

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

In the matter of
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

Adopted: February 4, 2004

Released: February 11, 2004

By the Commission:

I. INTRODUCTION

1. In this Third Order on Reconsideration of the Third Report and Order ("Third Reconsideration Order"), we deny three petitions for reconsideration of the Commission's Part 1 Third Report and Order First Reconsideration Order, insofar as the petitions address the Commission's clarification of the inapplicability of Section 1.2104 of our rules to installment payment defaults.

II. BACKGROUND

A. Installment Payment Program

2. Currently, the Commission requires all auction winners of spectrum licenses to pay for their licenses prior to license grant. During the first couple of years of the auctions program, however, the Commission allowed qualified auction winners of licenses in certain services to pay for their licenses in

1 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 (2000) ("First Reconsideration Order" or "Part 1 Fifth Report and Order").

2 We addressed all other issues raised in these petitions and all other petitions filed for reconsideration of the First Reconsideration Order in Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, WT Docket No. 97-82, Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order, 18 FCC Rcd 10,180 (2003) ("Second Reconsideration Order") (recon. pending).

3 The Commission has made its installment payment program available to eligible auction winners of licenses in the following services: the 218-219 MHz Service, see 47 C.F.R. § 95.816; broadband Personal Communications Services (PCS) frequency block C, 47 C.F.R. § 24.711; broadband PCS frequency block F, 47 C.F.R. § 24.716; broadband PCS frequency block A (pioneers' preference licensees only), see American Personal Communications

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installments over the initial terms of their licenses,<sup>4</sup> during which time installment payment program participants had the use of their licenses. The first Commission auction for which installment payments were available was Auction No. 2 (218-219 MHz Service), which concluded on July 29, 1994. The last such auction was Auction No. 11 (broadband PCS F block), which ended on January 14, 1997. The Commission decided late in 1997 that it would suspend the installment payment program<sup>5</sup> and affirmed its decision in 2000.<sup>6</sup> Because their initial license term has not yet ended, many installment program participants remain in the program today.

## B. Post-Auction Payment and Application Requirements

3. The Commission's competitive bidding rules establish a series of payment and application requirements that all high bidders must meet prior to being granted a license. Ten days following a public notice announcing an auction's close, high bidders must make an initial down payment<sup>7</sup> (a "first down") and must also file an application for license grant (a "long-form" application).<sup>8</sup> Section 1.2110(g)(1) of the Commission's rules requires that installment payors make a first down of ten percent of their high bids;<sup>9</sup> whereas, other payors must, pursuant to Section 1.2107(b), make a first down of twenty percent.

4. A second payment is required of all bidders within ten days following release of a public notice establishing the payment deadline.<sup>10</sup> For installment participants, this second payment is known as a "second down" and must equal another ten percent of the high bid.<sup>11</sup> If installment payors miss the deadline for the second down, they may take up to another ten days to pay, provided that they also pay a five percent late fee.<sup>12</sup> For high bidders not making installment payments, the second payment is not

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Washington-Baltimore MTA #10 Frequency Block A, File No. 15000-CW-L-94, Call Sign: KNLF200, *Order*, 11 FCC Rcd 12,384 (1996); regional narrowband PCS, 47 C.F.R. § 24.309 (1994); 900 MHz SMR, *id.* § 90.812 (1995); and the Multipoint Distribution Service (MDS), *id.* § 21.960.

<sup>4</sup> 47 C.F.R. § 1.2110(g); *see id.* §§ 1.2110(b)(4)(x)(E),(d) (1994); 21.960; 24.309 (1994); 24.711; 24.716; 90.812 (1995); 95.816; American Personal Communications Washington-Baltimore MTA #10 Frequency Block A, File No. 15000-CW-L-94, Call Sign: KNLF200, *Order*, 11 FCC Rcd 12,384 (1996).

<sup>5</sup> Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking, WT Docket No. 97-82, 13 FCC Rcd 374, at 397 ¶ 38 (1997) ("*Part 1 Third Report and Order*").

<sup>6</sup> *Part 1 Fifth Report and Order*, 15 FCC Rcd 15,322 ¶ 55.

<sup>7</sup> Unless otherwise provided by public notice, Section 1.2107(b) sets the deadline at ten business days for non-installment payors; whereas, Section 1.2110(g)(1) sets the deadline for installment payors at ten calendar days. 47 C.F.R. §§ 1.2107(b); 1.2110(g)(1).

<sup>8</sup> *See id.* § 1.2107(c) for all high bidders.

<sup>9</sup> The amount required for a first down payment from installment payors for broadband PCS frequency block C licenses won in Auctions No. 5 and 10 and for 900 MHz SMR licenses won in Auction No. 7 was five percent. *See id.* §§ 24.711(a)(2) (1996), 90.811.

<sup>10</sup> Section 1.2109(a) sets the deadline at ten business days for non-installment payors; whereas, Section 1.2110(g)(2) sets the deadline for installment payors at ten calendar days. *Id.* §§ 1.2109(a); 1.2110(g)(1).

<sup>11</sup> *Id.* § 1.2110(g)(2). The amount required for a second down payment from installment payors for broadband PCS frequency block C licenses won in Auctions No. 5 and 10 and for 900 MHz SMR licenses won in Auction No. 7 was five percent. *See id.* §§ 24.711(a)(2) (1996), 90.811.

<sup>12</sup> *Id.* § 1.2110(g)(2).

another down payment, but rather the final or “full” payment for the license.<sup>13</sup> Should the full payment deadline be missed, these bidders also have another ten business days in which to make both the full payment and an additional five percent late fee.<sup>14</sup> For all high bidders, license grant occurs upon Commission receipt of this second payment.<sup>15</sup>

5. While the pre-licensing payment rules for installment program participants differ from those for non-participants, the consequences of not complying with these rules or with the long-form application requirements are the same for all bidders. All high bidders, including installment payors, that default or are disqualified *prior* to license grant must, pursuant to Section 1.2104(g)(2) of the Commission’s rules, pay the difference between their high bid and a lower winning bid at the subsequent auction (the “differential” payment), plus an additional three percent of either their high bid or the subsequent winning bid, whichever is lower (the “three percent” payment).<sup>16</sup> Within the auctions context, the “differential-plus-three-percent” payment requirement has been the rule for all pre-licensing defaults since the Commission’s adoption in 1994 of its original competitive bidding rules.

6. Installment payors, unlike other high bidders, are also subject to post-licensing payment requirements. Installment payments are due quarterly.<sup>17</sup> The rules allow for two grace periods following each quarterly deadline and establish late payment fee requirements for a licensee that makes a late installment payment during the grace periods.<sup>18</sup> Should a licensee fail to make an installment payment and associated late fees by the end of the second grace period, Section 1.2110(g)(4)(iv) dictates that an installment payor “shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures.”<sup>19</sup> Modifications to the grace period rules became effective in 1998,<sup>20</sup> however, the “license-cancellation-plus-debt-collection” rule for installment payment defaults has remained unchanged since it was first adopted in 1994.<sup>21</sup>

### C. Procedural History

7. In its February 1997 “*Part 1 First NPRM*,” the Commission sought “comment on whether licensees that default on installment payment obligations should be subject to the default payment provisions outlined in Section 1.2104(g), *i.e.*, the difference between the defaulting winner’s bid and the subsequent winning bid plus 3 percent of the lesser of these amounts.”<sup>22</sup> The Commission noted that installment payors that fail to remit their pre-license grant payments, *i.e.*, their initial or second down

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<sup>13</sup> *Id.* § 1.2109(a).

<sup>14</sup> *See id.* § 1.2109(a).

<sup>15</sup> *Id.* §§ 1.2109(a); 1.2110(g)(2)

<sup>16</sup> *Id.* § 1.2104(g)(2). In 2003, the Commission added Section 1.2104(g)(3), extending the provisions of paragraph (g)(2) to defaults on bids made in combinatorial bidding auctions. *See id.* § 1.2104(g)(3); *Second Reconsideration Order*, 18 FCC Rcd 10,180.

<sup>17</sup> 47 C.F.R. § 1.2110(g)(4).

<sup>18</sup> *Id.* § 1.2110(g)(4)(i)-(iii).

<sup>19</sup> *Id.* § 1.2110(g)(4)(iv).

<sup>20</sup> Competitive Bidding Proceeding, 63 Fed. Reg. 2315, 2327-29, 2343-46 (Jan. 15, 1998).

<sup>21</sup> *See* 47 C.F.R. § 1.2104(g)(2). In 2003, the Commission added Section 1.2104(g)(3), extending the provisions of paragraph (g)(2) to defaults on bids made in combinatorial bidding auctions. *See id.* § 1.2104(g)(3); *Second Reconsideration Order*, 18 FCC Rcd 10,180, 10,198-205.

<sup>22</sup> Amendment of 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, 5725 ¶ 75 (1997) (“*Part 1 First NPRM*”); *see* 47 C.F.R. § 1.2104(g) (1994).

payments, are subject to the differential-plus-three-percent payment rule of Section 1.2104(g) and noted further that if such licensees default post-license grant on an installment payment, they are subject to the license-cancellation-plus-debt-collection rule. However, the Commission observed that this rule is silent on whether defaulters on installment payments should also have to make an additional three percent payment. The Commission tentatively concluded that “a licensee that makes the necessary down payments but defaults on installment payments should not be exempt from the default payment provisions of Section 1.2104(g).”<sup>23</sup>

8. Nonetheless, in the December 1997 *Part 1 Third Report and Order*, the Commission decided against applying Section 1.2104(g) to licensees that default on installment payments, noting that most commenters on the issue had opposed the Commission’s tentative conclusion.<sup>24</sup> The Commission explained that its “current rules and installment payment terms [were] adequate to discourage defaults”:

The risk of losing its license should provide a licensee a strong incentive to avoid default. If, however, a default does occur, the conditions on the face of each license and the terms of the notes and security agreements executed by licensees provide the Commission appropriate remedies that will ensure that defaulted licenses are returned to the Commission for reauction and that all outstanding debts, as well as the Commission’s costs are recoverable.<sup>25</sup>

However, in two sentences of a later paragraph in the same order discussing cross defaults, the Commission indicated that installment payment defaulters *would* become subject to the default payment set forth in Section 1.2104(g) of the rules.<sup>26</sup> While the erroneous portion of one of those sentences was subsequently removed in an *erratum*,<sup>27</sup> the other sentence survived.

9. To eliminate the possibility of any ambiguity arising from these paragraphs, and in response to a petition requesting reconsideration,<sup>28</sup> the Commission, in its 2000 *First Reconsideration Order*, clarified “that licensees defaulting on installment payments (‘installment payment defaulters’) are not subject to Section 1.2104(g)(2).”<sup>29</sup> The Commission has received three petitions for reconsideration of this clarification,<sup>30</sup> which we consider today.

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<sup>23</sup> *Part 1 First NPRM*, 12 FCC Rcd at 5726 ¶ 77 (1997); see 47 C.F.R. § 1.2104(g) (1994).

<sup>24</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 443 ¶ 116 .

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* 13 FCC Rcd at 446 ¶ 122.

<sup>27</sup> 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, WT Docket No. 97-82, ET Docket No. 94-32, *Erratum to Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 4621 (1998).

<sup>28</sup> NextWave Telecom Inc., Petition for Reconsideration (filed Feb. 17, 1998) (“NextWave 1998 Petition”).

<sup>29</sup> *First Reconsideration Order*, 15 FCC Rcd at 15,315 ¶¶ 38-39.

<sup>30</sup> Petitions for reconsideration were filed by MetroPCS, Inc. (“MetroPCS”); NextWave Telecom Inc. (“NextWave”); and a group comprising TeleCorp PCS, Inc., Tritel Communications, Inc., Poplar PCS, LLC, and Summit Wireless, LLC (jointly “TTPS”). We note that on February 12, 2002, the Wireless Telecommunications Bureau and the International Bureau approved applications requesting consent to transfer control of or assign licenses and authorizations currently held by TeleCorp and its various wholly-owned subsidiaries to AT & T Wireless Services, Inc. Wireless Telecommunications Bureau and International Bureau Grant Consent for Transfer of Control or Assignment of Licenses From TeleCorp PCS, Inc. to AT & T Wireless Services, Inc, WT Docket No. 01-315, *Public Notice*, 17 FCC Rcd 2383 (2002).

### III. DISCUSSION

#### A. Nature of the Clarification

10. All three petitioners suggest that the Commission's clarification in the *First Reconsideration Order* that Section 1.2104(g) does not apply to installment payment defaults constitutes an impermissible change from prior Commission policy.<sup>31</sup> They argue that the clarification conflicts with other Commission representations, constitutes impermissible retroactive rulemaking, was made without adequate notice, and is otherwise arbitrary and capricious. Before we address these objections, we first examine whether the clarification did, in fact, amount to a change in the Commission's rules.

11. TTPS contends that the clarification "increase[s] significantly the obligations of defaulting licensees[.]" but offers no authority for this claim.<sup>32</sup> NextWave argues that, from the first C block auction until the *First Reconsideration Order* clarification, Commission policies and rules consistently provided that defaulters on installment payments would be able to recover all or part of their down payments once the Commission had been "made whole" following a subsequent auction and after payment by defaulters of the three percent payment established in Section 1.2104(g).<sup>33</sup> NextWave cites as support a partial statement taken from a 1999 brief filed in the United States Court of Appeals for the Second Circuit by the United States Attorney on behalf of the Commission during the course of bankruptcy litigation between NextWave and the Commission concerning, among other things, NextWave's failure to make installment payments while in bankruptcy under Chapter 11: "[T]he 3% assessment set forth in 47 C.F.R. § 1.2104(g)(2) is the proper measure for determining the portion of NextWave's down payments that should stay with the FCC . . .".<sup>34</sup> MetroPCS also relies in part upon the identical statement.<sup>35</sup>

12. NextWave and MetroPCS both quote the brief out of context. The quoted language is excerpted not from a discussion of the Commission's rule for installment payment defaults, but rather from a discussion of the decision of a federal bankruptcy court, overturned by the Second Circuit, that the Commission had fraudulently conveyed NextWave's licenses.<sup>36</sup> The brief noted that the bankruptcy court had decided, based upon several of the Commission's auction rules, that three percent of NextWave's total winning bids for the licenses at issue in the bankruptcy should constitute the sum not subject to avoidance by NextWave under bankruptcy rules. As discussed in the brief, the bankruptcy court determined that the three percent payment "constituted a fair exchange of value not subject to avoidance. . . ." and, as such, adequately reconciled the policies of federal bankruptcy law and federal debt collection provisions.<sup>37</sup> In that context, the brief accepted the three percent assessment; however, the brief also noted that the Commission had designed Section 1.2104(g)(2) of its rules "to encourage bidders who wish to withdraw their bids to do so before bidding ceases."<sup>38</sup> Nowhere did the brief suggest that the

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<sup>31</sup> See MetroPCS Petition at 2-5, 11; NextWave Petition at 5; TTPS Petition at 5-6.

<sup>32</sup> TTPS Petition at 5-6.

<sup>33</sup> NextWave Petition at 2-3.

<sup>34</sup> *Id.* (quoting Brief for Appellant, *In re NextWave Communications, Inc.*, No. 99-5063 (2<sup>nd</sup> Cir. 1999)) ("Brief for Appellant").

<sup>35</sup> MetroPCS Petition at 9-10.

<sup>36</sup> See Brief for Appellant.

<sup>37</sup> See *id.* at 52-53.

<sup>38</sup> *Id.* at 53-54 (quoting Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5564 ¶ 76 (1994) ("*Competitive Bidding Fifth Report and Order*").

bankruptcy court had concluded that a three percent payment would be required or permitted outside of a bankruptcy situation for an installment default, nor did the brief anywhere imply the existence of a policy by the Commission to apply Section 1.2104(g)(2) to installment payment defaults.

13. NextWave and MetroPCS both also allege that, in rendering its decision, the Second Circuit Court of Appeals relied upon the description in the government's brief of the Commission's default payment rules.<sup>39</sup> Both petitioners misconstrue the court's decision. In discussing the Commission's default payment rules, the court, which ruled in favor of the Commission, mentioned only the rules for post-auction, pre-licensing defaults:

The FCC's penalty rules provide that default *between the close of the auction and the grant of the Licenses* exposes the winning bidder to liability for the amount it bid less the winning bid upon re-auction of the Licenses. *See* 47 C.F.R. § 1.2104(g)(1)-(2).<sup>40</sup>

The Commission's rules for installment payment defaults were never addressed in the court's decision.

14. NextWave and MetroPCS also rely on the 1994 *Competitive Bidding Fifth Report and Order* as substantiating their claims that the differential-plus-three-percent payment rule was, until the clarification, applicable to installment payment defaults.<sup>41</sup> However, the paragraph cited by both petitioners cross-references the discussion in the 1994 "*Competitive Bidding Second Report and Order*" of the consequences of pre-licensing defaults.<sup>42</sup> It is not until more than forty paragraphs later that the *Competitive Bidding Second Report and Order* addresses its rules for installment payments defaults.<sup>43</sup> In addition, NextWave cites a discussion of the "differential-plus-three-percent" payment rule for defaults contained in a letter from the Auctions and Industry Analysis Division to attorney John A. Prendergast.<sup>44</sup> However, this letter involves an auction in which installment payments were not even available. It concerns a default on a pre-license grant payment, the final down payment, and not an installment payment default, which, of course, occurs post-license grant.

15. NextWave's attempts to reinterpret the clarification are further undercut by an earlier petition it filed seeking reconsideration of the clarification. In that petition, NextWave states that it agrees with the Commission's decision not to apply Section 1.2104(g) to installment payment defaults, and it asks the Commission to clarify that the rules did *not* change:

NextWave agrees with the Commission's conclusions that . . . "the conditions on the face of each license and the terms of the notes and security agreements executed by licensees provide the Commission appropriate remedies that will ensure that defaulted licenses are returned to the Commission for reauction and that all outstanding debts, as well as the

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<sup>39</sup> NextWave Petition at 2-3; MetroPCS Petition at 9-10.

<sup>40</sup> NextWave v. FCC, 200 F.3d 43, 58 (2<sup>nd</sup> Cir. 1999), *cert. denied*, 531 U.S. 924 (2000) (emphasis added).

<sup>41</sup> NextWave Petition at 3-4 and n.12 (citing *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532, 5564); Metro PCS Petition at 7-8 (quoting *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532, 5563, 5564).

<sup>42</sup> *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5564 (quoting Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2383 (1994) ("*Competitive Bidding Second Report and Order*").

<sup>43</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2382-83 ¶¶ 195-199.

<sup>44</sup> NextWave Petition at 4 n.12 (quoting Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau to John A. Prendergast, Esq., Counsel for New Wave Networks, L.L.C., 14 FCC Rcd 6323 (1999)).

Commission's costs are recoverable."<sup>45</sup>

NextWave notes, however, that in the context of reaffirming [the Commission's] cross default policies, the [*Part 1 Third Report and*] *Order* can be interpreted as suggesting that the Commission *will* apply Section 1.2104(g) penalties (renamed "default payments") to licensees that default on installment payments. . . .

. . . [However,] both the language of the [*Part 1 Third Report and*] *Order* and the new rules appended thereto indicate that the Commission does not intend to apply this rule to defaults on installment payments. NextWave respectfully requests that the Commission clarify on reconsideration that this is the correct reading of its action.

16. MetroPCS additionally contends that Sections 1.2107(b) and 1.2109(c) are inconsistent with the Commission's determination that the differential-plus-three-percent rule does not apply to installment payment defaults. MetroPCS focuses on the following portion of Section 1.2107(b):

Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license or authorization, in which case it [sic] will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it [sic] will be returned, less applicable payments.<sup>46</sup>

MetroPCS turns also to similar language in Section 1.2109(c):

A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted. . . and it will be liable for the payment set forth in §§ 1.2104(g)(2). . . .<sup>47</sup>

17. MetroPCS's argument that Section 1.2104(g)(2) applies because a defaulting installment payor is, in fact, a "winning bidder" that "has defaulted" or that "defaults . . . after having made the required down payment" fails when Sections 1.2107(b) and 1.2109(c) are examined in context. Section 1.2107(b) deals exclusively with the twenty percent first-down payment that is required only from non-installment payors. This provision, therefore, does not address first-down payment requirements for those in the installment payment program. Instead, these requirements are set forth in Section 1.2110(g)(1), which establishes for installment payors a ten percent first-down payment requirement and the consequences of a first-down payment default.<sup>48</sup> Similarly, we do not apply Section 1.2109(c) to installment payment defaults, when Section 1.2110(g) provides the rule specifically applicable to such defaults. The texts of both Sections 1.2107(b) and 1.2109(c) establish that these provisions apply only to pre-licensing defaults. For example, the fourth sentence of Section 1.2107(b) begins: "Down payments will be held . . . until the high bidder has been awarded the license[.]" The sentence goes on to discuss the winning bidder's failure to qualify, a circumstance which would prevent license grant. Similarly, Section 1.2109(c) opens with language making it inapplicable on its face to post-licensing situations: "A winning bidder who is found unqualified to be a licensee . . ." Consequently, we read the two provisions in the only way that maintains their consistency, as well as their interrelationship with our other auction rules, i.e., as referring exclusively to pre-licensing payment defaults.

<sup>45</sup> NextWave 1998 Petition at 7 (citations omitted).

<sup>46</sup> 47 C.F.R. § 1.2107(b).

<sup>47</sup> *Id.* § 1.2109(c).

<sup>48</sup> *Id.* § 1.2110(g)(1).

18. Moreover, Section 1.2104(g) could not have been intended to apply to post-licensing defaults, as it makes no provision for license cancellation. Instead, the rule assumes that the license has not been granted and remains available for inclusion in a subsequent auction. In addition, accepting MetroPCS's narrow reading of Section 1.2109(c), and applying the Section 1.2104(g) differential-plus-three-percent rule to all post-licensing defaults, would lead to results that could not reasonably have been intended by the Commission. Such a reading would, for example, make Section 1.2104(g) applicable not only to installment payment defaulters but also to those that pay in full and later lose their licenses for reasons other than non-payment, such as failure to build out or egregious conduct.<sup>49</sup> Under this interpretation, a full payor stripped of its license halfway through the license term for some malfeasance could have a claim for reimbursement of a portion of the amount paid years before at auction. There is no support for this reading in any Commission rule or precedent. Instead, under the rules, if any licensee of a license won at auction defaults post-licensing for a non-financial reason (e.g., failure to build out), the license is cancelled and all of the cash paid is lost.<sup>50</sup> When the unlicensed spectrum is again licensed in a new auction, the former licensee does not get a partial refund. To maintain parity between cash and installment licensees after license grant, an installment defaulter would similarly not be able to benefit from the proceeds of a subsequent auction. Accordingly, we disagree with MetroPCS's interpretation of our rules.

19. MetroPCS further claims that a 1996 letter (the "*Letter*")<sup>51</sup> co-authored by the then-general counsel of the Commission states that the Commission would never collect from a debtor twice.<sup>52</sup> Again, MetroPCS disregards context. The *Letter* describes the Commission rules as providing "that, upon default, the Commission will cancel the license and initiate debt collection procedures."<sup>53</sup> The *Letter* does go on to postulate that equity principles established in the Debt Collection Act<sup>54</sup> and in Federal Claims Collection Standards<sup>55</sup> should allow the federal government to consider, in the course of debt collection proceedings, forgiving an outstanding debt so long as the government has been made whole, penalties and costs included, in a subsequent auction. Rather than support MetroPCS's claim, the *Letter* makes clear that any forgiveness of a debt arising from an installment payment default would occur only in the course of federal debt collection proceedings and not pursuant to the Commission's competitive bidding rules. This interpretation of the Commission's rules was recently recognized in a decision of the United States Bankruptcy Court.<sup>56</sup>

20. Finally, all three petitioners ignore that this proceeding began with a statement by the Commission that the license of an entity in installment payment default is subject to automatic license cancellation and to the license-cancellation-plus-debt-collection rule in place at that time.<sup>57</sup> The Commission's proposal to deviate from that rule, and its later rejection of that proposal and clarification of its rejection, only make sense if, at the outset, license-cancellation-plus-debt-collection had, in fact, been the rule.

<sup>49</sup> See, e.g., *id.* §§ 1.946(c), 24.103(h); 24.203(a),(b); 90.155(a); 90.633(d); 101.1011(a); 101.1325(c).

<sup>50</sup> *Id.*

<sup>51</sup> Letter from William E. Kennard, General Counsel, and Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Leonard J. Kennedy, Esquire, and Richard C. Denning, Esquire, 11 FCC Rcd 21,572 (1996) ("*Letter*").

<sup>52</sup> MetroPCS Petition at 3, 10.

<sup>53</sup> *Letter*, 11 FCC Rcd at 21,576.

<sup>54</sup> *Id.* (citing Debt Collection Act, as amended, 31 U.S.C. Chapter 37).

<sup>55</sup> *Id.* (citing Federal Claims Collection Standards, 4 C.F.R. Parts 101-105).

<sup>56</sup> *In re Magnacom Wireless, LLC*, No. 98-39048 at 6-8 (Bankr. W.D. Wash. filed Sept. 2, 2003).

<sup>57</sup> *Part 1 First NPRM*, 12 FCC Rcd 5686, 5725 ¶ 75.

## B. Other Objections

21. The remaining arguments raised by Petitioners are premised on their contention that the *First Reconsideration Order* clarification constituted a rule change. Having just disposed of this threshold argument, we could reject all three petitions without further discussion. However, because we believe that a rule change would have been procedurally proper, we find it useful, for purposes of argument, to address Petitioners' remaining concerns.

### 1. Retroactivity of Rulemaking

22. Both NextWave and MetroPCS contend that the Commission's *First Reconsideration Order* clarification represents impermissible retroactive rulemaking, in that, as MetroPCS claims, it "unreasonably affects the future legal consequences of past actions."<sup>58</sup> Both cite *Bowen v. Georgetown University Hospital*, in which the Supreme Court prohibited a rule change that altered the past consequences of past actions.<sup>59</sup> However, *Bowen* would be inapplicable to the current situation even if the *First Reconsideration Order* clarification had constituted a rule change. Impermissible retroactivity involves, by definition, the application of a new rule to past occurrences.<sup>60</sup> Had the Commission's clarification that it would not apply the differential-plus-three-percent rule to installment payment defaults been a change, the "change" would have been prospective, affecting only installment payment defaults that had not yet occurred. The "change" would not have affected, as Petitioners suggest, the past acts of committing to the license and the installment payment plan.<sup>61</sup> In *Celtronix v. FCC*, the Court of Appeals for the District of Columbia rejected a similar charge of retroactive rulemaking directed against a change by the Commission in its installment payment grace period rules.<sup>62</sup> The court explained that, in determining whether there has been impermissible retroactivity, the focus should be "on the *payment delays* and not on initial *issuance* of the license."<sup>63</sup> The court noted, moreover, that licensees, including those that win their licenses at auction, do not have a vested right in having the terms of their licenses remain static:

The pre-auction license system offered no vested right to any specific terms. Rather it is undisputed that the Commission always retained the power to alter the term of existing licenses by rulemaking. . . . The introduction of auctions made no change in this aspect of the licensing regime. In fact, Congress provided both that the Commission would retain its authority "to regulate or reclaim spectrum licenses," . . . and that nothing in the use of auctions would "be construed to convey any rights . . . that differ from the rights that apply to other licenses. . . ."<sup>64</sup>

### 2. Sufficiency of Notice

23. NextWave and MetroPCS also claim that the Commission failed to give fair notice of its intention not to apply the differential-plus-three-percent payment requirement to installment payment

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<sup>58</sup> NextWave Petition at 3; MetroPCS Petition at 11.

<sup>59</sup> See *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

<sup>60</sup> See *id.*, 488 U.S. at 219 (Scalia, J. concurring); see also *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994).

<sup>61</sup> See *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 587 (D.C.Cir.2001), *cert. denied*, 536 U.S. 923 (2002).

<sup>62</sup> *Id.*, 272 F.3d at 587.

<sup>63</sup> *Id.*, 272 F.3d at 588 (emphasis in original).

<sup>64</sup> *Id.*, 272 F.3d at 589 (citations omitted).

defaults.<sup>65</sup> NextWave contends that the Commission's auction rules "are shaped and administered on a non-public basis in accordance with unknown criteria."<sup>66</sup> MetroPCS argues that the Commission should have provided notice of its intent prior to the end of the initial C block auction.<sup>67</sup> Both petitioners cite *Trinity Broadcasting of Florida Inc. v. FCC*, in which the Court of Appeals for the District of Columbia overturned the Commission's decision to deny a television license renewal application, because the rule upon which the Commission had based its denial was unclear.<sup>68</sup>

24. The petitioners' arguments turn upon their claims that, prior to the clarification, the Commission had consistently given notice that an installment payment default would be subject to the same consequences as a pre-licensing default.<sup>69</sup> However, as discussed above, none of the authority offered by petitioners substantiates these claims. Moreover, the Commission's clarification in the *First Reconsideration Order* did not stem from an acknowledgement that the rules, as originally promulgated, were unclear. Rather, the clarification addressed the possibility of ambiguity in the *Part I Third Report and Order*. Apart from this possible ambiguity, the license-cancellation-plus-debt-collection rule, unchanged since its adoption, has been sufficiently clear to provide installment payors with notice that the differential-plus-three-percent rule does not apply to installment payment defaults.

25. Petitioners' arguments also assume that, in order for notice of a rule change to be adequate, such notice would have to precede the award of any affected license. However, as we have already explained, notice of a change in our default rule need predate only the act of default, not the auction in which the license was won.<sup>70</sup> Finally, the language in the *Part I First NPRM* was sufficient to put petitioners on notice of the Commission's own interpretation of its rules. The Commission sought and received comment and decided, partly because of the record, not to institute its proposed change. The subsequent clarification, also preceded by notice and comment, was unequivocal in relaying the appropriate rule to apply to installment payment defaults. Accordingly, regardless of whether the clarification represented a change in the Commission's installment payment default rule, the Commission's action was heralded by ample notice.

### 3. Sufficiency of Record

26. MetroPCS accuses the Commission of basing the clarification "upon an insufficient and ambiguous record."<sup>71</sup> To support this accusation, MetroPCS maintains that the Commission's original auction rules were clear that the differential-plus-three-percent payment requirement applied to post-down payment defaults.<sup>72</sup> However, we have already shown that, ever since the initial adoption of the Commission's competitive bidding rules, the consequence of an installment payment default has been application of the license-cancellation-plus-debt-collection rule. MetroPCS also contends that the *Part I Third Report and Order* was internally "contradictory, with one sentence saying Section 1.2104 applied to installment payment defaulters and another saying it did not."<sup>73</sup> There, we do not disagree. As

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<sup>65</sup> NextWave Petition at 3-4; MetroPCS Petition at 12.

<sup>66</sup> NextWave Petition at 1-2.

<sup>67</sup> MetroPCS Petition. at 12.

<sup>68</sup> NextWave Petition at 3; MetroPCS Petition at 12-13 (both NextWave and MetroPCS citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000)).

<sup>69</sup> See NextWave Petition at 3-4; MetroPCS Petition at 12.

<sup>70</sup> See *Celtronix*, 272 F.3d 585, 587.

<sup>71</sup> MetroPCS Petition at 11.

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

<sup>73</sup> *Id.*

discussed above, the purpose of the clarification was to eliminate the possibility of any ambiguity resulting from the *Part 1 Third Report and Order*, and to respond to NextWave's petition seeking clarification. Where we disagree with MetroPCS is with regard to the sufficiency of the record. In drafting the *Part 1 Third Report and Order*, the Commission considered 24 comments and 19 reply comments received in response to the *Part 1 First NPRM*.<sup>74</sup> In preparing the *First Reconsideration Order*, the Commission reviewed seven petitions for reconsideration, one of which was NextWave's, and two comments in support of these petitions.<sup>75</sup> Consequently, even assuming that the clarification amounted to a rule change, we can see no reasonable basis for MetroPCS's accusation.

#### 4. Parity and Rationality of Consequences

27. Both MetroPCS and TTPS complain that the Commission's clarification created an imbalance in its handling of defaults.<sup>76</sup> MetroPCS suggests that, prior to the clarification, the Commission treated all post-auction defaults the same:

The Commission has never sought to impose greater penalties on defaulting licensees than on defaulting bidders after an auction has closed. The Commission's rules provide for different penalties designed to remedy the harm caused by conduct which occurs before and after the *close of bidding*, as opposed to the time before and after *license grant*.<sup>77</sup>

TTPS implies that, prior to the clarification, the Commission's rules imposed the same consequences on post-licensing defaulters that they did on post-auction, pre-licensing defaulters: "[The clarification] remove[s] the parity that previously existed between obligations of defaulting licensees and entities that default on post-auction, pre-license payment obligations."<sup>78</sup>

28. Both petitioners betray a misunderstanding of the Commission's auction rules. The rules establish, as they have since their adoption, the same consequences for all post-auction, pre-licensing defaults, regardless of whether the defaulter is planning to participate in the installment payment program. As discussed above, if a non-installment payment bidder defaults on its first down or final payment, or otherwise defaults after the auction close but prior to license grant, it is subject to the "differential-plus-three-percent" payment requirement.<sup>79</sup> If a high bidder planning to enter the installment program defaults on any post-auction, pre-licensing requirement, it, too, is subject to the "differential-plus-three-percent" payment requirement.<sup>80</sup>

29. There is a similar parity of consequences for post-licensing defaults, regardless of the licensee's participation in the installment program. A default on an installment payment subjects the licensee to the license-cancellation-plus-debt-collection rule. In other words, the licensee loses the

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<sup>74</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 377 ¶ 1 n.4. We note that, in addition to a notice of proposed rulemaking, the *Part 1 First NPRM* contained an order and a memorandum opinion and order. *See supra* note 24. In providing the number of commenters and reply commenters, we do not specify to which aspects of the *Part 1 First NPRM* each of their comments was directed.

<sup>75</sup> *First Reconsideration Order*, 15 FCC Rcd at 15,297 ¶ 6. These numbers reflect the petitions and comments that specifically addressed the *Part 1 Third Report and Order*. *See id.*

<sup>76</sup> MetroPCS Petition at 6; TTPS Petition at 5.

<sup>77</sup> MetroPCS Petition at 6 (emphasis in original).

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *Supra* paragraph 5.

<sup>80</sup> *Id.*

license, is not refunded its prior installment payments, and is subject to collection of the balance of the debt. A licensee that defaults on a post-licensing, non-installment payment requirement faces analogous consequences. The licensee loses its license without provision for refund of its bid amount. For example, when a licensee fails to meet its service or buildout requirements, its license cancels,<sup>81</sup> and there is no rule suggesting that the government will reimburse the defaulter for the license price. In sum, when a license cancels because of a post-licensing default, the defaulter remains obligated for the entire license price, whether or not that amount has yet been fully paid. Thus, contrary to the claims made by MetroPCS and TTPS, the key factor in determining the consequence of a default is whether the default occurs before or after license grant, not whether the licensee is paying in installments.

30. NextWave and TTPS also attack the reasonableness of the license-cancellation-plus-debt-collection rule. NextWave suggests that it makes no sense for a high bidder that defaults prior to having made its first down payment to face a lesser consequence than an installment payment defaulter.<sup>82</sup> We disagree. Our rules are designed to encourage entities that cannot meet their financial obligations to exit the auctions process sooner rather than later. Thus, we require a substantial upfront payment from auction applicants as a condition of participating in bidding.<sup>83</sup> Moreover, the upfront payment required from auction applicants that have previously been in default on a Commission license or delinquent on a non-tax federal debt is fifty percent larger than would be required in the absence of a history of delinquency or default.<sup>84</sup> The consequence for withdrawing a high bid during an auction is payment of the difference between the high bid and a lower winning bid at the subsequent auction (i.e., the “differential” payment).<sup>85</sup> However, if the default occurs after the auction’s close but before license grant, the consequence is payment of the differential plus an additional three percent.<sup>86</sup>

31. It is reasonable to make these distinctions, because an earlier default is less damaging to the auctions process than a later one. Should a bidder withdraw its high bid during auction, a new high bidder can emerge from the same auction. A post-auction, pre-licensing default will typically delay licensing of the involved spectrum – and impede service to the public – until the next auction. A post-licensing default, such as an installment payment default or a failure to meet construction or service requirements, could conceivably delay re-licensing the involved spectrum and adversely affect service to the public for years, during which one or more auctions might have or could have been conducted.

32. TTPS argues that the consequence of an installment payment default is unlike that of any other default in Western jurisprudence.<sup>87</sup> Yet, as we have just shown, the consequence of any other post-licensing default on a license won at a Commission auction is, under our rules, comparable. We note, however, that while Commission rules provide for parity, an installment payment defaulter may ultimately enjoy relief that would not be available to other post-licensing defaulters. As discussed above, equity principles established in the Debt Collection Act<sup>88</sup> and in Federal Claims Collection Standards<sup>89</sup> should provide the federal government with the opportunity, during debt collection proceedings, to

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<sup>81</sup> See, e.g., 47 C.F.R. §§ 1.946(c), 24.103(h); 24.203(a),(b); 90.155(a); 90.633(d); 101.1011(a); 101.1325(c).

<sup>82</sup> NextWave Petition at 4.

<sup>83</sup> 47 C.F.R. § 1.2106.

<sup>84</sup> *Id.* § 1.2105(a)(2)(xi). This requirement has been in effect for C block applicants since 1998 (*see id.* § 1.2105(a)(2)(xi) (1998)) and for all applicants since 2000.

<sup>85</sup> *Id.* § 1.2104(g)(1).

<sup>86</sup> *Id.* § 1.2104(g)(2)

<sup>87</sup> TTPS Petition at 5-6.

<sup>88</sup> Debt Collection Act, as amended, 31 U.S.C. Chapter 37.

<sup>89</sup> Federal Claims Collection Standards, 4 C.F.R. Parts 101-105.

forgive an outstanding debt so long as the government has been made whole (including penalties and costs) in a subsequent auction. For all these reasons, we believe that the rule requiring license-cancellation-plus-debt-collection for installment payment defaults is both rational and appropriate.

#### IV. PROCEDURAL MATTERS AND ORDERING CLAUSE

##### A. Paperwork Reduction Act Analysis

33. This *Third Order on Reconsideration of the Part 1 Third Report and Order* contains no new or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104-13.

##### B. Ordering Clause

34. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j), the petitions for reconsideration of the *Order on Reconsideration of the Part 1 Third Report and Order* filed by MetroPCS, Inc.; NextWave Telecom Inc.; and a group comprising TeleCorp PCS, Inc., Tritel Communications, Inc., Poplar PCS, LLC, and Summit Wireless, LLC are, to the extent they are addressed herein, DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary