

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

In the Matter of
TRACY CORPORATION II
Request for Waiver of Installment Payment Rules
for Auction No. 11 and Reinstatement of License

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 2007

Released: February 28, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a Petition for Reconsideration filed on behalf of Tracy Corporation II ("Tracy"). Tracy seeks reconsideration of a decision of the Auctions and Spectrum Access Division ("Division") denying its request for waiver of the Commission's installment payment rules. When Tracy failed to timely meet its installment payment obligation for a broadband Personal Communications Services ("PCS") license that it had won in Auction No. 11 (the "License"), it defaulted on the License. Pursuant to Section 1.2110(g)(4)(iv) of the Commission's rules, the License therefore automatically canceled. For the reasons discussed herein, we find Tracy's current circumstances to be substantially similar to those in which waivers of the automatic cancellation provision have been granted. We therefore grant Tracy a nunc pro tunc waiver of the automatic cancellation provision of Section 1.2110(g)(4)(iv) of the Commission's rules with respect to the License.

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 Tracy Corporation II, Petition for Reconsideration, filed December 3, 2004 ("Petition"). See also Tracy Corporation II, Supplement to Petition for Reconsideration to Notify Commission of Payment of Outstanding Installment Debt, filed January 17, 2007 ("Supplement to Petition")

2 Letter to David L. Hill and Audrey P. Rasmussen, Counsel for Tracy Corporation II, from Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, 19 FCC Rcd 21991 (2004) ("Division Order").

3 The License, call sign KNLH752, is an F Block broadband PCS license for the Scottsbluff, Nebraska, Basic Trading Area (BTA411).

4 47 C.F.R. § 1.2110(g)(4)(iv).

were allowed to pay their winning bids in quarterly installments over the initial term of the license.<sup>5</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>6</sup> Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.<sup>7</sup> When in 1997 the Commission discontinued the use of installment payments for future auctions,<sup>8</sup> it allowed entities that were already paying for licenses in installments to continue doing so.<sup>9</sup>

3. Certain features of the Commission's installment payment rules have remained the same since they were first adopted in 1994. 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>10</sup> In

<sup>5</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>6</sup> *Id.* at 2389-90 ¶ 233. The goal of providing opportunities for small businesses to participate in the provision of spectrum-based services is set forth at 47 C.F.R. §§ 309(j)(3)(B) & 309(j)(4)(D).

<sup>7</sup> See 47 C.F.R. §§ 1.2110(e)(3)(iii) & (iv) (1994).

<sup>8</sup> The Commission discontinued the use of installment payments based on its findings that (1) installment payments are not necessary to ensure meaningful opportunities for small businesses to participate successfully in auctions; (2) the Commission must consider all of the objectives of Section 309(j), including the development and rapid deployment of new services for the benefit of the public; (3) filings for bankruptcy by entities unable to pay their winning bids may result in delays in the deployment of service; and (4) requiring the payment of bids in full within a short time after the close of auctions ensures greater financial accountability from applicants. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397-98 ¶¶ 38-39 (1998) (“*Part 1 Third Report and Order*”). The Commission affirmed this decision in 2000. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15322 ¶ 55, 15 FCC Rcd 21520 (2000) (“*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.

<sup>9</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>10</sup> See, e.g., 47 C.F.R. § 1.2110(e)(4) (1994) and 47 C.F.R. § 1.2110(f)(4) (1998). These provisions are now codified at 47 C.F.R. § 1.2110(g)(4). 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.

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1997, however, the Commission liberalized its installment payment grace period rules for those licensees that were already paying their winning bids in installments, providing these licensees with significant advantages they had not previously had. Under the rules adopted in 1994, any licensee whose installment payment was more than 90 days past due was in default, unless the licensee properly filed a grace period request.<sup>11</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>12</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>13</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>14</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>15</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>16</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>17</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>18</sup>

## B. Tracy Corporation II

5. At the conclusion of Auction No. 11, Tracy was the winning bidder on two PCS F Block licenses.<sup>19</sup> As a small business, Tracy was eligible to participate in the Commission's installment

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<sup>11</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>12</sup> 47 C.F.R. § 1.2110(f)(4)(i) & (ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶¶ 106-07. The amended rules took effect on March 16, 1998.

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

<sup>14</sup> 47 C.F.R. § 1.2110(f)(4)(ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>15</sup> 47 C.F.R. § 1.2110(f)(4) (iv) (1998). These rules have been simplified to provide licensees with two quarters (i.e., two 3-month periods) in which to submit late installment payments and associated late fees, rather than two 90-day periods. This change aligned the schedule for late payments with the quarterly schedule of regular installment payments. *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15310 ¶ 28.

<sup>16</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110.

<sup>17</sup> *Id.* at 443 ¶ 116.

<sup>18</sup> *Id.* at 439-40 ¶¶ 109-10; *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15304-05 ¶ 19.

<sup>19</sup> See "D, E, and F Block Auction Closes; Winning Bidders in the Auction of 1,479 Licenses to Provide Broadband PCS in Basic Trading Areas," *Public Notice*, DA 97-81 (rel. January 15, 1997). Tracy's net winning bid for the License was \$124,112. *Id.*, Attachment A. This bid, which represents the amount Tracy actually owed, was net of the 25 percent bidding credit for which Tracy, as a small business, qualified.

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payment plan available for qualifying entities that won F Block licenses in Auction No. 11.<sup>20</sup> In keeping with the Commission's rules, grant of the licenses was conditioned upon Tracy's full and timely performance of its payment obligations.<sup>21</sup>

6. Tracy 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, Tracy became subject to those rules.<sup>22</sup> Tracy sold one of the two licenses it had won in Auction No. 11 (for BTA270) in 1999.<sup>23</sup> For the license it retained, Tracy failed to pay the installment payment due on July 31, 2000, along with the required late fees, before the expiration of the two quarterly grace periods permitted under the rules. The License therefore automatically canceled on February 1, 2001, and Tracy became subject to debt collection procedures.<sup>24</sup>

7. In an effort to remedy its delinquency, Tracy submitted a payment to the Commission on June 8, 2001.<sup>25</sup> According to Tracy, it submitted this payment promptly once it was aware that a problem existed, i.e., one day after it was informed that the July 31, 2000, payment was delinquent.<sup>26</sup> Tracy then filed a request for waiver of the installment payment rules and reinstatement of the License on June 26, 2001.<sup>27</sup> In its Waiver Request, Tracy asserted that it missed its installment payment deadlines because it had received insufficient notice of its payment obligations.<sup>28</sup> Tracy further indicated that it had hired a new accounting team member who had relied on payment notices from the Commission to pay the company's financial obligations. According to Tracy, it did not receive a Commission notice to make the July 31, 2000, payment, and the new employee believed, based on the Commission notice received for the payment due on October 31, 2000, that it was not necessary to submit any payment until April 2001. Tracy further stated that the new employee relied on receiving an April 2001 payment notice from the Commission and inadvertently failed to make a payment at that time when such a payment notice was not

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<sup>20</sup> 47 C.F.R. §§ 1.2110(e) (1996) and 24.716 (1996). Bidding on F Block licenses was limited to "entrepreneurs," i.e., entities whose gross revenues for each of the preceding two years were under \$125 million and whose assets were under \$500 million at the time they filed FCC Form 175 to participate in the auction. 47 C.F.R. § 24.709(a) (1996). The specific terms of a winning bidder's installment payment plan depended on the amount of its gross revenues for the preceding two years. 47 C.F.R. § 24.716(b) (1996).

<sup>21</sup> 47 C.F.R. §§ 1.2110(e)(4) (1997).

<sup>22</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>23</sup> See ULS File No. 0000010960.

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

<sup>25</sup> Petition at 3. The payment submitted on June 8, 2001, was equal to the installments due on July 31, 2000, and October 31, 2000. Shortly thereafter Tracy submitted a payment equal to the late fees for both installments that would have been required when paying within the two automatic grace periods.

<sup>26</sup> *Id.*

<sup>27</sup> Tracy Corporation II, Petition for Reinstatement of F Block License and Request for Waiver of 47 C.F.R. § 1.2110(g)(4), filed June 26, 2001 ("Waiver Request"). Tracy also filed a supplement to its Waiver Request. Tracy Corporation II, Supplement to Petition for Reinstatement of F Block License and Request for Waiver of 47 C.F.R. § 1.2110(g)(4), filed September 10, 2001 ("Waiver Request Supplement").

<sup>28</sup> Waiver Request at 4-5.

received.<sup>29</sup> Following its June 2001 payment and during the pendency of its Waiver Request and the instant Petition, a period of over five years, Tracy made regular payments on its debt on the License.<sup>30</sup>

8. On November 3, 2004, the Division denied the Waiver Request.<sup>31</sup> The Division rejected Tracy's argument that it had not received adequate notice of its payment obligations, citing the multiple forms of notice Tracy had received and noting that the Commission's practice of sending out individual payment notices is not required, but rather has been performed as a courtesy to licensees.<sup>32</sup> In addition, the Division disagreed with Tracy's suggestion that its circumstances were similar to those in *MBO Wireless*, in which a waiver of the automatic cancellation rule had been granted. The Division pointed out that, unlike Tracy, MBO had failed to pay only an amount assessed as a late fee within the time allowed under the Commission's rules.<sup>33</sup> The Division also rejected Tracy's argument that the public interest favored granting it a waiver because it proposed to provide service in rural areas and denial of its request would necessitate the reauction of the License.<sup>34</sup>

9. Tracy filed the instant Petition seeking reconsideration of the *Division Order* on December 3, 2004. In its Petition, Tracy does not dispute that it defaulted on the License under the Commission's rules. Rather, Tracy challenges the validity of the automatic cancellation rule, arguing that it should have been notified before the License canceled so that it had an opportunity to cure the problem.<sup>35</sup> Tracy also challenges the applicability of the automatic cancellation rule to its circumstances, claiming that the Commission constructively waived its installment payment rules when it accepted payments after the default.<sup>36</sup>

10. In December 2006, Tracy paid its remaining obligation on the debt associated with the License. Shortly thereafter, Tracy filed the Supplement to Petition, arguing that, because its circumstances are now

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<sup>29</sup> Waiver Request at 3-4. For further details, see Declaration of Michael J. Tracy, President of Tracy Corporation II, Attachment to Waiver Request Supplement.

<sup>30</sup> Petition at 3 and Exhibit 1; Supplement to Petition at 2. Tracy made regular quarterly payments on its debt from July 2001 to October 2006.

<sup>31</sup> *Division Order*, 19 FCC Rcd at 21999.

<sup>32</sup> *Id.* at 21995, citing Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25113 (2000) ("*21st Century MO&O*"), *reconsideration denied*, Licenses of 21<sup>st</sup> Century Telesis Joint Venture, *Order on Reconsideration*, 16 FCC Rcd 17257 (2001), *review denied in part, dismissed in part*, *21<sup>st</sup> Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003).

<sup>33</sup> *Division Order*, 19 FCC Rcd at 21996-97, citing Letter to David Irwin and Nathaniel Hardy, Counsel for MBO Wireless, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 19 FCC Rcd 4011 (2004) ("*MBO Wireless*").

<sup>34</sup> *Division Order*, 19 FCC Rcd at 21997-98.

<sup>35</sup> Petition at 5.

<sup>36</sup> *Id.* at 4-6. Tracy also reiterates its earlier argument that the grant of a waiver would be in the public interest because Tracy can provide service to the market faster than if the Commission relicensed the spectrum. *Id.* at 8.

similar to those of other licensees that were recently granted waivers of the automatic cancellation provision of Section 1.2110(g)(4), it should be granted a similar waiver.<sup>37</sup>

### III. DISCUSSION

11. To obtain a waiver of the Commission's installment payment rules, Tracy 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) 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.<sup>38</sup> As explained below, we find that, in light of its current circumstances, Tracy has met this standard.

12. We note at the outset that we disagree with both Tracy's challenge to the automatic cancellation rule and its argument that it is entitled to a finding of constructive waiver. Because we are granting Tracy's request for waiver on separate grounds, we need not discuss these arguments in detail. We emphasize, however, that Tracy has not shown that the automatic cancellation rule is invalid. All licensees paying their winning bids in installments have been given ample notice of the automatic nature of license cancellation upon default, through rulemaking proceedings adopting and amending the installment payment rules and by other means,<sup>39</sup> and the Commission is not required to provide additional notice of individual license cancellations. In addition, Tracy has not shown that a constructive waiver of the automatic cancellation rule occurred in this case.<sup>40</sup>

13. Our decision to grant Tracy a waiver of the automatic cancellation provision of Section 1.2110(g)(4)(iv) is instead based solely on our finding that Tracy's current circumstances are substantially similar to cases in which we have recently granted such waivers. Specifically, we find, as we have in other cases, that Tracy's delay in making payment was not caused by a lack of funds, and that Tracy has demonstrated its financial qualifications to hold the License by its post-default debt payments and its recent payment in full of its outstanding debt obligation. Given these circumstances, we find that the underlying purpose of the automatic cancellation rule would not be served by its application in this case.

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<sup>37</sup> Supplement to Petition at 2-3, citing Big Sky Wireless Partnership, *Order*, 21 FCC Rcd 10066 (WTB 2006) and SoFast Internet Services, Inc., *Memorandum Opinion and Order*, 21 FCC Rcd 10126 (WTB/ASAD 2006) ("*SoFast Order*").

<sup>38</sup> 47 C.F.R. § 1.925.

<sup>39</sup> See, e.g., *Part 1 Third Report and Order*, 13 FCC Rcd at 437, 446, ¶¶ 107, 122 ("[Upon default on an installment payment, a license will automatically cancel without further action by the Commission. . . ."]; "Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules," *Public Notice*, 13 FCC Rcd 18213 (WTB 1998) ("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.").

<sup>40</sup> As did the Division, we also reject Tracy's argument that a waiver would be in the public interest because Tracy can provide service to the market faster than if the Commission relicensed the spectrum. *Division Order*, 19 FCC Rcd at 21997-98. As we have previously explained, the Commission has found that enforcing its installment payment rules serves the public interest better than relying on speculation that a party that has defaulted might provide service sooner than a future auction winner. Satellite Signals of New England, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses, *Order*, DA 07-482 ¶ 17 (rel. Jan. 31, 2007) ("*Satellite Signals Order*"), citing Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in the Cleveland, TN BTA, *Second Memorandum Opinion and Order*, 16 FCC Rcd 18357, 18360-61 ¶ 9 (2001); *21st Century MO&O*, 15 FCC Rcd at 25126-27 ¶¶ 28-29.

14. The Commission's competitive bidding rules promote a number of statutory purposes, including the rapid deployment of new technologies and services to the public and the efficient and intensive use of spectrum.<sup>41</sup> The Commission's rules presume that the entity that bids the most for a license in an auction is the entity that places the highest value on the use of the spectrum, and such entities are presumed to be those best able to put the licenses to their most efficient and effective use for the benefit of the public. Installment payment programs were established to help small entities participate in the competitive bidding process and the provision of spectrum-based services.<sup>42</sup> As we have previously noted, however, the Commission has, since the inception of the auctions program, endeavored to ensure that the rapid deployment of service and the efficient, intensive use of spectrum are not undermined by entities that lack the financial capacity to pay their winning bids and provide service to the public.<sup>43</sup>

15. The installment payment grace period rules codified in Section 1.2110(g)(4) provide licensees with a degree of flexibility in making installment payments while at the same time giving them incentives to make their payments on time.<sup>44</sup> To ensure that licensees that lack the funds to both pay their winning bids and provide service to the public do not retain licenses, the Commission limited the duration of installment payment grace periods and provided for the automatic cancellation of licenses in cases where licensees fail to timely meet their payment obligations.<sup>45</sup> The Commission has repeatedly emphasized the importance of the full and timely payment of installment payments on winning bids.<sup>46</sup> As the Commission has noted:

Insisting that licensees demonstrate their ability to pay as a condition to continuing to hold licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace. When licensees fail to pay winning bids, or the principal and related interest when paying winning bids in installments, on a timely basis in compliance with the Commission's rules, the presumption that the auction assigned the license to the party that placed the highest value on the license is lost.<sup>47</sup>

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<sup>41</sup> 47 U.S.C. §§ 309 (j)(3)(A) & (D). *See also* H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.A.N. 378, 580 (finding that "a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.").

<sup>42</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 229.

<sup>43</sup> *See, e.g., Satellite Signals Order*, DA 07-482, at ¶ 12.

<sup>44</sup> *See Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110.

<sup>45</sup> *Id.* at ¶¶ 109-10 (declining to provide more than 180 days for licensees to make late payments and rejecting argument that licenses should not cancel automatically upon default).

<sup>46</sup> *See, e.g., 21st Century MO&O*, 15 FCC Rcd at 25117-18 ¶ 10. *See also* 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 25103, 25105-06 ¶ 7 (2000), *further reconsideration denied*, *Second Memorandum Opinion and Order*, 16 FCC Rcd 18357 (2001).

<sup>47</sup> *21st Century MO&O*, 15 FCC Rcd at 25123-24 ¶ 22. In *21st Century MO&O*, the Commission determined that a party that lacked the financial wherewithal to make its installment payment by the deadline was not entitled to a

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16. To ensure that the Commission's auction and licensing process assigns a license to the entity best able to put the spectrum to efficient and effective use, enforcement of the automatic cancellation rule is critically important when a licensee fails to make payment due to lack of funds or an unwillingness to pay. The Commission therefore has historically established a high bar for meeting the Commission's waiver standard in the context of failed installment payments.

17. This high bar, however, is not an insurmountable hurdle. The Commission has determined that waiver of the automatic cancellation provision of Section 1.2110(g)(4)(iv) may be appropriate where the licensee's ability to pay its winning bid is not in doubt and where preserving the license assignment would be in the public interest.<sup>48</sup> In *Leaco* and *Advanced*, the Commission granted waivers of the automatic cancellation provision to licensees that missed installment payment deadlines not because of an inability to pay, but rather as a result of errors associated with the process of payment.<sup>49</sup> The Commission determined in those cases, based on a review of a number of circumstances, including the licensees' post-default payments, that the underlying purpose of the automatic cancellation rule would not be served, or would be frustrated, by its application, and that a grant of the requested waiver served the public interest.<sup>50</sup> In addition, in *SoFast* the Commission granted a waiver of the automatic cancellation provision where the licensee defaulted because it mistakenly failed to pay the required late fees when submitting payments during the automatic grace period but demonstrated its ability and willingness to meet its payment obligation by regularly making payments on its debt after the default.<sup>51</sup> In each of these cases, it was determined that there was no serious question as to whether the licensee was financially qualified to hold the licenses or whether the Commission assigned the licenses to the party best able to put the spectrum to efficient and effective use.

18. We find Tracy's current circumstances to be substantially similar to those presented in these recent decisions. Specifically, we find that Tracy's delay in payment was a result of circumstances unrelated to a lack of funds. Licensees are responsible for the actions and omissions of their employees, and the mistake of an employee would not, by itself, justify a waiver of the automatic cancellation rule.<sup>52</sup> However, Tracy's assertion that its delay in rendering payment was not caused by a lack of funds is supported by the fact that, as it sought a waiver of the automatic cancellation rule, it made regular

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waiver to give it additional time to find the requisite funds because grant of such a waiver would be unfair to auction participants, and would undermine the integrity of the auction and the Commission's rules.

<sup>48</sup> See, e.g., *Leaco Rural Telephone Cooperative, Inc. Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Hobbs, New Mexico Basic Trading Area, MDB191, Order*, 21 FCC Rcd 1182 (WTB 2006) ("*Leaco Order*"); *Advanced Communications Solutions, Inc. Request for Waiver of Section 1.2110(g)(4)(iv) and Reinstatement of 900 MHz Specialized Mobile Radio Licenses, Order*, 21 FCC Rcd 1627 (WTB 2006) ("*Advanced Order*").

<sup>49</sup> See *Leaco Order*, 21 FCC Rcd at 1188 ¶ 14; *Advanced Order*, 21 FCC Rcd at 1632 ¶ 11.

<sup>50</sup> *Leaco Order* at 1187-88 ¶¶ 13-5; *Advanced Order* at 1633 ¶¶ 14, 16.

<sup>51</sup> See generally *SoFast Order*.

<sup>52</sup> Indeed, in *SoFast*, the Division emphasized that it is the responsibility of the licensee to ensure that accurate and timely payment of all financial obligations is made to the Commission, and that the licensee is responsible for the consequences of any negligence by any of its employees. *SoFast*, 21 FCC Rcd at 10134 ¶ 18, citing *Triad Broadcasting, Inc., Memorandum Opinion and Order*, 96 FCC 2d 1235, 1242 ¶ 16 (1984), citing *James C. Vernon, Memorandum Opinion and Order*, 30 FCC 2d 456, 457 ¶ 5 (1971) (licensee not excused for rule violation even if possibly deceived by an employee).

payments on its debt for a period of over five years.<sup>53</sup> Moreover, as Tracy has indicated in its Supplement to Petition, it has now paid in full the remaining debt obligation for the License.<sup>54</sup> Given these circumstances, we conclude that Tracy's delay in rendering payment was caused by neither inability nor unwillingness to pay its winning bid in a timely fashion, and that automatic cancellation of the License is not required to protect the integrity of the Commission's auction and licensing process.

19. Equally important, we find that the public interest will be served by granting a waiver of the automatic cancellation rule in this case. Based on the facts before us, we believe that the public will benefit if the Commission's assignment of the License to Tracy is not disrupted. Tracy has demonstrated, not only by its effort to remedy its delay in payment but also by its regular debt payments and its payment in full of its debt on the License, that its financial qualifications to hold the License are not in question. Under these circumstances, the benefit of preserving the assignment of the License outweighs any public benefit that might be gained by its automatic cancellation.

#### IV. CONCLUSION

20. Given Tracy's current circumstances, we conclude that it has met the Commission's standard for a waiver of Section 1.2110(g)(4)(iv) with respect to the License.<sup>55</sup> In keeping with the Commission's statutory obligations, we conclude that the preservation of this PCS license assignment to Tracy provides the best assurance that the spectrum license will be used for the development and rapid deployment of new technologies, products and services for the benefit of the public without administrative delay.<sup>56</sup> We therefore conclude that a *nunc pro tunc* waiver of the automatic cancellation provision of Section 1.2110(g)(iv) with respect to the License serves the public interest.

#### V. ORDERING CLAUSE

21. 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 Sections 1.106 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.106 and 1.925, the Petition for Reconsideration filed by Tracy Corporation II on December 3, 2004, is GRANTED. 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>53</sup> Petition at 3 and Exhibit 1; Supplement to Petition at 2. Tracy's delay in rendering payment was longer than the delays we considered in *Leaco* and *Advanced*, as Tracy did not submit the amounts due in July and October 2000 until June 2001. However, we have no evidence of deliberate delay on Tracy's part, and, given its regular payments on its debt over a period of five years, we find no reason to question Tracy's assertion that it rendered payment promptly upon discovering its error.

<sup>54</sup> Supplement to Petition at 2.

<sup>55</sup> 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>56</sup> See 47 U.S.C. § 309(j)(3)(A).