

BRIEF FOR APPELLEE

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

No. 18-1176

GLH COMMUNICATIONS, INC.,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

ON APPEAL OF ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The appellant is GLH Communications, Inc. The appellee is the Federal Communications Commission.

2. Rulings under review.

Alpine PCS, Inc., CommNet Communications Network, Inc., GLH Communications, Inc., Inforum Communications, Inc., Lancaster Communications, Inc., Allen Leeds, TV Communications Network, Inc., Virginia Communications Network, Inc. Requests for Waiver of the Installment Payment Rules and Reinstatement of Licenses, Memorandum Opinion and Order, 25 FCC Rcd 469 (2010) (JA __), *recon. denied*, *GLH Communications, Inc. Requests for Waiver of the Installment Payment Rules and Reinstatement of Licenses*, Order on Reconsideration, 33 FCC Rcd ____ (rel. June 8, 2018) (JA __).

3. Related cases.

The order on review has not previously been before this Court. Counsel is not aware of any related cases that are pending before this Court or any other court. This Court previously dismissed a petition for issuance of a writ of mandamus to compel the Federal Communications Commission to act

on the petition for reconsideration that led to this appeal. Order, *In re: GLH Commc'ns, Inc.*, No. 18-1060 (D.C. Cir. Aug. 27, 2018).

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GLOSSARY

Act or Communications Act	Communications Act of 1934, as amended, 47 U.S.C. §151 <i>et seq.</i>
Bureau	Wireless Telecommunications Bureau of the Federal Communications Commission
<i>Bureau Order</i>	<i>GLH Communications, Inc. Request for Waiver of Installment Payment Rules, Order on Reconsideration, 22 FCC Rcd 2411 (WTB 2007) (JA __)</i>
Commission or FCC	Federal Communications Commission (appellee)
Division	Auctions and Industry Analysis Division of the Wireless Telecommunications Bureau
<i>Division Order</i>	<i>Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. §1.2110(g)(4) and Debt Collection Rules (47 C.F.R. §1901 et seq.), Order, 18 FCC Rcd 14695 (WTB 2003) (JA __)</i>
GLH	GLH Communications, Inc. (appellant)
<i>Order</i>	<i>Alpine PCS, Inc., CommNet Communications Network, Inc., GLH Communications, Inc., Inforum Communications, Inc., Lancaster Communications, Inc., Allen Leeds, TV Communications Network, Inc., Virginia Communications Network, Inc. Requests for Waiver of the Installment Payment Rules and</i>

Reinstatement of Licenses,
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denied, GLH Communications, Inc.
Requests for Waiver of the Installment
Payment Rules and Reinstatement of
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33 FCC Rcd ___ (rel. June 8, 2018)
(JA ___)

Reconsideration Order

GLH Communications, Inc. Requests
for Waiver of the Installment Payment
Rules and Reinstatement of Licenses,
Order on Reconsideration, 33 FCC Rcd
___ (rel. June 8, 2018) (JA ___)

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BRIEF FOR APPELLEE

INTRODUCTION

Appellant GLH Communications, Inc. (GLH) defaulted on installment payment obligations due in July 2003 for radio spectrum licenses that GLH had acquired by assignment and has failed to make a single payment towards its outstanding debt to the United States Treasury for over fifteen years. The defaults triggered the automatic cancellation of the underlying licenses and subjected GLH to Federal Communications Commission (FCC or Commission) debt collection procedures. The Auctions and Industry Analysis Division (Division) of the Wireless Telecommunications Bureau (Bureau) denied GLH's request for waiver of the license cancellation rule and for a two-year suspension of the debt collection

rules; the Bureau later denied reconsideration of that decision. On application for review, the Commission affirmed the Bureau and likewise denied reconsideration. The Commission's decisions were correct in all respects. The Court should deny this appeal.

QUESTIONS PRESENTED

Section 1.2110(g)(4)(iv) of the Commission's rules provides that if a licensee that is "obligated to make installment payments fails to pay the total Required Installment Payment, interest and any late 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." 47 C.F.R.

§1.2110(g)(4)(iv). The questions presented are:

1. Whether the Commission reasonably denied a request for waiver of section 1.2110(g)(4)(iv) where grant of a waiver would have undermined the purpose of the rule, and where GLH failed to present any unique circumstances that rendered application of the rule inequitable, unduly burdensome, or contrary to the public interest.
2. Whether the Commission properly rejected GLH's claim that it was entitled to a hearing notwithstanding the automatic cancellation of the licenses under section 1.2110(g)(4)(iv) of its rules.

3. Whether GLH is entitled to the proceeds obtained from the auction of licenses covering the same spectrum as that covered by GLH's canceled licenses either in full, or to the extent necessary to set off GLH's debt to the Commission.

JURISDICTION

The Commission released its order denying GLH's application for review on January 5, 2010; it released the order denying reconsideration on June 8, 2018. The notice of appeal was timely filed on June 27, 2018. *See* 47 U.S.C. §402(c). The Court has jurisdiction under 47 U.S.C. §402(b).

STATUTES AND REGULATIONS

The pertinent statutory provisions and regulations are set forth in the appendix to this brief.

COUNTERSTATEMENT

I. Statutory And Regulatory Background

A. The Commission's Competitive Bidding Authority

Under the Communications Act, the Commission has exclusive authority to grant licenses for the use of radio spectrum "if [the] public convenience, interest, or necessity will be served thereby." 47 U.S.C. §§301, 307(a); *see also id.* §309(a). In 1993, Congress mandated that in most instances the Commission should assign spectrum licenses through a system of competitive bidding (auctions) in which the license is awarded to the highest qualified bidder. *See* 47 U.S.C. §309(j).

B. The Installment Payment Program

When it adopted rules in 1994 implementing the competitive bidding provisions of the Communications Act, the Commission established an installment payment program under which qualified small businesses, or eligible entities, that won licenses in certain auctions were permitted to pay their winning bids in quarterly installments over the initial term of the license.¹ The Commission reasoned that permitting the bid amounts to be paid in installments would help to provide opportunities for small businesses to participate in the provision of spectrum-based services—one of section 309(j)'s goals.² The Commission discontinued the installment payment program in 1997, but it allowed eligible entities that were already paying for licenses in installments to continue doing so.³

In 1997, the Commission amended its installment payment rules to provide installment payment licensees with two automatic grace periods during which they

¹ See *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2389-91 ¶¶231-40 (1994).

² See *id.* at 2389-90 ¶233. See also 47 U.S.C. §309(j)(3)(B) (in designing systems of competitive bidding “the Commission . . . shall seek to . . . disseminat[e] licenses among a wide variety of applicants, including small businesses”); 47 U.S.C. §309(j)(4)(D) (in prescribing competitive bidding rules, “the Commission shall . . . ensure that small businesses . . . are given the opportunity to participate in the provision of spectrum-based services”).

³ See *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 374, 436 ¶106 (1997) (*Third Report and Order*).

could remit their required quarterly installment payment.⁴ The Commission found that the provision of automatic grace periods would eliminate uncertainty for licensees seeking to restructure debt and increase the likelihood that licensees and potential investors would find solutions to financial problems before defaults occurred.⁵ Under the amended rule, if a licensee did not fully and timely pay the required quarterly installment, it was automatically granted a 90-day period to pay the installment along with a five percent late fee. 47 C.F.R. §1.2110(f)(4)(i) (1998). If the licensee did not make full and timely payment of the installment during the 90-day grace period, the licensee was automatically granted a second 90-day period to pay the installment along with a ten percent late fee. 47 C.F.R. §1.2110(f)(4)(ii) (1998). In 2000, to align the schedule for late installment payments with the quarterly schedule for required installment payments, the Commission amended its rules to provide licensees with two quarters—i.e., two 3-

⁴ *Id.* at 436-48 ¶¶ 106-07. Prior to amendment, any licensee whose installment payment was more than 90 days past due was in default unless the licensee had properly filed a request for a grace period of 90 to 180 days. *See* 47 C.F.R. §1.2110(e)(4)(i)-(ii) (1994).

⁵ *See Third Report and Order*, 13 FCC Rcd at 443 ¶116.

month periods rather than two 90-day periods—to remit late installment payments and the corresponding late fee.⁶

Under the Commission’s rules, if a licensee fails to make its required installment payment, including the associated late fee, before the expiration of the second grace period, then the licensee “shall be in default” and “its license shall automatically cancel.” 47 C.F.R. §1.2110(g)(4)(iv). In addition, and as a result, the licensee “will be subject to debt collection procedures.” *Id. See* 47 C.F.R. §1.1901 *et seq.*

II. Factual Background

A. GLH’s Installment Payment Default.

In 2001, the Commission approved the assignment of six personal communication service (PCS) spectrum licenses serving markets in Kentucky, Alabama and Tennessee to GLH from a subsidiary of Leap Wireless International, Inc. (Leap). Public Notice, *Wireless Telecommunications Bureau Grants Consent to Assign C Block Broadband PCS Licenses*, 16 FCC Rcd 20304 (2001) (Public Notice) (JA ___).

A subsidiary of Leap had been the winning bidder in a 1996 auction of the licenses and, as a qualified eligible entity, opted to pay its winning bid in

⁶ See *Amendment of Part 1 of the Commission’s Rules—Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 15293, 15310 ¶ 28 (2000) (*2000 Order*).

installments. In doing so, the subsidiary executed security agreements in which it acknowledged, among other things, that in the event the Commission were to cancel the license for any default, the subsidiary would have “no right or interest in any moneys . . . given to the Commission by a subsequent licensee of the Spectrum, and that all such moneys . . . are, and shall remain, the full property of the federal Treasury.” *See, e.g.*, Security Agreement between Chase Tel Licensee Corp. and FCC ¶8(d) (attached to Application for Review) (JA __). When GLH acquired the licenses, it assumed Leap’s obligation to make the remaining installment payments for the licenses, along with the security agreements. *See* Assignment and Assumption of Installment Payment Plan Note and Security Agreement for Broadband PCS C Block (attached to Application for Review) (JA__); *see also* Public Notice, 16 FCC Rcd at 20304-05 (JA __).

GLH did not make the scheduled installment payments for the six licenses (amounting to \$605,371.04) that were due on January 31, 2003. (As of that date, the outstanding principal owed to the Commission for the licenses was \$8,383,941.79). *See* Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. § 1.2110(g)(4) and Debt Collection Rules (47 C.F.R. § 1.1901 et seq.) (Waiver Request) at 4 (JA __). As a result, under the Commission’s grace period rules, GLH had until March 31, 2003 to make its January 31 payment (along with a five percent late fee), or until

July 31, 2003 to make the payment (along with a ten percent late fee). *See* 47 C.F.R. §1.2110(g)(4).

GLH did not make the scheduled installment payment before expiration of the first grace period on March 31, 2003. On April 16, 2003, before the expiration of the second grace period, GLH filed a request for “temporary waivers” of the Commission’s installment payment deadlines and its debt collection rules. Waiver Request at 1 (JA __).⁷

In its request, GLH explained that because of a failure by Leap (which had by then filed for bankruptcy) to comply with certain agreements to pay GLH for its acquisition of the licenses, *id.* at 5 (JA __), GLH “does not currently have the capital to timely cure GLH’s payment delinquency with the Commission”; moreover, “GLH has been unsuccessful in its various efforts to obtain additional capital or alternative funding,” *id.* at 6, 7 (JA __, __). GLH acknowledged that if “GLH is not able to negotiate a debt compromise with the Commission or otherwise cure its payment delinquency to the Commission by July 31, 2003 . . .

⁷ Concurrent with the filing of the Waiver Request with the Bureau, GLH separately filed a petition with the agency’s Office of the Managing Director seeking to compromise its debt. In that petition, GLH proposed to return the six licenses to the Commission, as well as seven others owned by its sister companies, and to “apply[] the payments already made to the Commission” to make the agency “whole.” Waiver Request at 6 n.2 (JA __). By letter dated December 11, 2003, the petition was returned to GLH without action due to GLH’s failure to submit requested information and its apparent lack of interest in pursuing debt compromise.

GLH might automatically forfeit the Licenses pursuant to 47 C.F.R.

§1.2110(g)(4).” *Id.* at 6 (JA __). “In order to continue providing service to its 14,000-plus . . . customers,” as well as to “honor its payment obligations to the Commission to the fullest extent possible,” *id.* at 7 (JA __), GLH requested “a twenty-four (24) month waiver of the Commission’s installment payment deadlines and debt collection rules.” *Id.* at 14 (JA __).

On July 18, 2003, the Division denied GLH’s request to waive section 1.2110(g)(4)(iv) and dismissed without prejudice as premature GLH’s request for suspension of the debt collection rules. *Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. §1.2110(g)(4) and Debt Collection Rules (47 C.F.R. §1901 et seq.)*, Order, 18 FCC Rcd 14695, 14703 ¶¶21, 22 (WTB 2003) (*Division Order*) (JA __). “Precluding winning bidders, or subsequent licensees, from keeping the licenses when the winning bids are not paid pursuant to the Commission’s rules,” the Division explained, “minimizes bidders’ incentive to make bids that they cannot pay.” *Id.* at 14699 ¶10 (JA __). In this regard, the Division emphasized, GLH bore “the full risks of any commercial arrangements it made to pay for its licenses,” *id.* at 14701 ¶15 (JA __). And while the Division acknowledged a public interest in the continuation of service, it concluded that “any interest in a particular licensee providing service must be balanced against the larger public interest in preserving the integrity and

efficiency of the Commission’s licensing process, as well as the Commission’s obligation to fairly and consistently enforce its payment rules.” *Id.* at 14700 ¶12 (JA __).⁸

Prior to expiration of the second grace period on July 31, 2003, GLH paid in full the outstanding debt owed on two of the six licenses acquired from Leap and transferred those licenses to a sister entity. *See GLH Communications, Inc. Request for Waiver of Installment Payment Rules*, Order on Reconsideration, 22 FCC Rcd 2411, 2413 ¶ 8 (WTB 2007) (*Bureau Order*) (JA __); *accord* Brief of Appellant (Br.) at 5 n.3.⁹ GLH did not pay the January 31, 2003 installment payment and corresponding late fee for the remaining four licenses. As a result, pursuant to section 1.2110(g)(4)(iv) of the Commission’s rules, the licenses “canceled automatically on August 1, 2003, and GLH became subject to the

⁸ The Division dismissed GLH’s request to suspend the debt collection rules as premature, observing that “GLH might file for bankruptcy before the Commission commences debt collection procedures” or “GLH might find some means to satisfy its installment payment obligations on a timely basis” before the expiration of the second grace period. 18 FCC Rcd at 14702 ¶19 (JA __).

⁹ According to the agency’s records, the FCC received a total payment of \$1,972,876.62 for the two licenses.

[Commission's] debt collection procedures.” *Bureau Order*, 22 FCC Rcd at 2415 ¶8 (JA __).¹⁰

On August 15, 2003, GLH petitioned the Bureau to reconsider the decision denying its request for a waiver. Petition for Reconsideration in the Matter of Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. §1.2110(g)(4) and Debt Collection Rules (47 C.F.R. §1.1901 et seq.) (JA __). The Bureau denied reconsideration. In doing so, it reaffirmed the critical importance that “strict enforcement of the installment payment rules” has to the “integrity of the auction and licensing process by ensuring that spectrum is awarded to those entities who value the spectrum most and that have the necessary financial capacity to build out systems and provide service.” *Bureau Order*, 22 FCC Rcd at 2417 ¶15 (JA __).

B. The Order On Appeal

GLH thereupon applied to the full Commission for review. Application for Review (JA __). In its application, GLH asked the Commission to (i) “grant GLH an additional six months to meet its debt obligations to the Commission which

¹⁰ With respect to two of the four canceled licenses, GLH sought and the Commission granted “special temporary authority for over a year to enable GLH to discontinue operations and to afford existing customers time to transition to another service provider in an orderly manner.” *Id.* at 2415 ¶9, 2418 ¶17 (JA __, __). GLH did not seek authority from the Commission to continue operations with respect to the remaining two licenses. *Id.* at 2418 ¶17 (JA __).

were outstanding as of July 31, 2003” but “if it chooses not to grant such an extension, [to] reinstate GLH’s licenses and designate a hearing to consider whether they should be revoked under the circumstances presented,” or (ii) “remit GLH \$2,418,671 as the surplus received for the sale of the licenses.” *Id.* at 18-19 (JA __). (The Commission had subsequently auctioned licenses covering the same spectrum as that covered by GLH’s canceled licenses. *See* Public Notice, *Broadband PCS Spectrum Auction Closes – Winning Bidders Announced for Auction No. 58*, 20 FCC Rcd 3703 (2005)).

On January 5, 2010, the Commission denied GLH’s application, in an order that also resolved applications for review filed by seven other entities that similarly had “defaulted on payment obligations for wireless licenses won at auction and subject to the Commission’s installment payment loan program.” *Alpine PCS, Inc., CommNet Communications Network, Inc., GLH Communications, Inc., Inforum Communications, Inc., Lancaster Communications, Inc., Allen Leeds, TV Communications Network, Inc., Virginia Communications, Inc. Requests for Waiver of the Installment Payment and Reinstatement of Licenses*, Memorandum Opinion and Order, 25 FCC Rcd 469, 470-71 ¶1 (2010) (*Order*) (JA __).

The Commission explained that “grant of a waiver of the automatic cancellation rule would undermine the purpose of the rule where the licensee has not demonstrated its ongoing ability and willingness to fulfill payment obligations

despite its default.” *Id.* at 481 ¶19 (JA __). “[R]equiring licensees to demonstrate their continuing ability to pay as a condition of holding a license is essential to an efficient licensing process that is fair to all auction participants, both those who win licenses and those who do not.” *Id.* at 482 ¶20 (JA __). “If the Commission were to allow licensees to keep their licenses after they had failed to comply with the Commission’s payment rules,” the agency stated, “it would increase the incentive for bidders to make bids they could not pay and reduce opportunities for other bidders to win licenses.” *Id.* at 483 ¶21 (JA __). In short, the Commission concluded, “where the financial circumstances of a party seeking waiver of the automatic cancellation rule provide evidence that calls into question its ongoing financial ability and willingness to fulfill its payment obligations, grant of the waiver would frustrate the rule’s underlying purpose.” *Id.* at 486 ¶27 (JA __).

The Commission also found that there were no “unique financial circumstances” that demonstrated an entitlement to a waiver of the automatic cancellation rule. *Id.* at 489 ¶32 (JA __). “[C]laims regarding financial difficulties resulting from a licensee’s business decisions and commercial dealings, including those in which a third party has withdrawn financial support, do not amount to unique facts or circumstances that make application of the automatic cancellation rule inequitable, burdensome, or contrary to the public interest.” *Ibid.*

The Commission rejected GLH's contention that it was entitled to a hearing under section 312 of the Communications Act, 47 U.S.C. §312, before its licenses could be "revoked." The agency explained that "Commission licensees hold only those rights established by the terms and conditions of licenses issued to them." *Id.* at 508 ¶84 (JA __). Because one of the conditions for holding a license subject to installment payments "is full and timely payment," "[i]f that condition is not satisfied, the license authority lapses under its own terms, and the license is thus deemed automatically cancelled." *Id.* at 509 ¶84 (JA __). This "cessation of license authority," the Commission stated, "does not constitute a Section 312 license revocation, and the Section 312 hearing requirements are therefore inapplicable." *Ibid.* (JA __).

The Commission also rejected GLH's claim that the Bureau should have set off GLH's outstanding debt against the winning bid in a subsequent auction of licenses covering the same spectrum as that covered by the licenses on which GLH had defaulted. *See id.* at 500 ¶59 (JA __). First, the Commission found that section 1.2104(g)(2) of its rules, which provides for such a set-off (in conjunction with a 3 percent penalty), applies to licensees that default on their pre-award down payments, and not to licensees like GLH that default on their installment payments after the award of a license. *Id.* at 501 ¶61 (JA __). Rather, it is section 1.2110 of the Commission's rules that "dictates the consequences of an installment payment

default, namely the automatic cancellation of the license and Commission initiation of debt collection procedures.” *Ibid.*

Second, the Commission found that the Uniform Commercial Code (“UCC”) does not entitle GLH to a set-off of its debt, relying on the Commission’s longstanding policy and practice, approved by the Ninth Circuit, that “federal common law and not the UCC governs the rights and obligations of the Commission and its licensees with regard to the installment payment program.” *Id.* at 502-503 ¶¶ 64-66 (JA __ - __). *See In re Magnacom Wireless*, 503 F.3d 984 (9th Cir. 2007).

GLH petitioned the Commission to reconsider the denial of its application for review. Petition for Reconsideration (JA __). In its petition, GLH urged the Commission to “reconsider its action with respect to GLH, credit GLH with set-off against the amount of the re-auction proceeds, take whatever steps with the U.S. Treasury necessary to pay the excess re-auction amounts to GLH or, in the alternative, award GLH auction credits.” *Id.* at 11-12 (JA __ - __). The Commission denied reconsideration. *GLH Communications, Inc. Requests for Waiver of the Installment Payment Rules and Reinstatement of Licenses*, Order on Reconsideration, 33 FCC Rcd __ ¶1 (2018) (*Reconsideration Order*) (JA __). This appeal followed.

SUMMARY OF ARGUMENT

GLH held spectrum licenses that were awarded through auction and were subject to the Commission's installment payment program. When GLH acquired the licenses, it assumed responsibility for making the required installment payments, but it failed to do so. Under the Commission's rules, the licenses therefore were automatically canceled, and GLH became subject to collection of the outstanding debt. 47 C.F.R. §1.2110(g)(4)(iv).

The Commission reasonably denied GLH's request to waive the license cancellation and debt collection rules. GLH argues that it was financially unable to meet its payment obligation, and that with additional time it could have done so. But as the Commission reasonably determined, granting the waiver would have undermined the purpose of the payment rules and "would only encourage auction participants to overbid for licenses with the expectation that they would be provided relief, if needed, from their payment obligations." *Order* at 489 ¶31 (JA __); Section I.A, *infra*. The Commission also reasonably found that GLH had failed to present any unique or unusual circumstances that would render application of the automatic cancellation rule inequitable, unduly burdensome, or contrary to the public interest. *See Order*, 25 FCC Rcd at 489 ¶32 (JA __); Section I.B, *infra*. GLH emphasizes that it built out its licenses and initially had a record

of timely payments, but neither argument qualifies it as “unique” or warrants a waiver of the generally applicable rule.

GLH also was not entitled to a hearing under Section 312(c) of the Communications Act before its licenses were canceled. *See* Section II, *infra*. GLH’s argument ignores the difference between license revocation under Section 312(c) and the entirely distinct rules governing automatic license cancellation under 47 C.F.R. §1.2110(g)(4)(iv), and in any event, is foreclosed by this Court’s decision in *Morris Communication, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009).

Finally, GLH’s contention that it was entitled to the proceeds the Commission received upon the subsequent auction of new licenses covering the same spectrum as that formerly licensed to GLH has no basis. GLH’s reliance on the UCC is inconsistent with the terms of its installment agreements, the 1996 *Opinion Letter* on which auction participants have long relied, the Ninth Circuit’s decision in *Magnacom*, 503 F.3d 984, and this Court’s summary affirmance in *In re Alpine PCS, Inc.*, 404 Fed. Appx. 504 (D.C. Cir. 2010). *See* Section III.A, *infra*. Nor is it entitled to offset its debts with those auction proceeds. *See* Section III.B, *infra*. GLH ignores the difference between 47 C.F.R. §1.2104(g)(2), which applies to defaults before a license award, and 47 C.F.R. §1.2110(g)(4), which applies to licensees who thereafter default on installment payment obligations. The

Commission simply seeks to hold GLH to the contractual and regulatory obligations that it voluntarily accepted.

STANDARD OF REVIEW

Under the Administrative Procedure Act, GLH can prevail in its challenge to the agency's decisions only if it is able to demonstrate they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(A). Under this highly deferential standard of review, the Court "presumes the validity of agency action . . . and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment." *Cellco P'ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004). In this regard, the Commission need only articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

GLH faces a particularly heavy burden here because it challenges the Commission's interpretation of its own rules and the Commission's refusal to waive those rules.

The Commission's interpretation of its own rules is controlling unless that interpretation is "plainly erroneous or inconsistent with the regulation[]" or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk Am., Inc. v. Mich. Bell*

Tel. Co., 131 S. Ct. 2254, 2261 (2011) (citation and internal quotation marks omitted); *see AT&T, Inc. v. FCC*, 886 F.3d 1236, 1246 (D.C. Cir. 2018).

The Court may set aside the Commission’s refusal to waive its own rule only if GLH establishes that the Commission’s reasons for declining to grant the waiver were “so insubstantial as to render that denial an abuse of discretion.” *Morris*, 566 F.3d at 188 (citation and internal quotation marks omitted). *Accord BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181 (D.C. Cir. 2003); *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999). Under this standard, “the Commission abuses its discretion if it fails to provide adequate explanation before it treats similarly situated parties differently,” but the “strict construction” of its rule “in the face of waiver requests is insufficient evidence of an abuse of discretion.” *Morris*, 566 F.3d at 188-89 (citation and internal quotation marks omitted).

ARGUMENT

I. THE COMMISSION REASONABLY DENIED GLH’S REQUEST FOR WAIVER OF THE AUTOMATIC CANCELLATION RULE.

To obtain a waiver of the installment payment default automatic cancellation rule contained in 47 C.F.R. §1.2110(g)(4)(iv), GLH was required to show either (i) that the “underlying purpose” of the rule “would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest,” 47 C.F.R. §1.925(b)(3)(i); or (ii) that, in

light of “unique or unusual factual circumstances,” application of the rule “would be inequitable, unduly burdensome, or contrary to the public interest, or [GLH] has no reasonable alternative.” *Id.* §1.925(b)(3)(ii). The Commission reasonably held that GLH satisfied neither prong of this test.

A. The Commission Reasonably Determined That Waiver Would Undermine The Purpose Of The Automatic Cancellation Rule.

The Commission has long held that the “purpose of the automatic cancellation rule is to preserve the reliability and integrity of the competitive bidding and licensing processes by ensuring that licensees have the ongoing financial ability and willingness to fulfill their auction-related payment obligations.” *Order*, 25 FCC Rcd at 481 ¶19 (JA __). Under this licensing regime, the “Commission presumes that the entity that bids the most for a license in an auction is the entity that places the highest value on the use of the spectrum and is best able to put the licenses to use for the benefit of the public.” *Id.* at 482 ¶20 (JA __). The presumption “is lost when licensees paying winning bids in installments fail to pay the principal, related interest, and any late fees in compliance with the Commission’s rules.” *Id.* at 482 ¶21 (JA __).

As the Commission explained, requiring “licensees to demonstrate their continuing ability to pay as a condition of holding a license, is essential to an efficient licensing process that is fair to all auction participants, both those who

win licenses and those who do not.” *Id.* at 482 ¶20 (JA __). Granting a waiver request despite “evidence of . . . financial difficulties,” the Commission stated, “would only encourage auction participants to overbid for licenses with the expectation that they would be provided relief, if needed, from their payment obligations.” *Id.* at 489 ¶31 (JA __). In light of GLH’s professed financial difficulties and its “failure to demonstrate the ongoing ability and willingness to fulfill [its] financial obligations despite [its] default,” the Commission reasonably determined that grant of a waiver “would undermine the underlying purpose of the automatic cancellation rule.” *Id.* at 485 ¶25 (JA __). GLH’s contention that it “did not acquire these licenses in an auction” but is “two licensees removed from the actual bidder” (Br. at 23), is not relevant because strict enforcement of the installment payment rules “preserves a fair and efficient licensing process . . . and serves the public interest whether the licensee acquired the license directly through competitive bidding or through assignment” as occurred in GLH’s case. *Id.* at 483 ¶21 (JA __).

GLH also contends (Br. at 23) “that grant of the waiver requested by GLH to allow it a bit of extra time to pay its debt would not undermine the purposes” of the automatic cancellation rule. But GLH’s waiver request, which sought a two-year delay in its payments and was based on the unremedied disruption of its financing plans, “call[ed] into question its ongoing financial ability and willingness to fulfill

its payment obligations.” *Id.* at 486 ¶27 (JA ___). Under the circumstances, as the Commission reasonably found, grant of a waiver would frustrate the underlying purpose of the automatic cancellation rule to ensure that applicants have the financial wherewithal to stand behind their installment payment obligations.

Here, not only did GLH request two additional years to pay its missed installment payments, it has failed for the past fifteen years to make any payment toward its outstanding debt on the four licenses on which it defaulted. *See id.* at 487 n.127 (JA ___) (noting GLH’s acknowledgment that “it still has not paid the amounts initially due in January 2003”). Moreover, GLH “sought to repay its outstanding debt on its own terms, not on the terms to which it agreed when it acquired the licenses.” *Id.* at 488 ¶29 (JA ___).¹¹ The “Commission 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.” *Id.* at 487 ¶29 (JA ___).

¹¹ *See* Br. at 19 (GLH “approached the FCC with a proposal that would have assured that the FCC was made whole” by returning to the Commission “a group of valuable licenses . . . [that] added up to almost the same amount” as the outstanding debt, or by “recoup[ing] sufficient funds from the collateral it held to pay off the FCC in cash.”).

B. The Commission Reasonably Determined That GLH Had Not Shown Any Unique Circumstances Justifying A Waiver.

The Commission also reasonably found that GLH had failed to present any unique or unusual circumstances that would render application of the automatic cancellation rule inequitable, unduly burdensome, or contrary to the public interest. *See Order*, 25 FCC Rcd at 489 ¶32 (JA __).

GLH emphasizes (Br. at 22) that it “built out” its licenses and “provided service to the public.” But that does not distinguish its situation from other installment payment licensees that have encountered financial difficulties after build-out. *See Order*, 25 FCC Rcd at 493 ¶38 & n.157 (JA __) (collecting examples). As the Commission explained, the “interest in a particular licensee’s provision of service must be balanced against the broader public interest in preserving the integrity and efficiency of the Commission’s auction process.” *Id.* at 492 ¶37 (JA __). When a licensee “presents circumstances that raise questions about its ongoing ability and willingness to fulfill its payment obligations, assertions about the provision of service do not outweigh those questions and establish that the underlying purpose of the automatic cancellation rule would be frustrated by its application.” *Id.* at 492 ¶36 (JA __).¹²

¹² The Commission also granted GLH special temporary authority to allow its customers time to transition to another provider. *See Bureau Order*, 22 FCC Rcd at 2415 ¶9 (JA __).

Likewise, the fact that GLH had a brief record of timely payments (until it didn't), *see* Br. at 23, does not constitute a unique or unusual circumstance rendering the Commission's waiver denial inequitable or inconsistent with the public interest. While a past history of timely payment can in some circumstances be relevant in determining whether a licensee is "willing and able to fulfill its payment obligations in a timely manner on an ongoing basis," *Order*, 25 FCC Rcd at 491 ¶35 (JA__), here GLH had made it clear that Leap's bankruptcy fatally disrupted GLH's ability to continue to make timely payments. As the Commission explained, "assertions based on prior installment payment history" are outweighed "where a party concedes that it has experienced financial difficulties and has stopped making full and timely installment payments, and states that it can only fulfill its payment obligations . . . under alternative terms and conditions"; "such circumstances raise doubts about the party's ongoing ability and willingness to meet its financial obligations." *Id.* at 491-492 ¶35 (JA__).

Finally, GLH complains that the Commission's decision to deny a waiver "failed to follow" the agency's precedent in restructuring the debt of defaulting C-Block bidders. *See Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services, (PCS) Licenses, Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 16436 (1997) (*C-Block Relief Order*). But GLH never raised this argument

before the agency. It is therefore barred by section 405 of the Communications Act from raising it on appeal, since the Commission was “afforded no opportunity to pass.” 47 U.S.C. §405. *See, e.g., NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016). In any event, the relief afforded by that order – to the C-Block as a whole – was a one-time event requiring an election of remedies by January 31, 1998, or nearly three years before GLH’s acquisition of the licenses from Leap. *See C-Block Relief Order*, 12 FCC Rcd at 16470 ¶¶70. As the Commission expressly “emphasize[d],” “existing installment default rules and license conditions will continue to apply for those particular licenses in default after March 1, 1998.” *Id.* at 16473 ¶ 80. “[U]pon default,” such licenses “will automatically cancel” and be subject to “debt collection procedures.” *Ibid.*¹³

II. GLH WAS NOT ENTITLED TO A HEARING BEFORE ITS LICENSES AUTOMATICALLY CANCELED.

Section 312(c) of the Communications Act provides that before “revoking a license or permit pursuant to subsection (a)” (which lists a number of grounds for

¹³ GLH makes glancing references (Br. 21-22) to Bureau action taken with respect to the selective default by SNR Wireless LicenseCo on winning bids after being found not to qualify for designated entity bidding credits, *see Letter to Ari Q. Fitzgerald, Esq.*, 30 FCC Rcd 10704 (WTB 2015), and a failed challenge, on foreign ownership grounds, to Verizon’s license holdings, *see NTCH*, 841 F.3d at 506-508. Neither matter was brought to the Commission’s attention in the proceedings below, and thus they may not be raised here. *See* 47 U.S.C. §405. In any event, neither matter involved a request to waive an installment payment deadline, and thus neither has any relevance to this case.

revocation), the Commission is required to serve on the licensee a notice with the grounds for revocation, and provide an opportunity for a hearing, if one is not waived, before revocation. 47 U.S.C. §312(c). Relying on this provision, GLH contends that it was entitled to a hearing before its licenses could automatically cancel for failure to comply with its installment payment obligations. Br. at 46-50. GLH's contention is foreclosed by this Court's decision in *Morris*, and in any event fails.

In *Morris*, an installment payment licensee whose licenses had been automatically canceled argued that it was entitled to an "administrative hearing prior to any revocation of its authorizations." See 566 F.3d at 192. This Court rejected that contention as "without merit," explaining that the Communications Act provides that "no . . . license shall be construed to create any right beyond the terms, conditions and periods of the license," and *Morris*'s licenses "on their face" stated that they were "conditioned upon the full and timely payment of all moneys due." *Ibid.* (citations omitted). Because its licenses "were thus contingent on *Morris*'s timely payment of all amounts owing," once it failed to make the required payment, its licenses "lapsed" according to their terms. *Ibid.* Cf. *P & R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) (removal of authority to operate certain channels is not a license modification entitling licensee to hearing under 47 U.S.C. §316 when triggered by failure to satisfy license conditions).

GLH contends that “the license for KNL468 (Middlesboro-Harlan) – unlike the other three licenses in issue – was never conditioned on the timely payment of the installment note obligations.” Br. at 47. This argument was made for the first time on appeal and is therefore barred under 47 U.S.C. §405. In any event, this argument is beside the point because the automatic cancellation rule is regulatory, not contractual, and conditions the holding of a license subject to the installment payment program on “full and timely payment.” *Order*, 25 FCC Rcd at 509 ¶84 (JA __); 47 C.F.R. §1.2110(g)(4)(iv) (“[i]f an eligible entity obligated to make installment payments fails to pay . . . its license shall automatically cancel”).¹⁴

Thus, GLH’s licenses were not revoked, and Section 312(c) is not at issue here. Rather, as in *Morris*, GLH’s licenses lapsed through automatic cancellation

¹⁴ GLH also acknowledges that a hearing is not required when it would be “pointless.” Br. at 49 (citing *ICO Global Communications (Holdings) Ltd. v. FCC*, 428 F.3d 264, 270 (D.C. Cir. 2005)). Here there is no dispute that GLH failed to make the required installment payments on its licenses, and that failure, by the terms of the rule, triggered their “automatic . . . cancellation without any action by the Commission.” *Order*, 25 FCC Rcd at 509 ¶84 (JA __). GLH contends that a hearing was needed to consider “(1) the reason for non-payment; (2) the likelihood of GLH’s prompt and full payment upon liquidation of Leap’s collateral; and (3) the projected adverse consequences to the public in the event of revocation of GLH’s licenses.” Br. at 50. But these are all issues that go to GLH’s claim for a waiver—they raise no question as to whether GLH was in default and subject to automatic cancellation (a matter as to which there is no dispute). And GLH plainly had no right to a hearing, under the Communications Act or otherwise, before the Commission ruled on its request for a waiver.

for failure to satisfy the condition – imposed by §1.2110(g)(4)(iv) – that installment payments be timely made. But even if there were any question about the meaning of Section 312(c), the Commission’s determination that “cessation of license authority does not constitute a Section 312(c) license revocation, and the Section 312 hearing requirements are therefore inapplicable,” *Order*, 25 FCC Rcd at 509 ¶ 84 (JA __), was a reasonable interpretation of the Communications Act due deference under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984).

III. GLH WAS NOT ENTITLED TO THE PROCEEDS THE FCC RECEIVED FROM THE SUBSEQUENT AUCTION, OR TO BE CREDITED WITH THOSE PROCEEDS TO SET OFF ITS DEBT.

GLH contends that, in the event its licenses properly canceled, it is entitled to the proceeds the Commission received upon the subsequent auction of licenses for spectrum formerly associated with the licenses GLH held (including any amount by which those proceeds exceeded GLH’s debt). Br. at 37-45. At a minimum, GLH argues, it is entitled to set off those proceeds to extinguish its debt. Br. at 24-37. Neither contention is correct.

A. GLH Is Not Entitled To The Proceeds Of The FCC’s Subsequent Auction Of The Spectrum

GLH’s argument that it is entitled to the proceeds of the Commission’s subsequent auction of the licenses for spectrum that had previously been licensed to GLH is based on its assertion that the UCC requires a “secured party to pay over

to the debtor any recovery from the liquidation of the collateral held by the secured party which is in excess of the amount of the debt.” Br. at 39 (citing D.C. Code §28-9-615(d)(1)). But as the Commission explained, it “has long advised licensees that the UCC does not govern the consequences of installment payment defaults.” *Order*, 25 FCC Rcd at 502 ¶65 (JA __). See *Leonard J. Kennedy, Esq.*, 11 FCC Rcd 21572 (OGC & WTB 1996) (*1996 Opinion Letter*). Instead, “the rights and obligations of the FCC and its licensees arising from the installment payment program are clearly matters of federal law.” *Id.* at 21577. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

Moreover, unlike “collateral in goods or other tangible property,” when “FCC licenses . . . are canceled and reauctioned . . . there is no liquidation of the collateral . . . and no proceeds from the resale of the defaulted license because the license is canceled and, in effect, disappears.” *Reconsideration Order*, at ¶11 (JA __) (quoting *1996 Opinion Letter*, 11 FCC Rcd at 21576). In the case of a license like GLH’s that automatically cancels upon the licensee’s failure to make installment payments, “[t]he Commission [is] simply auctioning another initial license to use the same spectrum to another entity, not transferring the original license.” *Ibid.* (JA __).

Thus, in *Magnacom*, 503 F.3d 984, the court of appeals rejected a claim by the trustee in bankruptcy for an installment payment licensee whose licenses had canceled to the proceeds from the subsequent auction of licenses covering the same spectrum. As the court explained, “[a]ny value stemming from [the licensee’s] license was extinguished when the FCC unilaterally canceled the licenses pursuant to its contractual and regulatory rights.” *Id.* at 994. Those rights, the court stated, were “separate and independent from the FCC’s rights as a secured creditor.” *Ibid.* “Because the FCC’s license cancellation is not a UCC lien-enforcement remedy, the UCC’s requirements are simply inapplicable.” *Id.* at 995. In short, because a canceled license “ha[s] no value,” it “[can] not generate any traceable proceeds for purposes of the Bankruptcy Code.” *Ibid.*¹⁵

Likewise, in *In re Alpine PCS, Inc.*, 2008 WL 5076983 (Bankr. D.D.C.), an installment payment licensee whose licenses had canceled sought to enforce the automatic stay provisions of the Bankruptcy Code to enjoin the auction of spectrum that had been covered by its canceled licenses. The court rejected the argument that by auctioning the spectrum, the FCC was “acting to collect a claim” against the debtor. As it stated, “[t]his is not a case of a creditor selling a debtor’s collateral at auction with the debtor entitled to a credit for the amount received at

¹⁵ GLH makes no attempt to distinguish *Magnacom*; it simply asks that the Ninth Circuit’s analysis be “rejected.” GLH Br. at 44-45.

auction.” 2008 WL 5076983, at *6; *Id.* at *8 (“the FCC’s conducting of an auction to re-license the spectrum that was formerly licensed to [the debtor] cannot be viewed as a debt collection act”). “The proceeds realized from the new auction of the spectrum will not be an auction of the property of the debtor, but instead of property held by the FCC on behalf of the public.” *Ibid.* This Court affirmed the refusal to enjoin the auction of the spectrum “for the reasons stated in the opinion of the bankruptcy court.” *In re Alpine PCS, Inc.*, 404 Fed. Appx. 504.¹⁶

GLH’s claim to subsequent auction proceeds also flies in the face of its express acknowledgement, in the Security Agreement that Leap’s subsidiary executed and GLH assumed, that GLH “has no right or interest in any moneys or evidence of indebtedness given to the Commission by a subsequent licensee of the Spectrum, and that all such moneys and evidences of indebtedness are, and shall remain, the full property of the federal Treasury.” Security Agreement, ¶8(d) (JA __). *See Reconsideration Order*, ¶9 (JA __). GLH does not dispute its written disavowal of any right to subsequent proceeds. Br. at 39. Instead, it contends that

¹⁶ GLH attempts to find support for its position in this Court’s statement in *NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 151 (D.C. Cir. 2001), *aff’d*, 537 U.S. 293 (2003), that “cancelling the licenses and seeking to collect on the debt was ‘tantamount to . . . foreclosing on collateral.’” Br. at 41. But that statement was made in a discussion of the applicability of section 525 of the Bankruptcy Code in a challenge to the license cancellation; the case did not involve analysis of a former licensee’s entitlement to proceeds of a subsequent auction once its licenses have canceled. *See Magnacom*, 503 F.3d at 991.

the UCC barred the FCC from exacting such a promise. Br. at 39 (citing D.C. Code §28-9-602(5)). But as we have shown, the UCC is “simply inapplicable” to the cancellation of FCC licenses for failure to comply with the installment payment rules. *Magnacom*, 503 F.3d at 995. That provision of the UCC is therefore “not relevant.” *Id.* at 995 n.10.¹⁷

In addition, section 309(j)(8) of the Communications Act expressly provides that, with limited exceptions not applicable to this case, proceeds from spectrum license auctions “shall be deposited in the Treasury.” 47 U.S.C. §309(j)(8). Thus, even if the proceeds were otherwise traceable, the Communications Act does not contemplate that the Commission could distribute “excess reauction proceeds to the debtor or other creditors.” *1996 Opinion Letter*, 11 FCC Rcd at 21577. GLH proposes end runs around the statutory direction, such as paying it from the Treasury directly after the auction proceeds have been deposited or providing it with “auction credits in lieu of cash.” Br. at 43-44. In doing so, GLH misses the point. Any such end run would result in violating Congress’s direction that auction

¹⁷ By the same token, the Security Agreement did not “circumscribe[.]” the Commission’s “regulatory flexibility,” as GLH contends. Br. 42. On the contrary, the agreement recognized that GLH’s “continued retention of the License, and rights to operate as a Commission licensee thereunder, are conditioned upon compliance with all Commission orders and regulations applicable to the License and the Communications Act of 1934, as amended.” Security Agreement, ¶11 (JA ___). The FCC thus “had a regulatory and contractual right to cancel [GLH’s] licenses” that was “separate and independent from the FCC’s rights as a secured creditor.” *Magnacom*, 503 F.3d at 994.

proceeds be placed in (and by logical extension, kept in) the Treasury. That direction is entirely inconsistent with the notion that such proceeds may be paid to former licensees.

B. GLH Is Not Entitled To Be Credited With The Amount The FCC Obtained In A Subsequent Auction For The Same Spectrum To Set Off Its Debt.

At a minimum, GLH contends, its debt to the Commission should be set off by the amount the FCC recovered in the subsequent auction of licenses for the spectrum that had been covered by GLH's now-canceled licenses. First, GLH argues, section 1.2104(g)(2) of the Commission's rules provides that a defaulting licensee is liable for the "difference between its bid and the bid of a subsequent winning bidder for the same license in a subsequent auction" only "if the subsequent winning bid is lower than the defaulted bid." Br. at 26. "If the subsequent winning bid is higher than the original winning bid," then "the defaulter must [only] pay a penalty of 3% of its original bid." *Ibid.* Second, GLH contends, the UCC and equitable principles prohibit the FCC from seeking to collect GLH's debt when it has auctioned the same spectrum for even more. Br. at 36-37. Both contentions fail. Section 1.2104(g)(2) applies to auction bidders that default on their required payments or are disqualified after the auction closes but before the licenses are awarded. The rule does not apply to auction winners, like GLH, that are awarded licenses, and that subsequently default on their installment

payment obligations; and the UCC, as we have seen, does not apply to the subsequent auction proceeds. As for equitable principles, the Commission is free to take them into account when it seeks to collect the debt, but they do not reduce the amount outstanding.

1. Rule 1.2104(g)(2) Does Not Apply To GLH.

Section 1.2104(g)(2) of the Commission's rules sets forth the consequences placed "on bidders who withdraw high bids during the course of an auction, or who" – "after an auction closes" but before licenses are awarded – "default on payments ... or who are disqualified." 47 C.F.R. §1.2104(g)(2). By contrast, section 1.2110(g)(4) of the Commission's rules applies to companies that obtain licenses at auction but thereafter default on installment payment obligations. It specifies that an entity that fails to make the applicable installment payments after the expiration of the applicable grace periods "shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures." 47 C.F.R. §1.2110(g)(4)(iv). The provision makes no reference to proceeds the Commission might obtain in any subsequent auction of licenses for the same spectrum. *See ibid.*

As the Commission explained in the *Order*, it has long made clear that section 1.2104(g)(2) applies to all winning bidders, "including prospective installment payors, that default or are disqualified after the close of bidding but

prior to license grant.” *Order*, 25 FCC Rcd at 501 ¶60 (JA __). *See Amendment of Part I of the Commission’s Rules – Competitive Bidding Procedures*, Third Order on Reconsideration of the Third Report and Order, 19 FCC Rcd 2551, 2553 ¶5 (2004) (*2004 Order*); *2000 Order*, 15 FCC Rcd at 15315 ¶¶38-39 (“licensees defaulting on installment payments . . . are not subject to Section 1.2104(g)(2)”).

The Commission pointed out that textual and practical considerations supported its interpretation. For one thing, section 1.2110(g)(4), but not 1.2104(g)(2), “dictates the consequences of an installment payment default, namely, the automatic cancellation of the license.” *Order*, 25 FCC Rcd at 501 ¶61 (JA __). For another, “applying section 1.2104(g) to post-licensing defaults would lead to unintended and unreasonable results,” since it could mean that a licensee that had paid in full but had failed a post-licensing requirement (such as build-out) might be able to claim some of the proceeds of a subsequent auction. *Id.* at 501 ¶61 (JA __); *see also 2004 Order*, 19 FCC Rcd at 2558 ¶18.

GLH contends that the FCC’s interpretation constituted an impermissibly retroactive “rule change.” Br. 26. But as the Commission explained, its “installment payment rules had, in all material respects, remained unchanged in language and application since their inception.” *Order*, 25 FCC Rcd at 501 ¶62 (JA __). And even if the Commission’s rules had been less clear, the agency’s statement in the *2000 Order*—three years before GLH defaulted on its installment

payment obligations—left no doubt that “licensees defaulting on installment payments . . . are not subject to Section 1.2104(g)(2).” 15 FCC Rcd at 15315 ¶¶38-39.¹⁸ Thus, even if the Commission had changed its interpretation of the rule’s applicability, that change would not have been impermissibly retroactive. Rather, it would have affected only the consequences of future installment payment defaults about which installment payors would have had no “vested right.” *See Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001) (emphasizing that “the Commission has always retained the power to alter the terms of existing licenses by rulemaking”); *Order*, 25 FCC Rcd at 501 ¶62 n.229 (JA__).

Nor is there any basis for concluding that the distinction the Commission draws between the consequences of pre- and post-licensing defaults is unreasonable. As it explained, “an earlier default is less damaging to the auctions

¹⁸ GLH states that “[i]t was not until the *2004 Order* that the FCC definitively announced that Section 1.1204(g)(2) was inapplicable to installment payment defaulters such as GLH.” Br. at 31-32. But the *2004 Order* simply denied petitions for reconsideration of the statement in the *2000 Order*. Far from recognizing any existing uncertainty, it made the matter doubly clear. *See 2004 Order*, 19 FCC Rcd at 2558 ¶20 (“this proceeding began with a statement by the Commission that the license of an entity in installment payment default is subject to automatic cancellation and to the license-cancellation-plus-debt collection rule in place at the time”; “[t]he Commission’s proposal to deviate from that rule, and its later rejection of that proposal and clarification of its rejection, only make sense if, at the outset, license-cancellation-plus-debt-collection had, in fact, been the rule”).

process than a later one.” *2004 Order*, 19 FCC Rcd at 2562 ¶31. If a bidder withdraws during the auction, “a new high bidder can emerge from the same auction.” *Ibid.* And a “post-auction, pre-licensing default” will “typically delay licensing of the involved spectrum” only “until the next auction.” *Id.* By contrast, “a post-licensing default, such as an installment payment default, . . . could conceivably delay re-licensing the involved spectrum and adversely affect service to the public for years.” *Ibid. Accord Bureau Order*, 22 FCC Rcd at 2412 ¶3 n.9 (JA__).

Finally, GLH contends (Br. at 31) that the Commission’s interpretation (of its own rule) is contrary to this Court’s statement in *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003), that the defaulting installment payor in that case was subject to the repayment provisions of section 1.2104(g)(2) of the Commission’s rules. But the Court’s statement, which was made “without analysis” and without the benefits of briefing “by either party,” *Order*, 25 FCC Rcd at 501-02 ¶ 63 & n.231 (JA __ - __), was immaterial to the Court’s conclusion that the defaulting installment payor was subject to obligations that would not be altered “even if it prevailed on appeal.” *21st Century Telesis*, 318 F.3d at 198. In any event, the statement does not control over the Commission’s reasonable interpretation of its own rules. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

2. Neither The UCC Nor Principles Of Equity Mandate A Set-Off.

GLH also contends that, apart from the Commission's rules, the UCC entitles it to a set-off of its debt by requiring a secured party "to pay over the cash proceeds of a disposition of collateral to 'the satisfaction of obligations secured by the security interest . . . under which the collection or enforcement is made.'" Br. at 34 (citing D.C. Code §28:9-608 (2001)). But as we have explained, *see pp. 7-9 supra*, GLH's licenses canceled upon default, and the subsequent relicensing of the same spectrum did not constitute disposition of collateral, and thus GLH has no entitlement to proceeds of any such subsequent auction. *Order*, 25 FCC Rcd at 502-03 ¶¶65-66 (JA__); *1996 Opinion Letter*, 11 FCC Rcd at 21557-78 & n.4. *See Magnacom*, 503 F.3d at 994-995; *In re Alpine PCS*, 2008 WL 5076983, at *8.

Contrary to GLH's contention, the Commission would not "enjoy a windfall" (Br. at 34) or obtain "double recovery" (Br. at 36) if its debt is not set off against subsequent auction proceeds. On the contrary, GLH would simply be held to the terms of its installment payment note in accordance with the Commission's rules subjecting a defaulting installment payor to "debt collection procedures," 47 C.F.R. §1.2110(g)(4)(iv), as well as to the plain terms of its security agreement, which recognize that, in the event of default, "the Commission may demand, sue for, and collect the outstanding balance of the unpaid Obligations." Security Agreement, ¶8(c) (JA __). In short, GLH is simply required, because of its default,

“to pay the amount of the outstanding balance of its debt.” *Reconsideration Order*, at ¶12 (JA __).

To be sure, as the Commission has long recognized, equitable principles may come into play if and when the Commission commences proceedings to collect GLH’s unpaid debt. Thus, as the *1996 Opinion Letter* explained, “equity principles . . . should allow the federal government to forgive any outstanding debt so long as it has been made whole (penalties and costs included) in a subsequent auction.” 11 FCC Rcd at 21576. But as the letter makes clear, “any forgiveness of a debt arising from an installment payment default would occur only in the course of federal debt collection proceedings and not pursuant to the Commission’s competitive bidding rules.” *Reconsideration Order*, at ¶13 (JA __) (quoting *2004 Order*, 19 FCC Rcd at 2558 ¶19). To date, no debt collection proceedings have been instituted against GLH. *Reconsideration Order*, ¶13 (JA __). GLH is free to seek a compromise of its debt to the government in the course of such proceedings, but such evaluation of the equities in this appeal—before an attempt at debt collection is even made—would be premature.

CONCLUSION

The appeal should be denied.

Respectfully submitted,

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November 9, 2018

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STATUTORY APPENDIX

Communications Act Provisions:

47 U.S.C. §301

47 U.S.C. §307(a)

47 U.S.C. §309(a), (j)

47 U.S.C. § 312(a), (c)

FCC Rules:

47 C.F.R. §1.925(b)(3)

47 C.F.R. §1.2104(g)(2)

47 C.F.R. §1.2110(g)(4)(iv)

47 U.S.C.

§ 301. License for radio communication or transmission of energy

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

§ 307. Licenses

(a) Grant

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

§ 309. Application for license

(a) Considerations in granting application

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

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph

(2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

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

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

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

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

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

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

(3) Design of systems of competitive bidding

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

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum;

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services; and

(F) for any auction of eligible frequencies described in section 923(g)(2) of this title, the recovery of 110 percent of estimated relocation or sharing costs as provided to the Commission pursuant to section 923(g)(4) of this title.

(4) Contents of regulations

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

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

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

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

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

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

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

(5) Bidder and licensee qualification

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

(6) Rules of construction

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

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

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

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

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

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

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

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

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

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

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

(B) Consideration limited

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

(C) Consideration of demand for spectrum not affected

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

(8) Treatment of revenues

(A) General rule

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

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in the Treasury. Within 45 days following the conclusion of the competitive bidding-

(i) the deposits of successful bidders shall be deposited in the general fund of the Treasury (where such deposits shall be used for the sole purpose of deficit reduction), except as otherwise provided in subparagraphs (D)(ii), (E)(ii), (F), and (G); and

(ii) the deposits of unsuccessful bidders shall be returned to such bidders, and payments representing the return of such deposits shall not be subject to administrative offset under section 3716(c) of Title 31.

(D) Proceeds from reallocated Federal spectrum

(i) In general

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

(ii) Certain other proceeds

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), in the case of proceeds (including deposits and upfront payments from successful bidders) attributable to the auction of eligible frequencies described in paragraph (2) of section 923(g) of this title that are required to be auctioned by section 1451(b)(1)(B) of this title, such portion of such proceeds as is necessary to cover the relocation or sharing costs (as defined in paragraph (3) of such section 113(g)) of Federal entities relocated from such eligible frequencies shall be deposited in the Spectrum Relocation Fund. The remainder of such proceeds shall be deposited in the Public Safety Trust Fund established by section 1457(a)(1) of this title.

(E) Transfer of receipts

(i) Establishment of Fund

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

(ii) Proceeds for funds

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

(iii) Transfer of amount to Treasury

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

(iv) Recovered analog spectrum

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

(F) Certain proceeds designated for Public Safety Trust Fund

Notwithstanding subparagraph (A) and except as provided in subparagraphs (B) and (D)(ii), the proceeds (including deposits and upfront payments from successful bidders) from the use of a system of competitive bidding under this subsection pursuant to section 1451(b)(1)(B) of this title shall be deposited in the Public Safety Trust Fund established by section 1457(a)(1) of this title.

(G) Incentive auctions

(i) In general

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), the Commission may encourage a licensee to relinquish voluntarily some or all of its licensed spectrum usage rights in order to permit the assignment of new initial licenses subject to flexible-use service rules by sharing with such licensee a portion, based on the value of the relinquished rights as determined in the reverse auction required by clause (ii)(I), of the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system under this subsection.

(ii) Limitations

The Commission may not enter into an agreement for a licensee to relinquish spectrum usage rights in exchange for a share of auction proceeds under clause (i) unless-

- (I) the Commission conducts a reverse auction to determine the amount of compensation that licensees would accept in return for voluntarily relinquishing spectrum usage rights; and
- (II) at least two competing licensees participate in the reverse auction.

(iii) Treatment of revenues

Notwithstanding subparagraph (A) and except as provided in subparagraph (B), the proceeds (including deposits and upfront payments from successful bidders) from any auction, prior to the end of fiscal year 2022, of spectrum usage rights made available under clause (i) that are not shared with licensees under such clause shall be deposited as follows:

(I) \$1,750,000,000 of the proceeds from the incentive auction of broadcast television spectrum required by section 1452 of this title shall be deposited in the TV Broadcaster Relocation Fund established by subsection (d)(1) of such section.

(II) All other proceeds shall be deposited-

(aa) prior to the end of fiscal year 2022, in the Public Safety Trust Fund established by section 1457(a)(1) of this title; and

(bb) after the end of fiscal year 2022, in the general fund of the Treasury, where such proceeds shall be dedicated for the sole purpose of deficit reduction.

(iv) Congressional notification

At least 3 months before any incentive auction conducted under this subparagraph, the Chairman of the Commission, in consultation with the Director of the Office of Management and Budget, shall notify the appropriate committees of Congress of the methodology for calculating the amounts that will be shared with licensees under clause (i).

(v) Definition

In this subparagraph, the term “appropriate committees of Congress” means-

(I) the Committee on Commerce, Science, and Transportation of the Senate;

(II) the Committee on Appropriations of the Senate;

(III) the Committee on Energy and Commerce of the House of Representatives; and

(IV) the Committee on Appropriations of the House of Representatives.

(9) Use of former Government spectrum

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

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

(B) have been reassigned from Government use pursuant to part B of the National

Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 921 et seq.].

(10) Authority contingent on availability of additional spectrum**(A) Initial conditions**

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

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

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

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

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

(B) Subsequent conditions

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

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

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

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

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

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

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2022, except that, with respect to the electromagnetic spectrum identified under section 1004(a) of the Spectrum Pipeline Act of 2015, such authority shall expire on September 30, 2025.

(12) Repealed. Pub.L. 115-141, Div. P, Title IV, § 402(i)(4)(A), Mar. 23, 2018, 132 Stat. 1089

(13) Recovery of value of public spectrum in connection with pioneer preferences**(A) In general**

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

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

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

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

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

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

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

(C) Installments permitted

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

(D) Rulemaking on pioneer preferences

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

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

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

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

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

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

(E) Implementation with respect to pending applications

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

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

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

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

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

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

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

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

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

(F) Expiration

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

(G) Effective date

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

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial television broadcast licenses

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

(B) Spectrum reversion and resale

(i) The Commission shall-

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

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

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

(C) Certain limitations on qualified bidders prohibited

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

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

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

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

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

(15) Commission to determine timing of auctions

(A) Commission authority

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

(B) Termination of portions of auctions 31 and 44

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

(C) Exception

(i) Blocks excepted

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

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

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

(ii) Eligible bidders

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

(iii) Auction deadlines for excepted blocks

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

(iv) Repealed. Pub.L. 115-141, Div. P, Title IV, § 402(i)(4)(B), Mar. 23, 2018, 132 Stat. 1089

(v) Additional deadlines for recovered analog spectrum

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

(vi) Recovered analog spectrum

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

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

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

(D) Return of payments

Within one month after June 19, 2002, the Commission shall return to the bidders for licenses in the A-block, Bblock, and E-block of auction 44 the full amount of all upfront payments made by such bidders for such licenses.

(16) Special auction provisions for eligible frequencies

(A) Special regulations

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

(B) Conclusion of auctions contingent on minimum proceeds

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

(C) Authority to issue prior to deauthorization

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

(17) Certain conditions on auction participation prohibited

(A) In general

Notwithstanding any other provision of law, the Commission may not prevent a person from participating in a system of competitive bidding under this subsection if such person-

(i) complies with all the auction procedures and other requirements to protect the auction process established by the Commission; and

(ii) either-

(I) meets the technical, financial, character, and citizenship qualifications that the Commission may require under section 303(l)(1), 308(b), or 310 of this title to hold a license; or

(II) would meet such license qualifications by means approved by the Commission prior to the grant of the license.

(B) Clarification of authority

Nothing in subparagraph (A) affects any authority the Commission has to adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition.

(18) Estimate of upcoming auctions

(A) Not later than September 30, 2018, and annually thereafter, the Commission shall make publicly available an estimate of what systems of competitive bidding authorized under this subsection may be initiated during the upcoming 12-month period.

(B) The estimate under subparagraph (A) shall, to the extent possible, identify the bands of frequencies the Commission expects to be included in each such system of competitive bidding.

§ 312. Administrative sanctions

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit-

- (1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;
- (2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;
- (3) for willful or repeated failure to operate substantially as set forth in the license;
- (4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;
- (5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;
- (6) for violation of section 1304, 1343, or 1464 of Title 18; or
- (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(c) Order to show cause

Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

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§ 1.925 Waivers.

(b) Procedure and format for filing waiver requests.

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

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or
- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

§ 1.2104 Competitive bidding mechanisms.

(g) **Withdrawal, Default and Disqualification Payment.** As specified below, when the Commission conducts an auction pursuant to § 1.2103, the Commission will impose payments on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(2) **Default or disqualification after close of auction.** A bidder assumes a binding obligation to pay its full bid amount upon acceptance of the winning bid at the close of an auction. If a bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to a default payment consisting of a deficiency payment, described in § 1.2104(g)(2)(i), and an additional payment, described in § 1.2104(g)(2)(ii) and (g)(2)(iii). The default payment will be deducted from any upfront payments or down payments that the defaulting bidder has deposited with the Commission.

(i) **Deficiency payment.** The deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the winning bid in a subsequent auction, so long as there have been no intervening withdrawn bids that equal or exceed the defaulted bid or the subsequent winning bid. If the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the defaulted bid, no deficiency payment will be assessed. If there have been intervening subsequent withdrawn bids that are lower than the defaulted bid and higher than the subsequent winning bid, but no intervening withdrawn bids that equal or exceed the defaulted bid, the deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the highest intervening subsequent withdrawn bid. In the event that a bidding credit applies to any of the applicable bids, the deficiency payment will be based solely on net bids or solely on gross bids, whichever results in a lower payment.

(ii) **Additional payment—applicable percentage.** When the default or disqualification follows an auction without combinatorial bidding, the additional payment will equal between 3 and 20 percent of the applicable bid, according to a percentage (or percentages) established by the Commission in advance of the auction. When the default or disqualification follows an auction with combinatorial bidding, the additional payment will equal 25 percent of the applicable bid.

(iii) **Additional payment—applicable bid.** When no deficiency payment is assessed, the applicable bid will be the net amount of the defaulted bid. When a deficiency payment is assessed, the applicable bid will be the subsequent winning bid, using the same basis—i.e., net or gross—as was used in calculating the deficiency payment.

§ 1.2110 Designated entities.

(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:

(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.

(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.

CERTIFICATE OF FILING AND SERVICE

I, Pamela L. Smith, hereby certify that on November 9, 2018, I filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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