DA 01-170

January 23, 2001

J. Jeffrey Craven, Esquire
Patton Boggs, LLP
2550 M Street, NW
Washington, DC 20037-1350

Re: Eligibility Status of IVIDCO, L.L.C. and Contingent Waiver Request

Dear Mr. Craven:

This letter responds to your correspondence on behalf of IVIDCO, L.L.C. ("IVIDCO")[1] requesting reconsideration of the Auctions Finance and Market Analysis Branch ("Branch") determination[2] that IVIDCO is ineligible to participate in the restructuring plan adopted in the Commission's *218-219 MHz Order*.[3] IVIDCO contends that it had either a pending grace period or waiver request on file with the Commission prior to its missed payment of March 31, 1997. As such, IVIDCO asserts that its missed payment should not have resulted in its default and the automatic cancellation of its licenses pursuant to section 1.2110 of the Federal Communication Commission's ("Commission") rules.[4] Thus, IVIDCO contends that it should be eligible to participate in the 218-219 MHz Service restructuring plan. In the alternative, IVIDCO requests that the Auctions and Industry Analysis Division ("Division") now grant a waiver of the Commission's default and automatic license cancellation rules and reinstate IVIDCO's licenses, making it eligible to participate in the 218-219 MHz Service restructuring plan.[5] In addition, subsequent to the above referenced

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1 Letter to Rachel Kazan, Chief, Auctions Finance and Market Analysis Branch, Wireless Telecommunications Bureau, Federal Communications Commission, from J. Jeffrey Craven, Esq., dated Feb. 4, 2000 ("February 4, 2000 Letter"); Letter to Rachel Kazan, Chief, Auctions Finance and Market Analysis Branch, Wireless Telecommunications Bureau, Federal Communications Commission, from J. Jeffrey Craven, Esq., dated May 2, 2000 ("May 2, 2000 Letter"); and Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Communications Bureau, Federal Communications Commission, from J. Jeffrey Craven, Esq., dated January 11, 2001 ("January 11, 2001 Letter").

2 Letter to Marilyn F. Smith, IVIDCO, L.L.C., from Rachel Kazan, Chief, Auctions Finance and Market Analysis Branch, Wireless Telecommunications Bureau, Federal Communications Commission, dated January 6, 2000 ("*January 6, 2000 IVIDCO Ineligibility Letter*").

3 Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, FCC 99-239, 15 FCC Rcd 1497 (1999) ("*218-219 MHz Order"*).

4 47 C.F. R. § 1.2110 (1994).

5 *See generally* February 4, 2000 Letter.

letters, IVIDCO requested access to all grace period requests filed by every licensee in the 218-219 MHz Service.[6] For the reasons set forth below, we deny IVIDCO's request to be determined eligible to participate in the restructuring plan and deny its waiver request. However, we grant IVIDCO's request to have access to the grace period requests filed by current and former 218-219 MHz Service licensees. As the documents requested contain financial information particular to the current and former licensees, all identifying information will be redacted from the documents.

1. Background

On September 10, 1999, the Commission issued the *218-219 MHz Order* which modified the regulations governing the licensing of the 218-219 MHz Service (formerly known as IVDS) to maximize the efficient and effective use of the band.[7] The *218-219 MHz Order*, among other things, modified service and technical rules for the band and extended the license term from five to ten years.[8] The *218-219 MHz Order* also announced the Commission's decision to adopt a financial restructuring plan for "Eligible Licensees." Eligible Licensees are licensees that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules.[9] "Ineligible Entities" are former licensees that made second down payments and: (i) made some installment payments, but were not current in their installment payments as of March 16, 1998, and did not have a grace period request on file in conformance with the former rules; or (ii) entities that never made any installment payments and did not have a timely filed grace period request on file.[10] Ineligible Entities are not entitled to participate in the 218-219 MHz Service restructuring plan as they lost their licenses through default.[11] However, Ineligible Entities will be granted debt forgiveness for any outstanding balances owed and will be refunded their previously paid installment payments.[12]

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6 Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from J. Jeffrey Craven, Esq., dated July 24, 2000 ("July 24, 2000 Letter").

7 *218-219 MHz Order*, 15 FCC Rcd at 1506 ¶ 15.

8 *Id*. at 1517 ¶ 31.

9 *Id*. at 1520 ¶ 37.

10 *Id*. at 1520 ¶ 38.

11 *Id*. at 1518 ¶ 33 (citing 47 C.F.R. § 1.2110 (1994)); *see also* Public Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses, NextWave Personal Communications, Inc., and NextWave Power Partners, Inc., Petition for Reconsideration, Settlement Request Pursuant to DA 99-745 For Various Broadband PCS C Block Licenses, *Order on Reconsideration*, 15 FCC Rcd 17500 (2000) ("*NextWave Order on Reconsideration*"); *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999), *mandate enforced by* 217 F.3d 125 (2d Cir. 2000), *cert. denied*, 2000 WL 795201 (Oct. 10, 2000) (No. 99-1980); *Mountain Solutions v. FCC*, 197 F.3d 512 (D.C. Cir. 1999) (upholding the Commission's decision, in a PCS licensing matter, to deny a waiver of its rule requiring a winning bidder to timely submit both its first and second down payment before the Commission will grant a license).

12 *218-219 MHz Order*, 15 FCC Rcd at 1520 ¶ 38; Implementation Procedures For The Report And Order And Memorandum Opinion And Order Addressing the 218-219 MHz Services (Formerly Known As Interactive Video And Data Services (IVDS)), *Public Notice*, DA 00-900, 15 FCC Rcd 7329 (WTB 2000) (noting that the Department of Justice authorized the reduction of debt owed to the United States in accordance with the debt relief provisions of the *218-219 MHz Order*).

In January 2000, in accordance with the rules set forth in the *218-219 MHz Order*, current and former 218-219 MHz licensees were notified of their eligibility status with regard to the restructuring plan. IVIDCO was notified that it was an Ineligible Entity.[13] IVIDCO acknowledges that it failed to make the March 31, 1997 installment payment, making it more than ninety days delinquent as of March 16, 1998.[14] This missed payment, in conjunction with the Commission's records reflecting IVIDCO's failure to file a timely grace period request, informed the Branch's determination of IVIDCO's eligibility status.

Upon notification of its ineligibility, IVIDCO sought reconsideration of the Branch's decision.[15] IVIDCO contends that it had either a pending grace period or waiver request on file with the Commission before its missed payment of March 31, 1997.[16] IVIDCO relies upon the following five documents to support its contention: (1) an April 18, 1996 Letter; (2) a September 4, 1996 Rule Making Petition; (3) a November 18, 1996 Letter; (4) a February 10, 1997 Letter; and (5) a January 28, 1997 Rule Making Petition Amendment.[17] In the alternative, IVIDCO now requests a waiver of the Commission's default and automatic license cancellation rules, thereby reinstating IVIDCO's licenses and making it eligible to participate in the restructuring plan.[18]

2. <u>IVIDCO Failed To File A Timely Grace Period Request</u>

Grace periods were established by the Commission in order to protect licensees utilizing the installment payment program that experience temporary financial hardship from losing their license(s) through default. In the *1995 IVDS Omnibus Order*[19] and the *IVDS Grace Period Public Notice*,[20]

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13 *January 6, 2000 IVIDCO Ineligibility Letter*.

14 *See generally* February 4, 2000 Letter; May 2, 2000 Letter.

15 *See* February 4, 2000 Letter; May 2, 2000 Letter. In its letters, IVIDCO does not contend that it has provided service in the six years since grant of the license.

16 In its February 4, 2000 Letter, IVIDCO stated that five filings either "separately or collectively clearly constitute a standing waiver request." February 4, 2000 Letter at 1. However, in ex parte oral and written communications, IVIDCO contends that in fact, three of the filings are grace period requests. Ex parte presentation by Jeffrey Craven on June 1, 2000; Summary Sheet provided by Jeffery Craven on June 1, 2000.

17 Letter to Mr. William Caton, Secretary, and Ms. Regina Dorsey, Federal Communications Commission, from J. Jeffrey Craven, Esq., dated April 18, 1996 ("April 18, 1996 Letter"); Petition for Rule Making, from several IVDS licensees, filed Sept. 4, 1996 ("September 4, 1996 Rule Making Petition"); Letter to Regina Dorsey, Chief, Office of Billings and Collections, Federal Communications Commission, from J. Jeffrey Craven, Esq., dated Nov. 18, 1996 ("November 18, 1996 Letter"); Letter to Jerome Fowlkes, Chief Financial Analyst, Wireless Telecommunications Bureau, Federal Communications Commission, from J. Jeffrey Craven, Esq., dated Feb. 10, 1997 ("February 10, 1997 Letter"); Letter Amendment to Petition for Rule Making, from several IVDS licensees, filed Jan. 28, 1997 ("January 28, 1997 Rule Making Petition Amendment").

18 *See generally* February 4, 2000 Letter.

19 Interactive Video and Data Service (IVDS) Licensees, Various Requests by Auction Winners, *Order*, FCC No. 95-479, 11 FCC Rcd 1282 (1995)("*1995 IVDS Omnibus Order*").

20 Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying by Installment Payments, *Public Notice*, DA 95-1617, 10 FCC Rcd 10724 (1995) (WTB)

licensees were cautioned that in accordance with section 1.2110 of the Commission's rules, if a licensee individually required financial assistance it should request a three- or six-month grace period during the first ninety days following any missed installment payments.[21] Licensees were further cautioned that failure to submit payment within ninety days of the due date, or file a timely grace period request, would result in the default and automatic cancellation of its license(s).[22] However, if a licensee were granted a grace period, it would not need to make installment payments during the grace period.[23]

IVIDCO contends that three documents in particular, the April 18, 1996 Letter, the September 4, 1996 Rule Making Petition, and the February 10, 1997 Letter, either individually or collectively constitute a grace period request.[24] As discussed below, however, IVIDCO's attempt to re-characterize these three documents as a singular request for a grace period is unavailing, as these documents (as well as the other two cited documents) addressed altogether different matters.

The first document, the April 18, 1996 Letter, was a request that the Commission accept IVIDCO's then late first installment payment.[25] This request was limited to a situation involving one payment in April of 1996, and it did not relate to the critical missed March 31, 1997 payment.[26] The

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("*IVDS Grace Period Public Notice*"); *see also* Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction, *Public Notice*, Mimeo 54270 (rel. June 8, 1995) (WTB) ("*PCS Grace Period Public Notice*") (clarified grace period rule in the context of Personal Communications Services C block auction).

21 *1995 IVDS Omnibus Order*, 11 FCC Rcd 1282; *IVDS Grace Period Public Notice*, 10 FCC Rcd 10724.

22 *IVDS Grace Period Public Notice*, 10 FCC Rcd 10724 ("IVDS Licensees that elect to pay for their license in installments will have their license conditioned upon full and timely performance of all installment payment obligations. The Commission's rules provide that a licensee will be deemed in default on its installment payments if it is more than 90 days delinquent in making a payment to the government."); *see also 218-219 MHz Order* 15 FCC Rcd at 1518 ¶ 33 (citing 47 C.F.R. § 1.2110 (1994)).

23 *IVDS Grace Period Public Notice*, 10 FCC Rcd 10724. In 1998, the Commission amended the installment payment rules to provide for two automatic grace periods of ninety days each, subject to late fees. The 1998 amendment of the installment payment rules did not apply to installments due prior to the effective date, March 16, 1998. *See* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use 4660-4685 MHz, Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374, 436 (1997) ("*Part 1 Third Report and Order*"); 47 C.F.R. § 1.2110(f)(4)(ii)(iii)(1998). In addition, these Part 1 rules have recently been amended to reflect the use of quarters for implementation of the Commission's payment deadlines and attendant grace period rules. *See* Amendment of Part 1 of the Commission's Rules-Competitive Bidding Procedures, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and the Fourth Further Notice of Proposed Rulemaking*, FCC 00-274 (rel. August 14, 2000) ("*Part 1 Third Report and Order Recon*"). The amended Part 1 rules became effective on October 30, 2000, 60 days after the date of publication in the Federal Register. 65 Fed. Reg. 52323-01 (Aug. 29, 2000).

24 In both oral and written ex parte communications, counsel for IVIDCO clarified that it considered the filings detailed in its February 4, 2000 Letter as waiver requests, to actually be grace period requests. Ex parte presentation by Jeffery Craven on June 1, 2000; Summary Sheet provided by Jeffery Craven on June 1, 2000.

25 IVIDCO had an automatic 90-day grace period, from the January 5, 1996 installment payment due date, in which to remit payment or file a grace period request. The automatic 90-day grace period ended April 4, 1996.

26 The Commission's acceptance of the late payment does not shield IVIDCO from the consequences of

Commission accepted IVIDCO's late payment without penalty. Tellingly, the April 18, 1996 Letter made no mention of financial difficulty and/or a need to be relieved of its pending or future payment obligations, and there was nothing else that could conceivably be construed to relate to IVIDCO's March 1997 payment obligation.

The second document, the September 4, 1996 Rule Making Petition, was filed by several IVDS licensees requesting a change in the licensing terms for the 218-219 MHz Service. IVIDCO argues that the September 4, 1996 Rule Making Petition is a grace period request because it sought a "restructured payment schedule," which is one element of section 1.2110(e)(4)(ii) of the Commission's rules addressing grace period requests.[27] The request for a restructured payment schedule, however, was made in the context of a proposed rule change that would have extended the license term of all 218-219 MHz Service licensees from five years to ten years. Moreover, this rule making petition was clearly a generalized request, making no mention of any specific factors relevant to grace period requests such as a licensee's financial difficulties. Furthermore, there is nothing in the September 4, 1996 Rule Making Petition to link it to the March 31, 1997 installment payment deadline that IVIDCO missed, not even a reference to any need to be relieved of future installment payments (for any of the joint filers, including IVIDCO). In sum, the jointly filed September 4, 1996 Rule Making Petition was a request for a rule change, not a request for a grace period. (Similarly, the January 28, 1997 Rule Making Petition Amendment seeking a repeal of certain service rules, was also not a grace period request.)

Finally, the third document, the February 10, 1997 Letter, does not even mention IVIDCO, by name or license number, nor does it state a request for a suspension of installment payments for any licensee. Rather, the February 10, 1997 Letter was filed by an attorney on behalf of several unnamed IVDS licensees, although IVIDCO attempts to link itself to the letter by submitting a bill it received from this attorney, in which the February 10, 1997 Letter is referenced.[28] In fact, the letter simply summarizes a meeting with a member of the FCC's staff regarding general discussions about the grace period request rules. The February 10, 1997 Letter goes on to assert that a sentiment exists among IVDS licensees that the Commission should generally suspend installment payment obligations during the rulemaking process, thereby relieving licensees of the need to seek individualized relief via the grace period request process. Thus, the letter, on its face, distinguishes itself from a request for a grace period.

These documents, either individually or collectively, do not constitute a grace period request.[29] It is apparent that at the time these documents were filed IVIDCO did not consider them to be grace period requests,[30] and the substance of the documents does not support IVIDCO's attempt to

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subsequently failing to meet the Commission's installment payment rules. *See SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999); *see also Chem-Haulers, Inc. v. ICC*, 565 F.2d 728, 730 (D.C. Cir. 1977); *Texas International Airlines v. CAB*, 458 F.2d 782, 785 (D.C. Cir. 1971).

[27] 47 C.F.R. §1.2110(e)(4)(ii)(1994).

[28] Invoice No. 15469 to Marilyn Smith, IVIDCO, L.L.C., from Patton Boggs, L.L.P., billed by J. Jeffrey Craven for professional services rendered through 02/28/97, dated March 17, 1997.

[29] The only document not discussed in this section, the November 18, 1996 Letter, is merely an attempt to schedule a meeting; and, therefore is also not a grace period request.

[30] In an ex parte presentation on June 1, 2000, IVIDCO stated that it missed its March 1997 payment because it anticipated that a third party would make the payment. Ex Parte Meeting with Mr. Jeffrey Craven on June 1, 2000. This admission clearly undermines IVIDCO's assertion that any of these documents constitute

re-characterize the filings. Thus, we find that IVIDCO failed to file a timely grace period request in anticipation of the missed March 31, 1997 payment. We decline to accept IVIDCO's after the fact rationalization that the above documents were intended as, or amount to, pending grace period requests that shield IVIDCO from the consequences of failing to meet its payment obligations.

3. IVIDCO Did Not Have A Pending Waiver Request On File

In addition to IVIDCO's contention that it had a grace period request on file with the Commission, IVIDCO also characterized its filings as pending waiver requests.[31] As an initial matter, we note that a waiver request is not equivalent to a grace period request; and, even if IVIDCO had a waiver request on file with the Commission, it would not render IVIDCO eligible for participation in the restructuring plan. Grace periods were intended to protect licensees experiencing temporary financial difficulty from default and automatic license cancellation by suspending the licensee's payment obligation. In contrast, a waiver request seeks an exception to specific Commission rules, and until the Commission grants a waiver request, licensees are not relieved of the obligation to comply, and/or the consequences of non-compliance, with the Commission's rules.[32] Unlike a grace period request, the mere act of filing a waiver request does not suspend a licensee's installment payment obligation.

As explained above, IVIDCO's attempt to recast the April 18, 1996 Letter, the September 4, 1996 Rule Making Petition and the February 10, 1997 Letter as grace period requests is unpersuasive. Any attempt to portray these documents as a request for waiver of the installment payment rules for the March 31, 1997 payment is similarly flawed. The two filings not previously discussed in detail, the November 18, 1996 Letter and the January 28, 1997 Rule Making Petition Amendment, also make no mention of a request for waiver of the installment payment rules. The November 1996 Letter memorializes IVIDCO's attorneys' efforts to schedule a meeting and the January 28, 1997 Rule Making Petition Amendment requests the repeal of certain service rule sections, unrelated to the installment payment rules. It is apparent that none of the filings submitted by IVIDCO request, or state with any specificity, the desire or need to waive the applicable Commission rules. As IVIDCO did not request a waiver of the Commission's installment payment rules in these documents, we reject IVIDCO's attempt to characterize its filings as pending waiver requests.

4. IVIDCO Fails To Demonstrate Grounds For A Waiver Of The Default Rules

In its alternative argument, more than three years after the missed March 1997 payment, IVIDCO now requests a waiver of the applicable default and automatic license cancellation rules.[33] In order for the Commission to grant a waiver of its rules, one of two tests must be met. The entity requesting a waiver must demonstrate that either (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application in the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances in the

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either a grace period request, or a pending waiver request.

[31] In its February 4, 2000 Letter, IVIDCO stated that five filings either "separately or collectively clearly constitute a standing waiver request." February 4, 2000 Letter at 1.

[32] *See generally* In the Matter of Southeast Telephone, Inc., *Order*, DA 00-328 (rel. February 22, 2000); In the Matter of Bernard Pasquet, DA 00-122, *Order* (rel. January 25, 2000).

[33] February 4, 2000 Letter.

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.[34] IVIDCO's request does not meet either of these tests.

IVIDCO suggests that the underlying purpose of the Commission's rules would not be served by enforcement in this instance; and, it contends that enforcement would result in a further delay in service, contrary to the public interest.[35] Grant of IVIDCO's request would harm the overall auction structure. The underlying purpose of the default and automatic license cancellation rules, of which IVIDCO seeks a waiver, is to encourage licensees to timely and fully comply with their payment obligations, effectively utilize the spectrum, and ultimately maintain the integrity of the auction process.[36] Strict enforcement of the Commission's payment rules enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications and that spectrum is awarded to those qualified bidders who value the spectrum most. An efficient auction process will ultimately lead to the efficient assignment of licenses and speedy deployment of services. 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.[37] For the reasons stated above, we believe that IVIDCO has failed to demonstrate that the underlying purpose of the applicable default and automatic license cancellation rules would not be served by application in this instance, or that it would serve the public interest to waive enforcement.

IVIDCO also alleges that the Commission's procedures with respect to the payment notice and debt collection process, processing of requests for clarification of the rules and changes in the grace period rules, created confusion among licensees as to their payment obligations. IVIDCO contends that this confusion constituted unique or unusual circumstances that warrant granting a waiver to IVIDCO.[38] However, IVIDCO fails to demonstrate that it relied to its detriment on any of the above noted allegations, or that these alleged circumstances had any impact on IVIDCO's individual failure to comply with the Commission's installment payment rules. IVIDCO has clearly demonstrated that it was on notice and aware of its obligation to make the March 1997 installment payment. IVIDCO was also aware of the means by which it might have been excused from its payment obligation through the filing of a grace period request. Furthermore, the Commission provided ample notice to 218-219 MHz licensees regarding the Commission's payment rules.[39] Thus, IVIDCO has failed to demonstrate that it experienced the alleged confusion that it claims created unique or special circumstances requiring special consideration of its failure to comply with the installment payment rules as a result of unique or special circumstance requiring special consideration.

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[34] 47 C.F.R. § 1.925.

[35] *See* February 4, 2000 Letter at 5-6.

[36] The courts have recognized the importance of the Commission's default rules and affirmed the Commission's authority to enforce its rules. *See generally, Mountain Solutions*, 197 F.3d 512*; NextWave*, 200 F.3d 43.

[37] *See NextWave Order on Reconsideration*, 15 Fed Rcd 17500.

[38] February 4, 2000 Letter at 5.

[39] 48 C.F.R. § 1.2110(e)(4)(ii)(1994); *IVDS Grace Period PN*, 10 FCC Rcd 10724; *see also 1995 IVDS Omnibus Order*, 11 FCC Rcd at 1285 ¶ 19.

IVIDCO has failed to demonstrate that it meets either of the two tests put forth in the Commission's waiver rules. IVIDCO's waiver request is unsubstantiated and unpersuasive, particularly after full consideration of all of the factors in the *218-219 MHz Order* and Rule Making that culminated in relief for both Eligible Licensees and Ineligible Entities.

IVIDCO also contends that grant of the waiver request would be consistent with *Self Communications*,[40] *Lancaster Communications*,[41] *TE-MCG*,[42] and *Lakeland*. *Self Communications* is inapposite.[43] There, the Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, granted a request for waiver of the Commission's rules establishing license renewal terms and reinstated its license. The grace period or installment payment rules were not at issue in *Self Communications*. In that case, although Self Communications had expressed a desire to retain the license prior to the expiration date, it failed to timely file a renewal application. Based upon the totality of the circumstances, including the fact that Self Communications had made efforts to construct the station, the waiver was granted and the license reinstated.[44] However, a Notice of Apparent Liability was issued against Self Communications for willfully violating the Commissions rules.[45]

Lancaster Communications, *TE-MCG*, and *Lakeland* are equally inapplicable. As explained in the *NextWave Order on Reconsideration*, under the facts presented in *Lancaster Communications*, and *TE-MCG*, the Commission constructively waived the installment payment deadlines.[46] In *Lakeland*, the Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, found that although late payment could not revive an automatically cancelled license, the circumstances presented were consistent with previous cases, where, as a result of administrative oversight, the Commission has acknowledged that a constructive waiver of the installment payment deadlines had occurred.[47] Thus, the Policy and Rules Branch believed it appropriate to afford

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[40] Self Communications, Inc., Reinstatement Application for 218-219 MHz Service License KIVD0006, Chicago, Illinois and Request for Waiver of Sections 1.949(a) and 1.955(a)(1) of the Commission's Rules, DA 00-1134, *Order and Notice of Apparent Liability for Forfeiture* (rel. May 23, 2000) ("*Self Communications*").

[41] Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., Counsel for Lancaster Communications, Inc., DA 98-2052 (rel. Oct. 9, 1998) ("*Lancaster Communications*").

[42] Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Lloyd W. Coward, Esq., Counsel for TE-MCG Consortium, DA 99-258, 14 FCC Rcd. 2173 (1999) ("*TE-MCG*").

[43] January 11, 2001 Letter at 2-4. In addition, IVIDCO challenges the definition of Eligible Licensees adopted in the September 1999 *218-219 MHz Order*. Specifically, IVIDCO argues that definition unfairly favors licensees who were current in installments as of March 16, 1998 over licensees who filed untimely grace period requests. January 11, 2001 Letter at 4-5. Any challenge to the definition of Eligible Licensees should have been filed as a petition for reconsideration within 30 days of publication of the *218-219 MHz Order* in the federal register. 47 C.F.R. § 1.429. IVIDCO's untimely attempt to challenge the definition is rejected.

[44] *Self Communications*, ¶ 7.

[45] *Self Communications*, ¶ 8.

[46] *NextWave Order on Reconsideration*, 15 FCC Rcd at 17512-17513 (citations omitted).

[47] Lakeland PCS LLC And Cricket Licensee (Lakeland) Inc., For Assignment Of PCS License For Station KNLG741, File No. 0000191738, Public Notice Report No. 597, DA 00-2669, *Second Order on*

Lakeland similar treatment. In this case, there are no circumstances that could be construed as a constructive waiver of the requirement to file a grace period request.[48] Accordingly, IVIDCO has failed to establish constructive waiver of the grace period rules.

5. Document Request

IVIDCO requested[49] access to all grace period requests filed by current and former licensees in the 218-219 MHz Service.[50] The Division will make the requested documents available to IVIDCO. However, as the documents requested contain financial information particular to the current and former licensees, all identifying information will be redacted from the documents.

6. Conclusion

For the reasons detailed above, we find that IVIDCO did not file a timely grace period request and did not have a pending waiver request on file. Nor has IVIDCO demonstrated facts sufficient to justify a waiver of the Commission's default and automatic license cancellation rules.

For the reasons stated above, IVIDCO's petition for reconsideration of the Branch's decision regarding IVIDCO's eligibility to participate in the 218-219 MHz Service restructuring plan is DENIED.

For the reasons stated above, IVIDCO's February 2000 request for a waiver of the Commission's rules governing the 218-219 MHz Service restructuring plan to permit IVIDCO to become an Eligible Licensee is DENIED.

For the reasons stated above, IVIDCO's July 24, 2000 request for access to the grace period requests filed by 218-219 MHz licensees is GRANTED to the extent specified herein.

Reconsideration (rel. November 27, 2000) ("*Lakeland*") (citations omitted).

[48] Request for Extension of the C and F Block Installment Payments, WT Docket 97-82, 14 FCC Rcd 6080 (1999) (the Commission declined to grant a waiver of the resumption date for C block licensees as the Commission had committed no act that could reasonably be construed as constructively waiving the resumption date; had expressly refused to grant waiver requests of the resumption payment date; and distinguished *Cordell, Lancaster, TE-MCG* as situations that presented facts indicative of constructive waiver that were not present in Southeast), *aff'd Southeast v. Federal Communications Commission*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. 1999) (*per curiam*).

[49] *See* July 24, 2000 Letter.

[50] *See* 47 C.F.R. § 1.2110(e)(4)(ii) (1994).

This action is taken pursuant to sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 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