

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

In the Matter of
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
Rules and Reinstatement of Licenses

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 2010

Released: January 5, 2010

By the Commission:

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## I. INTRODUCTION

1. We have before us eight requests seeking reversal of staff-level decisions denying requests for waiver of section 1.2110 of the Commission’s installment payment rules filed by Alpine PCS, Inc. (“Alpine”)<sup>1</sup>, CommNet Communications Network, Inc. (“CommNet”),<sup>2</sup> GLH Communications, Inc. (“GLH”),<sup>3</sup> Inforum Communications, Inc. (“Inforum”),<sup>4</sup> Lancaster Communications, Inc. (“Lancaster”),<sup>5</sup> Allen Leeds (“Leeds”),<sup>6</sup> TV Communications Network, Inc. (“TVCN”),<sup>7</sup> and Virginia Communications, Inc. (“Virginia”)<sup>8</sup> (collectively the “Parties”).<sup>9</sup> Each of the Parties defaulted on

<sup>1</sup> Alpine PCS, Inc., Request for Waiver of Automatic Cancellation Rules for Auction No. 5, C Block Licenses for Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C), and Request for Debt Restructuring, Petition for Reconsideration, filed Feb. 28, 2007 (“Alpine Petition”).

<sup>2</sup> CommNet Communications Network, Inc., Request for Waiver and for Reinstatement of the 900 MHz Specialized Radio Service T Block License for MTA007, Dallas-Fort Worth, KNNX959, Petition for Reconsideration, filed June 7, 2007 (“CommNet Petition”); Supplement to Petition for Reconsideration, filed June 8, 2007 (“CommNet Supplement”).

<sup>3</sup> GLH Communications, Inc., Request for Waiver of Installment Payment Rules, Application for Review, filed Mar. 9, 2007 (“GLH AFR”); Supplement to Application for Review, filed Nov. 1, 2007 (“GLH Supplement”).

<sup>4</sup> Inforum Communications, Inc., Request for Constructive Waiver of Section 1.2110(g)(4)(ii) of the Commission’s Rules, Petition for Reconsideration, filed Feb. 9, 2004 (“Inforum Petition”); Supplement to Petition for Reconsideration, filed July 23, 2004 (“Inforum Supplement”).

<sup>5</sup> Lancaster Communications, Inc., Request for Waiver of Installment Payment Rules for Auction No. 7 and Reinstatement of Licenses, Petition for Reconsideration, filed Mar. 9, 2007 (“Lancaster Petition”).

<sup>6</sup> Allen Leeds, Application for Review, filed on Apr. 16, 2007 (“Leeds AFR”).

<sup>7</sup> TV Communications Network, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses, Application for Review, filed Feb. 28, 2007 (“TVCN AFR”); Supplement to Application for Review, filed Mar. 20, 2007 (“TVCN Supplement”).

<sup>8</sup> Virginia Communications, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 Licenses, Petition for Reconsideration, filed Feb. 28, 2007 (“Virginia Petition”); Request for Leave to File Supplement to Petition for Reconsideration and Contingent Request for Waiver of Page Limitation, filed Jan. 15, 2008; Supplement to Petition for Reconsideration, filed Jan. 15, 2008 (“Virginia Supplement”); Erratum to Supplement to Petition for Reconsideration, filed Jan. 16, 2008 (“Virginia Erratum”).

payment obligations for wireless licenses won at auction and subject to the Commission's installment payment loan program. Therefore, pursuant to section 1.2110(g)(4)(iv) of the Commission's rules, the licenses automatically canceled.<sup>10</sup> As explained below, the Parties have failed to demonstrate that the staff committed errors of fact or law in denying their requests for waiver of the Commission's installment payment rules. We therefore deny the Parties' requests for reversal of the decisions that were adopted pursuant to the delegated authority of the Commission's Wireless Telecommunications Bureau (the "Bureau") or of the Bureau's Auctions and Spectrum Access Division (the "Division").<sup>11</sup>

## II. BACKGROUND

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

2. 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>12</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>13</sup> Licensees paying in installments were generally allowed to pay only interest in the early years of the license term.<sup>14</sup> When the Commission discontinued the use of installment payment loans for future license auctions in 1997,<sup>15</sup> it allowed entities that were already paying for licenses in installments to continue doing so.<sup>16</sup>

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<sup>9</sup> Of the eight parties that filed requests for reconsideration or review of the denial of their previous requests to waive 47 C.F.R. § 1.2110, five also filed untimely supplements to their original pleadings. *See* CommNet Supplement, GLH Supplement, Inforum Supplement, TVCN Supplement, and Virginia Supplement. *See also infra* para. 16.

<sup>10</sup> 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>11</sup> The Auctions and Industry Analysis Division is the predecessor of the current Auctions and Spectrum Access Division and was responsible for certain of the decisions adopted and discussed herein. The term "Division" therefore collectively refers to both.

<sup>12</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *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>13</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>14</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>15</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 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 No. 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>16</sup> *See, generally, Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

3. 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>17</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>18</sup>

4. 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>19</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>20</sup> The amended rules also entitled all licensees paying in installments to a grace period of 180 days. Thus, if a licensee did not make full and timely payment of an installment, it was automatically granted a 90-day period during which it was allowed to pay the installment along with a 5 percent late fee.<sup>21</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

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<sup>17</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 47 C.F.R. § 1.2104 of the Commission's rules to installment payment defaults) (“*Part 1 Third Reconsideration of Third Report and Order*”). In this order, the Commission discussed its 1997 decision not to deviate from its license-cancellation-plus-debt-collection rule for installment payment defaults and explained the reasonableness of this decision. Noting that automatic license cancellation is not unique to defaults on installment payments (licenses terminate automatically, for example, when licensees fail to build out in compliance with the Commission's rules, whether they are paying their winning bids in installments or have paid them in full in a lump sum), the Commission explained that its rules are designed to encourage entities that cannot meet their financial obligations to exit the auction process sooner rather than later in order to avoid delays in licensing spectrum to entities that are able to provide service to the public. Thus, the consequence of defaulting after the close of an auction is more severe than the consequence of withdrawing a high bid during an auction, when a new high bidder can still emerge. Similarly, the consequence of a post-licensing default, such as an installment payment default or a failure to meet construction or service requirements, is more severe than the consequence of a pre-licensing default because the former could adversely affect service to the public much longer than the latter. *Id.* at 2561-62 ¶¶ 29-31.

<sup>18</sup> *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd at 2561-62 ¶ 29. The Commission reasoned that this consequence is comparable to that of a non-installment payment post-licensing default on a license won at a Commission auction – such as a default resulting from failure to build out or egregious conduct – where the license is canceled, and no part of the full license payment is refunded. *Id.* at 2558 ¶ 18.

<sup>19</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 90 to 180 days.

<sup>20</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.

<sup>21</sup> 47 C.F.R. § 1.2110(f)(4)(i) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

payment.<sup>22</sup> 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>23</sup>

5. 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>24</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>25</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>26</sup>

## **B. The Parties**

6. The Parties each requested a waiver of the installment payment rules, seeking relief from their payment deadlines and from the automatic cancellation of the license(s). In each case, the Division or Bureau denied the requested waiver, and the Parties now seek reversal of those decisions. Here, we provide a brief summary of the facts for each of the Parties.<sup>27</sup>

### **1. Alpine**

7. Alpine won two broadband Personal Communication Services ("PCS") C block licenses in Auction 5<sup>28</sup> and as an eligible entity elected to participate in the Commission's installment payment program. Installment payments for Alpine's licenses were due on January 31, 2002, and, pursuant to our rules, Alpine had until the expiration of the two-quarter grace period permitted under the rules, i.e., until July 31, 2002, to render such payments along with the associated late fees. On July 24, 2002, Alpine filed a request for debt restructuring or compromise and, on July 29, 2002, filed an amended version of this request.<sup>29</sup> The Commission's chief financial officer wrote to Alpine on July 30, 2002, acknowledging receipt of the request.<sup>30</sup> On the final day of the second quarterly grace period, July 31, 2002, Alpine also filed a request for waiver of the automatic cancellation provision of the rules.<sup>31</sup> On August 1, 2002, both

<sup>22</sup> 47 C.F.R. § 1.2110(f)(4)(ii) (1998); *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>23</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 ninety-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.

<sup>24</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110.

<sup>25</sup> *Id.* at 443 ¶ 116.

<sup>26</sup> *Id.* at 439-40 ¶¶ 109-10; *Part 1 Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,304-05 ¶ 19.

<sup>27</sup> The facts summarized here are presented in more detail in the relevant underlying Division or Bureau order.

<sup>28</sup> The licenses held by Alpine were for the broadband PCS C block in the San Luis Obispo, CA Basic Trading Area ("BTA") (BTA405), call sign KNLF333, and the Santa Barbara, CA BTA (BTA406), call sign KNLF334.

<sup>29</sup> Alpine Petition at 13; Letter from Robert F. Broz, President of Alpine PCS, Inc. to Regina Dorsey, Special Assistant to Chief Financial Officer, Office of Managing Director, Federal Communications Commission, dated July 24, 2002, "Edited and Resubmitted as of July 29, 2002" (July 29, 2002) (collectively "Alpine First Restructuring Request").

<sup>30</sup> Letter from Mark A. Reger, Chief Financial Officer, Federal Communications Commission, to Robert F. Broz, President, Alpine PCS, Inc., dated July 30, 2002. *See also* Alpine Petition at 14.

<sup>31</sup> Alpine PCS, Inc., For a Waiver of Section 1.2110(g)(iv) of the Rules Relating to the Payments due on July 31, 2002 Regarding its Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C) C Block Licenses, Request for Waiver, filed July 31, 2002.

licenses automatically canceled for Alpine's failure to make its installment payments.<sup>32</sup> In a January 30, 2004 letter to Alpine, the Commission's Office of General Counsel returned the debt compromise request without action, citing to Alpine's changed material circumstances.<sup>33</sup> On January 29, 2007 the Bureau denied Alpine's request for waiver of the automatic cancellation rule.<sup>34</sup> On February 28, 2007, Alpine filed the petition for reconsideration we have before us seeking reversal of the Bureau's denial.<sup>35</sup> On December 18, 2007, Alpine filed a second request for debt compromise,<sup>36</sup> which, on April 29, 2008, was dismissed without prejudice as "both premature and incomplete."<sup>37</sup>

## 2. CommNet

8. CommNet won a 900 MHz Specialized Mobile Radio ("SMR") license in Auction 7 and elected to participate in the Commission's installment payment program.<sup>38</sup> Before making its first installment payment, which was due on November 30, 2001, CommNet requested a one-year suspension of its payment obligations citing financial difficulties.<sup>39</sup> Its request was denied,<sup>40</sup> and CommNet made its quarterly payments, including late fees, until the installment payment due on November 30, 2003. Under the rules, CommNet had two quarterly grace periods, i.e., until June 1, 2004, to make that payment along with associated late fees.<sup>41</sup> CommNet alleged that it attempted to make that payment a few days before the second quarter grace period deadline, but stated it missed the deadline due to its own administrative

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<sup>32</sup> In the Matter of Alpine PCS, Inc., Request for Waiver of Automatic Cancellation Rule for Auction No. 5, C Block Licenses for Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C), *Order*, 22 FCC Rcd 1492, 1495 ¶ 8 (WTB 2007) ("*Alpine Order*").

<sup>33</sup> Letter from Paul K. Cascio, Office of General Counsel, Federal Communications Commission, to Robert F. Broz, President of Alpine PCS Inc., dated Jan. 30, 2004. *See also* Alpine Petition at 15-16.

<sup>34</sup> *Alpine Order*, 22 FCC Rcd at 1503 ¶ 25.

<sup>35</sup> Alpine also sought, and was denied, a stay of Auction 78, which offered among other licenses, licenses for the spectrum on which Alpine had previously been authorized to operate. Alpine PCS, Inc., Request for Stay of Auction 78 for the Broadband PCS C Block Licenses in the San Luis Obispo, CA and the Santa Barbara – Santa Maria, CA Basic Trading Areas, *Order*, 23 FCC Rcd 10485 (WTB/ASAD 2008) (denying Alpine's request to stay Auction 78). The Auction 78 inventory included 30 Advanced Wireless Service ("AWS") licenses and 25 broadband PCS licenses. *See* "Auction of AWS-1 and Broadband PCS Licenses Rescheduled for August 13, 2008; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 78," *Public Notice*, 23 FCC Rcd 7496 (WTB 2008).

<sup>36</sup> Letter from Frederick M. Joyce and Christine McLaughlin, Counsel for Alpine PCS, Inc., to Anthony Dale, Managing Director, Federal Communications Commission, dated Dec. 18, 2007 ("*Alpine Second Restructuring Request*").

<sup>37</sup> Letter from Regina Dorsey, Deputy Chief Financial Officer, Federal Communications Commission, to Frederick M. Joyce and Christine McLaughlin, Counsel for Alpine PCS, Inc., dated Apr. 29, 2008.

<sup>38</sup> The 900 MHz SMR license held by CommNet was for the T block in the Dallas-Fort Worth TX Major Trading Area ("MTA") (MTA007), call sign KNNX959.

<sup>39</sup> Letter from Delaney M. DiStefano, Counsel for CommNet Communications Network, Inc., to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated Nov. 14, 2001.

<sup>40</sup> Letter from Kelly Quinn, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Delaney M. DiStefano, Esq., Counsel for CommNet Communications Network, Inc., 17 FCC Rcd 10,418 (WTB/ASAD 2002).

<sup>41</sup> Because the last day of the second quarter of the grace period, May 31, 2004, fell on Memorial Day, the Commission considered payments timely if it received them no later than June 1, 2004. *See* CommNet Communications Network, Inc., Request for Waiver and for Reinstatement of the 900 MHz Specialized Radio Service T Block License for MTA007, Dallas-Fort Worth, KNNX959, *Order*, 22 FCC Rcd 8612, 8616 ¶ 8 (WTB 2007) ("*CommNet Order*").

errors.<sup>42</sup> On June 2, 2004, the license canceled automatically.<sup>43</sup> CommNet then sought reinstatement of the license and waiver of the automatic cancellation rule.<sup>44</sup> On May 9, 2007, the Division denied CommNet's request.<sup>45</sup> On June 7, 2007, CommNet filed the petition for reconsideration we have before us seeking reversal of the Division's denial.

### 3. GLH

9. GLH acquired four broadband PCS C block licenses by assignment in 2001.<sup>46</sup> As an eligible entity, GLH elected to assume the debt associated with the licenses and to participate in the Commission's installment payment program to finance its acquisition. GLH's installment payments for the four licenses were due on January 31, 2003.<sup>47</sup> Pursuant to our rules, GLH had two quarterly grace periods, i.e., until July 31, 2003, to render such payment along with associated late fees. In advance of this deadline, on April 16, 2003, GLH filed a request for waiver of the installment payment rules seeking a two-year waiver of the Commission's automatic cancellation and debt collection rules and asking the Commission to consider proposals for compromising its debt.<sup>48</sup> The Bureau denied this request on July 18, 2003.<sup>49</sup> GLH failed to submit the installment payments, along with the associated late fees, for the four licenses by July 31, 2003, and the licenses canceled automatically on August 1, 2003.<sup>50</sup> On August 15, 2003, GLH filed a petition for reconsideration of the Division's July 2003 denial of its waiver request, and in February of 2007, the Bureau denied that request.<sup>51</sup> On March 9, 2007, GLH filed the application for review we have before us seeking reversal of the Bureau's denial.

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<sup>42</sup> *Id.*, 22 FCC Rcd at 8616 ¶ 9 (noting CommNet's allegation that, because its bookkeeper had left "due to economic circumstances," an inexperienced individual made the banking mistake leading to the missed payment).

<sup>43</sup> *Id.* at 8616 ¶ 8.

<sup>44</sup> *Id.* at 8612 ¶ 1.

<sup>45</sup> *Id.* at 8627 ¶ 30.

<sup>46</sup> Request of GLH Communications, Inc. for Temporary Waivers of Installment Payment Deadlines (47 C.F.R. § 1.2110(g)(4)) and Debt Collection Rules (47 C.F.R. § 1901 et seq.), *Order*, 18 FCC Rcd 14,695 (WTB/AIAD 2003) ("*GLH Order*"), *recon. denied, Order on Reconsideration*, 22 FCC Rcd 2411, 2414 ¶ 6 (WTB 2007) ("*GLH Order on Reconsideration*"). GLH initially sought waiver for six broadband PCS licenses, but paid the outstanding obligations on those two licenses and assigned them to NTCH, Inc. *See GLH Order on Reconsideration*, 22 FCC Rcd at 2411 n.3. *See also* File No. 0001402262 (applying for voluntary *pro forma* transfer of broadband PCS C block licenses for BTA120 and BTA211). *See also* Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, Report No. 1686, *Public Notice*, at 2 (rel. Dec. 10, 2003) (granting assignment of authorization requested in File No. 0001402262). The remaining four licenses were for the broadband PCS C block in the following BTAs: Cookeville TN (BTA096), call sign KNLF461; Florence AL (BTA146), call sign KNLF463; Kingsport, TN-Johnston City, TN (BTA229), call sign KNLF465; and Middlesboro-Harlan, KY (BTA 295), call sign KNLF468.

<sup>47</sup> *GLH Order on Reconsideration*, 22 FCC Rcd at 2414-15 ¶ 7.

<sup>48</sup> *Id.*

<sup>49</sup> *GLH Order*, 18 FCC Rcd at 14,703 ¶ 21.

<sup>50</sup> *GLH Order on Reconsideration*, 22 FCC Rcd at 2415 ¶ 8.

<sup>51</sup> *Id.* at 2422 ¶ 27.

#### 4. Inforum

10. Inforum acquired a Broadband Radio Service (“BRS”)<sup>52</sup> license through an assignment on October 6, 1999.<sup>53</sup> As an eligible entity, it assumed the installment payment debt for the license. An installment payment for the license was due on January 31, 2001, and, under the Commission’s rules, Inforum had two quarterly grace periods, i.e., until July 31, 2001, to make its payment along with associated late fees.<sup>54</sup> Inforum failed to render the installment payment by July 31, 2001, and the license automatically canceled on August 1, 2001. On January 8, 2004, the Division denied Inforum’s request for reconsideration and for waiver of the automatic cancellation rule.<sup>55</sup> On February 9, 2004, Inforum filed the petition for reconsideration we have before us seeking reversal of the Division’s denial.<sup>56</sup>

#### 5. Lancaster

11. Lancaster won twenty-two 900 MHz SMR licenses in Auction 7 and elected to participate in the Commission’s installment payment plan to satisfy its winning bid obligations.<sup>57</sup> With respect to two of the twenty-two licenses, Lancaster failed to pay the entire installment payment due on September 1, 2003.<sup>58</sup> Under the Commission’s rules, Lancaster had until the end of the second quarterly grace period, i.e., until March 1, 2004, to render those payments along with associated late fees.<sup>59</sup> Lancaster failed to make the necessary installment payments and those two licenses canceled

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<sup>52</sup> In 2004, the Commission amended the rules governing the Multipoint Distribution Service (“MDS”) in order to encourage the deployment of broadband services by commercial and educational entities, and renamed MDS as BRS. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14,165 (2004). Because the new rules are now in effect, we refer to the service by its new name.

<sup>53</sup> The BRS license held by Inforum was for the Sarasota, FL BTA (MDB408). At the time of the assignment, Inforum was named Skylynx Communications, Inc. See *Inforum Communications, Inc. and TDI Acquisition Corporation, Memorandum Opinion and Order*, 20 FCC Rcd 820, 822 ¶ 6 n.22 (2005) (“*Inforum-TDI Assignment Order*”).

<sup>54</sup> See Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment, *Order*, 19 FCC Rcd 83, 84 ¶ 2 (WTB/ASAD 2004) (“*Inforum Order*”).

<sup>55</sup> *Inforum Order*, 19 FCC Rcd at 87 ¶ 13.

<sup>56</sup> On February 9, 2004, Paradise Cable, Inc. filed an application for review of the *Inforum Order*, claiming an interest in the proceeding as the alleged rightful licensee of the Sarasota BTA instead of Inforum. Paradise’s claims to the licenses at issue, however, have been rejected by the courts and the Commission. See *Inforum-TDI Assignment Order*, 20 FCC Rcd at 827 ¶ 12 (affirming Commission staff order that dismissed Paradise’s petition to deny assignment of licenses from Inforum to another entity, deferring to decrees by three federal courts that rejected attempts to revoke or rescind consummation of assignment of licenses from Paradise to Inforum), *aff’d*, *Paradise Cable, Inc. v. Federal Communications Commission*, No. 05-1040, slip op. (D.C. Cir. Feb. 15, 2006). Paradise therefore lacks standing to challenge the *Inforum Order* and we dismiss its application for review.

<sup>57</sup> Lancaster Petition at 2. The licenses held by Lancaster covered the Guam MTA (MTA050), Blocks A through T, the Dallas TX MTA (MTA007), Block A, and the San Antonio, TX MTA (MTA033), Block S. The call signs were KNNY300 through KNNY306 and KNNY309 through KNNY323. See Lancaster Communications, Inc. Request for Waiver of Installment Payment Rules for Auction No. 7 and Reinstatement of Licenses Application for Assignment of 900 MHz Specialized Mobile Radio Licenses, *Order*, 22 FCC Rcd 2438, 2438 n.4, 2441 ¶ 6 (WTB 2007) (“*Lancaster Order*”).

<sup>58</sup> The call signs for these two licenses were KNNY305 and KNNY306. See *Lancaster Order*, 22 FCC Rcd at 2441 ¶ 7 & n.28. Normally, Lancaster would have had through the last day of February to pay an installment payment due at the end of August, but, because both the original payment deadline and the second grace period deadline fell on a non-business day, the deadlines were extended until the next business day. *Id.*

<sup>59</sup> *Id.* at 2441 ¶ 7.

automatically on March 2, 2004.<sup>60</sup> Lancaster also failed to pay installment payments for the remaining twenty licenses by the due date of November 30, 2003.<sup>61</sup> Under the Commission's rules, Lancaster had until the end of the second quarterly grace period, i.e., until May 31, 2004, to render those payments along with associated late fees.<sup>62</sup> On May 28, 2004, Lancaster filed a request for waiver of the automatic cancellation rule, seeking additional time to fulfill its installment debt obligations.<sup>63</sup> Lancaster failed to make the necessary installment payments and those twenty licenses canceled automatically on June 1, 2004. On February 7, 2007, the Bureau denied Lancaster's request for waiver of the automatic cancellation rule.<sup>64</sup> On March 9, 2007, Lancaster filed the petition for reconsideration we have before us seeking reversal of the Bureau's denial.

## 6. Leeds

12. Leeds, an individual, won two BRS licenses in Auction 6, and elected to satisfy his winning bid obligations through participation in the Commission's installment program.<sup>65</sup> Installment payments for Leeds's two licenses were due on February 28, 1997. Under the Commission's installment payment rules at that time, Leeds had until May 30, 1997 to render such payment or to file a timely grace period request. Leeds failed to do either and the licenses automatically canceled on May 31, 1997.<sup>66</sup> On August 29, 1997, three months after the time allowed under the rules, Leeds submitted a request seeking additional time in which to make his February 1997 installment payments, a reduction in the amount of his obligation for the two licenses, and/or a refund of some of the money previously paid to the Commission.<sup>67</sup> The Division denied these requests on October 2, 2001.<sup>68</sup> Leeds sought reconsideration of this denial, and, on January 29, 2007, the Bureau denied Leeds's petition.<sup>69</sup> On April 16, 2007, Leeds filed the application for review we have before us seeking reversal of the Bureau's denial.<sup>70</sup>

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<sup>60</sup> *Id.* at 2441 ¶ 7 and n.29.

<sup>61</sup> *Id.* at 2441-42 ¶ 8.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2447 ¶ 22.

<sup>65</sup> The BRS licenses in question were for the Lexington, KY BTA (B252) and the Rockford, IL BTA (B380). See Allen Leeds, *Order*, 22 FCC Rcd 1508, 1510-11 ¶ 4 and n.12 (WTB 2007) ("*Leeds Order*").

<sup>66</sup> *Leeds Order*, 22 FCC Rcd at 1511 ¶ 5.

<sup>67</sup> *Id.*, citing Letter from James A. Stenger, Counsel for Allen Leeds, to Mark Rossetti, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated Aug. 29, 1997, at 2, 3-4.

<sup>68</sup> Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to James A. Stenger, Counsel for Allen Leeds, 16 FCC Rcd 17,621 (WTB/ASAD 2001).

<sup>69</sup> *Leeds Order*, 22 FCC Rcd at 1519 ¶ 24.

<sup>70</sup> Although Leeds did not file his application for review within thirty days of public notice of the Bureau's *Leeds Order*, as required by 47 C.F.R. § 1.115(d), we address the merits of the application because the Bureau, contrary to its customary practice of mailing adjudicatory orders to the parties, did not provide Leeds with personal notice of the *Leeds Order* until it provided notice to Leeds's counsel more than thirty days after public notice of that order. See 47 C.F.R. § 0.445(a). Leeds asserts he did not have actual notice of the *Leeds Order* within thirty days of public notice of the order and that he filed his application for review promptly after receiving personal notice of the *Leeds Order*. We find that a waiver of the thirty day time limit in 47 C.F.R. § 1.115(d) is justified and is in the public interest because Leeds's delay in filing the application for review was directly attributable to his lack of personal notice of the *Leeds Order*.

## 7. TVCN

13. TVCN won twelve BRS licenses in Auction 6 and acquired two additional BRS licenses in the secondary market.<sup>71</sup> As an eligible small business, TVCN elected to participate in the Commission's installment payment program for all fourteen licenses.<sup>72</sup> TVCN failed to make an installment payment due on November 30, 1998, for one of the licenses within the grace period then provided under the rules, i.e., by May 31, 1999, and the license automatically canceled on June 1, 1999.<sup>73</sup> TVCN subsequently missed the August 31, 2001 installment payment deadline for the remaining thirteen licenses, and pursuant to our rules, had two quarterly grace periods, i.e., until February 28, 2002, to make the required installment payments along with the associated late fees.<sup>74</sup> On November 29, 2001, TVCN filed a request, asking for, *inter alia*, a waiver of the installment payment rules and grant of an indefinite payment grace period of six months or longer so that TVCN could seek "new financing and/or buyers" to acquire the licenses.<sup>75</sup> TVCN did not make the installment payments due by the end of February 2002, and, as a result, the thirteen licenses automatically canceled on March 1, 2002.<sup>76</sup> On February 4, 2003, TVCN filed another request for a waiver of the installment payment rules, seeking a one-year grace period for making payments towards its debt obligation for all fourteen of the BRS licenses.<sup>77</sup> On January 29, 2007, the Bureau denied TVCN's requests for waiver of the automatic cancellation rule.<sup>78</sup> On February 28, 2007, TVCN filed the application for review we have before us seeking reversal of the Bureau's denial.

## 8. Virginia

14. Virginia won five BRS licenses in Auction 6 and as an eligible entity elected to participate in the Commission's installment payment plan.<sup>79</sup> Installment payments for Virginia's licenses were due on February 28, 2002, and, under our rules, it had two quarterly grace periods, i.e., until September 3, 2002, to make such payments along with associated late fees.<sup>80</sup> On August 30, 2002,

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<sup>71</sup> The BRS licenses held by TVCN were for the following markets: Clarksburg-Elkins, WV (MDB082), Dickinson, ND (MDB113), Fairmont, WV (MDB137), Logan, WV (MDB259), Morgantown, WV (MDB306), Salina, KS (MDB396), San Luis Obispo, CA (MDB405), Scottsbluff, NE (MDB411), Scranton-Wilkes Barre, PA (MDB412), Steubenville, OH (MDB431), Stroudsburg, PA (MDB435), Watertown, NY (MDB463), Wheeling, WV (MDB471), and Williston, ND (MDB476). See TV Communications Network, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses, *Order*, 22 FCC Rcd 1397, 1397 n.1, 1400-01 ¶ 6 (WTB 2007) ("*TVCN Order*").

<sup>72</sup> The Commission's original installment payment rules were in effect when TVCN began paying for the twelve licenses it won at auction and the first of the two licenses it acquired through assignment pursuant to the original installment payment rules. Payment for all of those licenses plus the second license acquired in the secondary market came under the amended grace period rules once they were implemented. See *TVCN Order*, 22 FCC Rcd at 1400-01 ¶ 6. See also *Part 1 Third Report and Order*, 13 FCC Rcd at 436 ¶ 106.

<sup>73</sup> *TVCN Order*, 22 FCC Rcd at 1401 ¶ 7.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*, citing Letter from Omar A. Duwaik, President, TV Communications Network, Inc. to Magalie R. Salas, Secretary, Federal Communications Commission, dated Nov. 29, 2001.

<sup>76</sup> *TVCN Order*, 22 FCC Rcd at 1401 ¶ 7.

<sup>77</sup> *Id.* at 1401-02 ¶ 8.

<sup>78</sup> *Id.* at 1409 ¶ 24.

<sup>79</sup> The BRS licenses held by Virginia were for the following markets: Athens, OH (MDB023), Cedar Rapids, IA (MDB070), Chillicothe, OH (MDB080), Davenport-Moline, IA (MDB105), and Waterloo-Cedar Falls, IA (MDB462). See Virginia Communications, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 Licenses, *Order*, 22 FCC Rcd 1386, 1386 n.2, 1389-90 ¶ 7 (WTB 2007) ("*Virginia Order*").

<sup>80</sup> *Id.*, 22 FCC Rcd at 1390 ¶ 8.

Virginia requested a waiver of the installment payment rule and a restructuring of its debt for the licenses.<sup>81</sup> On September 4, 2002, the licenses canceled automatically because of Virginia's failure to make any installment payments.<sup>82</sup> On April 7, 2003, Virginia submitted to the Commission's Office of Managing Director a proposal for restructuring its debt.<sup>83</sup> On January 29, 2007, the Bureau denied Virginia's requests for a waiver of the installment payment rules and for an extension of the payment deadlines and returned without action Virginia's request for restructuring of its debt on the licenses.<sup>84</sup> On February 28, 2007, Virginia filed the petition for reconsideration we have before us seeking reversal of the Bureau's denial.

### III. DISCUSSION

15. Because the Parties raise related issues regarding the application of the Commission's installment payment rules and seek substantially similar relief from the decisions reached by the Bureau or the Division pursuant to their delegated authority, we consolidate these requests for resolution.<sup>85</sup>

16. Before reviewing the substantive arguments raised by the requests, we note that five of the Parties also filed supplements to their initial filings outside the thirty day pleading cycle established in our rules, which require petitions for reconsideration and applications for review and their supplements to be filed within thirty days of public notice of the Commission's action on delegated authority.<sup>86</sup> Of these five supplements, two claim to correct inadvertent error,<sup>87</sup> one furthers arguments advanced in the underlying petition for reconsideration,<sup>88</sup> and two raise new questions of law that were not presented to

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<sup>81</sup> *Id.* at 1386 n.2, citing Waiver Request, Extension Request: BTA Quarterly Installments, filed by Virginia Communications, Inc., on August 30, 2002, and supplemented, Supplemental Memorandum in re: Virginia Communications, Inc., on May 23, 2003.

<sup>82</sup> *Virginia Order*, 22 FCC Rcd at 1390 ¶ 8.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1396-97 ¶¶ 21-24 (explaining that Virginia's debt restructuring proposal did not include adequate information or comply with the Commission's rules sufficiently to support a request for debt compromise).

<sup>85</sup> *See* 47 C.F.R. §§ 1.106, 1.115.

<sup>86</sup> *See* 47 C.F.R. §§ 1.106, 1.115; 47 U.S.C. § 405(a) (requiring petitions for reconsideration to be filed within thirty days from the date public notice is given of the Commission's decision or action). *See also* In the Matter of BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, *Memorandum Opinion And Order*, 15 FCC Rcd 17,590, 17,596-97 ¶ 10 (2000) ("*BDPCS MO&O*") (dismissing untimely supplements). CommNet, GLH, Inforum, TVCN, and Virginia filed untimely supplements to their original pleadings. *See* CommNet Supplement, GLH Supplement, Inforum Supplement, TVCN Supplement, Virginia Supplement, and Virginia Erratum.

<sup>87</sup> CommNet Supplement (resubmitting Declaration of Counsel and correspondence with Commission staff); TVCN Supplement (offering missing pages from its AFR). In addition, a letter from a third party was submitted after the filing deadline with respect to the TVCN AFR. *See* Letter from Michele Farquhar, Counsel for Oneida Broadband, LLC, to Gary Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, dated Sept. 29, 2006 (stating TVCN and Oneida had entered an agreement for TVCN to transfer the licenses to Oneida and Oneida offering to pay debt).

<sup>88</sup> *See generally* Inforum Supplement (further arguing why Inforum should be considered to have been granted a constructive waiver of the Commission's automatic cancellation rule). In addition, three letters were submitted after the filing deadline regarding the Inforum Petition, two of which were filed by a third party. *See* Letter from Jennifer Richter, Counsel for Sprint Nextel to FCC Secretary, dated June 30, 2006 (arguing that Inforum's case constituted a constructive waiver); Letter from Suzanne S. Goodwyn, Counsel for Inforum Communications, Inc., to FCC Secretary, dated Aug. 1, 2006 (attaching Sprint's letter of June 30, 2006 and arguing why a grant of a waiver would be consistent with Commission precedent) ("*Inforum Letter*"); Letter from Trey Hanbury, Director for Sprint Nextel, to Margy Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, (continued....)

the Bureau.<sup>89</sup> Pursuant to our rules, we dismiss all five of the supplements as untimely filed.<sup>90</sup> We also do not separately address any of the letters received after the filing deadline.<sup>91</sup>

17. The Commission will grant an application for review of a final action taken on delegated authority only when such action, *inter alia*, conflicts with statute, regulation, precedent or established Commission policy; involves application of a precedent or policy that should be overturned; or makes an erroneous finding as to an important or material factual question.<sup>92</sup> Similarly, reconsideration is only appropriate when the petitioner shows error in findings of fact or conclusions of law in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present

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dated July 14, 2008 (urging favorable resolution of Inforum's waiver and processing of assignment applications from Inforum to TDI, a wholly-owned Sprint subsidiary).

<sup>89</sup> See GLH Supplement at 1-2 (contending that the Bureau's decision in *Advance Acquisition Inc. Request for Waiver of Bid Withdrawal Payment, Order*, 22 FCC Rcd 18,846 (WTB 2007) ("*Advance Acquisition Order*") should apply to the Commission's calculation of GLH's outstanding installment payment obligations); Virginia Supplement at 6-9, 14 (arguing (1) that the Commission did not properly consider its own records regarding Virginia's spectrum holdings in determining whether it was the entity that most valued the subject spectrum, (2) that it had a limited property right in the license that precluded automatic cancellation, and (3) that it would be inequitable for the Commission to cancel the licenses, attempt to collect on the debt, and reactivate the same spectrum).

<sup>90</sup> See 47 C.F.R. §§ 1.106(f), 1.115(d). With respect to Virginia's late submissions, while the Commission has some discretion to consider late-filed supplements to timely filed petitions for reconsideration, we decline to do so where the arguments could have been made earlier. See, e.g., *Richard R. Zaragoza, et al.*, 2009 WL 1405882 (May 20, 2009) (where timely petition for reconsideration was filed, dismissing supplement filed after 30-day reconsideration deadline where, among other reasons, material "could have been provided earlier"). We note, however, that since many of the arguments offered by Virginia in its supplement mirror issues raised in timely filed petitions for reconsideration or applications for review filed by other parties, we have fully addressed those issues below in considering these other pleadings. See generally, Virginia Supplement and Virginia Erratum. We also decline to consider the late supplement to the GLH AFR. The Bureau's decision in the *Advance Acquisition Order*, which the GLH Supplement urges us to consider, would not change the outcome here. We note first that the Commission has not yet had an opportunity to consider the issue presented to the Bureau in that case. Nevertheless, it is clear that the *Advance Acquisition Order* would be wholly inapplicable here, where we are reviewing challenges to denials of waivers of 47 C.F.R. § 1.2110. See Licenses of 21<sup>st</sup> Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,121-23 ¶¶ 17-20 (2000) ("*21<sup>st</sup> Century MO&O*") (explaining the Commission's application of a strict standard of review for requests of waiver of its automatic cancellation rule), *recon. denied sub nom*, Licenses of 21<sup>st</sup> Century Telesis Joint Venture and 21<sup>st</sup> Century Bidding Corporation for Facilities in the Broadband Personal Communications Services, *Order on Reconsideration*, 16 FCC Rcd 17,257 (2001) ("*21<sup>st</sup> Century Order on Reconsideration*"), *petition dismissed in part and denied in part, 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003). In the *Advance Acquisition Order*, the Bureau held that, given the exceptionally high level of the final bid withdrawal payment due under the rules, the final payment owed was higher than necessary to serve the rule's purpose of deterring insincere bidding in Commission auctions. The Commission's rule prescribing the calculation of final bid withdrawal payments, 47 C.F.R. § 1.2104(g)(1), and the underlying purpose it serves are inapposite to our consideration here of the automatic cancellation of a license and the acceleration of the full outstanding debt obligation, which is governed exclusively by 47 C.F.R. § 1.2110.

<sup>91</sup> To the extent the Inforum Letter raises any new legal arguments, we decline to consider it on the same grounds that we dismiss the late-filed Inforum Supplement. Further, we note that many of the arguments offered in the Inforum Letter mirror issues raised in timely filed petitions for reconsideration and applications for review by itself and other parties and therefore those arguments have been fully addressed herein. We also need not address the ex parte letters submitted by third parties on behalf of either Inforum or TVCN, which in any event duplicate arguments made in a timely manner by Inforum and TVCN and rejected by us.

<sup>92</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).

such matters, or as to which consideration is in the public interest.<sup>93</sup> A petition that simply reiterates arguments previously considered and rejected will be denied.<sup>94</sup> As discussed fully below, the Parties have failed to demonstrate that the denials of their requests for waiver of the Commission's installment payment rules were contrary to precedent, statute or rule, applied precedent or policy that should be overruled, were based on erroneous findings or assumptions as to the facts, or that the staff decisions in any other way were based on errors of fact or law. Consistent with sections 1.106 and 1.115 of our rules, we therefore deny the petitions for reconsideration and applications for review.<sup>95</sup>

#### A. The Staff Decisions Correctly Applied the Waiver Standard

18. To address the appeals before us, we must consider whether, on delegated authority, the Bureau and the Division committed errors of fact or law in denying the Parties' requests for waiver of the automatic license cancellation rule under the standard set forth in section 1.925 of our rules.<sup>96</sup> To obtain a waiver of the Commission's rules, an applicant must show either (i) that the underlying purpose of the applicable rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique factual circumstances of the particular case render application of the rule inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative.<sup>97</sup>

19. In resolving requests for waiver of the installment payment rules, the Commission and its staff have consistently concluded that the underlying purpose of the automatic cancellation rule is to preserve the reliability and integrity of the competitive bidding and licensing processes by ensuring that licensees have the ongoing financial ability and the willingness to fulfill their auction-related payment obligations, thereby affirming that licenses have been assigned to the parties that place the highest value on the spectrum and will put it to efficient and effective use for the benefit of the public.<sup>98</sup> Accordingly, as discussed below, the Commission has held 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.<sup>99</sup> In addition, the Commission has consistently found that the various grounds for waiver as claimed here by the Parties – including temporary financial difficulties, provision of service, history of past payments, and alleged billing errors – do not constitute unique circumstances that justify waiver of the automatic cancellation rule in the

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<sup>93</sup> 47 C.F.R. § 1.106(c). See *WQAM License Limited Partnership, Memorandum Opinion and Order*, 15 FCC Rcd 13,549, 13,549 ¶ 2 (2000) (citing *WWIZ, Inc. v. FCC*, 37 F.C.C. 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)).

<sup>94</sup> *Id.*; see also, e.g., *Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc., for Renewal of License for Station WCBM(AM), Baltimore, Maryland, et al., Memorandum Opinion and Order*, 8 FCC Rcd 3986 ¶ 3 (Rev. Bd. 1993).

<sup>95</sup> See 47 C.F.R. §§ 1.106, 1.115(a).

<sup>96</sup> 47 C.F.R. § 1.925.

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., *Morris Communications, Inc., Memorandum Opinion and Order*, 23 FCC Rcd 3179, 3195 ¶ 35 (2008) ("*Morris Order*"), *aff'd, Morris Communications, Inc. v. FCC*, 566 F.3d 184 (D.C. Cir. 2009) ("*Morris Appellate Opinion*"); see also, *21st Century MO&O*, 15 FCC Rcd 25,113.

<sup>99</sup> See, e.g., *Morris Order*, 23 FCC Rcd at 3194-96 ¶¶ 34-39; see also, *Southern Communications Systems, Inc. Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, Memorandum Opinion and Order*, 15 FCC Rcd 25,103, 25,105-06 ¶ 7 (2000) ("*Southern MO&O*"), *further recon. denied, Second Memorandum Opinion and Order*, 16 FCC Rcd 18,357 (2001) ("*Southern Second MO&O*"); *21st Century MO&O*, 15 FCC Rcd at 25,117-18 ¶ 10.

absence of a demonstrated ability and willingness to fulfill the payment obligations associated with the license(s).<sup>100</sup>

20. The Commission's long established policy and precedent regarding the installment payment automatic cancellation rule is clear. In offering eligible small businesses the ability to pay their winning auction bids through the installment payment program, the Commission's rules have always explicitly conditioned retention of a license on the full and timely payment of each installment.<sup>101</sup> The rules state that failure to do so results in the automatic cancellation of the license.<sup>102</sup> The rules provide for this consequence because compliance with the Commission's payment rules is critical to realizing the public interest objectives of section 309(j) of the Communications Act.<sup>103</sup> 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.<sup>104</sup> Entities demonstrate that they value spectrum licenses more highly than others do by paying the full amounts bid for those licenses.<sup>105</sup> Thus, 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.<sup>106</sup>

21. The Commission has reasoned that the presumption that the auction assigned the license to the party that placed the highest value on the spectrum 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.<sup>107</sup> If the Commission were to allow licensees to keep their licenses after they had failed to comply with the Commission's payment rules, it would increase the incentive for bidders to

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<sup>100</sup> See *Morris Order*, 23 FCC Rcd at 3197 ¶¶ 40-43.

<sup>101</sup> See 47 C.F.R. § 1.2110(d)(4) (1994); see also 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)(D) as 47 C.F.R. § 1.2110(d)).

<sup>102</sup> 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(iii) (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)); see *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd at 2553 ¶ 6. Under the Commission's rules and precedent, once a license automatically cancels, the license term ends, the outstanding debt is accelerated, and the former licensee is no longer eligible to participate in the Commission's installment payment plan. 47 C.F.R. § 1.2110(g)(4)(iv); *Morris Order*, 23 FCC Rcd at 3190-91 ¶ 26.

<sup>103</sup> *Morris Order*, 23 FCC Rcd at 3194 ¶ 34.

<sup>104</sup> See Letter from Margaret Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Ronald E. Quirk, Jr., Counsel for Morris Communications, Inc., 20 FCC Rcd 8176, 8179-81 (2005) ("*Morris Division Order*") (citing *21st Century MO&O*, 15 FCC Rcd at 25,123-24), *aff'd*, *Morris Order*, 23 FCC Rcd at 3194 ¶ 34. In the *Morris Order*, the Commission noted that the Division, in denying Morris's request for waiver, had correctly observed that if the Commission were to exercise much flexibility in relieving bidders from their bid obligations, the bid would cease to operate as an effective proxy for identifying those who value the spectrum the most, thereby undermining the presumption that the high bidder is best able to put the spectrum to efficient and effective use for the benefit of the public. *Morris Order*, 23 FCC Rcd at 3194 n.106.

<sup>105</sup> Satellite Signals of New England, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses, *Order*, 22 FCC Rcd 1937, 1944-45 ¶ 14 (WTB 2007) ("*Satellite Signals Order*"), *recon. dismissed*, Satellite Signals of New England, Inc., Petition for Reconsideration and Request for Conditional Waiver of Installment Payment Rules for Auction No. 6, *Memorandum Opinion and Order*, 24 FCC Rcd 10,919 (WTB 2009).

<sup>106</sup> *Morris Division Order*, 20 FCC Rcd at 8179-81 (citing *21st Century MO&O*, 15 FCC Rcd at 25,123-24), *aff'd*, *Morris Order*, 23 FCC Rcd at 3194 ¶ 34.

<sup>107</sup> See, e.g., *21st Century MO&O*, 15 FCC Rcd at 25,123-24 ¶ 22; see also, *Morris Order*, 23 FCC Rcd at 3194 ¶ 34, *aff'd*, *Morris Appellate Opinion*, 566 F.3d 184.

make bids they could not pay and reduce opportunities for other bidders to win licenses.<sup>108</sup> By increasing the likelihood that winning bidders will be entities that are able to pay their bids and provide service to the public, the Commission furthers economic opportunity and competition in the marketplace.<sup>109</sup> In this manner, strict enforcement of the installment payment rules preserves a fair and efficient licensing process and promotes the rapid deployment of services for the benefit of the public.<sup>110</sup> Indeed, where initial licenses are assigned based on competitive bidding, strict enforcement of payment rules serves the public interest whether the licensee acquired the license directly through competitive bidding or through assignment in the secondary market, and whether the license was subject to the installment payment program or not.<sup>111</sup>

22. The Commission's policy of strict enforcement of the automatic cancellation rule does not, however, preclude the grant of a waiver. Indeed, the Commission has waived the automatic cancellation rule in several cases where the facts and circumstances have indicated that the public interest would be served by preserving the license assignment, despite a missed payment deadline.<sup>112</sup> In each such case, however, the Commission has granted the waiver only after finding that there was no serious question regarding the defaulting licensee's ongoing ability and willingness to fulfill its payment obligations despite its default and, therefore, no question regarding the presumption that it remained best suited to utilize the spectrum.<sup>113</sup> In contrast, where a defaulting licensee has not promptly paid its debt in full after acceleration or made continuing post-default payments with an unconditional promise to pay its accelerated debt in accord with the Commission's payment terms, the Commission has consistently

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<sup>108</sup> See, e.g., Duluth PCS, Inc. and St. Joseph PCS, Inc., Request for Partial Waiver of the Section 1.2110(g) of the Commission's Rules, *Order*, 19 FCC Rcd 7137, 7139-40 ¶ 5 (WTB/ASAD 2004) ("*Duluth PCS Order*").

<sup>109</sup> See, e.g., *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25123-24 ¶ 22.

<sup>110</sup> See *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25123-24 ¶ 22; *Morris Order*, 23 FCC Rcd at 3194 ¶ 34; *Morris Appellate Opinion*, 566 F.3d at 191 n.6.

<sup>111</sup> We disagree with GLH's suggestion that denial of a waiver is less warranted where the defaulter acquired its license through assignment, or that, given the cessation of the installment loan program, strict adherence to the Commission's payment deadlines is no longer necessary. See GLH AFR at 4, 10-11. Instead, we endorse the Bureau's conclusion that it is important to the integrity of the auctions program for an assignee that has assumed an installment debt to fully and timely pay the amount of the winning bids. See *GLH Order on Reconsideration*, 22 FCC Rcd at 2417 ¶ 15. As the Commission has said in refusing to waive other post-auction payment deadlines, the Commission associates strict enforcement of its payment deadlines with preservation of "the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications." See *Mountain Solutions Ltd., Inc. v. FCC*, 197 F.3d 512, 522 (D.C. Cir. 1999) (quoting from Part 1 of the Commission's Rules – Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5720-21 ¶ 61 (1997) ("*Part 1 Order-MO&O-NPRM*"), and affirming the Commission's strict enforcement of its post-auction down payment deadlines and the denial of a request for waiver); see also *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 901 (D.C. Cir. 2004) (upholding the Commission's strict enforcement of its post-auction final payment deadline).

<sup>112</sup> See, e.g., Leaco Rural Telephone Cooperative, Inc. Request for Waiver and Reinstatement of Broadband Radio Service Authorization for the Hobbs, New Mexico Basic Trading Area, MDB191, *Order*, 21 FCC Rcd 1182 (WTB 2006) ("*Leaco Order*"); Advanced Communications Solutions, Inc. Request for Waiver of Section 1.2110(g)(4)(iv) and Reinstatement of 900 MHz Specialized Mobile Radio Licenses, *Order*, 21 FCC Rcd 1627 (WTB 2006) ("*Advanced Order*").

<sup>113</sup> See, e.g., *Advanced Order*, 21 FCC Rcd at 1632 ¶¶ 11, 12, 1633 ¶ 14; *Leaco Order*, 21 FCC Rcd at 1185-87 ¶¶ 10-12. See also 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, 10,070-71 ¶¶ 11-12, 10,072 ¶ 14 (WTB 2006) ("*Big Sky Order*").

denied requests for waiver of the automatic cancellation rule based on the licensee's failure to demonstrate its ability and willingness to pay.<sup>114</sup>

23. The Commission's strict application of the automatic cancellation rule and the showing necessary to justify a waiver of the rule are therefore well established.<sup>115</sup> In the instant matters, however, the Parties are all similarly situated to defaulters that have previously been denied waivers of the automatic cancellation rule. In all of the cases we examine in this order, the very circumstances asserted by the Parties to justify their requests for waiver raise serious doubts about whether, despite their defaults, the Parties had the ongoing financial ability and willingness to fulfill their payment obligations, a fundamental requirement necessary to retain the presumption that they were best suited to utilize the spectrum. None of the Parties asserts circumstances that, considered individually or together, overcome those doubts and justify waiver. Accordingly, as discussed in greater detail below, the Parties do not demonstrate either (1) that the underlying purpose of the automatic cancellation rule would be frustrated by its application and grant of a waiver would be in the public interest, or (2) that unique circumstances render application of the automatic cancellation rule inequitable, burdensome, or contrary to the public interest.

24. We therefore find that the Bureau and the Division correctly applied the Commission rules, precedents and policies and did not commit error in denying installment payment waiver requests based upon (1) claims of temporary financial difficulties; (2) a licensee's past payment history; (3) a promise, or an alleged ability, to provide service to the public; (4) the existence of a potential assignee to assume or satisfy the debt; (5) a licensee's unfulfilled promises to pay installment debt obligations in full; and (6) allegations of payment notice errors or lack of notice.

#### **1. The Financial Circumstances of Each of the Parties Do Not Justify Waiver of the Automatic Cancellation Rule**

25. All of the Parties claim that the Bureau or the Division erroneously concluded that their financial circumstances raise serious questions about their ongoing ability and willingness to fulfill their payment obligations and, therefore, unjustifiably denied their requests for waivers of the automatic cancellation rule.<sup>116</sup> We note at the outset that the decisions of the Bureau and the Division relied upon the facts the Parties raised regarding their financial circumstances in the record below, and we address the

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<sup>114</sup> *Morris Order*, 23 FCC Rcd at 3194-3195 ¶ 35 (citing, e.g., *21st Century MO&O*, *Lancaster Order*, and *Satellite Signals Order*).

<sup>115</sup> See, e.g., *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003) (affirming the Commission's automatic cancellation of a license for an installment payment default); *Southeast Telephone, Inc. v. FCC*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999) (rejecting challenge to Non-Delinquency Orders); *Southeast Telephone, Inc. v. United States*, No. 99-5019, 1999 WL 993956 (6th Cir. Oct. 20, 1999); *accord P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) (upholding automatic cancellation of FCC license for licensee's failure to comply with license condition). See generally *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988) ("[S]trict adherence to a general rule may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases.").

<sup>116</sup> See, e.g., *Alpine Petition* at 3 (arguing that Alpine's need for "temporary waiver" was based on financial circumstances beyond its control); *CommNet Petition* at 1 (arguing that the Bureau failed to take into account its offer to pay off the amount due); *GLH AFR* at 12 (arguing that GLH had demonstrated its capacity to pay, but just needed additional time); *Inforum Petition* at 7 (stating that its continuing payments through October 2003, two years after default, proved financial capability and commitment to retaining the license); *Lancaster Petition* at 5-6 (arguing that the Bureau's decision erroneously discredits Lancaster's financial qualifications); *Leeds AFR* at 9 (arguing that his need for deferment of payments was reasonable); *TVCN AFR* at 2, 8-9 (arguing that financial difficulties do not mean TVCN was not financially able to pay installments and that the provision of service despite operating losses provided evidence of its financial ability); and *Virginia Petition* at 9 (arguing that temporary delay in payments does not support the conclusion that it lacked ability to make installment payments).

same facts in reaching our decision today.<sup>117</sup> We find that the Bureau and Division did not err in evaluating the Parties' own statements and actions as evidence of their financial circumstances and correctly decided that, in light of the Parties' failure to demonstrate the ongoing ability and willingness to fulfill their financial obligations despite their defaults, waivers would undermine the underlying purpose of the automatic cancellation rule. We also find that the Bureau and Division did not overlook any unique financial circumstances or arguments that would have rendered application of the automatic cancellation rule inequitable, burdensome, or contrary to the public interest and justified grant of any of the requested waivers.

26. In explaining the facts leading up to their missed payments and their need for waiver, Alpine, GLH, Inforum, Lancaster, Leeds, TVCN, and Virginia each describe negative or worsening financial circumstances resulting from various alleged causes outside of their control, including the sudden loss of financing or revenue due to the actions of a third party or other business set backs.<sup>118</sup> Alpine, GLH, Leeds, TVCN, and Virginia also argue that their inability to obtain a waiver or other relief from the Commission promptly after they had requested it caused or exacerbated their financial difficulties.<sup>119</sup> Alpine, CommNet, Leeds, and TVCN state that poor economic conditions in the industry contributed to their own financial difficulties and hindered their ability to meet their payment obligations.<sup>120</sup> TVCN also asserts that its financial difficulties were further complicated by the events of

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<sup>117</sup> See, e.g., *Alpine Order*, 22 FCC Rcd at 1497-98 ¶ 14; Alpine Petition at 10, 27 (describing financial distress based on unexpected loss of financing); *CommNet Order*, 22 FCC Rcd at 8620-21 ¶ 17; CommNet Petition, Decl. of Marjorie Conner (noting that in January 2006, eighteen months after its default, "CommNet's financial situation had changed for the better"); *GLH Order on Reconsideration*, 22 FCC Rcd at 2418 ¶ 18; GLH AFR at 4-5 (explaining that GLH was "unable" to pay due to unexpected loss of financing); *Inforum Order*, 19 FCC Rcd at 86-87 ¶ 10; Inforum Petition at 2-3 (stating that the "crippling financial burden" of litigation left it unable to implement business plan with licenses); *Lancaster Order*, 22 FCC Rcd at 2444 ¶ 16; Lancaster Petition at 2 (describing financial difficulties resulting from the health problems of principal owner); *Leeds Order*, 22 FCC Rcd at 1511 ¶ 5; Leeds AFR at 12-13 (stating that based on a number of events the "economics of the auction deal" changed); *TVCN Order*, 22 FCC Rcd at 1404 ¶ 13; TVCN AFR at 8, 10, 14 (attributing its failure to make installment payments to a loss of financing, delay in finding new financing following September 11, 2001, and financial difficulties in the industry); *Virginia Order*, 22 FCC Rcd at 1391 ¶ 10, 1393 ¶ 15; Virginia Petition at 4-5 (describing a "short-term setback" based on breach by third-party of contract, which led to loss of revenue, missed payments, and the submission of proposal for repayment on "modified schedule").

<sup>118</sup> Alpine Petition at 8-10 (stating that after the sudden termination of its financing, Alpine unsuccessfully attempted to find alternative financing); GLH AFR at 3-5 (explaining that GLH acquired the subject license subject to the obligation of the assignor, Leap, to pay GLH the monies necessary for GLH to make the installment payments, but that Leap suffered unexpected financial difficulties resulting in GLH's default on its debt); Inforum Petition at 2-7 (stating that based upon the "crippling financial burdens" of litigation and the loss of key personnel, it had recognized that it could not implement its business plan for the licenses and had agreed to assign them, but that it had defaulted prior to assignment because of the confusion and unavailability of officers at payment deadline); Lancaster Petition at 2 (stating that Lancaster had some financial difficulties resulting from the health-related problems of its owner); Leeds AFR at 5, 9, 12-14 (stating that that because of alleged Commission inaction on other license applications, he had not been awarded licenses that were "critical" for his plan, and that he had suffered a "loss in value" and needed a waiver so that he would have "more time to finance the auction debt"); TVCN AFR at 10 (stating that its prior financing commitment had become "doubtful"); and Virginia Petition at 4 (stating that it had lost financing from a third party).

<sup>119</sup> See Alpine Petition at 2, 13-16, 25-27, 29-31 (citing Commission's failure to compromise Alpine's debt despite its financial distress); GLH AFR at 5-6 (citing loss caused by Commission's failure to grant temporary relief); Leeds AFR at 5-9, 12-14 (stating that its inability to obtain through Commission litigation other licenses critical to its business plan caused loss in value and "changed the economics of the auction deal"); TVCN AFR at 14, 18-19 (citing denial of waiver despite industry financial difficulties); Virginia Petition at 9 (claiming financial difficulties were caused or exacerbated by debt acceleration under Commission rules).

<sup>120</sup> Alpine Petition at 3, 10-11 ("widespread depression" in the telecommunications industry in 2001-2002 was among the factors leading to Alpine's default); *CommNet Order*, 22 FCC Rcd at 8615-16 ¶¶ 7, 9 (noting that (continued....))

September 11, 2001.<sup>121</sup> Each of the Parties also contends that its circumstances created the need for only a “temporary” waiver of the installment payment rule to allow for additional time to make its payments.<sup>122</sup>

27. With respect to the first prong of the waiver standard, the Commission and staff have consistently emphasized that the ability to comply with the installment payment rules is critical to realizing the public interest objectives of section 309(j) of the Communications Act.<sup>123</sup> The Commission recently cited its earlier conclusion that “grant of a waiver based upon financial distress would undermine the purpose of the rule,” because the “[t]he installment payment rules are meant to preserve the reliability and integrity of the auction and licensing process by ensuring that the applicants have the necessary financial qualifications, thereby maintaining the goal of awarding licenses to the parties who most value the spectrum and providing expeditious service to the public. . . .”<sup>124</sup> Accordingly, 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 and the first prong of the waiver standard is not satisfied.

28. Thus, the Commission has granted waivers of the automatic cancellation rule only where the defaulting parties affirmatively demonstrate that they have the ongoing ability and willingness to fulfill their payment obligation by, for instance, promptly paying the accelerated debt in full or by making continuing post-default payments with an unconditional promise to pay their accelerated debt in accord with the Commission’s payment terms.<sup>125</sup> Indeed, Commission and staff decisions have consistently

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CommNet cited a “downturn in economic conditions” and an employee’s departure “due to economic circumstances” as a basis for its 2001 waiver request for a one year suspension of its obligation to make its installment payments and its 2004 request for waiver and reinstatement); Leeds AFR at 16 (stating that “wireless cable businesses began to fail . . . and MDS spectrum became virtually worthless”); TVCN AFR at 8 (explaining that the Commission should not be surprised by TVCN’s financial difficulties given the state of the wireless cable television industry).

<sup>121</sup> TVCN AFR at 10. TVCN explains that, by May 2001, a \$300 million financing commitment TVCN had received appeared to have fallen through and that, following September 11, 2001, another possible source of funding was “put on hold.” *Id.*

<sup>122</sup> See Alpine Petition at 3, 12-13 (arguing that Alpine needed “temporary,” not permanent, waiver of the automatic cancellation rules and sought debt relief or restructuring from the Commission); CommNet Petition at 1-2, Decl. of Marjorie Conner (asserting that an offer had been made to pay off the debt, and, as counsel she had reiterated that offer to staff, in light of CommNet’s improved financial situation); GLH AFR at 3, 5 (stating it needed “temporary debt relief” and seeking an additional two years to pay); Inforum Petition at 2-3, 6-7, 10 (noting that it sought to assign license because of inability to implement business plan based on financial circumstances, but needed waiver after making payment two days after default because of confusion and absence of key personnel); Lancaster Petition at 2 (arguing that it had sought a very brief extension of time to make its installment payment); Leeds AFR at 3, 13-14 (arguing for a “minor waiver with regard to the timing of his filing” and that he needed “more time” to finance the debt); TVCN AFR at 3, 10 (requesting a “[t]emporary [w]aiver” for six-month suspension of installment payments); Virginia Petition at 4, 9 (discussing its need to obtain an extension of “just a few months” until loan funds became available).

<sup>123</sup> 47 U.S.C. § 309(j); see, e.g., *Morris Order*, 23 FCC Rcd at 3194 ¶ 34.

<sup>124</sup> *Morris Order*, 23 FCC Rcd at 3194-95 ¶ 35 n.108 (quoting *Southern MO&O*, 15 FCC Rcd at 25,107 ¶ 8 n.29).

<sup>125</sup> *Advanced Order*, 21 FCC Rcd at 1633 ¶ 14, 1634 ¶ 19; *Big Sky Order*, 21 FCC Rcd at 10,072 ¶ 14; *Leaco Order*, 21 FCC Rcd at 1185-86 ¶ 10. We emphasize that despite our well established practice of accepting post-default payments towards a defaulter’s outstanding debt obligation as well as the weight afforded to such payments in considering the grant of a waiver of the automatic cancellation rule, each of the Parties here ceased making any such payments towards their outstanding accelerated debt. See *Lakeland PCS LLC and Cricket Licensee (Lakeland) for Assignment of PCS License for Station KNLG741, Second Order on Reconsideration*, 15 FCC Rcd 23,733, 23,735 n.11 (WTB/CWD 2000) (“*Lakeland Order*”) (noting that, since the licensee remains obligated for the full amount of (continued....)

refused to waive the automatic cancellation rule where a party failed to comply with the installment payment rule and raised doubts regarding its ability and willingness to meet the outstanding payment obligations associated with its licenses on a prospective basis.<sup>126</sup>

29. Here, the financial circumstances of each of the Parties demonstrate that none have met the first prong of our waiver standard. First, none of the Parties promptly paid their outstanding accelerated debt in full or made consistent ongoing payments subsequent to default with an unconditional promise to pay their accelerated debt in accord with the Commission's payment terms.<sup>127</sup> These circumstances raise questions as to their ongoing financial ability and willingness to fulfill their payment obligations post-default, and 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.<sup>128</sup> Second, in the requests before us, each of the Parties has sought to repay its outstanding debt on its own terms, not on the terms to which it agreed when it acquired the licenses.<sup>129</sup> Requests for alternative

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the debt when the license automatically cancels, mere acceptance of a post-default payment, by itself, would not constitute a constructive waiver).

<sup>126</sup> See *Morris Order*, 23 FCC Rcd at 3196 ¶ 39. See also, *21st Century MO&O*, 15 FCC Rcd at 25,126 ¶ 27; *Southern MO&O*, 15 FCC Rcd at 25,110-11 ¶ 15; Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, 14 FCC Rcd 6080, 6080-84 ¶¶ 1-7 (1999), *aff'd*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1214855 (D.C. Cir. Nov. 24, 1999); Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau to Jorge J. Inga, M.D., and Rafael Blanco, M.D., Pan American Interactive Corporation, 18 FCC Rcd 15,314 (WTB/AIAD 2003) ("*Pan American Interactive Letter*"); Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau to Messrs. Stephen Diaz Gavin and Paul C. Besozzi, Counsel for U.S. Telemetry Corporation, 17 FCC Rcd 6442, 6446-47 (WTB/AIAD 2002) ("*US Telemetry Letter*").

<sup>127</sup> *Alpine Petition* at 23; *Alpine Order*, 22 FCC Rcd at 1495 ¶ 8 (stating that Alpine had failed to make its payment due in January 2002); see *CommNet Petition* at 1-2 (arguing that since June 2004 it has offered to pay its outstanding debt "to settle this matter" but has been waiting for instructions "responsive to the Company's offer to pay . . . pursuant to a settlement"); *GLH AFR* at 18 (acknowledging that it still has not paid the amounts initially due in January 2003); *Inforum Petition* at 7 & n.11 (admitting that it has not made a post default payment since October 2003 and stating that it awaits waiver relief or instructions); *Lancaster Petition* at 7 (conceding that Lancaster owes over \$900,000); *Lancaster Order*, 22 FCC Rcd at 2442 ¶ 9 n.35 (stating that Lancaster made no payment toward its debt after March 2004); *Leeds AFR* at 16 (conceding that Leeds has not made any installment payments since his deferral request in 1997, arguing that "it would be foolhardy" to do so); *TVCN AFR* at 13; *TVCN Order*, 22 FCC Rcd at 1401-02 ¶¶ 7, 8 (explaining that TVCN failed to make its August 2001 payment within two quarters, and stating that TVCN has made no payment towards its debt obligation for any of the subject licenses since May 2001); *Virginia Petition* at 4; *Virginia Order*, 22 FCC Rcd at 1390 ¶ 8 (explaining that Virginia missed its payments due on February 28, 2002, and did not make such payments by September 3, 2002, the end of the two quarterly grace periods).

<sup>128</sup> *Morris Order*, 23 FCC Rcd at 3196 ¶ 39 (explaining that Morris neither paid its accelerated debt in full nor made an unconditional promise to pay its debt on the Commission's payment terms, seeking instead to pay in accordance with its own payment terms, something the Commission had never allowed in granting waivers of the automatic cancellation rule).

<sup>129</sup> *Alpine Petition* at 32 (seeking renegotiation of its debt obligations); *CommNet Petition* at 2 (stating that it can and will pay the full amount of its debt pursuant to a "reasonable settlement" with the Bureau); *GLH AFR* at 5 (requesting two years to make payment); *Inforum Petition* at 7, n.11 (explaining that it has ceased paying its installment debt and will resume such payment only upon a grant of its waiver request); *Lancaster Petition* at 2 (explaining that Lancaster did not seek a compromise or reduction of its debt but only an "additional interval" to remit its installment payments). *But see* In the Matter of Lancaster Communications, Inc., *Petition for Reconsideration*, filed August 6, 2004 (seeking an unspecified amount of additional time to render its installment payments so it could assign the licenses to a prospective purchaser); *Leeds AFR* at 10 (arguing that he seeks a deferral, not an adjustment, to his debt obligations), *but see* *Leeds AFR* at 2-3 (arguing that the Bureau did not (continued....))

payment schedules also raise doubts about an entity's ongoing ability and willingness to fulfill its payment obligations after default, and therefore the Commission has never granted a waiver of the automatic cancellation rule to a party seeking to repay its outstanding debt on its own terms.<sup>130</sup> Moreover, as detailed above, each of the Parties has made statements in the record that acknowledge significant financial difficulties.<sup>131</sup> All of these factors raise doubts that the Parties possessed the ongoing ability and willingness to fulfill their financial obligations and conflict with the presumption that they remain best suited to utilize the spectrum license(s). None of the other circumstances alleged by the parties overcome those doubts or independently demonstrate an ongoing ability and willingness to honor their financial obligations in accordance with the Commission's rules.

30. Further, the assertion that a party requests only "temporary" relief from a payment deadline is not compelling.<sup>132</sup> Claims of even temporary financial difficulties do not justify waiver of the installment payment rules under section 1.925.<sup>133</sup> Because the Parties have all failed to promptly pay their debt in full, and have not made consistent post-default payments with an unconditional promise to pay their debt in accord with the Commission's payment terms, their actions belie the alleged temporary nature of the relief sought and lend support to the staff determinations that the Parties have not overcome the loss of the presumption that they were best suited to utilize the spectrum.<sup>134</sup> The Commission has held that its installment payment program provides licensees with a substantial amount of time in which to pursue private market solutions to financial problems.<sup>135</sup> Moreover, the Commission has repeatedly observed that "[n]o matter what deadline we establish, it is inevitable that some licensees will seek more

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properly weigh his request for an adjustment of his auction obligation); TVCN AFR at 3, 16-17 (seeking either temporary waiver of six months or a conditional temporary waiver of two months to pay off its outstanding debt); Virginia Petition at 10 (seeking the ability to resume its installment payments or restructure its debt without automatic cancellation of the licenses).

<sup>130</sup> *Morris Order*, 23 FCC Rcd at 3196 ¶ 39 (noting that an offer to pay on terms different from the Commission's does not justify waiver of the automatic cancellation rule).

<sup>131</sup> See *supra* para. 25 and accompanying notes. Further, we find no merit to the claims by CommNet and Inforum that they were awaiting feedback from the Commission regarding how to pay their outstanding debt obligations. See CommNet Petition at 2 n.1; Inforum Petition at 7 n.11. It is well established that upon automatic cancellation, the former licensee owes the full amount of its outstanding installment debt, and for that reason the Commission accepts post-default payments offered to it by installment defaulters. See *Lakeland Order*, 15 FCC Rcd at 23,735 n.11 (noting that, since the licensee remains obligated for the full amount of the debt when the license automatically cancels, mere acceptance of a post-default payment, by itself, would not constitute a constructive waiver).

<sup>132</sup> We note that waiver of a specific installment payment deadline, if granted, would actually be permanent with respect to that deadline, rather than temporary. A party's distinction between temporary and permanent waiver seems more appropriately applied to a request for waiver of the payment obligation itself, rather than the payment deadline.

<sup>133</sup> See *Morris Order*, 23 FCC Rcd at 3194-95 ¶ 36 (party requesting waiver asserted financial difficulties based on economic conditions that limited its resources available for paying installments and constructing stations and sought to defer making any payments for one year).

<sup>134</sup> See, e.g., *21<sup>st</sup> Century, MO&O*, 15 FCC Rcd 25,123-24 ¶ 22. See also *Alpine Order*, 22 FCC Rcd at 1497-98 ¶ 14 (finding that, when licensees that are paying winning bids in installments fail to pay the principal and related interest in compliance with the Commission's rules, the presumption that the auction assigned the license to the party that placed the highest value on the spectrum is lost).

<sup>135</sup> *Southern MO&O*, 15 FCC Rcd at 25,110-11 ¶ 15 (referring to the two consecutive 90-day automatic grace periods then available to installment payors); see Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau to Mr. John Jung, Jung on Jung, 18 FCC Rcd 14,427, 14,430 (WTB/AIAD 2003) ("*Jung on Jung Letter*"); see also *US Telemetry Letter*, 17 FCC Rcd at 6446; *Part 1 Third Report and Order*, 13 FCC Rcd at 439-40 ¶ 110 (discussing rules providing time to pursue market solutions and consistency of rules with standard commercial practice).

time to pay.”<sup>136</sup> When a party requests additional time to fulfill its payment obligations, it raises serious doubts about its ability and willingness to continue to meet its financial obligations as a Commission licensee. Commission precedent therefore required the Bureau and the Division to consider the Parties’ financial circumstances, and we find no indication that staff misconstrued any of the available facts in determining that the Parties had not met our waiver standard.<sup>137</sup>

31. The staff, therefore, correctly decided that waiver of the automatic cancellation rule was not justified under the first prong of the waiver standard. Granting the requests before us, despite evidence of the parties’ financial difficulties, would contradict long standing precedent. Also, as the Commission has previously explained, it would only encourage auction participants to overbid for licenses with the expectation that they would be provided relief, if needed, from their payment obligations, an outcome that would undermine the purpose of the automatic cancellation rule.<sup>138</sup>

32. With respect to the second prong of the waiver standard, we also find that the staff decisions correctly determined that none of the Parties had demonstrated unique financial circumstances that entitled them to a waiver of the automatic cancellation rule. All businesses face potential risks and unexpected challenges, ranging from those affecting an individual business, such as a personnel matter, to those affecting an industry or, indeed, the entire nation, such as an economic downturn. With regard to challenges affecting an individual licensee, the Commission has concluded that claims regarding financial difficulties resulting from a licensee’s business decisions and commercial dealings, including those in which a third party has withdrawn its 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.<sup>139</sup> The Commission has also stated that it “cannot take into account the private business arrangements that an applicant has made to finance its successful [auction] bid”<sup>140</sup> and that an unanticipated lack of financing is not a special circumstance warranting a deviation from the Commission’s installment payment rules.<sup>141</sup> With regard to industry-wide or national challenges, the Commission has explained that all licensees face potential fluctuations in the marketplace and that

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<sup>136</sup> See Requests for Extension of the Commission’s Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22,071, 22,072-73 ¶ 4 (1998) (“*C and F Block Installment Payment Order*”), *recon. denied*, 14 FCC Rcd 6080 (1999), *aff’d.*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999), (quoting Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8354 ¶ 24 (1998)). See also *Southern MO&O*, 15 FCC Rcd at 25,110-11 ¶ 15; *GLH Order on Reconsideration*, 22 FCC Rcd at 2418 ¶ 19.

<sup>137</sup> *Morris Order*, 23 FCC Rcd at 3196 ¶¶ 37-39 (explaining that it was appropriate for Commission’s delegated authority to consider the petitioner’s request for additional time in denying a request for waiver of the automatic cancellation rule).

<sup>138</sup> *Alpine Order*, 22 FCC Rcd at 1497 ¶ 13.

<sup>139</sup> See, e.g., *Southern MO&O*, 15 FCC Rcd at 25,107-08 ¶ 10 (finding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule); *BDPCS MO&O*, 15 FCC Rcd at 17,604-07 ¶¶ 27-30 (finding that loss of expected source of funding cannot justify waiver of the Commission’s rules and that Commission is not required to “police the private business activities of each bidder”).

<sup>140</sup> See, e.g., *BDPCS MO&O*, 15 FCC Rcd at 17,606-07 ¶ 30 (citing BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission’s Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997)).

<sup>141</sup> See, e.g., *U.S. Telemetry Letter*, 17 FCC Rcd at 6447 (licensee is responsible for the consequences that flow from its business decision); *C and F Block Installment Payment Order*, 13 FCC Rcd at 22,072-73 ¶ 4 (“The challenge of raising capital to finance . . . licenses exists in varying degrees for all licensees and does not constitute ‘unique facts and circumstances.’”). See, generally, *supra* n.139.

therefore a widespread economic downturn is, by its very nature, not a unique circumstance that would provide grounds for waiving the installment payment rules.<sup>142</sup>

33. Thus, each of the Parties knew or should have known that the consequence of failing to comply with the Commission's installment payment rules was automatic cancellation and that waiver of the Commission's rules was an extraordinary remedy. We therefore reject the arguments of Alpine, GLH, Leeds, TVCN, and Virginia to the extent that they claim that their inability to obtain a waiver or other relief from the Commission promptly after they requested it caused or exacerbated their financial difficulties and provided evidence of unique circumstances sufficient to support a request for waiver.<sup>143</sup> The Parties, not the Commission, are responsible for their private business plans and decisions affecting their financing and ability to meet their payment obligations. As the Commission has previously explained, the timing of the Commission's response to a regulatory request does not provide a basis upon which to waive our payment rules.<sup>144</sup>

## 2. Past History of Making Installment Payments Does Not Justify Waiver of the Automatic Cancellation Rule

34. In support of their requests for reversal of the underlying orders, Alpine, GLH, Inforum, Lancaster, Leeds, and TVCN argue that the Bureau and Division erred in failing to recognize their prior installment payment history as grounds for waiver. They assert that strict enforcement of the automatic cancellation rule despite such payments was inequitable and contrary to our statutory public interest objectives.<sup>145</sup>

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<sup>142</sup> See, e.g., *Pan American Interactive Letter*, 18 FCC Rcd at 15,317-18; *Jung on Jung Letter*, 18 FCC Rcd at 14,430-31; *US Telemetry Letter*, 17 FCC Rcd at 6447.

<sup>143</sup> See Alpine Petition at 13-16, 25-27 (citing Commission's failure to compromise Alpine's debt despite its financial distress should provide grounds for a waiver); GLH AFR at 5-6 (citing loss caused by Commission's failure to grant temporary relief); Leeds AFR at 5-9, 12-14 (stating that its inability to obtain through Commission litigation other licenses critical to its business plan caused loss in value and "changed the economics"); TVCN AFR at 14, 18 (citing denial of waiver despite industry financial difficulties); Virginia Petition at 9 (claiming that its financial difficulties in rendering timely payment were caused or exacerbated by debt acceleration under Commission rules). While TVCN argues that but for the events of September 11, 2001, it would have obtained its funding (TVCN AFR at 10), we note that the Bureau and Division have previously and, we believe, appropriately refused to accept as a sufficient basis for waiving the installment payment rules general claims of economic hardship related to September 11, 2001. See *Rapid Wireless Ltd., Order*, 22 FCC Rcd 1410, 1414 ¶ 9, 1416-17 ¶ 14 (WTB 2007); *Jung on Jung Letter*, 18 FCC Rcd at 14,428-32; see also *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 903 (D.C. Cir. 2004) (upholding the Commission's denial of a request to waive a final payment deadline):

Neither is the unpredictable nature of the September 11 attacks an excuse: Delta does not claim that it had secured financing and then lost it as a direct result of the attacks, but blames the general market downturn for its inability to pay. All bidders must take market volatility into account; Delta apparently failed to do so. Entering the auction unprepared to pay on schedule is precisely the kind of conduct the FCC rules are designed to deter.

<sup>144</sup> *US Telemetry Letter*, 17 FCC Rcd at 6447 (explaining that the time taken by the Commission to process an assignment application does not change or affect the licensee's payment obligations); see *infra* paras. 72-76 (illustrating why Alpine's allegation of Commission delay in resolving Alpine's waiver request fails to justify granting that request).

<sup>145</sup> Alpine Petition at 3, 19 (contending that Alpine had already paid \$13 million in payments to the Commission); GLH AFR at 5, 13 (contending that because of GLH's and the prior licensee's seven year record of timely payment, GLH should have been granted a waiver of the automatic cancellation deadline); Inforum Petition at 7 (arguing that it wire transferred the amount owed two days after the automatic cancellation deadline and rendered nine additional payments through October 31, 2003, as proof of its commitment to retaining the Sarasota BTA authorization); Lancaster Petition at 6 (arguing that the Bureau failed to consider the more than \$1,000,000 in payments Lancaster had made during the first seven years of the license term); Leeds AFR at 16 (arguing that a waiver of the automatic (continued....))

35. We find that the staff decisions correctly concluded that, where an entity presents circumstances that raise questions about its ongoing ability and willingness to fulfill its payment obligations after a default, an entity's history of making payments does not overcome those questions or constitute a unique circumstance that would make application of the automatic cancellation rule inequitable or contrary to the public interest.<sup>146</sup> As a threshold matter, we reject any suggestion that an entity's past compliance with our installment payment rules should be considered unique. Where a party has presented facts indicating its financial distress, the Commission has consistently declined to waive the automatic cancellation rule based on claims of a prior timely installment payment history.<sup>147</sup> As explained above, we consider whether the party requesting a waiver has raised doubts about its ongoing ability and willingness to fulfill its payment obligations despite its default in determining whether strict enforcement of the automatic cancellation rule serves the underlying purpose of ensuring an efficient and fair auction and licensing process. We agree that a licensee's course of conduct, including its payment history, can be relevant to determining whether it is willing and able to fulfill its payment obligations in a timely manner on an ongoing basis.<sup>148</sup> Here, however, the past payment history of each of these Parties does not overcome substantial evidence of their inability or unwillingness to honor their ongoing financial obligations despite their defaults. Thus, 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 if another party acquires the license or under alternative terms and conditions, as each of these six Parties has argued here,<sup>149</sup> such circumstances raise doubts about the party's ongoing ability and willingness to meet its financial obligations that outweigh assertions based on prior installment

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cancellation deadline was warranted given the facts and would allow him to receive the benefit of the down payments and the initial installment payment he had made toward the licenses in the amount of \$288,000 in 1996); TVCN AFR at 15 (maintaining that the staff's denial of TVCN's request for waiver did not take into account the "balance of the equities," including timely payments of \$1,200,000).

<sup>146</sup> We note that five of the Parties argue that both their past payment history and their provision of service justify waiver. *See* Alpine Petition at 19 (arguing that the FCC fails to explain why Alpine's past payments of over \$13 million in debt payments and construction of networks does not warrant grant of a waiver); GLH AFR at 2,5, 11-12 (explaining that the licenses had been constructed and there was a past record of timely payments, and arguing that this served the underlying purposes of the Commission's payment rules); Lancaster Petition at 5-6 (maintaining that because Lancaster has met the Commission's substantial service requirements and has a seven year payment history, it is not the type of irresponsible bidder the installment payment rules were intended to protect against); Leeds AFR at 15 (explaining that a waiver was appropriate because he was investing time and money to launch wireless cable systems as evidenced by his efforts to provide service in Lexington and Rockford and his payment of his 20 percent down payment); and TVCN AFR at 8-9, 15, (arguing that in considering its request for waiver, the Commission did not properly consider the construction of its systems and the \$1.2 million TVCN has made in debt payments). *See also* discussion below at Section III.A.3. In light of their financial circumstances, which raise serious questions about the ongoing ability and willingness of each of these parties to fulfill its payment obligations, assertions about payment history and provision of service taken together do not overcome concerns about the licensee's financial difficulties or justify waiver of the automatic cancellation rule. *See Morris Order*, 23 FCC Rcd at 3196-97 ¶¶ 39-41 (affirming the denial of a waiver request despite assertions regarding both payment history and provision of service).

<sup>147</sup> *See, e.g., Morris Order*, 23 FCC Rcd at 3197 ¶ 41 (concluding that in the wake of claims of financial distress and in light of a request to pay its debt obligations under alternative terms, Morris provided no evidence of its ability and willingness to pay its winning bids, and none of the other circumstances it alleged overcame those doubts or provided an independent basis upon which to have granted waiver of the automatic cancellation rule).

<sup>148</sup> *See, e.g., Advanced Order*, 21 FCC Rcd at 1632 ¶ 12 (explaining that the fact that Advanced had made payments in accordance with the Commission's rules for approximately eight years and had continued to make regular post-default payments while its request for waiver was pending diminished the concern that the ability to pay was in question).

<sup>149</sup> *See supra* Section III.A.1.

payment history. Accordingly, the Bureau and the Division did not err in denying the requests for waiver despite these parties' alleged histories of prior payments.<sup>150</sup>

### 3. Provision of Service Does Not Justify Waiver of the Automatic License Cancellation Rule

36. Alpine, GLH, Lancaster, Leeds, TVCN, and Virginia argue that the Bureau or the Division erred by not giving sufficient weight to their arguments regarding provision of service in considering whether to grant a waiver of the automatic cancellation rule.<sup>151</sup> These parties maintain that the underlying purpose of the installment payment rules should be to accelerate service to the public and that a grant of a waiver of the automatic cancellation rule would speed such service, thereby serving the public interest.<sup>152</sup> We find that the staff decisions correctly concluded that, where an entity 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. Nor do such arguments regarding service constitute unique circumstances that would make application of the automatic cancellation rule inequitable or contrary to the public interest.<sup>153</sup>

37. When presented with this issue in the past, the Commission or its staff consistently has determined that, absent demonstration of an ongoing ability and willingness to pay despite a default, arguments regarding the provision of service do not outweigh the public interest in preserving the integrity of the auction and licensing process through strict enforcement of payment deadlines and, therefore, do not justify waiver of the automatic cancellation rule.<sup>154</sup> The Commission recently explained that any 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, as well as the

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<sup>150</sup> As the Commission has previously explained in denying a request for waiver, "[t]he fact that Petitioner had previously been complying with the rules and paying towards its debt does not excuse it from making all of its installment payments on a timely basis." *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25,127 ¶ 29.

<sup>151</sup> Alpine Petition at 7, 20 (arguing that the Bureau's denial of its waiver violated the statutory requirement of 47 U.S.C. § 309(j)(3) to promote rapid deployment of services); GLH AFR at 2, 5, 11-13 (arguing that the denial of the waiver has led to the loss of service to severely underserved customers and that the Bureau erred in not deeming the capacity to pay to be of lesser importance than actual service to the public); Lancaster Petition at 5-7 (arguing that the Bureau summarily disposed of Lancaster's argument that it should be granted a waiver of the automatic cancellation rule so that its customers would not experience an interruption in service); Leeds AFR at 11 (arguing that, if the Commission had seriously considered his request for waiver and reduction of auction debt, the channels could have been put to immediate use); TVCN AFR at 9, 10-11 (arguing that its provision of service provided evidence of financial ability and served the public interest); and Virginia Petition at 8 (arguing that in light of Virginia's record it constitutes the most feasible vehicle for rolling out service and the denial of its request for waiver therefore frustrates the underlying purpose of the Commission's rules).

<sup>152</sup> Alpine Petition at 20; GLH AFR at 11-13; Lancaster Petition at 6; Leeds AFR at 11-12, 15; TVCN AFR at 11 (arguing that uninterrupted service was in the public interest); and Virginia Petition at 10. *See also* Inforum Letter (advocating that resolution of the Inforum Petition and grant of a waiver will allow the license to be assigned to the Sprint Nextel, which will allow it to provide Sarasota with wireless broadband service).

<sup>153</sup> As we noted above, five of the Parties argue that both their past payment history and their provision of service justify waiver. *See supra* n.146. *See also Morris Order*, 23 FCC Rcd at 3196-97 ¶¶ 39-41 (affirming the denial of a waiver request despite assertions regarding both payment history and provision of service).

<sup>154</sup> The Commission has previously denied requests for extension of payment deadlines notwithstanding the provision of service by licensees. *See C and F Block Installment Payment Order*, 13 FCC Rcd at 22,071-72 ¶¶ 2-3 and dissenting statement at 22,077 (discussing service provided by two of licensees denied waivers of the installment payment and automatic cancellation rules). *See also Southern Second MO&O*, 16 FCC Rcd at 18,360-61 ¶ 9; *Southern MO&O*, 15 FCC Rcd at 25,105-06 ¶ 7; *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25,117-18 ¶ 10, 25,123-24 ¶ 22, 25,126-27 ¶¶ 28-29.

Commission's obligation to fairly and consistently enforce its installment payment rules.<sup>155</sup> In short, we agree with the Bureau's conclusion that an entity must establish its qualifications to be a Commission licensee by demonstrating an ability and willingness to meet its payment obligations for its spectrum license and by providing service to the public.<sup>156</sup>

38. Historically, the Commission has also concluded that, even where a licensee was providing service at the time of its waiver request, such service did not constitute unique circumstances that would excuse the licensee from meeting its installment payment deadlines.<sup>157</sup> We therefore conclude that it was appropriate, and indeed necessary, for the Bureau and the Division to deny requests for waiver of the automatic cancellation rule despite statements by six of the Parties regarding their provision of service to the public. Given the evidence of financial difficulty presented by each of these parties, their claims regarding provision of service do not merit waiver of the automatic cancellation rule under either prong of the waiver standard.<sup>158</sup>

#### 4. The Existence of a Potential Assignee Does Not Justify Waiver of the Automatic Cancellation Rule

39. Inforum and TVCN each assert that waiver of the installment payment rules is appropriate to allow assignment of the cancelled license(s) to a potential assignee.<sup>159</sup> TVCN specifically maintains that the Commission would receive full payment of the outstanding debt obligation through the assignment of licenses.<sup>160</sup> Lancaster similarly asserts that the person controlling Lancaster at the time of default has died and control of the company has been transferred to a charitable foundation that will make payments.<sup>161</sup> Each of these parties claims that waiver is warranted because the public interest would be served by preserving the licenses for use by another party, despite default and automatic cancellation.<sup>162</sup>

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<sup>155</sup> *Morris Order*, 23 FCC Rcd at 3199-200 ¶ 49.

<sup>156</sup> *Lancaster Order*, 22 FCC Rcd at 2444 ¶ 16.

<sup>157</sup> See *Duluth PCS Order*, 19 FCC Rcd at 7141-42 ¶¶ 8-9, 11; see also *Southern Second MO&O*, 16 FCC Rcd at 18,360-61 ¶ 9; *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25,126-27 ¶¶ 28-29.

<sup>158</sup> *Morris Order*, 23 FCC Rcd at 3199-200 ¶ 49.

<sup>159</sup> Inforum Petition at 3, 13 (explaining that Inforum was in the process of assigning the licenses to TDI at the time the licenses automatically canceled and arguing that the still-pending assignment application to TDI supports Inforum's request for a constructive waiver); *Inforum Order*, 19 FCC Rcd at 84 ¶ 3 (citing Inforum's request to receive a constructive waiver so that Inforum could transfer the licenses to TDI); TVCN AFR at 16-17 (explaining that Commission staff met with TVCN and Oneida and that Oneida's president emphasized his company's willingness and readiness to pay off the balance owed to the FCC by TVCN).

<sup>160</sup> *TVCN Order*, 22 FCC Rcd at 1401-02 ¶ 8; see also TVCN AFR at 17 (explaining that Oneida's president emphasized his company's willingness and readiness to pay off the balance owed to the FCC by TVCN).

<sup>161</sup> Lancaster Petition at 3 (explaining that, in the months preceding his death, Mr. Foster, the controlling interest of Lancaster, oversaw the establishment of the Foster Charitable Foundation, Inc. to which he would bequeath his interest in Lancaster); see also *id.* at 7-8 (explaining that Mr. Foster had passed away and that control of Lancaster had passed to the Foster Charitable Foundation, and if Lancaster was granted a waiver it could pay the outstanding balance owed and provide service to the public).

<sup>162</sup> *Inforum Order*, 19 FCC Rcd at 84 ¶ 3 (citing Inforum's request to receive a constructive waiver so that Inforum could transfer the licenses to TDI); Inforum Petition at 13 (arguing that the still-pending assignment application to TDI supports Inforum's request for a constructive waiver); Lancaster Petition at 7-8 (arguing that since its principal owner has died waiver would not confer a benefit on anyone in control at the time of the missed payment, and since control of the company has transferred to a charitable foundation that will make payments, waiver would serve the public interest); TVCN AFR at 17, 19 (arguing that grant of a waiver will allow payment by "TVCN-Oneida").

40. We agree with the staff that “the existence of a potential assignee does not negate the licensee’s failure to comply with the Commission’s rules.”<sup>163</sup> Any benefit that might result from permitting Inforum, Lancaster, or TVCN to retain the licenses and assign them to another party is speculative at best.<sup>164</sup> Moreover, any benefit that might be realized in the cases of Inforum, Lancaster, or TVCN is outweighed by the substantial harm of granting a waiver of payment obligations to an entity that has admitted it lacks the ongoing financial ability and the willingness to fulfill the payment obligations that serve to validate the presumption on which award of the licenses was based.<sup>165</sup> Granting a waiver in these circumstances would increase the likelihood that winning bidders in the future will not be the parties that can put the licenses to their highest and best use, but rather the parties that are the most optimistic regarding their chances to secure a post-auction buyer or obtain post-auction financing or relief similar to the relief requested by these parties.<sup>166</sup> Thus, we find that the staff correctly concluded that the existence of a proposed assignee that would allegedly assume the licensee’s payment obligations does not provide a basis upon which to grant waiver of the automatic cancellation rule under either prong of our standard.

#### **5. An Offer to Pay the Outstanding Installment Debt Does Not Justify Waiver of the Automatic Cancellation Rule**

41. CommNet, Leeds, and TVCN contend that on reconsideration, we should take into account their explicit offers to pay their outstanding installment debt obligations.<sup>167</sup> CommNet and TVCN also maintain that in denying their requests for waiver of the automatic cancellation rule the staff erred in not favorably considering their offers to satisfy their installment payment debt.<sup>168</sup>

42. Where a party does not demonstrate an ongoing ability and willingness, despite its default, to fulfill its payment obligations, e.g., by promptly paying the accelerated debt in full or continuing to make regular post-default payments with an unconditional promise to pay the accelerated debt in accord with the Commission’s payment terms, an unsubstantiated offer to pay an outstanding installment debt that has come due under our rules does not merit waiver of our automatic cancellation rule.<sup>169</sup> Unlike those that have been granted waiver of the automatic cancellation rule, CommNet, Leeds,

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<sup>163</sup> *Lancaster Order*, 22 FCC Rcd at 2444-45 ¶ 17; *TVCN Order*, 22 FCC Rcd at 1405-06 ¶ 15. See also Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to J. Curtis Henderson, Senior Vice President & General Counsel, Nucentrix Spectrum Resources, Inc., 17 FCC Rcd 559, 561 (WTB/AIAD 2002) (declining to grant a waiver for an administrative oversight in payments while the licensee was in negotiations to assign its license to a third party); Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Russell H. Fox, Esq., and Russ Taylor, Esq., Counsel for Capital Two-Way Communications, Inc., 16 FCC Rcd 11,786, 11,788 (WTB/AIAD 2001) (declining to grant a waiver of the installment payment rules while the licensee was in negotiations to assign its license to a third party).

<sup>164</sup> See *TVCN Order*, 22 FCC Rcd at 1405-06 ¶ 15.

<sup>165</sup> See *id.* See also *Inforum Order*, 19 FCC Rcd at 85 ¶ 6 (explaining that the Division denied waiver to allow for finalization of sale to TDI because doing so would undermine the Commission’s auction and licensing rules).

<sup>166</sup> See *TVCN Order*, 22 FCC Rcd at 1406 ¶ 16.

<sup>167</sup> CommNet Petition at 1-2 (arguing that the staff erred in failing to accept CommNet’s offer to pay in full upon Commission agreement to settle); Leeds AFR at 16, 18 (arguing that, since spectrum values have improved, Leeds “is willing” to pay off his debt); and TVCN AFR at 16-17 (arguing the staff erred in rejecting TVCN’s offers to pay its outstanding debt).

<sup>168</sup> CommNet Petition at 1-2; TVCN AFR at 16 -17.

<sup>169</sup> See *Morris Order*, 23 FCC Rcd at 3196 ¶ 39. In denying Morris’s request for waiver of the automatic cancellation rule based on similar arguments, the Commission weighed Morris’s promises to pay in full against its failure to continue to make post default payments, its claims of financial distress, and its requests for alternative payment terms. *Id.* Furthermore, where the Commission’s staff has granted waiver of the automatic cancellation rule, it has weighed favorably demonstrations by the defaulting licensees of their actual ability to meet their payment (continued....)

and TVCN have failed either to make consistent and ongoing post-default payments towards their installment debt obligation or to promptly pay their accelerated debt in full.<sup>170</sup> Moreover, each has indicated that there are restrictions associated with its offer to pay its outstanding debt.<sup>171</sup>

43. In light of their statements and actions calling into question their ongoing ability and willingness to meet their financial obligations, including the lack of any post-default payments by them, we find that CommNet, Leeds, and TVCN have failed to demonstrate that their asserted offers to pay in full provide a basis for waiver. Therefore, we find no error in the staff's denial of these requests for waiver of the automatic cancellation rule.

## 6. Allegations of Commission Errors and Confusion Regarding Computation or Lack of Notice Do Not Justify Waiver of the Automatic Cancellation Rule

44. Inforum argues that the Commission's installment payment notices included confusing errors that justify waiver of the automatic cancellation rule.<sup>172</sup> Additionally, Inforum, Leeds, and TVCN maintain that they did not receive sufficient notice from the Commission regarding their payment obligations.<sup>173</sup> These parties argue that, in light of these alleged computational and notice issues, waiver of the Commission's automatic cancellation rules is justified.<sup>174</sup>

45. We find no error in the Bureau and Division determinations that claims of Commission errors, computational confusion, and arguments of lack of notice regarding payment obligations are insufficient grounds to support waiver of our automatic cancellation rule.<sup>175</sup> In fact, beginning with the decision in *21<sup>st</sup> Century MO&O*, the Commission repeatedly has emphasized that it is the licensee's responsibility to know the amounts and the due dates of its installment payments.<sup>176</sup> As explained by the Commission in that decision, the practice of sending out individual installment payment notices is not

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obligations. See, e.g., *Leaco Order*, 21 FCC Rcd at 1185-86 ¶ 10, 1187 ¶¶ 12-13 (in granting a waiver of the automatic cancellation rule, the Bureau took into consideration the fact that the licensee promptly paid its debt obligation in full upon the acceleration of its debt, prior to the grant of the waiver); *Tracy Corporation II, Request for Waiver of Installment Payment Rules for Auction No. 11 and Reinstatement of License, Memorandum Opinion and Order*, 22 FCC Rcd 4071, 4075-76 ¶ 10, 4078-79 ¶ 18 (WTB 2007) ("*Tracy Order*") (the licensee in *Tracy* continued to make regular post-default payments and had paid its debt in full prior to the grant of the waiver); *Advanced Order*, 21 FCC Rcd at 1632 ¶¶ 11-12 (the licensee in *Advanced* made regular post-default payments and indicated that it could and would pay its outstanding debt, and its financial institutions confirmed that it had procedures in place to do so).

<sup>170</sup> See, e.g., *Leaco Order*, 21 FCC Rcd at 1185-86 ¶ 10, 1187 ¶¶ 12-13 (in granting a waiver of the automatic cancellation rule, the Bureau took into consideration the fact that the licensee promptly paid its debt obligation in full upon the acceleration of its debt, prior to the grant of the waiver); *Advanced Order*, 21 FCC Rcd at 1632 ¶¶ 11-12 (the licensee in *Advanced* made regular post-default payments and indicated that it could and would pay its outstanding debt, and its financial institutions confirmed that it had procedures in place to do so).

<sup>171</sup> See *supra* n. 129.

<sup>172</sup> Inforum Petition at 4-7, 11-12.

<sup>173</sup> *Id.* at 4-7, 11-12; Leeds AFR at 8-9; TVCN AFR at 4-6, 13.

<sup>174</sup> Inforum Petition at 4-6, 12 (detailing the history of Inforum's payment invoices and its confusion of the amount owed); Leeds AFR at 9 (explaining that his belief regarding the due date of his payment was reasonable because his counsel memorialized his understanding of his payment obligations in a letter to the Commission's staff, and that the Commission failed to respond to that letter in a timely manner); TVCN AFR at 13 (arguing that the Commission erroneously failed to send payment notices for license MDB405).

<sup>175</sup> In the *Morris Order*, the Commission came to the same conclusion regarding this issue. *Morris Order*, 23 FCC Rcd at 3188 ¶ 21.

<sup>176</sup> *Id.*; see also *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25,119-21 ¶¶ 15-16; *Southern MO&O*, 15 FCC Rcd at 25,107 ¶ 8, 25,107-08 ¶ 10.

mandated by any Commission rule and has been performed as a mere courtesy for Commission licensees.<sup>177</sup> Furthermore, as the Commission explained in the *Morris Order*, it is every licensee's responsibility to know its payment deadlines and to ensure that its payments are submitted on time.<sup>178</sup>

46. Although these Parties raise allegations of Commission errors, their own confusion over computations, and lack of notice regarding their payment obligations, none of them argue that such errors were the actual cause of their defaults. Rather, it is clear from the record that each Party's failure to render timely payment was either a calculated decision by the defaulter or the result of error on the part of the defaulter. Specifically, TVCN concedes that it elected not to make the subject payments, albeit under its claimed mistaken belief that its request for relief from the installment payment rules would prevent automatic cancellation of the license(s).<sup>179</sup> Likewise, Leeds admits that he elected not to make his required payment, claiming that he did so because the Commission did not contradict his mistaken belief that his payment deadline had been orally extended.<sup>180</sup> Furthermore, even though Inforum charges that it "may have [been] prejudiced" by alleged Commission errors,<sup>181</sup> it nonetheless admits that it failed to render timely payment because its principals were not available on the due date to submit such payment.<sup>182</sup> Thus, we find that the staff correctly denied requests for waiver of the automatic cancellation rule that were based on alleged Commission errors, confusion over computations, or lack of notice of payment obligations.

**B. None of the Parties Is Similarly Situated to Entities that Received Other Relief from the Installment Payment Rules**

**1. The Bureau Correctly Refused to Treat the Parties Similarly to Licensees That Filed for Bankruptcy Prior to Cancellation of Their Licenses**

47. Four of the Parties – Alpine, GLH, Leeds, and TVCN – contend that the Bureau incorrectly refused to apply to them the Commission waiver and debt restructuring precedent applicable to licensees that filed for bankruptcy prior to automatic cancellation of their licenses, which should, they claim, provide a basis for granting their requests for waiver of the automatic cancellation rule. For instance, TVCN contends that application of the Commission's automatic cancellation policies against licensees that do not file for bankruptcy protection but not against those that file for bankruptcy before cancellation is arbitrary, capricious, and an abuse of discretion.<sup>183</sup> Similarly, GLH argues that the Commission should have granted its waiver request and allowed it to restructure its debt as the Commission did for GLH's bankrupt creditor Leap, rather than force GLH into bankruptcy court.<sup>184</sup> Alpine argues that the Commission failed to explain why NextWave was entitled to debt restructuring and waivers while Alpine was not.<sup>185</sup> Leeds maintains that if the Commission seriously had entertained his

<sup>177</sup> *21<sup>st</sup> Century MO&O*, 15 FCC Rcd at 25,120-21 ¶ 16.

<sup>178</sup> *Morris Order*, 23 FCC Rcd at 3188-89 ¶ 21.

<sup>179</sup> TVCN AFR at 10, 12.

<sup>180</sup> Leeds AFR at 9 (arguing that the Commission could have corrected Leeds' counsel's December 1996 letter, which indicated that Leeds believed his payment was due in August 1997, and that Leeds believed his understanding was correct when the Commission did not reply to his counsel's letter).

<sup>181</sup> Inforum Petition at 12.

<sup>182</sup> *Id.* at 6-7.

<sup>183</sup> TVCN AFR at 12, 16-17 (arguing that, although it could have filed for bankruptcy, TVCN elected to file a request for waiver of the automatic cancellation deadline because it believed that doing so better served the public interest, and that it "has effectively been penalized for planning ahead").

<sup>184</sup> GLH AFR at 12.

<sup>185</sup> Alpine Petition at 21-22.

request for reduction of his auction debt, it would have accomplished the same policy objectives that it articulated in granting a waiver of its rules to NextWave and others.<sup>186</sup> We find that Alpine, GLH, Leeds, and TVCN have failed to show that by denying their waiver requests the Bureau treated them differently from similarly situated parties. The Bureau's denials were therefore not an abuse of discretion.

48. Because Alpine, GLH, Leeds, and TVCN did not file for bankruptcy protection prior to the automatic cancellation of the subject licenses, they are not similarly situated to licensees that did. Accordingly, Commission decisions granting requests for waiver and debt restructuring in the context of resolving the bankruptcies of licensees that filed for protection prior to the automatic cancellation of their licenses are not applicable to Alpine, GLH, Leeds, and TVCN. In *FCC v. NextWave Personal Communications, Inc.*, the Commission did not waive its automatic license cancellation rule, but rather the Supreme Court ruled that section 525(a) of the Bankruptcy Code barred the Commission from enforcing its automatic license cancellation rule against NextWave, a licensee in bankruptcy, upon its failure to make timely payments for the debt associated with its licenses.<sup>187</sup> However, as the Bureau properly explained in denying Alpine's request for waiver of the Commission's automatic cancellation rule, if section 525(a) does not apply because the licensee had not filed for bankruptcy prior to the automatic cancellation of the license, nothing in the *NextWave* decision prevents the regular operation of the Commission's automatic cancellation rules.<sup>188</sup> For that reason, we reject the attempts of TVCN, GLH, Alpine, and Leeds to analogize their situations to that of licensees that avoided application of the automatic cancellation rule by filing for Chapter 11 bankruptcy protection prior to missing their required installment payments.

49. Similarly, we disagree with Alpine, GLH, and TVCN to the extent that they argue that the Commission's resolution of bankruptcy litigation creates an inequitable policy preference because it enables a bankrupt licensee to avoid automatic cancellation, while a licensee offering a proposal to satisfy its outstanding installment payment obligation to the Commission without resorting to bankruptcy may lose its license.<sup>189</sup> It is bankruptcy law, and not the Commission, that enables a bankrupt licensee to avoid automatic cancellation. As the Bureau properly explained in affirming the Division's denial of GLH's request for waiver, an argument that the result is inequitable cannot support grant of a waiver of the automatic cancellation rule because bankruptcy is a status governed by statute, and different treatment based on differing circumstances is not inequitable.<sup>190</sup> We agree with the Bureau that Congress's decision to grant certain treatment to entities in bankruptcy provides no sound basis for arguing that entities outside bankruptcy should receive similar treatment.<sup>191</sup>

50. Moreover, to the extent that Alpine, GLH, Leeds, and TVCN assert that the denials of their requests for waiver somehow "penalized" them for not seeking bankruptcy, or otherwise encouraged them to seek bankruptcy, such arguments are unconvincing in light of the variety of factors that may influence a party's decision regarding bankruptcy.<sup>192</sup> A party's assertion that it might seek the protection of a bankruptcy court, with all the consequences that would entail, is no basis by itself for waiving the

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<sup>186</sup> Leeds AFR at 11, 13-14.

<sup>187</sup> *FCC v. NextWave Personal Communications Inc., et al.*, 537 U.S. 293 (2003) (affirming the D.C. Circuit's decision, 254 F.3d 130 (D.C. Cir. 2001), that because NextWave was under protection of Chapter 11 of the United States Bankruptcy Code, its licenses did not automatically cancel for nonpayment while it was in bankruptcy) ("*NextWave*").

<sup>188</sup> *Alpine Order*, 22 FCC Rcd at 1500-01 ¶ 21.

<sup>189</sup> Alpine Petition at 20-21; GLH AFR at 12; and TVCN AFR at 16-17.

<sup>190</sup> *GLH Order on Reconsideration*, 22 FCC Rcd at 2419 ¶ 22.

<sup>191</sup> *Id.*

<sup>192</sup> Alpine Petition at 20-21; GLH AFR at 12; Leeds AFR at 13; and TVCN AFR at 16-17.

Commission's automatic cancellation rules.<sup>193</sup> Based on the discussion above, a threat of impending bankruptcy would not satisfy either prong of the waiver standard of section 1.925 of the Commission's rules. Indeed, the Commission has found that waiving installment payment obligations because a licensee might file for bankruptcy "would harm the integrity of the auction process and encourage licensees to threaten litigation in the future."<sup>194</sup>

## 2. The Division Correctly Concluded that Inforum Did Not Establish Grounds for Constructive Waiver

51. Inforum argues that the Division should have granted its request for a constructive waiver.<sup>195</sup> Inforum bases this argument on Commission actions Inforum cited in its original waiver request – the Commission's acceptance of Inforum's August 2, 2001 late payment and the Commission's August 3, 2001 acceptance for filing of an application to assign the Inforum License to TDI Acquisition Corporation ("TDI")<sup>196</sup> – as well as on the Commission's subsequent acceptance of nine more post-default payments through October 31, 2003, and its September 9, 2003 dismissal of a petition to deny the TDI assignment application.<sup>197</sup> In addition, Inforum intimates, for the first time, that the Commission's grant of two hub site applications for the License is grounds for a constructive waiver.<sup>198</sup>

52. As support for its request, Inforum cites the *Lancaster Letter Order*, *TE-MCG*, and *Senter*, three constructive waiver cases decided on delegated authority under the Commission's former grace period request rules,<sup>199</sup> and suggests that the Commission endorsed these decisions in the *NextWave Reconsideration Order*.<sup>200</sup> In that order, however, the Commission did just the opposite, rejecting the precedent of *Lancaster*, *TE-MCG*, and *Senter*, which found constructive waiver of the automatic cancellation rule based on Commission acceptance of post-default payments, explaining that it was "not required to repeat previous errors in order to maintain consistency with precedent."<sup>201</sup>

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<sup>193</sup> *GLH Order on Reconsideration*, 22 FCC Rcd at 2419 ¶ 22; *TVCN Order*, 22 FCC Rcd at 1407 ¶ 19.

<sup>194</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Second Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 6571, 6580 ¶ 16 (1999).

<sup>195</sup> Inforum Petition at 1-2, 7-12.

<sup>196</sup> Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment, Inforum Communications, Inc., filed Oct. 30, 2001, at 8-10 ("Inforum Waiver Request").

<sup>197</sup> Inforum Petition at 8, 13.

<sup>198</sup> *Id.* at 13.

<sup>199</sup> See Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Thomas Gutierrez, Esq., Counsel for Lancaster Communications, Inc., 1998 WL 709412 (WTB 1998) ("*Lancaster Letter Order*"); Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Lloyd W. Coward, Esq., Meyer, Faller, Weisman & Rosenberg, P.C., Counsel for TE-MCG Consortium, 14 FCC Rcd 2173 (WTB 1999) ("*TE-MCG Order*"); Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Meredith S. Senter, Jr., Esq., Leventhal, Senter & Lerman P.L.L.C., Counsel for Cordell Engineering, Inc., 14 FCC Rcd 5003 (WTB/AIAD 1999) ("*Senter Order*" or "*Cordell Order*").

<sup>200</sup> Inforum Petition at 7-8 (citing In Re Public Notice of DA 00-49 Auction of the C and F Block Broadband PCS Licenses NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. Petition for Reconsideration, *Order on Reconsideration*, 15 FCC Rcd 17,500 (2000) ("*NextWave Reconsideration Order*").

<sup>201</sup> *NextWave Reconsideration Order*, 15 FCC Rcd at 17,511 ¶ 19 (citing *Chem-Haulers, Inc. v. ICC*, 565 F.2d 728, 730 (D.C. Cir. 1977)).

53. In fact, since the Commission amended its installment payment rules to allow for two automatic grace periods, there has only been one constructive waiver of the automatic cancellation rule. In *Lakeland*, also cited by Inforum,<sup>202</sup> a branch-level decision granted a constructive waiver of the automatic cancellation rule because the Commission continued to send payment notices to the former licensee after the licensee's default.<sup>203</sup> Inforum, in contrast, concedes that it did not continue to receive payment notices following its default.<sup>204</sup> While *Lakeland* notes that the former licensee, unlike Inforum, made all subsequent installment payments after its late payment,<sup>205</sup> the decision emphasizes that the Commission's acceptance of post-default payments without extenuating circumstances is not enough to revive an automatically canceled license.<sup>206</sup>

54. The Court of Appeals for the District of Columbia recently upheld the Commission's refusal to grant a constructive waiver under circumstances similar to Inforum's. In *Morris Communications, Inc. v. FCC*, the court concluded that the Commission reasonably distinguished the precedent of *TE-MCG*, *Senter*, and *Lakeland* on the grounds that Morris: (1) did not continue to receive payment notices following its default, unlike in *Lakeland*; (2) was on notice that the Commission's acceptance of post-default installment payments would not, by itself, constitute a constructive waiver, unlike in *TE-MCG*, and *Senter*; (3) had halted its post-default payments, unlike in *Lakeland*, *TE-MCG*, and *Senter*; and (4) asserted it was having financial difficulties.<sup>207</sup> All of these distinctions also apply to Inforum.<sup>208</sup> Accordingly, we believe that the staff acted properly in determining that Commission acceptance of Inforum's post-default payments did not amount to a constructive waiver.

55. We find the other factors presented by Inforum to be equally insufficient as bases for a constructive waiver of the automatic cancellation of Inforum's license. For example, the August 3, 2001 staff acceptance for filing of an application to assign the license from Inforum to TDI could not reasonably have been construed as a waiver of the installment payment rules.<sup>209</sup> Acceptance of the application was a ministerial act wholly separate from payment processing that conferred no right on either Inforum or TDI.<sup>210</sup> Moreover, the application remains pending, awaiting our resolution of Inforum's instant petition.<sup>211</sup>

56. No more persuasive a basis for constructive waiver is the staff level dismissal of a petition by Paradise Cable, Inc. to deny the Inforum-to-TDI assignment application, for *Paradise* mentions that the license formerly held by Inforum automatically canceled on August 1, 2001 and makes clear that the order "does not address or resolve the issues raised by Inforum" in its Petition to waive the automatic cancellation.<sup>212</sup>

<sup>202</sup> Inforum Petition at 10-12 (citing *Lakeland Order*, 15 FCC Rcd at 23,733-34).

<sup>203</sup> *Lakeland Order*, 15 FCC Rcd at 23,734-35 ¶¶ 2-4. See also *Morris Order*, 23 FCC Rcd at 3188 ¶ 20.

<sup>204</sup> Inforum Petition at 11-12.

<sup>205</sup> *Lakeland Order*, 15 FCC Rcd at 23,733-34 ¶ 2.

<sup>206</sup> *Id.* at 23,734-35 ¶ 4. See also *21<sup>st</sup> Century Order on Reconsideration*, 16 FCC Rcd at 17,261 ¶12 n.24.

<sup>207</sup> *Morris Appellate Opinion*, 566 F.3d at 188-191.

<sup>208</sup> We note that Inforum's post-default payments, made between 2001 and 2003, were all made after the release of the *Lakeland Order* and the *NextWave Reconsideration Order*.

<sup>209</sup> Inforum's petition incorrectly notes the acceptance date as August 3, 2003. Inforum Petition at 8.

<sup>210</sup> See e.g., *Morris Appellate Opinion*, 566 F.3d at 191-192 (finding that the Commission's receipt of notifications of build-out does not constitute "definite" action indicating waiver); *Leeds Order*, 22 FCC Rcd at 1516-17 ¶¶ 18-19.

<sup>211</sup> *Inforum Order*, 19 FCC Rcd at 84 ¶ 2.

<sup>212</sup> Application of Inforum Communications, Inc., Assignor, and TDI Acquisition Corporation, Assignee, for Assignment of Multipoint Distribution Service (MDS) Stations KNSC300, KNSC798, and WMI303, Sarasota, (continued....)

57. Finally, we need not consider Inforum's suggestion that the July 13, 2001 grant of two hub site applications constructively waived its default, as Inforum, having neglected to make this claim in its earlier Waiver Request,<sup>213</sup> cannot properly raise it here.<sup>214</sup> Even absent this procedural defect, the hub site applications were granted more than two weeks before Inforum's default, and thus the grant could not possibly have indicated that the default had been waived.<sup>215</sup>

**C. There is No Right to Set-Off Following Installment Payment Defaults**

58. As discussed above,<sup>216</sup> section 1.2110(g)(4)(iv) provides that when a licensee defaults on an installment payment, its license cancels automatically and it becomes subject to debt collection procedures for the amount it still owes.<sup>217</sup> Four of the Parties – GLH, Lancaster, Leeds, and TVCN – besides attempting to demonstrate their eligibility for a waiver of the automatic cancellation provisions of this rule, try to evade these consequences by attacking the application of the rule itself.<sup>218</sup>

59. GLH and TVCN each argue that their outstanding debt obligation should be reduced by the amount of any subsequent sale by the Commission of licenses covering the same spectrum as that covered by the licenses on which they defaulted.<sup>219</sup> GLH offers two theories for the proposition that it deserves a set-off. One of these is that section 1.2104(g)(2), and not section 1.2110(g)(4)(iv), governs the consequences of its defaults. GLH claims that under section 1.2104(g)(2) it should have received “a set-off for the high bid received by the Commission in the re-auction.”<sup>220</sup>

60. GLH acknowledges, however, that the Commission rejected this argument in the 2004 *Part 1 Third Reconsideration of Third Report and Order*.<sup>221</sup> In fact, that order was largely devoted to clarifying that section 1.2104 does not, and never did, apply to installment payment defaults.<sup>222</sup> The Commission explained that the rule in section 1.2104(g)(2), in effect since the beginning of the auctions

(Continued from previous page)

Florida, and of the Sarasota, Florida BTA (MDB408), *Memorandum Opinion and Order*, 18 FCC Rcd 18,508, 18,514-15 ¶ 13 n.54. The Commission subsequently upheld this dismissal, acknowledging Inforum's instant petition and noting that the assignment application remains pending. *Inforum-TDI Assignment Order*, 20 FCC Rcd at 825-26 ¶¶ 9, 10.

<sup>213</sup> See Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of Installment Payment, dated Oct. 30, 2001.

<sup>214</sup> See 47 C.F.R. § 1.106(c)(1); Northstar Technology, LLC, Request for a Waiver and Extension of the Broadband PCS Construction Requirements Regarding BTA098 Block F Authorization, *Order on Reconsideration*, 19 FCC Rcd 22,275, 22,280 ¶ 11(2004) (“Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to respond.”).

<sup>215</sup> Alpine also cites *Senter* and *Lakeland*, but only as general precedent for a waiver of the automatic cancellation rules. Alpine Petition at 22. Alpine neither argues that a constructive waiver occurred in its case nor describes any actions by the Commission that could have been construed as waiving the installment payment deadline. In fact, Alpine describes no circumstances in these two decisions relevant to its own situation, other than their grant of waivers of the automatic cancellation rule. As such, *Senter* and *Lakeland* do not provide us a basis for granting the Alpine Petition.

<sup>216</sup> See *supra* para. 3.

<sup>217</sup> 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>218</sup> See GLH AFR at 7-10, 16-18; Lancaster Petition at 7-8; Leeds AFR at 16; TVCN AFR at 17-18.

<sup>219</sup> GLH AFR at 7-10, 16-18; TVCN AFR at 17-18.

<sup>220</sup> GLH AFR at 7.

<sup>221</sup> *Id.* at 17.

<sup>222</sup> *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd at 2551-58 ¶¶ 1-20.

program,<sup>223</sup> applies to all winning bidders, including prospective installment payors, that default or are disqualified after the close of bidding but *prior* to license grant. The provision requires these bidders to pay the difference between their high bid and a lower winning bid for a license covering the spectrum at a subsequent auction, plus an additional three percent of either their high bid or the subsequent winning bid, whichever is lower.<sup>224</sup>

61. In the same order, the Commission rejected claims that section 1.2104(g) had ever applied to installment defaults, pointing out that the rule is unsuited to such defaults, as it makes no provision for license cancellation.<sup>225</sup> Rather, section 1.2104(g) assumes that the license has not been granted and remains available for inclusion in a subsequent auction. The Commission explained that applying section 1.2104(g) to post-licensing defaults would lead to unintended and unreasonable results, allowing, for example, a licensee that had paid in full for its license and subsequently failed to meet a post-licensing requirement, such as a service or build-out rule, to claim a set-off should a license be sold for any of the same spectrum that had been covered by its former license.<sup>226</sup> The Commission noted that only section 1.2110 dictates the consequences of an installment payment default, namely the automatic cancellation of the license and Commission initiation of debt collection procedures, and that these consequences have been the only ones applicable to such defaults since the beginning of the auctions program.<sup>227</sup>

62. GLH nevertheless argues that by failing to apply section 1.2104(g)(2) to GLH's defaults, the Commission has engaged in a "post hoc re-interpretation" of that provision, which amounts to secondary retroactivity.<sup>228</sup> There can be no retroactivity of any sort, however, without a rule change. The Commission, in the *Part 1 Third Reconsideration of Third Report and Order*, thoroughly demonstrated that its installment payment rules had, in all material respects, remained unchanged in language and application since their inception, thus appropriately rejecting an accusation that it had engaged in retroactive rulemaking.<sup>229</sup>

63. GLH argues that we must disregard the *Part 1 Third Reconsideration of Third Report and Order* because the year before its release the Court of Appeals for the District of Columbia Circuit, in *21<sup>st</sup> Century Telesis*, made a comment indicating that section 1.2104(g)(2) does apply to installment payment defaults.<sup>230</sup> We agree with the Bureau's earlier rejection of this same argument by GLH. As the Bureau observed, while the court in *21<sup>st</sup> Century Telesis* erroneously identified section 1.2104(g)(2) as the rule that determines an installment payor's default obligations, it did so without analysis and in a statement that was immaterial to its conclusion that an installment payor had default obligations that would not be

<sup>223</sup> *Id.* at 2553 ¶ 5. *See also* 47 C.F.R. § 1.2104(g)(2) (1994).

<sup>224</sup> *Part 1 Third Reconsideration of Third Report and Order* at 2553 ¶ 5.

<sup>225</sup> *Id.* at 2558 ¶ 18.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 2553 ¶ 6. *See also* 47 C.F.R. § 1.2110(e)(4) (1994); 60 Fed. Reg. 52,865 (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>228</sup> GLH AFR at 18, relying on *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 923 (2002) ("*Celtronix*").

<sup>229</sup> *Part 1 Third Reconsideration of Third Report and Order*, 19 FCC Rcd at 2551-58 ¶¶ 1-20, 2559 ¶¶ 21-22. The Commission also held that, even had the rule been changed, such a change would have been permissible under federal precedent and particularly under *Celtronix*. *Id.* at 2559 ¶¶ 21-22.

<sup>230</sup> GLH AFR at 17-18 (citing *21<sup>st</sup> Century Telesis Joint Venture and 21<sup>st</sup> Century Bidding Corporation v. FCC*, 318 F.3d 192 (D.C. Cir. 2003) ("*21<sup>st</sup> Century Telesis*").

altered by the claims in the case before it.<sup>231</sup> Accordingly, we are not bound by the court's statement in this instance.<sup>232</sup>

64. According to GLH's other theory, the Uniform Commercial Code ("UCC") entitles GLH to a set-off.<sup>233</sup> Although GLH acknowledges that it signed a security agreement with the Commission stating that GLH has no right or interest in any proceeds of the Commission's subsequent sale of a license for spectrum that had been covered by GLH's defaulted licenses, GLH contends that the UCC voids such language.<sup>234</sup> However, GLH provides no authority that dictates the application of the UCC to its situation.<sup>235</sup>

65. Furthermore, the Commission has long advised licensees that the UCC does not govern the consequences of installment payment defaults. In the 1996 "*C-Block Note and Security Agreement Opinion Letter*," the Commission's general counsel and its Wireless Telecommunications Bureau chief offered public guidance on installment payment plan notes and security agreements, explaining 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.<sup>236</sup> The *C-Block Note and Security Agreement Opinion Letter* clarified that in fashioning appropriate federal common law rules, courts would follow the principles of the UCC or other bodies of law, but only so long as those principles did not conflict with the implementation of specific federal policies. Addressing the specific issue of proceeds from a reauction of licenses following a default, the *C-Block Note and Security Agreement Opinion Letter* emphasized that:

[W]ith regard to the issue of the rights of the debtor, or other creditors, to the excess proceeds (if any) from a reauction following a default, Section 309(j)(8) of the Communications Act provides that all proceeds from the use of competitive bidding shall be deposited in the Treasury of the United States or used to cover certain of the Commission's costs. See 47 U.S.C. § 309(j)(8). Therefore, while the proceeds from the liquidation of the collateral through a[n] FCC-conducted reauction would generally be applied to debts due, the Commission is constrained by the terms of the Communications Act with regard to the distribution of excess reauction proceeds to the debtor or other creditors.

...

<sup>231</sup> *GLH Order on Reconsideration*, 22 FCC Rcd at 2421 n.75. We note, in addition, that 47 C.F.R. § 1.2104 was not even briefed by either party in *21<sup>st</sup> Century Telesis*. See *21<sup>st</sup> Century Telesis*, Brief for Appellants, 2002 WL 34244526 (Sept. 6, 2002); *id.* Brief for FCC, 2002 WL 34244527 (Sept. 6, 2002); *id.* Reply Brief for Appellants, 2002 WL 34244528 (Sept. 6, 2002).

<sup>232</sup> See *Magnacom Wireless, LLC v. FCC*, 503 F.3d 984, 993-94 (9<sup>th</sup> Cir. 2007) ("In our circuit, statements made in passing, without analysis, are not binding precedent."). We note that the court in *21<sup>st</sup> Century Telesis* relied on *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 522-23 (D.C. Cir. 1999) ("*Mountain Solutions*"), to support its statement. *Mountain Solutions*, however, concerned only defaults on second down payments, which, unlike installment payment defaults, are subject to the consequences of 47 C.F.R. § 1.2104(g)(2). See *21<sup>st</sup> Century Telesis*, 318 F.3d at 198.

<sup>233</sup> GLH AFR at 8-10.

<sup>234</sup> *Id.* at 9.

<sup>235</sup> GLH refers solely to *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77 (1938), the only potentially relevant holding of which – that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state" – is inapposite, if for no other reason than, in the instant situation, an act of Congress, i.e., the Communications Act, does apply. See GLH AFR at 8.

<sup>236</sup> Letter from William E. Kennard, General Counsel, and Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Leonard J. Kennedy, Esq., and Richard C. Denning, Esq., 11 FCC Rcd 21,572, 21,577 (OGC/WTB 1996) ("*C-Block Note and Security Agreement Opinion Letter*").

. . . . To the extent that the provision of UCC § 9-504 (requiring that secured party must account to the debtor for any surplus over the amount remaining on the debtor's obligation) directly conflicts with the Communications Act and FCC regulations, we believe that the UCC must yield to implementation of the federal mandate.<sup>237</sup>

66. The Commission has relied upon the *C-Block Note and Security Agreement Opinion Letter* since shortly after its release,<sup>238</sup> and the letter's advice regarding the inapplicability of the UCC is supported by *Magnacom Wireless*, a 2007 opinion in which the Court of Appeals for the Ninth Circuit upheld a bankruptcy court's dismissal of a trustee's claim for set-off following the sale of licenses for spectrum previously covered by the bankrupt's now-canceled licenses.<sup>239</sup> The court held that the Commission has a regulatory right to cancel licenses on which the installment payor has defaulted.<sup>240</sup> The court described UCC requirements as "simply inapplicable," stating that nothing in the Commission's security agreement with the debtor or in applicable law requires the Commission's cancellation of a defaulted license to be subject to the UCC.<sup>241</sup>

67. TVCN claims that, consistent with "statutory, procedural or constitutional requirements[,]," it should receive a set-off but does not cite any requirement or other authority that would entitle it to one.<sup>242</sup> TVCN also maintains that the Bureau, by denying TVCN its requested relief, abused its discretion and acted capriciously and contrary to law, but again TVCN makes no effort to substantiate its accusation.<sup>243</sup>

68. The remaining two Parties, Lancaster and Leeds, rely on none of the aforementioned theories or, indeed, any other theory, to argue for a set-off. Instead, Lancaster explains that, absent a waiver, it would lose significant resources that it could otherwise use for charitable, educational, or scientific causes, while, with grant of a waiver, it could retain its licenses and still provide service, thereby being able to generate revenue for such charitable causes.<sup>244</sup> Leeds simply laments that he must "forfeit" the licenses on which he has defaulted and the principal and interest he has already paid, while remaining subject to government debt collection for the outstanding balance.<sup>245</sup> Thus, while both

<sup>237</sup> *C-Block Note and Security Agreement Opinion Letter*, 11 FCC Rcd at 21,576-77.

<sup>238</sup> See, e.g., *Part 1 Order-MO&O-NPRM*, 12 FCC Rcd at 5693-94 ¶ 11 n.23, 5694-95 ¶ 12 n.25, 5695-96 ¶ 13 n.33 (citing the *C-Block Note and Security Agreement Opinion Letter* with regard to protections for commercial lenders making loans, and equipment vendors extending credit, to auction winners paying in installments).

<sup>239</sup> *Magnacom Wireless*, 503 F.3d at 987.

<sup>240</sup> *Id.* at 994-95.

<sup>241</sup> *Id.* GLH's additional reliance on *U.S. v. Winstar Corp.*, 116 S. Ct. 2432 (1996), is misplaced, as nothing in that opinion, affirming that the United States had changed the terms of, and thereby breached, contracts with financial institutions has bearing on the case before us. GLH AFR at 10.

<sup>242</sup> TVCN AFR at 17-18. TVCN begins with a faulty premise, namely that the Commission originated part of its default policy in Auction 6, which concluded in 1996. *Id.* This assertion is incorrect, and TVCN offers no authority to support it. As we discuss above, license-cancellation-plus-debt-collection has been the consequence of installment payment defaults since the Commission first adopted its auction rules. See *supra* paras. 3, 58.

<sup>243</sup> TVCN AFR at 17-18.

<sup>244</sup> Lancaster Petition at 7-8 ("Absent a grant of the requested waiver, Lancaster would be required to remit over \$900,000 to the government immediately, and would not recover any of the 22 SMR licenses it won at Auction No. 7 – thus eliminating any potential for Lancaster to generate revenues from the provision of service to subscribers.").

<sup>245</sup> Leeds AFR at 16 ("According to the Decision, Mr. Leeds must forfeit the rights to the MDS1 and 2A and H1 channel licenses, he must forfeit the \$288,000 he paid to the Commission in principal and interest and he must be subject to government debt collection for the balance, even though he receives no licenses.").

Lancaster and Leeds complain about the consequences dictated by section 1.2110(g)(4)(iv), neither denies the section's applicability to its default.

**D. The Waiver Requests Did Not Toll the Installment Payment Deadline**

69. Two of the Parties – Alpine and TVCN – contend that, by filing their waiver requests, they tolled their installment payment deadlines and prevented the automatic cancellation of the licenses. Alpine bases its argument on its original installment payment plan note, which, it argues, says that the note maker will be in default if it remains delinquent for more than ninety days and the maker has not submitted a written request for a grace period or extension of payments.<sup>246</sup> TVCN submits that, because it filed its request for waiver prior to the end of its second quarterly grace period, it believed that automatic cancellation would not go into effect so long as its waiver request was still pending before the Commission.<sup>247</sup> It acknowledges that there may be nothing in the Communications Act requiring that the Commission thus suspend automatic cancellation but explains that it believed that federal and state practice gave rise to its expectation that the Commission would do so.<sup>248</sup>

70. Neither Alpine nor TVCN has made a persuasive case for tolling of the installment payment deadline to avoid automatic cancellation of the licenses. TVCN is correct in that nothing in the Act or, for that matter, Commission rules or precedent allows for such tolling. Rather, the overarching message delivered by Commission installment payment decisions is that we strictly enforce installment payment deadlines and the automatic cancellation of licenses when those deadlines are missed. Alpine's Petition fails to acknowledge that the "tolling language" in the note that it cites is a reference to the Commission's prior grace period rules and that the language from the note quoted in its own petition contains a specific provision which conditions the note's terms upon "then-applicable orders and regulations of the Commission" that may be in effect at the time of default.<sup>249</sup> Every installment payment defaulter whose automatic cancellation waiver request has been denied has been subject to the same language.<sup>250</sup> The Commission's rules and policies dictate – and thus TVCN and Alpine, as Commission licensees, knew or should have known – that licenses subject to the Commission's installment payment program cancel automatically upon payment default, without further action from the Commission.<sup>251</sup> If it were otherwise – if installment payors could toll their payment deadlines simply by filing waiver requests – such requests would long ago have become the norm, eviscerating the Commission's enforcement of the automatic cancellation rule and defeating the underlying purpose of the rule, which, we repeat, is to encourage potential licensees to bid only what they can pay and then, if they win, to make all their payments on time. Accordingly, the claims of Alpine and TVCN that they did not default and that their licenses did not automatically cancel are without merit.

**E. The Commission's Staff Did Not Violate Commission Rules or Legal Duties**

71. Alpine alleges several failings by the Commission and its staff and claims that these require us to reconsider staff denials of Alpine's waiver request and requests for debt compromise. As we discuss, we find no merit in the allegations or any justification for reconsideration.

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<sup>246</sup> Alpine Petition at 16-17 (arguing that under its notes it has never been in default), 24.

<sup>247</sup> TVCN AFR at 12.

<sup>248</sup> *Id.* at 12.

<sup>249</sup> Alpine Petition at 17.

<sup>250</sup> The Commission has addressed this specific provision in the installment notes, finding it to be a clear reference to the rules that would be applicable at the time of default. *Part I Reconsideration of Third Report and Order*, 15 FCC Rcd at 15,309 ¶ 26.

<sup>251</sup> *See supra* para. 3.

72. ***Alleged Improper Delay.*** Alpine contends that the staff violated section 1.1911(e) of the Commission's rules, which states that "[t]he Commission will respond promptly to communications from the debtor, within 30 days whenever feasible, and will advise debtors who dispute the debt that they must furnish available evidence to support their contentions."<sup>252</sup> Alpine bases this accusation on the length of time it took the Commission to respond to the Alpine First Restructuring Request and the Bureau to release an order resolving Alpine's waiver request.<sup>253</sup> Alpine argues that the Commission's delay violated section 1.1911(e) and "led to Alpine's business demise."<sup>254</sup> According to Alpine, this violation was arbitrary and capricious and thus provides a basis on which the denial of Alpine's waiver request and refusal to grant either of Alpine's restructuring requests must be reversed.<sup>255</sup>

73. We reject these arguments. As the Commission explained in the *Morris Order*, section 1.1911(e), which is one of the Commission's debt collection rules,<sup>256</sup> has no relevance to a request for relief from installment payment default rules.<sup>257</sup> Section 1.1911 concerns the Commission's written demand for payment whereby the Commission initiates the demand process. Thus the prompt response by the Commission referenced in section 1.1911(e) applies only to communications from the debtor within, and related to, the demand process. The provision, accordingly, does not apply to Alpine's waiver request. Nor does it apply to Alpine's First Restructuring Request, which, having preceded the Commission's demand letters on Alpine's two defaulted licenses by some eighteen months,<sup>258</sup> was not part of the demand process envisioned by the rule.<sup>259</sup>

74. We note that, even where section 1.1911(e) does apply, it calls for a prompt response, not necessarily a resolution, and that the provision's thirty-day response time is a goal, not a mandate.<sup>260</sup>

<sup>252</sup> 47 C.F.R. § 1.1911(e).

<sup>253</sup> Alpine Petition at 30; *see supra* para. 7.

<sup>254</sup> Alpine Petition at 30.

<sup>255</sup> *Id.* at 30-31.

<sup>256</sup> *See* 47 C.F.R. Chapter I, Part 1, Subpart O, "Collection of Claims Owed the United States".

<sup>257</sup> *See Morris Order*, 23 FCC Rcd at 3189-3190 ¶¶ 23-25.

<sup>258</sup> *See* Letter from Mark Reger, Chief Financial Officer, Federal Communications Commission, to Alpine PCS, Inc., dated Jan. 16, 2004 (demanding payment of the loan for license number PBB405C) and Letter from Mark Reger, Chief Financial Officer, Federal Communications Commission, to Alpine PCS, Inc., dated Jan. 16, 2004 (demanding payment of the loan for license number PBB406C).

<sup>259</sup> In any event, Commission staff responded to the Alpine First Restructuring Request within a week of its being filed and to the Alpine Second Restructuring Request approximately two weeks after its filing. *See* Letter from Mark A. Reger, Chief Financial Officer, Federal Communications Commission, to Robert F. Broz, President, Alpine PCS, Inc., dated July 30, 2002; Letter from Mark A. Stephens, Chief Financial Officer, Federal Communications Commission, to Frederick M. Joyce and Christine McLaughlin, Venable, LLP Counsel for Alpine PCS, Inc., dated Jan. 4, 2008. *See also* Alpine Petition at 14.

<sup>260</sup> As a practical matter, the Commission could not promise in its rule to resolve a complex matter such as a debt restructuring proposal within a brief period such as thirty days. Section 1.1915 of the rules, our provision for debt compromise, allows the Commission to attempt to reach compromise on a claim, "preferably during the course of personal interviews," not a process that lends itself to the speedy response envisioned by 47 C.F.R. § 1.1911(e). *See* 47 C.F.R. § 1.1915. Furthermore, to determine whether and how to compromise, the Commission must conduct a careful examination of the debtor's finances and credit, a potentially lengthy endeavor. Moreover, under 47 C.F.R. § 1.1915, the Commission must pursue compromise in accordance with Federal Claims Collection Standards ("FCCS"), which do not impose a deadline for resolving a restructuring requests. Finally, when the principal balance of the debt exceeds \$100,000 (or a higher amount authorized by the Attorney General), the authority to compromise rests with the Department of Justice. In such case, the Commission evaluates the compromise offer in accordance with FCCS and refers the offer, along with appropriate financial information, to the Department of Justice, again a process that may take more than thirty days. *Id.*

Moreover, even in a case where an installment debtor had a legitimate question as to Commission staff compliance with a debt collection rule, that circumstance could not shield the debtor against its own failure to comply with a license payment obligation, which failure would have been what had made debt collection necessary in the first place. Section 1.1901(i) states that the Commission's definition of delinquency for the purposes of its debt collection rules "in no way . . . affect the Commission's rules . . . regarding payment for licenses (including installment, down, or final payments) or automatic cancellation of Commission licenses . . ." <sup>261</sup> This provision cross-references section 1.1902(f), which explains that no debt collection rule "shall supercede [sic] or invalidate other Commission rules, such as the part 1 general competitive bidding rules . . . or the service specific competitive bidding rules . . . regarding the . . . Commission's right to cancel a license. . . ." <sup>262</sup> Finally, section 1.1908 states in its entirety that "[t]he failure or omission of the Commission to comply with any provision in this regulation shall not serve as a defense to any debtor." <sup>263</sup>

75. Alpine also suggests that its business "was driven into financial ruin" because of the time it took for resolution of its First Restructuring Request and its waiver request. <sup>264</sup> However, Alpine provides no support for this suggestion, and the record demonstrates that Alpine's financial difficulties preceded and precipitated its defaults. <sup>265</sup>

76. Accordingly, Alpine's allegations of Commission delay do not provide grounds for waiver of the automatic cancellation of its licenses. Alpine's arguments also fail to justify reconsideration of Alpine's restructuring requests, because, among other reasons, both requests are premised on Alpine's being able to retain licenses for some or all of the spectrum covered by the canceled licenses. <sup>266</sup>

77. ***Alleged Breach of Fiduciary Duties.*** Alpine argues that the Commission breached fiduciary duties owed Alpine, because the Commission "flooded the market with PCS spectrum, allowed 'sham' designated entities to bid up license prices, and then refused to renegotiate installment debts." <sup>267</sup>

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<sup>261</sup> 47 C.F.R. § 1.1901(i).

<sup>262</sup> 47 C.F.R. § 1.1902(f). *See Morris Appellate Opinion*, 566 F.3d at 192.

<sup>263</sup> 47 C.F.R. § 1.1908.

<sup>264</sup> *See, e.g.*, Alpine Petition at 2, 15, 28.

<sup>265</sup> Alpine told the Commission in its waiver request that its financial difficulties were largely caused by the failure of an equipment vendor to provide promised financing. *Id.* at 5. *See also id.* at 26-27 (explaining that Alpine had sought relief because it was in "difficult financial circumstances"). In dismissing the Alpine Second Restructuring Request, Commission staff noted that the unaudited financial documents submitted by Alpine in support of its request suggested that it had "been operating within the zone of insolvency since 2002 or earlier." Letter from Regina Dorsey, Deputy Chief Financial Officer, Federal Communications Commission, to Frederick M. Joyce and Christine McLaughlin, Counsel for Alpine PCS, Inc., dated Apr. 29, 2008 at 6.

<sup>266</sup> *See* Alpine First Restructuring Request; Alpine Second Restructuring Request.

<sup>267</sup> Alpine Petition at 25-27. Alpine cites cases that provide no support for its claim that the Commission owed it a fiduciary duty. *Love v. U.S.*, 915 F.2d 1242, 1247-48 (9th Cir. 1989) involved a farmer's conversion claim against the Farmers Home Administration for its sale of the farmer's property securing an agricultural loan without the required notice and hearing. The court of appeals concluded that the farmer could sue the government under the Federal Tort Claims Act for breach of the duty of good faith. This case has no bearing on Alpine's factual circumstances and does not establish that the Commission has a duty to waive the automatic license cancellation rule for a licensee that defaults on its license payments where the license is expressly conditioned on full and timely payment and the licensee holds no property right in the license. *See* 47 U.S.C. § 301 ("no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license"). The other cases cited by Alpine are equally inapposite. In *Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 64 P.2d 101 (1937), the court recognized the existence of a fiduciary relationship between a bank and its customer for whom it had acted as financial advisor for many years. In *Barret v. Bank of America*, 229 Cal. Rptr. 16 (1986), the court found a bank/depositor relationship to be "quasi-fiduciary" in an action against the bank brought by a personal guarantor of a (continued....)

78. Alpine does not explain how the Commission breached a duty – or, indeed, what that duty was – with regard to the amount of broadband PCS spectrum made available. Alpine, like every other prospective auction participant (and, indeed, every member of the public) had access to a description of the Commission’s entire inventory of PCS spectrum well before the Commission ever held its first auction.<sup>268</sup> Alpine alone is responsible for its business judgments regarding its participation in the competitive bidding process.<sup>269</sup> Furthermore, if Alpine had had information or concerns militating against licensing spectrum to other designated entities, it should have raised these issues in a petition to deny prior to the award of licenses, in time for the Commission to take appropriate action.

79. Alpine additionally suggests that Commission staff breached a duty of candor and good faith by “arbitrarily and inexplicably” cutting off compromise negotiations with Alpine at the same time that the Commission was negotiating with NextWave.<sup>270</sup>

80. Alpine provides no support for its claim of arbitrary treatment. The settlement of bankruptcy litigation relating to a license that did not automatically cancel for non-payment of installment debt because the licensee was under the protection of Chapter 11 of the Bankruptcy Code provides no basis to support a waiver of the automatic cancellation rules where a licensee has defaulted without such legal protections. As we explain above,<sup>271</sup> Alpine cannot use the course of those negotiations as a justification for avoiding the consequences of its default.<sup>272</sup>

81. We also take issue with Alpine’s premise that the Commission had a duty to reduce or eliminate Alpine’s debt. It did not. Alpine participated in the auctions process voluntarily, entered into installment agreements responsible for knowing the rules applicable to those agreements, and elected not to reduce its licensed spectrum and associated debt when all C block licensees with installment payments had the opportunity to do so.<sup>273</sup> The Commission’s strict enforcement of the automatic cancellation rules not only is not a breach of fiduciary duty, it is essential for a fair, effectively administered auctions program.

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loan alleging reliance on the bank loan officer’s advice. Finally, in *United Teachers Associates Insurance Co. v. Mackeen & Bailey Inc.*, 99 F.3d 645 (5th Cir. 1996), the court held that a fiduciary relationship could exist between an insurance company and its actuary. None of these cases supports Alpine’s claim that the Commission breached a duty to Alpine by strictly enforcing its installment payment default rules.

<sup>268</sup> See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd 2941, 2945-46 ¶ 10 (1994) (adopting rules for auctions of narrowband PCS licenses); *Id.*, *Fifth Report and Order*, 9 FCC Rcd 5532, 5534 ¶ 1, 5535-36 ¶¶ 6-7 (2004) (adopting rules for auctions of broadband PCS licenses).

<sup>269</sup> See, e.g., *Southern MO&O*, 15 FCC Rcd at 25,107 ¶ 10 (noting that a licensee’s failure to properly organize and manage its business dealings is not a unique circumstance that warrants the granting of a waiver); *BDPCS MO&O*, 15 FCC Rcd at 17,604-07 ¶¶ 27-30.

<sup>270</sup> Alpine Petition at 26-27.

<sup>271</sup> See *supra* Section III.B.1.

<sup>272</sup> We note that the Commission previously offered all broadband PCS C block licensees the opportunity to restructure their installment payment obligations to the Commission. See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997); *id.*, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998). See also “Wireless Telecommunications Bureau Announces Broadband Personal Communications Services C Block Elections,” *Public Notice*, 13 FCC Rcd 16,705 (WTB 1998); “Wireless Telecommunications Bureau Announces Broadband Personal Communications Services (PCS) C Block Unconditional Elections,” *Public Notice*, 13 FCC Rcd 17,434 (WTB 1998).

<sup>273</sup> See *supra* n.272.

82. ***Alleged New Policies.*** Alpine also argues that the Commission violated Alpine’s rights by creating “new policies” to Alpine’s detriment.<sup>274</sup> Specifically, Alpine suggests that the staff denial of its waiver request deviates from Commission precedent. To sustain this contention, Alpine relies on three decisions, two of which were adopted before the Commission instituted its installment loan program, and none of which has anything to do with the Commission’s payment rules.<sup>275</sup> The Commission has held that waivers of other rules, even those including other payment deadlines (such as those involving withdrawal, upfront, and down payment rules), do not support waiver of installment payment rules, because the purpose of and procedures attending other rules are different from those underlying the installment payment deadlines and automatic license cancellation rule.<sup>276</sup> The sorts of waivers at issue in the decisions cited by Alpine involve none of the policy considerations relevant to the underlying purposes of the installment rules, and we, accordingly, find that they do not justify reversal of the denial of Alpine’s waivers.

**F. GLH Was Not Entitled to a Hearing Prior to the Automatic Cancellation of The Licenses**

83. GLH argues that the automatic cancellation of a license amounts to a revocation and should therefore be subject to the Commission’s hearing procedures.<sup>277</sup> As explained herein, however, parties are not statutorily entitled to a pre-cancellation revocation hearing.

84. As a general matter, section 301 of the Communications Act makes clear that Commission licenses are granted for the use, but not the ownership, of radio frequencies and that no Commission-issued license “shall be construed to create any right, beyond the terms, conditions, and periods of the license.”<sup>278</sup> In keeping with section 301, the Supreme Court has indicated that licensees do not hold property rights in licenses,<sup>279</sup> and the Commission has held that licensees have no vested interest in any frequency licensed to them.<sup>280</sup> Thus, Commission licensees hold only those rights established by the terms and conditions of the licenses issued to them. The Commission’s automatic cancellation rules reflect the fact that one of the conditions of holding a license subject to the installment payment program

<sup>274</sup> Alpine Petition at 27-29.

<sup>275</sup> Alpine Petition at 28 (citing T-Com, Inc. and American Paging, Inc. *et al.*, *Memorandum Opinion and Order*, 5 FCC Rcd 6691, 6693 ¶ 14 (1990); Mobilfone Service, Inc., 48 RR 2d 1626 (CCB 1981); and Rush Network Corp. Request for Extension of Time to Construct a 220-222 MHz Commercial Nationwide Land Mobile Radio System, *Order*, 12 FCC Rcd 9731 (WTB/CWD 1997)). These three cases concern waivers granting an extension of time outside the payment context.

<sup>276</sup> See *21<sup>st</sup> Century*, 15 FCC Rcd at 25,121-23 ¶¶ 17-20.

<sup>277</sup> GLH AFR at 13-16 (arguing that a hearing was required before the Commission could “revoke” the licenses through automatic cancellation, per 47 U.S.C. § 312).

<sup>278</sup> 47 U.S.C. § 301.

<sup>279</sup> See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (“The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.”).

<sup>280</sup> Amendment of the Commission’s Rules Regarding Maritime Automatic Identification Systems, WT Docket No. 04-344, *Report and Order and Further Notice of Proposed Rule Making and Fourth Memorandum Opinion and Order*, 21 FCC Rcd 8892, 8925-26 ¶ 46 (2006) (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), and finding that the Commission has consistently upheld the principle that no licensee obtains any vested interest in any frequency). Moreover, throughout the history of the Commission’s auctions program, the consequence of defaults on installment payments has been the same for all licensees:

A default on an installment payment subjects the licensee to the license-cancellation-plus-debt-collection rule. In other words, the licensee loses the license, is not refunded its prior installment payments, and is subject to collection of the balance of the debt.

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

is full and timely payment. If that condition is not satisfied, the license authority lapses under its own terms, and the license is thus deemed automatically cancelled.<sup>281</sup> Accordingly, such a cessation of license authority does not constitute a Section 312 license revocation, and the Section 312 hearing requirements are therefore inapplicable.<sup>282</sup> Nor do the Commission's rules make any provision for a hearing prior to the cancellation of licenses for failure to meet installment payment obligations. Indeed, the nature of an automatic cancellation, the language on the subject licenses themselves, and the rules by their very operation, provide for automatic license cancellation without any action by the Commission in such circumstances.<sup>283</sup>

85. The Bureau properly disposed of this argument in the *GLH Order on Reconsideration*, and GLH raises no new arguments.<sup>284</sup> In accordance with Commission and judicial precedent regarding automatic license cancellation, and pursuant to the Commission's rules, a license cancels automatically, outside of the provisions of section 312 and without prior recourse to hearing, if the licensee fails to abide by one of the conditions for holding that license, such as the full and timely payment requirement that applies to licenses held under the installment payment program.<sup>285</sup>

#### IV. CONCLUSION

86. As discussed above, Alpine, CommNet, GLH, Inforum, Lancaster, Leeds, TVCN, and Virginia have not shown that the decisions denying their requests for waiver of the Commission's installment payment rules were in error. We therefore deny their requests to reverse those decisions.

#### V. ORDERING CLAUSES

87. 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 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Alpine PCS, Inc. on February 28, 2007, is DENIED.

88. IT IS FURTHER 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 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by CommNet Communications Network, Inc. on June 7, 2007, is DENIED. IT IS FURTHER ORDERED that the Supplement to Petition for Reconsideration filed by CommNet Communications Network, Inc. on June 8, 2007, is DISMISSED.

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<sup>281</sup> *Morris Appellate Opinion*, 566 F.3d at 192 (upholding FCC's automatic cancellation of licenses for failure to satisfy full and timely payment requirement, explaining that appellant's "licenses were thus contingent on [its] timely payment of all amounts owing; once [appellant] failed to make the . . . payments [by the final due date], the license themselves also lapsed"). *Cf. National Science and Technology Network, Inc. v. FCC*, 397 F.3d 1013 (D.C. Cir. 2005) (affirming automatic license cancellation for failure to meet an express license condition – *i.e.*, construction requirements); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 740 (D.C. Cir. 1974) ("When an applicant accepts a government permit which is subject to certain conditions, he cannot later assert alleged rights which the permit required him to surrender in order to receive it.").

<sup>282</sup> *Morris Appellate Opinion*, 566 F.3d at 192 (rejecting appellant's contention that FCC violated its administrative due process rights by denying it an administrative hearing prior to cancellation of licenses for failure to make full and timely payment, observing that appellant's licenses were conditioned on such payment, and that appellant's licenses, and all rights thereunder, lapsed once appellant failed to make such payment); *cf. P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) (holding that Commission's removal of authority to licensee to operate on 15 of the 20 channels originally authorized by license was not a 47 U.S.C. § 316 license modification and therefore did not trigger any 47 U.S.C. § 316 hearing rights, because right to use the 15 channels was conditioned on satisfaction of loading requirement, a condition that licensee had failed to fulfill).

<sup>283</sup> See 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>284</sup> *GLH Order on Reconsideration*, 22 FCC Rcd at 2420-21 ¶¶ 23-24.

<sup>285</sup> *Morris Appellate Opinion*, 566 F.3d at 192.

89. IT IS FURTHER 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 filed by GLH Communications, Inc. on March 9, 2007, is DENIED. IT IS FURTHER ORDERED that the Supplement to Application for Review filed by GLH Communications, Inc. on November 1, 2007, is DISMISSED.

90. IT IS FURTHER 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 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Inforum Communications, Inc. on February 9, 2004, is DENIED. IT IS FURTHER ORDERED that the Supplement to Petition for Reconsideration filed by Inforum Communications, Inc. on July 23, 2004, is DISMISSED.

91. IT IS FURTHER 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 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Lancaster Communications, Inc. on March 9, 2007, is DENIED.

92. IT IS FURTHER 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 filed by Allen Leeds on April 16, 2007, is DENIED.

93. IT IS FURTHER 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 filed by TV Communications Network, Inc. on February 28, 2007, is DENIED. IT IS FURTHER ORDERED that the Supplement to Application for Review filed by TV Communications Network, Inc. on November 1, 2007, is DISMISSED.

94. IT IS FURTHER 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 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Virginia Communications, Inc. on February 28, 2007, is DENIED. IT IS FURTHER ORDERED that the Supplement to Petition for Reconsideration filed by Virginia Communications, Inc. on January 15, 2008, is DISMISSED.

95. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by Paradise Cable, Inc. on February 9, 2004, is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary