

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

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

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 23, 2010**

**Released: July 27, 2010**

By the Commission: Commissioner Copps dissenting and issuing a statement.

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we reject a request for reinstatement of a license that canceled automatically when the licensee did not pay the full amount of its installment payment debt by the date on which the final payment was due. In the years since its default, the former licensee has neither made continuing payments nor paid its outstanding debt in full. As in other similar cases, we find that application of the automatic cancellation rule serves its underlying purpose and promotes the public interest by protecting the integrity of Commission's auction and licensing process.

2. We deny an application for review<sup>1</sup> filed by Spectrum IVDS, L.L.C. ("Spectrum IVDS"). Spectrum IVDS seeks reversal of the Wireless Telecommunications Bureau's ("Bureau") denial<sup>2</sup> of its petition for reconsideration and request for reinstatement of the 218-219 MHz Service B block license for the Detroit/Ann Arbor, Michigan, market (IVM005B), call sign KIVD0019 ("License").<sup>3</sup>

<sup>1</sup> Spectrum IVDS, L.L.C., Application for Review, filed July 7, 2008 ("Application for Review").

<sup>2</sup> Spectrum IVDS, L.L.C., Request for Reconsideration of License Renewal and Reinstatement of the 218-219 MHz Service B Block License for Market IVM005, Detroit /Ann Arbor, Michigan, Call Sign KIVD0019, *Order*, 23 FCC Rcd 8800 (2008) ("Bureau Order").

<sup>3</sup> Spectrum IVDS, L.L.C., Petition for Reconsideration and Request for Reinstatement of License, filed Mar. 21, 2005 ("Petition"). See also Spectrum IVDS, L.L.C., Supplement to Petition for Reconsideration and Request for Reinstatement of License, filed Apr. 17, 2007 ("Supplement"). In 1998, the Commission redesignated the Interactive Video and Data Service as the 218-219 MHz Service "to reflect the breadth of services evolving in this spectrum." Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19,064, 19,065-66 ¶ 1, 19,066-67 ¶ 3, 19,075-76 ¶ 16 (1998); 63 Fed. Reg. 54,073, 54,075-76, 54,077 (Oct. 8, 1998); 63 Fed. Reg. 52,215, 52,221 (Sept. 30, 1998). For consistency, we refer herein to this service as the "218-

3. Spectrum IVDS acquired the License by assignment in 2001.<sup>4</sup> As an eligible entity, it elected to assume responsibility for paying the outstanding debt obligation associated with the License through the Commission's installment payment loan program.<sup>5</sup> However, Spectrum IVDS failed to pay the full amount of its outstanding installment debt by January 18, 2005, the end of the initial term of the License.<sup>6</sup> As a result, the License canceled automatically,<sup>7</sup> and the Bureau dismissed Spectrum IVDS's application for license renewal.<sup>8</sup> In its application for review of the *Bureau Order*, Spectrum IVDS requests reinstatement of the License and an opportunity to pay all outstanding installment payment amounts within 90 days of release of a decision granting its requests.<sup>9</sup>

## II. BACKGROUND

### A. The Commission's Installment Payment Program

4. When the Commission first adopted competitive bidding rules in 1994, it established an installment payment loan program under which qualified small businesses that won licenses in certain services were allowed to pay their winning bids in quarterly installments over the initial term of the license.<sup>10</sup> In deciding to offer installment payment loans, the Commission reasoned that in appropriate circumstances such plans would, by reducing the amount of private financing small entities needed in advance of auctions, help to provide opportunities for small businesses to participate in the provision of spectrum-based services.<sup>11</sup> Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.<sup>12</sup> When the Commission in 1997 discontinued the use of installment payment loans for future license auctions,<sup>13</sup> it allowed entities that were already paying for licenses in installments to continue doing so.<sup>14</sup>

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219 MHz Service," even where previous decisions have referred to it as the "Interactive Video and Data Service" or "IVDS."

<sup>4</sup> "Wireless Telecommunications Bureau Grants Consent to Assign 218-219 MHz Service Licenses," *Public Notice*, 16 FCC Rcd 18,057 (2001); see ULS File No. 0000426369.

<sup>5</sup> See Petition ¶ 2; Application for Review at 2.

<sup>6</sup> *Bureau Order*, 23 FCC Rcd 8803-04 ¶ 10; Petition at ¶¶ 3-5.

<sup>7</sup> 47 C.F.R. § 1.2110(g)(3)(ii), (4).

<sup>8</sup> See ULS File No. 0002010282; "Wireless Telecommunications Bureau Market-Based Applications Action," *Public Notice*, Report No. 2078 (rel. Feb. 23, 2005).

<sup>9</sup> Application for Review at 11.

<sup>10</sup> Implementation of section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2389-91 ¶¶ 231-40 (1994). The first Commission auction for which installment payments were available was Auction 2 (218-219 MHz Service), which concluded on July 29, 1994.

<sup>11</sup> *Id.* at 2389-90 ¶ 233. The goal of providing opportunities for small businesses to participate in the provision of spectrum-based services is set forth at 47 U.S.C. § 309(j)(3)(B), (4)(D).

<sup>12</sup> See 47 C.F.R. § 1.2110(e)(3)(iii), (iv) (1994); 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)).

<sup>13</sup> The Commission discontinued the use of installment payments based on its findings that (1) installment payments are not necessary to ensure meaningful opportunities for small businesses to participate successfully in auctions; (2) the Commission must consider all of the objectives of section 309(j), including the development and rapid deployment of new services for the benefit of the public; (3) filings for bankruptcy by entities unable to pay their winning bids may result in delays in the deployment of service; and (4) requiring the payment of bids in full within a short time after the close of auctions ensures greater financial accountability from applicants. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and*

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5. Certain features of the Commission's installment payment rules have remained the same since their inception. The rules have always conditioned the grant of licenses upon the full and timely performance of licensees' payment obligations and have provided that, upon a licensee's installment payment default, the license cancels automatically and the Commission institutes debt collection procedures.<sup>15</sup> In other words, a licensee that defaults on an installment payment loses the license, is not refunded any prior payments, and is subject to collection of the remaining balance of the debt.<sup>16</sup>

6. In 1997, the Commission liberalized its installment payment grace period rules for licensees that were already paying their winning bids in installments, providing these licensees with significant advantages not previously available to them. Under the initial installment payment rules adopted in 1994, any licensee whose installment payment was more than 90 days past due was in default, unless the licensee had properly filed a grace period request.<sup>17</sup> The rules as amended in 1997, however, provided licensees with an automatic grace period, i.e., a grace period to which they were entitled without having to file a request.<sup>18</sup> If a licensee did not make full and timely payment of an installment, it was automatically granted a 90-day period during which it was allowed to pay the installment along with a 5 percent late fee.<sup>19</sup> If it did not submit the missed installment payment and the 5 percent late fee before the expiration of this 90-day period, the licensee was automatically granted a second 90-day period during which it could remit payment along with an additional late fee equal to 10 percent of the missed payment.<sup>20</sup> Thus, the amended rules entitled all licensees paying in installments to a grace period of 180 days. A licensee's failure to make its required payment, including the associated late fees, by the end of the 180-day period placed it in default.<sup>21</sup>

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*Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 397-400 ¶¶ 38-40 (1998) (“*Part 1 Third Report and Order*”). The Commission affirmed this decision in 2000. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,322 ¶ 55 (2000) (“*Part 1 Reconsideration of Third Report and Order*”). The last Commission auction for which installment payments were available was Auction 11 (broadband PCS F block), which ended on January 14, 1997.

<sup>14</sup> See generally *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>15</sup> See 47 C.F.R. § 1.2110(e)(4) (1994); 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)); and 47 C.F.R. § 1.2110(f)(4) (1998). See also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Third Order on Reconsideration of the Third Report and Order*, 19 FCC Rcd 2551 (2004) (addressing the inapplicability of section 1.2104 of the Commission's rules, 47 C.F.R. § 1.2104, to installment payment defaults) (“*Part 1 Third Reconsideration of Third Report and Order*”).

<sup>16</sup> *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd at 2561-62 ¶ 29.

<sup>17</sup> 47 C.F.R. § 1.2110(e)(4)(i), (ii) (1994); 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)). Licensees were permitted to request a grace period of three to six months. 47 C.F.R. § 1.2110(e)(4)(ii) (1994); 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)).

<sup>18</sup> 47 C.F.R. § 1.2110(f)(4)(i), (ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436-38 ¶¶ 106-07. The amended rules took effect on March 16, 1998. 63 Fed. Reg. 2315 (Jan. 15, 1998).

<sup>19</sup> 47 C.F.R. § 1.2110(f)(4)(i) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>20</sup> 47 C.F.R. § 1.2110(f)(4)(ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>21</sup> 47 C.F.R. § 1.2110(f)(4)(iv) (1998). These rules were amended in 2000 to provide licensees with two quarters (i.e., two three-month periods), rather than two 90-day periods, in which to submit late installment payments and associated late fees. *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,310 ¶ 28. This change aligned the schedule for late payments with the quarterly schedule of regular installment payments.

7. In liberalizing its grace period rules, the Commission found that the amended rules eliminated uncertainty for licensees seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions<sup>22</sup> and that the added certainty the rules provided to licensees would increase the likelihood that licensees and potential investors would find solutions to capital problems before defaults occurred.<sup>23</sup> Noting that a grace period is an extraordinary form of relief in cases of financial distress and that the rules it adopted are consistent with commercial practice, the Commission declined to provide more than 180 days for licensees to make late payments and rejected the argument that licenses should not cancel automatically upon default.<sup>24</sup>

8. Although the Commission provided for two automatic grace periods for quarterly installments during the term of the license, the Commission's rules have always required that full payment of the installment debt be made within the initial license term. Thus, payment of all remaining amounts owed must be made prior to the end of the license term. Section 1.2110(g)(3)(ii) states that installment payment plans will "allow installment payments for the full license term,"<sup>25</sup> and section 1.2110(g)(4) requires that a "license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan."<sup>26</sup> These rules apply not only to the original licensee, but also to an assignee or transferee that has assumed the installment payment loan, including the obligation for full and timely payment.

9. To be granted renewal of a license, licensees must, in general, demonstrate that they have substantially complied with all applicable Commission rules and policies, the Communications Act of 1934, as amended, and any payment obligations arising from competitive bidding.<sup>27</sup> Licensees that elected to pay their winning bids in installment payments – or those, like Spectrum IVDS, that assumed installment debt – were required, pursuant to section 1.2110(g), "to pay the full amount of their high bids in installments over the term of their licenses."<sup>28</sup> Those licenses were also conditioned upon full and timely performance of the payment obligations under the installment plans, pursuant to section 1.2110(g)(4).<sup>29</sup> The Commission has repeatedly held that strict enforcement of these provisions is critical to the underlying presumption of competitive bidding – as authorized under section 309(j) of the Communications Act – that the entity that bids the most for a license in an auction is the entity that places the highest value on the use of the spectrum.<sup>30</sup> It is, thus, fundamentally important that licensees paying through installments continue, throughout their license terms, to demonstrate their financial qualifications to be Commission licensees in order to protect the integrity of the Commission's auction and licensing

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<sup>22</sup> *Part I Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110.

<sup>23</sup> *Id.* at 443 ¶ 116.

<sup>24</sup> *Id.* at 439-40 ¶¶ 109-10; *Part I Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,304-05 ¶ 19.

<sup>25</sup> 47 C.F.R. § 1.2110(g)(3)(ii); *see id.* § 1.2110(b)(4)(x)(E)(3)(ii) (1994).

<sup>26</sup> *Id.* § 1.2110(g)(4); *see id.* § 1.2110(b)(4)(x)(E)(4) (1994).

<sup>27</sup> *See, e.g., id.* §§ 24.16(b), 27.14(b)(2), 90.743(a)(2), 90.816(b)(1)(ii); *see also* the Communications Act of 1934, as amended, 47 U.S.C. §§ 151–614.

<sup>28</sup> 47 C.F.R. § 1.2110(g); *see id.* § 1.2110(b)(4)(x)(E) (1994).

<sup>29</sup> *Id.* § 1.2110(g)(4); *see id.* § 1.2110(b)(4)(x)(E)(4) (1994).

<sup>30</sup> *See*, Alpine PCS, Inc., Requests for Waiver of the Installment Payment Rules and Reinstatement of Licenses, *Memorandum Opinion and Order*, 25 FCC Rcd 469, 482 ¶ 20 (2010) ("*Installment Payment Order*"); *see also* Morris Communications, Inc., Request for Waiver of Installment Payment Rules and Reinstatement of 900 MHz SMR Licenses, *Memorandum Opinion and Order*, 23 FCC Rcd 3179, 3194 ¶ 34 (2008) ("*Morris MO&O*"), *aff'd*, *Morris Communications, Inc. v. FCC*, 566 F.3d 184, 190-91 & n.6 (D.C. Cir. 2009) ("*Morris Appellate Opinion*").

process.<sup>31</sup> In seeking renewal, a licensee must demonstrate both compliance with Commission rules and regulations and fulfillment of its payment obligations to support the presumption that it is the entity that most values the spectrum.

## B. Spectrum IVDS

10. Interactive Video and Data Networks, Inc. (“Interactive”) won the License in Auction 2.<sup>32</sup> As a small business, Interactive was eligible to participate in the Commission’s installment payment loan program, which was available for qualifying entities.<sup>33</sup> The Commission granted the License to Interactive on January 18, 1995, for a period of five years, and, in keeping with the Commission’s rules, conditioned the license grant upon full and timely performance of the installment payment obligations throughout the initial license term.<sup>34</sup> In 1999, the Commission extended the term for licenses in the 218-219 MHz Service from five to ten years.<sup>35</sup>

11. In 2001, Spectrum IVDS acquired the License from Interactive.<sup>36</sup> As a condition of the assignment, Spectrum IVDS assumed the remaining financial obligations for the License.<sup>37</sup> In so doing, Spectrum IVDS elected to participate in the Commission’s installment payment loan program and to pay the outstanding debt, including all payments of unpaid principal, interest, and late fees, by January 18, 2005, the final day of the initial term of the License.<sup>38</sup>

12. On January 18, 2005, Spectrum IVDS filed a renewal application<sup>39</sup> but failed to remit the outstanding unpaid principal, interest, and fees for the License within the initial license term. Therefore, on January 19, 2005, pursuant to section 1.2110(g)(4), Spectrum IVDS defaulted and the License canceled. On February 16, 2005, the Bureau dismissed Spectrum IVDS’s renewal application, noting that the License had canceled on January 19, 2005, pursuant to section 1.2110.<sup>40</sup> Spectrum IVDS made one

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<sup>31</sup> See *Installment Payment Order*, 25 FCC Rcd at 482 ¶ 20.

<sup>32</sup> See “Interactive Video and Data Service (IVDS) Applications to Be Granted January 18, 1995,” *News Release*, No. 51403 (rel. Dec. 29, 1994).

<sup>33</sup> 47 C.F.R. § 1.2110(e) (1994); see 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)); 47 C.F.R. § 95.816(d)(3) (1994).

<sup>34</sup> 47 C.F.R. § 1.2110(e)(4) (1994); see 60 Fed. Reg. 52,865 (Oct. 11, 1995) (correcting 1994 designated entity regulations of 47 C.F.R. Part 1 to redesignate 47 C.F.R. § 1.2110(b)(4)(x)(E) as 47 C.F.R. § 1.2110(e)); see “Wireless Telecommunications Bureau Staff Clarifies Grace Period Rule for IVDS Auction Licensees Paying By Installment Payments,” *Public Notice*, 10 FCC Rcd 10,724 (WTB 1995).

<sup>35</sup> Amendment of Part 95 of The Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, 15 FCC Rcd 1497, 1499-1500 ¶¶ 4, 1514-18 ¶¶ 25-32 (1999); 47 C.F.R. § 95.812(a) (2000). The rule establishing the longer license term took effect January 3, 2000. 64 Fed. Reg. 59,656 (Nov. 3, 1999).

<sup>36</sup> “Wireless Telecommunications Bureau Grants Consent to Assign 218-219 MHz Service Licenses,” *Public Notice*, 16 FCC Rcd 18,057 (2001); see ULS File No. 0000426369.

<sup>37</sup> See Petition ¶ 1 and Att. A (Letter from Mark Reger, Chief Financial Officer, Office of the Managing Director, Federal Communications Commission, to Craig Siebert, Managing Member, Spectrum IVDS, L.L.C. (Feb. 18, 2005) (“Reger Letter”).

<sup>38</sup> *Bureau Order*, 23 FCC Rcd at 8803 ¶ 9.

<sup>39</sup> ULS File No. 0002010282.

<sup>40</sup> *Id.* The dismissal of the renewal application was included in a public notice issued on February 23, 2005. “Wireless Telecommunications Bureau Market-Based Applications Action,” *Public Notice*, Report No. 2078 (rel. Feb. 23, 2005).

post-default payment at the end of January 2005, shortly after the License cancelled, but has not made any further payments towards its outstanding debt obligation for the License.<sup>41</sup>

13. On March 21, 2005, Spectrum IVDS filed a petition for reconsideration, seeking reinstatement of the License and the renewal application and proposing to pay its outstanding debt obligation in two quarterly installment payments on April 30, 2005, and July 31, 2005, respectively.<sup>42</sup> In April 2007, Spectrum IVDS supplemented its petition, this time proposing to pay its remaining debt obligation within 90 days after release of a Bureau order granting its requests.<sup>43</sup> Although Spectrum IVDS had not specifically requested a waiver of section 1.2110(g), the Bureau addressed its petition as if it had made such a request, analyzing the petition under the waiver standard in section 1.925 of the rules.<sup>44</sup> The Bureau denied Spectrum IVDS's petition on June 6, 2008.<sup>45</sup>

14. In the instant application for review, filed July 7, 2008, Spectrum IVDS renews the arguments in its petition, presents new arguments, and again seeks reinstatement of the License along with a 90-day period following grant of its application for review in which to pay all outstanding installment payment amounts.<sup>46</sup>

### III. DISCUSSION

15. The Commission will grant an application for review of a final action taken on delegated authority only when such action conflicts with statute, regulation, precedent, or established Commission policy; involves a question of law or policy which has not previously been resolved by the Commission (but which has been presented to the designated authority); involves application of a precedent or policy that should be overturned; makes an erroneous finding as to an important or material factual question; or involves prejudicial procedural error.<sup>47</sup> As we explain, Spectrum IVDS's Application for Review fails to establish any of these grounds.

16. In its Application for Review, Spectrum IVDS maintains for the first time that because it filed an application to renew the License on January 18, 2005 – the last day of the License term – section 1.62 of the rules prevented the License from canceling on January 19, 2005.<sup>48</sup> Under section 1.62, when a

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<sup>41</sup> As of January 19, 2005, Spectrum IVDS had not paid the installment payments due on July 31, 2004, and October 31, 2004, or the final payment of all remaining unpaid principal, interest, and late fees due on the last day of the initial license term, January 18, 2005. On January 27, 2005, Spectrum IVDS did submit funds equal to its July 31, 2004, regular installment payment plus late fees, but has made no further payment on its outstanding balance since January 2005.

<sup>42</sup> Petition ¶ 5.

<sup>43</sup> Supplement ¶¶ 3, 5.

<sup>44</sup> *Bureau Order*, 23 FCC Rcd at 8806 ¶ 16; see 47 C.F.R. § 1.925. To have obtained a waiver under that standard, Spectrum IVDS would have had to show either that (i) the underlying purpose of section 1.2110(g) would not have been served, or would have been frustrated, by application to its case, and that a grant of the requested waiver would have been in the public interest; or (ii) the unique facts and circumstances of its case had rendered application of section 1.2110(g) inequitable, unduly burdensome, or otherwise contrary to the public interest, or that Spectrum IVDS had had no reasonable alternative.

<sup>45</sup> *Bureau Order*.

<sup>46</sup> See Application for Review.

<sup>47</sup> See 47 C.F.R. § 1.115. See also Application for Review of Declaratory Ruling Issued by the Chief, Cable Services Bureau, In re Jay Lubliner and Deborah Galvin, Potomac, Maryland, *Memorandum Opinion and Order*, 13 FCC Rcd 16,107, 16,109 ¶ 4 (1998).

<sup>48</sup> Application for Review at 5.

“proper and timely” license renewal application is pending at the time of license expiration, the license will “continue in effect without further action by the Commission” until the Commission takes final action on the renewal application.<sup>49</sup> Because Spectrum IVDS failed to present this argument to the Bureau, the argument cannot now provide Spectrum IVDS with a basis for relief.<sup>50</sup> We nonetheless observe that nothing in section 1.62 prevents or postpones the automatic cancellation of a license for failure to timely pay an amount due the Commission under an installment payment loan.<sup>51</sup>

17. The remainder of Spectrum IVDS’s arguments go to support its overarching contention that the Bureau has misconstrued Spectrum IVDS’s nonpayment as an inability to pay<sup>52</sup> or a failure to assign sufficient value to the License.<sup>53</sup> As evidence of its financial wherewithal, Spectrum IVDS asserts that it made a good faith effort to pay all installment amounts. It points to its past payments, which, including late fees and interest, it claims add up to 89 percent of the initial license cost.<sup>54</sup> Spectrum IVDS maintains that these payments demonstrate both that it is committed to investing in the License and that it has the ability and incentive to pay the outstanding debt obligation.<sup>55</sup> The Bureau rejected this same argument in the *Bureau Order*, explaining that timely payments are the responsibility of every installment payor and that, as such, a history of past payments does not alone constitute a unique circumstance on which the Commission will base a waiver after a subsequent payment default.<sup>56</sup>

18. We made this point even more emphatically in our recent *Installment Payment Order*, rejecting “any suggestion that an entity’s past compliance with our installment payment rules should be considered unique” and thus a basis for waiver of the automatic cancellation rule following a default.<sup>57</sup> As we explained, a history of past payments does not overcome substantial evidence of a defaulter’s inability or unwillingness to honor its ongoing financial obligations.<sup>58</sup> Our concern about a defaulter’s

<sup>49</sup> 47 C.F.R. § 1.62(a)(1); *see* 47 U.S.C. § 307(c)(3).

<sup>50</sup> *See* 47 C.F.R. § 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”).

<sup>51</sup> We note that section 1.62 is designed not to interfere with the functioning of our other rules and procedures. 47 C.F.R. § 1.62(a)(1) (“No operation by any licensee under this section shall . . . in any way affect or limit the action of the Commission with respect to any pending application or proceeding.”). In other words, section 1.62 prevents only an otherwise valid, and thus renewable, license from expiring. *See Consolidated Nine, Inc. v. FCC*, 403 F.2d 585, 594 (D.C. Cir. 1968).

<sup>52</sup> *See* Application for Review at 3-7.

<sup>53</sup> *See id.* at 8-10.

<sup>54</sup> *Id.* at 3.

<sup>55</sup> *Id.* at 3.

<sup>56</sup> *Bureau Order*, 23 FCC Rcd at 8809-10 ¶ 25; *see* 47 C.F.R. § 1.925 (setting forth the applicable waiver standard). The Bureau also noted that if Spectrum IVDS had not routinely taken advantage of both grace periods for each of its payments, and thereby incurred substantial late fees, the total amount it had paid would have been much smaller. *Bureau Order*, 23 FCC Rcd at 8809-10 ¶ 25.

<sup>57</sup> *Installment Payment Order*, 25 FCC Rcd at 491-92 ¶ 35.

<sup>58</sup> *Id.* at 491-92 ¶ 35; *see Morris MO&O*, 23 FCC Rcd at 3195-97 ¶¶ 39-41, *aff’d*, *Morris Appellate Opinion*. Spectrum IVDS similarly asserts that the amount of money it spent on station KIVD0019, the service options it developed in the 218-219 MHz band, the business relationships involving the License into which it entered with third parties, and the efforts it undertook to communicate these accomplishments to Commission and Congressional staff are all evidence of the value it assigns to the License. Application for Review at 8-10. Because Spectrum IVDS failed to present these arguments to the Bureau, we will not examine them here. *See* 47 C.F.R. §§ 1.106(c); 1.115(c). We note, however, that this sort of evidence, like a history of past payments, would not by itself be sufficient to justify waiver of our default rules. *See Installment Payment Order*, 25 FCC Rcd at 491-92 n.146 and accompanying text.

ability or willingness to pay arises not only when we are presented with overt admissions of financial difficulty but also when the defaulter's circumstances and actions indicate that it will fulfill its payment obligations only under alternative terms and conditions, such as the ones proposed by Spectrum IVDS.<sup>59</sup> As the Commission has learned in a decade-and-a-half of administering installment payment loans, a licensee's continued, knowing failure to pay its loan obligations – whether resulting from the licensee's lack of funds or from its unwillingness to pay in the absence of prior assurance that its license cancellation will be waived – unacceptably weakens the integrity of the auctions program.

19. Spectrum IVDS also blames its default on a January 3, 2005, communication it received from the Commission<sup>60</sup> indicating that Spectrum IVDS had until January 31, 2005, to make its July 31, 2004, installment payment along with associated late fees.<sup>61</sup> In its petition, Spectrum IVDS claimed that it did not understand that its ability to continue making payments pursuant to section 1.2110(g)(4) of the rules was in any way limited by the terms of its installment loan.<sup>62</sup> The Bureau rejected this claim, explaining that Spectrum IVDS was, or should have been, aware that it was required to have fully paid its loan on or before January 18, 2005, and should have planned accordingly.<sup>63</sup>

20. We find to be unpersuasive Spectrum IVDS's reliance on the letter dated January 3, 2005. Spectrum IVDS concedes that it also received from the Commission a payment notice dated January 15, 2005,<sup>64</sup> which listed Spectrum IVDS's final installment payment as due on January 18, 2005.<sup>65</sup> Additionally, Spectrum IVDS acknowledges that January 18, 2005, is the date by which its installment loan requires payment in full of unpaid principal, accrued interest, and other remaining obligations.<sup>66</sup> Finally, as explained above, section 1.2110(g)(3)(ii) states that installment payment plans will "allow installment payments for the full license term."<sup>67</sup>

21. Moreover, nothing in the terms of Spectrum IVDS's installment loan – or in the Commission's rules and orders – suggests that the final payment deadline for an installment loan can be overridden by inconsistent information in a routine payment notice. As we observed in our *Installment Payment Order*, "the practice of sending out individual installment payment notices is not mandated by any Commission rule and [is] performed as a mere courtesy for Commission licensees."<sup>68</sup> The Bureau's treatment of this issue is thus consistent with that decision, as well as with the *Morris MO&O*.<sup>69</sup> Thus, despite the communication dated January 3, 2005, Spectrum IVDS knew or should have known that full payment of all amounts still outstanding on its loan was due no later than January 18, 2005, the final day of the initial license term. Even assuming, as argued by Spectrum IVDS, that it was entitled to the

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<sup>59</sup> See *Installment Payment Order*, 25 FCC Rcd at 491-92 ¶ 35.

<sup>60</sup> Application for Review Ex. B; Petition Ex. B.

<sup>61</sup> Application for Review at 4-5.

<sup>62</sup> Petition ¶ 3.

<sup>63</sup> *Bureau Order*, 23 FCC Rcd at 8810-11 ¶ 26; see Petition at Att. A (Reger Letter). Moreover, Spectrum IVDS cannot claim ignorance of the January 18, 2005, end of its license term, given that it filed a renewal notice on that date. See ULS File No. 0002010282; Application for Review at 5.

<sup>64</sup> Application for Review Ex. B.

<sup>65</sup> The January 15, 2005, payment notice also listed as past due Spectrum IVDS's July 31 and October 31, 2004, installment payments and associated late fees.

<sup>66</sup> Petition ¶ 3.

<sup>67</sup> 47 C.F.R. § 1.2110(g)(3)(ii); see *id.* § 1.2110(b)(4)(x)(E)(3)(ii) (1994).

<sup>68</sup> See *Installment Payment Order*, 25 Rcd at 495-96 ¶¶ 44-45.

<sup>69</sup> See *Morris MO&O*, 23 FCC Rcd at 3188-89 ¶ 21, *aff'd*, *Morris Appellate Opinion*, 566 F.3d 184.

quarterly grace periods for the July 31, 2004 and October 31, 2004 payments,<sup>70</sup> Spectrum IVDS made only the July 31, 2004 payment. Spectrum IVDS's continued failure to pay its outstanding obligation in full undermines the credibility of its reliance on the Commission communications it cites as an excuse for its default and supports the Bureau's presumption that Spectrum IVDS lacks the ability or the will to fulfill its payment obligations.

22. Claiming that the Bureau incorrectly interpreted Spectrum IVDS's proposals that it be given a certain period of time to pay off its outstanding debt as an indication of an inability to pay, Spectrum IVDS attempts to demonstrate that its proposals were instead consistent with Bureau precedent in the *Advanced* and *Big Sky* decisions where licensees were allowed a period of time to pay off their loans following release of decisions granting waivers of their installment payment defaults.<sup>71</sup> Spectrum IVDS suggests that if we believe that its current 90-day proposal involves too much time, we should, rather than deny the proposal, simply shorten the post-grant payment period to 31 days, as provided in "other instances."<sup>72</sup>

23. Spectrum IVDS ignores a crucial distinction between the facts of its case and those at issue in *Advanced* and *Big Sky*. In those two cases, the licensees continued to make regular payments on their debts while their waiver requests were pending.<sup>73</sup> Spectrum IVDS, on the other hand, has, since its one post-default payment at the end of January 2005, made no payments toward the amounts it acknowledges remain due. Spectrum IVDS has failed to pay even though our precedent leaves no doubt that it will remain obligated for the full amount of its debt regardless of how its request for relief is ultimately resolved.<sup>74</sup>

24. Finally, Spectrum IVDS attempts to distinguish itself from a number of other defaulters whose waiver requests were denied following their affirmative statements indicating financial difficulties or their assertions that their delinquencies resulted from the Commission's failure to provide prior notice of the payment amount or deadline.<sup>75</sup> We need not address the claimed differences between Spectrum IVDS and other defaulters that were denied relief, because Spectrum IVDS has not demonstrated that its circumstances are like those of the parties that were granted relief. In each of those decisions granting relief, the defaulting parties had affirmatively demonstrated that they had the ongoing ability and

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<sup>70</sup> Application for Review at 3-4.

<sup>71</sup> *Id.* at 6-7, citing *Advanced Communications Solutions, Inc. Request for Waiver of Section 1.2110(g)(4)(iv) and Reinstatement of 900 MHz Specialized Mobile Radio Licenses, Order*, 21 FCC Rcd 1627 (WTB 2006) ("*Advanced*") and *Big Sky Wireless Partnership, Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Butte, Montana Basic Trading Area, MDB064, Order*, 21 FCC Rcd 10,066 (WTB 2006) ("*Big Sky*").

<sup>72</sup> *Id.* at 6.

<sup>73</sup> See *Advanced*, 21 FCC Rcd at 1630 ¶ 7; *Big Sky*, 21 FCC Rcd at 10,069 ¶ 7.

<sup>74</sup> See *Bureau Order*, 23 FCC Rcd at 8808-09 ¶ 23, citing 47 C.F.R. § 1.2110(g)(4)(iv) and *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd 2551. See also *Installment Payment Order*, 25 Rcd at 487-88 ¶ 29 ("[T]he 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." (citations omitted)).

<sup>75</sup> Application for Review at 6-7.

willingness to fulfill their payment obligations either by promptly paying the accelerated debt in full or by making continuing post-default payments with an unconditional promise to pay their accelerated debt according to the Commission's payment terms.<sup>76</sup> In short, we have found that the best indicator of ability and willingness to pay is payment.

#### IV. CONCLUSION

25. For the reasons discussed above, we conclude that Spectrum IVDS has not shown that the *Bureau Order* was in error, and we therefore deny Spectrum IVDS's Application for Review.

#### V. ORDERING CLAUSE

26. Accordingly, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review of Spectrum IVDS, L.L.C., filed on July 7, 2008, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>76</sup> See *Installment Payment Order*, 25 Rcd at 486-87 ¶ 28; see also *id.* at 494-95 ¶¶ 41-43 (holding that a defaulter's offer to pay its outstanding installment debt does not justify waiver of its default).

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: Spectrum IVDS, L.L.C.: Request for Reconsideration of License Renewal and Reinstatement of the 218-219 MHz Service B Block for Market IVM005, Detroit/Ann Arbor, Michigan, Call Sign KIVD0019, Memorandum Opinion and Order, FCC 10-131*

Although I whole-heartedly agree with this decision's sentiment that the Commission must preserve the integrity of its spectrum auction processes through vigilant enforcement of its regulations, the denial of Spectrum IVDS' Application for Review stands to weaken licensees' ability to rely on the words and actions of this agency. I understand that the payment notice, sent by this Commission to Spectrum IVDS on January 3, 2005, was not statutorily mandated. However, it does not strike me as unreasonable for an interested party, particularly an eligible entity, to claim reliance on a written notice made by this agency. That notice allowed for payment of part of the installment loan obligation beyond January 18, 2005, the end of the licensee's initial license term. Thus, the Commission played an arguably significant role in creating confusion surrounding Spectrum IVDS' payment deadlines. In light of these circumstances, it is my belief that the Commission could have, and more importantly should have, facilitated a more appropriate and understanding resolution to this matter, especially given Spectrum IVDS' substantial payment of its loan obligation. Accordingly, I must respectfully dissent from this decision.