that: (i) the underlying purpose of the rule would not be served, or would be frustrated, by its application in

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<sup>25</sup> Letter from Kelly Quinn, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Delaney M. DiStefano, Esq., Counsel for CommNet Communications Network, Inc., 17 FCC Rcd 10,418 (2002).

<sup>26</sup> Waiver and Reinstatement Request at 5, 13-14.

<sup>27</sup> *Id.* at 5-6, 13-14.

<sup>28</sup> *See* 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>29</sup> Waiver and Reinstatement Request at 4-6, 13-14.

<sup>30</sup> *Id.* at 13.

<sup>31</sup> *Id.* at 5, 11-12.

<sup>32</sup> *Id.* at 3-4, 10-11.

<sup>33</sup> *Id.* at 18-19.

the instant case, and a grant of the requested waiver would be in the public interest; or (ii) the unique facts and circumstances of the instant case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or CommNet has no reasonable alternative.<sup>34</sup> CommNet argues that it satisfies both prongs of this standard. We find, however, that it has failed to make the necessary showing for either one.

11. **First prong of the waiver standard.** With respect to the first prong of the Commission's waiver standard, CommNet reasons that because the automatic cancellation rule is part of the Commission's designated entity rules,<sup>35</sup> and because these rules were promulgated in response to Congress's directive that the Commission encourage the participation of small businesses in the provision of spectrum-based services, enforcement of the automatic cancellation rule in this case would frustrate the underlying purpose of the designated entity rules.<sup>36</sup> CommNet further argues that "harsh application" of the automatic cancellation rule would not be in the public interest.<sup>37</sup> Acknowledging the Commission's "compelling interest in ensuring that designated entities make good on their payment obligations," CommNet argues nevertheless that the public interest would be "best served by allowing spectrum won at auction by a small business to remain, if reasonably possible, in the hands of that small business."<sup>38</sup>

12. CommNet also asserts that it attempted in good faith to comply with the Commission's installment payment rules. CommNet emphasizes that this is not a case where the licensee intentionally or knowingly failed to make an installment payment on time or had insufficient funds to make the payment.<sup>39</sup> CommNet suggests that in balancing the public interest in strict enforcement of the installment payment rules against the hardship that enforcement would impose upon a licensee that has acted in good faith, the Commission should give greater weight to the latter factor. According to CommNet, the Commission has established ample precedent for such an approach in numerous enforcement cases in which the Commission has reduced or canceled forfeitures after taking into account the good faith of the licensees.<sup>40</sup> CommNet does not, however, cite any specific cases.

13. These arguments fall short of meeting the first prong of the waiver standard. The Commission has consistently rejected arguments that its obligation under section 309(j) of the Communications Act to facilitate the participation of designated entities in the provision of spectrum-based services requires it to waive its installment payment rules in cases where licensees are unable or unwilling to pay their winning bids.<sup>41</sup> The Commission's competitive bidding system was designed to

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<sup>34</sup> 47 C.F.R. § 1.925.

<sup>35</sup> "Designated entities" are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies. 47 C.F.R. § 1.2110(a).

<sup>36</sup> Waiver and Reinstatement Request at 8-9 (citing 47 U.S.C. § 309(j)(3)(B), (4)(D)).

<sup>37</sup> *Id.* at 10.

<sup>38</sup> *Id.* at 12.

<sup>39</sup> *Id.* at 11.

<sup>40</sup> *Id.* at 12-13.

<sup>41</sup> See, e.g., 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 Services (PCS) C Block Auction, *Memorandum Opinion and Order*, 13 FCC Rcd 21,983, 21,994 ¶ 20 (1998) ("Neither its mandate to provide opportunities for small businesses nor its finding that small businesses have difficulty obtaining (continued....)")

serve a number of statutory purposes, including the rapid deployment of new technologies and services to the public and the efficient and intensive use of spectrum.<sup>42</sup> Installment payment programs were established to help small entities participate in the competitive bidding process and the provision of spectrum-based services;<sup>43</sup> they were not, however, intended to allow the retention of licenses by parties unable to pay for the licenses and provide service. Indeed, since the inception of the auctions program, the Commission has endeavored to ensure that the rapid deployment of service and the efficient, intensive use of spectrum are not undermined by entities that lack the financial capacity to pay their winning bids and operate communications systems.<sup>44</sup>

14. In keeping with this objective, the Commission has determined that strict enforcement of its installment payment rules enhances the integrity of the auction and licensing process.<sup>45</sup> Allowing winning bidders to retain licenses when they are unable to pay their winning bids prevents the auction process from assigning licenses to those parties best able to serve the public. At the same time, precluding licensees from keeping licenses when they do not timely pay their winning bids reduces the incentive for bidders to make bids they cannot pay and increases opportunities for other bidders to win

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capital requires the Commission to waive payment deadlines for small businesses in this instance.”), *aff’d in part and dismissed in part, Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999); Styles Interactive, Inc. Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline, *Memorandum Opinion and Order*, 12 FCC Rcd 17,987, 17,991-92 ¶ 7 (1997) (“The Commission has fulfilled its mandate and acted consistently with its own findings by making bidding credits and installment payment plans available to small businesses participating in the IVDS auction. Neither its mandate to provide opportunities nor its finding that small businesses have difficulty obtaining capital requires the Commission to waive payment deadlines for small businesses.”); TPS Utilicom, Inc., *Order on Reconsideration*, 18 FCC Rcd 2516, 2522-23 ¶ 12 (WTB 2003).

<sup>42</sup> 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.”).

<sup>43</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 229.

<sup>44</sup> As noted above, for example, when the Commission amended its grace period rules in 1997, it 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. See *supra* para. 4. See also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2390 ¶ 237 (deciding not to allow installment payments for large spectrum blocks in order to avoid delay of service to public that could result from encouraging undercapitalized firms to acquire licenses they lack the resources to finance adequately).

<sup>45</sup> See, e.g., Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, *Memorandum Opinion and Order*, 15 FCC Rcd 25,103, 25,110-11 ¶ 15 (2000) (“*Southern MO&O*”), *further recon. denied, Second Memorandum Opinion and Order*, 16 FCC Rcd 18,357 (2001) (“*Southern Second MO&O*”); Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,117-18 ¶ 10 (2000) (“*21st Century MO&O*”), *recon. denied*, Licenses of 21st Century Telesis Joint Venture and 21st Century Bidding Corporation for Facilities in the Broadband Personal Communications Services, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001), *petition dismissed in part and denied in part, 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003).

licenses.<sup>46</sup> Thus, strict enforcement of the automatic cancellation rule is essential to preserving a fair and efficient licensing process for all participants in Commission auctions, including those that win licenses and those that do not. Moreover, by increasing the likelihood that winning bidders will be entities that are able to pay their bids and provide service to the public, the Commission furthers economic opportunity, competition in the marketplace, and the rapid deployment of services.<sup>47</sup>

15. The Commission's rules presume that the entity that bids the most for a license in an auction is the entity that places the highest value on the use of the spectrum, and such entities are presumed to be those best able to put the licenses to their most efficient and effective use for the benefit of the public.<sup>48</sup> When licensees that are paying winning bids in installments fail to pay the principal and related interest 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.<sup>49</sup> In certain circumstances, a party that loses this presumption may be able to show that there is no question as to whether the auction assigned the license to the party that valued the license most highly and that a waiver of the automatic cancellation rule would therefore be in the public interest. CommNet, however, has failed to make such a showing.

16. In those cases in which we have granted waivers of the automatic cancellation rule, the defaulting licensees have made such showings by convincingly demonstrating not only that they had been able and willing to timely pay the particular installment payments that they had missed but also that they were able and willing to pay their debts to the Commission following their defaults. In *Leaco*, *Advanced*, and *Big Sky*, we granted waivers of the automatic cancellation rule to licensees that had missed installment payment deadlines as a result of errors associated with the AIP process of payment.<sup>50</sup> More recently, in *Tracy* we granted a waiver of the rule to a licensee that had failed to timely meet its installment payment obligation because of the errors of a new accounting team member.<sup>51</sup> The

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<sup>46</sup> See, e.g., Duluth PCS, Inc. and St. Joseph PCS, Inc., Request for Partial Waiver of Section 1.2110(g) of the Commission's Rules, *Order*, 19 FCC Rcd 7137, 7139-40 ¶ 5 (WTB 2004) ("*Duluth*").

<sup>47</sup> See, e.g., *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22. See also *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d at 518 ("Having established a more lenient payment structure for designated entities, which by definition usually faced problems of accessing financial resources, the Commission could . . . reasonably rely on strict enforcement of the deadlines to provide an 'early warning' that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public." (citations omitted)).

<sup>48</sup> See, e.g., *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22.

<sup>49</sup> See, e.g., *id.*

<sup>50</sup> *Leaco Rural Telephone Cooperative, Inc. Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Hobbs, New Mexico Basic Trading Area, MDB191, Order*, 21 FCC Rcd 1182 (WTB 2006) ("*Leaco*"); *Advanced Communications Solutions, Inc. Request for Waiver of Section 1.2110(g)(4)(iv) and Reinstatement of 900 MHz Specialized Mobile Radio Licenses, Order*, 21 FCC Rcd 1627 (WTB 2006) ("*Advanced*"); *Big Sky Wireless Partnership, Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Butte, Montana Basic Trading Area, MDB064, Order*, 21 FCC Rcd 10,066 (WTB 2006) ("*Big Sky*").

<sup>51</sup> *Tracy Corporation II, Request for Payment of Installment Payment Rules for Auction No. 11 and Reinstatement of License, Memorandum Opinion and Order*, 22 FCC Rcd 4071 (WTB 2007) ("*Tracy*"). In two other cases, we have waived the automatic cancellation of licenses where the licensees failed to timely pay late fees. *SoFast Internet Services, Inc., Memorandum Opinion and Order*, 21 FCC Rcd 10,126 (WTB/ASAD 2006) ("*SoFast*"); Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to David Irwin and Nathaniel Hardy, Irwin, Campbell & Tannenwald, P.C., Counsel (continued....)



circumstances surrounding CommNet's failure to timely submit its November 2003 installment payment are in certain respects similar to circumstances we considered in these earlier decisions, i.e., the error of a new employee and the failure to properly submit a payment through the AIP program. However, as we emphasized in all of these earlier cases, such errors by themselves are insufficient to justify waivers of the automatic cancellation rule. Rather, we granted waivers in these cases because the defaulting licensees had demonstrated their ability and willingness to pay for the licenses not only by having made pre-default payments and having shown that their missed payments were attributable to error, but also, and more importantly, by having continued to fulfill their debt obligations through the submission of substantial post-default debt payments.<sup>52</sup>

17. In contrast, CommNet has made no payments on its debt obligation for the License since making the payment received on June 3, 2004, although it knew or should have known that, regardless of how its waiver request was decided, it was required under the Commission's rules to pay this debt in full.<sup>53</sup> Moreover, unlike the licensees that have been granted waivers of the automatic cancellation rule, CommNet has indicated that its financial circumstances are precarious.<sup>54</sup> The Commission has repeatedly emphasized that it is essential to a fair and efficient licensing process to require licensees to demonstrate their ability to pay as a condition of continuing to hold licenses,<sup>55</sup> and we have, in each case in which we have waived the automatic cancellation rule, been very careful to ensure that there was no serious question regarding the defaulting licensee's ability and willingness to pay the monies owed toward its debt obligation to the Commission.<sup>56</sup> Given CommNet's failure to submit post-default

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for MBO Wireless, Inc., 19 FCC Rcd 4011 (WTB 2004) ("*MBO*"). As explained below, the underlying purpose of the late fee requirement is different from, and less critical to the integrity of the auctions process than, the underlying purpose of the requirement of timely paying the principal and interest of installment payments. Therefore, the standard we have applied to the adjudication of requests for waiver of the automatic cancellation rule has been less strict in cases involving failures to timely pay late fees than in cases involving failures to timely pay principal and interest. See *infra* para. 27.

<sup>52</sup> Leaco had promptly paid its debt obligation in full upon the acceleration of its debt, prior to the grant of the waiver. *Leaco*, 21 FCC Rcd at 1185-86 ¶ 10, 1187 ¶¶ 12-13. The licensees in *Advanced* and *Big Sky* had made regular post-default payments on their debt obligations during the pendency of their waiver requests. *Advanced*, 21 FCC Rcd at 1630 ¶ 7, 1632 ¶ 12; *Big Sky*, 21 FCC Rcd at 10,069 ¶ 7, 10,071 ¶ 12, 10,072 ¶ 14. Tracy had made regular post-default payments on its debt obligation and paid this debt in full prior to the grant of the waiver. *Tracy*, 22 FCC Rcd at 4076 ¶ 13, 4078-79 ¶ 18. CommNet has made informal statements to Commission staff indicating that it is able to pay its debt on the License. However, CommNet's statements are unsupported by any post-default payments other than the payment received by the Commission on June 3, 2004, and CommNet has never supplemented the record to include a commitment to pay its debt in full.

<sup>53</sup> See 47 C.F.R. § 1.2110(g)(4)(iv); *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd 2551.

<sup>54</sup> See Waiver and Reinstatement Request at 4 ("Due to harsh economic conditions in the telecommunications marketplace, CommNet was unable to make two of its quarterly auction payments due pursuant to the terms of the installment payment plan."), 15 ("[S]trict application of the agency's rule will certainly cause an economic disaster. . . ."), 18 ("CommNet fears that it will be unable to meet its payment obligations with no asset to show for its payments, and no asset with which to generate revenue through end users.").

<sup>55</sup> See, e.g., *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22; *Southern MO&O*, 15 FCC Rcd at 25,105-06 ¶ 7.

<sup>56</sup> See, e.g., *Advanced*, 21 FCC Rcd at 1632 ¶¶ 11, 12, 1633 ¶ 14; *Big Sky*, 21 FCC Rcd at 10,070-71 ¶¶ 11, 12, 10,072 ¶ 14.

payments on its debt and its statements regarding its financial difficulties, we find that CommNet's ability to pay for the License is in serious doubt. We therefore cannot conclude that we should continue to presume that CommNet is the party best able to use the spectrum efficiently and effectively or that a grant of the requested waiver would serve the underlying purpose of the automatic cancellation rule.

18. Furthermore, CommNet's vague reference to unnamed decisions in which the Commission has found that enforcement of a full forfeiture would not be in the public interest provides no basis for waiver of the Commission's automatic cancellation rule. Such decisions necessarily involve different Commission rules, with different purposes, and CommNet has not shown that any such case is relevant here. Moreover, as discussed herein, we have as precedent numerous installment payment decisions that specifically address requests for waiver of the automatic cancellation rule. Considering all the facts and arguments presented by CommNet, we find that it has failed to satisfy the first prong of the Commission's waiver standard.

19. **Second prong of the waiver standard.** Regarding the second prong of the Commission's waiver standard, CommNet claims that its bookkeeper's having recently left its employ, its related deposit of funds into an account with the wrong bank, its having initiated its first attempt to make payment several days in advance of the end of the grace period, and its attempt to take remedial action after its discovery of its error all render its circumstances unique. We disagree. The commission of an administrative error by an inexperienced employee, and the events that flowed from that error, were neither unique nor unlikely occurrences, but rather were predictable ones that could have been anticipated and should have been averted by CommNet. The Commission has consistently held that licensees are responsible for the conduct of their employees and the consequences that flow from such conduct and that employees' mistakes, negligence, or other misconduct are not unique circumstances that justify waivers of the automatic cancellation rule.<sup>57</sup> Thus, although evidence of an employee's mistake may support a finding that a licensee's failure to timely submit a particular installment payment was not caused by an inability to make that payment, such evidence has never been considered sufficient by itself to support a conclusion that a defaulting licensee has satisfied the standard for waiver of the automatic cancellation rule. As discussed above, in those cases in which waivers of the automatic cancellation rule have been granted to defaulters that have asserted employee mistake, the waivers were granted not because the mistakes were deemed to be unique circumstances, but rather because the defaulting parties had demonstrated by other means, and in particular by submitting substantial post-default payments to the Commission, that there was no serious question regarding whether they remained entitled to the presumption that the auction had assigned the licenses to the parties that valued them most highly.<sup>58</sup>

20. CommNet also characterizes other disparate circumstances as unique facts that it alleges warrant grant of its request under the second prong of the Commission's waiver standard. First, CommNet argues that, by making payments for several years on the License, it has shown its fidelity to the installment payment rules and thus is uniquely situated to receive a waiver.<sup>59</sup> Citing the denial of its 2001 request for a one-year suspension of its installment payment deadlines, CommNet further contends

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<sup>57</sup> See, e.g., *Southern MO&O*, 15 FCC Rcd at 25,107-08 ¶ 10 (finding that neither lack of coordination between business partners nor illness of employee was unique circumstance warranting waiver of automatic cancellation rule); *SoFast*, 21 FCC Rcd at 10,134, 10,135 ¶¶ 18, 20 (finding that neither employee negligence nor embezzlement was unique circumstance warranting waiver of automatic cancellation rule).

<sup>58</sup> See *supra* para. 16.

<sup>59</sup> Waiver and Reinstatement Request at 17-18.

that it has a history of making timely payments “despite a severe economic downturn.”<sup>60</sup> However, timely payments are every installment payor’s obligation, and past payments on a license do not constitute unique circumstances.<sup>61</sup> Moreover, the Commission has never granted a waiver of the automatic cancellation rule based on a history of pre-default payments where the defaulting licensee has not made substantial post-default payments on its debt. We therefore find unpersuasive CommNet’s contention that license cancellation is inequitable where payments have been made for the license.<sup>62</sup> An economic downturn, which can be expected to affect many, if not all, installment payors, is similarly not a unique circumstance,<sup>63</sup> nor is a licensee’s continuation of payments during such a downturn. Therefore, CommNet’s arguments regarding its payment history do not, absent the submission of post-default payments, provide grounds for a waiver of the automatic cancellation rule.

21. Second, CommNet maintains that the value of the License, as judged by prices paid in another 900 MHz SMR auction, is far below the winning bid it is obligated to pay and that such a disparity is a unique factor that should persuade the Commission to grant its request for waiver.<sup>64</sup> CommNet further suggests that granting its waiver request and allowing it to continue making payments “will best ensure the maximum purchase price and return to the U.S. Treasury. . . .”<sup>65</sup> The hypothesized value of a license for particular spectrum at any point in time is not, however, an unusual circumstance. The value of spectrum licenses can, and often does, fluctuate over time. Therefore, a change in the value of a license after its assignment by competitive bidding does not warrant the grant of a waiver of an installment payment deadline, and we need not consider whether CommNet’s allegation regarding the value of the License is factually accurate.

22. Third, CommNet intimates that it is uniquely situated because denial of its request may force it into insolvency.<sup>66</sup> A likelihood of insolvency is not, however, a unique circumstance, nor is it a basis

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<sup>60</sup> *Id.* at 4, 17.

<sup>61</sup> See Lancaster Communications, Inc., *Order*, 22 FCC Rcd 2438, 2444 ¶¶ 15-16 (WTB 2007).

<sup>62</sup> Even in cases in which we have found a waiver of the automatic cancellation rule to be warranted, we have indicated that a history of timely payments does not by itself justify waiver of the rule. See *Advanced*, 21 FCC Rcd at 1627 ¶¶ 14-15 (history of payment over eight years in compliance with the Commission’s rules by itself would not justify waiver); *Leaco*, 21 FCC Rcd at 1182 ¶¶ 10-13 (long-term prior successful participation in the AIP program by itself would not justify waiver).

<sup>63</sup> See Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Jorge J. Inga, M.D., and Rafael Blanco, M.D., Pan American Interactive Corporation, 18 FCC Rcd 15,314, 15,317-18 (WTB 2003); Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Stephen Diaz Gavin and Paul C. Besozzi, Patton Boggs, LLP, Counsel for U.S. Telemetry Corporation, 17 FCC Rcd 6442, 6447 (WTB 2002).

<sup>64</sup> Waiver and Reinstatement Request at 18.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 15 (“[S]trict application of the agency’s rule will certainly cause an economic disaster which will neither support the Commission in future collection efforts of the subject debt, nor serve the public interest in the continuation of delivery of services from the facilities authorized under the license.”). See also *id.* at 18 (“CommNet fears that it will be unable to meet its payment obligations with no asset to show for its payments, and no asset with which to generate revenue through end users.”).

on which we would waive an installment payment deadline.<sup>67</sup> As the Commission has explained, altering a licensee's installment payment obligations because it may consider filing for bankruptcy would harm the integrity of the auctions process.<sup>68</sup> Moreover, a licensee's suggestion that it may be forced into bankruptcy absent a waiver of an installment payment deadline, far from showing that the denial of its waiver request would be contrary to the public interest, tends to indicate that the licensee bid more than it was able to pay for the license and that the auction did not assign the license to the party best able to put it to efficient and effective use for the benefit of the public. CommNet's suggestion that strict application of the automatic cancellation rule in this case will be economically disastrous for it therefore undermines its claim that application of the rule would be inequitable or otherwise contrary to the public interest.

23. Fourth, CommNet indicates that there will be a break in service to customers served under the License if its request is denied.<sup>69</sup> Here, too, CommNet fails to demonstrate unique facts and circumstances to support its argument that application of the rule in the instant case would be inequitable, unduly burdensome, or otherwise contrary to the public interest. As we have pointed out in response to similar arguments in the past, the provision of service does not outweigh the public interest in preserving the integrity of the auction and licensing process and, therefore, does not excuse a licensee from meeting its installment payment deadlines.<sup>70</sup> The Commission is committed to avoiding unnecessary disruptions in service to the public and has the authority to do so by granting, upon request or *sua sponte*, special temporary authority ("STA") that will permit a former licensee to continue providing service for a time after a license cancels.<sup>71</sup> CommNet, however, has not requested an STA to provide service on the License following its cancellation, nor do we have any information before us that would justify our granting CommNet an STA on our own motion.

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<sup>67</sup> See *Southern MO&O*, 15 FCC Rcd at 25,107 ¶ 8 n.29 ("[G]rant of a waiver based upon financial distress would undermine the purpose of the [automatic cancellation] rule."); 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.), *Order*, 18 FCC Rcd 14,695, 14,697-98 ¶ 6 (WTB 2003) ("*GLH*"), *recon. denied, Order on Reconsideration*, 22 FCC Rcd 2411, 2419 ¶ 22 (WTB 2007), *application for review pending* ("A party's assertion that it might seek the protection of a bankruptcy court, with all the consequences that would entail, if the Commission does not otherwise waive the party's obligations is no basis by itself for waiving the Commission's rules."); TV Communications Network, Inc., *Order*, 22 FCC Rcd 1397, 1407-08 ¶ 21 (WTB 2007), *application for review pending* ("[The licensee's] alleged significant business difficulties do not amount to unique facts or circumstances that would make application of the automatic cancellation rule inequitable.").

<sup>68</sup> See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Second Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 6571, 6580 ¶ 16 (1999).

<sup>69</sup> Waiver and Reinstatement Request at 15.

<sup>70</sup> See, e.g., *Duluth*, 19 FCC Rcd at 7140 ¶ 7; *GLH*, 18 FCC Rcd at 14,699-700 ¶ 12.

<sup>71</sup> See *GLH*, 18 FCC Rcd at 14,699-700 ¶ 12 (citing 47 C.F.R. § 1.931(a)); Pinpoint Wireless, Inc., Request for Waiver and Extension of the Broadband PCS Construction Requirements, *Order*, 18 FCC Rcd 1904, 1910 ¶ 13 (2003) (denying requested waiver and *sua sponte* granting special temporary authority); MBO Wireless, Inc. Requests for Extension of Special Temporary Authority to Operate PCS F Block License KNLF925, BTA311, Muskogee, Oklahoma and PCS C Block License KNLF591, BTA433 Stillwater, Oklahoma, *Order*, 17 FCC Rcd 11,257 (2002)).

24. As part of its argument that it meets the second prong of the Commission's waiver standard, CommNet contends that enforcement of the automatic cancellation rule in its case would be inequitable because it would be inconsistent with Commission precedent. However, none of the decisions CommNet cites is determinative in the instant case. Thirteen of the decisions concern installment payors' defaults on second down payments,<sup>72</sup> and two concern defaults on final payments by winning bidders not paying in installments.<sup>73</sup>

25. The Commission has concluded that decisions involving waivers of second down payment deadlines are not relevant to determining whether to grant a waiver of a quarterly installment payment deadline.<sup>74</sup> As the Commission has explained, "[t]he circumstances that satisfy the standards for waiver of the down payment rules will not necessarily satisfy the standards for waiver of the installment payment rules" because "the function, purpose, and corresponding burdens imposed by the second down payment rule differ from the function, purpose, and corresponding burdens imposed by the installment payment rule."<sup>75</sup> More specifically, the Commission has indicated that the down payment rules serve to discourage insincere or financially unqualified bidders from waiting until after the close of an auction to arrange financing and that it allows only a few days for the submission of down payments in order to prevent post-auction shopping of licenses.<sup>76</sup> In light of these factors, the Commission has in some cases found that the public interest would not be served by application of the second down payment deadline

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<sup>72</sup> See Waiver and Reinstatement Request at 15-17 (citing Magnacom Wireless, L.L.C. Request for Waiver of Section 24.716(a)(2) of the Commission's Rules, *Order*, 13 FCC Rcd 766 (WTB 1998); 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, B178, B335, and B436, Frequency Block C, *Memorandum Opinion and Order*, 12 FCC Rcd 22,938 (1997); Cenkan Towers, L.L.C. Request for Waiver of Section 90.811 of the Commission's Rules Regarding Various MTA Markets, *Order*, 12 FCC Rcd 1516 (WTB 1997); The Wireless, Inc. Request for Waiver of Section 90.811 of the Commission's Rules Regarding Various MTA Markets, *Order*, 12 FCC Rcd 1821 (WTB 1997); Roberts-Roberts & Associates, LLC, *Order*, 12 FCC Rcd 1825 (WTB 1997); Southern Communications Systems, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B085, *Order*, 12 FCC Rcd 1532 (WTB 1997); RFW, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B230, *Order*, 12 FCC Rcd 1536 (WTB 1997); MFRI, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B435, *Order*, 12 FCC Rcd 1540 (WTB 1997); Wireless Telecommunications Company Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B411, *Order*, 12 FCC Rcd 1544 (WTB 1997) CSS Communications, Co., Request for Waiver of Section 90.811(a)(2) of the Commission's Rules Regarding Various MTA Markets, *Order*, 12 FCC Rcd 1507 (WTB 1997); Paradise Cable, Inc. Sarasota-Bradenton, Florida, B408 Multipoint Distribution Service Request for Waiver of Section 21.955(b), *Order*, 12 FCC Rcd 9760 (WTB 1997); *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512 (1999) (upholding Commission's denial of request for waiver of second down payment deadline); and Longstreet Communications International, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B012, *Order*, 12 FCC Rcd 1549 (WTB 1997)).

<sup>73</sup> See Waiver and Reinstatement Request at 15-17 (citing Metricom, Inc.'s Request for Waiver for Section 27.208(a) of the Commission's rules for Wireless Communications Service Markets: ME30A, ME45A, ME46A, RE01D, RE05C, RE05D, RE06C, RE06D, *Order*, 13 FCC Rcd 890 (WTB 1998) ("*Metricom*"); LMDS Communications, Inc. Request for Waiver of Sections 1.2109(a) and (c), 1.2104(g) and 101.1105(b) of the Commission's Rules regarding BTA117, BTA122, BTA203, BTA215, BTA218, BTA287, BTA317, BTA328, BTA330, BTA335, BTA375 and BTA416, *Order*, 15 FCC Rcd 8618 (WTB 2000) ("*LMDS*").

<sup>74</sup> *Southern MO&O*, 15 FCC Rcd at 25,109-10 ¶ 13.

<sup>75</sup> *Id.* at 25,109-10 ¶¶ 13-14.

<sup>76</sup> *Id.* at 25,110 ¶ 14.

where the winning bidders had demonstrated inadvertence and an ability to pay at the time of the payment deadline.<sup>77</sup> In contrast, the Commission's installment payment rules provide licensees with two quarters past each payment due date in which to remit payment. In adopting these grace periods, the Commission provided licensees with ample time to pursue private market solutions to financing difficulties; to allow for further delay would only serve to undermine the purpose behind enforcement of the Commission's payment deadlines.<sup>78</sup>

26. Decisions involving requests for waivers of final payment deadlines are also different from decisions involving requests for waivers of installment payment deadlines. A final payment is the lump sum payment of the remainder of a winning bid obligation after submission of the down payment, whereas installment payments represent the remainder of a winning bid obligation (after the down payment) amortized over the term of the license. Accordingly, requests for waivers of installment payment deadlines often involve circumstances and factors that are not relevant to requests for waivers of final payment deadlines, including the defaulting licensee's history of post-default payments. For this reason, the grant of a waiver of a final payment deadline to a party that missed the deadline through inadvertence will not necessarily support the grant of a waiver of an installment payment deadline, even where the installment payment deadline was also missed through inadvertence. Thus, *Metricom*, one of the two final payment cases cited by CommNet, does not support the grant of a waiver in the instant case. In *Metricom*, the Wireless Telecommunications Bureau granted a partial waiver of a final payment deadline (i.e., it waived the deadline but imposed a 5 percent late fee) to a winning bidder whose payment was submitted two days late because its bank did not follow its payment wiring instructions.<sup>79</sup> Upon submission of this payment, the winning bidder in *Metricom* had paid its winning bid obligation in full, and there was therefore no question regarding its ability or willingness to meet its payment obligation.<sup>80</sup> CommNet, on the other hand, has not paid its winning bid in full and indeed has made no payment on its debt to the Commission since the late submission of its November 2003 installment payment. Finally, *LMDS*, the other final payment decision cited by CommNet, does not support CommNet's request for waiver because, *inter alia*, the defaulting entity's request for waiver of a final payment deadline was denied.<sup>81</sup>

27. The sole decision CommNet mentions that concerns a default on a quarterly installment payment, *MBO*, provides no support for granting a waiver of the automatic cancellation rule to CommNet.<sup>82</sup> In *MBO*, the Auctions and Industry Analysis Division waived the licensee's missed

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<sup>77</sup> *Id.* at 25,109-10 ¶ 13.

<sup>78</sup> *Id.* at 25,110-111 ¶ 15.

<sup>79</sup> *Metricom*, 13 FCC Rcd at 892-93 ¶ 9. As noted in the decision, shortly after the winning bidder in *Metricom* had missed its final payment deadline, the Commission amended its final payment rule to allow winning bidders to submit their final payments up to ten days late provided that they paid a 5 percent late fee. *Id.* at 892 ¶ 8 (citing *Part 1 Third Report and Order*, 13 FCC Rcd at 428-30 ¶¶ 93-95). Had the winning bidder in *Metricom* been governed by the amended final payment rule, its payment would have been within the ten-day late period and it would have had an opportunity to pay the late fee within this period as well.

<sup>80</sup> *Id.* at 892 ¶¶ 6-7.

<sup>81</sup> *LMDS*, 15 FCC Rcd 8618.

<sup>82</sup> See Waiver and Reinstatement Request at 15 (citing *MBO*, 19 FCC Rcd 4011).

installment payment deadline with respect to amounts equivalent to late fees.<sup>83</sup> In doing so, the Division emphasized that the purpose of requiring late fees is different from the purpose of requiring the timely payment of winning bids. As the Division explained, “Requiring payment of winning bids, both principal and interest when paid in installments, protects the integrity of the auction and the Commission’s licensing process. Requiring payment of late fee amounts encourages timeliness in making those underlying payments.”<sup>84</sup> The Division further stated, “[W]ere this case not centered, at heart, around missed late fees but rather missed installment payments, allegations of mistake and circumstance similar to those raised by MBO here would not distinguish it from prior cases in which we determined that denying relief was essential to safeguarding the integrity of the auctions process. In contrast, where the failure to make a timely payment occurs just with respect to amounts that arise due to the late fee rules, the underlying need for strict enforcement of the automatic cancellation rule is not as clear-cut or compelling.”<sup>85</sup>

28. Unlike the licensee in *MBO*, CommNet failed to timely pay not only late fees but also principal and interest. Its waiver request must therefore be considered in light of our precedent relevant to the late payment of installment payments, including principal and interest, and not our precedent regarding the untimely payment of late fees. As discussed above, licensees that have defaulted by failing to timely submit installment payments have been granted waivers of the automatic cancellation rule only where they have demonstrated their ability and willingness to pay for the licenses, including through post-default debt payments.<sup>86</sup> In *MBO*, the Auctions and Industry Analysis Division concluded that the untimely payment of amounts equivalent to late fees did not by itself call into question whether the auction had assigned the licenses to the party that placed the highest value on them.<sup>87</sup> However, CommNet’s failure to make post-default payments on its debt and its statements indicating its financial distress raise serious questions about its ability to pay for the License and thus call into question whether it was the party that placed the highest value on the License. We therefore cannot conclude in this case that the auction assigned the License to the party best able to use the spectrum efficiently and effectively.<sup>88</sup>

#### IV. CONCLUSION

29. We conclude that a waiver of the automatic cancellation rule in this case would not be in the public interest. The Commission has long recognized that, consistent with the policies underlying its

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<sup>83</sup> The licensee had sent a quarterly payment prior to the deadline and did not realize that the payment arrived after the deadline and early within the first quarter grace period, thus triggering a late fee obligation. The failure to submit this late fee eventually caused the licensee to miss an installment payment deadline because part of the principal and interest it paid following the imposition of the late fee was applied to the late fee.

<sup>84</sup> *MBO*, 19 FCC Rcd at 4013. See also *SoFast*, 21 FCC Rcd at 10,134-35 ¶ 19.

<sup>85</sup> *MBO*, 19 FCC Rcd at 4016. See also *SoFast*, 21 FCC Rcd at 10,136 ¶ 23.

<sup>86</sup> See *supra* para. 16.

<sup>87</sup> *MBO*, 19 FCC Rcd at 4016-17. See also *SoFast*, 21 FCC Rcd at 10,136 ¶ 23.

<sup>88</sup> See *supra* para. 17. We note also that we emphasized in *MBO* that if there had been any indication that the licensee had lacked the ability or willingness to pay the equivalent of the late fees by the deadline, a waiver would not have been justified. *MBO*, 19 FCC Rcd at 4015. See also *SoFast*, 21 FCC Rcd at 10,135-36 ¶ 22.

competitive bidding authority, the best way for it to ensure that licenses are assigned to those who place the highest value on them is to require that bidders honor their winning bids by making full and timely payments.<sup>89</sup> As discussed above, the Commission has therefore concluded that strict enforcement of its installment payment rules, including the automatic license cancellation rule, is essential to preserving the integrity of the competitive bidding process. CommNet has failed to demonstrate any justification for a waiver of the automatic cancellation rule in the instant case, and we therefore deny its Waiver and Reinstatement Request.

## V. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED that the request filed on behalf of CommNet Communications Network, Inc., on September 22, 2004, seeking waiver of the Commission's rule governing installment payment deadlines, 47 C.F.R. § 2110(g)(4)(iv), and reinstatement of the 900 MHz Specialized Mobile Radio Service T block license for the Dallas-Fort Worth major trading area, MTA007, is DENIED.

31. This action is taken pursuant to sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), and sections 1.925 and 1.2110(g)(4) of the Commission's rules, 47 C.F.R. §§ 1.925 and 1.2110(g)(4), under authority delegated pursuant to section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Fred B. Campbell, Jr.  
Chief, Wireless Telecommunications Bureau

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<sup>89</sup> See, e.g., *21st Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22.