

ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1020

ALPINE PCS, INC.

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee.

ON APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties before this Court are Alpine PCS, Inc. (“Alpine”), Appellant, and the Federal Communications Commission (“the Commission” or “FCC”), Appellee.

B. Rulings Under Review

In the Matter of Alpine PCS, Inc., et al., 25 FCC Rcd 469 (2010) (“*Order*”) (JA____).

C. Related Cases

The *Order* on review has not previously been before this Court. A related case, *In re: Alpine PCS, Inc.*, Case No. 09-5293, a bankruptcy matter on appeal from the District Court, is pending and has been fully briefed. The Court has ordered that the two related cases be heard by the same panel and argued on the same day. *See Order*, Case No. 09-5293 (March 30, 2010).

D. Deferred Appendix

The parties will be using a deferred appendix.

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GLOSSARY

Alpine	Alpine PCS, Inc.
<i>Bureau Order</i>	<i>In re Alpine PCS, Inc.</i> , 22 FCC Rcd 1492 (WTB 2007) (JA __)
<i>C-Block Restructuring Order</i>	<i>In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees</i> , 12 FCC Rcd 16436 (1997).
FCC or Commission	Federal Communications Commission
<i>Grace Period Order</i>	<i>In the Matter of Amendment of Part I of the Commission's Rules — Competitive Bidding Procedures</i> , 13 FCC Rcd 374 (1997)
JA	Joint Appendix
NextWave	NextWave Personal Communications, Inc., or affiliated entities
NextWave Global Settlement Motion	<i>In re NextWave Personal Commc'ns, Inc.</i> , Case No. 98 B 21529 (ASH) (Bankr. S.D.N.Y), Motion Pursuant to Section 363 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002, 6004 and 9019 Approving Settlement and Releases, dated April 20, 2004 (JA __)
<i>Order</i>	<i>In re Alpine PCS, Inc., et al.</i> , 25 FCC Rcd 469 (2010) (JA __)
PCS	Personal Communications Service (a form of wireless telecommunications)
WTB or Bureau	Wireless Telecommunications Bureau of the FCC

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BRIEF FOR APPELLEE

QUESTION PRESENTED

Whether the FCC reasonably denied Alpine's request to waive automatic cancellation of Alpine's spectrum licenses under the agency's installment payment rules where Alpine failed to make full and timely payments on its winning auction bids and admitted in agency filings that it was unable to meet its ongoing payment obligations.

STATEMENT OF JURISDICTION

The FCC released the *Order* on appeal on January 5, 2010. *In the Matter of Alpine PCS, Inc., et al.*, 25 FCC Rcd 469 (2010) ("*Order*"). This Court has jurisdiction under section 402(b)(5) of the Communications Act of 1934, as

amended, 47 U.S.C. § 402(b)(5) (appeal by the holder of a license that has been modified or revoked by the FCC). *See NextWave Personal Commc'ns, Inc. v. FCC*, 254 F.3d 130, 140 (D.C. Cir. 2001), *aff'd on other grounds*, 537 U.S. 293 (2003).¹

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum to this brief.

COUNTERSTATEMENT OF THE CASE

This case involves a challenge to an FCC order declining to waive the agency's automatic cancellation rule and reinstate two Personal Communications Service ("PCS") licenses. Alpine obtained each license by submitting the high bid at an FCC spectrum auction. The licenses were conditioned upon Alpine's written promise to pay its winning bid in full and timely quarterly installments in accordance with FCC rules.

Alpine failed to make the required installment payments due for each license on January 31, 2002. The FCC's installment payment rules provided that upon failure to make full and timely installment payments the licenses canceled automatically without any action by the FCC after the passage of two three-month

¹ Alpine also asserts (Br. 1) that jurisdiction rests on 47 U.S.C. § 402(a) (petition for review of an order of the FCC except those appealable under section 402(b)). Sections 402(a) and (b) are mutually exclusive, however. *See Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 256 (D.C. Cir. 2008). In our view, section 402(b)(5) alone grants this Court jurisdiction to decide this case. *See Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009).

grace periods. On July 31, 2002 – the last day for payment under the FCC’s grace periods – Alpine filed a request for a waiver of the automatic cancellation rule but made no payment on either license. The waiver request filing did not toll the operation of the FCC’s automatic cancellation rule, and the licenses automatically canceled on August 1, 2002.

In the *Order* on review, the FCC denied Alpine’s request to waive the automatic cancellation rule and reinstate the licenses, finding that Alpine had failed to meet the FCC’s waiver standards and that granting a waiver was not warranted under the circumstances. Alpine now seeks judicial review.²

COUNTERSTATEMENT OF THE FACTS

A. Statutory and Regulatory Framework

Licensing Through Spectrum Auctions. Pursuant to 47 U.S.C. § 301, the Commission has exclusive authority to grant spectrum licenses where the agency finds that the “public convenience, interest, or necessity will be served thereby.” *Id.* § 307(a); *see also id.* § 309(a).

Under authority granted to the FCC in 1993, *see* 47 U.S.C. § 309(j), the FCC assigns spectrum for use in commercial wireless communications through a system of “competitive bidding,” or auctions, in which a license is awarded to the highest qualified bidder. Auctions for spectrum licenses rest on the assumption that the

² In *In re Alpine PCS, Inc.*, No. 09-5293, Alpine seeks review of the bankruptcy court’s determination that the licenses in question were not property of Alpine’s bankruptcy estate because they canceled long before Alpine filed for Chapter 11 bankruptcy. The Court has directed the clerk to schedule oral argument in this case and Case No. 09-5293 on the same day before the same panel.

entity that bids the highest for a license generally is the entity that will be best able to put the licenses into service for the public. *See, e.g., In re Morris Commc'ns, Inc.*, 23 FCC Rcd 3179, ¶ 34 (2008), *aff'd*, *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184; *In re Southern Commc'ns Systems, Inc.*, 15 FCC Rcd 25103, ¶ 7 (2000), *further recon. denied*, 16 FCC Rcd 18357 (2001).

In authorizing the use of auctions, Congress provided that selection of licensees by auction would not change the FCC's usual regulatory powers. Congress thus specified that the use of auctions would not "diminish the authority of the FCC under the other provisions of [the Act] to regulate or reclaim spectrum licenses;" or "be construed to convey any rights . . . that differ from the rights that apply to other licenses." 47 U.S.C. §§ 309(j)(6)(C), (D).

The FCC's Installment Payment Program. In implementing the congressional mandate to use competitive bidding in license assignments, the FCC created an installment payment program to allow small businesses and other designated entities that obtain licenses through the auction program to pay their winning bids in quarterly installments. *See* 47 C.F.R. § 1.2110(d)(4) (1994).³ From the beginning, the FCC's installment payment rules consistently have specified that failure to make a full and timely payment of each required installment amount when due triggers automatic cancellation of the license. *See*

³ The installment payment rules were originally codified as 47 C.F.R. § 1.2110(b)(4)(x)(D). In 1995, the rules were redesignated to appear at 47 C.F.R. § 1.2110(d)). *See* 60 Fed. Reg. 52,865 (Oct. 11, 1995)

Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 9 FCC Rcd 2348, ¶ 240 (1994); 47 C.F.R. § 1.2110(d)(4)(iii) (1994).

Under the installment payment rules applicable at the time of Alpine’s 2002 default, a licensee that missed a required installment payment was given two automatic grace periods of three calendar months each during which the missed payment could be paid (along with applicable late fees). *See* 47 C.F.R. § 1.2110(g)(4)(i), (ii) (2001). The rules provided that at the conclusion of the second grace period, if there had been no cure payment, the license would “automatically cancel” without any action by the FCC, and the defaulting licensee would “be subject to debt collection procedures.” *Id.*, § 1.2110(g)(4)(iv) (2001).

Waivers of the Automatic Cancellation Rule. The FCC has a general policy under 47 C.F.R. § 1.925 of considering whether to waive its wireless service rules where an applicant can show (1) “[t]he underlying purpose of the rule(s) 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 (2) “[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”

Under this discretionary waiver policy, the FCC will entertain qualifying requests by wireless licensees to waive the automatic cancellation rule on a case-by-case basis. In analyzing whether a waiver would be appropriate, the FCC has stated that the underlying purpose of the automatic cancellation rule is to preserve the reliability and integrity of the competitive bidding and licensing processes by

ensuring that licensees who have won licenses on the promise of full payment of the winning bid have the ongoing financial ability and the willingness to fulfill their auction payment obligations. *See, e.g., Morris Commc'ns*, 23 FCC Rcd 3179, ¶¶ 34-39. If a winning bidder subsequently cannot carry out its payment obligation, the presumption that it is in fact the best qualified to hold the license is lost. *Id.* Accordingly, the FCC consistently has denied requested waivers of the automatic cancellation rule where the licensee has not demonstrated its ongoing ability and willingness to fulfill its payment obligations. *Id.*

B. Alpine's Default and Automatic License Cancellation

The Terms and Conditions of the Licenses Granted to Alpine. In 1996, Alpine was the winning bidder in the "C-Block" auction for two FCC licenses in the Personal Communications Service – a wireless telecommunications service used for mobile phone and data offerings. Alpine qualified for participation in the FCC's installment payment plan and agreed to pay most of its winning auction bid for each license in quarterly installments.

The two PCS licenses granted to Alpine were expressly "conditioned upon the full and timely payment of all monies due pursuant to sections 1.2110 and 24.711 of the Commission's Rules." (JA __, __). The licenses stated that "[f]ailure to comply with this condition will result in automatic cancellation of this authorization." (JA __).

To assist the FCC in collecting the auction debt, the FCC also required licensees such as Alpine to execute a Promissory Note and Security Agreement covering the outstanding installment payment debt for each license. Notes (JA __,

___); Security Agreements (JA __, __).⁴ In its Notes, Alpine “acknowledge[d]” that the licenses were “conditioned upon full and timely payment of financial obligations under the installment payment plan, as set forth in the then-applicable orders and regulations of the Commission” Notes at 3 (JA __, __). The Security Agreements also reiterated that, in the event of default, “the License[s] shall be automatically canceled pursuant to 47 C.F.R. § 1.2110.” Security Agreements at ¶ 8(a) (JA __, __).

The Notes and Security Agreements also made clear that they were expressly subject to the FCC’s rules. Specifically, the Notes provide that they “shall be governed by and construed in accordance with the Communications Act, as amended, and then-applicable orders and regulations of the Commission, and federal law. Nothing in this Note shall be deemed to modify any then-applicable orders and regulations of the Commission, and nothing in this Note shall be deemed to release the Maker from compliance therewith.” Notes at 6 (JA __, __); Security Agreements, ¶ 3 (JA __, __).

Alpine was awarded its licenses in September 1996. In 1997, after a number of entities petitioned the FCC for debt restructuring, the FCC issued an order giving all C-block PCS licensees (including Alpine) a one-time debt restructuring option, under which a licensee could, *inter alia*: (1) return a license in exchange

⁴ At the time of the execution of the Notes, Alpine had outstanding installment payment obligations of \$8,901,900.00 (plus accruing interest) for the San Luis Obispo license (Note, JA __) and \$17,280,675.00 (plus accruing interest) for the Santa Barbara license (Note, JA __).

for debt forgiveness and also receive a substantial refund of its original down payment; (2) return 15 MHz of the 30 MHz of spectrum covered in each license and receive a concomitant 50% reduction in its debt obligation; or (3) retain all of its original spectrum and also remain obligated on its original debt obligations. *See C-Block Restructuring Order*, 12 FCC Rcd 16436 (1997); *Order on Reconsideration*, 13 FCC Rcd 8345 (1998). *See also U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 230-31 (D.C. Cir. 2000) (describing the restructuring order). Under this one-time opportunity to revisit and restructure its debt obligations, Alpine opted to retain all of its original spectrum and therefore its original debt obligations in full.

Alpine's Payment Default. Alpine failed to make its required installment payments due January 31, 2002. Pursuant to the applicable FCC regulations, Alpine automatically received two three-month grace periods terminating on July 31, 2002. 47 C.F.R. § 1.2110(g)(4)(i) and (ii). When Alpine failed to pay its overdue installments by that date, the licenses canceled automatically pursuant to the terms of 47 C.F.R. § 1.2110(g)(4)(iv).

C. Alpine's Requests for Debt Restructuring and Waiver of the Automatic Cancellation Rule.

Auction Debt Restructuring Request. Near the end of the second three-month grace period, Alpine filed a request to renegotiate its auction debt while retaining its licenses. Request for Debt Restructuring, dated July 24, 2002, edited and resubmitted, July 29, 2002 (JA ____). Alpine requested either a reduction of 50% of its original auction bids in exchange for a return of 15 MHz of spectrum

associated with each license or, alternatively, retaining its full spectrum and a reduction in its outstanding debt by 50% together with a two-year moratorium on all payments, both principal and interest. Request for Debt Restructuring at __ (JA ____).

Alpine's debt restructuring request emphasized its poor financial condition and declared that "[a]s of this date, Alpine has no ability to pay the full amount of debt in a reasonable time." Amended Request for Debt Restructuring at 2 (JA ____). Alpine's submission also included an opinion letter from a telecommunications valuation and brokerage firm, stating "it will be impossible [for Alpine] to finance the build-out of the [license] markets with the current burden of FCC debt." Exhibit B to Amended Request for Debt Restructuring (JA ____).

The FCC's chief financial officer wrote to Alpine on July 30, 2002, acknowledging receipt of the debt restructuring request and stating that the FCC would either issue a written response within 60 days or update Alpine on the status of its request within 60 days. Letter from Mark A. Reger to Robert F. Broz, July 30, 2002 (JA ____). Within that 60-day period, the FCC's staff commenced its review of Alpine's debt restructuring request, and sought additional documents from Alpine regarding the financial condition of Alpine and its related subsidiaries.

On January 30, 2004, the FCC's staff responded to Alpine's debt restructuring request. See Letter from Paul K. Cascio to Robert F. Broz, January 30, 2004 (JA ____). The letter noted that Alpine's request had been reviewed pursuant to 31 C.F.R. § 902, the Treasury Department's "Claims Collection

Standards” for delinquent debts owed to the United States. *Id.* The letter explained that the staff was returning Alpine’s request without action because the staff had learned that there had been material changes in the financial status of some of Alpine’s affiliates and/or subsidiaries that modified the assumptions underlying Alpine’s debt compromise request. *Id.* Alpine did not seek further administrative review of the FCC staff action, or seek review by the full Commission.

Request to Waive Automatic Cancellation. On July 31, 2002 – the last day of the second and final three-month grace period – Alpine filed a request pursuant to 47 C.F.R § 1.925 for waiver of the automatic cancellation rule (JA ____). The waiver request was supplemented on August 30, 2002 (JA ____). Alpine premised its request on the deteriorating value of spectrum licenses and its inability to find alternative sources of financing after losing its vendor financing in 2001. *See, e.g.,* Waiver Request at 4-5 (JA ____).

D. The Bureau Denial

On January 29, 2007, the FCC’s Wireless Telecommunications Bureau (“Bureau” or “WTB”) denied Alpine’s waiver request. *In re Alpine PCS, Inc.*, 22 FCC Rcd 1492 (WTB 2007) (“*Bureau Order*”) (JA ____).

The Bureau determined that granting a waiver to Alpine would be inconsistent with the underlying purpose of the automatic cancellation rule and auction program because Alpine admitted that it could not continue to meet its payment obligations, and had no prospect of doing so in the future. *Bureau Order*, ¶¶13-17 (JA ____). Rejecting Alpine’s claim that its financial circumstances were so

“unique” as to justify a waiver, the Bureau observed that, like all licensees, Alpine was responsible for its own business choices and that every licensee is exposed to risk in the marketplace. *Id.*, ¶ 18 (JA ____). The Bureau also rejected Alpine’s effort to equate its situation to that of another licensee, NextWave Personal Communications, Inc. The Bureau explained that, unlike Alpine, NextWave had filed for bankruptcy prior to its payment default and that section 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a), prevented the FCC from enforcing the automatic cancellation rule against NextWave. *Bureau Order*, ¶ 21 (JA ____).

E. The FCC’s *Order* on Review

Alpine filed a timely petition for reconsideration of the *Bureau Order*. On January 5, 2010, the full Commission issued the *Order* (JA ____), which considered Alpine’s waiver request along with similar administrative appeals by seven other former wireless licensees. In the *Order*, the Commission, *inter alia*, affirmed the Bureau’s decision to deny Alpine’s waiver request.

The FCC first addressed Alpine’s contention that the Bureau employed too stringent a waiver standard. *Order*, ¶¶ 18-24 (JA ____-____). The FCC held that the Bureau correctly applied the FCC’s precedents, noting that the FCC has “consistently refused to waive the automatic cancellation rule” where the licensee defaulted on its auction debt payments and failed to demonstrate its ability and willingness to pay its outstanding auction debt in accordance with the rules. *Order*, ¶ 28 (JA ____).

Turning to the merits of Alpine’s waiver request, the FCC held that the Bureau correctly concluded that Alpine’s claim of financial distress and lost

financing did not justify a waiver of the automatic cancellation rule. *Order*, ¶¶ 25-33 (JA __-__). The FCC recognized that granting Alpine a waiver because of its stated inability to pay the full auction debt would “only encourage auction participants to overbid for licenses in the expectation that they would be provided relief, if needed, from their payment obligations.” *Id.*, ¶ 31 (JA ____). Nor did Alpine’s lost financing and financial distress demonstrate “unique” circumstances as contemplated by the second prong of the waiver rule. *Id.* ¶ 32 (JA ____).

The FCC also agreed with the Bureau that Alpine was not similarly situated to *NextWave*, *Order*, ¶ 48 (JA ____), because *NextWave* was in bankruptcy at the time of its payment default and was therefore protected from the automatic cancellation rule by 11 U.S.C. § 525(a). *Id.* For the same reason, the FCC also rejected Alpine’s claim that the FCC should have agreed to compromise its auction debt because the FCC agreed to a litigation settlement in the *NextWave* bankruptcy case. *Id.*

The FCC also rejected Alpine’s remaining claims for a waiver – that Alpine’s pending waiver request filing had suspended the operation of the automatic cancellation rule (*Order*, ¶¶ 69-70) (JA __-__); that the FCC had a fiduciary duty as a lender to assist Alpine in reducing its debt and retaining its licenses (*id.*, ¶¶ 77-81)(JA__-__); and that the Commission violated its debt-collection rules in failing to respond promptly to Alpine’s waiver request (*id.*, ¶¶ 73-74)(JA __-__). The FCC found that none of these arguments had merit and none justified ignoring the FCC’s conclusion that granting Alpine a waiver would be contrary to the public interest. *Id.*, ¶ 86 (JA ____).

F. Alpine's Bankruptcy and Related Events

While Alpine's reconsideration request was pending, the FCC announced a new auction to assign spectrum to new PCS licensees, including spectrum that previously had been assigned to Alpine. *Public Notice of Auction 78*, 23 FCC Rcd 5484 (WTB, 2008). Alpine filed a request to stay the auction relating to its formerly licensed spectrum, which the Bureau denied. *In the Matter of Alpine PCS, Inc.*, 23 FCC Rcd 10485 (WTB, 2008). The Bureau noted that any license granted at the auction would remain subject to the final outcome of Alpine's reconsideration petition. *Id.*, ¶ 18.⁵

On August 12, 2008 – the day before the scheduled date for the auction of its formerly licensed spectrum – Alpine commenced a Chapter 11 bankruptcy case. JA _____. Alpine immediately requested that the bankruptcy court halt the FCC's auction on the ground that the auction constituted a "foreclosure" on property of the Alpine bankruptcy estate in violation of the automatic stay of the Bankruptcy Code, 11 U.S.C. § 362. Denying the stay, the bankruptcy court held that the licenses claimed by Alpine were not property of the bankruptcy estate because the licenses had canceled in 2002. *See In re Alpine PCS, Inc.*, Case No. 08-00543 (Bankr. D.D.C., October 10, 2008) (JA ____). Alpine appealed the stay denial to the District Court, which affirmed on the same grounds. (JA ____). Alpine then

⁵ At the conclusion of Auction 78, the high bidder for both the Santa Barbara license and the San Luis Obispo license was Club 42 CM Limited Partnership. *See Auction 78 Closing Public Notice*, 23 FCC Rcd 12749 (WTB, 2008). Alpine filed petitions to deny the grant of the Club 42 licenses based on its claim that its licenses had not canceled. The Commission has not yet issued the licenses to Club 42, and any such grant remains subject to the outcome of this appeal.

appealed the bankruptcy rulings to this Court. *In re: Alpine PCS, Inc.*, Case No. 09-5293.⁶

SUMMARY OF ARGUMENT

1. Alpine premised its administrative waiver request on the assertion that it could not pay its winning auction bids and had no prospect of doing so in the future, and indeed could not even complete the construction of its network without debt restructuring relief. Faced with these undisputed facts, the FCC reasonably concluded that waiving its auction payment rules would not be in the public interest.

The *Order* under review fully explained the FCC's rationale for denying a waiver under its long standing precedent of strict enforcement of the automatic cancellation rule, and its conclusion that Alpine's financial distress did not constitute unique or special circumstances warranting relief. The FCC also explained why Alpine was not similarly situated to NextWave (which was in bankruptcy at the time of its payment default), and why the litigation settlement in the *NextWave* bankruptcy case did not compel the FCC to grant similar treatment to Alpine.

2. Alpine offers a scattershot array of additional arguments. None provides a basis for reversal.

⁶ As we have noted, Case No. 09-5293 has been fully briefed and is to be scheduled for argument on the same day and before the same panel as this case.

a. Contrary to Alpine's claim that the *Order* is void under the Bankruptcy Code's automatic stay, 11 U.S.C. § 362(a), the licenses had canceled long before the bankruptcy filing and thus were not part of the bankruptcy estate. Moreover, Alpine's automatic stay argument was never presented to the FCC and thus, under 47 U.S.C. § 405(a), cannot be asserted to overturn the *Order*.

b. Alpine's claim that it never was in "default" is premised on a misreading of the Note, which provided that the filing of a written request for a grace period or extension of payments would forestall default only if the written request was filed within a ninety-day delinquency period, and only if at the time of the default the FCC's rules authorized the filing of such a request. Alpine's 2002 filings complied with neither of these conditions. More fundamentally, Alpine's reliance on the Note as providing an escape from automatic cancellation under the rules ignores the Note's express provisions that nothing in the Note shall be deemed to release the licensee from compliance with applicable FCC rules.

c. Nor did the FCC breach any fiduciary or contractual duty to Alpine by refusing to restructure Alpine's debt and enforcing its automatic cancellation rule. On the contrary, the FCC had a duty to the American public, which it has fulfilled by enforcing its rules.

d. Finally, the FCC did not violate the requirement in its debt-collection rules, 47 C.F.R. § 1.1911(e), that it respond within 30 days, if feasible, to an inquiry by a debtor. The rule on which Alpine relies is inapplicable to waivers, and in any event the FCC's debt collection rules expressly provide that nothing in those rules can supersede or invalidate the FCC's automatic cancellation rule.

STANDARD OF REVIEW

To prevail here, Alpine must carry a particularly “heavy burden.” *WAIT Radio, Inc. v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir. 1972). The standard for reviewing the FCC’s denial of a waiver request is extremely deferential: An agency’s refusal to grant a waiver will not be overturned unless its reasons are “so insubstantial as to render that denial an abuse of discretion.” *Morris Commc’ns, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009) (internal quotations and citations omitted). The Court may “not compel the Commission to grant a waiver ... as long as the request was given at least a ‘hard look’ to ensure that the agency is not rigidly applying a rule where it is not in the public interest.” *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 900-01 (D.C. Cir. 2004).

ARGUMENT

I. THE FCC REASONABLY DENIED ALPINE’S WAIVER REQUEST.

When Alpine was awarded its two PCS licenses, it was plain – from the express terms on the face of each license, the Promissory Notes signed by Alpine, and the FCC’s codified rules – that the licenses would automatically cancel if Alpine failed to make full and timely payment of its winning bids. Alpine now seeks to avoid the consequences of its failure to comply with this essential license requirement, and asks this Court to force the FCC to restore the canceled licenses and “renegotiat[e]” (Alpine Br. 2, 10) Alpine’s auction debt. The FCC’s denial of Alpine’s request for a waiver of the automatic cancellation rule was warranted under the facts and was fully consistent with FCC precedent in denying waivers in similar situations.

Because the licenses canceled automatically in 2002, they were not part of the bankruptcy estate when Alpine filed its bankruptcy petition in 2008. *See In re Alpine PCS, Inc.*, Case No. 08-00543 (Bankr. D.D.C., October 10, 2008), *aff'd*, Case No. 08-2055 (EGS) (D.D.C., July 22, 2009), *appeal pending*, Case No. 09-5293 (D.C. Cir.) (denying Alpine's request to stay the FCC's auction because the canceled licenses are not part of Alpine's bankruptcy estate).

A. The FCC Has Reasonably Established a Policy of Strict Enforcement of Auction Payment Deadlines.

The FCC evaluated Alpine's waiver request in light of the agency's "clear" and "long standing" policy of "strict enforcement" of the auction payment deadlines – mandating automatic cancellation where a licensee fails to make full and timely payment of its auction debt and will be unable to meet its payment obligations in the future. *Order*, ¶¶ 18-24 (JA ____). Alpine's brief does not even mention that established policy, and makes no effort to distinguish the substantial body of FCC precedent explaining and applying that policy.

This Court has already upheld that policy in several decisions.⁷ In a related context, this Court has likewise upheld the FCC's strict enforcement of the

⁷ *See 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003); *Vista Commc'ns, Inc. v. FCC*, 99 Fed.Appx. 235 (D.C. Cir. 2004); *In re: Request For Extension Of The Commission's Initial Non-Delinquency Period For C And F Block Installment Payments*, 14 FCC Rcd 6080 (1998), *aff'd sub nom. SouthEast Tel., Inc. v. FCC*, 1999 WL 1215855 (D.C. Cir. 1999) (each affirming an FCC decision denying a waiver of the automatic cancellation rule or an extension for more time in which to make payment).

payment deadlines for down payments or final payments by winning bidders at the conclusion of the auction.⁸

Indeed, the FCC's strict enforcement of the automatic cancellation rule for missed installment payments was upheld just last year in *Morris*, 566 F.3d 184.⁹ *Morris* is similar to the case at bar in several important respects: the licensee in *Morris* missed paying installment payments on licenses it had won at auction, thus causing its licenses to cancel automatically under the same rule, the same license terms and conditions, and the same Note provisions applicable here. In addition, the licensee in *Morris* filed for waiver of the automatic cancellation rule; the FCC denied that waiver; and the FCC subsequently issued to other parties new licenses associated with the same spectrum. This Court rejected an assortment of challenges to the FCC's action and held that the FCC reasonably denied the waiver request. *Id.*

There is one factual difference between Alpine's situation and that of the licensee in *Morris* – Alpine filed its waiver request one day prior to default and automatic cancellation of the licenses, whereas the appellant in *Morris* filed its waiver request a few days after default and automatic cancellation of its licenses.

⁸ See *Delta Radio*, 387 F.3d 897 (upholding the FCC's enforcement of its post-auction final payment deadline); *BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003) (upholding the FCC's enforcement of its down payment deadline); *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999) (upholding the FCC's enforcement of its down payment deadline).

⁹ Although Counsel for Alpine in this case represented the appellant in *Morris*, see 566 F.3d at 185, the *Morris* decision is nowhere mentioned in Alpine's brief.

But, as we establish below, that factual distinction has no bearing on operation of the automatic cancellation rule or the standards for determining whether granting a waiver of that rule is in the public interest.

Together, *Morris* and the other decisions from this Court considering the FCC's automatic cancellation rule recognize that the FCC's "strict construction" of the payment rules and automatic cancellation upon default does not violate the "hard look" requirement of the FCC's waiver standards or the APA. *See Morris*, 566 F.3d at 188-89 (the mere adoption of a strict enforcement policy for installment payment deadlines is "insufficient evidence of an abuse of discretion") (quoting *Mountain Solutions*, 197 F.3d at 517). The Court requires only that the FCC adequately explain "why strict rule application serves the public interest," *Delta Radio*, 387 F.3d at 901.

The *Order* here fully meets these requirements. As the FCC explained in the *Order*, the strict enforcement policy applied in this proceeding is founded on the core function of the auction process – to select the applicant that is presumed to be most likely to have the incentive and financial capability to put the licenses into service for the public. *Order* ¶ 20 (JA__).

Because the installment payment rules are "critical to realizing the public interest objectives of section 309(j) of the Communications Act" establishing the auction program, *Order*, ¶ 20 (JA __), the FCC has recognized it must carefully consider the impact of granting a waiver of its rules to allow a defaulting licensee more time to pay its winning bid or to renegotiate the amount of the bid. As the FCC explained in the *Order*, ¶ 20 n.104 (JA__), "if the Commission were to

exercise much flexibility in relieving bidders from their bid obligations, the bid would cease to operate as an effective proxy for identifying those who value the spectrum the most, thereby undermining the presumption that the high bidder is best able to put the spectrum to efficient and effective use for the benefit of the public.” The FCC concluded that “strict enforcement of the installment payment rules preserves a fair and efficient licensing process and promotes the rapid deployment of services for the benefit of the public.” *Order*, ¶ 21 (JA ____).

Applying these principles in reviewing requests for waiver of the automatic cancellation rule upon an installment payment default, the FCC reasonably held that granting a waiver where the licensee is unable or unwilling to make full and timely payment of its current and future auction debt obligations would undermine the purpose of the rule, would be contrary to the public interest, and would impede the achievement of the regulatory goals set forth in section 309(j). *Order*, ¶ 21 (JA ____).

In the FCC’s judgment, extending time to pay or renegotiating the bid amount would, in the long run, give bidders an incentive to overbid at the auction in an effort to win the license, hope for the best, and seek to renegotiate or extend the payments if they find themselves in financial distress in the future, thus undermining the integrity of the auction process. *Order*, ¶ 31 (JA ____). As then-Circuit Judge Roberts recognized in the context of the FCC default payment rule applied to winning bidders that fail to make the required down payment at the close of the auction, “[e]nforcement of the default penalty rule was appropriate, to borrow from Voltaire, ‘*pour encourager les autres.*’” *BDPCS*, 351 F.3d at 1182.

Further, even if the financial distress was not anticipated at the time of the auction and the bidding was sincere in its inception, freely granting winning bidders payment extensions or renegotiating the amount of the winning bid after the close of the auction would raise questions about the “integrity” of the auction process itself. *Order*, ¶¶ 19-20 (JA ____). It is important that the process be “fair to all auction participants, both those who win licenses and those who do not.” *Id.*, ¶ 20 (JA ____). A post-auction reduction or extension of the winning bidder’s payment obligations might suggest that a losing bidder actually would have been better suited to hold the licenses, but was denied the opportunity by the winning bidder’s higher (but unsustainable) bid. *Id.* See also *U.S. Airwaves*, 232 F.3d at 235-36 (recognizing that the FCC has a “duty” of “fairness to losing bidders” and cannot simply forgive “agreed-upon payments” allowing the winning bidders to pay less for their licenses).

Summarizing the many waiver cases decided under the strict enforcement policy by the FCC and by FCC staff acting on delegated authority, the *Order* concluded that strict application of the automatic cancellation rule and the showing necessary to justify a waiver of the rule are “well established.” *Order*, ¶ 23 (JA ____). The FCC observed, *Order*, ¶ 28 (JA ____):

Commission and staff decisions have consistently refused to waive the automatic cancellation rule where a party failed to comply with the installment payment rule and raised doubts regarding its ability and willingness to meet the outstanding payment obligations associated with its licenses on a prospective basis.

As in *Mountain Solutions*, the FCC here has “reasonably focus[ed] on the importance of meeting payment deadlines.” 197 F.3d at 517. In sum, the FCC’s reasons for “strict enforcement” of the payment deadlines, stated in the *Order*, are not “so insubstantial” as to render denial of Alpine’s waiver request under such a policy an abuse of discretion. *Morris*, 566 F.3d at 191.

Alpine points to FCC precedent concerning waiver of other types of license deadlines – for network construction and commencement of service where the FCC concluded that missing the deadline was beyond the control of the licensee. Br. 36-37.¹⁰ As the FCC recognized, *Order*, ¶ 82 (JA ___), the cited decisions do not concern auctioned licenses, and “involve none of the policy considerations relevant to the underlying purposes of the installment rules.” *Id.*

Equally misplaced is Alpine’s reliance (Br. 28) on the line of “constructive waiver” cases, where the licensee missed a payment but thereafter resumed compliance with the payment rules and the payments were accepted by the FCC. As the Court recognized in *Morris*, 566 F.3d at 189-190, the FCC reasonably

¹⁰ Alpine cites *T-Com, Inc.*, 5 FCC Rcd 6691 (1990) (FCC granted rule waiver upon finding that licensee acted in good faith belief that it had completed construction in compliance with an ambiguous FCC rule, and consequently filed an erroneous certification of completion instead of requesting an extension); *Mobilfone Service, Inc.*, 48 Radio Reg.2d 1626 (CCB 1981) (granting extension of construction deadline where applicant did not begin construction until obtaining state certification); and *Rush Network Corp.*, 12 FCC Rcd 9731 (CWD, WTB 1997) (granting extension of construction deadline upon finding that equipment had not yet been fully developed for the particular service band and that extending construction deadline would result in more efficient service to the public without compromising the overall construction goals for the service band).

distinguishes between payment default cases such as Alpine and “constructive waiver” cases where payments continued and were accepted as installment payments after the default.

B. Alpine Had Adequate Notice Of The Installment Payment Deadlines and The Consequences of Non-Compliance.

Alpine here does not claim that it lacked notice of the payment deadline or was confused as to the amount to be paid. Indeed, it was precisely because Alpine was aware of the deadline and the consequences of non-payment that it submitted its last-minute petition for waiver of the automatic cancellation rule. This awareness confirms the appropriateness of strictly enforcing the payment deadlines. *See, e.g., Salzer v. FCC*, 778 F.2d 869, 875-76 (D.C. Cir. 1985).

At the time of the license grant in 1996, Alpine was informed that its licenses were conditioned on full and timely payment of its auction winning bids – by the regulatory payment condition in the licenses (JA __, __), by the clear language of the FCC’s rules which provided for automatic cancellation upon a payment default, and by the Promissory Notes that Alpine executed (JA __, __). *See 21st Century Telesis*, 318 F.3d at 201 (finding that the licensee had notice of its auction installment payment obligations before license cancellation based on the language in the license, auction rules, promissory note, and FCC pronouncements). *See also Morris*, 566 F.3d at 192 (in upholding FCC’s automatic cancellation of licenses for failure to satisfy full and timely payment requirement, the Court explained that appellant’s “licenses were thus contingent on [its] timely payment of all amounts owing; once [appellant] failed to make the . . . payments [by the final

due date], the licenses themselves also lapsed”). Finally, the FCC’s strict enforcement policy was clearly in place and discussed in published Commission decisions well before Alpine’s payment default in 2002.¹¹ Thus, its application to Alpine’s waiver request should have come as no surprise.

C. The FCC Reasonably Applied Its Strict Enforcement Policy To Alpine.

The FCC decision regarding Alpine’s waiver request was a straightforward application of the FCC’s long standing enforcement policy to a licensee that admitted its inability to fulfill its auction bid obligations. The decision was reasonable and consistent with FCC precedent and should be affirmed.

To be eligible for a waiver of the FCC’s automatic cancellation rule, Alpine was required to demonstrate: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case rendered application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or Alpine had no reasonable alternative to keeping its licenses while failing to pay the government in full. 47 C.F.R. § 1.925. Alpine failed on both counts, and the FCC therefore reasonably denied its waiver request.

¹¹ See, e.g., *Licenses of 21st Century Telesis, Inc.*, 15 FCC Rcd 25113, ¶¶ 17-20 (2000) (explaining the Commission’s application of a strict standard of review for requests for waiver of its automatic cancellation rule), *recon. denied*, 16 FCC Rcd 17257 (2001), *aff’d*, *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003).

With respect to the first prong of the waiver eligibility standard – whether a waiver would be consistent with the underlying purpose of the applicable rule – the FCC found that Alpine had failed to demonstrate its willingness and ability to meet its auction debt obligation, and thus granting a waiver to Alpine would undermine the underlying purpose of the automatic cancellation rule and would be inimical to the public interest. *Order*, ¶¶ 29-31 (JA ____).

The FCC’s determination was plainly reasonable. Alpine’s waiver request made clear that its payment default was not an inadvertent mistake, for which waivers may be available. Rather, Alpine stated that it intentionally ceased paying its auction debt because it could not continue to meet its installment payment obligations. *See* Alpine Waiver Request at 5 (JA ____); Alpine Debt Restructuring Request at 2-3 (JA ____). Indeed, Alpine informed the agency that it could not even complete the build-out of its wireless network to provide commercial service in its present financial condition. Alpine Debt Restructuring Request, at 4 (JA ____). As the FCC found, the grant of Alpine’s waiver request thus would be contrary to the public interest, would undermine the integrity of the auction process, and would be inconsistent with the underlying purpose of the automatic cancellation rule. *Order*, ¶ 31 (JA ____).

As for the second eligibility prong, the FCC rejected Alpine’s assertions that a waiver was justified by the background circumstances causing Alpine’s financial distress – the downturn in the telecommunications industry leading to a decline in the value of spectrum licenses and Alpine’s unanticipated loss of vendor financing. *Order*, ¶¶ 32-33 (JA ____). The FCC stated, “all licensees face potential fluctuations

in the marketplace and that therefore a widespread economic downturn is, by its very nature, not a unique circumstance” warranting an individualized waiver from the installment payment rules. *Order*, ¶ 32 (JA ____). Likewise, with respect to Alpine’s loss of financing, the FCC explained, “[t]he Parties, not the Commission, are responsible for their private business plans and decisions affecting their financing and ability to meet their payment obligations.” *Id.*, ¶ 32 (JA ____). *See also Delta Radio*, 387 F.3d at 903 (“All bidders must take market volatility into account”).

The FCC’s decision with respect to each of these conclusions was supported by precedent, as cited in the *Order*, as well as by common sense. Alpine argues that it should receive a waiver, even though the grant would be contrary to the FCC’s public interest determination under the first waiver prong, because it would be unfair to penalize Alpine for financial distress beyond its control. The underlying premise of Alpine’s argument is that the FCC should determine the extent to which Alpine is or is not at fault for its own financial circumstances.

As a practical matter, however, the FCC is unable to wade through the details of its licensees’ financial arrangement to determine whether any given payment failure was beyond the licensee’s control, or whether the licensee took unwarranted risks, failed to perform due diligence in arranging for its financing, or otherwise failed to manage its business affairs prudently. Requiring such a determination from the FCC in every waiver application based on alleged financial distress would put an impossible administrative burden on the FCC, and could ultimately involve undesirable FCC regulation of the internal business affairs of

each licensee through the backdoor of the waiver process. Avoiding that approach, the FCC reasonably held that every licensee is responsible for its own business affairs, and for taking into account the potential for general business downturns, as well as the possibility that its private financing arrangements will fail. The FCC sensibly has focused on the end result – the ability of the licensee to make full and timely installment payments – and has left potentially complex business decisions to the business managers. As the Court explained in *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 (D.C. Cir. 1999), the “strict adherence to a general rule may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases.”

Finally, Alpine complains (Br. 30) that the FCC wrongly combined review of Alpine’s reconsideration request with the administrative appeals of several other licensees and addressed all in a single decision. The FCC has broad discretion in handling its docket. *See* 47 U.S.C. § 154(j) (“The FCC may conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice”); *see also FCC v. Schreiber*, 381 U.S. 279, 289 (1965); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). Here, the FCC was able to consider efficiently common issues of law and fact while still addressing each applicant’s individual claims on the merits. *Order*, ¶ 15 (JA__). Far from impermissible, this approach was quite sensible. Contrary to Alpine’s assertion, the FCC in fact separately addressed each argument raised in Alpine’s Petition for Reconsideration. *See Order*, ¶¶ 7, 25-33, 34-35, 36-38, 47-50, 69-70, 72-76, 77-81, 82 (JA __-__). That the FCC disagreed with Alpine does not

indicate prejudgment or a lack of adequate deliberation; it simply indicates the agency was not persuaded by Alpine's arguments. *See Delta Radio*, 387 F.3d at 902.¹²

D. The FCC Correctly Distinguished The Treatment Of Licenses In *NextWave*.

Alpine claims that it should have been given the same benefits accorded to another PCS auction bidder, NextWave Personal Communications. Br. 24-27. Critically, however, NextWave was able to retain its licenses because it had filed for bankruptcy *prior* to its payment default and this Court held that the FCC was therefore barred by section 525 of the Bankruptcy Code from canceling NextWave's licenses. *See NextWave Personal Commc'ns, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003). Alpine, in contrast, was not in bankruptcy at the time of the automatic cancellation of its licenses in 2002, and accordingly was not entitled to the protections of the Bankruptcy Code.

¹² Alpine also asserts that the *Order* should be reversed because it did not consider "the statement of FCC policy favoring renegotiation of telecom debt as a means of preventing foreclosure and further financial distress." Br. 29. The Commission's silence on this issue is understandable because there was no such policy. On the contrary, as set forth in the *Order*, the FCC's policy is the strict enforcement of the automatic cancellation rule where a licensee is unable or unwilling to meet its ongoing installment debt payments. *Order*, ¶ 28 (JA ____). In any event, Alpine never relied on the alleged policy in its administrative appeals within the agency. *See* Alpine Petition for Reconsideration at 2-4 (JA ____) (listing asserted errors in the *Bureau Order*). Because the matter was never presented to the FCC, Alpine's assertion here is barred under 47 U.S.C. § 405(a). *See Qwest Corp. v. FCC*, 482 F.3d 471, 474-77 (D.C. Cir. 2007).

Prior to this Court's *NextWave* decision, the FCC had in fact sought to treat NextWave *precisely* the same as Alpine, by strictly enforcing the automatic cancellation rule. As it did with Alpine, the FCC: (1) announced that NextWave's licenses had canceled upon payment default by operation of the automatic cancellation rule; (2) included the spectrum formerly assigned to NextWave in a new auction; (3) objected to NextWave's proposed reorganization plan on the grounds the licenses had canceled and were no longer in the estate; and (4) denied NextWave's request for reconsideration of automatic cancellation, finding that granting relief to NextWave would be inconsistent with the fundamental purpose of the automatic cancellation rule. *See NextWave*, 254 F.3d at 137-39.

Accordingly, until this Court reversed the cancellation of NextWave's licenses under section 525 of the Bankruptcy Code, the FCC treated NextWave and Alpine identically in enforcing its installment payment rules.

In the aftermath of this Court's decision, which was upheld by the Supreme Court, NextWave's licenses were deemed never to have canceled, *see Public Notice*, 16 FCC Rcd 15970 (WTB 2001) (reinstating NextWave's licenses to active status), and the FCC resumed its position as a secured creditor in the *NextWave* bankruptcy case. Under the Bankruptcy Code, NextWave had special advantages in dealing with secured creditors that are not available to debtors such as Alpine outside of bankruptcy. Because NextWave's outstanding auction debt was greater than the current value of the licenses, NextWave could use the Bankruptcy Code to reduce the FCC's secured claim to the current value of the licenses, and have the remaining part of its unpaid debt treated as "unsecured" and discharged in the

bankruptcy case, or alternatively pay the entire debt over an extended period beyond the payment terms of the original note.¹³ In addition, upon resumption of the bankruptcy case, NextWave threatened litigation against the FCC based on allegations that the FCC's actions in canceling NextWave's licenses in violation of section 525 of the Bankruptcy Code allegedly injured NextWave. *See* NextWave Global Settlement Motion at 4, ¶ 9 (JA ____) (referencing NextWave's claims against the FCC). Given these circumstances, the FCC determined to settle the NextWave bankruptcy case to put an end to the years of litigation and obtain a "positive outcome for the government." *Id.* at 19, ¶ 19.

As the FCC found, none of the special circumstances leading to the NextWave settlement were present in Alpine's waiver request. *Order*, ¶¶ 48-49 (JA __-__). Although allowing NextWave to retain its licenses may be "grossly unfair" to losing bidders and licensees who forfeited their licenses or made timely payments despite financial difficulties, such arguable unfairness arises from the application of the Bankruptcy Code's protections. *NextWave*, 254 F.3d at 154-55. "The Code expressly contemplates that bankrupts will sometimes avoid the consequences of late or non-payment they might have faced had they not filed for bankruptcy." *Id.* at 155.

¹³ *See* 11 U.S.C. § 506(a) (limiting secured claims to the actual value of the collateral); § 524(a) (effect of discharge); § 1141(d) (discharge of all debts except those paid in a confirmed plan); § 1129(b)(2)(A)(i)(II) (deferred payment of secured claims).

II. ALPINE'S ADDITIONAL ARGUMENTS FOR REVERSAL ARE BASELESS.

Alpine offers a litany of additional claims. None provides any basis to reverse the *Order*.

A. The FCC Did Not Violate The Bankruptcy Code's Automatic Stay In Issuing the *Order*, and In Any Event, Alpine's Argument Is Waived.

Alpine's lead argument is that the FCC could not continue to consider Alpine's reconsideration petition once its bankruptcy case was filed because the Bankruptcy Code's automatic stay, 11 U.S.C. § 362(a), allegedly barred continuation of any administrative proceeding against the debtor to obtain possession against any property of the estate; therefore, Alpine asserts, the *Order* is void. Br. 20-23.

Alpine's claim is predicated on the erroneous assumption that the licenses were part of Alpine's bankruptcy estate at the time of the *Order*. As we have explained, however, the licenses were granted to Alpine contingent on full and timely payment of the auction debt, and the licenses automatically terminated upon failure to meet that essential license condition in 2002, six years before Alpine's bankruptcy. As the bankruptcy court determined in denying Alpine's request to stay the auction, the automatic stay is inapplicable because the canceled licenses were not part of the bankruptcy estate. *See In re Alpine PCS, Inc.*, Case No. 08-00543 (Bankr. D.D.C., October 10, 2008), *aff'd*, Case No. 08-2055 (EGS) (D.D.C., July 22, 2009), *appeal pending*, Case No. 09-5293 (D.C. Cir.).

Moreover, Alpine had ample opportunity to inform the FCC of its position that continuation of the reconsideration proceeding was barred by the automatic stay. Yet, although Alpine took other affirmative steps seeking to enforce the automatic stay against the FCC's planned auction, it took no action before the bankruptcy court or the FCC requesting a stay of the FCC's consideration of the reconsideration petition. Because Alpine's automatic stay claim was not presented to the FCC in the reconsideration proceeding, it is not properly before this Court as a basis for overturning the *Order*. See 47 U.S.C. § 405(a). It is not enough that Alpine's bankruptcy was known to the FCC or that Alpine attempted unsuccessfully to use the automatic stay to halt the auction. The reconsideration proceeding was a "materially different" matter. See *U.S. Airwaves*, 232 F.3d at 236. If Alpine believed that the reconsideration proceeding was barred by the automatic stay, it was incumbent on Alpine to raise the issue directly, rather than attempting to "sandbag" the agency by withholding legal arguments until they reach the court of appeals. *Id.*

B. Alpine Defaulted Under The Terms Of The Note.

Alpine claims that it did not "default" under the Promissory Note for each license (JA __, __) because it had a "contractual right" to file for an "extension of payments" under the terms of the Notes. Br. 30-34. Alpine argues that it had two avenues to avoid cancellation – either making payment before the end of the two automatic grace periods, as provided in the FCC's rules, 47 C.F.R. § 1.2110(g)(4)(i)-(iv)(2001), or filing a written request for a grace period or extension of payments under the terms of the Note. *Id.* Alpine admits that it did

not comply with the FCC's default payment rules, but argues that its filings in 2002 met the specifications of the Note and thereby avoided a default under the Note.

Alpine's argument rests on the provision (set forth at pages 2-3 of the Note) specifying that a default occurs, *inter alia*, if the maker of the note "remains delinquent for more than 90 days" and has not submitted "a request in writing for a grace period or extension of payments, if any such grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission." (JA ____).

Alpine wrongly asserts it was not in default because it submitted a request in writing for an extension of payments before the last grace period expired. However, as discussed more fully at pp. 35-39 of the Government's brief in the bankruptcy appeal, *In re Alpine PCS, Inc.*, No. 09-5293, the Note states that a written request for a grace period or extension of payments will forestall a default only "*if* any such grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission." Note at 2 (JA __, __) (emphasis added).

Thus, contrary to Alpine's argument, the Note looks to the FCC's then-applicable rules to determine whether the filing of a written request for a grace period or extension of payments suspends automatic cancellation. Under the Note, filing a request for a grace period or extension of payments avoids automatic cancellation only "if" it is made pursuant to a "rule," applicable at the time of the delinquency, that specifically permits the filing of such a request and provides that

such a filing avoids automatic cancellation. Indeed, the Note makes clear that the provisions of the Note do not supersede the requirements of the FCC's rules. The Note states at 6 (JA ____):

Nothing in this Note shall be deemed to modify any then-applicable orders and regulations of the Commission, and nothing in this Note shall be deemed to release the Maker from compliance therewith.

In this case, the Note tracked the operation of the original grace period rule (47 C.F.R. § 1.2110(d)(4)(ii)(1994)), in effect between 1994 and 1997. But the Commission modified the grace period rule in 1997, eliminating the opportunity to make written requests for individualized grace periods that would defer cancellation under the rules. *See Grace Period Order*, 13 FCC Rcd 374 (1997), *aff'd*, *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 923 (2002). The new grace period rules gave licensees two automatic three-month grace periods, followed by automatic cancellation if payment was not made within the two specified grace periods. *See* 47 C.F.R. § 1.2110(g)(4)(iv) (the version of the rule effective at the time of Alpine's default). *See also Celtronix Telemetry*, 272 F.3d at 589 (the Commission "replaced" the old grace period and "indisputably intended its new grace period rule to apply to payment delays occurring after the rule's adoption").

As the FCC correctly concluded, the installment payment rule in effect at the time of Alpine's failure to pay, section 1.2110(g)(4), does not permit any requests for additional grace periods or extensions of payments beyond the two automatic grace periods provided by the rule. *Order*, ¶ 70 (JA ____). Accordingly, regardless

of Alpine's attempted requests for an additional extension of payments, the "if" clause of the Note was not met by any of Alpine's filings, and those filings did not forestall automatic cancellation on August 1, 2002 pursuant to section 1.2104(g)(4)(iv).

Alpine argues that any "ambiguities" in the Note should be construed against the FCC as drafter. Br. 32-33. However, there is no ambiguity in the Note – it plainly incorporates the grace period provisions of whatever FCC's rules are in effect at the time of the missed payment. The FCC found that, after the 1997 rule amendments, no FCC rule allows the filing of a request for a grace period or extension of payments. *Order*, ¶ 70 (JA ____). The FCC's construction of its own rules and their operation is "controlling" unless inconsistent with the plain meaning of the rules or prior FCC precedent. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). Here, the FCC's construction of its rules concerning the availability of grace periods and extensions of payments is fully consistent with the FCC's declarations since 1997 that a license cancels automatically after the end of the two grace periods, and no filing by a licensee can forestall automatic cancellation.

Even assuming, *arguendo*, that the Note does provide Alpine a special contractual right to avoid default independent of the generally applicable rules, Alpine's filings in 2002 did not meet the stand-alone requirements of the Note. Alpine wholly ignores the provision of the Note stating that a default occurs "***if the Maker remains delinquent for more than 90 days***" and has not "submitted a written request for a grace period or payment extension." JA _____. In other words, under the Note, any written request for a grace period or extension of payments

had to be submitted *before* the expiration of the 90-day delinquency period permitted in the Note. A written request for a grace period submitted after the 90th day is thus ineffective to avoid default and license cancellation. *See in re Grace Period Request Letter for Allen Leeds*, 16 FCC Rcd 17621 (A&IAD, WTB 2001) (under the pre-1997 rules, paralleling the default terms of the Note, a grace period request must be submitted no later than the end of the 90-day delinquency period and a grace period request submitted after the 90th day is ineffective), *recon. denied*, 22 FCC Rcd. 1508 (WTB 2007), *review denied*, 25 FCC Rcd 469 (2010), *petition for recon. pending*.

Because Alpine missed its payments due on January 31, 2002, under the default provisions of the Note, Alpine had until May 1, 2002 to file a written request for extension of payments to avoid a default on the 91st day. However, under the undisputed facts, Alpine did not submit any extension request until July 24, 2002. Thus, even under Alpine's own argument that the Note trumps the FCC's rules, Alpine was in default under the express terms of the Note and its licenses accordingly canceled.¹⁴

¹⁴ Alpine observes that the FCC filed papers to perfect and continue its secured lien after the licenses had already canceled. Br. 11-12. As explained in Exhibit C to the FCC's proof of claim (attached as an Appendix to Alpine's brief), the FCC has an unsecured claim for the balance of Alpine's auction debt because the collateral securing the Note (the licenses) no longer exists, now that the licenses have canceled. However, if the licenses had been reinstated through the waiver proceeding, or are reinstated by this Court on appeal, the perfected liens on file would serve to protect the FCC's status at that point as a secured creditor.

C. The FCC Had No Fiduciary Or Contractual Duty To Renegotiate Alpine's Auction Debt.

Alpine claims that in refusing to waive the automatic cancellation rule and renegotiate Alpine's debt, the FCC breached an alleged "fiduciary" relationship with Alpine and an implied covenant of good faith and fair dealing in the Note. Br. 34-36.

This argument is mistaken. The FCC does not have a fiduciary duty to the licensees it regulates; instead, the FCC has a duty to the American public to assure the efficient use of spectrum for the public benefit. The FCC fulfills that public duty by enforcing its rules, including the automatic cancellation rule. In establishing the auction program, the FCC did not assume a role other than that of a licensing authority and regulator of spectrum: the method of selection changed, but not the FCC's obligations to regulate in the public interest.

Although Congress contemplated that licensees would begin paying for valuable spectrum licenses through the auction program, it made clear that the use of auctions would not "diminish the authority of the FCC under the other provisions of [the Act] to regulate or reclaim spectrum licenses;" or "be construed to convey any rights . . . that differ from the rights that apply to other licenses." *See* 47 U.S.C. §§ 309(j)(6)(C), (D). *See also Celtronix Telemetry*, 272 F.3d at 590 (rejecting a claim that auction winning bidders obtained special contractual protections against the FCC's exercise of its regulatory powers in the public interest).

The only citations offered by Alpine to support the FCC's alleged fiduciary status are two state court decisions suggesting that, in unusual cases, a fiduciary relationship can be created between a bank and its longtime customer where the customer relies on the bank for financial advice beyond a normal banking relationship.¹⁵ These decisions are far afield from the present case. Here, the FCC made no promises to Alpine as to the value of the auctioned spectrum or its future success as a licensee. To the contrary, prospective bidders were specifically warned before the C-Block auction that the opportunity to acquire a license "is not, however, for everyone. Many people will lose money. You should only enter these auctions if you are fully aware of the risks." See C-Block Bidder Information Package, August 2, 1995 at 3. <http://wireless.fcc.gov/auctions/05/releases/c-bip1.pdf>.

In sum, the FCC did not create a fiduciary relationship with Alpine and breached no duty to Alpine in enforcing the automatic cancellation rule.

D. The FCC Did Not Violate Its Debt-Collection Procedures.

Alpine claims that the waiver denial is void because 47 C.F.R. § 1.1911(e) required the FCC to respond promptly and "within 30 days whenever feasible" to

¹⁵ See *Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 64 P.2d 101 (1937); *Barret v. Bank of America*, 229 Cal. Rptr. 16 (1986). These cases have not been extended to normal commercial banking relationships. See, e.g., *Jette v. Orange County Financial, Inc.*, 2008 WL 5113785 (E.D. Cal. Nov. 24, 2008) (dismissing fiduciary claims).

Alpine's waiver request. Br. 38. This Court rejected a similar claim in *Morris*, 566 F.3d at 192, and should do so here as well.

The *Morris* court assumed for purposes of its decision that the FCC's delay in ruling on Morris's waiver request violated the response time set forth in section 1.1911(e), but the Court held that such a violation had no effect on the validity of the automatic cancellation or the waiver decision. 566 F.3d at 192. As the Court explained in *Morris*, 47 C.F.R. § 1.1902(f) provides that nothing in the debt collection rules shall supersede or invalidate other FCC rules "including but not limited to the Commission's *right to cancel a license or authorization*." *Id.* (italics in original). Indeed, not mentioned in *Morris*, the rules further make clear that "[t]he failure or omission of the Commission to comply with any provision in this regulation shall not serve as a defense to any debtor." 47 C.F.R. § 1.1908.

Moreover, the FCC found here that the time limits in section 1.1911(e) are inapplicable to the FCC's enforcement of its automatic cancellation rule, or the handling of requests to waive that rule. *See Order*, ¶ 72 (JA ____). Section 1.1911 is within Part 1, Subpart O of the rules, and addresses the FCC's demand for payment of a delinquent debt. Subsection (e) concerns how the FCC handles inquiries or correspondence from the debtor *after* a written demand for payment of a delinquent debt is made by the FCC. It has no relationship at all to the FCC's handling of a waiver request under 47 C.F.R. § 1.925, which imposes no time limit on the FCC's consideration.

Finally, Alpine argues that the FCC's delays in responding to Alpine's waiver and debt restructuring requests somehow invalidate the FCC's waiver

denial because failure to respond promptly to Alpine's requests allegedly led to Alpine's financial demise. Br. 35. As the FCC recognized, this claim is belied by Alpine's statements showing that Alpine's financial fall took place in 2001 and 2002. Alpine's financial woes were in fact the impetus for filing the restructuring and waiver requests, and not the consequence of the FCC's alleged delay in providing a response. *See Order*, ¶ 75 & n.265 (JA ____).

The FCC and its staff were compelled to balance the time and resources spent on reviewing requests to waive the automatic cancellation rule by defaulting former licensees against the agency's other ongoing activities, which included conducting more than 40 new spectrum auctions since July 2002. The staff reasonably gave a lower priority in the agency's overall mission to requests to waive the automatic cancellation rule, particularly where, as here, a defaulting former licensee admitted that it could not continue to meet its ongoing auction debt payments and could not build out its network to provide commercial service to the public.

In the end, Alpine's complaint is not with the chronology of the FCC's response to the waiver request, but with the content of its ultimate answer. The fundamental issue is whether (not when) the FCC reasonably denied Alpine's waiver request, given that Alpine acknowledged in 2002 that it could not make its installment payments, would not be able to make them in the future, and could not build out its network because of existing financial difficulties. *Cf. Morris*, 566 F.3d at 191-92 (FCC delay in responding to requests of defaulting licensee did not

provide basis for equitable estoppel). Alpine's argument provides no basis to reverse the *Order*.

CONCLUSION

Based on the foregoing, the Court should affirm the FCC's *Order*.

Respectfully submitted

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July 2, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALPINE PCS, INC.)	
)	
APPELLANT,)	
)	
V.)	
)	
FEDERAL COMMUNICATIONS COMMISSION)	No. 10-1020
)	
APPELLEE.)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case contains 10853 words.

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July 2, 2010

10-1020

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Alpine PCS, Inc., Appellant,

v.

Federal Communications Commission, Appellee.

CERTIFICATE OF SERVICE

I, Richard K. Welch, hereby certify that on July 2, 2010, I caused to be electronically filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

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STATUTORY AND RULE APPENDIX

11 U.S.C. § 362(a)
11 U.S.C. § 506(a)
11 U.S.C. § 524(a)
11 U.S.C. § 525(a)
11 U.S.C. § 1129(b)
11 U.S.C. § 1141(d)

47 U.S.C. § 154(j)
47 U.S.C. § 301
47 U.S.C. § 307(a)
47 U.S.C. § 309(a)
47 U.S.C. § 309(j)
47 U.S.C. § 402
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31 C.F.R. § 902.2
47 C.F.R. § 1.925
47 C.F.R. § 1.1902
47 C.F.R. § 1.1908
47 C.F.R. § 1.1911
47 C.F.R. § 1.2110(d)(4)(1994)
47 C.F.R. § 1.2110

11 U.S.C. § 1129(b)

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER II. REORGANIZATION
SUBCHAPTER II. THE PLAN

§ 1129. Confirmation of plan

* * * * *

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

* * * * *

11 U.S.C.A. § 362(a)

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 3. CASE ADMINISTRATION
SUBCHAPTER IV. ADMINISTRATIVE POWERS

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

* * * * *

11 U.S.C. § 506(a)

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER I. CREDITORS AND CLAIMS

§ 506. Determination of secured status

(a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

* * * * *

11 U.S.C. § 524(a)

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II. DEBTOR'S DUTIES AND BENEFITS

§ 524. Effect of discharge

(a) A discharge in a case under this title--

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

* * * * *

11 U.S.C. § 525(a)

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II. DEBTOR'S DUTIES AND BENEFITS

§ 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled “An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes,” approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

* * * * *

11 U.S.C. § 1141(d)

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER II. REORGANIZATION
SUBCHAPTER III. POSTCONFIRMATION MATTERS

§ 1141. Effect of confirmation

* * * * *

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not--

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if--

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(5) In a case in which the debtor is an individual--

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if--

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date; and

(ii) modification of the plan under section 1127 is not practicable; and

(C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that--

(i) section 522(q)(1) may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt--

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor--

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

47 U.S.C.A. 154(j)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 – WIRE OR RADIO COMMUNICATION
SUBCHAPTER I – GENERAL PROVISIONS

§ 154. Federal Communications Commission

* * * * *

(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or be attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * * * *

47 U.S.C. § 301

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 307(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 307. Licenses

(a) Grant

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

* * * * *

47 U.S.C. § 309(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

47 U.S.C. § 309(j)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 309. Application for license

* * * * *

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a

competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

- (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
 - (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
 - (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;
 - (D) efficient and intensive use of the electromagnetic spectrum;
 - (E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed; and
 - (i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and
 - (ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.
 - (F) for any auction of eligible frequencies described in section 923(g)(2) of this title, the recovery of 110 percent of estimated relocation costs as provided to the Commission pursuant to section 923(g)(4) of this title.
- (4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall--

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraphs (B), (D), and (E), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 154(k) of this title for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each expenditure made for purposes of conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding--

(i) the deposits of successful bidders shall be paid to the Treasury, except as otherwise provided in subparagraph (E)(ii);

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 614 of this title.

(D) Disposition of cash proceeds

Cash proceeds attributable to the auction of any eligible frequencies described in section 923(g)(2) of this title shall be deposited in the Spectrum Relocation Fund established under section 928 of this title, and shall be available in accordance with that section.

(E) Transfer of receipts

(i) Establishment of fund

There is established in the Treasury of the United States a fund to be known as the Digital Television Transition and Public Safety Fund.

(ii) Proceeds for funds

Notwithstanding subparagraph (A), the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system under this subsection with respect to recovered analog spectrum shall be deposited in the Digital Television Transition and Public Safety Fund.

(iii) Transfer of amount to Treasury

On September 30, 2009, the Secretary shall transfer \$7,363,000,000 from the Digital Television Transition and Public Safety Fund to the general fund of the Treasury.

(iv) Recovered analog spectrum

For purposes of clause (i), the term “recovered analog spectrum” has the meaning provided in paragraph (15)(C)(vi).

(9) Use of former government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that--

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 921 et. seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless--

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C.A. § 923(a)]; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if--

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C.A. § 924(a)];

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act [47 U.S.C.A. § 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2012.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report--

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent--

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make

significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by--

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall--

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications.--In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)--

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to--

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than \$400,000,000, and if such amount is less than \$400,000,000, the Commission shall recover an amount equal to \$400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on August 5, 1997.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial full-power television broadcast licenses

A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond June 12, 2009.

(B) Spectrum reversion and resale

(i) The Commission shall--

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection.

(C) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum reclaimed pursuant to subparagraph (B)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not--

(i) preclude any party from being a qualified bidder for such spectrum on the basis of--
-

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II) the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

(D) Redesignated (C)

(15) Commission to determine timing of auctions

(A) Commission authority

Subject to the provisions of this subsection (including paragraph (11)), but notwithstanding any other provision of law, the Commission shall determine the timing of and deadlines for the conduct of competitive bidding under this subsection, including the timing of and deadlines for qualifying for bidding; conducting auctions; collecting, depositing, and reporting revenues; and completing licensing processes and assigning licenses.

(B) Termination of portions of auctions 31 and 44

Except as provided in subparagraph (C), the Commission shall not commence or conduct auctions 31 and 44 on June 19, 2002, as specified in the public notices of March 19, 2002, and March 20, 2002 (DA 02-659 and DA 02-563).

(C) Exception

(i) Blocks excepted

Subparagraph (B) shall not apply to the auction of--

(I) the C-block of licenses on the bands of frequencies located at 710-716 megahertz, and 740-746 megahertz; or

(II) the D-block of licenses on the bands of frequencies located at 716-722 megahertz.

(ii) Eligible bidders

The entities that shall be eligible to bid in the auction of the C-block and D-block licenses described in clause (i) shall be those entities that were qualified entities, and that submitted applications to participate in auction 44, by May 8, 2002, as part of the original auction 44 short form filing deadline.

(iii) Auction deadlines for excepted blocks

Notwithstanding subparagraph (B), the auction of the C-block and D-block licenses described in clause (i) shall be commenced no earlier than August 19, 2002, and no later than September 19, 2002, and the proceeds of such auction shall be deposited in accordance with paragraph (8) not later than December 31, 2002.

(iv) Report

Within one year after the date of enactment of this paragraph, the Commission shall submit a report to Congress--

(I) specifying when the Commission intends to reschedule auctions 31 and 44 (other than the blocks excepted by clause (i)); and

(II) describing the progress made by the Commission in the digital television transition and in the assignment and allocation of additional spectrum for advanced mobile communications services that warrants the scheduling of such auctions.

(v) Additional deadlines for recovered analog spectrum

Notwithstanding subparagraph (B), the Commission shall conduct the auction of the licenses for recovered analog spectrum by commencing the bidding not later than January 28, 2008, and shall deposit the proceeds of such auction in accordance with paragraph (8)(E)(ii) not later than June 30, 2008.

(vi) Recovered analog spectrum

For purposes of clause (v), the term "recovered analog spectrum" means the spectrum between channels 52 and 69, inclusive (between frequencies 698 and 806 megahertz, inclusive) reclaimed from analog television service broadcasting under paragraph (14), other than--

(I) the spectrum required by section 337 to be made available for public safety services; and

(II) the spectrum auctioned prior to February 8, 2006.

(D) Return of payments

Within one month after the date of enactment of this paragraph, the Commission shall return to the bidders for licenses in the A-block, B-block, and E-block of auction 44 the full amount of all upfront payments made by such bidders for such licenses.

(16) Special auction provisions for eligible frequencies

(A) Special regulations

The Commission shall revise the regulations prescribed under paragraph (4)(F) of this subsection to prescribe methods by which the total cash proceeds from any auction of eligible frequencies described in section 923(g)(2) of this title shall at least equal 110 percent of the total estimated relocation costs provided to the Commission pursuant to section 923(g)(4) of this title.

(B) Conclusion of auctions contingent on minimum proceeds

The Commission shall not conclude any auction of eligible frequencies described in section 923(g)(2) of this title if the total cash proceeds attributable to such spectrum are less than 110 percent of the total estimated relocation costs provided to the Commission pursuant to section 923(g)(4) of this title. If the Commission is unable to conclude an auction for the foregoing reason, the Commission shall cancel the auction, return within 45 days after the auction cancellation date any deposits from participating bidders held in escrow, and absolve such bidders from any obligation to the United States to bid in any subsequent reauction of such spectrum.

(C) Authority to issue prior to deauthorization

In any auction conducted under the regulations required by subparagraph (A), the Commission may grant a license assigned for the use of eligible frequencies prior to the termination of an eligible Federal entity's authorization. However, the Commission shall condition such license by requiring that the licensee cannot cause harmful interference to such Federal entity until such entity's authorization has been terminated by the National Telecommunications and Information Administration.

47 U.S.C. § 402

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

- (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
- (2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
- (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
- (4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
- (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.
- (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.
- (7) By any person upon whom an order to cease and desist has been served under section 312 of this title.
- (8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 U.S.C.A. § 405(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order.

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

31 C.F.R. §902.2

CODE OF FEDERAL REGULATIONS
TITLE 31—MONEY AND FINANCE: TREASURY
SUBTITLE B—REGULATIONS RELATING TO MONEY AND FINANCE
CHAPTER IX—FEDERAL CLAIMS COLLECTION STANDARDS (DEPARTMENT
OF THE TREASURY - DEPARTMENT OF JUSTICE)
PART 902—STANDARDS FOR THE COMPROMISE OF CLAIMS

§ 902.2 Bases for compromise.

(a) Agencies may compromise a debt if the Government cannot collect the full amount because:

(1) The debtor is unable to pay the full amount in a reasonable time, as verified through credit reports or other financial information;

(2) The Government is unable to collect the debt in full within a reasonable time by enforced collection proceedings;

(3) The cost of collecting the debt does not justify the enforced collection of the full amount; or

(4) There is significant doubt concerning the Government's ability to prove its case in court.

(b) In determining the debtor's inability to pay, agencies should consider relevant factors such as the following:

(1) Age and health of the debtor;

(2) Present and potential income;

(3) Inheritance prospects;

(4) The possibility that assets have been concealed or improperly transferred by the debtor; and

(5) The availability of assets or income that may be realized by enforced collection proceedings.

(c) Agencies should verify the debtor's claim of inability to pay by using a credit report and other financial information as provided in paragraph (g) of this section. Agencies should consider the applicable exemptions available to the debtor under state and Federal law in determining the Government's ability to enforce collection. Agencies also may consider uncertainty as to the price that collateral or other property will bring at a forced

sale in determining the Government's ability to enforce collection. A compromise effected under this section should be for an amount that bears a reasonable relation to the amount that can be recovered by enforced collection procedures, with regard to the exemptions available to the debtor and the time that collection will take.

(d) If there is significant doubt concerning the Government's ability to prove its case in court for the full amount claimed, either because of the legal issues involved or because of a bona fide dispute as to the facts, then the amount accepted in compromise of such cases should fairly reflect the probabilities of successful prosecution to judgment, with due regard given to the availability of witnesses and other evidentiary support for the Government's claim. In determining the litigative risks involved, agencies should consider the probable amount of court costs and attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412, that maybe imposed against the Government if it is unsuccessful in litigation.

(e) Agencies may compromise a debt if the cost of collecting the debt does not justify the enforced collection of the full amount. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection, with consideration given to the time it will take to effect collection. Collection costs may be a substantial factor in the settlement of small debts. In determining whether the cost of collecting justifies enforced collection of the full amount, agencies should consider whether continued collection of the debt, regardless of cost, is necessary to further an enforcement principle, such as the Government's willingness to pursue aggressively defaulting and uncooperative debtors.

(f) Agencies generally should not accept compromises payable in installments. This is not an advantageous form of compromise in terms of time and administrative expense. If, however, payment of a compromise in installments is necessary, agencies should obtain a legally enforceable written agreement providing that, in the event of default, the full original principal balance of the debt prior to compromise, less sums paid thereon, is reinstated. Whenever possible, agencies also should obtain security for repayment in the manner set forth in part 901 of this chapter.

To assess the merits of a compromise offer based in whole or in part on the debtor's inability to pay the full amount of a debt within a reasonable time, agencies should obtain a current financial statement from the debtor, executed under penalty of perjury, showing the debtor's assets, liabilities, income and expenses. Agencies also may obtain credit reports or other financial information to assess compromise offers. Agencies may use their own financial information form or may request suitable forms from the Department of Justice or the local United States Attorney's Office.

47 C.F.R. § 1.925

CODE OF FEDERAL REGULATIONS
TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A—GENERAL
PART 1—PRACTICE AND PROCEDURE
SUBPART F—WIRELESS RADIO SERVICES APPLICATIONS AND PROCEEDINGS
APPLICATION REQUIREMENTS AND PROCEDURES

§ 1.925 Waivers.

(a) Waiver requests generally. The Commission may waive specific requirements of the rules on its own motion or upon request. The fees for such waiver requests are set forth in § 1.1102 of this part.

(b) Procedure and format for filing waiver requests.

(1) Requests for waiver of rules associated with licenses or applications in the Wireless Radio Services must be filed on FCC Form 601, 603, or 605.

(2) Requests for waiver must contain a complete explanation as to why the waiver is desired. If the information necessary to support a waiver request is already on file, the applicant may cross-reference the specific filing where the information may be found.

(3) The Commission may grant a request for waiver if it is shown that:

(i) The underlying purpose of the rule(s) 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) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

(4) Applicants requiring expedited processing of their request for waiver shall clearly caption their request for waiver with the words "WAIVER—EXPEDITED ACTION REQUESTED."

I Action on Waiver Requests.

(i) The Commission, in its discretion, may give public notice of the filing of a waiver request and seek comment from the public or affected parties.

(ii) Denial of a rule waiver request associated with an application renders that application defective unless it contains an alternative proposal that fully complies with the rules, in which event, the application will be processed using the alternative proposal as if the waiver had not been requested. Applications rendered defective may be dismissed without prejudice.

47 C.F.R. § 1.1902

CODE OF FEDERAL REGULATIONS
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CHAPTER I - FEDERAL COMMUNICATIONS COMMISSION
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PART 1. PRACTICE AND PROCEDURE
SUBPART O - COLLECTION OF CLAIMS OWED THE UNITED STATES
GENERAL PROVISIONS

§ 1.1902 Exceptions.

(a) Claims arising from the audit of transportation accounts pursuant to 31 U.S.C. 3726 shall be determined, collected, compromised, terminated or settled in accordance with regulations published under the authority of 31 U.S.C. 3726 (see 41 CFR part 101-41).

(b) Claims arising out of acquisition contracts subject to the Federal Acquisition Regulations (FAR) shall be determined, collected, compromised, terminated, or settled in accordance with those regulations. (See 48 CFR part 32). If not otherwise provided for in the FAR, contract claims that have been the subject of a contracting officer's final decision in accordance with section 6(a) of the Contract Disputes Act of 1978 (41 U.S.C. 605(a)), may be determined, collected, compromised, terminated or settled under the provisions of this regulation, except that no additional review of the debt shall be granted beyond that provided by the contracting officer in accordance with the provisions of section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605), and the amount of any interest, administrative charge, or penalty charge shall be subject to the limitations, if any, contained in the contract out of which the claim arose.

(c) Claims based in whole or in part on conduct in violation of the antitrust laws, or in regard to which there is an indication of fraud, the presentation of a false claim, or a misrepresentation on the part of the debtor or any other party having an interest in the claim, shall be referred to the Department of Justice (DOJ) as only the DOJ has authority to compromise, suspend, or terminate collection action on such claims. The standards in the FCCS relating to the administrative collection of claims do apply, but only to the extent authorized by the DOJ in a particular case. Upon identification of a claim based in whole or in part on conduct in violation of the antitrust laws or any claim involving fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any party having an interest in the claim, the Commission shall promptly refer the case to the Department of Justice for action. At its discretion, the DOJ may return the claim to the forwarding agency for further handling in accordance with the standards in the FCCS.

(d) Tax claims are excluded from the coverage of this regulation.

(e) The Commission will attempt to resolve interagency claims by negotiation in accordance with Executive Order 12146 (3 CFR 1980 Comp., pp. 409-412).

(g) Nothing in this subpart shall supercede or invalidate other Commission rules, such as the part 1 general competitive bidding rules (47 CFR part 1, subpart Q) or the service specific competitive bidding rules, as may be amended, regarding the Commission's rights, including but not limited to the Commission's right to cancel a license or authorization, obtain judgment, or collect interest, penalties, and administrative costs.

47 C.F.R. § 1.1908

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SUBPART O. COLLECTION OF CLAIMS OWED THE UNITED STATES
GENERAL PROVISIONS

§ 1.1908 Omissions not a defense.

The failure or omission of the Commission to comply with any provision in this regulation shall not serve as a defense to any debtor.

47 C.F.R. § 1.1911

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PART 1. PRACTICE AND PROCEDURE
SUBPART O - COLLECTION OF CLAIMS OWED THE UNITED STATES
ADMINISTRATIVE OFFSET--CONSUMER REPORTING AGENCIES--
CONTRACTING FOR COLLECTION

§ 1.1911 Demand for payment.

(a) Written demand as described in paragraph (b) of this section, and which may be in the form of a letter, order, memorandum, or other form of written communication, will be made promptly upon a debtor of the United States in terms that inform the debtor of the consequences of failing to cooperate to resolve the debt. The specific content, timing, and number of demand letters depend upon the type and amount of the debt, including, e.g., any notes and the terms of agreements of the parties, and the debtor's response, if any, to the Commission's letters or telephone calls. One demand letter will be deemed sufficient. In determining the timing of the demand letter(s), the Commission will give due regard to the need to refer debts promptly to the Department of Justice for litigation, in accordance with the FCCS. When necessary to protect the Government's interest (for example, to prevent the expiration of a statute of limitations), written demand may be preceded by other appropriate actions under the FCCS, including immediate referral for litigation. The demand letter does not provide an additional period within to challenge the existence of, or amount of the non-tax debt if such time period has expired under Commission rules or other applicable limitation periods. Nothing contained herein is intended to limit the Commission's authority or discretion as may otherwise be permitted to collect debts owed.

(b) The demand letter will inform the debtor of:

- (1) The basis for the indebtedness and the opportunities, if any, of the debtor to request review within the Commission;
- (2) The applicable standards for assessing any interest, penalties, and administrative costs (§§ 1.1940 and 1.1941);
- (3) The date by which payment is to be made to avoid late charges and enforced collection, which normally will not be more than 30 days from the date that the initial demand letter was mailed or hand-delivered; and

(4) The name, address, and phone number of a contact person or office within the Commission.

(c) The Commission will expend all reasonable effort to ensure that demand letters are mailed or hand-delivered on the same day that they are dated. As provided for in any agreement among parties, or as may be required by exigent circumstances, the Commission may use other forms of delivery, including, e.g., facsimile telecopier or electronic mail. There is no prescribed format for demand letters. The Commission utilizes demand letters and procedures that will lead to the earliest practicable determination of whether the debt can be resolved administratively or must be referred for litigation.

(d) The Commission may, as circumstances and the nature of the debt permit, include in demand letters such items as the Commission's willingness to discuss alternative methods of payment; its policies with respect to the use of credit bureaus, debt collection centers, and collection agencies; the Commission's remedies to enforce payment of the debt (including assessment of interest, administrative costs and penalties, administrative garnishment, the use of collection agencies, Federal salary offset, tax refund offset, administrative offset, and litigation); the requirement that any debt delinquent for more than 180 days be transferred to the Department of the Treasury for collection; and, depending on applicable statutory authority, the debtor's entitlement to consideration of a waiver. Where applicable, the debtor will be provided with a period of time (normally not more than 15 calendar days) from the date of the demand in which to exercise the opportunity to request a review.

(e) The Commission will respond promptly to communications from the debtor, within 30 days whenever feasible, and will advise debtors who dispute the debt that they must furnish available evidence to support their contentions.

(f) Prior to the initiation of the demand process or at any time during or after completion of the demand process, if the Commission determines to pursue, or is required to pursue, offset, the procedures applicable to offset in §§ 1.1912 and 1.1913, as applicable, will be followed. The availability of funds or money for debt satisfaction by offset and the Commission's determination to pursue collection by offset shall release the Commission from the necessity of further compliance with paragraphs (a), (b), (c), and (d) of this section.

(g) Prior to referring a debt for litigation, the Commission will advise each person determined to be liable for the debt that, unless the debt can be collected administratively, litigation may be initiated. This notification will follow the requirements of Executive Order 12988 (3 CFR, 1996 Comp., pp. 157-163) and may be given as part of a demand letter under paragraph (b) of this section or in a separate document. Litigation counsel for the Government will be advised that this notice has been given.

(h) When the Commission learns that a bankruptcy petition has been filed with respect to a debtor, before proceeding with further collection action, the Commission may

immediately seek legal advice from its counsel concerning the impact of the Bankruptcy Code on any pending or contemplated collection activities. Unless the Commission determines that the automatic stay imposed at the time of filing pursuant to 11 U.S.C. 362 has been lifted or is no longer in effect, in most cases collection activity against the debtor should stop immediately.

(1) After seeking legal advice, a proof of claim will be filed in most cases with the bankruptcy court or the Trustee. The Commission will refer to the provisions of 11 U.S.C. 106 relating to the consequences on sovereign immunity of filing a proof of claim.

(2) If the Commission is a secured creditor, it may seek relief from the automatic stay regarding its security, subject to the provisions and requirements of 11 U.S.C. 362.

(4) Offset is stayed in most cases by the automatic stay. However, the Commission will determine from its counsel whether its payments to the debtor and payments of other agencies available for offset may be frozen by the Commission until relief from the automatic stay can be obtained from the bankruptcy court. The Commission will also determine from its counsel whether recoupment is available.

47 C.F.R. § 1.2110(d)(4)(1994)

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SUB-CHAPTER A--GENERAL
PART 1--PRACTICE AND PROCEDURE
SUBPART Q--COMPETITIVE BIDDING PROCEEDINGS
GENERAL PROCEDURES

§ 1.2110 Designated entities.

* * * * *

(d) The Commission may permit small businesses, including small businesses owned by women and minorities and rural telephone companies that qualify as small businesses, that are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

* * * * *

(4) 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.

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to subpart O of this part.

* * * * *

47 C.F.R. § 1.2110

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CHAPTER I - **FEDERAL COMMUNICATIONS COMMISSION**
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART O - COMPETITIVE BIDDING PROCEEDINGS
GENERAL PROCEDURES

§ 1.2110 Designated entities.

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) Eligibility for small business and entrepreneur provisions--

(1) Size attribution.

(i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship.

(ii) If applicable, pursuant to § 24.709 of this chapter, the total assets of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as an entrepreneur. An applicant seeking status as an entrepreneur must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous two years of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship.

(2) Aggregation of affiliate interests. Persons or entities that hold interests in an

applicant (or licensee) that are affiliates of each other or have an identity of interests identified in § 1.2110(c)(5)(iii) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.

Example 1 to paragraph (b)(2): ABC Corp. is owned by individuals, A, B and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A & B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person or entity.

Example 2 to paragraph (b)(2): ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(3) Exceptions.

(i) Consortium. Where an applicant to participate in bidding for Commission licenses or permits is a consortium either of entities eligible for size-based bidding credits an/or for closed bidding based on gross revenues and/or total assets, the gross revenues and/or total assets of each consortium member shall not be aggregated. Each consortium member must constitute a separate and distinct legal entity to qualify for this exception. Consortia that are winning bidders using this exception must comply with the requirements of § 1.2107(g) of this chapter as a condition of license grant.

(ii) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(iii) Rural telephone cooperatives.

(A)(1) An applicant will be exempt from § 1.2110(c)(2)(ii)(F) for the purpose of attribution in § 1.2110(b)(1), if the applicant or a controlling interest in the applicant, as the case may be, meets all of the following conditions:

(i) The applicant (or the controlling interest) is organized as a cooperative pursuant to state law;

(ii) The applicant (or the controlling interest) is a "rural telephone company" as defined by the Communications Act; and

(iii) The applicant (or the controlling interest) demonstrates either that it is eligible for tax-exempt status under the Internal Revenue Code or that it

adheres to the cooperative principles articulated in *Puget Sound Plywood, Inc. v. Commissioner of Internal Revenue*, 44 T.C. 305 (1965).

(2) If the condition in paragraph (b)(3)(iii)(A)(1)(i) above cannot be met because the relevant jurisdiction has not enacted an organic statute that specifies requirements for organization as a cooperative, the applicant must show that it is validly organized and its articles of incorporation, by-laws, and/or other relevant organic documents provide that it operates pursuant to cooperative principles.

(B) However, if the applicant is not an eligible rural telephone cooperative under paragraph (a) of this section, and the applicant has a controlling interest other than the applicant's officers and directors or an eligible rural telephone cooperative's officers and directors, paragraph (a) of this section applies with respect to the applicant's officers and directors and such controlling interest's officers and directors only when such controlling interest is either:

(1) An eligible rural telephone cooperative under paragraph (a) of this section or

(2) controlled by an eligible rural telephone cooperative under paragraph (a) of this section.

(iv) Applicants or licensees with material relationships--

(A) Impermissible material relationships. An applicant or licensee that would otherwise be eligible for designated entity benefits under this section and applicable service-specific rules shall be ineligible for such benefits if the applicant or licensee has an impermissible material relationship. An applicant or licensee has an impermissible material relationship when it has arrangements with one or more entities for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 50 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.

(B) Attributable material relationships. An applicant or licensee must attribute the gross revenues (and, if applicable, the total assets) of any entity, (including the controlling interests, affiliates, and affiliates of the controlling interests of that entity) with which the applicant or licensee has an attributable material relationship. An applicant or licensee has an attributable material relationship when it has one or more arrangements with any individual entity for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.

(C) Grandfathering--

(1) Licensees. An impermissible or attributable material relationship shall not disqualify a licensee for previously awarded benefits with respect to a license awarded before April 25, 2006, based on spectrum lease or resale (including wholesale) arrangements entered into before April 25, 2006.

(2) Applicants. An impermissible or attributable material relationship shall not disqualify an applicant seeking eligibility in an application for a license, authorization, assignment, or transfer of control or for partitioning or disaggregation filed before April 25, 2006, based on spectrum lease or resale (including wholesale) arrangements entered into before April 25, 2006. Any applicant seeking eligibility in an application for a license, authorization, assignment, or transfer of control or for partitioning or disaggregation filed after April 25, 2006, or in an application to participate in an auction in which bidding begins on or after June 5, 2006, need not attribute the material relationship(s) of those entities that are its affiliates based solely on § 1.2110(c)(5)(i)(C) if those affiliates entered into such material relationship(s) before April 25, 2006, and are subject to a contractual prohibition preventing them from contributing to the applicant's total financing.

Example to paragraph (b)(3)(iv)(C)(2): Newco is an applicant seeking designated entity status in an auction in which bidding begins after the effective date of the rules. Investor is a controlling interest of Newco. Investor also is a controlling interest of Existing DE. Existing DE previously was awarded designated entity benefits and has impermissible material relationships based on leasing agreements entered into before April 25, 2006, with a third party, Lessee, that were in compliance with the Commission's designated eligibility standards prior to April 25, 2006. In this example, Newco would not be prohibited from acquiring designated entity benefits solely because of the existing impermissible material relationships of its affiliate, Existing DE. Newco, Investor, and Existing DE, however, would need to enter into a contractual prohibition that prevents Existing DE from contributing to the total financing of Newco.

(c) Definitions--

(1) Small businesses. The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) Controlling interests.

(i) For purposes of this section, controlling interest includes individuals or entities with either de jure or de facto control of the applicant. De jure control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) The entity plays an integral role in management decisions.

(ii) Calculation of certain interests.

(A) Fully diluted requirement.

(1) Except as set forth in paragraph (c)(2)(ii)(A)(2) of this section, ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(2) Rights of first refusal and put options shall not be calculated on a fully diluted basis for purposes of determining de jure control; however, rights of first refusal and put options shall be calculated on a fully diluted basis if such ownership interests, in combination with other terms to an agreement, deprive an otherwise qualified applicant or licensee of de facto control.

Note to paragraph (c)(2)(ii)(A): Mutually exclusive contingent ownership interests, i.e., one or more ownership interests that, by their terms, are mutually exclusive of one or more other ownership interests, shall be calculated as having been fully exercised only in the possible combinations in which they can be exercised by their holder(s). A contingent ownership interest is mutually exclusive of another only if contractual language specifies that both interests cannot be held simultaneously as present ownership interests.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of the applicant shall be considered to have a controlling interest in the applicant. The officers and directors of an entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant. The personal net worth, including personal income of the officers and directors of an applicant, is not attributed to the applicant. To the extent that the officers and directors of an applicant are affiliates of other entities, the gross revenues of the other entities are attributed to the applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have a controlling interest in such applicant or licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

- (1) The nature or types of services offered by such an applicant or licensee;
- (2) The terms upon which such services are offered; or
- (3) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have a controlling interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

- (1) The nature or types of services offered by such an applicant or licensee;
- (2) The terms upon which such services are offered; or
- (3) The prices charged for such services.

(3) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least greater than 50 percent equity ownership and, in the case of a corporate applicant, have a greater than 50

percent voting interest. For applicants that are partnerships, every general partner must be either a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of Black or African American, Hispanic or Latino, American Indian or Alaskan Native, Asian, and Native Hawaiian or Pacific Islander extraction.

(4) Rural telephone companies. A rural telephone company is any local exchange carrier operating entity to the extent that such entity--

(i) Provides common carrier service to any local exchange carrier study area that does not include either:

(A) Any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or

(B) Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(ii) Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(iii) Provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(iv) Has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(5) Affiliate.

(i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity--

(A) Directly or indirectly controls or has the power to control the applicant, or

(B) Is directly or indirectly controlled by the applicant, or

(C) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) Has an “identity of interest” with the applicant.

(ii) Nature of control in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the

same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) Spousal affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) Kinship affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context “immediate family member” means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) Affiliation through stock ownership.

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) Affiliation arising under stock options, convertible debentures, and agreements to merge. Except as set forth in paragraph (c)(2)(ii)(A)(2) of this section, stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 to paragraph (c)(5)(v). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

Note to paragraph (c)(5)(v): Mutually exclusive contingent ownership interests, i.e., one or more ownership interests that, by their terms, are mutually exclusive of one or more other ownership interests, shall be calculated as having been fully exercised only in the possible combinations in which they can be exercised by their holder(s). A contingent ownership interest is mutually exclusive of another only if contractual language specifies that both interests cannot be held simultaneously as present ownership interests.

(vi) Affiliation under voting trusts.

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of

shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) Affiliation under joint venture arrangements.

(A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be counted in determining such

applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

(6) Consortium. A consortium of small businesses, very small businesses, or entrepreneurs is a conglomerate organization composed of two or more entities, each of which individually satisfies the definition of a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. Each individual member must constitute a separate and distinct legal entity to qualify.

(d) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(e) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(f) Bidding credits.

(1) The Commission may award bidding credits (i.e., payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(2) Size of bidding credits. A winning bidder that qualifies as a small business may use the following bidding credits corresponding to its respective average gross revenues for the preceding 3 years:

(i) Businesses with average gross revenues for the preceding years, 3 years not exceeding \$3 million are eligible for bidding credits of 35 percent;

(ii) Businesses with average gross revenues for the preceding years, 3 years not exceeding \$15 million are eligible for bidding credits of 25 percent; and

(iii) Businesses with average gross revenues for the preceding years, 3 years not exceeding \$40 million are eligible for bidding credits of 15 percent.

(3) Bidding credit for serving qualifying tribal land. A winning bidder for a market will be eligible to receive a bidding credit for serving a qualifying tribal land within that market, provided that it complies with § 1.2107(e). The following definition, terms, and conditions shall apply for the purposes of this section and § 1.2107(e):

(i) Qualifying tribal land means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments, that has a wireline telephone subscription rate equal to or less than

eighty-five (85) percent based on the most recently available U.S. Census Data.

(ii) Certification.

(A) Within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and attach a certification from the tribal government stating the following:

(1) The tribal government authorizes the winning bidder to site facilities and provide service on its tribal land;

(2) The tribal area to be served by the winning bidder constitutes qualifying tribal land; and

(3) The tribal government has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate among wireless carriers seeking to provide service on the qualifying tribal land.

(B) In addition, within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and file a certification that it will comply with the construction requirements set forth in paragraph (f)(3)(vii) of this section and consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land.

(C) If the winning bidder fails to submit the required certifications within the 180-day period, the bidding credit will not be awarded, and the winning bidder must pay any outstanding balance on its winning bid amount.

(iii) Bidding credit formula. Subject to the applicable bidding credit limit set forth in § 1.2110(f)(3)(iv), the bidding credit shall equal five hundred thousand (500,000) dollars for the first two hundred (200) square miles (518 square kilometers) of qualifying tribal land, and twenty-five hundred (2500) dollars for each additional square mile (2.590 square kilometers) of qualifying tribal land above two hundred (200) square miles (518 square kilometers).

(iv) Bidding credit limit. If the high bid is equal to or less than one million (1,000,000) dollars, the maximum bidding credit calculated pursuant to § 1.2110(f)(3)(iii) shall not exceed fifty (50) percent of the high bid. If the high bid is greater than one million (1,000,000) dollars, but equal to or less than two million (2,000,000) dollars, the maximum bidding credit calculated pursuant to § 1.2110(f)(3)(iii) shall not exceed five hundred thousand (500,000) dollars. If the high bid is greater than two million (2,000,000) dollars, the maximum bidding credit calculated pursuant to § 1.2110(f)(3)(iii) shall not exceed thirty-five (35) percent of the high bid.

(v) Bidding credit limit in auctions subject to specified reserve price(s). In any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2) with reserve price(s) and in any auction with reserve price(s) in which the Commission specifies that this provision shall apply, the aggregate amount available to be awarded as bidding credits for serving qualifying tribal land with respect to all licenses subject to a reserve price shall not exceed the amount by which winning bids for those licenses net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the applicable reserve price. If the total amount that might be awarded as tribal land bidding credits based on applications for all licenses subject to the reserve price exceeds the aggregate amount available to be awarded, the Commission will award eligible applicants a pro rata tribal land bidding credit. The Commission may determine at any time that the total amount that might be awarded as tribal land bidding credits is less than the aggregate amount available to be awarded and grant full tribal land bidding credits to relevant applicants, including any that previously received pro rata tribal land bidding credits. To determine the amount of an applicant's pro rata tribal land bidding credit, the Commission will multiply the full amount of the tribal land bidding credit for which the applicant would be eligible excepting this limitation ((f)(3)(v)) of this section by a fraction, consisting of a numerator in the amount by which winning bids for licenses subject to the reserve price net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the reserve price and a denominator in the amount of the aggregate maximum tribal land bidding credits for which applicants for such licenses might have qualified excepting this limitation ((f)(3)(v)) of this section. When determining the aggregate maximum tribal land bidding credits for which applicants for such licenses might have qualified, the Commission shall assume that any applicant seeking a tribal land bidding credit on its long-form application will be eligible for the largest tribal land bidding credit possible for its bid for its license excepting this limitation ((f)(3)(v)) of this section. After all applications seeking a tribal land bidding credit with respect to licenses covered by a reserve price have been finally resolved, the Commission will recalculate the pro rata credit. For these purposes, final determination of a credit occurs only after any review or reconsideration of the award of such credit has been concluded and no opportunity remains for further review or reconsideration. To recalculate an applicant's pro rata tribal land bidding credit, the Commission will multiply the full amount of the tribal land bidding credit for which the applicant would be eligible excepting this limitation ((f)(3)(v)) of this section by a fraction, consisting of a numerator in the amount by which winning bids for licenses subject to the reserve price net of discounts the Commission takes into account when reporting net bids in the Public Notice closing the auction exceed the reserve price and a denominator in the amount of the aggregate amount of tribal land bidding credits for which all applicants for such licenses would have qualified excepting this limitation ((f)(3)(v)) of this section.

(vi) Application of credit. A pending request for a bidding credit for serving qualifying tribal land has no effect on a bidder's obligations to make any auction payments, including down and final payments on winning bids, prior to award of the

bidding credit by the Commission. Tribal land bidding credits will be calculated and awarded prior to license grant. If the Commission grants an applicant a pro rata tribal land bidding credit prior to license grant, as provided by paragraph (f)(3)(v) of this section, the Commission shall recalculate the applicant's pro rata tribal land bidding credit after all applications seeking tribal land biddings for licenses subject to the same reserve price have been finally resolved. If a recalculated tribal land bidding credit is larger than the previously awarded pro rata tribal land bidding credit, the Commission will award the difference.

(vii) Post-construction certification. Within fifteen (15) days of the third anniversary of the initial grant of its license, a recipient of a bidding credit under this section shall file a certification that the recipient has constructed and is operating a system capable of serving seventy-five (75) percent of the population of the qualifying tribal land for which the credit was awarded. The recipient must provide the total population of the tribal area covered by its license as well as the number of persons that it is serving in the tribal area.

(viii) Performance penalties. If a recipient of a bidding credit under this section fails to provide the post-construction certification required by paragraph (f)(3)(vii) of this section, then it shall repay the bidding credit amount in its entirety, plus interest. The interest will be based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted. Such payment shall be made within thirty (30) days of the third anniversary of the initial grant of its license. Failure to repay the bidding credit amount and interest within the required time period will result in automatic termination of the license without specific Commission action. Repayment of bidding credit amounts pursuant to this provision shall not affect the calculation of amounts available to be awarded as tribal land bidding credits pursuant to (f)(3)(v) of this section.

(g) Installment payments. The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified by public notice, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay a default payment pursuant to § 1.2104(g)(2).

(2) Within ten (10) days of the conditional grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment

payment plan. If a winning bidder eligible for installment payments fails to submit this additional ten (10) percent of its high bid by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due. When a winning bidder eligible for installment payments fails to submit this additional ten (10) percent of its winning bid, plus the late fee, by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of second down payments and any applicable late fees.

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) Impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) Allow installment payments for the full license term;

(iii) Begin with interest-only payments for the first two years; and

(iv) Amortize principal and interest over the remaining term of the license.

(4) 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.

(i) Any licensee that fails to submit its quarterly payment on an installment payment obligation (the "Required Installment Payment") may submit such payment on or before the last day of the next quarter (the "first additional quarter") without being considered delinquent. Any licensee making its Required Installment Payment during this period (the "first additional quarter grace period") will be assessed a late payment fee equal to five percent (5%) of the amount of the past due Required Installment Payment. The late payment fee applies to the total Required Installment Payment regardless of whether the licensee submitted a portion of its Required Installment Payment in a timely manner.

(ii) If any licensee fails to make the Required Installment Payment on or before the last day of the first additional quarter set forth in paragraph (g)(4)(i) of this section, the licensee may submit its Required Installment Payment on or before the last day of the next quarter (the "second additional quarter"), except that no such additional time will be provided for the July 31, 1998 suspension interest and installment payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications

Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, 13 FCC Rcd 8345 (1998). Any licensee making the Required Installment Payment during the second additional quarter (the “second additional quarter grace period”) will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due Required Installment Payment. Licensees shall not be required to submit any form of request in order to take advantage of the first and second additional quarter grace periods.

(iii) All licensees that avail themselves of these grace periods must pay the associated late payment fee(s) and the Required Installment Payment prior to the conclusion of the applicable additional quarter grace period(s). Payments made at the close of any grace period(s) will first be applied to satisfy any lender advances as required under each licensee's “Note and Security Agreement,” with the remainder of such payments applied in the following order: late payment fees, interest charges, installment payments for the most back-due quarterly installment payment.

(iv) If an eligible entity obligated to make installment payments fails to pay the total Required Installment Payment, interest and any late payment fees associated with the Required Installment Payment within two quarters (6 months) of the Required Installment Payment due date, it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures. A licensee in the PCS C or F blocks shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures, if the payment due on the payment resumption date, referenced in paragraph (g)(4)(ii) of this section, is more than ninety (90) days delinquent.

(h) The Commission may establish different upfront payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(i) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and all other agreements, including oral agreements, establishing, as applicable, de facto or de jure control of the entity or the presence or absence of impermissible and attributable material relationships. Designated entities also must provide the date(s) on which they entered into each of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at their facilities or with their designated agents the lists, summaries, dates, and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to § 1.2114.

(k) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(l) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

(m) Audits.

(1) Applicants and licensees claiming eligibility shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding FCC-licensed service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(n) Annual reports. Each designated entity licensee must file with the Commission an annual report within five business days before the anniversary date of the designated entity's license grant. The annual report shall include, at a minimum, a list and summaries of all agreements and arrangements (including proposed agreements and arrangements) that relate to eligibility for designated entity benefits. In addition to a summary of each agreement or arrangement, this list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement. Annual reports will be filed no later than, and up to five business days before, the anniversary of the designated entity's license grant.

(o) Gross revenues. Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross

revenues may be certified by its chief financial officer or its equivalent and must be prepared in accordance with Generally Accepted Accounting Principles.

(p) Total assets. Total assets shall mean the book value (except where generally accepted accounting principles (GAAP) require market valuation) of all property owned by an entity, whether real or personal, tangible or intangible, as evidenced by the most recently audited financial statements or certified by the applicant's chief financial officer or its equivalent if the applicant does not otherwise use audited financial statements.