ORAL ARGUMENT SCHEDULED FOR APRIL 11, 2011

BRIEF FOR APPELLEE

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

NO. 10-1264

SPECTRUM IVDS, L.L.C.

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

Appellee.

ON APPEAL OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ACTING ASSOCIATE GENERAL
COUNSEL

STEWART A. BLOCK
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties before this Court are Spectrum IVDS, L.L.C. ("Spectrum"), Appellant, and the Federal Communications Commission ("the Commission" or "FCC"), Appellee.

B. Rulings Under Review

Spectrum IVDS, L.L.C., 25 FCC Rcd 10457 (2010) ("*Order*") (JA____).

C. Related Cases

The *Order* on review has not previously been before this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED....1

STATEMENT OF JURISDICTION....2

STATUTES AND REGULATIONS....2

COUNTERSTATEMENT OF THE CASE....3

COUNTERSTATEMENT OF THE FACTS....3

A. Statutory and Regulatory Framework....3

B. Spectrum's License Acquisition, Subsequent Payment Default and Automatic License Cancellation....9

C. The FCC's Consideration of Spectrum's Petition for Reinstatement and Additional Time to Pay....12

SUMMARY OF ARGUMENT....16

ARGUMENT....18

I. THE ORDER IS REVIEWED UNDER THE ARBITRARY AND CAPRICIOUS STANDARD....18

II. THE FCC ACTED WITHIN ITS DISCRETION IN DENYING A WAIVER....19

A. The FCC Properly Applied Its Established Strict Enforcement Policy In Determining Whether To Grant Spectrum A Waiver....20

B. The Waiver Denial Based On Spectrum's Continued Refusal To Pay Its Remaining Installment Debt Was Consistent With FCC Precedent Under Its Strict Enforcement Policy....21

(1) The FCC Reasonably Concluded that Spectrum Was Unwilling or Unable to Complete Its Financial Obligations....22

Page

(2) The FCC Reasonably Distinguished the "Constructive Waiver" Cases....................................24

(3) The FCC Reasonably Determined that the Errors in the Payment Notices Spectrum Received Did Not Justify a Waiver Grant in the Face of Spectrum's Continued Default. 26

III. SPECTRUM HAS WAIVED ITS REMAINING CLAIMS, WHICH ARE WITHOUT MERIT.....................................27

A. Spectrum's Claim That The Grace Period Rule Extends The Payment Deadlines Beyond The License Term 29

(1) Spectrum Did Not Preserve its Grace Period Rule Claim. 29

(2) If the Court Does Reach the Merits of Spectrum's Construction of the Installment Payment Rules, the *Order* Should be Affirmed..33

B. Spectrum's Equitable Estoppel Claim Is Also Barred and Unavailing. 36

CONCLUSION 39

TABLE OF AUTHORITIES

Page

Cases

* *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003) 3, 20, 38

Alpine PCS Inc. v. FCC, 2010 WL 5258942 (D.C. Cir. Dec. 21, 2010) 20

* *Auer v. Robbins*, 519 U.S. 452 (1997) 18, 30, 33

Bartholdi Cable Co. v. FCC, 114 F.3d 274 (D.C. Cir. 1997) 32

BDPCS, Inc. v. FCC, 351 F.3d 1177 (D.C. Cir. 2003) 20, 28, 30

Chase Bank, N.A. v. McCoy, 2011 WL 197641, (U.S., Jan. 24, 2011) 18, 30, 33

* *Coalition for Noncommerical Media v. FCC*, 249 F.3d 1005 (D.C. Cir. 2001) 31, 32

Delta Radio, Inc. v. FCC, 387 F.3d 897 (D.C. Cir. 2004) 19, 20

Freeman Eng'g Assocs. v. FCC, 103 F.3d 169 (D.C. Cir. 1997) 28

Global Crossing Telecomm., Inc. v. FCC, 259 F.3d 740 (D.C. Cir. 2001) 18

Hansen v. Harris, 619 F.2d 942 (2d Cir. 1980) 37

* *In re Core Communications, Inc.*, 455 F.3d 267 (D.C. Cir. 2006) 28, 33

International Union v. Clark, 2006 WL 2598046 (D.D.C. Sept. 11, 2006) 37

Kisser v. Cisneros, 14 F.3d 615 (D.C. Cir. 1994) 18

* *Morris Communications, Inc. v. FCC*, 566 F.3d 184 (D.C. Cir. 2009) 3, 19, 20, 24, 25, 36

New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005) 31

Page

Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) 37

Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007).................... 28, 32

* *Schweiker v. Hansen*, 450 U.S. 785 (1981) 36

Socop-Gonzalez v. INS, 272 F.3d 1176 (9th Cir. 2001) 37

Star Wireless, LLC v. FCC, 522 F.3d 469 (D.C. Cir. 2008)....................32

United States v. McCorkle, 321 F.3d 1292 (11th Cir. 2003) 37

Vista Communications, Inc. v. FCC, 99 Fed.Appx. 235 (D.C. Cir. 2004)....................20

WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969) 31

WAIT Radio, Inc. v. FCC, 459 F.2d 1203 (D.C. Cir. 1972)....................19

Washington Ass'n for Television & Children v. FCC, 712 F.2d 677 (D.C. Cir. 1983)....................28

Administrative Decisions

218-219 MHz Service Flex NPRM, 13 FCC Rcd 19064 (1998) 8, 34

218-219 MHz Service Restructuring Order, 15 FCC Rcd 1497 (1999) 8

* *Alpine PCS, Inc.,* 25 FCC Rcd 469 (2010), *aff'd, Alpine PCS Inc. v. FCC*, 2010 WL 5258942 (D.C. Cir. Dec. 21, 2010) 6, 7, 21

Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, 13 FCC Rcd 374 (1998) 5, 6, 23

Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, 15 FCC Rcd 15293 (2000) 5, 23

Page

Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services, 7 FCC Rcd 1630 (1992) 7

Lakeland PCS LLC, 15 FCC Rcd 23,733 (WTB 2000) 24, 25

* *Licenses of 21st Century Telesis, Inc.*, 15 FCC Rcd 25113 (2000), *recon. denied*, 16 FCC Rcd 17257 (2001), *aff'd*, *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003) 6

Meredith S. Senter, Jr., Esq., 14 FCC Rcd 5003 (WTB 1999) 25

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) 6

Ronald E. Quirk Jr., 20 FCC Rcd 8176 (WTB 2005) 24

Wireless Telecommunications Bureau Grants Consent to Assign 218-219 MHz Service Licenses,\ Public Notice, 16 FCC Rcd 18,057 (2001) 9

Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules, Public Notice, 11 FCC Rcd 10853 (WTB 1996) 6

Statutes and Regulations

5 U.S.C. § 706(2)(A) 18

47 U.S.C. § 301 34

47 U.S.C. § 309(j)(6)(D) 34

47 U.S.C. § 402(b)(5) 2

* 47 U.S.C. § 405(a) 2, 17, 27, 29

47 C.F. R. § 1.2110(g)(4)(i)-(iv) 5, 10

47 C.F.R § 1.2110(g)(4) 4, 13, 33

Page

47 C.F.R. § 1.106(b) 30

47 C.F.R. § 1.115(c).................... 15, 30

47 C.F.R. § 1.1910(b)(2)....................4

47 C.F.R. § 1.2110(d)(4)(ii) (1994) 4

47 C.F.R. § 1.2110(g)(3)....................4

47 C.F.R. § 1.2110(g)(3)(ii).................... 13, 33

47 C.F.R. § 1.62 .... 14, 29

47 C.F.R. § 95.811(d) (1994)....................7

47 C.F.R. § 95.816(d)(3)(1994)....................8

Others

Interactive Video and Data Service (IVDS) Applications to Be Granted January 18, 1995, FCC News Release No. 51403 (rel. Dec. 29, 1994) 7

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

218-219 MHz Service Flex NPRM	*Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 13 FCC Rcd 19064 (1998)
218-219 MHz Service Restructuring Order	*Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service,* 15 FCC Rcd 1497 (1999).
Bureau Order	*Spectrum PCS, Inc*., 23 FCC Rcd 8800 (WTB 2008) (JA __)
FCC or Commission	Federal Communications Commission
Grace Period Rule	47 C.F.R. § 1.2110(g)(4)(i)-(iv)
JA	Joint Appendix
Order	*Spectrum PCS, Inc.,* 25 FCC Rcd 10457 (2010) (JA __)
Part I Third Report and Order	*Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, 13 FCC Rcd 374 (1997)
Part 1 Third Report and Order Reconsideration Order	*Amendment of Part 1 of the Commission's Rules– Competitive Bidding Procedures,* 15 FCC Rcd 15293 (2000)
IVDS	Interactive Video and Data Service (a form of wireless telecommunications), now renamed the 218-219 MHz Service
Spectrum	Appellant Spectrum IVDS, L.L.C
WTB or Bureau	Wireless Telecommunications Bureau of the FCC

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

NO. 10-1264

SPECTRUM IVDS, L.L.C.

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

Appellee.

ON APPEAL OF AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

The Federal Communications Commission ("FCC" or "Commission") notified Appellant Spectrum IVDS, L.L.C. ("Spectrum") that its wireless license had canceled because Spectrum failed to pay the full amount of its installment payment debt by the end of its ten-year license term. When informed of the payment default, Spectrum chose not to tender the remaining amount owing, but instead offered only to make further payments on terms of its own choosing. In the

order on review,[1] the FCC denied Spectrum's request for license reinstatement and additional time to make the missed payments. The questions presented are:

(1) Whether the FCC acted within its discretion in denying Spectrum's request for reinstatement of its licenses and denying a waiver of Spectrum's default, where Spectrum failed to fulfill its payment obligations that were an express condition for retaining its license, requested additional time to make the missed payments, and has remained in default for six years.

(2) Whether 47 U.S.C. § 405(a) bars Spectrum's claim that (a) the FCC erred in its construction of its installment payment rules, and (b) the FCC is equitably estopped from canceling Spectrum's license because of errors in courtesy payment notices sent to Spectrum, where Spectrum presented neither argument to the FCC in its Application for Review of the staff's decision and thus the agency did not have an opportunity to pass on those issues.

STATEMENT OF JURISDICTION

The FCC released the Order on July 27, 2010. Spectrum filed its notice of appeal on August 26, 2010 (JA __). This Court has jurisdiction under 47 U.S.C. § 402(b)(5).

STATUTES AND REGULATIONS

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

---

[1] *Spectrum IVDS, L.L.C.*, 25 FCC Rcd 10457 (2010) ("*Order*") (JA __).

COUNTERSTATEMENT OF THE CASE

In 2001, the FCC consented to Spectrum's acquisition of a wireless license from the original winning bidder for that license. In acquiring the license, Spectrum executed loan documents making it unconditionally liable for the full auction debt, less the payments the FCC had already received from the original licensee, and the FCC permitted Spectrum to pay the outstanding debt in regular quarterly installment payments, with a final payment at the end of the license term on January 18, 2005. When Spectrum failed to pay the full amount of its installment payment debt by that date, the license automatically canceled by rule. Spectrum filed a petition for reconsideration asking for reinstatement of the license and more time to make its remaining payments.

The FCC's Wireless Telecommunications Bureau ("WTB" or "Bureau") denied Spectrum's petition for reconsideration. 23 FCC Rcd 8800 (WTB 2008) (JA___) ("*Bureau Order*"). The full Commission affirmed the Bureau's decision and denied Spectrum's Application for Review. 25 FCC Rcd 10457 (JA__) ("*Order*"). Spectrum now seeks judicial review.

COUNTERSTATEMENT OF THE FACTS

A. Statutory and Regulatory Framework

The FCC's Installment Payment Program for Auction Debt. The FCC uses a system of competitive bidding – that is, an auction – for assigning certain wireless licenses. *See* 47 U.S.C. § 309(j); *see generally*, *e.g.*, *Morris Communications, Inc. v. FCC*, 566 F.3d 184 (D.C. Cir. 2009); *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003).

During the early years of the auction program, the FCC allowed eligible entities to pay the winning auction bid in installments over the initial license term. *See* 47 C.F.R. § 1.2110(g)(3). Each license granted under the installment payment program was conditioned on full and timely payment of each installment payment, and a default of that obligation triggered automatic cancellation of the license. *Id.*, § 1.2110(g)(4). Whether or not the licensee opted to pay the full auction debt at the time of the license grant, or to pay the debt in installments, every winning bidder was obligated for the full amount of its winning bid at the close of the auction. *See In re NextWave Personal Communications, Inc.,* 200 F.3d 43, 57-58 (2d Cir. 1999). At the end of the initial license term, a licensee could apply for a renewal of the license, but in order to qualify for a renewal, it was required to demonstrate that it had complied with all applicable statutory and regulatory requirements, and was not in default on its auction debt obligations. *See* 47 C.F.R. § 1.1910(b)(2) (barring any action on behalf of a licensee that has unpaid debt to the FCC).

The FCC included in the original installment payment rules a provision allowing a licensee facing financial difficulty to request that the FCC grant a discretionary grace period of up to 90 days to make a required quarterly installment payment. *See* 47 C.F.R. § 1.2110(e)(4)(ii) (1994).[2] In 1997, the FCC liberalized the rule to remove the need to apply for a grace period, and instead allowed a

---

[2] *See* 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)).

licensee to defer a required quarterly installment payment by using up to two automatic grace periods of 90 days each (for a total deferral of no more than 180 days) by paying late fees specified in the rule. *See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, 13 FCC Rcd 374, 434 – 442 (¶¶ 106-113) (1997) ("*Part 1 Third Report and Order*"). In 2000, the rule was adjusted to change the 90-day grace periods to grace periods of three months each, corresponding to the schedule of quarterly payments for installment payment licensees. 47 C.F.R. § 1.2110(g)(4)(i)-(iv) ("Grace Period Rule"). *See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, 15 FCC Rcd 15293, 15309-10 (¶¶ 27-28) (2000) ("*Part 1 Third Report and Order Reconsideration Order*").

Although the FCC thereby permitted licensees to defer payments for up to two calendar quarters without being considered delinquent, the FCC made clear that grace periods were an "extraordinary remedy" that should be used only in "extraordinary circumstances," specifically "instances of financial distress [ ] for which temporary relief is appropriate." *Part 1 Third Report and Order*, 13 FCC Rcd at 439 (¶ 109), 438 (¶ 107); *Part 1 Third Report and Order Reconsideration Order*, 15 FCC Rcd at 15304-05 (¶ 19). Grace periods, the Commission emphasized, "were not intended to serve as a tool that licensees might use in their normal course of planning auction strategy and build-out." *Part 1 Third Report and Order Reconsideration Order*, 15 FCC Rcd at 15304 (¶ 19). Rather, the FCC's "fundamental goal" in adopting the late payment provisions was "to encourage payment by the due date." *Id.; see also Part 1 Third Report and Order*,

13 FCC Rcd at 439 (¶ 110) (noting that the rule "is consistent with the standard commercial practice of establishing late payment fees and developing financial incentives for licensees to resolve capital issues before payment due dates").

The FCC has a longstanding policy of "strict enforcement" of auction payment deadlines, including installment payments.[3] Under that policy, if a licensee fails to make full and timely payment of its auction debt, its license automatically cancels without further action. As the FCC recently reiterated, the policy advances the core function of the auction process – to select the applicant that values the license most highly and therefore is presumed to be most likely to have the incentive and financial capability to put the licenses into service for the public. *Alpine PCS, Inc.,* 25 FCC Rcd 469, 482 (¶ 20) (2010), *aff'd, Alpine PCS Inc. v. FCC,* 2010 WL 5258942 (D.C. Cir. Dec. 21, 2010) (*per curiam*). If a winning bidder is unable or unwilling to make full and timely payment of its auction winning bid, that presumption is lost. *Id.* In the FCC's judgment, extending time for a licensee to pay its installment debt would, in the long run, undermine the integrity of the auction process by giving incentives to bidders to overbid at an auction in an effort to win the license, hope for the best, and seek to

---

[3] *See*, *e.g*., *Licenses of 21st Century Telesis, Inc*., 15 FCC Rcd 25113, 25121-23 (¶¶ 17-20) (2000) (explaining the Commission's application of a strict standard of review for requests of 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); *Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments*, 14 FCC Rcd 6080 (1999), *aff'd sub nom. SouthEast Tel., Inc. v. FCC*, 1999 WL 1215855 (D.C. Cir. 1999). *See also Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules,* Public Notice, 11 FCC Rcd 10853 (WTB 1996).

renegotiate or extend the payments if they subsequently found themselves in financial distress. 25 FCC Rcd at 489 (¶ 31). Consequently, the FCC has granted waivers of automatic cancellation only where the defaulting licensee promptly after the default either continues to make payments consistent with its installment obligations or promptly makes full payment of its remaining installment payment debt, allowing the FCC to conclude that the default was not due to the licensee's inability to pay its auction debt obligation. Conversely, the FCC "has never granted a waiver of the automatic cancellation rule where a party has ceased making post-default payments towards its outstanding debt obligation . . . . [or] to a party seeking to repay its outstanding debt on its own terms." 25 FCC Rcd at 487 (¶ 29) (citations omitted).

Licenses in the 218-219 MHz Service. Licenses in the Interactive Video and Data Service ("IVDS") were originally intended to be used to provide "interactive television."[4] The license that is the subject of this case was originally assigned to Interactive Video and Data Networks, Inc., as the winning bidder in the FCC's 1994 auction for IVDS licenses.[5] IVDS licenses were originally issued for a five-year initial term.[6] Small businesses were allowed pay their winning auction

---

[4] *Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide Interactive Video Data Services*, 7 FCC Rcd 1630 (¶ 1) (1992).

[5] *See Interactive Video and Data Service (IVDS) Applications to Be Granted January 18, 1995*, FCC News Release No. 51403 (rel. Dec. 29, 1994). *See also Sioux Valley Rural_Television, Inc. v. FCC*, 349 F.3d 667 (D.C. Cir. 2003) (describing the IVDS auction).

[6] 47 C.F.R. § 95.811(d) (1994).

bid in installments "over the term of their licenses." 47 C.F.R. § 95.816(d)(3)(1994).

Subsequently, the FCC expanded the types of services that licensees could provide using the spectrum and renamed the service the "218-219 MHz service" to reflect the broader uses to which the licenses could be put. *See 218-219 MHz Service Flex NPRM*, 13 FCC Rcd 19064, 19075 (¶ 16) (1998). In a further order, the FCC also extended the initial license term to ten years and reamortized the existing auction debt to the full ten-year term "in conjunction with the extension of the license term from five to ten years." *218-219 MHz Service Restructuring Order,* 15 FCC Rcd 1497, 1522 (¶ 40) (1999). Licensees wishing to remain in the installment payment plan after the expansion of the license term to ten years were required to execute a Promissory Note and Security Agreement reflecting the amount of the debt and containing a new amortized payment schedule. *Id.* at 1522-25 (¶¶ 42-44).[7] The FCC, however, rejected proposals to extend the payment schedule beyond the license term, and held that any extension of installment payments would be "inextricably tied to the requested extension of the license term from five to ten years." *See 218-219 MHz Service Flex NPRM,* 13 FCC Rcd at 19085 (¶ 37).

---

[7] *See also 218-219 MHz Flex NPRM*, 13 FCC Rcd at 19086 (¶ 39) ("Every licensee electing to continue making installment payments would be required to execute appropriate loan documentation, that may include a note and security agreement, as a condition of the reamortization of its installment payment plan under the revised ten-year term, pursuant to Section 1.2110(f)(3) of the Commission's rules"). Section 1.2110(f)(3) has since been renumbered section 1.2110(g)(3).

B. Spectrum's License Acquisition, Subsequent Payment Default and Automatic License Cancellation

Spectrum's Acquisition of the License. In October 2001, the FCC consented to an assignment of the license at issue in this case from Interactive Video and Data Networks, Inc., the original winning bidder, to Spectrum.[8] The FCC issued a license to Spectrum for the remainder of the ten-year license term, ending on "January 18, 2005." License (JA __).

As a condition to the Commission's approval of the assignment, Spectrum executed an Assumption and Assignment Agreement (JA __-__) in which Spectrum assumed the Note (JA _-_) and Security Agreement (JA __-__) originally signed by the winning bidder. Spectrum agreed unconditionally to pay the remaining amount of the original auction debt ($803,296.95 in principal) under the terms of the Note. Assumption and Assignment Agreement at 3 (JA ___). The Note specified that:

> The entire unpaid principal amount, together with accrued and unpaid interest thereon, and all other obligations of the Maker hereunder, if not sooner paid, shall be due and payable on January 18, 2005 ("Maturity Date").

Note at p. 1 (JA __) (emphasis in original).

The payment schedule attached to the Note showed regular quarterly payments ending on October 31, 2004, and a final payment of the remaining

---

[8] *Wireless Telecommunications Bureau Grants Consent to Assign 218-219 MHz Service Licenses,* Public Notice, 16 FCC Rcd 18,057 (2001).

balance due on the January 18, 2005, Maturity Date, with all payments rendered and no remaining balance after that date.

The Note assumed by Spectrum "acknowledge[d]" that its license was "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 . . . ." Note at 3 (JA __, __). The Security Agreement also reiterated that, in the event of default, "the License shall automatically cancel without further action by the Commission." Security Agreement at ¶ 9(a) (JA __).

Spectrum's Failure to Make Full and Timely Payment. A total of 16 installment payments remained at the time Spectrum assumed the debt. Spectrum began making quarterly installment payments pursuant to the schedule of payments attached to the Note. However, Spectrum routinely delayed each payment for six months after the payment due date – the maximum time permitted in the Grace Period Rule. See 47 C.F.R. § 1.2110(g)(4)(i)-(iv).

The FCC's Office of Managing Director sent to each licensee a standard computer-generated reminder of upcoming payment deadlines and the additional late fees associated with each quarterly payment under the Grace Period Rule. The automated notice sent to Spectrum on January 3, 2005 erroneously listed payment deadlines for the outstanding July 2004 and October 2004 quarterly installments extending beyond the Maturity Date of the Note and the end of the license term. On January 15, 2005, however, the FCC sent a notice reminding Spectrum of its upcoming January 18, 2005 final payment, as well as the remaining outstanding

prior payments.[9] Spectrum did not seek clarification from the FCC regarding the inconsistencies in the payment notices.

Spectrum filed an application for license renewal on January 18, 2005, the day its license term expired, but did not accompany its license renewal application with a payment for the remaining outstanding balance, as required in the Note. As of January 18, 2005, Spectrum was in arrears for the July 2004 quarterly payment, the October 2004 quarterly payment, and the final payment due on the Maturity Date of the Note, January 18, 2005.

Because Spectrum failed to make the final three installment payments (and associated late fees) on its license by the maturity date of the Note, January 18, 2005, its license automatically canceled under the express terms of the Note and Security Agreement. Because the initial license had canceled, the FCC dismissed, without prejudice, Spectrum's application for license renewal as moot. *See Order*, ¶ 12 (JA__). On February 16, the FCC amended its licensing files to show the cancellation of Spectrum's license and dismissal of its renewal application. *Id.* On February 18, 2005, the FCC sent Spectrum a demand for payment of the remaining balance due ($145,168.74). Letter from Mark Reger, FCC to Craig Siebert, February 18, 2005 (JA __).

---

[9] Footnotes to the January 15 payment notice continued to include deadlines for the July 31, 2004, and October 31, 2004, payments extending beyond the end of the license term, and a separate footnote described the January 18, 2005, payment as being due on January 31, 2005 (as would typically be the quarterly payment date).

Spectrum submitted its past due July 31, 2004, installment payment on January 27, 2005. It has never paid the past due October 2004 installment or the past due final January 18, 2005 payment, even though the Note that Spectrum assumed when it acquired the license unconditionally required full payment of the debt by the Maturity Date, January 18, 2005. Spectrum's past due installments remain unpaid even now, six years after the Maturity Date of the Note and the end of the license term.

C. The FCC's Consideration of Spectrum's Petition for Reinstatement and Additional Time to Pay

Spectrum's Request for Reconsideration and Reinstatement. Rather than making the required payments, Spectrum sought reconsideration of the dismissal of the renewal application, reinstatement of the license, and additional time to pay its outstanding debt obligation. Request for Reconsideration and Reinstatement, dated March 21, 2005 (JA__); Supplemental Request, dated April 17, 2007 (JA __). In its March 2005 petition, Spectrum asked for license reinstatement and promised to make the remaining payments within six months from the original due dates. Petition, ¶ 5 (JA __). In its Supplemental Petition, Spectrum modified its payment offer, and said it would make full payment 90 days after license reinstatement. Supplemental Petition, ¶ 3 (JA __). In support of its request, Spectrum stated that it was a small company with many individual stockholders and needed the extra time to "make proper notice to its principals to make this final payment." *Id.* (JA __).

The Bureau Order. In June 2008, the FCC's Wireless Telecommunications Bureau denied Spectrum's request for reconsideration and reinstatement of its license. *Bureau Order*, 23 FCC Rcd 8800 (JA___). The Bureau held that Spectrum knew or should have known that all payments had to be made by the end of the license term, based on the provisions of 47 C.F.R. § 1.2110(g)(3)(ii), which specifies that an installment payment plan "allow[s] installment payments for the full license term," § 1.2110(g)(4), which conditions retention of the license on "the full and timely performance of the licensee's payment obligations under the installment plan," and the Note assumed by Spectrum, which required payment of all outstanding balances by the "Maturity Date" (the date the license term expired). *Bureau Order,* ¶¶ 7, 20 (JA__, __).

The Bureau also found no basis in its rules or precedent to grant Spectrum a waiver of its default. Key to the Bureau's conclusion was the fact that Spectrum's outstanding debt obligation remained unpaid. *Bureau Order*, ¶ 16 (JA __). The Bureau concluded that Spectrum's continued non-payment raised serious doubts as to its ability or willingness to satisfy the remaining installment debt for the License, and did not support a waiver grant under the FCC's policy of strict enforcement of the full and timely payment requirement. *Id.*, ¶¶ 24-25 (JA __). In the face of Spectrum's payment default, the Bureau also found no basis for granting a waiver based on Spectrum's claim that its misunderstanding of the payment deadlines stemmed, at least in part, from erroneous payment notices provided by the FCC's Office of Managing Director. *Id.*, ¶ 26 (JA). The Bureau noted that Spectrum's asserted claims of mistake or misunderstanding did not

distinguish Spectrum's situation from that presented by other cases in which a licensee argued unsuccessfully that it missed a payment deadline because it was confused by alleged errors in the payment notices. *Id.*

Spectrum's Application for Review. Spectrum sought review of the *Bureau Order* by the full Commission. *See* Spectrum Application for Review ("AFR"), dated July 7, 2008 (JA ___). The company asserted that the Bureau had erred in assuming that Spectrum was unwilling and unable to pay the remaining balance, in failing to give proper weight to Spectrum's past history of payments, and in refusing to take account of the confusing and incorrect information the staff provided in the payment notices sent to Spectrum. *Id.* at 3 (JA __-__). While focusing on its claim to a waiver of its payment default, Spectrum did not pursue in its AFR the claim that the Grace Period Rule extended its time to make payments after the end of the license term. Rather, Spectrum argued that by filing a renewal application on January 18, 2005, Spectrum's initial ten-year license term was automatically extended under 47 C.F.R. § 1.62 until the FCC took action on the renewal request, thereby allowing Spectrum more time to make payments pursuant to the Grace Period Rule after the January 18, 2005, maturity date. *Id*. at 5.[10]

The Order on Review. The Commission affirmed the *Bureau Order* and denied review. *Order*, 25 FCC Rcd 10457 (2010) (JA __).

---

[10] Section 1.62 provides that when any "proper and timely" petition for license renewal is pending before the Commission at the time of expiration of the license, the license shall "continue in effect" until such time as the Commission shall take final action on the renewal petition. 47 C.F.R. § 1.62.

The FCC rejected Spectrum's argument that, pursuant to section 1.62 of the rules, the company's application for license renewal had prevented the License from canceling on January 19, 2005. *Order*, ¶ 16 (JA __). The Commission found that Spectrum had not asserted that argument in its filings with the Bureau, and the argument therefore had not been properly raised with the Commission. *Id. See* 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."). In the alternative, the Commission rejected the argument on the merits, holding that section 1.62 does not prevent automatic cancellation for a payment default, but "prevents only an otherwise valid, and thus renewable, license from expiring." *Order*, ¶ 16 & n.51(JA __).

The Commission observed that the remainder of Spectrum's AFR was devoted to challenging the Bureau's conclusion that a waiver of the default was not warranted because Spectrum had failed to demonstrate that it was willing and able to comply with its installment payment obligations. *Order*, ¶ 17 (JA __). The Commission held that the Bureau's waiver denial was correct. *Id.*, ¶¶ 17-24 (JA __). The Commission contrasted Spectrum's continued failure to comply with its payment obligation with those instances where the FCC has granted a waiver, noting that in each such case the licensee upon learning of a missed payment immediately paid the missing installment and continued to comply with its payment obligations while its waiver application was pending, *Id.*, ¶ 23 (JA__).

Finally, the Commission found no basis for granting a waiver based on Spectrum's claims that it was misled by errors in the payment notices the company

had received. The Commission pointed out that the January 15, 2005, payment notice informed Spectrum that its payment was due on January 18, 2005, and that Spectrum knew or should have known based on the Maturity Date in the Note that all remaining amounts were to be paid by that date. *Order*, ¶ 20 (JA __). The Commission emphasized that it has long held that payment notices are courtesies to licensees and that "nothing in the terms of Spectrum IVDS's installment loan – or in the Commission's rules and orders – suggests that the final payment deadline for an installment loan can be overridden by inconsistent information in a routine payment notice." *Id.*, ¶ 21 (JA __).

Commissioner Copps dissented, expressing his view that it was not unreasonable for Spectrum to have relied on the staff's payment notice giving dates for future payments. Commissioner Copps stated that, in view of the substantial payments already made by Spectrum, he believed the FCC should have "facilitated a more appropriate and understanding resolution to this matter." 25 FCC Rcd at 10467.

SUMMARY OF ARGUMENT

1. Spectrum's brief focuses principally on its claim that the Grace Period Rule allowed the company to defer installment payments beyond the end of the license term and its assertion that the FCC is equitably estopped from canceling Spectrum's license because of erroneous information contained in automated payment notices by Commission staff. Neither contention was presented to the full Commission in Spectrum's Application for Review (JA __). They are

consequently barred under section 405 of the Communications Act, 47 U.S.C. § 405(a).

In any event, the FCC reasonably explained – on the basis of the Communications Act, the Commission's rules, and the Note that Spectrum assumed – that Spectrum was not entitled to make installment payments beyond the end of the license term. The Commission's reasonable interpretation of its own rules and precedent is controlling. As for Spectrum's equitable estoppel claim, there no basis on which to conclude that the erroneous automated payment notices it received were the product of the kind of "affirmative misconduct" – rather than garden-variety mistake – necessary to obtain equitable estoppel against the Government. Thus, even if the claims were not waived, they fail on the merits.

2. This appeal properly centers on the only issue that Spectrum actually presented to the Commission – whether the agency should have denied Spectrum a waiver of its payment default. On that issue, as we show below, the company cannot carry its heavy burden of demonstrating that the Commission abused its considerable discretion. The Commission found that Spectrum failed to prove its willingness and ability to complete its payment obligations under the terms of the Note, as required for a waiver under the agency's longstanding policy of strictly enforcing its installment payment deadlines. The Agency emphasized that not only had Spectrum defaulted on its final payments, it sought to repay on terms of its own devising, and in any event failed to pay the remaining balance over the past six years. The Commission properly distinguished Spectrum's default from that presented by other licensees in the "constructive waiver" cases cited by Spectrum,

observing that those licensees, unlike Spectrum, continued to make required installment payments without further default, thereby demonstrating their financial ability and commitment to fulfilling their installment payment obligations. The FCC also reasonably concluded that neither Spectrum's past payment history, nor the errors in the payment notices Spectrum received, justified a waiver in view of Spectrum's patent inability or unwillingness to meet its outstanding debt obligations without further delay. The FCC's conclusions were reasonable, supported by precedent, and consistent with the FCC's enforcement policy. The *Order* should be affirmed.

ARGUMENT

I. THE ORDER IS REVIEWED UNDER THE ARBITRARY AND CAPRICIOUS STANDARD.

The FCC's *Order* may not be overturned unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Pursuant to this "highly deferential" standard, the Court "must presume the validity of [the] agency['s] action," and may "reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *Kisser v. Cisneros*, 14 F.3d 615, 618, 619 (D.C. Cir. 1994) (citations omitted). The Court defers to an agency's reasonable application of its own precedents, *Global Crossing Telecomm., Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001), and to an agency's construction of its own rules and policies, *Chase Bank, N.A. v. McCoy*, 2011 WL 197641, slip op. at 8 (U.S., Jan. 24, 2011); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's construction of its own rules

and their operation is "controlling" unless inconsistent with the plain meaning of the rules or prior precedent).

To prevail in overturning the FCC's waiver denial, Spectrum carries 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 Communications*, 566 F.3d at 188 (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 (D.C. Cir. 2004).

II. THE FCC ACTED WITHIN ITS DISCRETION IN DENYING A WAIVER.

When Spectrum assumed the Promissory Note and Security Agreement, it became obligated to pay the outstanding auction debt by the end of the license term. Spectrum knew from the loan documents, as well as from the FCC's rules, that the license would automatically cancel if Spectrum failed to make full and timely payment of its installment payment obligation. Spectrum unquestionably defaulted on its payment obligation – and has remained in default for six years. It has never made the October 2004 quarterly payment and the final payment due on the Maturity Date of the Note, January 18, 2005. In its Petition for Reconsideration, Spectrum requested license reinstatement, but did not offer to pay

the remaining debt, and asked instead for additional time to make these payments, which it repeated in its Supplemental Petition two years later. Under these circumstances, the Commission reasonably denied Spectrum's request for reinstatement and refused to grant a waiver.

A. The FCC Properly Applied Its Established Strict Enforcement Policy In Determining Whether To Grant Spectrum A Waiver.

At the time of its default in 2005, Spectrum clearly knew, or should have known, of the FCC's policy of "strict enforcement" of the auction payment deadlines – which mandates automatic cancellation where a licensee fails to make full and timely payment of its auction debt and fails to demonstrate that it is able and willing to meet its payment obligations in the future. *Order*, ¶ 9 (JA __). By 2005, the FCC had explained its policy in many decisions,[11] and the application of the policy in denying waivers had been upheld time and again by this Court.[12]

---

[11] *See, e.g.,* cases cited at n.3, *supra*.

[12] This Court has affirmed several FCC decisions denying a waiver of an installment payment default under the strict enforcement policy. *See, e.g., Alpine PCS Inc. v. FCC,* 2010 WL 5258942 (D.C. Cir. Dec. 21, 2010) (*per curiam*); *Morris* Communications*, Inc. v. FCC*, 566 F.3d 184 (D.C. Cir. 2009); *Vista Communications, Inc. v. FCC*, 99 Fed.Appx. 235 (D.C. Cir. 2004); *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003) (each affirming an FCC decision denying a waiver of an installment payment default). *See also Delta Radio, Inc. v. FCC*, 387 F.3d 897 (D.C. Cir. 2004) (upholding the FCC's strict enforcement of its post-auction final payment deadline); *BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003) (upholding the FCC's strict enforcement of its down payment deadline).

The FCC collected and summarized the relevant precedent most recently in *Alpine PCS, Inc.*, 25 FCC Rcd 469 (2010). There the FCC explained that the strict enforcement policy protects the integrity and fairness of the auction process by assuring that a licensee paying an auction bid by installments remains willing and able to fulfill its installment payment obligations throughout the license term. *Id.* at 482 (¶ 20). The Commission emphasized 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) of the Communications Act. 25 FCC Rcd at 482-83 (¶ 21). Consequently, the FCC "has never granted a waiver of the automatic cancellation rule where a party has ceased making post-default payments towards its outstanding debt obligation . . . . [or] to a party seeking to repay its outstanding debt on its own terms." *Order,* ¶ 23 n.74, *quoting Alpine PCS*, *Inc.*, 25 FCC Rcd at 487-88 (¶ 29).

B. The Waiver Denial Based On Spectrum's Continued Refusal To Pay Its Remaining Installment Debt Was Consistent With FCC Precedent Under Its Strict Enforcement Policy

The FCC reasonably determined that Spectrum did not satisfy the waiver standard under the agency's strict enforcement policy. Spectrum's continued refusal to pay its remaining debt, and its requests for additional time to make the payments if granted reinstatement, indicated that Spectrum was either unable or unwilling to comply with its payment obligations, thereby disqualifying it from

obtaining a waiver. *Order*, ¶ 18 (JA __). If Spectrum had made these payments promptly after the default, it would have arguably come within the FCC's precedent in which waivers were granted to licensees that continued making payments after default. But it did not do so.

(1) The FCC Reasonably Concluded that Spectrum Was Unwilling or Unable to Complete Its Financial Obligations.

Spectrum contends (Br. 25) that the FCC's conclusion that Spectrum was unwilling or unable to pay its remaining obligations except on its own terms is not supported by the evidence and thus is arbitrary and capricious. But the FCC based its conclusion on Spectrum's continued refusal to make its final installment payments and on the company's requests for additional time to complete its payments if granted reinstatement. *Order*, ¶ 18 (JA __). These facts, which are undisputed, amply support the FCC's waiver denial.

Spectrum points to its history of past payments as evidence of its financial capability. Br. 23. But that payment history – in which the company invariably used the maximum Grace Period Rule deferral for each payment – is hardly evidence of fiscal strength. The FCC reasonably concluded that Spectrum's invocation of the Grace Period Rule for each installment payment was evidence of Spectrum's financial distress. As the *Bureau Order* noted (¶ 26) (JA__), the FCC established the Grace Period Rule to be used as a last resort for licensees under financial duress, not to be used as a matter of course. *See also Order* ¶ 7 (JA ___) (grace period is an "extraordinary form of relief in cases of financial distress" and is "consistent with commercial practice"). Indeed, when the agency adopted and

then refined the grace period rules in 1998 and 2000, it emphasized that grace periods were an “extraordinary remedy” that should be used only in “extraordinary circumstances,” specifically “instances of financial distress [ ] for which temporary relief is appropriate.” *Part 1 Third Report and Order*, 13 FCC Rcd at 439 (¶ 109), 438 (¶ 107); *Part 1 Third Report and Order Reconsideration Order*, 15 FCC Rcd at 15304 (¶ 19). Grace periods “were not intended to serve as a tool that licensees might use in their normal course of planning auction strategy and build-out.” *Part 1 Third Report and Order Reconsideration Order*, 15 FCC Rcd at 15304-05 (¶ 19).

Spectrum’s habitual invocation of six month grace periods for every quarterly payment prior to the end of its license term may not have violated the letter of the Commission’s rule, but it certainly was not in keeping with the rule’s stated purpose – *i.e.*, that grace periods are to be used in extraordinary circumstances to provide temporary relief in times of financial distress.

Spectrum emphasizes (Br. 30) that it had made 14 out of its 16 installment payments. The FCC reasonably determined, however, that Spectrum’s past payment history could not overcome its failure to complete its payment obligations. As the Commission explained, it “has learned in a decade-and-a-half of administering installment payment loans [that] a licensee’s continued, knowing failure to pay its loan obligations – whether resulting from the licensee’s lack of funds or from its unwillingness to pay in the absence of prior assurance that its license cancellation will be waived – unacceptably weakens the integrity of the auctions program.” *Order*, ¶ 18 (JA __). In other words, the best evidence of

Spectrum's ability and willingness to pay was payment itself – which Spectrum adamantly failed to make. *Id.*, ¶ 24 (JA __).

Moreover, Spectrum's claim of ability and willingness to pay is further undermined by its admission in its Supplemental Petition in 2007 (two years after the default) that it needed 90 days after restoration of the license to make payment because it is a small company and has many shareholders that must be contacted to arrange for the payment – an acknowledgement that it did not have the cash on hand to fulfill its payment obligations. *See* Supplemental Petition at ¶ 3 (JA __).

Nor did the fact that Spectrum made a single post-default payment (on January 27, 2005) serve to demonstrate its future capability or willingness to comply with its payment obligations. After that payment, Spectrum ceased making additional payments and remained in default at the time the FCC considered its request for reinstatement. Spectrum's position is therefore similar to that of the licensee in *Morris Communications*, which also ceased making installment payments after having made a few post-default payments. *Ronald E. Quirk Jr.*, 20 FCC Rcd 8176, 8177 (WTB 2005). Here, as in *Morris Communications*, the FCC reasonably and within its discretion refused to grant a waiver. *Morris Communications*, 566 F.3d at 190-91.

(2) The FCC Reasonably Distinguished the "Constructive Waiver" Cases.

Spectrum's failure to continue to fulfill its payment obligation also distinguishes this case from staff-level decisions in *Lakeland PCS LLC*, 15 FCC Rcd 23,733 (WTB 2000), and *Meredith S. Senter, Jr., Esq.*, 14 FCC Rcd 5003

(WTB 1999), cited by Spectrum. Br. 26-27. In both cases, the FCC's staff granted the licensee a "constructive waiver" where the facts showed that the FCC erroneously allowed the licensee to make a payment after automatic cancellation, *and* the licensee thereafter continued to make its subsequent installment payments without a further default. In granting a constructive waiver in these cases, the FCC emphasized the licensee's subsequent continued compliance with the installment payment requirements. *See Lakeland PCS LLC*, 15 FCC Rcd at 23,734 ("Since [the initial post-default payment], Lakeland has timely made its installment payments"); *Meredith S. Senter, Jr. Esq.*, 14 FCC Rcd at 5004 (recognizing that the licensee's subsequent payments were "indicative of a commitment on the [licensee's] part ... to meet its payment obligations").

The "constructive waiver" cases only underscore the fundamental defect in Spectrum's position – a continued failure (amounting to a knowing refusal) to make the remaining installment payments unless it obtains reinstatement and a request for additional delay in making the installments once the requested reinstatement is granted. *Order*, ¶ 23 (JA __). As this Court held in *Morris Communications*, 566 F.3d at 189-190, the FCC reasonably distinguishes between cases such as Spectrum's where the licensee ceased payments, and "constructive waiver" cases where the licensees continued to make payments after the default while their waiver was pending, thereby demonstrating their willingness and ability to complete their auction debt obligations.

(3) The FCC Reasonably Determined that the Errors in the Payment Notices Spectrum Received Did Not Justify a Waiver Grant in the Face of Spectrum's Continued Default.

Finally, the FCC correctly concluded that Spectrum was not entitled to a waiver based on its receipt of erroneous payment notices from the FCC's Office of Managing Director. *Order*, ¶¶ 20-21 (JA __). Spectrum contends that the notices caused it to believe that it could continue to use the Grace Period Rule to make payments after the end of the license term. Br. 25-26. The payment notices did contain incorrect information about the due dates of certain payments. They erroneously set forth payment deadlines for the July 2004 and October 2004 installments that extended beyond the Maturity Date of the Note and the end of the license term, and provided confusing information regarding the payment due on January 18, 2005. But as the Commission explained in the *Order*, the payment notices were provided as a courtesy to licensees, and could not modify any payment schedule or override a licensee's obligations to pay on time. *Order*, ¶ 21 (JA __). Especially in the face of Spectrum's ongoing default, the Commission reasonably concluded that the errors in the payment notices did not justify granting the company's request for a waiver. *Id.* Indeed, even under the most generous reading of the payment notices, Spectrum would have been obligated to make its remaining payments no later than the end of July 2005, and yet Spectrum failed to make payment even under that extended schedule. As the FCC reasonably concluded, Spectrum's claim that its default was caused by the faulty information regarding the applicability of the Grace Period Rule, rather than inability or

unwillingness to pay its auction debt, is disproved by the fact that Spectrum has remained in default for the past six years and continues to request additional time to make its final installment payments. *Id*.

The FCC's waiver denial was consistent with its precedent holding that a licensee's claims that it was confused or misled by erroneous information in payment notices does not excuse a licensee's default. *See Bureau Order*, ¶ 26 n.76 (JA__) (collecting cases); *Order*, ¶ 21 n.69 (JA__) (citing *Morris Communications*). As this Court recognized in *21st Century Telesis*, where a licensee similarly claimed that its default was caused by erroneous payment notices:

> [A] prudent licensee would have attempted to make a reasonable effort to comply. . . . [D]iscrepancies in payment notices, even had they produced some genuine uncertainty, would hardly have justified 21st Century's decision to make no payment at all.

318 F.3d at 202 (internal citations and quotations omitted).

The FCC's decision denying a waiver was thus reasonable and should be affirmed.

III. SPECTRUM HAS WAIVED ITS REMAINING CLAIMS, WHICH ARE WITHOUT MERIT.

The remainder of Spectrum's brief raises claims that were never presented to the FCC in its Application for Review, and thus are barred by section 405(a) of the Communications Act, which provides that a party seeking to reverse an FCC decision may not rely on a question of law or fact which the full Commission has not had an opportunity to consider. 47 U.S.C. § 405(a) (the filing of a petition for

reconsideration is "a condition precedent to judicial review" of a Commission order where the party seeking review "relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass"). This Court "has strictly construed [section 405(a)], holding that [it] 'generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission.'" *In re Core Communications, Inc.*, 455 F.3d 267, 277 (D.C. Cir. 2006) (*quoting BDPCS, Inc. v. FCC*, 351 F.3d at 1182).

Section 405(a) is designed to give the FCC an opportunity to correct errors in its decisions before they are submitted to judicial review. *See Qwest Corp. v. FCC*, 482 F.3d 471, 475 (D.C. Cir. 2007). It "codifies time-honored exhaustion principles, including the general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 680-82 (D.C. Cir. 1983) (internal quotations omitted). Accordingly, if a petitioner could have called a question of law or fact to the agency's attention, but did not, the issue is waived under section 405(a). *See Freeman Eng'g Assocs. v. FCC*, 103 F.3d 169, 182-83 (D.C. Cir. 1997).

A. Spectrum's Claim That The Grace Period Rule Extends The Payment Deadlines Beyond The License Term

(1) Spectrum Did Not Preserve its Grace Period Rule Claim.

Spectrum's primary argument before this Court is that the Grace Period Rule allowed Spectrum to extend its installment payment deadlines beyond the Maturity Date of the Note and the end of the license term. Br. 14-22. Spectrum did not assert this claim in its AFR to the full Commission. It therefore failed to preserve it for review. 47 U.S.C. § 405(a).

The *Bureau Order* rejected Spectrum's contention that the Grace Period Rule allowed Spectrum to defer its past due payment for up to six months, notwithstanding the Maturity Date in the Note or the end of the initial license term. Spectrum's AFR seeking review of the *Bureau Order*, however, abandoned that claim and asserted a different theory – that Spectrum's filing of a renewal application on January 18, 2005, automatically extended the license term pursuant to 47 C.F.R. § 1.62, and thereby also permitted the continued operation of the Grace Period Rule to extend installment payment deadlines. *See* Spectrum AFR, 5 (JA _-_). In other words, Spectrum's section 1.62 argument to the full Commission was premised on the assumption that, absent a timely and appropriate petition for license renewal, the Grace Period Rule would *not* operate beyond the Maturity Date and the end of the license term.

Spectrum's section 1.62 argument is both procedurally and substantively flawed. The Commission explained that the argument was raised for the first time

in the AFR and had not been submitted to the Bureau in the first instance as required by 47 C.F.R. § 1.115(c) and therefore is barred from review. *Order*, ¶ 16 (JA __).[13] As this Court recognized in *BDPCS, Inc. v. FCC*, 351 F.3d at 1184, the Commission appropriately refuses to consider arguments barred by section 1.115(c), and does not abuse its discretion by enforcing the rule.

In any event, the Commission concluded, "nothing in section 1.62 prevents or postpones the automatic cancellation of a license for failure to timely pay an amount due the Commission under an installment payment loan." *Id.* The rule permits an "otherwise valid" license to continue in effect while a renewal application is pending, but it does not permit a renewal application to forestall cancellation for default. *Id.* at n.51. 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 Chase Bank v. McCoy*, 2011 WL 197641, slip op. at 8; *Auer v. Robbins*, 519 U.S. at 461.

In order to succeed in its section 1.62 argument, Spectrum must overcome *both* the Commission's procedural and substantive objections. *See BDPCS, Inc. v. FCC*, 351 F.3d at 1183. Spectrum's brief, however, mentions section 1.62 only in passing (Br. 7, 22) and offers no disagreement with either the Commission's

---

[13] Section 1.115(c) promotes administrative efficiency by assuring that the Bureau will have before it all relevant arguments upon which to reach a decision, thereby avoiding potential administrative delays and waste of administrative resources by filing an unnecessary Application for Review with the full Commission. If the issue was not previously raised before the Bureau, the Bureau will consider a timely filed petition for reconsideration under certain circumstances. *See* 47 C.F.R. § 1.106(b).

procedural or substantive holding. Its argument is therefore waived. *See New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005).

Apart from its baseless section 1.62 argument, Spectrum devoted the remainder of its AFR to the company's objections to the Bureau's waiver denial. *See* Spectrum AFR, 6-10 (JA __-__). Spectrum's argument that the Bureau erred in denying Spectrum a waiver of its default also implicitly assumed the correctness of the Bureau's analysis of the installment payment rules. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969) ("The very essence of waiver is the assumed validity of the general rule, and also the applicant's violation unless waiver is granted").[14] Thus, at no time did the full Commission have before it any claim asserting that the Grace Period Rule itself permitted Spectrum to pay its remaining installments after the end of the license term and the Maturity Date of the Note. Without giving the full Commission an opportunity to pass on the issue, the matter was not preserved for judicial review under Section 405(a).

The fact that the *Order* briefly relates in the "Background" section that the rules require payment in full by the end of the license term (*Order*, ¶ 8 (JA__)) does not demonstrate that a challenge to the Bureau's interpretation of the Commission's installment payment rules was presented to or considered by the Commission as required by Section 405(a). That point is made clear in *Coalition for Noncommerical Media v. FCC*, 249 F.3d 1005 (D.C. Cir. 2001):

---

[14] Commissioner Copps' dissenting statement similarly assumed that Spectrum had violated the installment payment rules by failing to submit full payment by January 18, 2005, and urged only that the FCC should have exercised its discretion to grant a waiver of that default under the circumstances. 25 FCC Rcd at 10467 (JA __).

> To be sure a few sentences of the Commission order made reference, in its background section, to the Mass Media Bureau's disposition of the issue that the Coalition is now raising. But the "mere fact that the Commission discusses an issue does not mean that it was provided a meaningful 'opportunity to pass' on the issue." Only a discussion offered in response to someone's argument – such as petitioner's, another party's, or a Commissioner's – qualifies.

249 F.3d at 1009 (citations omitted). *Accord Qwest Corp.*, 482 F.3d at 476 (although the FCC's citation of the deadline for acting on a forbearance petition demonstrated that the FCC was aware of the deadline, the mere mention of the statutory deadline in the ordering clause of the order was not a disposition of an unmade claim for purposes of Section 405); *Star Wireless, LLC* v. FCC, 522 F.3d 469, 476 (D.C. Cir. 2008) (where petitioner did not raise a challenge to the FCC's statutory construction of the term "willful" in its filings before the agency, appellate challenge to FCC's use of definition was barred by section 405, even though the FCC relied on its pre-existing definition in its order).

Nor does the fact that the matter was raised before the Bureau suffice under section 405, when the claim was abandoned in the AFR. *See Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) (an issue cannot be preserved for judicial review simply by raising it before a Bureau; it is "the Commission" itself that must be afforded the opportunity to pass on the issue).

By not presenting the merits of its Grace Period Rule claims to the full Commission, Spectrum deprived this Court of the Commission's authoritative construction, to which this Court would ordinarily defer. Spectrum cannot now ask this Court to perform, at first instance, the necessary analysis of the interplay between the Grace Period Rule, the Communications Act, and the rest of the

FCC's licensing and auction rules. *See In re Core Communications, Inc.*, 455 F.3d at 677 ("because Core did not give the Commission an opportunity to address the question, we cannot be the first authority to construe the meaning of § 160(c)").

(2) If the Court Does Reach the Merits of Spectrum's Construction of the Installment Payment Rules, the *Order* Should be Affirmed.

Although mentioned only in the "Background" section, the *Order* provided a reasonable explanation of the operation of its rules as not permitting installment payments beyond the end of the license. The Commission's conclusion that its rules and installment payment Notes have always required payment in full by the end of the license term is supported by 47 C.F.R. § 1.2110(g)(3)(ii), which describes the content of each installment payment plan and by its terms allows payments only for the length of the "license term," and by 47 C.F.R. § 1.2110(g)(4), which conditions retention of the license on "the full and timely performance of the licensee's payment obligations under the installment plan." *Order*, ¶¶ 8-9 (JA__). The Commission reasonably determined that nothing in the Grace Period Rule modified the fundamental principle that all payments must be received by the end of the license term to demonstrate the licensee's continued financial qualifications to be Commission licensees through the entire license term. *Id.*, ¶ 8 (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 Chase Bank v. McCoy*, 2011 WL 197641, slip op. at 8; *Auer*, 519 U.S. at 461.

Here, the FCC's construction is consistent with the Communications Act and the agency's decisions in this area.

Moreover, the Communications Act makes clear that licensees have no rights to the license or to use of spectrum beyond the license term. *See* 47 U.S.C. § 301 ("no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license"). Although Congress established a program for allocating licenses by auction, it made clear that the payment of auction bids would not "be construed to convey any rights . . . that differ from the rights that apply to other licenses." *See* 47 U.S.C. § 309(j)(6)(D). Consistent with section 301, the FCC, in developing the rules for the expanded 218-219 MHz Service, described the revised installment payment terms as "inextricably tied" to the ten year license term and noted that it had rejected a proposal to extend payments beyond the new ten year license term. *218-219 MHz Service Flex NPRM*, 13 FCC Rcd at 19085 (¶ 37).

Based on Section 301, the FCC properly determined that the Grace Period Rule is not reasonably read to extend the statutory limits of the license term. In contrast, under Spectrum's reading, the Grace Period Rule would automatically extend the license term for installment payers by six months, even though Spectrum does not dispute that the set license term for all 218-219 MHz licensees, whether or not they were installment payers, was for just 10 years, not 10.5 years. Licensees should not be able, by failing to pay the remaining amount owing at the end of the term, to gain additional spectrum rights not provided in their license.

Finally, the FCC's construction of its rules is consistent with the Note Spectrum assumed when it obtained its license in 2001. The Note specified that the "entire unpaid principal amount, together with accrued and unpaid interest thereon" was "due and payable on January 18, 2005," which the Note defined as the "Maturity Date." Note, p. 1 (JA __). Attached to the Note was a payment schedule showing regular quarterly payments ending on October 31, 2004, and a final payment of the remaining balance on the January 18, 2005 Maturity Date, with all payments rendered and no remaining balance after that date. The Note made no provision for payments extending beyond the Maturity Date.[15]

These considerations – the statutory framework limiting licensees to operating within a prescribed license term; the FCC's express decision to tie the extension of the payment cycle to a ten-year license term; and the amortization schedule in the Note showing that all payments were to be received by the Maturity Date – made it entirely reasonable for the FCC to determine that Spectrum's final license payment had to be made within the express term of the license. That determination, accordingly, is controlling.

---

[15] Spectrum claims that the Note incorporates the deadline extensions in the Grace Period Rule. Br. 28 (quoting the Note, p. 2, as defining a default as failure to make full payment on or before the due date specified hereinabove, *as extended by any applicable grace period(s) specified in the Then-Applicable Orders and Regulations of the Commission*") (emphasis added by Spectrum). But as the Commission explained, the Grace Period Rule does not operate to extend deadlines beyond the maturity date of the Note. The italicized language thus only governed quarterly installment payments made prior to the end of the license term.

B. Spectrum's Equitable Estoppel Claim Is Also Barred and Unavailing.

Spectrum also contends, based on the erroneous statements in the staff's payment notices giving Spectrum payment deadlines beyond the end of the license term, that the FCC should be equitably estopped from automatically canceling the license for Spectrum's failure to pay in full by January 18, 2005. Br. 27-28. This claim is also barred by Section 405(a). Although Spectrum urged the Commission to take the erroneous payment notices into account as a measure of Spectrum's "good faith" when deciding whether to grant a waiver (AFR, at 3) (JA__), Spectrum did not (until its pleadings in this Court) contend that the notices estopped the agency from canceling its licenses for nonpayment. Because the Commission had no opportunity to pass on Spectrum's claim of regulatory estoppel, Spectrum is barred from raising an estoppel contention now.

In any event, Spectrum's estoppel claim fails on the merits. As Spectrum recognizes, to obtain equitable estoppel against the Government, Spectrum must prove more than the usual showing of detrimental reliance on a representation made to the party. Spectrum must also demonstrate that the Government "engaged in affirmative misconduct." *See Morris Communications*, 566 F.3d at 191.

Spectrum cannot meet this standard. This element requires more than merely the negligent issuance of erroneous advice or information by a Government employee regardless of intent. *See, e.g.*, *Schweiker v. Hansen*, 450 U.S. 785 (1981) (rejecting estoppel where Social Security employee erroneously told claimant that she was not eligible for benefit and consequently the claimant failed

to file a claim). As the Supreme Court recognized in *Office of Personnel Management v. Richmond*, 496 U.S. 414, 433 (1990) (citing Judge Friendly's dissenting opinion in the appellate court in *Hansen v. Harris*, 619 F.2d 942, 954 (2d Cir. 1980), which the Supreme Court reversed in *Schweiker v. Hansen, supra*):

> It ignores reality to expect that the Government will be able to secure perfect performance from its hundreds of thousands of employees scattered throughout the continent. To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.

496 U.S. at 433 (internal quotations and citations omitted). *See also United States v. McCorkle*, 321 F.3d 1292, 1297 (11th Cir. 2003) ("[a]ffirmative misconduct requires more than governmental negligence or inaction"); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001) (affirmative misconduct means a deliberate lie or a pattern of false promises, in contrast to negligently providing misinformation); *International Union v. Clark*, 2006 WL 2598046 (D.D.C. Sept. 11, 2006) ("the provision of erroneous information, without more, cannot give rise to an equitable estoppel claim against the Government").

Here, at most, Spectrum can show only that the erroneous information it received in the payment notices was the result of errors by employees and contractors charged with overseeing the content in the FCC's automated payment notices. Spectrum cannot establish – indeed, it does not allege – that the erroneous advice was provided out of malice, or intended to mislead. Absent any support in the record for a conclusion that the erroneous payment notices were the product of

anything more than a simple mistake, Spectrum cannot meet the "affirmative misconduct" prerequisite for equitable estoppel.

In sum, whether the erroneous payment notices are reviewed under the FCC's waiver standard as a basis for granting a waiver or as the basis for a claim of equitable estoppel, "a defaulting licensee should not be permitted to turn a clerical error into a windfall of rights it would not otherwise enjoy." *21st Century Telesis*, 318 F.3d at 202 (internal quotation and citation omitted).

CONCLUSION

For the foregoing reasons, the Court should deny the appeal and affirm the *Order*.

Respectfully submitted,

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ACTING ASSOCIATE GENERAL COUNSEL

/S/ STEWART A BLOCK
STEWART A. BLOCK
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

January 31, 2011

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

SPECTRUM IVDS, L.L.C.	)	
	)	
APPELLANT,	)	
	)	
V.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA	)	NO. 10-1264
	)	
	)	
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 9991 words.

/S/ STEWART A. BLOCK
Stewart A. Block
Counsel
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

January 31, 2011

STATUTORY APPENDIX

47 U.S.C. § 405

47 C.F.R. § 1.62
47 C.F.R. § 1.2110
47 C.F.R. § 95.811 (1994)
47 C.F.R. § 95.816 (1994)

47 U.S.C. § 405

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.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 1.62

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I - FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE
GENERAL APPLICATION PROCEDURES

§ 1.62 Operation pending action on renewal application.

(a)(1) Where there is pending before the Commission at the time of expiration of license any proper and timely application for renewal of license with respect to any activity of a continuing nature, in accordance with the provisions of section 9(b) of the Administrative Procedure Act, such license shall continue in effect without further action by the Commission until such time as the Commission shall make a final determination with respect to the renewal application. No operation by any licensee under this section shall be construed as a finding by the Commission that the operation will serve the public interest, convenience, or necessity, nor shall such operation in any way affect or limit the action of the Commission with respect to any pending application or proceeding.

(2) A licensee operating by virtue of this paragraph shall, after the date of expiration specified in the license, post, in addition to the original license, any acknowledgment received from the Commission that the renewal application has been accepted for filing or a signed copy of the application for renewal of license which has been submitted by the licensee, or in services other than broadcast and common carrier, a statement certifying that the licensee has mailed or filed a renewal application, specifying the date of mailing or filing.

(b) Where there is pending before the Commission at the time of expiration of license any proper and timely application for renewal or extension of the term of a license with respect to any activity not of a continuing nature, the Commission may in its discretion grant a temporary extension of such license pending determination of such application. No such temporary extension shall be construed as a finding by the Commission that the operation of any radio station thereunder will serve the public interest, convenience, or necessity beyond the express terms of such temporary extension of license, nor shall such temporary extension in any way affect or limit the action of the Commission with respect to any pending application or proceeding.

(c) Except where an instrument of authorization clearly states on its face that it relates to an activity not of a continuing nature, or where the non-continuing nature is otherwise clearly apparent upon the face of the authorization, all licenses issued by the Commission shall be deemed to be related to an activity of a continuing nature.

47 C.F.R. § 1.2110

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART Q. 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 offer or its equivalent if the applicant does not otherwise use audited financial statements.

47 C.F.R. § 95.811 (1994)

CODE OF FEDERAL REGULATIONS
TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER D—SAFETY AND SPECIAL RADIO SERVICES
PART 95—PERSONAL RADIO SERVICE
SUBPART F—INTERACTIVE VIDEOS AND DATA SERVICE (IVDS)
SYSTEM LICENSE REQUIREMENTS

§ 95.811 License requirements.

(a) Each IVDS system must be licensed.
(b) Each CTS where the antenna does not exceed 6.1 meters (m) (20 feet) above ground or an existing man-made structure (other than an antenna structure) is authorized under the IVDS system license. All other CTSs must be individually licensed to the system licensee.
(c) Each component RTU in an IVDS system is authorized under the IVDS system license or if associated with an individually licensed CTS, under that CTS license.
(d) The term of each IVDS system license and each CTS license is five years.

47 C.F.R. § 95.816 (1994)

CODE OF FEDERAL REGULATIONS
TITLE 47—TELECOMMUNICATION
CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER D—SAFETY AND SPECIAL RADIO SERVICES
PART 95—PERSONAL RADIO SERVICE
SUBPART F—INTERACTIVE VIDEOS AND DATA SERVICE (IVDS)
SYSTEM LICENSE REQUIREMENTS

§ 95.816 Competitive bidding proceedings.

(a) Mutually exclusive IVDS initial applications are subject to competitive bidding.
(b) The General Procedures set forth in 47 CFR Part 1, Subpart Q are applicable to competitive bidding proceedings used to select among mutually exclusive applicants for initial IVDS licenses.
(c) The specific procedures applicable to auctioning particular IVDS licenses will be set forth by Public Notice. Generally, the following competitive bidding procedures will be used to auction mutually exclusive IVDS licenses. The Commission, however, may design and test alternative procedures.
(1) Competitive bidding design. Sequential oral (oral outcry) auctions will be used to assign licenses in and around large urban areas and single-round sealed bidding will be used for rural areas unless otherwise specified by the Commission. See 47 CFR 1.2103 and 1.2104.
(2) Forms.
(i) Applicants must submit short-form applications (FCC Form 175) as specified in Commission Public Notices. Minor deficiencies may be corrected prior to the auction. Major modifications such as changes in ownership, failure to sign an application or failure to submit required certifications will result in the dismissal of the application. See 47 CFR 1.2105(a) and (b).

(ii) Applicants must submit a long-form application (FCC Form 574) within ten (10) business days after being notified that it is the winning bidder for a license. See 47 CFR 1.2107 (c) and (d).
(3) Upfront payments. For oral outcry bidding, applicants will be required to show the Commission or its representative, immediately prior to the auction, a cashiers check for at least $2500 in order to get a bidding number and secure a place in the room where the bidding will take place. Bidders will be required to have $2500 upfront money for every five licenses they win. No upfront payment will be required from applicants in single-round sealed bid auctions. See 47 CFR 1.2106.
(4) Down payments. Within five (5) business days after an oral outcry auction is over, or within five (5) business days after being notified that it is the high bidder in a single round sealed bid auction, a high bidder on a particular license(s) must submit to the Commission's lockbox bank such additional funds as are necessary to bring total deposits (upfront payment plus down payment) up to twenty (20) percent of the high bid(s). Small businesses eligible and electing to use installment payments pursuant to §95.816(d)(3) are required to bring their total deposits up to ten (10) percent of their winning bid. The remainder of the twenty (20) percent down payment must be submitted within five (5) business days of the grant of their license(s). See 47 CFR 1.2107(b).
(5) Full payment. Auction winners, except for small businesses eligible for installment payments, must pay the balance of their winning bids in a lump sum within five (5) business days following the grant of their license(s). The grant of a license(s) to an auction winner(s) will be conditioned on the timely payment of all monies due the Commission. See 47 CFR 1.2109(a).
(6) Default or disqualification, see 47 CFR 1.2104(g).
(i) Sequential oral auctions. If a high bidder, after signing a bid confirmation form, fails to make the required down payment, fails to pay for a license, or is otherwise disqualified, it will be assessed a penalty equal to the difference between its winning bid and the winning bid the next time the license is auctioned by the Commission, plus three (3) percent of the lower of these two amounts.
(ii) Single round sealed bid auctions. If a high bidder withdraws its bid prior to making the required down payment, it will be assessed a penalty equal to the difference between its bid and the next highest

bid. If a high bidder, after having made the required down payment for a license, fails to pay the remaining amount for the license, or is otherwise disqualified, it will be assessed a penalty equal to the difference between its winning bid and the winning bid the next time the license is auctioned by the Commission plus three (3) percent of the lower of these two amounts.

(d) Designated entities. Designated entities are small businesses, and businesses owned by members of minority groups and/or women, as defined in 47 CFR 1.2110(b).

(1) Bidding credits. A winning bidder that qualifies as a business owned by women and/or minorities may use a bidding credit of twenty-five (25) percent to lower the cost of its winning bid. A bidding credit is available for a license for either frequency segment A or frequency segment B in each service area. A bidding credit, however, may be applied to only one of the two licenses available in each service area.

(2) Tax certificates. Any initial investor in a business owned by minorities and/or women and who provides “start-up” financing, which allows such business to acquire a IVDS license(s), and any investor who purchases ownership in an interest in a IVDS license owned by minorities and/or women within the first year after license issuance, which allows for the stabilization of the entity's capital base, may, upon the sale of such investment or interest, request from the Commission a tax certificate, so long as such investor transaction does not reduce minority or female ownership or control in the entity below 50.1 percent. Any IVDS licensee who assigns or transfers control of its license to a business owned by minorities and/or women may request that the Commission issue it a tax certificate.

(3) Installment payments. Small businesses, including small businesses owned by women and/or minorities may elect to pay the full amount of their bid in installments over the term of their licenses. See 47 CFR 1.2110(d).

(e) Unjust enrichment. Any business owned by minorities and/or women that obtains a IVDS license through the benefit of tax certificates shall not assign or transfer control of its license within one year of its license grant date. If the assignee or transferee is a business owned by minorities and/or women, this paragraph shall not apply; Provided, however, that the assignee or transferee shall not assign or transfer control of the license within one year of the grant date of the assignment or transfer.

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

Spectrum IVDS, L.L.C., Appellant,

v.

Federal Communications Commission, Appellee.

CERTIFICATE OF SERVICE

I, Richard K. Welch, hereby certify that on January 31, 2011, I 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 the case who are registered CM/ECF users will be served by the CM/ECF system.

John B. Richards
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001

/s/ Richard K. Welch