Dear Messrs. Fox and Taylor:

This letter responds to the Petition filed on behalf of Capital Two-Way Communications, Inc. (“petitioner”) requesting that the Auctions and Industry Analysis Division waive the Commission’s installment payment rules.1 In the alternative, the Petition requests a grace period pursuant to the installment payment rules that were in effect at the time the two licenses were awarded to Capital Two-Way Communications, Inc. and Everest Communications, Inc. (“Capital/Everest”).2 For the reasons set forth below, we deny the Petition.

On April 16, 1996, the Commission granted Capital/Everest two 900 MHz Specialized Mobile Radio (“SMR”) licenses from Auction No. 7.3 As a small business, Capital/Everest was eligible to participate in the Commission’s installment payment plan for 900 MHz SMR licenses.4 After grant of the

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2 Petition at 1-2.


licenses, only seven installment payments were made on each license. On December 1, 1998, the last such payment was made when the Commission received the May 31, 1998 installment payment for each license. After that date, no additional payments were made on either of the licenses.

The Commission’s installment payment rules in effect after March 16, 1998 provided that if a licensee did not make full and timely payment of an installment, a 90-day non-delinquency period was automatically granted.\(^5\) This was immediately followed by an automatic 90-day grace period if full payment was not made during the non-delinquency period.\(^6\) Licenses automatically cancelled once this 180-day period had elapsed.\(^7\) Thus, under the installment payment rules in effect, the licenses cancelled automatically for failure to make full and timely payment.

Nine months after the last payment was made on the licenses, and after the licenses had automatically cancelled, the instant Petition was filed.\(^8\) Petitioner argues that a waiver should be granted because service to the public would be delayed by a future auction of licenses for the same spectrum,\(^9\) and because an assignment application is pending that would assign the licenses to an entity with the financial means to make the installment payments.\(^10\) For a waiver of the Commission’s rules to be granted, one of two tests must be met. The entity requesting the waiver must demonstrate either that: (1) the underlying purpose of the rules would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest or, (2) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.\(^11\) As we explain below, the instant Petition failed to establish grounds for a waiver.

The Petition fails to establish that the underlying purpose of the Commission’s rules would not be served by their application in this instance. The argument that grant of this waiver would speed service to the public ignores the fact that grant of such a waiver would undermine the auction and licensing process.

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\(^8\) Petition.

\(^9\) Petition at 3.

\(^10\) Petition at 2-3.

\(^11\) 47 C.F.R. §1.925.
The licenses were conditioned upon the full and timely performance of the payment obligations, which the licensee failed to fulfill. The Commission has repeatedly emphasized the importance of full and timely payment. Strict enforcement of payment rules enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial capacity and that spectrum is awarded to those qualified bidders who value the spectrum most. Moreover, the Commission has held that the ability to make installment payments is evidence of a licensee’s ability to access the capital necessary to both pay for the license and provide service to the public. Insisting that licensees demonstrate their ability to pay as a condition to holding licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won licenses in the auctions and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.

Turning to the second part of the waiver standard, there is nothing unique or unusual presented by the Petition. The representation that a pending license assignment would put the licenses in the hands of a third party with the means to make payments is unremarkable. The Commission’s rules require that the licensee make timely and full payment on its licenses. Thus, the Petition does not provide a basis for a grant of a waiver of the Commission’s installment payment rules.

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12 47 C.F.R. § 90.812(a) (1996) (“An MTA license issued to an eligible small business that elects installment payments will be conditioned on the full and timely performance of the license holder’s quarterly payments.”); see also Dallas Security Agreement at ¶ 2 (“The debtor recognizes that its continued retention of the License, and rights to operate as a Commission licensee thereunder, is conditioned upon compliance with all orders and regulations applicable to the Licensee and the Communications Act of 1934, as amended”); San Antonio Security Agreement at ¶ 2 (contains the same language as in the Dallas Security Agreement).


15 See NextWave Order on Reconsideration, 15 FCC Rcd 17500.


As an alternative argument, the petitioner contends that it should not be subject to the Commission’s installment payment rules in effect when its licenses cancelled. Rather, the petitioner maintains that the Commission should apply the former Part 1 rules that were in effect when the licenses were granted. The Commission’s former Part 1 rules provided that any licensee whose installment payment was more than ninety days past due was in default, unless the licensee properly filed a grace period request. In the Part 1 Third Report and Order, the Commission modified the installment payment grace period provisions as applied to all licensees participating in an installment payment plan at that time. The petitioner argues that application of the modified rules (“new Part 1 rules”) would constitute impermissible retroactive rulemaking. The Commission rejected this argument in the Order on Reconsideration of the Part 1 Third Report and Order and concluded that the new Part 1 rules do not violate the prohibitions on retroactivity under the Administrative Procedure Act (“APA”). The Petition does not provide a basis to depart from Commission precedent on this issue. Further, even under the old Part 1 rules, the waiver request, filed nine months after its last payment, was clearly untimely.

Finally, the petitioner erroneously contends that its situation is analogous to that of TE-MCG. In TE-MCG, the Wireless Telecommunications Bureau recognized a constructive waiver of the Commission’s rules where installment payments were accepted after the installment payment deadlines had passed. However, in this instance, the licensee ceased making payments and did not file a request for a waiver of the Commission’s rules until nine months after its last installment payment. Thus, the factual circumstances presented here are clearly distinguishable from TE-MCG.

For the reasons detailed above, the instant Petition requesting a waiver of the Commission’s installment payment rules, or in the alternative, requesting a grace period is DENIED.

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18 Petition at 4.
19 47 C.F.R. § 1.2110(e)(4)(ii) and (iii) (1996).
21 Petition at 4-5.
24 Petition at 5-6.
26 Petition.
This action is taken pursuant to sections 1, 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309(j) and the authority delegated pursuant to section 0.331 of the Commission’s Rules, 47 C.F.R. § 0.331.

Sincerely,

Margaret Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau