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

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| In the Matter of | ) | |
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| TV Communications Network, Inc. | ) | |
| | ) | |
| Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses | ) | |
| | ) | |

**ORDER**

**Adopted: January 29, 2007** **Released: January 29, 2007**

By the Chief, Wireless Telecommunications Bureau:

## I. INTRODUCTION

1. We have before us requests filed by TV Communications Network, Inc. ("TVCN"), seeking a waiver of the Commission's installment payment rules and the reinstatement of fourteen Broadband Radio Service ("BRS") licenses that canceled automatically under those rules (the "Licenses").[1] TVCN won twelve BRS licenses in Auction No. 6 and subsequently acquired two

[1] Letter from TVCN to Magalie R. Salas, Secretary, Federal Communications Commission, dated November 29, 2001 (requesting waiver and indefinite suspension of installment payment obligations) ("Letter Request of November 29, 2001"); Letter from TVCN to Marlene H. Dortch, Secretary, Federal Communications Commission, dated February 4, 2003 (requesting waiver and one-year suspension of installment payment obligations) ("Letter Request of February 4, 2003"); Letter from TVCN to Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Federal Communications Commission, dated February 14, 2006 (requesting waiver of installment payment obligations) ("Letter Request of February 14, 2006"); Letter from TVCN to Gary Michaels, Deputy Chief, Auctions and Spectrum Access Division, Federal Communications Commission, dated March 13, 2006 (requesting waiver of installment payment obligations) ("Letter Request of March 13, 2006"); E-mail from TVCN to Gary Michaels, Deputy Chief, Auctions and Spectrum Access Division, Federal Communications Commission, dated May 26, 2006 (requesting waiver of installment payment obligations) ("E-Mail Request of May 26, 2006") (collectively, the "Requests").

The licenses were: MDB082 (Clarksburg-Elkins, WV), MDB113 (Dickinson, ND), MDB137 (Fairmont, WV), MDB259 (Logan, WV), MDB306 (Morgantown, WV), MDB396 (Salina, KS), MDB405 (San Luis Obispo, CA), MDB411 (Scottsbluff, NE), MDB412 (Scranton-Wilkes Barre, PA), MDB431 (Steubenville, OH), MDB435 (Stroudsburg, PA), MDB463 (Watertown, NY), MDB471 (Wheeling, WV), and MDB476 (Williston, ND).

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

additional licenses in the secondary market. As an eligible entity, TVCN elected to pay the amounts owed on the Licenses through the Commission's installment payment loan program.

2. As explained below, one of the Licenses canceled automatically in 1999 because TVCN failed to meet its installment payment obligations for that license.[2] In November of 2001, indicating that it was unable to obtain financing or locate buyers for the Licenses, TVCN sought relief from the Commission's installment payment rules by requesting a waiver of the rules and an indefinite suspension of its payment obligations.[3] This request was not granted. TVCN subsequently failed to make any installment payments for the remaining thirteen licenses within the time permitted under the rules. Accordingly, these licenses automatically canceled in 2002.[4] TVCN now requests a waiver of the automatic cancellation rule and reinstatement of the Licenses.[5] For the reasons set forth below, we deny this request.

## 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.[6] 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.[7] Licensees paying in installments were generally allowed to pay only interest in the early

[2] 47 C.F.R. §§ 1.2110(f)(4)(iv) (1999) and 21.960(b)(4) (1999). In the *BRS Report and Order,* adopted in June 2004, the Commission eliminated Part 21 of its rules and consolidated its rules for BRS in Part 27. *BRS Report and Order,* 19 FCC Rcd at 14236-38 ¶¶ 186-90. The consolidation of the BRS rules in Part 27 is not relevant to the instant case.

[3] Letter Request of November 29, 2001.

[4] 47 C.F.R. §§ 1.2110(g)(4)(iv) (2002) and 21.960(b)(4) (2002).

[5] Letter Request of March 13, 2006. TVCN's request for relief includes the license that canceled in 1999.

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

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

years of the license term.[8] When in 1997 the Commission discontinued the use of installment payments for future auctions,[9] it allowed entities that were already paying for licenses in installments to continue doing so.[10]

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.[11] 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.[12] 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.[13]

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

[9] The Commission discontinued the use of installment payments based on its findings that (1) installment payments are not necessary to ensure meaningful opportunities for small businesses to participate successfully in auctions; (2) the Commission must consider all of the objectives of Section 309(j), including the development and rapid deployment of new services for the benefit of the public; (3) filings for bankruptcy by entities unable to pay their winning bids may result in delays in the deployment of service; and (4) requiring the payment of bids in full within a short time after the close of auctions ensures greater financial accountability from applicants. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397-98 ¶¶ 38-39 (1998) ("*Part 1 Third Report and Order*"). The Commission affirmed this decision in 2000. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and 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.

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

[11] *See, e.g.*, 47 C.F.R. § 1.2110(e)(4) (1994) and 47 C.F.R. § 1.2110(f)(4) (1998). *See also* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551 (2004). In this Order addressing the inapplicability of 47 C.F.R. § 1.2104 of the Commission's rules to installment payment defaults, the Commission discussed its 1997 decision not to deviate from its license-cancellation-plus-debt-collection rule for installment payment defaults and explained the reasonableness of this decision. Noting that automatic license cancellation is not unique to defaults on installment payments (licenses 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.

[12] 47 C.F.R. § 1.2110(e)(4)(i) & (ii) (1994). Licensees were permitted to request a grace period of 90 to 180 days.

[13] 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.

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.[14] 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.[15] 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.[16]

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,[17] 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.[18] 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.[19]

### B. TVCN

6. As noted above, TVCN won twelve licenses in Auction No. 6, which concluded on March 28, 1996.[20] In keeping with the Commission's rules, grant of these licenses was conditioned upon TVCN's full and timely performance of its payment obligations.[21] As a small business, TVCN was eligible to participate in the Commission's installment payment plan available for qualifying entities that

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[14] 47 C.F.R. § 1.2110(f)(4)(i) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

[15] 47 C.F.R. § 1.2110(f)(4)(ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

[16] 47 C.F.R. § 1.2110(f)(4)(iv) (1998). These rules have been simplified 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. This change aligned the schedule for late payments with the quarterly schedule of regular installment payments. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and the Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15310 ¶ 28; *Erratum*, 15 FCC Rcd 21520 (2000) ("*Part 1 Reconsideration of Third Report and Order*").

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

[18] *Id.* at 443 ¶ 116.

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

[20] *Public Notice*, "Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas" (rel. Mar. 29, 1996).

[21] 47 C.F.R. §§ 1.2110(e)(4) (1996) and 21.960(b)(4) (1996) ("A BTA authorization issued to an eligible winning bidder that elects installment payments shall be conditioned upon the full and timely performance of the BTA authorization holder's payment obligations under the installment plan."). *See also Public Notice*, "FCC Announces Grant of MDS Authorizations," Report No. D-871 (rel. Aug, 16, 1996); *Public Notice*, "FCC Announces Grant of MDS Authorizations," Report No. D-902-A (rel. Dec 30, 1996).

won licenses in Auction No. 6.[22] Subsequent to Auction No. 6, TVCN acquired two additional BRS licenses in the secondary market.[23] The Commission's rules permitted the transfer of licenses acquired with installment payment financing to entities qualified to obtain such financing if they assumed the original installment payment obligations.[24] Due to its small business status, TVCN was able to use installment payments for these two additional licenses. TVCN began making its installment payments for the initial twelve licenses, as well as the first license it acquired in the secondary market, under the Commission's original installment payment rules. When the Commission's amended grace period rules became effective on March 16, 1998, TVCN became subject to these rules.[25] These rules also applied when TVCN began making installment payments for the second license it acquired in the secondary market.

7. TVCN failed to render the installment payment that was due in November 1998 within the automatic grace period provided under the rules, i.e., by May 31, 1999, on one of the Licenses—MDB405. Accordingly, that license automatically canceled on June 1, 1999.[26] TVCN did not pay the installment payments due on the rest of the Licenses on August 31, 2001. Under the Commission's installment payment rules, TVCN had two quarters, or until February 28, 2002, to make these payments.[27] However, rather than make the payments during the automatic two-quarter grace period that the Commission's rules provided, TVCN filed a letter with the Commission on November 29, 2001, in which it requested that the Commission waive its installment payment rules and grant the company an indefinite grace period of six months or more while it sought financing and/or buyers for the Licenses.[28] According to TVCN, negotiations for financing had fallen through and it had also been unable to find buyers for the Licenses.[29] TVCN failed to make any installment payments on the thirteen remaining licenses by the end of its automatic grace period. Accordingly, these thirteen licenses automatically canceled on March 1, 2002.[30]

8. Consistent with its rules, the Commission initiated debt collection procedures with respect to the Licenses.[31] On February 4, 2003, following its receipt of debt acceleration letters from the Commission, TVCN filed another request for a waiver of the installment payment rules as well as a one-

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[22] 47 C.F.R. § 21.960(b) (1996).

[23] The Commission consented to the assignment of the first of these licenses in May 1997 and to the assignment of the second in February 2000. *See Public Notice,* "The Commission Took the Following Actions on Mass Media Bureau Multipoint Distribution Service Applications," Report No. D-929-A (rel. May 29, 1997). *See also Public Notice,* "Mass Media Bureau Multipoint Distribution Service," Report No. 143 (rel. Feb. 4, 2000).

[24] 47 C.F.R. §§ 1.2110(d) (1996), 1.2111(c) (1996), and 21.960(a) and (b) (1996).

[25] *See Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

[26] 47 C.F.R. §§ 1.2110(f)(4)(iv) (1999) and 21.960(b)(4) (1999).

[27] 47 C.F.R. §§ 1.2110(g)(4)(ii) (2002) and 21.960(b)(4) (2002).

[28] Letter Request of November 29, 2001.

[29] *Id.*

[30] 47 C.F.R. §§ 1.2110(g)(4)(iv) (2002) and 21.960(b)(4) (2002).

[31] 47 C.F.R. §§ 1.2110(g)(4)(iv) (2002) and 21.960(b)(4) (2002).

year grace period for making any payment towards its debt obligations.[32] In its letter of March 13, 2006, and its e-mail of May 26, 2006, TVCN claimed that an unidentified potential assignee could pay the debt owed for the Licenses.[33] On September 29, 2006, counsel for Oneida Broadband, LLC ("Oneida") filed a letter on behalf of TVCN and Oneida, stating that the two companies had entered into an agreement for TVCN to transfer the Licenses to Oneida.[34] TVCN has made no payment towards its debt obligation for the Licenses since May 2001.

## III. DISCUSSION

9. To obtain a waiver of the Commission's rules, an applicant must show either that (i) the underlying purpose of the applicable rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique factual circumstances of the particular case render application of the rule inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative.[35]

10. In support of its request for waiver, TVCN makes four main arguments. First, it claims that it would be in the public interest to permit a potential assignee to acquire the Licenses because such assignee could pay the outstanding balance owed on them and provide service more quickly than would otherwise be possible.[36] TVCN notes that it has completed construction in certain license areas, including small markets.[37] Second, TVCN contends that the Commission should have responded to its initial request for relief from its installment payment obligations prior to the automatic cancellation of thirteen of the Licenses so that it could have sought bankruptcy protection prior to defaulting on its debt.[38] Third, TVCN cites a pre-2001 timely payment history as grounds to support a waiver.[39] Fourth, it claims that its significant business difficulties also justify a waiver.[40] We find that none of these arguments warrants granting a waiver of the Commission's installment payment rules.

11. TVCN fails to establish that the underlying purpose of the Commission's rules would not be served by their application in this instance. The Commission's competitive bidding system was designed to serve a number of statutory purposes, including the rapid deployment of new technologies

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[32] Letter Request of February 4, 2003.

[33] Letter Request of March 13, 2006; E-Mail Request of May 26, 2006.

[34] Letter from Michele C. Farquhar, Counsel to Oneida Broadband, LLC, to Gary Michaels, Deputy Chief, Auctions and Spectrum Access Division, Federal Communications Commission, dated September 29, 2006 ("TVCN-Oneida Letter"). As explained below, this letter offers other supplementary arguments in support of the Requests. Oneida is not a party to this proceeding, and Ms. Farquhar does not indicate that she is acting as counsel to TVCN. However, because the letter states that it is filed "on behalf of" TVCN, we will consider the arguments made therein.

[35] 47 C.F.R. § 1.925.

[36] Letter Request of March 13, 2006.

[37] *Id.*

[38] E-mail Request of May 26, 2006.

[39] Letter Request of March 13, 2006.

[40] *Id.*

and services to the public and the efficient and intensive use of spectrum.[41] Installment payment programs were established to help small entities participate in the competitive bidding process and the provision of spectrum-based services;[42] 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 prevent entities that lack the financial capacity to pay their winning bids and operate communications systems from undermining the rapid deployment of service and the efficient, intensive use of spectrum.[43]

12. 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.[44] 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 licenses.[45] 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. This in turn promotes economic opportunity, competition in the marketplace, and the rapid deployment of services for the benefit of the public.[46]

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[41] 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.").

[42] *Competitive Bidding Second Report and Order,* 9 FCC Rcd at 2388 ¶ 229.

[43] 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 5. *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).

[44] *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).

[45] *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/ASAD 2004) *("Duluth PCS Order").*

[46] *See, e.g., 21st Century MO&O*, 15 FCC Rcd at 25123-24 ¶ 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 focus on the importance of meeting payment deadlines to deter such entities from abusing the lenient structure by " 'shop [ping]' a winning

13. When a licensee fails to pay its winning bid on a timely basis in compliance with the Commission's rules, the presumption that the auction assigned the license to the party that placed the highest value on the license is lost.[47] In certain circumstances a party that loses this presumption may be able to show that its failure to meet a payment deadline was not due to an inability to pay and that there is no question as to whether the auction assigned the license to the party best able to put the spectrum to efficient and effective use.[48] That is not the case here, however. TVCN has repeatedly acknowledged its history of financial difficulties and its inability to meet its payment obligations on the Licenses. In its initial waiver request, for example, TVCN stated that a commitment for financing, as well as negotiations with a potential buyer, had fallen through and that it sought a grace period of six months "or until it obtains the necessary funding to make the required payments."[49] In May 2006, TVCN also stated that by November 2001 "[o]ur operating losses were mounting and the BTA payments were adding to our financial hardship.... By November 2001, while we were still current in our BTA installment payments, we had no choice but to submit a waiver request."[50] Given TVCN's inability to meet its payment obligations, we find that there is no justification for waiving the Commission's installment payment rules and reinstating the Licenses.[51]

14. The TVCN-Oneida Letter now argues that TVCN was financially capable of paying its installment payments at the time of its default.[52] Coming more than four and a half years after TVCN's

bid in order to obtain financing for a payment. The Commission also 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).

[47] *21st Century MO&O*, 15 FCC Rcd at 25123-24.

[48] *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) *("Leaco Order")*; 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) *("Advanced Order")*.

[49] Letter Request of November 29, 2001.

[50] Letter Request of May 13, 2006, at 2. On February 4, 2003, TVCN also stated: "TVCN has been losing money on operating MDS systems ever since the construction of our first MDS system in 1984." Letter Request of February 4, 2003, at 1. In the same letter, TVCN noted that it had been "avoiding filing for bankruptcy under the hope that the Commission would grant our request." *Id.*

[51] In circumstances where the petitioner lacks the financial qualifications to hold the licenses at issue, the Commission consistently has denied waivers of its automatic cancellation rule. *See, e.g, 21st Century MO&O,* 15 FCC Rcd at 25127 ¶ 27*; Southern MO&O,* 15 FCC Rcd at 25111 ¶ 15; Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, 14 FCC Rcd 6080 (1999), *aff'd*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1214855 (D.C. Cir., Nov. 24, 1999); Request of 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 (WTB/AIAD 2003), *recon. pending ("GLH Order")*; Letter to Jorge J. Inga, M.D., and Rafael Blanco, M.D., Pan American Interactive Corporation, from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 18 FCC Rcd 15314 (2003); Letter to Messrs. Stephen Diaz Gavin and Paul C. Besozzi, Counsel for U.S. Telemetry Corporation, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 17 FCC Rcd 6442, 6446 (2002) *("U.S. Telemetry Letter")*.

[52] TVCN-Oneida Letter at 2, 3. *See also* E-Mail Request of May 26, 2006 (stating that if the Commission had denied its initial waiver request, it "could have found a way to come up with the necessary payments during the cure period, or could have elected to file for bankruptcy protection").

default, and in light of the company's earlier arguments indicating that it was experiencing significant financial difficulties at the time it stopped making its installment payments, we find this assertion unpersuasive. Given TVCN's multiple statements indicating that it was unable to meet its payment obligations, we also find unconvincing the TVCN–Oneida Letter's recent assertion that TVCN chose not to continue submitting its required installment payments because "doing so would have precluded its ability to pursue alternative uses for the licenses that, in the long run, would better serve both TVCN and the public interest."[53] Even assuming, however, that TVCN chose not to make its payments although it could have done so, such a choice would not warrant reinstatement of the Licenses. The Licenses were conditioned on TVCN's timely fulfillment of its payment obligations, and TVCN knew or should have known that failing to render timely installment payments would result in the automatic cancellation of the Licenses. If TVCN decided not to make its payments, it was solely responsible for this decision and the resulting cancellation of the Licenses.[54] The Commission is not responsible for licensees' business decisions,[55] and the TVCN-Oneida Letter's suggestion that TVCN was left in "an untenable position" because the Commission did not act on its 2001 waiver request within the two-quarter automatic grace period is without merit.[56]

15. Furthermore, contrary to TVCN's arguments, the purported benefit from services that might be offered to the public by a proposed assignee is outweighed by the harm of granting a waiver of payment obligations to an entity that has admitted it lacks the financial qualifications to remain a Commission licensee.[57] Indeed, the Commission has specifically found that "[t]he existence of a potential assignee does not negate the licensee's failure to comply with the Commission's rules."[58] Any benefit that might result from permitting TVCN to retain the Licenses and assign them to another party is speculative at best. The harm to competition and the public interest that may result from allowing financially unqualified winning bidders to retain licenses could, on the other hand, be substantial. Thus,

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[53] TVCN-Oneida Letter at 2.

[54] The TVCN-Oneida Letter claims that TVCN believed that the automatic cancellation rule would not apply to the Licenses during the pendency of its request for a waiver. As support, it asserts that one of the Licenses was listed as "Active" on the database of the Commission until 2005. Such a fact would not, however, free TVCN of its responsibility to understand the Commission's installment payment rules, the terms of its notes and security agreements, and clear precedent of the Commission. The TVCN-Oneida Letter also fails to offer any explanation for why TVCN believed the other Licenses were not similarly listed. *See* TVCN-Oneida Letter at 5.

[55] *See Southern MO&O*, 15 FCC Rcd at 25107 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule).

[56] TVCN-Oneida Letter at 4. The TVCN-Oneida Letter states that the Letter Request of November 29, 2001, "was filed more than six months in advance of the automatic cancellation period." *Id.* at 3. This is incorrect, because TVCN had in fact missed the August 31, 2001, installment payment deadline for the Licenses. Under the Commission's rules, the end of the two-quarter period for late installment payments was February 28, 2002.

[57] The TVCN-Oneida Letter cites such alleged benefits to the grant of a waiver as the unique value of the current grouping of the Licenses and the facilitation of the transition to BRS services. *See, e.g.,* TVCN-Oneida Letter at 4.

[58] Letter to Russell H, Fox, Esq., and Russ Taylor, Esq., Counsel for Capital Two-Way Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 11786, 11788 (2001).

even where defaulting licensees were providing service, the Commission has denied requests for an extension of installment payment deadlines.[59]

16. In sum, TVCN has presented no facts to support a conclusion that the purposes of the Commission's installment payment rules would be undermined by their enforcement in this case. These rules provide licensees with a substantial amount of time in which to pursue private market solutions to financial problems.[60] To allow TVCN to retain the Licenses and to transfer them to a third party would only serve to undermine the purposes of the Commission's installment payment rules. A grant of TVCN's waiver request would increase the likelihood that winning bidders in the future will not be the parties that can put licenses to their most effective use, but will be the parties that are the most optimistic regarding their chances of obtaining post-auction financing or post-auction relief similar to the relief requested by TVCN.[61] More specifically, a grant of TVCN's waiver request would encourage auction participants to overbid for licenses with the expectation that they will be granted waivers of their obligation to pay their bids in a timely manner and will be allowed to seek buyers for canceled licenses.

17. TVCN's remaining arguments are equally unpersuasive and do not meet the Commission's standard for grant of a waiver. Specifically, TVCN's argument that the Commission should have denied its waiver request prior to the automatic cancellation deadline for the Licenses lacks merit. In correspondence to the Commission, TVCN contends that if the Commission had issued such a denial it "could have elected to file for bankruptcy protection" before the automatic cancellation of the Licenses. According to TVCN, "[i]n the event of [a] bankruptcy election, it would have been in [an] identical situation as that of Nextwave," which was able to retain its broadband PCS licenses because bankruptcy law prohibited the Commission from canceling them.[62]

18. TVCN, like all other licensees participating in the Commission's installment payment program, was entitled to an automatic two-quarter grace period following each installment payment due date. As noted above, TVCN knew, or should have known, that the failure to make a payment by the end of such grace periods would result in automatic cancellation of the Licenses and that the pendency of its waiver request did not change its payment obligations.[63] Therefore, TVCN had all the information it needed from the Commission to decide whether bankruptcy was its best course of action. TVCN's attempt to blame the Commission for its decision not to declare bankruptcy is accordingly without merit and cannot provide the basis for a waiver of the Commission's rules. We note also that the Commission

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[59] *See Duluth PCS Order,* 19 FCC Rcd at 7141-42 ¶¶ 8-9; *GLH Order,* 18 FCC Rcd at 14699-700 ¶ 12 (citing Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22071, 22077 (1998)).

[60] *Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110 (discussing consistency of rules with standard commercial practice); 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 (2003) *("Jung Letter")*; *U.S. Telemetry Letter,* 17 FCC Rcd at 6446.

[61] TPS Utilicom, Inc., *Order on Reconsideration*, 18 FCC Rcd 2516, 2523-24 ¶ 13 (WTB 2003).

[62] E-Mail Request of May 26, 2006. *See also Federal Communications Commission v. NextWave Personal Communications, Inc.,* 537 U.S. 293 (2003), *aff'g* 254 F.3d 130 (D.C. Cir. 2001) (The U.S. Supreme Court affirmed the D.C. Circuit's decision that because NextWave was under protection of Chapter 11 of the United States Bankruptcy Code its licenses did not automatically cancel for nonpayment while it was in bankruptcy.).

[63] As noted above, the TVCN-Oneida Letter's assertion that TVCN believed that the automatic cancellation rule would not apply to the Licenses during the pendency of its waiver request does not advance TVCN's case. *See supra* note 54.

is not obligated to act within any particular timeframe on requests for installment payment grace periods that exceed the automatic grace period provided for in its rules. The Commission established an automatic grace period for licensees paying in installments in part because such a grace period would ease the burden on the Commission of considering individual grace period requests.[64] To require that the Commission act on every individual grace period request within the period of the automatic grace period would defeat one of the purposes of making grace periods automatic.

19. TVCN states that "[w]e have been avoiding filing for bankruptcy under the hope that the Commision would grant our request" for a waiver.[65] To the extent that this statement represents a potential threat to enter bankruptcy, it requires emphasis that 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."[66] Furthermore, the Commission has found that waiving installment payment obligations because a licensee might file for bankruptcy "would harm the integrity of the auction process and encourage licensees to threaten litigation in the future."[67]

20. We also decline to grant a waiver of the automatic cancellation rule based on TVCN's claims of a prior timely payment history. The Commission may examine the financial circumstances of a waiver petitioner to determine if automatic cancellation would frustrate the goals of the auction and licensing process. A licensee's course of conduct, including its payment history, can be relevant to determining whether it is willing and able to satisfy its payment obligations in a timely manner.[68] TVCN's correspondence clearly demonstrates, however, that it is financially incapable of honoring its payment obligations. TVCN acknowledges that its "operating losses were mounting and . . . obtaining additional financing was getting more difficult" when it first sought a waiver.[69] Indeed, as noted above, TVCN concedes that it "has been losing money . . . operating MDS systems ever since the construction of [its] first MDS system in 1984."[70] These admissions of significant financial difficulties, as well as TVCN's default and subsequent failure to satisfy its debt obligations to the Commission, necessitate the rejection of the Requests.

21. TVCN's alleged significant business difficulties do not amount to unique facts or circumstances that would make application of the automatic cancellation rule inequitable. The TVCN-Oneida Letter describes a lengthy history of problems with the BRS business. These include failed financing negotiations, "unforeseen economic conditions," "dramatic" market changes, and the previously

[64] *Part 1 Third Report and Order*, 13 FCC Rcd at 440 ¶ 110.

[65] Letter Request of February 4, 2003.

[66] *GLH Order*, 18 FCC Rcd at 14698 ¶ 6

[67] 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, WT Docket No. 97-82, *Second Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 6571, 6580 ¶ 16 (1999).

[68] Letter to David Irwin and Nathaniel Hardy, Counsel for MBO Wireless, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 19 FCC Rcd 4011 (2004) ("*MBO Letter*"); *Advanced Order,* 21 FCC Rcd at 1633 ¶ 12.

[69] Letter Request of March 13, 2006.

[70] Letter Request of February 4, 2003.

noted pattern of sustained losses.[71] All licensees face such potential business risks and market changes, and unsuccessful negotiations are in no way unique.[72] Despite the assertions of the TVCN–Oneida Letter, such problems do not render the application of the Commission's installment payment rules "unduly burdensome" nor do they leave a licensee with "no reasonable alternative" but the avoidance of its installment payment payment obligations.[73] They therefore cannot satisfy the second prong of the Commission's waiver standard. Furthermore, TVCN's admitted grave economic difficulties provide further evidence that granting it a waiver would thwart the automatic cancellation rule's purposes of protecting the licensing process and promoting the provision of service to the public.

22. Similarly meritless is the assertion in the TVCN-Oneida Letter that TVCN's initial waiver request was unique and therefore warrants special consideration.[74] The letter provides two grounds for this argument, one being that the Letter Request of November 21, 2001, was filed before the beginning of the two-quarter automatic grace period. This assertion is factually incorrect because, as noted previously, the automatic grace period began to run upon TVCN's failure to meet its installment payment deadline on August 31, 2001. However, even if TVCN had filed its waiver request prior to the beginning of the automatic grace period, such filing would not constitute a unique circumstance that warrants the waiver of the Commission's installment payment rules. These rules provided TVCN with an automatic two-quarter grace period; to consider the filing of a request for an alternative grace period a unique circumstance simply because of its timing would in effect render the Commission's rules meaningless. The TVCN-Oneida Letter also claims that the request was unique because it sought a grace period in which no payments would be required, rather than the waiver of the automatic cancellation rule. This attempt to distinguish TVCN's request from requests for waiver of the automatic cancellation rule fails, because the grant of a grace period of unspecified length would be possible only through the waiver of the automatic cancellation rule. The TVCN-Oneida Letter states that "to the extent that the Commission deems the automatic cancellation rules apply to TVCN, even while its waiver request has been pending," it also requests a waiver of these rules.[75] We find that this waiver request does not need to be analyzed separately from TVCN's request for a suspension of its installment payments and must be denied for the same reasons.

## IV. CONCLUSION

23. The default of TVCN on its required installment payments, its failure to make any further payments towards its obligations since that date, as well as its admitted financial distress, require us to reject its requests for a waiver of the Commission's installment payment rules and reinstatement of the Licenses. In denying this request, we conclude that application of the rules in this case will not frustrate their underlying purpose, is not contrary to the public interest, and is not inequitable, unduly burdensome, or otherwise contrary to the public interest.

[71] Letter Request of November 29, 2001; Letter Request of February 4, 2003; Letter Request of March 13, 2006; TVCN-Oneida Letter at 3.

[72] *See, e.g., Jung Letter,* 18 FCC Rcd at 14430-31.

[73] TVCN-Oneida Letter at 3, 4.

[74] TVCN-Oneida Letter at 2-3.

[75] TVCN-Oneida Letter at 5-6.

## V. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED that, pursuant to authority granted in Section 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), the Requests submitted on November 29, 2001, February 4, 2003, February 14, 2006, March 13, 2006, and May 26, 2006, by TVCN seeking a waiver of the Commission's rules governing installment payment deadlines and reinstatement of the Licenses are DENIED. This action is taken under authority delegated pursuant to Section 0.331 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

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