time, however, we noted that determining an appropriate upfront payment involved balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders.[233] We concluded that the best approach would be to maintain the flexibility to determine the amount of the upfront payment on an auction-by-auction basis, because this balancing may yield different results depending upon the particular licenses being auctioned.[234]

85. Many commenters make specific proposals regarding the proper size and terms for assessing upfront payments in future auctions. For example, PageNet and CII suggest that the Commission adopt a standard upfront payment rule requiring separate upfront payments for each license identified in an applicant's short-form application.[235] CII contends that this would reduce the number of "phantom" mutual exclusivities (*i.e.*, theoretical frequency conflicts caused by the fact that the current auction rules create no financial disincentive to list licenses in an application on which the applicant has no *bona fide* intention to bid).[236] In contrast, Airadigm and NPCS argue that the Commission should not require a separate upfront payment for each license on which an entity elects to bid, as this would limit bidders' flexibility to change strategy and force them to reveal their bidding strategy prior to the start of the auction.[237] In an alternate proposal, AirTouch and CII suggest that the Commission require applicants to increase their upfront payments as an auction progresses to equal a percentage of their total bids.[238] AirTouch argues that this requirement would reduce the risk of defaults and discourage parties from submitting "jump bids" where they have no intention of actually winning a particular license.[239] Similarly, to reduce the risk of default, CII recommends that when an applicant's upfront payment drops below a specific percentage of its high bid amount, the Commission allow the applicant to increase its deposit to a certain percentage of its high bid total within ten business days.[240] In contrast to these two proposals, Airadigm opposes increasing the upfront payment requirement once a bidder's bid amount

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[233] *Id.* at 2378.

[234] *Id.*

[235] PageNet Comments at 11; CII Comments at 11.

[236] CII Comments at 11-12.

[237] Airadigm Reply Comments at 7; NPCS Reply Comments at 5-6.

[238] AirTouch Comments at 6 and Reply Comments at 2-3; CII Comments at 10-11.

[239] AirTouch Comments at 6 and Reply Comments at 2-3.

[240] CII Comments at 10-11.

exceeds a certain multiple of the original upfront payment amount because this would create a significant barrier to small businesses.[241]

86. We agree with Airadigm and NPCS that it is unnecessary to adopt additional rules governing the amount of the upfront payment and the terms under which it is assessed. We believe that our reasoning in the *Competitive Bidding Second Report and Order* remains valid, and that the required upfront payment should be tailored to the particular auction design and to the characteristics of the licenses being auctioned.[242] This determination can be made in a variety of ways and using a variety of techniques to estimate the value of the spectrum being auctioned; however, as a general rule we have required an upfront payment equal to $0.02 per pop per megahertz. As discussed *infra*, under the current competitive bidding rules the Commission maintains the discretion to alter the amount of the required upfront payment or to modify the terms under which the upfront payment is assessed.[243] We believe that retaining this discretion provides the Commission with the greatest level of flexibility to determine the appropriate upfront payment amount on an auction-by-auction basis.

2. Refund of Upfront Payments

87. Background. Section 309(j)(8)(C) of the Communications Act requires that any deposits the Commission may require for the qualification of any person to bid in an auction shall be deposited into an interest bearing account.[244] The Communications Act further requires that within 45 days of the auction's conclusion, the deposits of successful bidders shall be paid to the United States Department of Treasury ("Treasury"), the deposits of unsuccessful bidders shall be returned, and all accrued interest shall be transferred to the Telecommunications Development Fund ("TDF").[245] Prior to the enactment of this provision, auction proceeds were deposited in a non-interest bearing account with the U.S. Treasury. The Commission has permitted bidders who completely withdraw during the auction to receive a refund of their upfront payments prior to the close of the auction, upon written request. In the *Notice*, we sought comment on whether this practice should be continued.[246]

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[241] Airadigm Reply Comments at 6.

[242] *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377, ¶ 170.

[243] *See, e.g., LMDS Second Report and Order*, 12 FCC Rcd at 12545, ¶ 330.

[244] 47 U.S.C. § 309(j)(8)(C). This provision was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 3, 110 Stat. 56 (1996).

[245] *Id.*

[246] *Notice* at ¶ 57.

88. Discussion. After considering the issue in light of Congress's 1996 amendment to Section 309(j)(8)(C) and the comments received in this proceeding, we will continue our current practice of returning the upfront payments of bidders who have completely withdrawn from an auction prior to the conclusion of competitive bidding. As we suggested in the *Notice,* it is unclear whether Congress intended, in amending Section 309(j)(8)(C), to require the Commission to change its practice of refunding upfront payments to bidders who withdraw during the course of an auction.[247] We continue to believe, however, that the prompt return of upfront payments is in the public interest, because it prevents unnecessary encumbrances on the funds of auction bidders, many of whom may be small businesses, after they have withdrawn from the auction. In addition, we believe that this practice minimizes the financial burdens of participating in an auction, because auction participants earn no interest on upfront payment funds on deposit with the Commission. Moreover, all commenters addressing the issue support our proposal to continue this practice.[248] AirTouch proposes that the Commission retain an administrative fee based upon the number of rounds an applicant has remained in the auction when it refunds upfront payments to bidders who have withdrawn.[249] Airadigm and AT&T state that not returning upfront payments in a prompt manner in circumstances where a bidder has withdrawn is akin to a "fee" that Congress did not intend to authorize, and that may work to discourage participation in the Commission's auction program.[250] We agree with Airadigm and AT&T, and conclude that such a fee is inappropriate, and therefore, we reject AirTouch's proposal.

3. Down Payment and Full Payment for Licenses

a. Level of Down Payments

89. Background. Previously, the Commission required a winning bidder to submit additional funds as necessary to bring its total deposits up to 20 percent of its high bid(s) within five business days after being notified that it is a high bidder on a particular license.[251] In the *Order* accompanying the *Notice*, we modified our rules to establish a due date for down payments of ten business days after the issuance of a Public Notice announcing winning

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[247] *Id.*

[248] *See* AT&T Comments at 3-4; AirTouch Comments at 7; Airadigm Comments at 12 and Reply Comments at 8; AMTA Comments at 12; CII Comments at 15-16; ISTA Comments at 2 and Reply Comments at 3.

[249] AirTouch Comments at 7.

[250] Airadigm Reply Comments at 8-9; AT&T Comments at 3-4.

[251] 47 C.F.R. § 1.2107(b).

bidders.[252] In the *Notice,* we proposed to retain discretion to determine the down payment amount required for each service and to delegate this authority to the Bureau, which will announce this amount in a Public Notice to be issued prior to the start of each auction.[253] We also noted that in an effort to help to determine the appropriate down payment amount for a particular service, the Bureau will seek input from the public. We also sought comment on whether the level of down payments used in the past should be raised for some services.[254]

90. Discussion. We created the down payment requirement in the *Competitive Bidding Second Report and Order*, in which we concluded that at the conclusion of the auction, a bidder must tender a significant and non-refundable down payment to the Commission over and above its upfront payment in order to provide further assurance that the winning bidder will be able to pay the full amount of its winning bid.[255] We believe that a substantial down payment is required to ensure that licensees have the financial capability to attract the capital necessary to deploy and operate their systems, and to protect against default. Because it is due soon after the close of the auction, the down payment is a valuable indicator of a license applicant's financial viability. In addition, we believe that it is important that we learn early on in the licensing process when an applicant might be unable to finance its winning bid or bids.

91. Several commenters oppose any increase in the down payment beyond 20 percent of the high bid amount.[256] Airadigm opposes granting the Bureau the discretion to establish a down payment amount because it believes that the Bureau could unfairly disadvantage small businesses by requiring disproportionately large down payments for auctions of particularly capital-intensive services.[257] In addition, Airadigm states that granting the Bureau this discretion could complicate applicants' financing arrangements because down payment amounts could vary with each auction. After consideration of these comments, we conclude that a standard down payment amount of 20 percent is appropriate. Finally, if unusual circumstances present themselves in the context of a particular service, the Commission reserves the right to adopt a different amount by rule in that service.

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[252] *See Notice* at ¶ 14.

[253] *Notice* at ¶ 59.

[254] *Id.*

[255] *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2381, ¶¶ 189-92.

[256] *See* CII Comments at 10. Merlin Comments at 12; AMTA Comments at 9; Airadigm Comments at 12; NPCS Reply Comments at 5.

[257] Airadigm Comments at 12.

b. Untimely Second Down Payments and Full Payments

92. Background. Section 1.2109(a) of the Commission's rules[258] provides that auction winners not eligible for installment payments are generally required to make final payment on their license(s) within a certain time following award of the license(s). Similarly, Section 1.2110(e) of the Commission's rules[259] provides that all winning bidders eligible for installment payments are required to submit a second down payment within a certain period after conditional license grant. These payment deadlines are announced by public notice when the Commission is prepared to grant the license(s). Where a winning bidder fails to make its final auction payment for the balance of its winning bid in a timely manner, it is considered in default on its license(s) and subject to the applicable default payment.[260] In the *Notice*, we proposed to allow winning bidders to make their final payments or second down payments within a short period after the applicable deadline, provided that they also pay a late fee.[261] We also sought comment on our tentative conclusion that if a winning bidder misses the final payment or second down payment deadline and also fails to remit the required payment and the applicable late fee by the end of the late payment period, it would be declared in default and subject to the applicable default payments.[262] Additionally, we sought comment on whether a late payment of five percent of the amount due is an appropriate late payment fee, and asked that commenters proposing alternative late payment fee(s) provide a rationale for the alternative fee amount(s).[263] Finally, we sought comment on the appropriate time period to allow late second down payments and final payments.[264]

93. Discussion. We will amend Sections 1.2109(a) and 1.2110(e) of our rules to permit auction winners to make their second down payments or final payments within ten business days after the applicable deadline, provided that they also pay an appropriate late fee, without being considered in default. As we recognized in the *Notice*, in past auctions there have been cases where a winning bidder missed the applicable second down payment deadline but

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[258] 47 C.F.R. § 1.2109(a).

[259] 47 C.F.R. § 1.2110(e).

[260] 47 C.F.R. §§ 1.2104(g), 1.2107(c).

[261] *Notice* at ¶ 61.

[262] *Id.*

[263] *Id.* at ¶ 62.

[264] *Id.* at ¶ 61.

subsequently made its down payment and filed a request seeking a waiver of the deadline. In some of these cases, the Bureau granted the waivers, subject to payment of a five percent late fee. In granting the waivers, the Bureau recognized the licensee's good faith and ability to pay as evidenced by its timely remittance of all earlier payments and prompt action to cure the delinquency.[265]

94. We recognize that applicants may encounter unexpected or unforeseeable difficulties when trying to arrange financing and make substantial payments under strict deadlines. In circumstances that may warrant favorable consideration of a waiver request or an extension of the payment date, we must also evaluate the fairness to other licensees who made their payments in a timely fashion. Two commenters, Mountain Solutions, Ltd. ("Mountain Solutions") and AirTouch, the only commenters to address this issue in detail, support our proposal to permit late payment subject to a standard late fee for any licensee not able to make a timely payment.[266] We agree, and amend Section 1.2109(a) to permit winning bidders who are required to make final payment on their licenses within a certain period of time as announced by public notice, to submit their payment 10 business days after the payment deadline, provided that they also pay a late fee equal to five percent of the amount due. Although we suspend the use of installment payments for the immediate future, in the event the Commission once again offers installment payments, we also amend Section 1.2110(e) to permit auction winners paying for the licenses in installments to submit their second down payment 10 business days after the payment deadline, provided they also pay a late fee equal to five percent of the amount due.

95. As discussed above, our rules provide that winning bidders have ten business days to make timely payment following notification that their licenses are ready to be granted. We believe that in establishing this additional ten business day period, during which winning bidders will not be considered in default, we provide an adequate amount of time to permit winning bidders to adjust for any last-minute problems. We decline to provide for a lengthier late payment period because we believe that extensive relief from initial payment obligations could threaten the integrity, fairness, and efficiency of the auction process. As we observed in the *Notice*, a late fee of five percent is consistent with general commercial practice and

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[265] *See, e.g.,* Roberts-Roberts & Associates, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets, *Order*, DA 97-252, (rel. February 4, 1997); Longstreet Communications International, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market B012, *Order*, DA 97-251 (rel. February 4, 1997). *But see* Styles Interactive, Inc. -- Application for Review of Denial of Petition for Reconsideration Seeking Waiver of IVDS Final Down Payment Deadline, *Memorandum Opinion and Order*, FCC 97-390 (rel. October 28, 1997) and Mountain Solutions LTD, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B053, B168, B172, B187, B188, B224, B247, B275, B366 and B381, *Order*, DA No 97-891 (rel. April 28, 1997) *recon pending* (denying requests for waiver of the second down payment deadline).

[266] *See* Mountain Solutions Comments at 2 and Reply Comments at 2-3; AirTouch Comments at 7-8.

provides some recompense to the federal government for the delay and administrative or other costs incurred.[267] In addition, we believe that a five percent fee is large enough to deter winning bidders from making late payments and yet small enough so as not to be punitive.[268] Therefore, applicants who do not submit the required final payment and five percent late fee within the 10-day late payment period will be declared in default, and will be subject to the default payment specified in Section 1.2104(g) of our rules.[269]

96. Finally, we emphasize that our decision to permit late payments is limited to payments owed by winning bidders who have submitted timely initial down payments. We continue to believe that the strict enforcement of payment deadlines enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications. In this connection, we believe that the *bona fide* ability to pay demonstrated by a timely initial down payment is essential to a fair and efficient auction process. Thus, we have not proposed to modify our approach of requiring timely submission of initial down payments that immediately follow the close of an auction. We did not propose to adopt a late payment period for down payments that are due soon after the close of the auction as we believe it is reasonable to expect that winning bidders timely remit their down payments, given that it is their first opportunity to demonstrate to the Commission their ability to make payments toward their licenses. Further, if a winning bidder defaults on its down payment on a license, the Commission can take action under Section 1.2109(b) relatively soon after the auction has closed, by, for example, re-auctioning the license or offering it to the other highest bidders (in descending order) at their final bids. Similarly, we do not allow for any

[267] *Notice* at ¶ 62. *See, e.g.*, Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

[268] Mountain Solutions Comments at 2 and Reply Comments at 3.

[269] *See* 47 C.F.R. § 1.2104(g).

late submission of upfront payments, as to do so would slow down the licensing process by delaying the start of an auction.

c. Full Payment and Petitions to Deny

97. Background. In the *Notice*, we recognized that under our current rules, winning bidders not eligible for installment payments are not required to submit the balance of their winning bids until petitions to deny filed against them are dismissed or denied and their licenses are ready to be granted.[270] Similarly, winning bidders that are designated entities paying in installments are not required to pay their second down payments until petitions to deny filed against them are dismissed or denied and their licenses are ready to be granted. In the interim, winning bidders for the same auction with no petitions filed against them are required to submit the balance of their winning bids (or, in the case of designated entities, their second down payments) earlier because their licenses are ready for grant. In the *Notice*, we sought comment on whether we should require all bidders that win licenses to make their full payments (or second down payments) at the same time.

98. Discussion. As discussed above (*see* Section III.B.5, *supra*), we suspend the use of installment payments as a means of financing small business participation in our auction program for the immediate future. As a result, all auction winners, including small businesses, will be required to submit the full payment owed on their winning bids shortly after a license is ready to be granted. As we suggested in the *Notice*, we recognize that in the past the filing of petitions to deny against a winning bidder's application(s) has often had the effect of significantly delaying the grant of the applicant's license(s), and as a result, the deadline for that applicant to submit the balance of its winning bid. However, in the Balanced Budget Act Congress granted the Commission the authority to shorten the petition to deny period, and as a result, to grant licenses much more rapidly.[271] As an initial matter, consistent with this legislation, we amend Sections 1.2108(b) and (c) of our rules[272] to provide that the Commission shall not grant a license earlier than seven days following issuance of a public notice by the Commission that long-form applications have been accepted for filing.

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[270] *Notice* at ¶ 64.

[271] Balanced Budget Act, § 3008. This provision provides as follows:

> . . . [N]o application for an instrument of authorization for frequencies assigned under this title . . . shall be granted by the Commission earlier than 7 days following issuance of a public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereto . . . . [T]he Commission may specify a period (no less than 5 days following issuance of such public notice) for the filing of petitions to deny any application for an instrument of authorization for such frequencies. *Id.*

[272] 47 C.F.R. §§ 1.2108(b), (c).

Also consistent with the Balanced Budget Act, we amend this Section to provide that in all cases the period for filing petitions to deny shall be no shorter than five days. In this regard, we seek comment in this *Second Further Notice of Proposed Rule Making* (*see infra*) on whether there are instances in which the Commission should provide for a longer period for the filing of petitions to deny or for the grant of initial licenses in auctionable services.

99. In light of this change in our rules, we believe that the concerns discussed in the *Notice* regarding delays in the granting of licenses and, as a result, in the deadline for full payment are substantially reduced. While applications that are the subject of petitions to deny ordinarily take longer to resolve than uncontested applications, we believe these changes in procedure will reduce the risk of frivolous petitions being filed solely for purposes of delay, and will enhance our ability to resolve petitions expeditiously. Finally, we believe that concerns regarding delayed payment are outweighed by the risk and uncertainty that would be imposed on an applicant if it were required to make its full auction payment while a petition against its application was still pending and could potentially result in denial of the application. As a result, we decline to amend our rules to require all winning bidders to make their full payments at the same time, regardless of whether petitions to deny their applications have been filed.

4. Default Payments

100. Background. Section 1.2104(g) of the Commission's rules[273] provides that when a bidder withdraws, defaults, or is otherwise disqualified from a simultaneous multiple round auction, upfront and/or down payment amounts that the bidder has on deposit with the Commission will be applied first to the bid withdrawal and default payments owed to the Commission.[274] In the past, this rule has been interpreted to encompass upfront and/or down

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[273] 47 C.F.R. § 1.2104(g).

[274] *See* 47 C.F.R. §§ 1.2104 (g)(2); 1.2106(d),(e); 1.2107(b). Specifically, Section 1.2106(e) states:

(e) In accordance with the provisions of paragraph (d), in the event a penalty is assessed pursuant to § 1.2104 for bid withdrawal or default, upfront payments or down payments *on deposit with the Commission* will be used to satisfy the bid withdrawal or default penalty before being applied toward *any* additional payment obligations that the high bidder may have.

Section 1.2106(d), cross-referenced above, states:

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder. Where the upfront payment amount exceeds the required deposit of a winning bidder, the Commission may refund the excess amount *after determining that no bid withdrawal penalties are owed by that bidder.*

Section 1.2104, also cross-referenced above, at paragraph (g)(2) states:

If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be

payment funds a bidder has on deposit for licenses won at the same auction.[275] In the *Notice*, we proposed to delete the language "simultaneous multiple-round" from Section 1.2104(g) of our rules because we believe that this means of satisfying bid withdrawal or default payments should apply to other auction designs as well as simultaneous multiple-round auctions.[276]

101. Discussion. We adopt our proposal to delete the words "simultaneous multiple-round" from Section 1.2104(g), and will apply the default/withdrawal payment procedure to all auction designs. Several commenters support this decision, maintaining that rigorous enforcement of the Commission's payment deadlines is critical to preserving the integrity of the auction and licensing process by ensuring that applicants possess the necessary financial qualifications.[277] These commenters also suggest that default payments are an effective and necessary method of discouraging defaults and encouraging private market solutions to licensee financing difficulties.[278] We believe that this modification to our general rules governing bidder default will help to maintain the integrity of the auction process by discouraging defaults on the part of bidders, encouraging bidders to make secondary or back-up financial arrangements, and ensuring that default payments are made in a timely manner. We also believe that this modification will help to discourage insincere bidding and ensure that licenses end up in the hands of those parties that value them the most and have the

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subject to the penalty in subsection (1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from *any* upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

Finally, Section 1.2107(b) refers to applying upfront and down payments to satisfy penalties. *See* §§ 1.2107(b) ("a high bidder must submit to the Commission's lockbox bank such additional funds (the 'down payment') as are necessary to bring its total deposits (*not including upfront payments applied to satisfy penalties*) up to twenty (20) percent of its high bid(s). . . . 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, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, *less applicable penalties*").

[275] *Public Notice*, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481 (April 6, 1996); *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2382 ¶ 195. *See also*, CH PCS, Inc, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, DA 96-1273, 11 FCC Rcd 9343 (rel. August 9, 1996).

[276] *Notice* at ¶ 67.

[277] *See* ISTA Comments at 3; CII Comments at 16-17; Hughes Comments at 8; Airadigm Comments at 14.

[278] *Id.*

financial qualifications necessary to construct operational systems and provide service.[279]

102. Our rules provide that where a winning bidder defaults on a license, the bidder becomes subject to a default payment equal to the difference between the amount bid and the winning bid the next time the license is offered by the Commission, plus a payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower.[280] In the *Competitive Bidding Fifth Report and Order*, the Commission stated that where the default payment cannot be determined, the Commission may assess an initial default payment "of up to 20 percent" of the defaulting bidder's winning bid.[281] We adopt our proposal in the *Notice* to employ this practice for all auctionable services. No commenter addressed this issue. Although the Commission provided that this deposit amount will be up to 20 percent of the defaulted bid amount, we note that if a license is reauctioned for an amount greater than the defaulted bid for the license, the default payment due will be only three percent of the defaulted bid.[282] Thus, in the future we will assess an initial default deposit of between three percent (3%) and twenty percent (20%) of the defaulted bid amount where a winning bidder or licensee defaults and the defaulted license has yet to be reauctioned. Once the license has been reauctioned by the Commission and the total default payment can be determined, the Commission will either assess the balance of the appropriate default payment, or refund any amounts due, as necessary.

5. Installment Payments

a. Late Payments

103. Background. Section 1.2110(e)(4)(i) of our rules provides that if an entity paying for its licenses in installments is more than ninety (90) days delinquent in any payment it shall be in default. Section 1.2110(e)(4)(ii) provides that upon default or in anticipation of default on an installment payment, a licensee may request that the Commission grant a three- to six-month grace period, during which no installment payments need be made.[283] This rule states

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[279] *See* 47 U.S.C. § 309(j)(5).

[280] *See* 47 C.F.R. § 1.2104(g)(2).

[281] *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5563, n. 51; *Public Notice*, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481 (April 6, 1996). *See also* CHPCS, Inc., BTA No. B347, Frequency Block C, *Order*, DA 96-1825 (rel. November 4, 1996) (assessing an initial default deposit equal to three percent of the total default payment).

[282] 47 C.F.R. § 24.704(a)(2). *See also* 47 C.F.R. § 1.2104(g).

[283] 47 C.F.R. § 1.2110(e)(4)(ii).

that in considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before; how far into the license term the default occurs; the reasons for default; whether the licensee has met construction build-out requirements; the licensee's financial condition; and whether the licensee is seeking a buyer under an authorized distress sale policy.[284] Under this rule, licensees are required to come before the Commission with a filing as well as financial information such as an income statement or balance sheet, in the case of financial distress, to provide the necessary information for the Commission to make its ruling. As a practical matter, licensees are then required to wait for a ruling by the Commission, or the Bureau on delegated authority, before knowing whether a grace period is granted or denied. In order to simplify these grace period procedures, we proposed to maintain our initial 90-day non-delinquency period, but to provide licensees with a subsequent automatic 90-day grace period in which to make their required payment without being considered in default.

104. We also proposed in the *Notice* to adopt a late payment fee schedule similar to that employed for the broadband PCS F block auction. Under this system, licensees that are late in their scheduled installment payments are assessed a late payment fee equal to five percent (5%) of the amount of the past due payment.[285] Specifically, we proposed to require that licensees taking advantage of the initial 90-day non-delinquency period be assessed a late fee of five percent of the late payment, and that licensees taking advantage of the subsequent automatic 90-day grace period be assessed a late fee of 10 percent (10%) of the late payment. We further proposed that the consecutive 90-day non-delinquency and grace periods (*e.g.*, a total of 180 days in which to submit the required payment) be automatic, so that in the future licensees would not be required to file a grace period request and wait for the Commission, or the Bureau on delegated authority, to render a decision.

105. Finally, we proposed in the *Notice* to modify the method by which interest that accrues is amortized when a licensee fails to make a required installment payment. Section 1.2110(e)(4)(ii) of our rules provides that interest that accrues during a grace period will be amortized over the remaining term of the license.[286] In the *Notice*, we recognized that amortizing interest in this way has the effect of changing the amount of all future payments and requiring the Commission, or its designee, to generate a new payment schedule for the license. Changing the amount of the installment payment has, in turn, created uncertainty about the interest schedule, and increased the administrative burden on the Commission by

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[284] *Id.*

[285] 47 C.F.R. § 24.716(c).

[286] 47 C.F.R. § 1.2110(e)(4)(ii).

requiring formulation of a new amortization schedule.[287] In order to avoid the potential problems associated with changing the amount of installment payments, we proposed to amend Section 1.2110(e)(4)(ii) to require that all current licensees who avail themselves of the automatic grace period pay the required late fee(s), all interest accrued during the non-delinquency period, and the appropriate scheduled payment with the first payment made following the conclusion of the non-delinquency period or grace period.

106. Discussion. In order to add certainty to the installment payment process, we adopt our proposals from the *Notice* to modify our grace period provisions. As discussed above (*see* Section III.B.5, *supra*), we decline to use installment payments for the immediate future as a means of financing small business participation in our auction program. As a result, our decision with regard to late payment fees for installment payments effectively will apply only to existing licensees who are currently paying for their licenses in installments. From this point forward, instead of considering individual grace period requests, the following system will apply: A licensee who does not make payment on an installment obligation will automatically have an additional 90 days in which to submit its required payment without being considered delinquent, but will be assessed a five percent late payment fee as discussed above. If the licensee fails to make the required payment at the close of this first 90-day non-delinquency period, the licensee will automatically be provided a subsequent 90-day grace period, this time subject to a second, additional late fee equal to ten percent of the initial required payment.

107. As proposed in the *Notice*, under this system, licensees will not be required to submit a filing to take advantage of these provisions.[288] During this 90-to-180-day period, the Commission or its designated collection agent will continue to pursue collection of past-due installments and fees.[289] Also during this time, the licensee will have the opportunity to raise necessary capital, continue service and construction efforts, or seek a buyer for its license(s) that will resume payments. These late payment provisions will apply independently to all installment payments. Therefore, the late payment provisions and accompanying late fees will not affect the payment schedule for future payments. Thus, even if a licensee elects to take advantage of the late payment provisions, the licensee will still be responsible for remitting all future installment payments in a timely manner, unless the licensee elects to take advantage of

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[287] *See also, Second Report and Order and Further Notice of Proposed Rule Making,* which provides for the payment of interest accrued during the period in which installment payments were suspended over eight quarterly payments. *Second Report and Order and Further Notice of Proposed Rule Making* at ¶ 27.

[288] We further note that the late fee is to be paid at the time the regular quarterly installment payment is made.

[289] *See* Debt Collection Improvement Act, Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3711(a).

the late payment provisions for any future installment payment. The following example illustrates how this system will operate:

> *ABC Corp. has a $100,000 installment interest payment due on March 1. If ABC Corp. is able to make its payment on March 1, then it must remit $100,000 to the Commission. If ABC Corp. makes its payment anytime from March 2 until May 30 (the end of the non-delinquency period), then ABC Corp. must remit $105,000 to the Commission to be considered current on its March 1 installment payment. If ABC Corp. does not make its March 1 payment by May 30, then it must remit $115,000 on or before August 28. If ABC Corp. does not remit the required $115,000 by August 29 (the end of the 90-day grace period), then it will be considered in default and its license will automatically cancel on August 30 without further action by the Commission.*[290]
>
> *ABC Company's June 1 installment payment of $100,000 remains due on June 1 regardless of the payment status of the March 1 payment. The late payment terms apply to June installment payment independently of the March payment. Thus, if ABC Company does not make its March 1 payment until June 1, the total amount due to the Commission on June 1 is $215,000 which consists of the March payment, the March 5% non-delinquency late fee, the March 10% grace period late fee and the June payment. Assuming the licensee remits the March 1 payment and accompanying March late fees of $115,000 to the Commission by August 29, then the total amount due to the Commission on September 1 will be $215,000 which consists of the June installment payment of $100,000, the June 5% non-delinquency late fee, the June 10% grace period late fee and September installment payment of $100,000.*
>
> *ABC Company may elect to make late payments and pay the accompanying late fees on the March and June payments. However, ABC Company must remit $115,00 representing the required March payment and accompanying March late fees by August 29 (the end of March's 90-day grace period) or it will be considered in default and its license will automatically cancel on August 30 without further action by the Commission. Furthermore, ABC Company must remit and additional $115,000 representing the required June payment and accompanying June late fees by November 29 (the end of June's 90-day grace period) or it will be considered in default and its license will automatically cancel on November 30 without further action by the Commission.*

As we proposed in the *Notice*, the late fees we adopt will accrue on the next business day following the payment due date and will be payable with the next quarterly installment payment obligation. We emphasize that at the close of non-delinquency or grace period, a licensee must submit the required late fee(s), all interest accrued during the non-delinquency

[290] *See* 47 C.F.R. § 1.2110(e)(4)(iii).

period, and the appropriate scheduled payment with the first payment made following the conclusion of the non-delinquency period or grace period. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments. As part of our spectrum management responsibilities, we wish to ensure that spectrum is put to use as soon as possible. We also believe that licensees should be working to obtain the funds necessary to meet their payment obligations before they are due and, accordingly, that the non-delinquency and grace periods we adopt should be used only in extraordinary circumstances. Thus, as we emphasized in the *Notice*, a licensee who fails to make payment within 180 days sufficient to pay the late fees, interest, and principal, will be deemed to have failed to make full payment on its obligation and will be subject to license cancellation pursuant to Section 1.2104(g)(2) of the Commission's rules.

108. Several commenters support our efforts to provide licensees with predetermined non-delinquency periods without requiring the submission of a formal grace period request.[291] In addition, many of the commenters addressing this issue, including AMTA, Hughes, AirTouch, Mountain Solutions and CII support the imposition of a late payment fee similar to that imposed in the broadband F block auction, in order to create a significant incentive for timely payment of installment obligations.[292] CII believes that modifying our current grace period procedures will provide licensees with knowledge in advance of the extent of any relief that will be forthcoming from the Commission to a licensee who misses an installment payment.[293] AirTouch believes that any licensee who fails to make payment within 180 days should face the automatic cancellation of its license. AirTouch contends that once a certain number of installment payments have been submitted late, the Commission should declare the licensee in default and subject to the default payments proposed in the *Notice*.[294] In contrast, only CIRI opposes this liberalization of the current grace period rules, requesting instead that grace period relief be made available only when a licensee can demonstrate that such relief is warranted and the public debt will ultimately be satisfied.[295] Although Hughes recommends the imposition of a "significant" late fee to the extent that an applicant misses a payment

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[291] *See* AMTA Comments at 12-13; CII Comments at 16; Pocket Comments at 7-8; Airtouch Comments at 8; Merlin Reply Comments at 4; Airadigm Reply Comments at 2; ISTA Reply Comments at 5-6.

[292] *See* AMTA Comments at 13; Hughes Comments at 8; AirTouch Comments at 8; Mountain Solutions Comments at 3, CII Comments at 16.

[293] CII Comments at 16.

[294] AirTouch Comments at 8-9.

[295] CIRI Comments at 14 and Reply Comments at 2-3.

deadline, Hughes believes that a five to ten percent late fee is large enough to discourage late payments and to ensure that the government is compensated for its administrative expenses in recouping the payment.[296] As an alternative to our proposal in the *Notice*, GWI proposes that any such late payment fee should be pro-rated over the 90 day payment period instead of accruing all at once regardless of when the late payment is made, in order to provide an economic incentive for licensees who are overdue in their payment obligations to retire the payment quickly instead of waiting until the end of the payment period. In addition, GWI suggests that such a pro-rated payment is fairer to licensees who inadvertently miss a required payment through administrative error or other unavoidable, unforeseen circumstances.[297]

109. As an alternative to our proposals in the *Notice*, Airadigm contends that following the first 90-day non-delinquency period, licensees should be given a second 90-day period with a five percent late fee, followed by a third 90-day grace period with a 10 percent late fee.[298] ISTA believes that a rule whereby any license is cancelled at the close of the second 90-day grace period is draconian, and that such a "hard-and-fast" automatic cancellation rule would doom many small businesses.[299] GWI opposes the imposition of an additional 10 percent late payment fee where licensees require an additional 90-day late payment period.[300] We decline to adopt these alternate proposals. As we indicated in the *Notice*, the grant of a grace period is an extraordinary remedy and we wish to encourage licensees to seek private market solutions to their capital problems before the payment due date. In this regard, we note that the Commission has an obligation under the Debt Collection Improvement Act ("DCIA") to enforce payment obligations owed to the federal government.[301]

110. We believe that the automatic grace period provisions we adopt today provide licensees with adequate financial incentives to make installment payments on time, while at the same time creating increased certainty that will help licensees pursue private market solutions to their financing difficulties. These provisions also will discourage licensees from attempting to maximize their cash flow at the government's expense by submitting a required

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[296] *Id.*

[297] GWI Reply Comments at 8.

[298] Airadigm Reply Comments at 2.

[299] ISTA Reply Comments at 7.

[300] GWI Reply Comments at 9.

[301] *See* Debt Collection Improvement Act, Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3711(a).

installment payment after it is due. Several commenters agree with this assessment.[302] At the same time, these provisions will eliminate uncertainty for many licensees who are seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions. In addition, this system will ease the burden on the Commission of considering individual grace period requests where Commission or its designee may not have the necessary resources to evaluate a licensee's financial condition, business plans, and capital structure proposals. We recognize that some commenters oppose the imposition of a late fee on overdue installment payment,[303] and in particular on the 90-day non-delinquency period.[304] However, this approach is consistent with the standard commercial practice of establishing late payment fees and developing financial incentives for licensees to resolve capital issues before payment due dates.[305] This approach also is consistent with the provisions of the DCIA, which requires that the Commission notify the Secretary of the Treasury and commence debt collection procedures where a party is more than 180 days past due on any outstanding debt owed to a federal agency.[306]

111. We recognize that a number of commenters oppose the application of these provisions to current licensees.[307] In particular, GWI and IVDS Enterprises argue that to the extent the Commission adopts a late payment fee, it should limit the imposition of such a fee to licenses issued in future auctions.[308] However, our recent experience with the installment payment program has shown the importance of ensuring that all licensees, including current licensees, have adequate financial incentives to make installment payments on time. We also note that in awarding licenses in the past to entities choosing to pay in installments, the Commission has emphasized that the terms of the installment payment program will be governed by current Commission rules and regulations, as amended. For example, in awarding licenses to C block licensees paying for their licenses in installments, the Commission indicated in the associated "Note and Security Agreement" that the terms of the installment plan would be governed by and construed in accordance with then-applicable

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[302] *See, e.g.*, AMTA Comments at 13; Hughes Comments at 8; AirTouch Comments at 8.

[303] ISTA Comments at 1 and Reply Comments at 4-5; IVDS Enterprises Reply Comments at 3; Pocket Comments at 7-8; Merlin Reply Comments at 4.

[304] Airadigm Comments at 14; IVDS Enterprises Reply Comments at 1-2.

[305] *See, e.g.*, Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

[306] *See* 31 C.F.R. § 3711(g)(1).

[307] *See* Mountain Solutions Reply Comments at 5-6; GWI Reply Comments at 7; IVDS Enterprises Reply Comments at 4.

[308] GWI Reply Comments at 7; IVDS Enterprises Reply Comments at 4.

Commission orders and regulations, as amended. We also believe that these licensees should obtain the benefit of increased certainty that provisions for automatic grace periods provide. This decision is supported by Mountain Solutions, who requests that current licensees obtain the benefits of any loosening of the late payment fee and grace period rules.[309]

112. As provided in the *Second Report and Order and Further Notice of Proposed Rule Making,* installment payments for C and F block licensees will resume effective March 31, 1998. Under our decision to reinstate installment payments for these licensees, we provided them with one automatic 60-day non-delinquency period following the March 31, 1998, deadline, during which time they will not be considered delinquent in their payment obligations. As we indicated in the *Second Report and Order and Further Notice of Proposed Rule Making*, we will not entertain any requests for extension of the March 31, 1998 deadline beyond an automatic 60-day non-delinquency period, so that for C and F block licensees all required payments must be submitted no later than May 30, 1998. Only those licensees making a timely payment of all amounts due, as set forth in the *Second Report and Order* will be permitted to take advantage of the late payment provisions we adopt today.[310]

113. In commenting on these modifications to the grace period provisions, CIRI also proposes that the Commission make public the terms of any workouts or debt relief provided to licensees.[311] CIRI notes that parties may request confidential treatment of sensitive financial information pursuant to Section 0.459 of the Commission's rules, and that such confidential treatment should be sufficient to safeguard the privacy interests of licensees, while still making the terms of any workout available for public scrutiny.[312] As an initial matter, because we adopt our proposals providing for automatic grace periods, we do not envision licensees filing grace period requests under normal circumstances from this point forward. As a result, we believe that CIRI's concerns about the Commission making public a licensee's request for grace period relief are moot. Moreover, because from this point forward a licensee's taking advantage of our late payment provisions will be an administrative matter processed by the Commission's loan servicer, and not a formal waiver request, aside from instances where a licensee is declared in default, there will be no public notice of a licensee's payment status. The license is cancelled automatically under such circumstances. In contrast, for licensees who have previously filed grace period requests consistent with our current rules and procedures, we will continue our current practice of making the request public when a decision is released granting or denying the request, except to the extent that

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[309] Mountain Solutions Reply Comments at 5-6.

[310] *See* 47 C.F.R. § 1.2110.

[311] CIRI Reply Comments at 3.

[312] *Id.* at 4.

any request by the licensee for confidential treatment is granted pursuant to Section 0.459 of the Commission's rules.[313] We further clarify that such licensees are not deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace period requests. Licensees whose requests for a grace period are denied will have ten (10) business days to make the required payment or be considered in default.

b. Defaults on Installment Payments

114. Background. In the *Notice,* we tentatively concluded that 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). Sections 1.2110(e)(1) and 1.2110(e)(2) of our rules provide that applicants eligible for installment payments will be liable for such a payment if they fail to remit either their initial or final down payment.[314] Section 1.2110(e)(4)(iii) provides that (1) following the expiration of any grace period without successful resumption of payment, (2) upon denial of a grace period request, or (3) upon default with no such request submitted, the license of an entity paying on an installment basis will be cancelled automatically and the Commission will initiate debt collection procedures pursuant to Federal Claims Collection Standards and applicable laws.[315] This section of our rules does not clearly indicate, however, whether under these circumstances the licensee will be liable for the default payment set forth in Section 1.2104(g).

115. Discussion. We do not adopt our tentative conclusion to apply the default provisions of Section 1.2104(g) to licensees who default on an installment payment. Most commenters addressing the issue oppose this proposal.[316] For example, Pocket submits that default payments assessed later in the license term become highly arbitrary and unduly burdensome. Pocket also contends that such payments are greater than those traditionally required for secured creditors and create substantial disincentives for investors and creditors

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[313] *See* 47 C.F.R. § 0.459. We note that several PCS C and F block licensees have filed requests for an extension of the deadline for making payments with the Bureau pursuant to 47 C.F.R. § 1.2110(e)(4)(ii). In addition, two parties have filed requests for the restructuring of installment payment schedules, and several parties have filed requests for annual, as opposed to quarterly payment schedules. These requests will be addressed separately by the Bureau in a manner consistent with the procedures we have outlined.

[314] 47 C.F.R. §§ 1.1220(e)(i) and 1.2110(e)(2).

[315] 47 C.F.R.§ 1.2110(e)(4)(iii); *see* 47 C.F.R. Part 1, Subpart O, 4 C.F.R. Parts 101-105, and 31 U.S.C §§ 3701 *et seq.*

[316] *See, e.g.*, Airadigm Comments at 16; Pocket Comments at 9.

who might otherwise be interested in providing financing for licensees.[317] Pocket also notes that any default payment assessed disadvantages a licensee's other creditors, which also makes it more difficult for licensees to raise capital.[318] Finally, Pocket states that default payments assessed later in the license term have no deterrent effect as there is no basis to believe that licensees that have paid substantial sums to the Treasury will willingly default.[319] In contrast, AirTouch supports our tentative conclusion that licensees that ultimately fail to fulfill their installment payment obligations despite the availability of a 90-day non-delinquency period and a subsequent, automatic 90-day grace period, should be declared in default, and in turn be made subject to the default payments proposed in the *Notice*.[320]

116. We have considered the comments of those who oppose the proposed assessment, and find that an additional payment requirement for licensees defaulting on installments is not necessary to achieve our stated objectives. Our current rules and installment payment terms are adequate to discourage defaults and encourage licensees to find private market solutions when they face financial difficulties. We also believe that the rules we adopt today providing for a 90-day non-delinquency period followed by a subsequent, automatic 90-day grace period, subject to appropriate late fees of five percent for the 90-day non-delinquency period and 10% for automatic 90-day grace period, payable at the conclusion of these periods serve these goals without substantially risking delays or disruption in service to the public. In particular, we believe that this certainty regarding the Commission's treatment of licensees needing extra time to make their installment payments will increase the likelihood that licensees and potential investors will find solutions to capital problems before a default occurs. 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.

c. Cross Default in the Context of Installment Payments

117. Background. As we indicated in the *Notice*, a number of parties have asked that we

[317] Pocket Comments at 9.

[318] *Id.*

[319] Pocket Comments at 10.

[320] AirTouch Comments at 8-9.

address the issue of cross default in the context of installment payments.[321] The Commission's rules currently provide that in the event of default, any default payment assessed will be deducted from any upfront payments or down payments a defaulting bidder has deposited with the Commission.[322] The Commission has pursued a policy of cross default for defaults on down payments.[323] A cross default provision would specify that if a licensee defaults on one installment payment loan, it would also default on any other installment payment loans it holds. These provisions are standard in credit-related agreements.[324] We sought comment on whether the Commission should apply cross defaults to its installment payment plan loans. We also asked whether to apply a cross default provision across services. We asked, for example, whether the Commission should consider pursuing default remedies against all PCS and SMR licenses when a licensee with both SMR and broadband PCS licenses defaults on one of its PCS licenses. Alternatively, we asked whether we should pursue default remedies against the single license only. We also asked whether specific factors should influence our decision to pursue cross-defaults and whether cross defaults should be applied automatically or on a case-by-case basis. Finally, we sought comment in general on what remedies are appropriate when licensees default on installment payments.

118. In response to the *Installment Payment Public Notice*, the Commission received extensive comment on the issue of cross default in the context of defaults on installment payments. Several commenters urged the Commission not to adopt a cross default provision.[325] In addition, some commenters urged the Commission to allow licensees to distribute their licenses among independent entities as a means of insulating against cross default.[326] Such a decision, they contend, would allow potential financiers to invest in specific markets that meet their investment criteria without fear that a default in other markets would threaten their investment.[327] Furthermore, some commenters specifically requested that the

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[321] *See, e.g.*, Letter to Michele C. Farquhar from Jay P. Urwitz, August 2, 1996.

[322] 47 C.F.R. § 1.2104(g)(2).

[323] *See* "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," *Public Notice*, 11 FCC Rcd 10853 (1996). *See also* Letter to Kenneth Hobbs from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-260 (rel. February 4, 1997)

[324] *See* Stephen R. Kruft, *Cross Default Provisions in Financing and Derivatives Transactions*, 113 Banking L.J. 216 (1996).

[325] *See e.g.*, BIA Capital Comments at 4; AmeriCall *ex parte* letter, July 11, 1997; Magnacom *ex parte* letter, August 13, 1997.

[326] *See, e.g.*, ClearComm Reply Comments at 4.

[327] *Id.*

Commission clarify its rules regarding cross default in the context of defaults on installment payments if licenses are held by licensees with the same or overlapping control groups.[328]

119. In the *Second Report and Order* in this docket, we concluded that we would not pursue cross default remedies against C block licensees who default on installment payments with regard to other licenses in the C or F blocks.[329] We stated that our decision was warranted in light of our efforts to provide current C block licensees who are experiencing financing difficulties with options for meeting their financial obligations to the Commission. We deferred until completion of the Part 1 Rule Making our decision on whether to amend more comprehensively our policy of cross defaults. We also emphasized that existing installment payment default rules and license conditions would continue to apply for any C block licensees found to be in default after the March 31, 1998, date for resumption of C block installment payments.

120. Discussion. After consideration of the comments in this proceeding, we conclude that we will not pursue a policy of cross default (either within or across services) where licensees default on an installment payment. Because we eliminate the use of installment payments as a means of financing small business participation in our auction program for the foreseeable future (*see* Section III.B.5, *supra*), we note that in practice this decision will apply only to existing licensees who are currently paying for their licenses in installments.

121. Our decision not to pursue cross default remedies against current licensees who default on an installment payment is supported by the majority of commenters.[330] For example, Airadigm contends that it is unfair to jeopardize an entire business because of a default on one license.[331] Similarly, ISTA argues for separate treatment of separate services, regardless of ownership, lest a failure in one business cause failure in unrelated businesses.[332] IVDS Enterprises proposes that licensees be able to discontinue installment payments on a

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[328] *See, e.g.,* ClearComm Reply Comments at 4; BIA Capital Comments at 4.

[329] *See Second Report and Order* at ¶¶ 79-80. We explained, for example, that if a licensee defaults on a C block license and that licensee holds other C block licenses on which it is making its payments, we will not declare it to be in default on its debt associated with the other C block licenses. Similarly, if a licensee defaults on a C block license, and also holds F block licenses on which it is making its payments, we will not declare it to be in default on its F block debt.

[330] *See, e.g.,* Airadigm Comments at 16; Reply Comments at 5; Pocket Comments at 11, Merlin Reply Comments at 6-7; NPCS Reply Comments at 8; ISTA Reply Comments at 8; GWI Reply Comments at 4.

[331] Airadigm Comments at 16.

[332] ISTA Reply Comments at 8.

particular license and allow that license to be cancelled or revoked.[333] IVDS Enterprises believes that such a decision should not affect the licensee's other licenses, whether in the same or other services, where the licensee has made timely installment payments.[334] Alternatively, Pocket believes that the Commission should reserve the authority to impose cross defaults on a case-by-case basis only for licensees that have demonstrated bad faith.[335]

122. We recognize that some commenters strongly advocate a policy of cross defaults in this context. These commenters suggest that such a policy (1) prevents speculation during the auction and cherry-picking (*e.g.*, selectively defaulting on some licenses while keeping others) after the auction concludes,[336] (2) encourages auction participants to find private market solutions to financial shortfalls,[337] and (3) is consistent with commercial lending policies.[338] We believe, however, that the default provisions contained in Section 1.2104(g)(2) serve as an adequate incentive to discourage speculation and encourage licensees to pursue non-default solutions to financial difficulties. We also emphasize that our decision on this matter only addresses default in the context of installment payments, and does not affect our policy with regard to defaults on down payments.[339] In addition, by making licensees who default on an installment payment subject to the default payment set forth in Section 1.2104(g)(2), we create an additional deterrent to licensees considering default as a solution to financing shortfalls. We believe that this policy will promote the goals of Section 309(j) by not punishing otherwise successful licensees for failures in one market, and will strike an appropriate balance between our conflicting roles as both "lender" and "regulator."[340] Accordingly, upon default on an installment payment, a license will automatically cancel without further action by the Commission, the licensee will become subject to the default payment set forth in Section 1.2104(g) of our rules (*see* Section III.D.5, *supra*), and the

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[333] IVDS Enterprises Reply Comments at 4.

[334] IVDS Enterprises Reply Comments at 4-5.

[335] Pocket Comments at 12-13.

[336] CIRI Comments at 15-16.

[337] PCIA Comments at 7; Airtouch Comments at 9.

[338] AirTouch Comments at 9.

[339] *See* Section III.D.b, *supra*. *See also* 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).

[340] *See Report to Congress* at 39.

Commission will initiate debt collection procedures against the licensee and accountable affiliates.[341]

E. Competitive Bidding Design, Procedure, and Timing Issues

1. Balanced Budget Act of 1997 Notice and Comment Procedures

123. Background. The Balanced Budget Act of 1997 provides that "before the issuance of bidding rules" the Commission must provide adequate time for parties to comment on proposed auction procedures, and that "after the issuance of bidding rules," the Commission must provide adequate time "to ensure that interested parties have sufficient time to develop business plans, assess market conditions, and evaluate availability of equipment."[342] In previous auctions, it has been our practice to permit the Bureau, on delegated authority, to address a variety of issues related to the conduct of the auction and to announce these issues by public notice subsequent to the adoption of service-specific auction rules.[343] This practice has proven workable and efficient, and has enabled the Commission, through the involvement of the Bureau, to respond rapidly to a variety of day-to-day operational concerns associated with the conduct of each auction.

124. Discussion. We believe that in the past our service-specific rule making process has served the purpose of adequately ensuring that interested parties have sufficient time to familiarize themselves with the rules and procedures to be employed in an auction prior to the application deadlines and start date of that auction. We nevertheless believe that this legislation requires that we provide an additional opportunity for input from potential bidders prior to the issuance of detailed auction-specific information by the Bureau. To date, the Bureau has served as the primary point of contact with potential bidders and other parties interested in issues relating to each upcoming auction, and this has worked well.[344] In light of

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[341] 47 C.F.R. §§ 1.2104(g), 1.2110(e)(4)(iii). *See also* 31 U.S.C. Chapter 37; 4 C.F.R. Parts 101-105; 47 C.F.R. Part 1, Subpart O.

[342] Balanced Budget Act of 1997, § 3002(a)(1)(B)(iv).

[343] *See, e.g.*, "Auction of 800 MHz Specialized Mobile Radio Service Licenses," *Public Notice*, DA 97-1672 (rel. August 6, 1997) ("*800 MHZ SMR Pre-Auction Public Notice*); "Auction of Local Multipoint Distribution Service Licenses," *Public Notice*, DA 97-2081(rel. September 25, 1997) ("*LMDS Pre-Auction Public Notice*").

[344] For example, the Bureau has traditionally released a public notice announcing the licenses to be auctioned, the start date of the auction, relevant filing deadlines (*e.g.*, the short-form application (FCC Form 175) filing deadline and the deadline for submission of upfront payments) and dates for pre-auction events (*e.g.*, the auction seminar and mock auction). *See, e.g.*, "FCC Announces Upcoming Spectrum Auction Schedule; Two

the typically time-sensitive nature of most issues arising in the weeks prior to the start of an auction, the Bureau has been equipped to make determinations and respond rapidly to potential bidders' concerns.[345] Consistent with the provisions of the Balanced Budget Act, and to ensure that potential bidders have adequate time to familiarize themselves with the specific provisions that will govern the day-to-day conduct of an auction, we direct the Bureau, under its existing delegated authority,[346] to seek comment on a variety of auction-specific issues prior to the start of each auction.[347]

125. We direct the Bureau to seek comment on specific mechanisms relating to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices,[348] minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation. We direct the Bureau to afford interested parties a reasonable time, in light of the start date of each auction and relevant pre-auction filing deadlines, to comment on auction-specific issues. In this regard, we note that it has been the Bureau's practice to release the public notice providing details concerning each upcoming auction sufficiently in advance of the short-form filing deadline (*e.g.*, 30 days prior to the deadline) to provide interested parties with an opportunity to develop business plans, assess market conditions and evaluate the availability of equipment. Also consistent with our previous practice, we recognize that the Bureau needs the flexibility to announce, at any time in the

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Auctions To Commence Before End of the Year," *Public Notice*, DA 97-1627 (rel. July 30, 1997).

[345] *See, e.g.*, Letter to Mr. John Prawat, DigiVox Telecom, Inc. from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-730 (rel. April 11, 1997) (addressing DigiVox's Request for Rule Waiver of the Upfront Payment Requirement in the WCS Auction); Letter to Linda Feldmann, Esq., Leventhal, Senter & Lerman, from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-2261 (rel. October 24, 1997) (addressing the request of Castle Tower Corporation (PR) for waiver of the Commission's Rules to correct its application to reflect its status as non-small business applicant in the 800 MHz SMR auction).

[346] *See* 47 C.F.R. §§ 0.131(c), 0.331, 0.332.

[347] We note that the Bureau has recently begun this process by seeking comment on issues relating to the 800 MHz and LMDS auctions, both of which we announced prior to the passage of the Balanced Budget Act. *See* "Comment Sought on Balanced Budget Provisions Calling For Reserve Prices or Minimum Opening Bids in FCC Auctions," *Public Notice*, DA 97-1933 (rel. September 5, 1997) (800 MHz SMR), and "Comment Sought on Reserve Prices or Minimum Opening Bids for LMDS Auction," *Public Notice*, DA 97-2224 (rel. October 17, 1997) (LMDS).

[348] *See* Section III.E.4, *infra*.