

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

In the Matter of
Virginia Communications, Inc.
Request for Waiver of Installment Payment Rules
for Auction No. 6 Licenses

ORDER

Adopted: January 29, 2007

Released: January 29, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. By this Order, we deny the request of Virginia Communications, Inc. ("VCI"), for a waiver of Section 1.2110(g)(4)(iv) of the Commission's rules, pursuant to which five Broadband Radio Service ("BRS") licenses VCI won at auction (the "Licenses") automatically canceled. We also deny VCI's request for an extension of its installment payment deadlines for the Licenses. In addition, we return without action VCI's request for restructuring of its debt on the Licenses.

1 47 C.F.R. § 1.2110(g)(4)(iv).

2 Waiver Request, Extension Request: BTA Quarterly Installments, filed by Virginia Communications, Inc., on August 30, 2002; Supplemental Memorandum in re: Virginia Communications, Inc., filed on behalf of Virginia Communications, Inc., on May 23, 2003 (respectively, the "Waiver Request" and the "Supplemental Memorandum"). The Licenses at issue are MDB023 (Athens, OH), MDB070 (Cedar Rapids, IA), MDB080 (Chillicothe, OH), MDB105 (Davenport-Moline, IA), and MDB462 (Waterloo-Cedar Falls, IA).

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). 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 Proposal of Virginia Communications, Inc. to Re-Structure BTA Installment Payment Obligations, filed on behalf of Virginia Communications, Inc., on April 7, 2003 ("Debt Restructuring Proposal").

2. VCI won the Licenses in Auction No. 6 and requested an extension of its installment payment deadlines within a year of the grant of the Licenses. Under the rules in effect at the time, licensees were not considered to be in default during the pendency of such a request. Because VCI's grace period request was pending longer than the six-month grace period it requested, thus resulting in a longer grace period, the request was dismissed as moot and VCI was instructed to resume payment. Although VCI briefly did so, it subsequently defaulted on its installment payments, and the Licenses automatically canceled. In its Waiver Request and Supplemental Memorandum, VCI presents several arguments in support of its contention that the Licenses should not have canceled and that it should be given additional time to meet its installment payment obligations. For the reasons set forth below, we find all of these arguments to be without merit. We return VCI's debt restructuring request without action because the request fails to conform to the Commission's rules.

## 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 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.<sup>4</sup> In 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>5</sup> Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.<sup>6</sup> When in 1997 the Commission discontinued the use of installment payments for future auctions,<sup>7</sup> it allowed entities that were already paying for licenses in installments to continue doing so.<sup>8</sup>

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<sup>4</sup> 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.

<sup>5</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 C.F.R. §§ 309(j)(3)(B) & 309(j)(4)(D).

<sup>6</sup> *See, e.g.*, 47 C.F.R. §§ 1.2110(e)(3)(iii) & (iv) (1994).

<sup>7</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), 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 15293, 15322 ¶ 55. The last Commission auction for which installment payments were available was Auction No. 11 (broadband PCS F block), which ended on January 14, 1997.

4. 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>9</sup> In 1997, however, the Commission liberalized its installment payment grace period rules 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>10</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>11</sup> The amended rules also entitled all licensees paying in installments to a grace period of 180 days. 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>12</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>13</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>14</sup>

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<sup>8</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>9</sup> See, e.g., 47 C.F.R. § 1.2110(e)(4) (1994) and 47 C.F.R. § 1.2110(g)(4) (2002). 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 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 because the former could adversely affect service to the public much longer than the latter. *Id.* at 2561-62 ¶¶ 29-31.

<sup>10</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>11</sup> 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.

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

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

<sup>14</sup> 47 C.F.R. § 1.2110(f)(4)(iv) (1998).

5. 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>15</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>16</sup> 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.<sup>17</sup>

6. In 2000, the Commission simplified its grace period rules to provide licensees with two quarters (i.e., two 3-month periods) in which to submit late installment payments and associated late fees, rather than two 90-day periods.<sup>18</sup> This change aligned the schedule for late payments with the quarterly schedule of regular installment payments.<sup>19</sup> The Commission's grace period rules as amended in 1997 and 2000 remain in effect today.

## B. VCI

7. VCI won the Licenses in Auction No. 6, which concluded in March of 1996, bidding a total of \$1,912,000 for the five licenses.<sup>20</sup> VCI then exercised its option as a small business to participate in the installment payment plan that was made available to qualified winning bidders in Auction No. 6.<sup>21</sup> Consistent with the Commission's rules, the grant of the Licenses was conditioned upon VCI's full and timely performance of its installment payment obligations.<sup>22</sup> On February 21, 1997, pursuant to the Commission's original grace period rules,<sup>23</sup>

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<sup>15</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110.

<sup>16</sup> *Id.* at 443 ¶ 116.

<sup>17</sup> *Id.* at 439-40 ¶¶ 109-10; 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 15293, 15304-05 ¶ 19 (2000) (“*Part 1 Reconsideration of Third Report and Order*”).

<sup>18</sup> *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15310 ¶ 28.

<sup>19</sup> *Id.*

<sup>20</sup> “Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas,” *Public Notice* (rel. March 29, 1996).

<sup>21</sup> *See* 47 C.F.R. § 21.960(b) (1996).

<sup>22</sup> Section 1.2110(e)(4) (1996) of the Commission's rules expressly provided that “[a] license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's obligations under the installment plan.” *See also* 21.960(b)(4) (1996). Licenses MDB023 (Athens, OH), MDB070 (Cedar Rapids, IA), MDB080 (Chillicothe, OH), and MDB462 (Waterloo-Cedar Falls, IA) were granted on August 16, 1996. “FCC Announces Grant of MDS Authorizations,” *Public Notice*, Report No. D-871 (rel. Aug. 16, 1996). License MDB105 (Davenport-Moline, IA) was granted on September 17, 1996. “FCC Announces Grant of MDS Authorizations,” *Public Notice*, Report No. D-878 (rel. Sept. 17, 1996).

<sup>23</sup> 47 C.F.R. § 1.2110(e)(4)(i) & (ii) (1994).

VCI submitted a request for a grace period of six months for 13 BRS licenses won in Auction No. 6, including the Licenses.<sup>24</sup> Under the rules in effect at the time, licensees were not considered to be in default during the pendency of such a request.<sup>25</sup> On March 20, 2001, the former Auctions and Industry Analysis Division dismissed VCI's grace period request as moot because it had been pending longer than the six-month grace period requested and thus had resulted in a longer grace period. VCI was instructed to resume payment by August 31, 2001.<sup>26</sup> VCI briefly resumed making payments subsequent to this date.

8. While VCI's grace period request was pending, it became subject to the automatic grace period rules that became effective in 1998.<sup>27</sup> VCI failed to make its required installment payments for the Licenses that were due on February 28, 2002. On August 30, 2002, VCI filed the Waiver Request we consider here. The two-quarter grace period for the February 2002 installment payments expired on September 3, 2002.<sup>28</sup> The failure of VCI to make these installment payments by the September 3 deadline placed it in default, triggering the automatic cancellation of the Licenses.<sup>29</sup> The Commission notified VCI on February 14, 2003, of the acceleration of its debt obligation due to the default.<sup>30</sup> On April 7, 2003, the company submitted to the Commission's Office of Managing Director a proposal for restructuring its debt.<sup>31</sup> On May 23, 2003, VCI filed the Supplemental Memorandum in support of its efforts to obtain a waiver of the automatic cancellation of the Licenses, an extension of its installment payment deadlines, and the restructuring of its debt.<sup>32</sup> The company has made no payments on its debt obligation for the Licenses since its default.

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<sup>24</sup> In addition to the Licenses, VCI requested a grace period for the following licenses: MDB012 (Altoona, PA), MDB083 (Clarksville, TN), MDB131 (Erie, PA), MDB197 (Huntington, WV), MDB205 (Iowa City, IA), MDB330 (Olean, NY), MDB359 (Portsmouth, OH), and MDB362 (Prescott, AZ).

<sup>25</sup> See "Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules," *Public Notice*, DA 98-1897 (rel. Sept. 18, 1998).

<sup>26</sup> Letter to Virginia Communications, Inc., from E. Rachel Kazan, Chief, Auction Finance and Market Analysis Branch, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated March 20, 2001, as amended by Letter to Virginia Communications, Inc., from E. Rachel Kazan, Chief, Auction Finance and Market Analysis Branch, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated June 20, 2002.

<sup>27</sup> See *supra* paragraph 4.

<sup>28</sup> In 2002, August 31 fell on a Saturday, and the following Monday, September 2, was Labor Day. The end of the two-quarter grace period was therefore September 3.

<sup>29</sup> 47 C.F.R. 1.2110(g)(4)(iv).

<sup>30</sup> Letters to Virginia Communications, Inc., from Mark Reger, Chief Financial Officer, Office of Managing Director, Federal Communications Commission, dated February 14, 2003 (citing 47 C.F.R. §1.2110 (g)(4)(iv)). A separate letter was sent for each of the Licenses.

<sup>31</sup> See *supra* note 3.

<sup>32</sup> See *supra* note 2.

### III. DISCUSSION

9. In order to obtain a waiver of the automatic cancellation and installment payment rules, VCI must show either that (i) the underlying purposes of the rules 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) in view of unique or unusual factual circumstances, application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or that it has no reasonable alternative.<sup>33</sup> As discussed below, VCI does not satisfy either prong of the waiver standard.

10. In its Waiver Request, VCI contends that “unique and unusual factual circumstances” in this case would make enforcement of the automatic cancellation rule inequitable, unduly burdensome, and contrary to the public interest.<sup>34</sup> Citing its service in Prescott, Arizona, as an example of the public interest being served, VCI states that it intends to replicate this service in other license areas and that it could make service available to the public “years sooner” than would be the case if the Commission enforced its automatic cancellation rule and auctioned new licenses.<sup>35</sup> VCI explains its inability to meet its installment payment deadlines for the Licenses by stating that it had entered into a contract for the sale of one of its licenses and that the buyer had defaulted on the contract. Describing this default as “unique and unusual,” VCI asserts that “[g]iven sufficient time” it would be able to make its required payments.<sup>36</sup>

11. VCI’s Supplemental Memorandum purports to supplement the company’s Waiver Request based on “two pertinent developments,” the Commission’s April 2003 *BRS Notice of Proposed Rule Making* and VCI’s April 2003 Debt Restructuring Proposal.<sup>37</sup> Asserting that it has been an early and successful contributor to the BRS industry, VCI claims that it plans to provide service to areas with “significant rural, and in certain cases, Native American populations.”<sup>38</sup> VCI also argues that it has been operating under adverse conditions, namely regulatory uncertainty due to potential BRS rule changes and “paralysis in the capital markets generally.”<sup>39</sup> VCI again indicates that it was unable to make its installment payments because a third party defaulted on an agreement to purchase one of its licenses.<sup>40</sup> According to VCI, following its default and debt acceleration it advised the Commission’s Office of Managing

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<sup>33</sup> 47 C.F.R. §1.925.

<sup>34</sup> Waiver Request at 1-2.

<sup>35</sup> *Id.* at 1.

<sup>36</sup> *Id.* at 2.

<sup>37</sup> Supplemental Memorandum at 1-2 (citing 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, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003) (“*BRS Notice of Proposed Rule Making*”) and the Debt Restructuring Proposal).

<sup>38</sup> Supplemental Memorandum at 2-9, 11. *See also id.* at 48, 65.

<sup>39</sup> *Id.* at 11-15.

<sup>40</sup> *Id.* at 17-20.

Director and Office of General Counsel that it wished to submit a debt restructuring proposal because “immediate payment was impossible.”<sup>41</sup> VCI states that without debt restructuring it may be forced into bankruptcy.<sup>42</sup>

12. Finally, the Supplemental Memorandum argues at great length that strict enforcement of the Commission’s installment payment rules does not necessarily promote the values underlying the Commission’s broadband policy and the purposes of its auction rules. According to VCI, the Commission should not refuse to grant waivers of its installment payment rules without considering the facts of each case and how a waiver in an individual case may serve the agency’s goals better than the rules’ enforcement.<sup>43</sup> VCI further contends that in the instant case waiver of these rules would serve their purposes better than their enforcement because the services VCI would provide in the future would implement the Commission’s overall policy goals.<sup>44</sup>

13. VCI’s arguments fail to satisfy the first prong of the Commission’s waiver standard. The Commission’s competitive bidding system was designed to 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>45</sup> Installment payment programs were established to help small entities participate in the competitive bidding process and the provision of spectrum-based services;<sup>46</sup> they were not, however, intended to allow the retention of licenses by parties unable to pay for the licenses. 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>47</sup>

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<sup>41</sup> *Id.* at 20.

<sup>42</sup> *Id.* at 45. *See also id.* at 46 (stating that having to meet its current debt obligations under the Commission's rules “would cripple expansion plans for the Prescott system, necessitate downsizing, and may trigger a default of the Company's SBA loan”); 52-53 (suggesting that VCI might consider filing for bankruptcy protection in order to have its debt reduced).

<sup>43</sup> *Id.* at 24-49.

<sup>44</sup> *See, e.g., id.* at 48.

<sup>45</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>46</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 229.

<sup>47</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* paragraph 4. *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2381-82 ¶¶ 189-192 (discussing importance of down payments that will ensure that winning bidders are able to pay full amount of their winning bids, rapidly deploy their systems, and operate them in an efficient manner); *id.* 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).

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>48</sup> The automatic cancellation rule specifically safeguards the integrity of the Commission's competitive bidding and licensing process by ensuring that parties that cannot meet their installment payment obligations do not retain licenses won at auction.<sup>49</sup> Precluding winning bidders, or subsequent licensees, from keeping licenses when their winning bids are not paid pursuant to the Commission's rules reduces bidders' incentive to make bids they cannot pay. This in turn increases opportunities for bidders that can pay their bids to win licenses, promotes a fair and efficient licensing process for all auction participants, and maintains the integrity of the Commission's competitive bidding program. 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 also furthers economic opportunity and competition in the marketplace.<sup>50</sup>

15. VCI's arguments against strict enforcement of the Commission's installment payment rules are unconvincing. The Commission's general policy of strictly enforcing its installment payment rules does not preclude the grant of waivers in individual cases where the Commission finds that, based on the particular facts of the case, a waiver would serve the purpose of the rules and would be in the public interest. Indeed, where the Commission has found that there is no question as to the licensee's ability to pay its winning bid and that preserving the original license assignment would be in the public interest, it has granted waivers of the automatic cancellation rule.<sup>51</sup> Despite its lengthy theoretical discussion, VCI does not rebut the concern that a licensee unable to meet its payment obligations did not value the spectrum more than other auction participants, nor does it demonstrate that in the instant case it was the party that valued the Licenses most highly.<sup>52</sup>

16. 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 use for the benefit of the public. However, when licensees that are paying winning bids in installments fail to pay the

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<sup>48</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 25103, 25110-11 ¶ 15 (2000) ("*Southern MO&O*"), *further recon. denied*, *Second Memorandum Opinion and Order*, 16 FCC Rcd 18357 (2001); Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25113, 25117-18 ¶ 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 17257 (2001), *petition dismissed in part and denied in part*, *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003).

<sup>49</sup> See *21st Century MO&O*, 15 FCC Rcd at 25117-18 ¶ 10.

<sup>50</sup> See, e.g., *id.* at 25123-24 ¶ 22.

<sup>51</sup> See, e.g., 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 (2006); 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 (2006).

<sup>52</sup> See Supplemental Memorandum at 24-49.



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>53</sup> Such circumstances raise the prospect that the defaulting licensee outbid others regardless of, or without reasonable consideration for, its ability to pay.

17. Several facts indicate that VCI may indeed have bid more for the Licenses than was reasonable given its resources. These facts include VCI's request for a grace period less than a year after the Licenses were granted; its failure to make any payments on its outstanding loan obligation since its default in 2002, despite the imposition of debt collection procedures; its statements that absent debt restructuring it might be forced into bankruptcy; and its indications that it was unable to meet its payment obligations because of the failure of one third party to honor a contract. We need not determine, however, whether VCI bid irresponsibly in Auction No. 6, because in any event it was unable to pay its bids due to a lack of funds.<sup>54</sup> Given this inability to pay, we cannot conclude that VCI was the party that valued the Licenses most highly. Under these circumstances, the underlying purpose of the automatic cancellation rule is better served by applying the rule than by waiving its enforcement.

18. The Commission has also determined that enforcement of the installment payment rules better serves the public interest than would reliance on speculation about services that a party already in default might offer if granted a waiver.<sup>55</sup> VCI's arguments rest on precisely this kind of speculation about potential services that it might make available in the future to rural and Native American communities.<sup>56</sup> The Commission has repeatedly found that neither an asserted intent to provide service to rural or tribal areas nor actual service to such areas warrants a waiver of its competitive bidding payment rules.<sup>57</sup> Maintaining the integrity of the auctions process benefits all applicants, including those that intend to serve rural and tribal areas. We therefore find that neither VCI's past service nor any service it may intend to provide warrants a waiver of the Commission's installment payment rules.

19. VCI has also failed to present any unique or unusual factual circumstances that would satisfy the second prong of the Commission's waiver standard. The Commission has

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<sup>53</sup> See, e.g., *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25123-24 ¶ 22.

<sup>54</sup> See *BDPCS, Inc.*, BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, *Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17607-08 ¶ 31 (2000) ("*BDPCS MO&O*") (emphasizing that defaulting licensee's motivation in not withdrawing from auction was not relevant to decision regarding default payment because rules do not require finding of "bad faith" as a prerequisite to imposition of full default payment).

<sup>55</sup> *Southern MO&O*, 16 FCC Rcd at 18360-61 ¶ 9; *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25126-27 ¶¶ 28-29.

<sup>56</sup> See, e.g., Supplemental Memorandum at 4-15.

<sup>57</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, 7141-42 ¶¶ 8-9, 11 (WTB/ASAD 2004) (denying waiver of installment payment deadlines based on licensee's service to rural areas and tribal lands); *TPS Utilicom, Inc.*, *Order on Reconsideration*, 18 FCC Rcd 2516, 2522-23 ¶ 12 (WTB 2003) (asserted intent to provide service to Native Americans does not excuse defaulting party from complying with the Commission's competitive bidding rules); *Application of AirCom Communications Consultants, Inc.*, *Order*, 16 FCC Rcd 17685, 17690 ¶ 13 (WTB/PSPWD 2001) (intent to serve Native Americans does not outweigh public interest in consistent enforcement of rules).

repeatedly found that circumstances such as those VCI describes are insufficient grounds for the grant of a waiver of installment payment deadlines. Neither the provision of service in areas other than those covered by the Licenses, nor an intention to provide service under the Licenses, constitutes an unusual circumstance justifying a waiver of VCI's installment payment deadlines.<sup>58</sup> A third party's contractual default is also not a unique or even unusual event. Moreover, the Commission has made clear that it "cannot take into account the private business arrangements that an applicant has made to finance its successful bid"<sup>59</sup> and that unanticipated financing difficulties are not a unique circumstance that would warrant a waiver.<sup>60</sup> VCI's assertions concerning economic and regulatory challenges that confront all BRS licensees, and the telecommunications industry as a whole, are similarly unremarkable. Such widespread challenges are by their very nature not unique to any individual participant in the marketplace. All businesses encounter potential risks such as fluctuations in capital markets.<sup>61</sup>

20. VCI's assertion that the denial of its debt restructuring proposal could force it into bankruptcy, thus hampering its future provision of services to the public, is not a unique circumstance, nor is it a basis on which we would waive an installment payment deadline.<sup>62</sup> The Commission has previously determined that a waiver of the automatic cancellation rule "in response to a licensee's threatened bankruptcy would reduce the rule's effectiveness."<sup>63</sup> Furthermore, the Commission has found that waiving installment payment obligations because a licensee could file for bankruptcy "would harm the integrity of the auction process and encourage licensees to threaten litigation in the future."<sup>64</sup> Moreover, a licensee's suggestion that it may be forced into bankruptcy absent a waiver of a 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

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<sup>58</sup> See *supra* paragraph 18.

<sup>59</sup> *BDPCS MO&O*, 15 FCC Rcd at 17606-07 ¶ 30.

<sup>60</sup> See, e.g., *id.*; Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22071, 22072 ¶ 4 (1998) ("The challenge of raising capital to finance . . . licenses exists in varying degrees for all licensees and does not constitute 'unique facts and circumstances.'"), *petitions for reconsideration denied*, 14 FCC Rcd 6080 (1999), *aff'd.*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999) (unpublished decision).

<sup>61</sup> See, e.g., Letter to Mr. John Jung, Jung on Jung, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 18 FCC Rcd 14427, 14430-31 (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, 6447 (2002).

<sup>62</sup> See 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 14695, 14697-98 ¶ 6 (WTB 2003), *recon. pending*.

<sup>63</sup> *Id.*

<sup>64</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Amendment of Part I 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).

party that valued it most highly. VCI's suggestion that a denial of its waiver request could force it into bankruptcy therefore undermines any claim that application of the rule would be inequitable or otherwise contrary to the public interest.

21. Finally, VCI's Debt Restructuring Proposal does not support a determination that VCI is eligible to pay its accelerated debt in regular installments and does not include adequate information conforming to the Commission's rules for debt compromise. Any further consideration of a request to pay the accelerated debt in installments must conform to Section 1.1914 of the Commission's rules,<sup>65</sup> and any request for debt compromise must comply with Section 1.1915.<sup>66</sup>

#### **IV. CONCLUSION**

22. VCI has not satisfied the standard for a waiver of the Commission's automatic cancellation rule or its installment payment deadlines for the Licenses. Licensees' payment of their financial obligations—which they establish themselves by choosing to outbid other bidders—is a critical component of the Commission's auction process. VCI is not absolved of these obligations because the business decisions it made, including its decision to outbid others on the Licenses and its decision to enter into a contractual agreement with a particular party, did not yield the results it desired. The facts of this case raise serious doubts about whether VCI was the auction participant that valued the Licenses most highly. We therefore find that application of the Commission's installment payment rules in this case will serve rather than frustrate their underlying purpose, is not inequitable or unduly burdensome, and is in the public interest, and we deny VCI's Waiver Request. Because VCI's Debt Restructuring Proposal does not support a determination that VCI is eligible to pay its accelerated debt in regular installments and does not include the information required by the Commission's rules for debt compromise, we return without action its request to restructure its debt. VCI's entire outstanding debt obligation is therefore subject to debt collection procedures.

#### **V. ORDERING CLAUSES**

23. Accordingly, IT IS ORDERED that, pursuant to authority granted in Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(j), Virginia Communications, Inc.'s Waiver Request received on August 30, 2002, and its Supplemental Memorandum received on May 23, 2003, seeking waiver of the Commission's rules governing installment payment deadlines and automatic cancellation with respect to the Licenses, are DENIED.

24. IT IS FURTHER ORDERED that, pursuant to authority granted in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.1914 and 1.1915 of the Commission's rules, 47 C.F.R. §§ 1.1914 and 1.1915, the Proposal of Virginia Communications, Inc. to Re-Structure BTA Installment Payment Obligations received on April 7, 2003, is RETURNED WITHOUT ACTION.

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<sup>65</sup> 47 C.F.R. § 1.1914.

<sup>66</sup> 47 C.F.R. § 1.1915.

25. This action is taken under authority delegated pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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