

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

In the Matter of
Petition for Reconsideration of Dismissal of
Application for Assignment of Licenses from
United States Wireless Cable, Inc. to Rioplex
Wireless Ltd.
File No. 20020426AAZ

ORDER

Adopted: December 28, 2007

Released: December 28, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a Petition for Reconsideration of a Dismissal of Application for Assignment of Licenses ("Petition") filed by United States Wireless Cable, Inc. ("USWC") together with its operating subsidiary United States Wireless Systems, Inc. ("USWS"). The Petition seeks reversal of a March 16, 2005 Wireless Telecommunications Bureau, Broadband Division ("Division") letter dismissing a request for consent to assignment because the authorizations for the subject licenses had automatically cancelled pursuant to section 1.2110(g)(iii)-(iv) of the Commission's installment payment rules. Subsequently, on March 6, 2007, USWS filed a letter withdrawing the request for reconsideration of the dismissal of the assignment application, but seeking the continued consideration of the arguments for reinstatement of the two Broadband Radio Service ("BRS") licenses for the Brownsville-Harlingen, Texas and Victoria, Texas basic trading areas ("BTAs"). As discussed fully below, we deny the Petition for Reconsideration.

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

1 "Petition for Reconsideration of Dismissal of Application for Assignment of MDS BTA Licenses from United States Wireless Cable, Inc. to RioPlex Wireless Ltd. in File No. 20020426AAZ" filed on behalf of United States Wireless Systems, Inc. and United States Wireless Cable, Inc. on April 22, 2005 (Petition).

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.

2 Letter from James A. Stenger, counsel for United States Wireless Systems, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission dated March 6, 2007 (USWS Letter).

were allowed to pay their winning bids in quarterly installments over the initial term of the license.³ 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.⁴ Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.⁵ When in 1997 the Commission discontinued the use of installment payments for future auctions,⁶ it allowed entities that were already paying for licenses in installments to continue doing so.⁷

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.⁸ In 1997, however, the Commission liberalized its installment payment grace period rules for

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 first Commission auction for which installment payments were available was Auction No. 2 (218-219 MHz Service), which concluded on July 29, 1994.

⁴ *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).

⁵ See 47 C.F.R. §§ 1.2110(e)(3)(iii) & (iv) (1994).

⁶ 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 15,293, 15,322 ¶ 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.

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

⁸ 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.

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.⁹ The rules as amended in 1997, however, provided licensees with an automatic grace period (up to 180 days, cumulatively), i.e., a grace period to which they were entitled without having to file a request.¹⁰ 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.¹¹ 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.¹² 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.¹³

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,¹⁴ 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.¹⁵ 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.¹⁶

B. United States Wireless Cable ("USWC")

5. USWC won the BRS licenses for the Brownsville (MDB 056) and the Victoria (MDB 456) Basic Trading Areas (collectively the "Licenses") in Auction No. 6, which concluded in March of 1996.¹⁷

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

¹⁰ 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.

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

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

¹³ 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. 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 15,293, 15,310 ¶ 28, 15 FCC Rcd 21,520 (2000) ("*Part 1 Reconsideration of Third Report and Order*"). This change, which aligned the schedule for late payments with the quarterly schedule of regular installment payments, does not affect our evaluation of the instant case.

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

¹⁵ *Id.* at 443 ¶ 116.

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

¹⁷ "Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas," *Public Notice* (rel. March 29, 1996).

6. As a small business, USWC was eligible to participate in the Commission's installment payment plan available for qualifying entities that won licenses in Auction No. 6.¹⁸ In keeping with the Commission's rules, grant of the Licenses was conditioned upon USWC's full and timely performance of its payment obligations.¹⁹ USWC was scheduled to make interest-only payments for the first two years of the ten-year license term. Payments of interest and principal were to be amortized over the remaining eight years.²⁰

7. USWC began making its installment payments under the Commission's original installment payment rules. When the Commission's amended grace period rules became effective on March 16, 1998, USWC became subject to those rules.²¹ USWC failed to pay the installment payment due on the Brownsville license on February 28, 2001, along with the required late fees, before the expiration of the 180 days it was permitted under the rules. The Brownsville license therefore automatically canceled on September 1, 2001.²² USWC failed to pay the installment payment due on the Victoria license on May 31, 2001, along with the required late fees, before the expiration of 180 days. The Victoria license therefore automatically canceled on December 1, 2001.²³ USWC accordingly became subject to debt collection procedures.²⁴

8. On April 26, 2002, Rioplex Wireless, Ltd. filed an application to acquire the Licenses and all associated site-based licenses for MDB056, Brownsville, TX and MDB456, Victoria, TX.²⁵ On March 16, 2005, the Bureau dismissed that application because the Licenses had automatically cancelled.²⁶

9. USWC, the former Commission licensee, is the parent company of USWS, an operating subsidiary. In the Petition, USWC and USWS argue that the Commission's reconsideration of the cancellation of the licenses and the dismissal of the assignment application are warranted because the cancellation of the licenses after substantial payments have been made would be inequitable, and because license cancellation was not authorized by the bankruptcy court.²⁷ Specifically, the Petition argues that USWC made the required 20% down payment for the Licenses along with installment payments through September of 2000, and therefore "the total amounts paid are substantial on a percentage basis, given the relatively small face amount of the Notes."²⁸ Additionally, the Petition contends that because the proposed

¹⁸ 47 C.F.R. § 21.960(b) (1996).

¹⁹ 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.

²⁰ 47 C.F.R. §§ 1.2110(e)(3)(iii) & (iv) (1996) and 21.960(b)(3) (1996).

²¹ See *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

²² 47 C.F.R. 1.2110(g)(4)(iv).

²³ *Id.*

²⁴ *Id.* See also *Part 1 Third Report and Order*, 13 FCC Rcd at 440, 443 ¶¶ 110, 116; *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,315-16 ¶ 39 (2000); 47 C.F.R. § 1.1914(a) (1998); 4 C.F.R. § 102.11 (1998).

²⁵ See File No. 20020426AAZ (April 26, 2002).

²⁶ Letter from Mary M. Shultz, Deputy Chief, Broadband Division, to RioPlex Wireless Ltd. (March 16, 2005).

²⁷ Petition at 4-5.

²⁸ Petition at 4.

assignment of the licenses to RioPlex Wireless Ltd. included a provision for full payment of the Commission's installment debt, cancellation of the Licenses and the dismissal of the application to assign the Licenses are inequitable.²⁹

10. Furthermore, although the Petition concedes that it was USWS, and not USWC, that filed for bankruptcy on October 27, 2000, and that the BTA rights and licenses were held by USWC at the time of USWS's bankruptcy filing, the Petition maintains that the Commission did not obtain the necessary approval from the bankruptcy court to "cancel any property rights of the Debtor."³⁰ Specifically, the Petition argues that USWC had "agreed to assign and transfer to USWS all of the rights in leases, licenses, equipment and other assets used or useful in operating the wireless systems" such that USWS had an "interest" in the licenses that precluded the Commission from canceling them without prior bankruptcy court approval.³¹ The Petition explains that a deferment of payment for the Licenses was requested by the Trustee, pending receipt of information requested from the Commission regarding payment histories and the Court's review and approval to bring and maintain the accounts as current.³²

11. Subsequently, in a March 6, 2007 letter filed solely by USWS, USWS maintains that it no longer requests reinstatement of the dismissed assignment application, but that it continues to seek reinstatement of the BTA licenses.³³ Specifically, USWS states that the Commission has cancelled individual BTA channel licenses and replaced them with new consolidated BTA licenses and that in accordance with such procedures the Commission should issue consolidated BTA licenses to USWS.³⁴ USWS argues that its request is intended to resolve the remaining issues in the USWS bankruptcy proceeding as well as the petition for reconsideration filed on April 22, 2005. It further explains that it "is prepared to accept a grant of the licenses that is conditioned upon payment in full of the outstanding balances due to the U.S. Treasury upon issuance of the licenses." In support of this request, USWS argues that Commission precedent "favors the certainty of collecting the balance due from a previously conducted auction, rather than the uncertainty of continued litigation and speculation over the possibility of future re-auction of the licenses that results of which cannot be predicted and which may be indefinitely delayed by continued litigation."³⁵

III. DISCUSSION

A. Petition for Reconsideration and Informal Request for Waiver of Automatic Cancellation

12. As we explain below, the arguments submitted in the Petition lack merit and do not warrant reconsideration of the Division's letter dismissing the assignment application from USWC to Rioplex Wireless Ltd. or reinstatement of the automatically cancelled Licenses. The standard for a petition for reconsideration is provided in Section 1.106 of the Commission's rules.³⁶ As the Commission has stated, "Reconsideration is warranted only if the petitioner cites material error of fact or law or presents new or

²⁹ *Id.* at 3, 5.

³⁰ *Id.* at 5.

³¹ *Id.*

³² *Id.* at 4.

³³ See generally USWS Letter.

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ 47 C.F.R. § 1.106.

previously unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant [the] review of [the] prior action.”³⁷ The Petition has neither cited errors nor presented new facts that meet this standard for avoiding dismissal of the assignment application.

13. The Petition’s sole ground for reconsideration of the dismissal of the assignment application is that the Licenses should not have automatically cancelled. Even if the Commission were to consider this Petition as an informal request for waiver of the automatic cancellation rule, it fails to meet the standard for such a request. To obtain a waiver of the Commission’s rules, a party must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in the particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the party has no reasonable alternative.³⁸

14. 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.³⁹ The Commission established installment payment programs to help small entities participate in the competitive bidding process and the provision of spectrum-based services,⁴⁰ but has endeavored to ensure that entities that lack the financial capacity to pay their winning bids and operate communications systems do not undermine the rapid deployment of service and the efficient, intensive use of spectrum.⁴¹

³⁷ Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules, *Order on Reconsideration*, 16 FCC Rcd 5022, 5028 ¶ 18 (2001) (citing 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, *Order on Reconsideration*, 12 FCC Rcd 5188, 5202 n.84 (1997) (citing D.W.S., Inc., *Memorandum Opinion and Order*, 11 FCC Rcd 2933 ¶ 4 (1996))).

³⁸ 47 C.F.R. §§ 21.19 (1998) and 1.925.

³⁹ 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.”).

⁴⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 229.

⁴¹ 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).

15. 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.⁴² Precluding licensees from keeping licenses when they are not able to pay their winning bids pursuant to the Commission's rules reduces the incentive for bidders to make bids they cannot pay and increases opportunities for other bidders to win licenses. In this manner, strict enforcement of installment payment deadlines preserves a fair and efficient licensing process for all participants in Commission auctions, including both those that win licenses and those that do not, which in turn promotes economic opportunity, competition in the marketplace, and the rapid deployment of services for the benefit of the public.⁴³ To that end, licensees paying through installments must, throughout their license terms, continue to demonstrate their financial qualifications to be Commission licensees in order to protect the integrity of the Commission's auction and licensing process.⁴⁴

16. Thus, while we agree with the Petition that payment history is relevant with respect to the operation of the automatic cancellation rule, such payment history must be evaluated in the context of other factors. With regard to the Petition's argument that substantial payments had been made towards the Licenses prior to USWS's Trustee seeking a deferment of installment payments, the Commission has consistently found that a defaulting licensee's pre-default payment history, without more, is insufficient to support a waiver of the automatic cancellation rule.⁴⁵

17. Accordingly, the Petition presents no new issues, facts or considerations to demonstrate that the automatic cancellation of the Licenses was improper or inequitable and, therefore, provides no basis to support its request for reconsideration of the dismissal of the assignment application. Pursuant to the Commission's rules, when USWC failed to meet its installment payment obligations, the Licenses automatically cancelled. The Division therefore properly dismissed the assignment application seeking to assign licenses from USWC to Rioplex Wireless, Ltd. Likewise, the Petition has failed to meet the standard for waiver of the Commission's rules.

⁴² 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), *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).

⁴³ See, e.g., *21st Century MO&O*, 15 FCC Rcd at 25123-24 ¶ 22.

⁴⁴ 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"); 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").

⁴⁵ See, e.g., Lancaster Communications, Inc., *Order*, 22 FCC Rcd 2438, at 2442 ¶ 10, 2447 ¶ 21 (denying request for waiver of automatic license cancellation rule where licensee had made seven years of payments prior to experiencing financial distress); *Leaco*, 21 FCC Rcd at 1187 ¶ 13 (finding that any one of defaulting licensee's proffered facts, including seven-year history of payments, would not alone suffice to meet the Commission's waiver standard); *Advanced*, 21 FCC Rcd at 1633 ¶ 15 (finding that any one of defaulting licensee's proffered facts, including eight-year history of payments, would not alone suffice to meet the Commission's waiver standard).

B. Claims Regarding Bankruptcy Law

18. The Petition also lacks merit regarding its claimed bankruptcy protections. Citing the Supreme Court's decision in *Federal Communications Commission v. NextWave Personal Communications Inc.*, 123 S. Ct. 832 (2003) ("*NextWave*"), the Petition argues that bankruptcy law prohibits the automatic cancellation of the Licenses because USWC had an agreement with USWS to assign the licenses when the latter declared bankruptcy.⁴⁶ The Petition contends that the agreement gave USWS an ownership interest in the Licenses that bars their cancellation.⁴⁷

19. We find no basis for the Petition's reliance on *NextWave*, which involved, unlike the instant case, a licensee already in bankruptcy when the default occurred. Only in cases where the licensee is under the protection of Chapter 11 of the U.S. Bankruptcy Code at the time it defaulted will the Commission's automatic cancellation rule be ineffective.⁴⁸ As noted above, USWC was the licensee at the time of the defaults and was not in bankruptcy. USWS was never the licensee of these Licenses and, indeed, under Section 310(d) of the Communications Act, could not have been the licensee because the Commission neither received nor approved a request for assignment of the Licenses to USWS.⁴⁹ Because USWC was not in bankruptcy when the Licenses automatically cancelled, the protections afforded to bankrupt entities do not apply to this case. For that reason, we reject the Petition's attempt to analogize USWC's situation to that of licensees that filed for Chapter 11 bankruptcy protection prior to missing required installment payments, and we conclude the Commission was not under an obligation to secure bankruptcy court approval prior to the automatic operation of its regulatory payment rules.

20. Furthermore, section 301 of the Communications Act makes clear that Commission licenses are granted for the use, but not the ownership, of radio frequencies and that no Commission-issued license "shall be construed to create any right, beyond the terms, conditions, and periods of the license."⁵⁰ In keeping with Section 301, the Supreme Court has indicated that licensees do not hold property rights in licenses,⁵¹ and the Commission has held that licensees have no vested interest in any frequency licensed to them.⁵² Thus, Commission licensees hold only those rights established by the terms

⁴⁶ Petition at 5.

⁴⁷ *Id.*

⁴⁸ Since the *NextWave* decision, the Bureau has found that the U.S. Bankruptcy Code rendered the Commission's automatic cancellation rule ineffective only in such cases. See *In Re Urban Comm-North Carolina, Inc.*, Petition for Reconsideration of Public Notice Announcing Auction of C and F Block PCS Spectrum, Petition for Stay, *Order*, 18 FCC Rcd 18791 (WTB 2003); *Airadigm Communications, Inc.*, *Order*, 18 FCC Rcd 16,296 (WTB 2003), *recon. dismissed*, *Airadigm Communications, Inc.*, *Order on Reconsideration*, 21 FCC Rcd 3893 (WTB 2006). See also *GLH Order*, 18 FCC Rcd at 14,697 (finding that licensee's statement that absent waiver of installment payment rules it will seek relief in bankruptcy court has no effect on consideration of waiver request).

⁴⁹ See 47 U.S.C. § 310(d) (prohibiting the transfer or assignment of licenses except upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby).

⁵⁰ 47 U.S.C. § 301.

⁵¹ See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.").

⁵² Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems, *Report and Order and Further Notice of Proposed Rule Making and Fourth Memorandum Opinion and Order*, 21 FCC Rcd 8892, 8925-26 ¶ 46 (2006) (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), and finding that the Commission has consistently upheld the principle that no licensee obtains any vested interest in any frequency).

Moreover, throughout the history of the Commission's auctions program, the consequence of defaults on installment payments has been the same for all licensees:

(continued....)

and conditions of the licenses issued to them. The BRS licenses issued to USWC were conditioned on USWC's full and timely payment of its obligations under the installment payment plan in which it participated. Once USWC had failed to meet this condition by defaulting on its payments, it had no right to the licenses.⁵³ Certainly, a third party such as USWS could not have superior rights in a Commission license than the licensee itself. We therefore find that the Petition's claim that the Division failed to consider the rights of USWC or USWS is without merit.

C. USWS's March 6, 2007 Letter

21. The USWS Letter is equally unconvincing. USWS argues that because it is prepared to pay the Commission in full for the Licenses, no waiver of the automatic cancellation rule is necessary.⁵⁴ However, insofar as the Licenses cancelled automatically upon USWC's failure to render timely installment payments, USWS offer is unavailing. 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.⁵⁵ But, in the instant case, USWS's assertion that it is "prepared to accept a grant of the licenses that is conditioned upon payment in full of the outstanding balances" does not support such a waiver. As discussed fully above, USWS has no regulatory interest in the Licenses. USWS's ability or desire to pay USWC's outstanding debt obligation is therefore irrelevant to the Commission's consideration of a waiver of the automatic cancellation rule. Furthermore, having failed to meet its payment obligations and having not made any payment towards its debt since 2001, USWC has not provided any evidence that it is the party that values the Licenses most highly.

22. For all of the reasons discussed above, USWS's argument that the Commission should waive its payment rules to resolve bankruptcy litigation is misplaced.⁵⁶ As conceded in the Petition, USWC, the licensee at the time of automatic cancellation, was not in bankruptcy.⁵⁷ Accordingly, USWS has failed to demonstrate that a waiver of the automatic cancellation rule would be warranted under the facts presented.

IV. ORDERING CLAUSE

23. Accordingly, IT IS ORDERED that, pursuant to the 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), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by United States

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A default on an installment payment subjects the licensee to the license-cancellation-plus-debt-collection rule. In other words, the licensee loses the license, is not refunded its prior installment payments, and is subject to collection of the balance of the debt.

Part 1 Third Reconsideration of Third Report and Order, 19 FCC Rcd at 2561-62 ¶ 29.

⁵³ Section 303(r) of the Act authorizes the FCC to "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." 47 U.S.C. § 303(r). *See also Capital Telephone Co. v. FCC*, 498 F.2d 734, 740 (D.C. Cir. 1974) ("When an applicant accepts a government permit which is subject to certain conditions, he cannot later assert alleged rights which the permit required him to surrender in order to receive it").

⁵⁴ USWS Letter at 2.

⁵⁵ *See, e.g., Leaco*, 21 FCC Rcd 1182 (2006); *Advanced*, 21 FCC Rcd 1627 (2006).

⁵⁶ *See* USWS Letter at 2.

⁵⁷ Petition at 5.

Wireless Cable, Inc. and United States Wireless Systems, Inc., is DENIED. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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