

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

In the Matter of)
Spectrum IVDS, L.L.C.)
Request for Reconsideration of License Renewal) File No. 0002010282
and Reinstatement of the 218-219 MHz Service)
B Block License for Market IVM005, Detroit/Ann)
Arbor, Michigan, Call Sign KIVD0019)

ORDER

Adopted: June 6, 2008

Released: June 6, 2008

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we deny the petition filed on behalf of Spectrum IVDS, L.L.C. ("Spectrum IVDS") for reconsideration of the dismissal of a renewal application for the 218-219 MHz Service B block license for the Detroit/Ann Arbor, Michigan, market (IVM005B), call sign KIVD0019 ("License").

2. As a result of Spectrum IVDS's failure to fulfill its payment obligation, which was a condition of the License and required by the Commission's rules, the Wireless Telecommunications Bureau ("Bureau") dismissed its application for license renewal.

1 Spectrum IVDS, L.L.C., Petition for Reconsideration and Request for Reinstatement of License, filed March 21, 2005 ("Petition"). See also Spectrum IVDS, L.L.C., Supplement to Petition for Reconsideration and Request for Reinstatement of License, filed April 17, 2007 ("Supplement").

2 See ULS File No. 0000426369.

3 Petition at 1-2.

4 Id. at 2-3.

5 See ULS File No. 0002010282.

II. BACKGROUND

A. The Commission's Installment Payment Program

3. When the Commission first adopted competitive bidding rules in 1994, it established an installment payment program under which qualified small businesses that won licenses in certain services were allowed to pay their winning bids in quarterly installments over the initial term of the license.⁶ In deciding to offer installment payment plans, the Commission reasoned that in appropriate circumstances such plans would, by reducing the amount of private financing small entities needed in advance of auctions, help to provide opportunities for small businesses to participate in the provision of spectrum-based services.⁷ Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.⁸ When in 1997 the Commission discontinued the use of installment payments for future auctions,⁹ it allowed entities that were already paying for licenses in installments to continue doing so.¹⁰

4. Certain features of the Commission's installment payment rules have remained the same since they were first adopted in 1994. The rules have always conditioned the grant of licenses upon the full and timely performance of licensees' payment obligations and have provided that, upon a licensee's default, the license cancels automatically and the Commission institutes debt collection procedures.¹¹

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

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

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

⁹ The Commission discontinued the use of installment payments based on its findings that (1) installment payments are not necessary to ensure meaningful opportunities for small businesses to participate successfully in auctions; (2) the Commission must consider all of the objectives of Section 309(j), including the development and rapid deployment of new services for the benefit of the public; (3) filings for bankruptcy by entities unable to pay their winning bids may result in delays in the deployment of service; and (4) requiring the payment of bids in full within a short time after the close of auctions ensures greater financial accountability from applicants. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397-98 ¶¶ 38-39 (1998) (“*Part 1 Third Report and Order*”). The Commission affirmed this decision in 2000. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,322 ¶ 55 (2000). The last Commission auction for which installment payments were available was Auction 11 (broadband PCS F block), which ended on January 14, 1997.

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

¹¹ *See, e.g.*, 47 C.F.R. § 1.2110(e)(4) (1994) and 47 C.F.R. § 1.2110(f)(4) (1998). 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 that Order, which addresses the inapplicability of 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 that 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

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5. In 1997 the Commission liberalized its installment payment grace period rules for those licensees that were already paying their winning bids in installments, providing these licensees with significant advantages they had not previously had. Under the rules adopted in 1994, any licensee whose installment payment was more than 90 days past due was in default, unless the licensee properly filed a grace period request.¹² The rules as amended in 1997, however, provided licensees with an automatic grace period of 180 days, i.e., a grace period to which they were entitled without having to file a request.¹³ Thus, if a licensee did not make full and timely payment of an installment, it was automatically granted a 90-day period during which it was allowed to pay the installment along with a 5 percent late fee.¹⁴ If it did not submit the missed installment payment and the 5 percent late fee before the expiration of this 90-day period, the licensee was automatically granted a second 90-day period during which it could remit payment along with an additional late fee equal to 10 percent of the missed payment.¹⁵ A licensee's failure to make payment, including the associated late fees, by the end of the second 90-day period placed it in default.¹⁶

6. In liberalizing its grace period rules, the Commission found that the amended rules eliminated uncertainty for licensees seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions,¹⁷ and that the added certainty the rules provided to licensees would increase the likelihood that licensees and potential investors would find solutions to capital problems before defaults occurred.¹⁸ Noting that a grace period is an extraordinary remedy in cases of financial distress and that the rules it adopted are consistent with commercial practice, the Commission declined to

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have paid them in full in a lump sum), the Commission explained that its rules are designed to encourage entities that cannot meet their financial obligations to exit the auction process sooner rather than later in order to avoid delays in licensing spectrum to entities that are able to provide service to the public. Thus, the consequence of defaulting after the close of an auction is more severe than the consequence of withdrawing a high bid during an auction, when a new high bidder can still emerge. Similarly, the consequence of a post-licensing default, such as an installment payment default or a failure to meet construction or service requirements, is more severe than the consequence of a pre-licensing default because the former could adversely affect service to the public much longer than the latter. *Id.* at 2561-62 ¶¶ 29-31.

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

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

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

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

¹⁶ 47 C.F.R. § 1.2110(f)(4) (iv) (1998). These rules have been simplified to provide licensees with two quarters (i.e., two 3-month periods) in which to submit late installment payments and associated late fees, rather than two 90-day periods. This change aligned the schedule for late payments with the quarterly schedule of regular installment payments. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,310 ¶ 28, 15 FCC Rcd 21,520 (2000) (“*Part 1 Reconsideration of Third Report and Order*”).

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

¹⁸ *Id.* at 443 ¶ 116.

provide more than 180 days for licensees to make late payments and rejected the argument that licenses should not cancel automatically upon default.¹⁹

7. Regardless of the liberalizations made to the grace period rules, the Commission continued to require that full payment be made within the initial license term. Section 1.2110(g)(3)(ii) states that installment payment plans will “allow installment payments for the full license term,”²⁰ and section 1.2110(g)(4) requires that a “license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee’s payment obligations under the installment plan.”²¹ This obligation for “full and timely payment” did not change if the installment debt was assumed by a new, eligible entity upon assignment or transfer of control. The Commission continued to require that the license be paid in full within the initial license term.

B. Spectrum IVDS

8. At the conclusion of Auction No. 2, Interactive Video and Data Networks, Inc. (“Interactive”), was the winning bidder for the License.²² As a small business, Interactive was eligible to participate in the Commission’s installment payment loan program, which was available for qualifying entities that won licenses in Auction No. 2.²³ The Commission granted the License to Interactive on January 18, 1995, for a period of ten years, and, in keeping with the Commission’s rules, conditioned the license grant upon full and timely performance of the installment payment obligations throughout the initial license term.²⁴

9. In 2001, Spectrum IVDS acquired the License from Interactive.²⁵ As a condition of the assignment, Spectrum IVDS assumed the remaining financial obligations for the License.²⁶ In so doing, Spectrum IVDS elected to participate in the Commission’s installment payment loan program and to pay the outstanding debt, including all payments of unpaid principal, interest, and late fees, by January 18, 2005, the final day of the initial term of the License (also described as the “Maturity Date” in the Assumption Agreement).²⁷

10. On January 18, 2005, Spectrum IVDS filed a renewal application, but failed to remit the outstanding unpaid principal, interest and fees for the License within the initial license term. Therefore, on January 19, 2005, pursuant to Section 1.2110(g)(4) and the condition on the License, Spectrum IVDS

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

²⁰ 47 C.F.R. § 1.2110(g)(3).

²¹ 47 C.F.R. § 1.2110(g)(4).

²² See “Interactive Video and Data Service (IVDS) Applications to Be Granted January 18, 1995,” *News Release*, No. 51403 (rel. Dec. 29, 1994).

²³ 47 C.F.R. §§ 1.2110(e), 95.816(d)(2) (1994).

²⁴ 47 C.F.R. § 1.2110(e)(4) (1994); “Wireless Telecommunications Bureau Staff Clarifies Grace Period Rule for IVDS Auction Licensees Paying By Installment Payments,” *Public Notice*, 10 FCC Rcd 10724 (WTB 1995).

²⁵ See ULS File No. 0000426369.

²⁶ Spectrum IVDS signed an Assignment and Assumption of Installment Payment Plan Note and Security Agreement (“Assumption Agreement”). See Petition at 1 and Attachment B (Letter from Mark Reger, Chief Financial Officer, Office of Managing Director, to Craig Siebert, Managing Member, Spectrum IVDS, L.L.C., dated February 18, 2005).

²⁷ See Petition at 2 and Attachment B at 1-2.

defaulted.²⁸ On February 16, 2005, the Bureau dismissed Spectrum IVDS's renewal application, noting that the License had canceled on January 19, 2005.²⁹

11. Spectrum IVDS filed the instant Petition on March 21, 2005. Spectrum IVDS states that it made 14 installment payments after acquiring the License from Interactive and that, for each of the installment payments it submitted, it utilized the two-quarter grace period and paid the required late fees as allowed under Section 1.2104(g)(4).³⁰ Spectrum IVDS asserts that it did not understand that the rules allowing for a two-quarter grace period were limited by the provisions of the Assumption Agreement,³¹ and that it assumed that making a payment on January 27, 2005,³² was consistent with Section 1.2110(g)(4) of the Commission's rules.³³ Spectrum IVDS moreover asserts that it received a Commission letter indicating that its July 31, 2004 payment had to be submitted by January 31, 2005, which it maintains was consistent with its assumption regarding the rules, and conflicted with the Maturity Date provision in the Assumption Agreement.³⁴ Spectrum IVDS therefore asks the Commission to take into consideration its good faith actions, to reinstate the License and the renewal application, and to permit it to pay its remaining debt obligation in two quarterly installment payments, one by April 30, 2005 and the second by July 31, 2005.³⁵

12. In April 2007, Spectrum IVDS supplemented its Petition. In this Supplement, Spectrum IVDS modifies its request and seeks an additional 90 days after a grant of the reinstatement of the License and its renewal application in which to make full payment of its outstanding debt obligation. Spectrum IVDS maintains that this amount of time would allow it "to make proper notice to its principals to make this final payment," given that it is a "small company comprised of many individual stockholders."³⁶ Spectrum IVDS also argues that its request is supported by Commission decisions made after it filed its original request in 2005.³⁷ To date, Spectrum IVDS has failed to make any post-default payments towards its outstanding debt obligation for the License.

²⁸ See Petition, Attachment B at 1-2. As of January 19, 2005, Spectrum IVDS had not paid the installment payments initially due on July 31, 2004, and October 31, 2004, or the final payment of all remaining unpaid principal, interest, and late fees due on the Maturity Date, January 18, 2005. Spectrum IVDS did submit funds on January 27, 2005, equal to its July 31st regular installment payment plus late fees. It does not dispute, however, that it owes the two final installment payments and it acknowledges that it has never rendered payment (in full or in part) for this debt. Petition at 2.

²⁹ See ULS File No. 0002010282. The dismissal of the renewal application was included in a public notice issued on February 23, 2005. "Wireless Telecommunications Bureau Market-Based Applications Action," *Public Notice*, Report No. 2078 (rel. Feb. 23, 2005).

³⁰ Petition at 2.

³¹ *Id.*

³² The payment made by Spectrum IVDS on January 27, 2005, amounted to the sum of its July 31, 2004, installment payment and what would have been 5 and 10 percent late fees for the first and second grace periods under 47 C.F.R. § 1.2110(g)(4)(i)-(ii).

³³ Petition at 2.

³⁴ *Id.*

³⁵ *Id.* at 1, 3.

³⁶ Supplement at 2.

³⁷ *Id.* at 2-3, citing 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

III. DISCUSSION

13. Spectrum IVDS is seeking reconsideration of the dismissal of its application to renew the License. Under Section 1.106(d)(2) of the Commission's rules, a party requesting reconsideration of a final Commission action shall, where appropriate, provide findings of fact and/or conclusions of law it believes to be erroneous and must also state with particularity the respects in which it believes such findings and conclusions should be changed.³⁸ In this case, the Bureau dismissed Spectrum IVDS's renewal application due to the failure to make full and timely payment for the License within the initial license term, as required under the Commission's installment payment rules.³⁹ As detailed below, we find that Spectrum IVDS has failed to show that the Bureau erroneously dismissed the renewal application.

14. To be granted renewal of a license, licensees must, in general, demonstrate that they have substantially complied with all applicable Commission rules, policies, and the Communications Act of 1934, as amended, including any payment obligations arising from competitive bidding.⁴⁰ Licensees that elected to pay their winning bids in installment payments – or those, like Spectrum IVDS, that assumed the installment debt – were required, pursuant to Section 1.2110(g), “to pay the full amount of their high bids in installments over the term of their licenses.”⁴¹ Those licenses were also conditioned upon full and timely performance of the payment obligations under the installment plans, pursuant to Section 1.2110(g)(4).⁴² In addition, the Commission has repeatedly held that strict enforcement of these provisions is critical to the underlying presumption of competitive bidding – and, therefore, Section 309(j) of the Communications Act – 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.⁴³ It is, thus, fundamentally important that licensees paying through installments must, throughout their license terms, continue to demonstrate their financial qualifications to be Commission licensees in order to protect the integrity of the Commission's

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(WTB 2006) (“*Advanced Order*”); and So Fast Internet Services, Inc., *Memorandum Opinion and Order*, 21 FCC Rcd 10,126 (WTB 2006).

³⁸ 47 C.F.R. § 1.106(d)(2).

³⁹ The Notice of Dismissal specifically states: “License canceled 1/19/05 pursuant to 47 CFR 1.2110.”

⁴⁰ See, e.g., 47 C.F.R. §§ 24.16(b), 27.14(b)(2), 90.743(a)(2), 90.816(b)(1)(ii).

⁴¹ 47 C.F.R. § 1.2110(g).

⁴² 47 C.F.R. § 1.2110(g)(4).

⁴³ See, e.g., 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, 25,107-08, ¶ 10 (2000) (“*Southern Communications MO&O*”), *further recon. denied, Second Memorandum Opinion and Order*, 16 FCC Rcd 18,357 (2001); Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,117-18 ¶ 10 (2000) (“*21st Century MO&O*”), *recon. denied*, Licenses of 21st Century Telesis Joint Venture and 21st Century Bidding Corporation for Facilities in the Broadband Personal Communications Services, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001), *petition dismissed in part and denied in part, 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003). See also Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly, *Public Notice*, 11 FCC Rcd 10,853 (WTB 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 (WTB/ASAD 2001), citing Application for Assignment of Broadband PCS Licenses, *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.”).

auction and licensing process.⁴⁴ When such a licensee is seeking renewal, it must demonstrate both compliance with Commission rules and regulations and fulfillment of its payment obligations to support the presumption that it is the entity that most values the spectrum.

15. Spectrum IVDS does not contend that it made its final installment payment by the last day of the license term or that it has made any payment toward its outstanding debt obligation since it became aware that it missed that deadline. In failing to satisfy the remaining installment payment debt within the initial license term, Spectrum IVDS violated both the Commission's rules and the License condition, and lost the presumption that it was the entity that placed the highest value on the use of the spectrum. Under such circumstances, the dismissal of Spectrum IVDS's license renewal application was appropriate.⁴⁵

16. Although Spectrum IVDS has not specifically requested a waiver of Section 1.2110(g), we will address its request for reinstatement of the License and for additional time in which to pay its outstanding installment debt as if it had made such a request. To obtain a waiver of Section 1.2110(g), Spectrum IVDS 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.⁴⁶ As explained below, we find that Spectrum IVDS has failed to meet this standard.

17. Spectrum IVDS argues that it has acted in "good faith" in meeting its installment payment obligations. According to Spectrum IVDS, it has made 14 installment payments since it acquired the License, which it argues equates to roughly 87.5 percent of the debt it assumed. Spectrum IVDS maintains that, having routinely availed itself of paying within the two quarterly grace periods for every prior installment payment, it "assumed" that making its July 2004 payment on January 27, 2005 was acting pursuant to the Commission's payment rules. Spectrum IVDS asserts that grant of its requested relief would further "the Commission's policy objectives of placing licenses in the hands of licensees committed to utilizing frequencies in the public interest and being paid in full for said license"⁴⁷

18. The Commission's competitive bidding system was designed to serve a number of statutory purposes, including the rapid deployment of new technologies and services to the public and the efficient and intensive use of spectrum.⁴⁸ Installment payment programs were established to help small entities

⁴⁴See, e.g., Lancaster Communications, Inc. Request for Waiver of Installment Payment Rules for Auction No. 7 and Reinstatement of License, Application for Assignment of 900 MHz Specialized Radio Licenses, Order, 22 FCC Rcd 2438, 2443-44 ¶ 14 (WTB 2007) ("*Lancaster Order*").

⁴⁵All licensees are obligated to know the Commission's rules. Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, *Report and Order*, 12 FCC Rcd 17,087, 17,099 ¶ 22 (1997) ("The Commission expects, and it is each licensee's obligation, to know and comply with all of the Commission's rules."). See also 47 U.S.C. § 312(a)(4) (2004) (allowing the Commission to revoke licenses for "willful or repeated" violations of, or failure to observe the Commission's rules); Liability of Pacific Broadcasting Corp., Licensee of Television Broadcast Translator Stations K06HO, K06HA, K07HQ, and K13HV, Merizo, Guam for Forfeiture, *Memorandum Opinion and Order*, 47 F.C.C.2d 818 (Brdcst. Bur. 1974) (holding that licensees must accept the penalty for not following Commission rules, whether or not they are warned of the consequences for failure to comply).

⁴⁶47 C.F.R. § 1.925.

⁴⁷Petition at 2-3.

⁴⁸47 U.S.C. §§ 309 (j)(3)(A), (D). See also H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580 (finding that "a carefully designed system to obtain competitive bids from competing qualified applicants

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participate in the competitive bidding process and the provision of spectrum-based services.⁴⁹ Indeed, since the inception of the auctions program, the Commission has 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 operate communications systems.⁵⁰

19. In keeping with this objective, the Commission has determined that strict enforcement of its installment payment rules enhances the integrity of the auction and licensing process.⁵¹ Allowing winning bidders to retain licenses when they are unable to pay their winning bids prevents the auction process from assigning licenses to those parties best able to serve the public. At the same time, precluding licensees from keeping licenses when they do not timely pay their winning bids reduces the incentive for bidders to make bids they cannot pay and increases opportunities for other bidders to win licenses.⁵² Thus, strict enforcement of the automatic cancellation rule is essential to preserving a fair and efficient licensing process for all participants in Commission auctions, including those that win licenses and those that do not. Moreover, by increasing the likelihood that winning bidders will be entities that are able to pay their bids and provide service to the public, the Commission furthers economic opportunity, competition in the marketplace, and the rapid deployment of services.⁵³

20. Spectrum IVDS maintains that it understood Section 1.2110(g)(4) to provide for automatic grace periods for any installment payments, including those payments owed at the end of the license term.⁵⁴ Section 1.2110(g), however, allows eligible licensees to “pay for the full amount of their high bids in installments *over the term of their licenses...*”⁵⁵ Moreover, as noted above, Section 1.2110(g)(4) conditions the grant of a license to an entity that elects installment payments “upon the full and timely performance of the licensee’s payment obligations under the installment plan.”⁵⁶ In addition, when it acquired the License, Spectrum IVDS executed the Assumption Agreement, which plainly states that the

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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”).

⁴⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 229.

⁵⁰ As noted above, for example, when the Commission amended its grace period rules in 1997, it declined to provide more than 180 days for licensees to make late payments and rejected the argument that licenses should not cancel automatically upon default. *See supra* para. 5. *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2390 ¶ 237 (deciding not to allow installment payments for large spectrum blocks in order to avoid delay of service to public that could result from encouraging undercapitalized firms to acquire licenses they lack the resources to finance adequately).

⁵¹ *See, e.g., Southern Communications MO&O*, 15 FCC Rcd at 25,110-11 ¶ 15; *21st Century MO&O*, 15 FCC Rcd at 25,117-18 ¶ 10.

⁵² *See, e.g., Duluth PCS, Inc. and St. Joseph PCS, Inc., Request for Partial Waiver of Section 1.2110(g) of the Commission’s Rules, Order*, 19 FCC Rcd 7137, 7139-40 ¶ 5 (WTB 2004).

⁵³ *See, e.g., 21st Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22. *See also Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d at 518 (“Having established a more lenient payment structure for designated entities, which by definition usually faced problems of accessing financial resources, the Commission could . . . reasonably rely on strict enforcement of the deadlines to provide an ‘early warning’ that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public.” (citations omitted)).

⁵⁴ Petition at 2.

⁵⁵ 47 C.F.R. § 1.2110(g) (emphasis added).

⁵⁶ 47 C.F.R. § 1.2110(g)(4).

entire unpaid principal, interest and late fees must be paid on or before January 18, 2005.⁵⁷ When taken together, these provisions clearly contemplate payment in full to be made over the term of a license, and not beyond.

21. The requirement for full payment of a winning bid by the end of a license term is also in accord with the presumption 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.⁵⁸ When licensees that are paying winning bids in installments fail to pay the principal and related interest 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.⁵⁹ In certain circumstances, a party that loses this presumption may be able to show that there is no question as to whether the auction assigned the license to the party that valued the license most highly and that a waiver of the installment payment rule would therefore be in the public interest. As explained below, Spectrum IVDS has failed to make such a showing.

22. Spectrum IVDS argues that its requested relief is supported by recent decisions in which the Bureau has granted waivers of the installment payment rule.⁶⁰ Yet, in each of those cases, the defaulting licensees convincingly demonstrated not only that they had been able and willing to timely pay the particular installment payments that they had missed but also that they were able and willing to pay their debts to the Commission following their defaults. In *Leaco*, *Advanced*, and *Big Sky*, we granted waivers of the automatic cancellation provision of Section 1.2110(g)(4) to licensees that had missed installment payment deadlines as a result of errors associated with the process of payment.⁶¹ We granted waivers in these cases because the defaulting licensees had demonstrated their ability and willingness to pay for the licenses not only by having made pre-default payments and having shown that their missed payments were attributable to error, but also, and more importantly, by having continued to fulfill their debt obligations through the submission of substantial post-default debt payments.⁶²

23. In contrast, Spectrum IVDS has not paid its debt in full, nor has it made any payment toward this debt since it discovered its error. Despite acknowledging that it became aware in February 2005 of its missed payment deadline, it has made no further payment towards this debt obligation for more than two years. Moreover, it is well settled that when a license automatically cancels, the former licensee remains obligated for the full amount of the debt obligation and its debt is accelerated.⁶³ Spectrum

⁵⁷ See Petition, Attachment B at 1.

⁵⁸ See, e.g., *21st Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22.

⁵⁹ See, e.g., *id.*

⁶⁰ Supplement at 2-3.

⁶¹ *Leaco Order*, 21 FCC Rcd 1182; *Advanced Order*, 21 FCC Rcd 1627; Big Sky Wireless Partnership, Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Butte, Montana Basic Trading Area, MDB064, *Order*, 21 FCC Rcd 10,066 (WTB 2006) ("*Big Sky Order*").

⁶² The licensee in *Leaco*, for example, promptly paid its debt obligation in full upon the acceleration of its debt, prior to the grant of the waiver. *Leaco Order*, 21 FCC Rcd at 1185-86 ¶ 10, 1187 ¶¶ 12-13. The licensee in *Tracy* also paid its debt in full prior to the grant of the waiver. Tracy Corporation II, Request for Waiver of Installment Payment Rules for Auction No. 11 and Reinstatement of License, *Memorandum Opinion and Order*, 22 FCC Rcd 4071, 4075-76 ¶ 10, 4078-79 ¶ 18 (WTB 2007) ("*Tracy Order*"). The licensee in *Advanced* indicated that it could and would pay its outstanding debt, and its financial institutions confirmed that it had procedures in place to do so. *Advanced Order*, 21 FCC Rcd at 1632 ¶¶ 11, 12. Notwithstanding the weight accorded to these demonstrations by the defaulting licensees of their ability to meet their payment obligations, Spectrum IVDS has not resumed making post-default payments on its debt since the issuance of these decisions.

⁶³ See 47 C.F.R. § 1.2110(g)(4)(iv); *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd 2551. See also *Big Sky Order* at 10,067 ¶ 3, 10,074 ¶ 20; *Advanced Order* at 1628 ¶ 3, 1635 ¶ 22; Lakeland PCS LLC and

IVDS, however, has repeatedly sought to pay on its own terms. First, it asked to be able to continue to pay in installments – one by April 30, 2005, and the other by July 31, 2005.⁶⁴ Then, even after these dates passed, it recently requested additional time to render payment. To date, Spectrum IVDS has made no further payment towards its debt, even though it knew, or should have known, that, regardless of how its request was decided, it was required under the Commission’s rules to pay this debt in full.⁶⁵ These actions call into question its financial qualifications to be a Commission licensee.

24. The Commission has repeatedly emphasized that it is essential to a fair and efficient licensing process to require licensees to demonstrate their ability to pay as a condition of continuing to hold licenses,⁶⁶ and, in each case in which the Bureau has waived the provisions of the installment payment rule, we have been very careful to ensure that there was no serious question regarding the defaulting licensee’s ability and willingness to pay the monies owed toward its debt obligation to the Commission.⁶⁷ Where defaulting licensees have not demonstrated their ability to pay, the Commission has denied their requests for waiver of the rule.⁶⁸ In Spectrum IVDS’s case, it not only failed to submit post-default payments on its debt, but now asks for 90 additional days from the resolution of its request,⁶⁹ a period of time that is nearly three times that which we have given to defaulting licensees after waiving provisions of the installment payment rule.⁷⁰ By seeking to repeatedly revise its payment terms, Spectrum IVDS has called into question its financial ability.⁷¹ As a result, we cannot conclude that Spectrum IVDS is the party best able to use the spectrum efficiently and effectively or that a grant of a waiver would serve the underlying purpose of installment payment rules.⁷²

25. We likewise do not find Spectrum IVDS’s circumstances to be unique, or even sufficiently unusual, to warrant a waiver. Spectrum IVDS maintains that, after it assumed the installment payment

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Cricket Licensee (Lakeland) Inc. for Assignment of PCS License for Station KNLG741, *Second Order on Reconsideration*, 15 FCC Rcd 23,733, 23,735 n. 11 (WTB/CWD 2000) (“*Lakeland Order*”).

⁶⁴ Petition at 3.

⁶⁵ Spectrum IVDS made one payment (on January 27, 2005) shortly after the final payment deadline, but none after it became aware of the missed deadline when its renewal application was dismissed in February 2005. *See* 47 C.F.R. § 1.2110(g)(4)(iv).

⁶⁶ *See, e.g., 21st Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22; *Southern MO&O*, 15 FCC Rcd at 25,105-06 ¶ 7.

⁶⁷ *See, e.g., Advanced Order*, 21 FCC Rcd at 1632 ¶¶ 11, 12, 1633 ¶ 14; *Big Sky Order*, 21 FCC Rcd at 10,070-72 ¶¶ 11-12, 14.

⁶⁸ *See 21st Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22; *Morris Communications, Inc. Request for Waiver of Installment Payment Rules and Reinstatement of 900 MHz SMR Licenses, Memorandum Opinion and Order*, FCC 08-57, 23 FCC Rcd 3179, 3196 ¶¶ 37-39 (2008) (“*Morris Order*”) (petitioner’s requests for alternative payment schedules raises “very serious doubts” about its financial qualifications to be a Commission licensee). *See also Lancaster Order*, 22 FCC Rcd at 2444 ¶ 16; *Satellite Signals of New England, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses, Order*, 22 FCC Rcd 1937 (WTB 2007).

⁶⁹ Spectrum IVDS states that this amount of time would give it “a reasonable period to make proper notice to its principals to make this final payment,” given that it is a “small company comprised of many individual stockholders.” Supplement at 2.

⁷⁰ *See Advanced Order*, 21 FCC Rcd at 1628 ¶ 2, 1634 ¶ 19. *See also Big Sky Order*, 21 FCC Rcd at 10,067 ¶ 3, 10,073 ¶ 17.

⁷¹ *See Morris Order*, 23 FCC Rcd at 3196 ¶ 39.

⁷² Given that Spectrum IVDS has made no payments after it discovered it made the error, and even seeks additional time, we find little comfort in Spectrum IVDS’s statement reaffirming its commitment to pay in a timely manner.

debt, it made payment equating to roughly 87.5 percent of its total debt and that this amount surpasses the principal amount of the debt, with the remaining stemming from late fees. Timely payments, however, are every installment payor's obligation, and past payments on a license do not constitute unique circumstances.⁷³ The fact that Spectrum IVDS has, by paying late fees and interest, paid more than the initial principal amount owed when it acquired the License is immaterial. Spectrum IVDS voluntarily took advantage of the automatic grace periods. Had it paid by the first deadline, no late fees would have assessed. Moreover, in considering requests for waiver of the installment payment rule, the Commission has not relied heavily on a history of pre-default payments, particularly where the defaulting licensee has not also made post-default payments on its debt.⁷⁴ We therefore find unpersuasive Spectrum IVDS's reliance on its past performance as a basis for extending the payment terms beyond the term of the License.

26. Additionally, we reject Spectrum IVDS's claim that its misunderstanding of the installment payment deadlines stemmed, at least in part, from erroneous information provided in a payment notice. The Commission has held unequivocally that it is the responsibility of a licensee to ensure that installment payments are timely made and that it is not the duty of the Commission to inform a licensee that payments have been missed or that a license has been terminated.⁷⁵ Spectrum IVDS was aware, or should have been aware, of its installment payment schedule, the Commission's rules, and its payment obligations upon the loan's Maturity Date and should have planned accordingly. It bore the risk of any complications or confusion that may have arisen. Spectrum IVDS's asserted misunderstanding cannot, without more, relieve it of its obligations under the Commission's rules. Allegations of mistake and circumstances similar to those raised by Spectrum IVDS would not distinguish it from prior cases in which denying waivers of the installment payment rules preserved the integrity of the auctions and licensing process.⁷⁶ Finally, we note, as Spectrum IVDS itself has, that it made every payment utilizing both grace periods. We reiterate that the Commission did not intend the two-quarter grace period to be

⁷³ The Commission has consistently found that a defaulting licensee's pre-default payment history, without more, is insufficient to support a waiver of the automatic cancellation rule. *See, e.g., Lancaster Order*, 22 FCC Rcd at 2442 ¶ 10, 2447 ¶ 21 (denying request for waiver of automatic license cancellation rule where licensee had made seven years of payments prior to experiencing financial distress); *Leaco Order*, 21 FCC Rcd at 1187 ¶ 13 (finding that any one of defaulting licensee's proffered facts, including seven-year history of payments, would not alone suffice to meet the Commission's waiver standard); *Advanced Order*, 21 FCC Rcd at 1633 ¶ 15 (finding that any one of defaulting licensee's proffered facts, including eight-year history of payments, would not alone suffice to meet the Commission's waiver standard).

⁷⁴ *See Morris Order*, 23 FCC Rcd at 3197 ¶ 41 ("nothing unique about Morris's payment history would cause us to set aside the doubts it has raised concerning its ability to meet its financial obligations to the Commission").

⁷⁵ *See 21st Century MO&O*, 15 FCC Rcd at 25,120 ¶ 16 (noting that the practice of sending individual notices is not mandated by any Commission rule, but is only a courtesy to licensees). *See also Lakeland Order*, 15 FCC Rcd at 23,734, ¶ 4.

⁷⁶ *See, e.g. 21st Century MO&O*, 15 FCC Rcd at 25124-25 ¶ 25; Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment, *Order*, 19 FCC Rcd 83 (WTB/ASAD 2004), *recon. pending*; Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. § 1.2110(g)(4)) and Debt Collection Rules (47 C.F.R. § 1901 et seq.), *Order*, 18 FCC Rcd 14,695 (WTB/ASAD 2003), *recon. denied*, 22 FCC Rcd 2411 (WTB 2007); Pan American Interactive, 18 FCC Rcd 15,314 (WTB/AIAD 2003); Letter to Messrs. Stephen Diaz Gavin and Paul C. Besozzi, Counsel for U.S. Telemetry Corporation, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 17 FCC Rcd 6442, 6446 (WTB/AIAD 2002). The Auctions and Industry Analysis Division ("AIAD") was the predecessor of the current Auctions and Spectrum Access Division.

used as a matter of course.⁷⁷ Instead, it is intended for licensees to use as a matter of last resort. To do otherwise runs a substantial risk, as the instant circumstances demonstrate.

IV. CONCLUSION

27. We conclude that Spectrum IVDS has not demonstrated that it meets the standard for a petition for reconsideration. Nor has Spectrum IVDS met the Commission's standard for a waiver of the "full and timely payment" requirement. Because Spectrum IVDS has not paid its winning bid in full and indeed has made no payment on its debt to the Commission since the late submission of its July 2004 installment payment, its circumstances are unlike cases in which defaulting licensees have submitted substantial post-default payments to the Commission. Consequently, we find that Spectrum IVDS has not resolved doubts as to its ability and willingness to satisfy the remaining installment debt for the License in a timely fashion, but rather, by continuing to seek more favorable payment terms has called its own financial ability into question. Given these facts, we cannot conclude that Spectrum IVDS is the party best able to use the spectrum efficiently and effectively or that a grant of a waiver would serve the underlying purpose of installment payment rules.

V. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(j), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration and Request for Reinstatement of License filed by Spectrum IVDS, L.L.C., on March 21, 2005, is DENIED, as specified herein. 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

James D. Schlichting
Deputy Chief, Wireless Telecommunications Bureau

⁷⁷ Indeed, the Commission has stated that it believes that licensees should be working to obtain the funds necessary to meet their payment obligations before they are due and accordingly, that grace periods should be used only in extraordinary circumstances. *See Part I Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110 (adopting automatic two quarter grace period is consistent with "the standard commercial practice of establishing late payment fees and developing financial incentives for licensees to resolve capital issues *before payment due dates.*") (emphasis added).