

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

In the Matter of )
Spectrum Resources, Inc. ) File Nos. 0000439718, 0000464099
Request For Reconsideration of the Automatic )
Cancellation of Auction No. 7 Licenses )

ORDER ON RECONSIDERATION

Adopted: February 7, 2007

Released: February 7, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we deny a petition filed by Spectrum Resources, Inc. ("Spectrum Resources"), in which it seeks reconsideration of the Wireless Telecommunications Bureau's ("Bureau") dismissal of its applications for assignment of two 900 MHz Specialized Mobile Radio ("SMR") service licenses, KNNY212 (MTA025H, Puerto Rico - U.S. Virgin Islands) and KNNY213 (MTA047M, Honolulu) (collectively the "Licenses"). These applications were not granted because, pursuant to section 1.2110(g)(4)(iv) of the Commission's rules, the Licenses had canceled automatically upon Spectrum Resources' failure to meet its installment payment deadlines. While Spectrum Resources disputes that the Licenses did, in fact, cancel, it nonetheless seeks both reconsideration of the automatic cancellation and reinstatement of the Licenses. For the reasons set forth below, we find the arguments presented by Spectrum Resources to be without merit.

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 Spectrum Resources, Petition for Reconsideration (filed Feb. 15, 2002) ("Petition").

2 See Notice of Dismissal [KNNY213], FCC File No. 0000439718 (Jan. 16, 2002), and Notice of Dismissal [KNNY212], FCC File No. 0000464099 (Jan. 16, 2002) ("Dismissal Notices").

3 47 C.F.R. § 1.2110(g)(4)(iv).

4 Petition at 7-8.

5 Spectrum Resources asks that we reconsider the cancellation of the Licenses (Petition at ii, 16) and the dismissal of its assignment applications (Petition at 1, 16).

6 Petition at 13, 16.

were allowed to pay their winning bids in quarterly installments over the initial term of the license.<sup>7</sup> In deciding to offer installment payment plans, the Commission reasoned that in appropriate circumstances such plans would, by reducing the amount of private financing small entities needed in advance of auctions, help to provide opportunities for small businesses to participate in the provision of spectrum-based services.<sup>8</sup> Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.<sup>9</sup> When in 1997 the Commission discontinued the use of installment payments for future auctions,<sup>10</sup> it allowed entities that were already paying for licenses in installments to continue doing so.<sup>11</sup>

3. Certain features of the Commission's installment payment rules have remained the same since they were first adopted in 1994. Thus, the rules have always conditioned the grant of licenses upon the full and timely performance of licensees' payment obligations and have provided that, upon a licensee's default, the license cancels automatically and the Commission institutes debt collection procedures.<sup>12</sup> In 1997, however, the Commission liberalized its installment payment grace period rules

<sup>7</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2389-91 ¶¶ 231-40 (1994) (“*Competitive Bidding Second Report and Order*”). The first Commission auction for which installment payments were available was Auction No. 2 (218-219 MHz Service), which concluded on July 29, 1994.

<sup>8</sup> *Id.*, 9 FCC Rcd 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), (4)(D).

<sup>9</sup> See 47 C.F.R. §§ 1.2110(e)(3)(iii), (iv) (1994).

<sup>10</sup> The Commission discontinued the use of installment payments based on its findings that (1) installment payments are not necessary to ensure meaningful opportunities for small businesses to participate successfully in auctions; (2) the Commission must consider all of the objectives of section 309(j) of the Communications Act, including the development and rapid deployment of new services for the benefit of the public; (3) filings for bankruptcy by entities unable to pay their winning bids may result in delays in the deployment of service; and (4) requiring the payment of bids in full within a short time after the close of auctions ensures greater financial accountability from applicants. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397-98 ¶¶ 38-39 (1998) (“*Part 1 Third Report and Order*”). The Commission affirmed this decision in 2000. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,322 ¶ 55 (“*Part 1 Reconsideration of Third Report and Order*”). The last Commission auction for which installment payments were available was Auction No. 11 (broadband Personal Communications Services F block), which ended on January 14, 1997.

<sup>11</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>12</sup> See, e.g., 47 C.F.R. § 1.2110(e)(4) (1994) and 47 C.F.R. § 1.2110(f)(4) (1998). See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551 (2004) (“*Part 1 Third Order on Reconsideration of the Third Report and Order*”). In this order addressing the inapplicability of section § 1.2104 of the Commission's rules, 47 C.F.R. § 1.2104, to installment payment defaults, the Commission discussed its 1997 decision not to deviate from its license-cancellation-plus-debt-collection rule for installment payment defaults and explained the reasonableness of this decision. Noting that automatic license cancellation is not unique to defaults on installment payments (licenses terminate automatically, for example, when licensees fail to build out in compliance with the Commission's rules, whether they are paying their winning bids in installments or have paid them in full in a lump sum), the Commission explained that its rules are designed to encourage entities that cannot meet their financial obligations to exit the auction process sooner rather than later in order to avoid delays in licensing spectrum to entities that are able to provide service to the public. Thus, the consequence of defaulting after the close of an auction is more severe than the consequence of withdrawing a high bid during an auction, when a new high bidder can still emerge. Similarly, the consequence of a post-licensing default, such as an installment payment default or a failure to meet construction or service requirements, is more severe than the consequence of a pre-licensing default because the former could adversely affect service to the public much longer than the latter. *Id.* at 2561-62 ¶¶ 29-31.

for those licensees that were already paying their winning bids in installments, providing these licensees with significant advantages they had not previously had. Under the rules adopted in 1994, any licensee whose installment payment was more than 90 days past due was in default, unless the licensee properly filed a grace period request.<sup>13</sup> The rules as amended in 1997, however, provided licensees with an automatic grace period, i.e., a grace period to which they were entitled without having to file a request.<sup>14</sup> The amended rules also entitled all licensees paying in installments to a grace period of 180 days. Thus, if a licensee did not make full and timely payment of an installment, it was automatically granted a 90-day period during which it was allowed to pay the installment along with a 5 percent late fee.<sup>15</sup> If it did not submit the missed installment payment and the 5 percent late fee before the expiration of this 90-day period, the licensee was automatically granted a second 90-day period during which it could remit payment along with an additional late fee equal to 10 percent of the missed payment.<sup>16</sup> A licensee's failure to make payment, including the associated late fees, by the end of the second 90-day period placed it in default.<sup>17</sup>

4. In liberalizing its grace period rules, the Commission found that the amended rules eliminated uncertainty for licensees seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions,<sup>18</sup> and that the added certainty the rules provided to licensees would increase the likelihood that licensees and potential investors would find solutions to capital problems before defaults occurred.<sup>19</sup> Noting that a grace period is an extraordinary form of relief in cases of financial distress and that the rules it adopted are consistent with commercial practice, the Commission declined to provide more than 180 days for licensees to make late payments and rejected the argument that licenses should not cancel automatically upon default.<sup>20</sup>

## B. Spectrum Resources

5. On April 15, 1996, the Commission announced that Spectrum Resources was the winning bidder in Auction No. 7 for the Licenses.<sup>21</sup> Spectrum Resources, as a small business, chose to participate in the Commission's installment payment plan to pay for its licenses. Spectrum Resources' licenses were granted on August 16, 1996, and installment payments on each license were due each quarter until Spectrum Resources' obligation was paid in full. Spectrum Resources' first payment was due on November 30, 1996, and subsequent payments were due quarterly on or before February 28, May 31, August 31, and November 30 each year.

6. Spectrum Resources submitted its payments in compliance with the Commission's rules

<sup>13</sup> 47 C.F.R. § 1.2110(e)(4)(i), (ii) (1994). Licensees were permitted to request a grace period of 90 to 180 days.

<sup>14</sup> *Id.* § 1.2110(f)(4)(i), (ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶¶ 106-07. The amended rules took effect on March 16, 1998.

<sup>15</sup> 47 C.F.R. § 1.2110(f)(4)(i) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>16</sup> 47 C.F.R. § 1.2110(f)(4)(ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>17</sup> 47 C.F.R. § 1.2110(f)(4)(iv) (1998). These rules have been amended to provide licensees with two quarters (i.e., two 3-month periods), rather than two 90-day periods, in which to submit late installment payments and associated late fees. *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,310 ¶ 28. This change does not affect our evaluation of the instant case.

<sup>18</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110.

<sup>19</sup> *Id.* at 443 ¶ 116.

<sup>20</sup> *Id.* at 439-40 ¶¶ 109-10; *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,304-05 ¶ 19.

<sup>21</sup> FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas, *Public Notice*, 11 FCC Rcd 18,599 at Att. A (1996).

through its November 30, 2000, payments.<sup>22</sup> However, Spectrum Resources failed to make its February 28, 2001, payments within the two quarterly grace periods permitted under the rules, i.e., by August 31, 2001.<sup>23</sup> Accordingly, the Licenses canceled automatically on September 1, 2001, and Spectrum Resources was subject to debt collection.<sup>24</sup> Meanwhile, in early 2001, Spectrum Resources filed applications to assign the Licenses, refiling these applications in May 2001 after identifying a call sign error.<sup>25</sup> On November 15, 2001, two and a half months after the automatic cancellation of the Licenses (and more than eight months after the deadline for its February payments), Spectrum Resources rendered payments equaling the amounts due on February 28, 2001, plus a five percent late fee, along with the amounts due on May 31, 2001 (with no late fee).<sup>26</sup> Since submitting these untimely and insufficient funds, Spectrum Resources has made no further payment toward its debt obligation. On January 16, 2002, because the Licenses had automatically canceled four months earlier, the Bureau dismissed applications filed by Spectrum Resources to assign the Licenses.<sup>27</sup>

7. On February 15, 2002, Spectrum Resources submitted the petition at issue. Spectrum Resources contends that (a) the Commission implicitly waived the automatic cancellation rule and constructively waived the late payment deadline;<sup>28</sup> (b) Spectrum Resources should have been, but was not, given explicit notice of the deadline;<sup>29</sup> (c) the Licenses did not, in fact, cancel;<sup>30</sup> (d) cancellation of the Licenses constituted impermissible discriminatory action by the Commission;<sup>31</sup> (e) the Commission's "unyielding enforcement" of section 1.2110 is arbitrary and capricious;<sup>32</sup> and (f) the Licenses should be reinstated on grounds of equity and public interest.<sup>33</sup> We reject these arguments as explained below.

### III. DISCUSSION

#### A. Claim of Constructive Waiver

8. Spectrum Resources' initial argument is that the Commission, by accepting Spectrum Resources' November 15, 2001, payments, implicitly waived the automatic cancellation rule and constructively waived the late payment deadline.<sup>34</sup> Spectrum Resources likens its circumstances to those of the licensees in three cases – *Cordell*, *TE-MCG*, and *Lancaster*<sup>35</sup> – in which the Bureau determined

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<sup>22</sup> See Petition at 1.

<sup>23</sup> *Id.*

<sup>24</sup> 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>25</sup> Petition at 1.

<sup>26</sup> *Id.* at 1-2.

<sup>27</sup> See Dismissal Notices.

<sup>28</sup> Petition at 2-5.

<sup>29</sup> *Id.* at 6-7.

<sup>30</sup> See supra note 5; Petition at 7-8.

<sup>31</sup> Petition at 8-10.

<sup>32</sup> *Id.* at 10-13.

<sup>33</sup> *Id.* at 13-16.

<sup>34</sup> *Id.* at 2-5.

<sup>35</sup> Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Meredith S. Senter, Jr., Esq., Counsel for Cordell Engineering, Inc., 14 FCC Rcd. 5003 (1999) ("*Cordell*"); Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Lloyd W. Coward, Esq., Counsel for TE-MCG Consortium, 14 FCC Rcd 2173 (1999) ("*TE-MCG*"); and Letter from Daniel B.

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that a constructive waiver had occurred.<sup>36</sup> In these three decisions, the Bureau addressed situations involving the Commission's rules that were effective prior to March 16, 1998, under which a licensee whose installment payment was more than 90 days past due was in default unless the licensee had properly filed a grace period request.<sup>37</sup> In these cases, the Bureau granted partial waivers of certain installment payment deadlines, i.e., it waived the deadlines on condition that the licensees pay late fees, where the licensees had made payments more than 90 days late and filed late grace period requests and the Commission had accepted the payments. The instant case involves revised payment rules, which give licensees more time to submit installment payments before licenses cancel and more certainty regarding both their obligations and the consequences of failing to meet these obligations. Spectrum Resources' reliance on the partial waivers granted in *Cordell*, *TE-MCG*, and *Lancaster* is therefore misplaced. Moreover, recent constructive waiver precedent has clearly articulated that the mere acceptance of payments is insufficient to revive an automatically canceled license.<sup>38</sup>

### B. Claim of Inadequate Notice

9. Spectrum Resources next contends that it should have received, but did not receive, "explicit notice of [the Commission's] 'precise' [installment payment] requirements."<sup>39</sup> However, Spectrum Resources admits that it failed to pay its installments, not because of any notice issue, but "in the mistaken belief that obligations incurred during the pendency of the assignment process would be reconciled as a condition to FCC grant of those applications."<sup>40</sup> Thus, lack of diligence, rather than lack of notice is the reason for Spectrum Resources' failure to make its installment payments. Moreover, from the installment plan documents it signed as well as from Commission orders,<sup>41</sup> Spectrum Resources had full notice that the grant of the Licenses was conditioned upon its full and timely performance of its payment obligations and compliance with the Commission's installment payment rules. We therefore find no merit in this argument.

### C. Claim of No Automatic License Cancellation

10. Spectrum Resources denies that the Licenses canceled, maintaining that the concept of automatic cancellation is invalid.<sup>42</sup> We disagree. There is no question that pursuant to section 1.2110(g)(4)(iv) a license will cancel automatically for the failure to pay installment debt within the specified time frames.<sup>43</sup> Only in extraordinary cases, where the Commission has taken an administrative

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Phythyon, Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., Counsel for Lancaster Communications, Inc., 1998 WL 709412 (1999) ("*Lancaster*").

<sup>36</sup> Petition at 2-5.

<sup>37</sup> 47 C.F.R. § 1.2110(e)(4)(ii) and (iii) (1996).

<sup>38</sup> See *Lakeland PCS LLC and Cricket Licensee (Lakeland) Inc. for Assignment of PCS License for Station KNLG741, Second Order on Reconsideration*, 15 FCC Rcd 23,733, 23,735 ¶ 4 n.11 (2000) ("*Lakeland*").

<sup>39</sup> Petition at 6.

<sup>40</sup> *Id.* at ii.

<sup>41</sup> See, e.g., *Part 1 Third Report and Order*, 13 FCC Rcd at 437, 446, ¶¶ 107, 122. See also *1998 Installment Payment Public Notice* ("Any licensee that becomes more than one-hundred eighty (180) days delinquent on an installment payment shall be in default, and the license shall automatically cancel without further action by the Commission. In that event, the debt shall be transferred to the Department of Treasury for collection subject to the Debt Collection Improvement Act of 1996.").

<sup>42</sup> Petition at 5, 7-8.

<sup>43</sup> See, e.g., *Licenses of 21<sup>st</sup> Century Telesis Joint Venture, Order on Reconsideration*, 16 FCC Rcd 17,257, 17,261-62 ¶ 14 (2001), *aff'g sub nom.*, *Licenses of 21<sup>st</sup> Century Telesis, Inc., Memorandum Opinion and Order*, 15 FCC

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action inconsistent with the automatic operation of its rule, has there been a finding that constructive waiver has occurred.<sup>44</sup> Thus, Spectrum Resources' argument is without merit.<sup>45</sup>

#### D. Claim of Discriminatory Action

11. Spectrum Resources argues that the automatic cancellation of the Licenses is invalid because the Commission has not consistently "taken the position that licenses automatically cancel if payment is more than 180-days late."<sup>46</sup> Spectrum Resources claims that the fact that the Commission sought comment on a petition for reinstatement or waiver by Airadigm Communications, Inc. ("Airadigm") following the automatic cancellation of Airadigm's licenses demonstrates that license cancellation in such circumstances is not necessarily automatic. Moreover, according to Spectrum Resources, the fact that the Commission sought public comment in Airadigm's case and not in that of Spectrum Resources violates the judicially recognized principle that similarly situated parties must be treated equally.<sup>47</sup>

12. In support of its contention, Spectrum Resources cites *Green Country Mobilephone, Inc. v. FCC*<sup>48</sup> and *Melody Music, Inc. v. FCC*,<sup>49</sup> two District of Columbia Circuit Court of Appeals decisions in which the court was concerned that the Commission had arrived at different outcomes for similarly situated parties. These decisions do not support Spectrum Resources' position, as we are not dealing here with similarly situated licensees. Airadigm's default, unlike Spectrum Resources', occurred after Airadigm had filed for bankruptcy protection.<sup>50</sup> We disagree with Spectrum Resources' contention that this distinction "cannot justify the disparate treatment[.]"<sup>51</sup> and, accordingly, find Spectrum Resources' claim of discriminatory treatment unpersuasive.

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Rcd 25,113, 25,117-23 ¶¶ 9-20 (2000) ("*21<sup>st</sup> Century MO&O*"), *aff'd on other grounds*, 21<sup>st</sup> Century Telesis Joint Venture, 318 F.3d 192 (D.C. Cir. 2003).

<sup>44</sup> See, e.g., *Lakeland*, 15 FCC Rcd 23,733.

<sup>45</sup> We note that, contrary to Spectrum Resources' additional argument that automatic cancellation has been rejected by bankruptcy courts, bankruptcy precedent on this issue applies only in cases where the licensee is, unlike Spectrum Resources, under the protection of Chapter 11 of the U.S. Bankruptcy Code at the time it defaults. Since the Supreme Court's decision in *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003), the Bureau has found that the U.S. Bankruptcy Code renders 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 18,791 (WTB 2003); *Airadigm Communications, Inc.*, *Order*, 18 FCC Rcd 16,296 (WTB 2003) ("*Airadigm Order*"), *recon. dismissed*, *Airadigm Communications, Inc.*, *Order on Reconsideration*, 21 FCC Rcd 3893 (WTB 2006). See also *GLH Communications, Inc.*, 18 FCC Rcd 14,695, 14,697-98 ¶ 6 (2003) (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); *In re Personal Communications Network, Inc.*, 249 B.R. 233, 237 (Bankr. E.D.N.Y. 2000) ("the Licenses having cancelled prepetition, [the bankrupt] brought no ownership interests in respect of the Licenses to the bankruptcy estate[.]")

<sup>46</sup> Petition at 8-10.

<sup>47</sup> *Id.*

<sup>48</sup> *Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985); Petition at 9-10.

<sup>49</sup> *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965); Petition at 9-10.

<sup>50</sup> See, e.g., *Airadigm Order*, 18 FCC Rcd at 16,298 ¶ 4.

<sup>51</sup> Petition at 10 n.6.

### E. Claim of Arbitrary and Capricious Enforcement

13. Spectrum Resources also accuses the Commission of arbitrary and capricious enforcement of its payment deadlines.<sup>52</sup> It cites a series of non-installment payment related decisions in which the Commission waived payment deadlines on licenses won at auction,<sup>53</sup> suggesting that there is no rationale for granting waivers in those cases and for being “inflexible” as to Spectrum Resources’ request.<sup>54</sup>

14. In fact, the Commission has clearly articulated the reasons that it granted requests in the cases Spectrum Resources cites and not in cases like that of Spectrum Resources. The decisions on which Spectrum Resources relies fall into two categories: those waiving second down payment deadlines and those granting waivers of bid withdrawal payment obligations.<sup>55</sup> With regard to the former, the Commission has concluded that decisions involving waivers of second down payment deadlines are “not relevant” to determining whether to grant a waiver of a quarterly installment payment deadline.<sup>56</sup> As the Commission has explained, “[t]he circumstances that satisfy the standards for waiver of the down payment rules will not necessarily satisfy the standards for waiver of the installment payment rules”<sup>57</sup> because “the function, purpose, and corresponding burdens imposed by the second down payment rule differ from the function, purpose, and corresponding burdens imposed by the installment payment rule.”<sup>58</sup> Because those making second down payments have just a few days in which to remit payment, the Commission has in some cases found that the public interest would not be served by rigid application of the short second down payment deadline and has granted a partial waiver where the winning bidder has demonstrated inadvertence and an ability to pay at the time of the payment deadline.<sup>59</sup>

15. With regard to the withdrawal payment obligation decisions cited by Spectrum Resources, the Commission has voiced a similar distinction. Noting that bid withdrawal payment rules (like upfront payment and down payment rules) “are intrinsically different in scope and purpose from the installment payment rule[,]” the Commission has explained that “[t]he purpose of the Commission’s bid withdrawal payment rule is to deter bidders from submitting insincere bids.”<sup>60</sup> Referring to the same cases relied on by Spectrum Resources,<sup>61</sup> the Commission has further explained that it “granted in part requests for waiver of the bid withdrawal rule because difficulties with the auctions software caused bidders to submit bids that were exponentially greater than the bids they had intended to submit. Thus, waiver was appropriate because application of the rule would not have served its purpose.”<sup>62</sup>

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<sup>52</sup> *Id.* at 10-13.

<sup>53</sup> *Id.* at 10-12.

<sup>54</sup> *Id.* at 12-13.

<sup>55</sup> *See* Petition at 11-12.

<sup>56</sup> Southern Communications Systems, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 25,103, at 25,109-10 ¶ 13 (2000).

<sup>57</sup> *Id.* at 25,110-11 ¶ 14.

<sup>58</sup> *Id.* at 25,109-10 ¶ 13.

<sup>59</sup> *Id.* at 25,110-11 ¶ 14.

<sup>60</sup> Licenses of 21<sup>st</sup> Century Telesis, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,121-23 ¶¶ 17-18 (2000) (“21<sup>st</sup> Century”).

<sup>61</sup> *Id.* at 25,121 ¶ 17 n.47.

<sup>62</sup> *Id.* at 25,121-23 ¶¶ 17-18.

16. Inasmuch as Commission precedent concerning waivers of second down payment deadlines and bid withdrawal payment obligations is inapposite to the situation presented by Spectrum Resources, we see no basis for its contention that enforcing the installment payment deadline and automatic cancellation rule in its case would be arbitrary and capricious, and we therefore reject this claim.

#### F. Claim that Licenses Should Be Reinstated

17. *Equity Claim.* Spectrum Resources reasons that, because it has a monetary investment in the licenses, principles of equity dictate that the Licenses be reinstated. Failure to grant the request for reinstatement would, according to Spectrum Resources, allow the Commission to both retain the payments already made by Spectrum Resources and collect payment from the winning bidder for the same spectrum in any subsequent re-auction.<sup>63</sup> Spectrum Resources terms such a result “inequitable,” particularly because it differs from the outcome of a default on a real estate mortgage.<sup>64</sup> This argument reflects the erroneous assumption by Spectrum Resources that it has a property right to the Licenses. As section 301 of the Communications Act<sup>65</sup> and judicial and Commission interpretations of the Act<sup>66</sup> make clear, no such property right exists.<sup>67</sup> We therefore find Spectrum Resources’ equity claim without merit.

18. *Public Interest Claim.* Spectrum Resources asserts that by reinstating the Licenses we would best serve the public interest, convenience, and necessity in that we would be promoting the rapid deployment of wireless service.<sup>68</sup> According to Spectrum Resources, allowing it to avoid default and assign the Licenses, which it says it has constructed, will provide the public with service more quickly than if the spectrum has to be re-auctioned.<sup>69</sup> Faced with the same argument in other cases, the Commission has found that enforcing its installment payment rules serves the public interest better than relying on unsubstantiated speculation that a party that has defaulted might provide service sooner than a future auction winner.<sup>70</sup> Even where a licensee was providing service at the time of its waiver request, such service has not excused the licensee from meeting its installment payment deadlines.<sup>71</sup> The fact that

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<sup>63</sup> Petition at 14-15.

<sup>64</sup> *Id.*

<sup>65</sup> See 47 U.S.C. § 301 (specifying that the Act provides 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”).

<sup>66</sup> See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); 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).

<sup>67</sup> Moreover, throughout the history of the Commission’s auctions program, the consequence of all defaults occurring post-license grant has been the same for all licensees:

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. A licensee that defaults on a post-licensing, non-installment payment requirement faces analogous consequences. The licensee loses its license without provision for refund of its bid amount.

*Part 1 Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551, 2560 ¶ 24, 2561-62 ¶ 29.

<sup>68</sup> Petition at 15.

<sup>69</sup> *Id.* at 15-16.

<sup>70</sup> See *Southern Communications Systems, Inc., Second Memorandum Opinion and Order*, 16 FCC Rcd 18,357, 18,360-61 ¶ 9 (2001); *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25,126-27 ¶¶ 28-29.

<sup>71</sup> See *Duluth PCS, Inc., Order*, 19 FCC Rcd 7137, 7141-42 ¶¶ 8-9 (WTB 2004).



at the time of its default Spectrum Resources may have had prospective assignees for the Licenses does not alter our analysis. The Commission has repeatedly held that “the existence of a potential assignee does not negate the licensee’s failure to comply with the Commission’s rules.”<sup>72</sup> Accordingly, we cannot grant Spectrum Resources’ requests on this basis.

#### IV. CONCLUSION

19. Spectrum Resources has not justified its request for reconsideration of the automatic cancellation of the Licenses, nor has it demonstrated that the Licenses should be reinstated. Accordingly, Spectrum Resources’ entire outstanding debt obligation is subject to debt collection procedures.

#### V. ORDERING CLAUSE

20. 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), the Petition for Reconsideration filed by Spectrum Resources, Inc., on February 15, 2002, 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

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<sup>72</sup> See *id.*, 19 FCC Rcd at 7142 ¶ 10 (declining to grant waiver of installment payment rules on basis of funds expected from pending loan application at an “advanced and active processing stage”); Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to J. Curtis Henderson, Senior Vice President and General Counsel, Nucentrix Spectrum Resources, Inc., 17 FCC Rcd 559, 561 (2002) (declining to grant a waiver for an administrative oversight in payments while the licensee was in negotiations to assign its license to a third party); Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Russell H. Fox, Esq., and Russ Taylor, Esq., Counsel for Capital Two-Way Communications, Inc., 16 FCC Rcd 11,786, 11,788 (declining to grant a waiver of the installment payment rules while the licensee was in negotiations to assign its license to a third party).