

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

In the Matter of)
GLH Communications, Inc.)
Request for Waiver of Installment Payment Rules)

ORDER ON RECONSIDERATION

Adopted: February 7, 2007

Released: February 7, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. This Order denies a Petition for Reconsideration filed on behalf of GLH Communications, Inc. ("GLH"). In its Petition, GLH seeks reconsideration of a decision of the former Auctions and Industry Analysis Division ("Division") that denied GLH's request for waiver of the Commission's installment payment rules. Pursuant to these rules, four of GLH's six Personal Communication Services ("PCS") C Block licenses automatically canceled on August 1, 2003, due to GLH's failure to make required payments on winning bids for the licenses. For the reasons explained below, GLH's Petition fails to demonstrate that a waiver of the rules would serve the public interest. Accordingly, we deny GLH's Petition.

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 in the Matter of 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. § 1.1901 et seq.)), dated August 15, 2003 ("Petition").

2 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. § 1.1901 et seq.)), Order, 18 FCC Rcd 14695 (WTB/AIAD 2003) ("Division Order"). The Auctions and Industry Analysis Division was the predecessor of the current Auctions and Spectrum Access Division. The Division Order denied 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. § 1.1901 et seq.)), dated April 16, 2003 ("Request").

3 GLH initially sought a waiver of the automatic cancellation rule for six licenses, and the Division Order denied this request. As explained below, GLH paid its outstanding obligations on two of these licenses in full and transferred those two to another entity prior to defaulting on the other four. The request for waiver we consider here therefore pertains to four licenses.

were allowed to pay their winning bids in quarterly installments over the initial term of the license.⁴ 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.⁵ Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.⁶ When in 1997 the Commission discontinued the use of installment payments for future auctions,⁷ it allowed entities that were already paying for licenses in installments to continue doing so.⁸

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.⁹ In 1997, however, the Commission liberalized its installment payment grace period rules for

⁴ 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.

⁵ *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).

⁶ *See* 47 C.F.R. §§ 1.2110(e)(3)(iii) & (iv) (1994).

⁷ 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 (“*Part 1 Reconsideration of Third Report and Order*”). The last Commission auction for which installment payments were available was Auction No. 11 (broadband PCS F block), which ended on January 14, 1997.

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

⁹ *See, e.g.*, 47 C.F.R. § 1.2110(e)(4) (1994) and 47 C.F.R. § 1.2110(f)(4) (1998). *See also* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551 (2004) (“*Part 1 Third Reconsideration of Third R&O*”). 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

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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.¹⁰ 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.¹¹ 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.¹² 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.¹³ 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.¹⁴

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,¹⁵ 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.¹⁶ 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.¹⁷

5. In 2000, the Commission simplified the grace periods for participants in installment payment plans by replacing the two 90-day grace periods with two quarterly grace periods.¹⁸ This change aligned the schedule for late payments with the quarterly schedule of regular installment payments.¹⁹

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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.

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

¹¹ 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.

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

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

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

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

¹⁶ *Id.* at 443 ¶ 116.

¹⁷ *Id.* at 439-40 ¶¶ 109-10; *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15304-05 ¶ 19.

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

¹⁹ *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,310 ¶ 28.

B. GLH

6. In 2001, GLH acquired six PCS C Block licenses.²⁰ Each of the licenses authorized GLH to use 15 megahertz of spectrum.²¹ Upon acquiring the licenses, GLH assumed the original licensee's installment payment obligations, under the same terms and conditions.²²

7. On April 16, 2003, anticipating that it would not be able to pay the installment payments due on January 31, 2003, within the two-quarter automatic grace period provided by the Commission's rules, i.e., by July 31, 2003, GLH filed a request for waiver of the installment payment rules.²³ More specifically, GLH sought a two-year waiver of the Commission's automatic cancellation and debt collection rules and asked that the Commission consider proposals for compromising its debt. In its Request, GLH stated that when it had assumed the obligation to make installment payments on the licenses, it had also obtained a secured promissory note (the "Note") from Leap Wireless International, Inc. ("Leap"), the former licensee's corporate parent.²⁴ According to GLH, the Note obligated Leap to provide GLH with the money to make future installment payments for the licenses and was secured by stock in a Leap subsidiary.²⁵ GLH asserted that, notwithstanding the Note, Leap did not provide the funds needed for the January 31, 2003, installment payments.²⁶ GLH stated that it did not have access to capital

²⁰ See *Entrepreneurs' C Block Auction Closes*, *Public Notice*, DA 96-716 (rel. May 8, 1996). The auction winner of the relevant licenses was Chase Telecommunications, L.P. ("Chase"). On December 12, 1997, the Wireless Telecommunications Bureau granted *pro forma* transfers of the licenses from Chase to ChaseTel Licensee Group. Wireless Telecommunications Bureau Commercial Wireless Services Information, Report No. LB-98-13 (rel. December 12, 1997). The Commission later approved the subsequent application to transfer the relevant licenses from ChaseTel to GLH. Wireless Telecommunications Bureau Grants Consent to Assign C Block Broadband PCS Licenses, *Public Notice*, 16 FCC Rcd 20304 (2001).

²¹ The licenses authorized service in Tennessee and Alabama. GLH identifies the following BTAs as the relevant markets: 96, 120, 146, 211, 229, and 295. See Request at 2. Following Auction No. 5, a substantial number of C Block licensees encountered difficulty making installment payments. To comply with the Commission's statutory mandate to promote dissemination of licenses among a wide variety of licensees, the Commission offered C Block licensees four options to restructure their debt, including an option to disaggregate licenses so that the licensee retained use of 15 megahertz of the spectrum, returned use of 15 megahertz to the Commission, and reduced the original principal owed to the Commission by 50 percent. See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997); *on reconsideration*, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998). ChaseTel elected to disaggregate its licenses. See Wireless Telecommunications Bureau Announces Broadband Personal Communications Services C Block Elections, *Public Notice*, 13 FCC Rcd 16,705 (1998). Consequently, while Chase's original licenses authorized use of 30 megahertz, by the time ChaseTel transferred the licenses to GLH, ChaseTel had returned 15 megahertz of each license to the Commission and each license only authorized use of the remaining 15 megahertz.

²² Petition at 4. As a small business, the original licensee qualified to pay 90 percent of its net high bids in installments over ten years, paying only interest for six years and then principal and interest for four years. See 47 C.F.R. §§ 24.711 and 24.712. GLH was subject to these same conditions.

²³ See Request, *supra* note 2.

²⁴ Request at 4-5.

²⁵ *Id.* at 5.

²⁶ *Id.* at 5. According to GLH's calculations, its total payment due on January 31, 2003, was \$605,371.04 (consisting of \$458,598.06 in quarterly payment and \$146,718.98 in interest payments). *Id.* at 4. Leap and its subsidiaries filed for bankruptcy protection on April 14, 2003. GLH claimed that it was unable to foreclose on its collateral under the Note before the bankruptcy filings by Leap and its subsidiaries. *Id.* at 5.

or alternative funding to make the required payments prior to July 31, 2003, and asserted that, absent relief from the Commission, it might have no choice but to file for bankruptcy protection.²⁷

8. On July 18, 2003, the Division, acting on delegated authority, issued an Order denying the Request.²⁸ Following the denial of the Request, GLH paid all amounts outstanding with respect to two of the six licenses and made a *pro forma* transfer of those two licenses prior to July 31, 2003.²⁹ However, GLH failed to submit the January 31, 2003, payments for the four other licenses, along with the associated late fees, by July 31, 2003. The four licenses therefore canceled automatically on August 1, 2003, and GLH became subject to debt collection procedures pursuant to Section 1.2110(g)(4) of the Commission's rules.³⁰

9. Following the cancellation of the four licenses, the Commission granted GLH Special Temporary Authority ("STA") to operate using two of these former licenses so that GLH could make arrangements to discontinue operations and give existing customers time to transition to another service provider.³¹ Pursuant to GLH's request, the Commission twice extended these two STAs. In one case, GLH eventually requested early cancellation of its STA.³² In the other instance, notwithstanding GLH's request for a third extension, the STA expired. GLH subsequently withdrew its request for a third extension.³³

10. GLH filed the Petition, seeking reconsideration of the *Division Order*, on August 15, 2003. In its Petition, GLH repeats three arguments similar to those originally made in its Request as to why the Commission's installment payment rules should be waived in this case. First, GLH argues that the application of the installment payment automatic cancellation rule in this case will disrupt service to 16,000 customers.³⁴ Second, GLH contends that cancellation of the licenses is inequitable because it acted prudently and diligently to establish its financing, to build-out its system, and to provide service, and it defaulted on its payment obligations solely due to the bankruptcy of its third party financier, a major wireless carrier.³⁵ Third, GLH also contends that the Commission's refusal to waive its rules subjected GLH to inequitable treatment, in light of the protection against automatic cancellation afforded to bankrupt entities that default on installment payments.³⁶

²⁷ *Id.* at 6-7.

²⁸ *See supra* note 2. In addition to seeking waiver of the Commission's automatic cancellation rules in its original Request, GLH also sought waiver of the Commission's debt collection rules. The Order dismissed without prejudice the request for waiver of the debt collection rules as premature. GLH does not seek reconsideration of that decision. *See* Petition at n. 2.

²⁹ GLH assigned KNLF642 and KNLF464 to NTCH, Inc. *See* Universal Licensing System ("ULS") File No. 0001402262 (applying for voluntary *pro forma* transfer of C Block licenses for BTA120 and BTA211). *See also* Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, Report No. 1686, *Public Notice*, at 2 (rel. Dec. 10, 2003) (granting assignment of authorization requested in File No. 0001402262).

³⁰ 47 C.F.R. §1.2110(g)(4)(iv).

³¹ *See* Call Sign WPYF501 (STA to operate on C Block of broadband PCS in BTA096); Call Sign WPYF502 (STA to operate on C Block of broadband PCS in BTA146).

³² *See* ULS File No. 0001835558 (application to cancel STA call sign WPYF50), filed August 10, 2004.

³³ *See* ULS File No. 0001899855 (application to cancel STA call sign WPYF502), filed September 18, 2006.

³⁴ Petition at 2.

³⁵ *Id.* at 5-6.

³⁶ *Id.* at 7-10.

11. In addition to these arguments regarding the merits of waiving the Commission's rules, GLH's Petition presents two new arguments with respect to the Commission's authority to enforce the rules governing GLH's default. First, GLH contends that the Commission is barred by statute from canceling GLH's licenses without first affording GLH a hearing.³⁷ Second, GLH asserts that the Commission's pre-licensing default rules should determine GLH's obligations following its default on the licenses, rather than the Commission's post-licensing procedures and GLH's Notes.³⁸

III. DISCUSSION

A. Request for Waiver of the Automatic Cancellation Rule

12. To obtain a waiver, GLH must show either that (i) the underlying purpose of the applicable rule would not be served, or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.³⁹ As discussed below, GLH fails to make either showing necessary to support the grant of a waiver.

13. With respect to the first prong of the waiver standard, GLH has not shown that the purpose of the applicable rule would not be served by its application in this case. The Commission's competitive bidding rules, including the automatic cancellation rule, serve several statutory objectives enumerated in Section 309(j)(3) of the Communications Act, including the rapid deployment of services for the benefit of the public and the efficient and intensive use of spectrum, and are not limited to assuring simply that the licensee provides service.⁴⁰ In designing its auctions, the Commission has determined that assigning licenses to the qualified applicant willing to pay the most for the license promotes these statutory objectives.⁴¹

14. The automatic cancellation rule in particular serves a crucial function in the competitive bidding process. Precluding winning bidders, or subsequent licensees such as GLH, from keeping the licenses when the winning bids are not paid pursuant to the Commission's rules minimizes bidders' incentive to make bids they cannot pay. This makes it possible for other bidders that will pay their bids to win the licenses through the auction. This process protects the integrity of the competitive bidding and promotes a fair and efficient licensing process for all participants in the Commission's auction, including both those who won licenses and those who did not, which, in turn, promotes economic opportunity and competition in the marketplace.⁴²

³⁷ *Id.* at 10-11.

³⁸ *Id.* at 11-12.

³⁹ 47 C.F.R. § 1.925.

⁴⁰ *See* 47 U.S.C. § 309(j)(3).

⁴¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360-61, ¶ 70. The Commission assigns licenses based on license applicants' competing bids. Each of those bids presumably reflects the estimated value of the prospective service to the public and the applicant's effectiveness in providing it. *See id.*, 9 FCC Rcd at 2360-61, ¶ 70 ("[T]he market value assigned to licenses via the auction process can be expected to reflect the benefits to both consumers and producers, now and in the future.") Moreover, assigning licenses based on competing bids reduces administrative and judicial delay by using a simple and objective standard to compare competing applicants.

⁴² *See Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,123-24, ¶ 22 (2000) ("*21st Century MO&O*"), *aff'd* 21st Century Telesis Joint Venture and 21st Century Bidding Corporation v. Federal Communications Commission, 318 F3d 192 (D.C. Cir. 2003).

15. The Commission repeatedly has emphasized that strict enforcement of the installment payment rules enhances the integrity of the auction and licensing process by ensuring that spectrum is awarded to those entities who value the spectrum most and that have the necessary financial capacity to build out systems and provide service.⁴³ The original assignment of the licenses at issue was premised on the winning bidder demonstrating the integrity of its valuation by paying the amount of the winning bids. Although GLH purchased the licenses on the secondary market, it assumed the winning bidder's obligation to fully and timely pay the amount of the winning bids. Absent the full payment of the winning bids, GLH's ability to provide service with the licenses cannot protect the integrity of the auction and licensing process and is insufficient to support the grant of a waiver. To allow GLH to retain the licenses although it has not met its payment obligations would compromise the Commission's auction and licensing process. In short, an entity must demonstrate its financial qualifications to be a Commission licensee by both paying for its spectrum license and providing service to the public.

16. For this reason, we disagree with GLH's arguments regarding its provision of service. GLH essentially restates its earlier argument that the Commission should waive the automatic cancellation rule so that GLH can continue to provide service to rural and low-income members of the public.⁴⁴ The Petition states that, as of its filing, GLH was serving more than 16,000 customers.⁴⁵ GLH asserts that delivery of service to the public is the primary goal of the Commission's installment payment and automatic cancellation rules.⁴⁶ GLH argues that the public interest in avoiding termination of its service as of the date of the Petition is in the public interest, and, therefore, the requested waivers should be granted.⁴⁷

17. The Commission has determined, however, that the provision of service by itself does not outweigh the public interest in preserving the integrity of the auction and licensing process and, therefore, is insufficient to merit waiver of the automatic cancellation rule.⁴⁸ Any interest in a particular licensee providing service must be balanced against the larger public interest in preserving the integrity and efficiency of the Commission's licensing process, as well as the Commission's obligation to fairly and consistently enforce its payment rules. Moreover, contrary to GLH's contention at the time it filed the

⁴³ Southern Communications Systems, Inc. Request for Limited rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion and Order*, 15 FCC Rcd 25,103, 25, 117-18, ¶ 10 (2000) ("*Southern Communications MO&O*"), *further reconsideration denied*, *Second Memorandum Opinion and Order*, 16 FCC Rcd 18,357 (2001); *21st Century MO&O*, 15 FCC Rcd at 25,117-18, ¶ 10. *See also* Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly, *Public Notice*, 11 FCC Rcd 10,853 (1996). Letter to James A. Stenger, Esq., Counsel for Allen Leeds, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 17,621, 17,623 (2001) (citing Application for Assignment of Broadband PCS Licenses, FCC 98-301, *Order*, 14 FCC Rcd 1126, ¶ 1 (1998)) ("Allowing bidders to adjust their bids post-auction would encourage insincere bidding and therefore interfere with the Commission's goal to ensure that licenses are auctioned to those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.").

⁴⁴ Compare Petition at 2-3 and Request at 14.

⁴⁵ Petition at 1.

⁴⁶ Petition at 2, Request at 9.

⁴⁷ Petition at 2-3, Request at 3.

⁴⁸ The Commission previously has denied requests for extension of payment deadlines notwithstanding the provision of service by licensees. *See* Request for Extensions of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22,071, 22,077 (1998), *recon. 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) ("*C and F Block Installment Payment Order*") (discussing service provided by two licensees denied waivers of the installment payment and automatic cancellation rules).

Petition, applying the automatic cancellation rule in this case did not force the immediate termination of service. GLH paid the outstanding installment payments due for two of the six licenses prior to the expiration of the two-quarter automatic grace period, i.e., by July 31, 2003, and transferred them to another licensee. With respect to two other licenses, the Commission provided GLH with special temporary authority for over a year to enable GLH to discontinue operations and to afford existing customers time to transition to another service provider in an orderly manner.⁴⁹ With respect to the remaining two licenses, GLH never even sought such authority.

18. Turning to the second prong of the waiver standard, GLH argues that it presents unique facts and circumstances that render application of the rule inequitable, unduly burdensome, and contrary to the public interest. More specifically, GLH contends that, unlike in past cases where the Commission denied requests for waiver of the automatic cancellation rule,⁵⁰ GLH needed additional time to cure its payment delinquencies; its failure to make payment was the result of a contractual default of a large, third-party PCS carrier; it had built-out and was operating its system as a viable business; and, finally, the protection against automatic cancellation provided by bankruptcy, as affirmed in the Supreme Court's *NextWave* decision, rendered the application of the rule to solvent licensees in GLH's circumstances inequitable.⁵¹ None of these arguments, each of which GLH made previously in a slightly different form, is sufficient to merit granting the Petition under the second prong of the Commission's waiver standard.

19. A licensee's asserted need for more time than the Commission's rules afford does not constitute the type of unique circumstance required to justify a waiver.⁵² The Commission repeatedly has observed that "[n]o matter what deadline we establish, it is inevitable that some licensees will seek more time to pay."⁵³ The Commission has also determined that a two-quarter grace period during which licensees may make late payments should be sufficient.⁵⁴

20. GLH's claim that a third party's unpredicted bankruptcy caused it to default on its installment payments is unavailing in light of Commission precedent under which GLH bears the full risk of any commercial arrangements it made to pay for its licenses.⁵⁵ The Commission repeatedly has held that it "cannot take into account the private business arrangements that an applicant has made to finance

⁴⁹ See Universal Licensing System License Call Sign WPYF501 (Special Temporary Authority for PCS Broadband C Block frequencies in market BTA 96); Universal Licensing System License Call Sign WPYF502 (Special Temporary Authority for PCS Broadband C Block frequencies in market BTA 146).

⁵⁰ Although GLH argues its facts and circumstances differ from past cases where the Commission has declined to waive the automatic cancellation rule, we find that GLH cannot satisfy the standard for receiving a waiver simply by drawing distinctions between its circumstances and the circumstances of other licensees that have been denied waivers. Rather, any such distinctions must demonstrate that application of the rule to GLH would be inequitable, unduly burdensome, or otherwise contrary to the public interest.

⁵¹ Petition at 4, 7-9 (citing *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003)).

⁵² See, e.g., *Southern Communications MO&O*, 15 FCC Rcd at 25,111, ¶ 15.

⁵³ *C and F Block Installment Payment Order*, 13 FCC Rcd at 22072-73 ¶ 4 (1998) (quoting Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8354 ¶ 24 (1998)). See also *Southern Communications MO&O*, 15 FCC Rcd at 25110 ¶ 15; Letter to Mr. Kurt Schueler, President of New England Mobile Communications, Inc. from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 19355, 19357-58 (2001).

⁵⁴ See *Part 1 Third Report and Order*, 13 FCC Rcd 374, 439-440, ¶ 110.

⁵⁵ See *Southern Communications MO&O*, 15 FCC Rcd at 25107, ¶ 10 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule); *U.S. Telemetry Corporation Letter*, 17 FCC Rcd at 6447.

its successful bid.”⁵⁶ Moreover, “the Commission has been consistent in strictly enforcing this standard” with respect to various payment rules, including default payments and down payments.⁵⁷ GLH made a business decision to rely on Leap’s Note for payment of the debt owed to the Commission for the licenses.⁵⁸

21. GLH also contends that, unlike the circumstances involving other license installment payment defaults, it had constructed its system and was operating it as part of a viable business.⁵⁹ GLH was nonetheless obliged to pay for the licenses. GLH appears to argue that it should be granted relief because its business was “viable” so long as Leap made the installment payments.⁶⁰ However commercially reasonable GLH’s arrangement for Leap to finance license installment payments may have seemed, GLH remains responsible for assuring that its installment payments are timely made to the Commission. All licensees that arrange for third-party financing face the possibility that problems will arise with their access to capital. There is therefore nothing unique about GLH’s financing problems that would warrant a waiver of the Commission’s rules.

22. Finally, GLH argues that the Supreme Court’s *NextWave* holding leads to an inequitable result because it enables a bankrupt licensee to avoid its Commission obligations, or at least automatic cancellation, while a licensee offering a proposal to satisfy its entire obligation to the Commission without resorting to bankruptcy may lose its licenses.⁶¹ This argument cannot support grant of a waiver to GLH. Bankruptcy is a status governed by statute, and different treatment based on differing circumstances is not inequitable.⁶² Congress’s decision to grant certain treatment to entities in bankruptcy provides no sound basis for arguing that entities outside bankruptcy should receive similar treatment. Moreover, GLH’s assertion that the denial of the waiver somehow “penalizes” GLH for not seeking bankruptcy or otherwise encourages it to seek bankruptcy ignores the variety of factors that lead a party to declare bankruptcy.⁶³ A party’s assertion that it might seek the protection of a bankruptcy court, with all the consequences that would entail, if the Commission does not otherwise waive the party’s obligations is no basis by itself for waiving the Commission’s rules.

⁵⁶ 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, FCC 00-243, *Memorandum Opinion and Order*, 15 FCC Rcd 17,590, 17,606, ¶ 30 (2000) (“*BDPCS MO&O*”) (quoting BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission’s Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230, 3235, ¶ 8 (1997); Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd 6384, 6385 (CAB 1994), *review denied*, 10 FCC Rcd 12,153, 12,155 (1995), *recon. denied*, 11 FCC Rcd 8211, 8216-17 (1996)).

⁵⁷ *BDPCS MO&O*, 15 FCC Rcd at 17,606, ¶ 30 (involving default payments) (citing Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, *Memorandum Opinion & Order*, 10 FCC Rcd 12,153, 12,155 (1995), *recon. denied*, 11 FCC Rcd 8211, 8216-17 (1996) (involving down payments)).

⁵⁸ Petition at 5-6, Request at 2-3.

⁵⁹ Petition at 6.

⁶⁰ See Petition at 5 (“GLH’s payment default was the result of an unpredictable event [Leap’s bankruptcy] beyond GLH’s control.”)

⁶¹ Petition at 6-7, Request at 13.

⁶² It is not inequitable to hold GLH to its obligations even if Leap’s bankruptcy protects Leap from all of its obligations. GLH’s obligations stem from its acquisition of the licenses and assumption of the obligation to make future installment payments. Petition at 3, Request at 4.

⁶³ *Id.* at 10.

B. The Commission's Authority to Enforce Automatic Cancellation

23. GLH also asserts that the Commission's automatic cancellation rule is unenforceable because it is inconsistent with Section 312(c) of the Communications Act, which requires the Commission to provide an opportunity for a hearing "[b]efore revoking a license or permit pursuant to subsection (a)." ⁶⁴ Section 312(c) mandates an opportunity for a hearing, however, only prior to "revocation" of a license for one of the reasons listed in Section 312(a). ⁶⁵ The failure to comply with the payment requirements for auctioned licenses is not among these enumerated reasons. Thus, when a licensee fails to meet its installment payment obligations, the Commission does not revoke the license pursuant to Section 312. Instead, the license cancels automatically pursuant to Section 1.2110(g)(4)(iv) without Commission action and the hearing requirement of Section 312(c) is not triggered. GLH argues that license "cancellation" is a form of "revocation" and that the Commission is therefore required to provide it with an opportunity for hearing under Section 312(c). ⁶⁶ We disagree. Regardless of the term used, it is clear that Section 312(c) applies only to the revocation of licenses for the reasons stated in Section 312(a).

24. We also reject GLH's argument that the automatic cancellation rule is unenforceable because the Commission was without the authority to promulgate such a rule. According to GLH, Congress denied the Commission the authority to cancel licenses without a hearing by enacting Section 309(j)(6) of the Communications Act, which states, *inter alia*, that the use of competitive bidding shall not limit or otherwise affect the requirements of other sections of the Act. ⁶⁷ GLH contends that Section 309(j)(6) prohibited the Commission from depriving holders of licenses won at auction of their right to a pre-revocation hearing under Section 312(c) and from conditioning such licenses on timely payment. ⁶⁸ In adopting the automatic cancellation rule and in conditioning licenses on the full and timely fulfillment of installment payment obligations, the Commission did not, however, limit or otherwise affect the provisions of Section 312. As explained above, Section 312 governs the revocation of licenses by the Commission based on particular circumstances listed in Section 312(a), and the hearing requirement of Section 312(c) applies only to revocations of licenses based on those circumstances. The automatic cancellation rule therefore does not conflict with Section 312(c) and is not prohibited under Section 309(j). Moreover, the Communications Act authorizes the Commission to impose conditions on the grant of a license, ⁶⁹ and it specifically provides for the automatic cancellation of licenses for failure to meet

⁶⁴ *Id.* at 10-11 (citing 47 U.S.C. §312(c)).

⁶⁵ See *California Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004) ("That the Congress took care to specify in section 312 the circumstances following the grant of a license that warrant its revocation tends to show that if the Congress was focused on post-grant events, it mentioned them").

⁶⁶ Petition at 11. GLH cites the United States Court of Appeals for the District of Columbia Circuit decision in *NextWave* to support its argument. Petition at n.21. The *NextWave* case, however, discussed the "revocation" of NextWave's licenses only in the context of determining the Court's jurisdiction under Section 402, 47 U.S.C. § 402, and the application of Section 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a). In that case, the courts had no occasion to rule on whether the Commission's automatic cancellation of NextWave's licenses for non-payment of its auction debt required a prior hearing under Section 312(c). See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (judicial decisions do not serve as precedent for points that were not raised and analyzed).

⁶⁷ Petition at 11 (citing 47 U.S.C. § 309(j)(6)).

⁶⁸ *Id.*

⁶⁹ 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 Act." 47 U.S.C. § 303(r). See *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").

conditions of the license grant.⁷⁰ The United States Court of Appeals for the District of Columbia Circuit also has recognized that licenses cancel automatically, outside of the provisions of Section 312, if the licensee fails to abide by a condition of the license grant.⁷¹

C. GLH's Default Obligation

25. Finally, GLH contends that following its default “the provisions of Section 1.2104(g)(2) . . . come into play.”⁷² Shortly after GLH filed its Petition, the Commission addressed this issue when it expressly stated in the *Part 1 Reconsideration of the Third Report and Order* that “installment payment defaults are covered by Section 1.2110(g)(4) . . . which does not incorporate Section 1.2104(g)(2). . . . [P]ursuant to Section 1.2110(g)(4)(iv) . . . licensees that default on installment payment obligations will automatically lose their licenses and be subject to debt collection procedures.”⁷³ GLH asserts that the Commission’s statements regarding the rule are at odds with the actual rule and therefore constitute an unlawful and material retroactive alteration of the rules governing default obligations. The Commission has since rejected precisely these arguments, concluding both that the *Part 1 Reconsideration of the Third Report and Order* did not make any changes to the rule and that, even if it did, the changes did not constitute impermissible retroactive rulemaking.⁷⁴ GLH has presented no new arguments to disturb the Commission’s prior conclusions.⁷⁵

IV. CONCLUSION

26. For the reasons set forth above, application of the automatic cancellation rule in this case will not frustrate the underlying purpose of the rule, is not contrary to the public interest, and is not

⁷⁰ See 47 U.S.C. § 319(b) (“permits for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified”). See also *National Science and Technology Network, Inc. v. FCC*, 397 F.3d 1013 (D.C. Cir. 2005) (affirming automatic license cancellation for failure to meet an express license condition).

⁷¹ See *P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984). See also *Peninsula Communications, Inc. v. FCC*, 55 Fed.App. 1 (D.C. Cir. 2003), where the Court, citing *Temmer*, held that that license termination pursuant to a conditional grant does not implicate the hearing requirement under Section 312 (*id.* at 2):

One of Peninsula's remaining challenges is that the 2001 order revoked the licenses without a hearing as required in 47 U.S.C. § 312(c). But the Commission did not revoke any of the licenses. It conditionally granted the renewals and then rescinded the conditional grants for failure to satisfy the condition.

⁷² Petition at 12.

⁷³ *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd 15293, 15315-316, ¶ 39. See Petition at 14 (citing *Part 1 Reconsideration of Third Report and Order*, ¶ 39).

⁷⁴ *Part 1 Third Reconsideration of Third R&O*, 19 FCC Rcd 2551, 2558-59, ¶¶ 20-21.

⁷⁵ GLH cites to court opinion in *21st Century Telesis* in support of its contention that 1.2104(g)(2) applies to post-licensing defaults on installment payments. Petition at 13. The court in *21st Century Telesis* incorrectly cited 1.2104(g)(2) as the applicable rule for determining an installment payor’s default obligations. See *21st Century Telesis Joint Venture and 21st Century Bidding Corporation v. Federal Communications Commission*, 318 F.3d 192, 198 (D.C. Cir. 2003). However, the court’s error in *21st Century Telesis* was immaterial to its conclusion that an installment payor had default obligations that would not be altered by the claims in the case before it. *Id.* As the concurring opinion noted, the issue relating to the licensee’s default obligations was the subject of “extremely sketchy briefing.” *Id.* at 203. The inconsequential error in *21st Century Telesis* does not alter the Commission’s conclusion in both the *Part 1 Reconsideration of Third Report and Order* and the subsequent *Part 1 Third Order on Reconsideration*.

inequitable, unduly burdensome, or otherwise contrary to the public interest. Moreover, the application of the automatic cancellation rule is in accordance with the Commission's legal authority. Finally, contrary to GLH's misreading of the rule, GLH's default obligations are not determined by the Commission's rule for pre-licensing defaults.

IV. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that the Petition for Reconsideration dated August 15, 2003, filed on behalf of GLH with respect to the Commission's rule governing installment payment deadlines, 47 C.F.R. § 1.2110(g)(4), is DENIED.

28. This action is taken pursuant to Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.⁷⁶

FEDERAL COMMUNICATIONS COMMISSION

Fred B. Campbell, Jr.
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⁷⁶ 47 C.F.R. § 0.331.