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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Part I of the)
Commission's Rules --)
Competitive Bidding Proceeding)

WT Dkt No. 97-82

REPLY COMMENTS
GENERAL WIRELESS, INC.

General Wireless, Inc. ("GWI"), by its attorneys, hereby submits this Reply in response to the Notice of Proposed Rulemaking ("NPRM")¹ and the comments filed in the above-captioned proceeding. GWI submits this Reply principally to clarify that the NPRM's proposed modifications to the installment payment rules regarding cross default, late payments and grace periods should and were intended to apply only to licenses awarded through future auctions and not to existing licensees. GWI also supports the majority of commenters opposing or otherwise suggesting changes to the proposed cross-default, late payment and grace period rule modifications.

GWI, through its subsidiaries, holds 14 C block PCS licenses. GWI's 14 subsidiary licensees each signed a note and

¹ In re Amendment of Part 1 of the Commission's Rules, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, WT Dkt. No. 97-82 (released Feb. 28, 1997) (hereinafter "NPRM").

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security agreement subjecting them to installment payment obligations pursuant to Section 24.711 of the Commission's rules. Thus, GWI has a significant interest in the proposals made in the *NPRM*.

I. THE PROPOSED INSTALLMENT PLAN RULE CHANGES SHOULD NOT BE APPLIED RETROACTIVELY TO EXISTING LICENSEES

In the *NPRM*, the Commission specifically stated that it was seeking comment on whether to modify its installment payment rules regarding late payments, default payments and grace periods "for future auctions."² The comments submitted in connection with these potential rule changes, however, did not expressly acknowledge that the rules would apply only to future auctions.³ The Commission should nevertheless confirm that its proposed rule changes regarding cross defaults, late penalties and grace periods will not apply to entities that already have won licenses at auction and signed notes and security agreements based on the Commission's existing rules.

Small business auction winners like GWI entered into investment agreements and financing arrangements prior to and during the C block auction to prepare for and bid in the auction in reliance upon the then-existing installment payment rules.

² *NPRM* at ¶ 4 (emphasis added).

³ See, e.g., Comments of Pocket Communications, Inc.; Comments of Mountain Solutions, LTD, Inc.

GWI continued to bid in part based on the rules adopted for that auction. Imposing additional conditions like those discussed in the *NPRM* on existing C Block PCS licensees who have already won licenses and signed notes and security agreements would place a substantial unexpected burden upon such licensees and undermine reasonable expectations of their investors.

For example, each C Block licensee who met its down payment obligations signed a note and security agreement that set forth the licensee's payment schedule and obligations for each of its PCS licenses. These notes and security agreements fail to provide for cross defaults or penalties for late payments. Indeed, if, as the Commission suggests, it deems "standard credit-related agreements" as the litmus test for its installment plan rules, then it must adhere to similar commercial norms in its financial dealings. It would be unconscionable for the Commission (or any more traditional credit facility) unilaterally to rewrite (through rule changes) the already executed notes and security agreements to provide for cross defaults, late payment penalties, or other modified grace period conditions. Thus the Commission should clarify that these rule changes, if adopted, will not apply to existing licensees.⁴

⁴ In fact, in the one place that the Commission discussed a proposed rule change in connection with current licensees, the Commission was clear in doing so. See
(continued...)

II. THE COMMISSION SHOULD NOT ADOPT THE INSTALLMENT PLAN RULE CHANGES AS PROPOSED

In the event that the Commission is inclined to adopt the proposed rule changes for future auctions or, notwithstanding its pronouncement in the *NPRM*, to existing licensees, GWI supports those commenters who oppose or recommend modifications to how these rules should be applied.

A. CROSS DEFAULTS DO NOT SERVE THE PUBLIC INTEREST AND SHOULD NOT BE ADOPTED

In the *NPRM*, the Commission sought comment on whether it should pursue cross defaults in the context of installment payments such that if a licensee were to default on one FCC installment payment loan, it would also be deemed in default on any other FCC installment payment loans it holds.⁵ GWI agrees

⁴(...continued)

NPRM at ¶ 73. If the Commission intended to apply all of the proposed rule changes, including cross default and late payment penalties, to current licensees, the Commission would have clearly stated its intent rather than referring to their application only "for future auctions." In any event, as explained above, the Commission should not apply its modified grace period proposals to current licensees who, along with their investors, relied on the existing regulatory scheme in formulating their business plans. Further, given that many C Block licensees are experiencing difficulty in raising additional financing under current public capital market conditions, it would serve no useful purpose -- and in fact could further hinder such companies' efforts to access capital markets -- for the Commission to accelerate grace period interest payments or impose additional late fees.

⁵ *NPRM* at ¶ 76.

with those commenters who oppose the imposition of cross-default provisions.⁶

Incorporating cross-default provisions would neither serve the public interest nor help fulfill the legislative intent of promoting the entry of small business into the telecommunications industry. Installment payment obligations assumed by small business and entrepreneurial entities are not representative of the "standard" credit-related agreements referred to in the *NPRM*.⁷ The Commission is charged with promoting a number of public policies; it is not a traditional financial institution.

In fact, the incorporation of cross-default provisions clearly will have a "chilling effect" on perspective lenders and other investors. Many licensees bid upon and receive multiple licenses that cover diverse and different geographical areas. Different lenders may finance different geographical regions. Cross-default provisions would deny licensees the ability to attract lenders and other investors willing to finance only a portion of a licensee's holdings. Under cross defaults even if a licensee is financially capable of meeting its entire installment payment obligations for all but one of its awarded licenses, it still risks losing all of its licenses irrespective of when such

⁶ See, e.g., Comments of Pocket Communications, Inc. at 11-13; Comments of Merlin Telecom, Inc. at 26.

⁷ *NPRM* at ¶ 76.

a default occurred. Further, where a licensee begins operating and offering service to subscribers through some but not all of its markets, those subscribers receiving service should not be subjected to service disruption simply because their service provider is unable to meet its installment payment obligations for some other market.

Finally, as mentioned by other commenters, the Commission failed to demonstrate in the *NPRM* how the imposition of cross defaults will serve the public interest or promote the interest of licensees.⁸ In fact, it has failed even to identify any wrong that the cross-default provisions are intended to remedy, let alone how they would do so. In short, no public interest would be served by the adoption of cross-default provisions.⁹

⁸ See Comments of Merlin Telecom, Inc. at 26; Comments of Pocket Communications, Inc. at 11.

⁹ Several comments supported cross-default provisions and speculated in their comments that cross default "encourages thoughtful participation in auctions" (Comments of AirTouch at 9); and would discourage a bidder from acquiring a market that it does not truly desire (Comments of Cook Inlet Region, Inc. at 16). Yet, it is hard to imagine that a bidder would compete seriously for a market and make the down payment for such market (or fail to make the down payment and subject itself to financial penalties) if it did not truly desire the market. The existing penalties more than adequately "encourage thoughtful participation in auctions." In short, cross-default provisions would further complicate small businesses' attempts to raise capital without any corresponding public benefits.

B. TO THE EXTENT THAT THE COMMISSION ADOPTS LATE PAYMENT PENALTIES, IT SHOULD DO SO ON A PRO-RATED BASIS

The Commission sought comment on whether it should adopt a 5% late payment fee on any installment payment that is overdue.¹⁰ Such payment would accrue on the next business day following the payment due date and would be payable with the next quarterly installment payment. The Commission tentatively concluded that such a late payment provision would provide licensees "an adequate financial incentive to make installment payments on time."¹¹

A few parties commented on whether the imposition of a late payment penalty is appropriate, but none commented on the *timing* of the penalty. GWI submits that any such penalty should be limited to licenses issued pursuant to future auctions and pro-rated over the 90-day payment period instead of accruing all at once regardless of whether the overdue payment was made on the first day or the 90th day following the due date.¹² The prorated penalty provides an economic incentive for licensees who are overdue in their payment to retire the payment quickly instead of

¹⁰ *NPRM* at ¶ 70.

¹¹ *Id.*

¹² For example, if a licensee made a payment two days after the due date, the Commission would apply a penalty of .11% of the overdue payment (.05% X 2/90) to the licensee.

waiting until the end of the pay period. A pro-rated penalty also provides a measure of fairness to those licensees who inadvertently miss a payment due to administrative error or other unavoidable but unforeseen circumstances. Furthermore, mitigating the late payment penalty in such a manner will decrease the number of waiver requests licensees may file with the Commission to diminish or reduce such penalty.

C. IMPOSING ADDITIONAL PENALTIES ON LICENSEES WHO CHOOSE TO AVAIL THEMSELVES OF A GRACE PERIOD IS EXTREME AND WOULD FURTHER DISADVANTAGE TROUBLED LICENSEES

In the *NPRM* the Commission sought comment on whether a licensee who did not make a timely payment on an installment obligation within 90 days of its due date should *automatically* receive an additional 90 days ("grace period") to make that payment conditioned upon receipt of the 5% late payment penalty discussed above plus an additional late payment fee of 10%.¹³ Any licensee who did not make payment of the full amount within 90 days of the original due date, including the total 15% late payment fee plus all interest that accrued over the grace period, would have its license automatically revoked.

¹³ *NPRM* at ¶ 74.

GWI agrees with those commenters who oppose the imposition of the additional 10% late payment penalty.¹⁴ The purpose behind the grace period is to allow a licensee who is having temporary financial difficulty additional time to raise the funds necessary to put itself back on track to afford timely installment payments. A licensee in such position already has demonstrated good faith by making the full down payment and, in most cases, several installment payments. Thus, it is unlikely that such licensee would have the funds but simply refuses to pay, particularly given the negative ramifications that such failure to pay could have on the licensee in connection with its existing financing arrangements or attempts to raise further financing. Finally, if the Commission were to impose an additional penalty notwithstanding the policies to the contrary, the penalty should be smaller than the additional 10% penalty proposed and it should be pro-rated similar to the proposal by GWI to pro-rate the 5% late payment penalty.¹⁵ An additional 10% penalty is onerous and will hinder a licensee's ability to restore its financial status and resume timely installment payments. A smaller penalty pro-rated over the 90-day grace period will provide a sufficient

¹⁴ See, e.g., Comments of Pocket Communications, Inc. at 7 (commenting that such proposed late fees would only serve to aggravate licensees' financial difficulties).

¹⁵ See *supra* at 7.

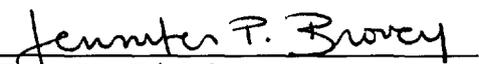
incentive for licensees to make timely payments, but will not necessarily obstruct a licensee's good faith attempt to restore its financial status.

Conclusion

Accordingly, for the reasons set forth above, the Commission should clarify that the proposed modifications to the installment payment rules regarding cross default, late payments and grace periods will apply only to future auctions and not to existing licensees. In addition, the Commission should modify its proposed rules as they may apply to future auction winners to the extent described above.

Respectfully submitted,

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April 16, 1997

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