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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

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In the Matter of	)	
Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding	)	WT Docket No. 97-82

Reply of NextWave Telecom Inc.

I. INTRODUCTION

NextWave Telecom Inc. (NextWave) respectfully submits its reply comments in response to the above-captioned Federal Communication Commission (FCC or Commission) Notice of Proposed Rule Making.[1] NextWave, through its subsidiaries, NextWave Personal Communications Inc. and NextWave Power Partners Inc., is a C block licensee and a winning bidder in the D, E and F block auction of 10 MHz broadband PCS licenses. As such, NextWave has substantial interest in the modifications to the auction rules that the Commission proposes.

NextWave also brings a unique point of view to this proceeding. We have participated in three of the most complex and competitive auctions held to-date. Throughout this process, our

[1] *In the Matter of In the Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Proceeding,* Order, Memorandum of Opinion and Order, and Notice of Proposed Rule Making, WT Docket No. 97-82, (rel. Feb. 20, 1997) (*Notice*).

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resources and efforts have been focused on bringing new competition into the wireless arena. Unlike traditional companies that have bid in FCC auctions, NextWave has participated in the PCS auctions as a small, entrepreneurial business. As such, we experienced firsthand how auction rules affected a small business' ability to participate successfully in an auction and to grow thereafter.

II. THE COMMISSION SHOULD CLARIFY ITS AUCTION POLICIES WHILE KEEPING ITS AUCTION RULES FLEXIBLE

We applaud the Commission for its efforts to improve the mechanics of the auction process. NextWave agrees with many of the changes that the Commission proposes in its *Notice*. In these reply comments, we address a limited number of issues that we consider of the greatest concern, based on NextWave's unique experience. As an overarching matter, as it seeks to "establish a uniform set of provisions,"[2] the Commission auction policy and rules cannot be divorced from spectrum policy. The Commission must design auction policy to serve multiple public interest goals, not just raise revenue. Thus, while our comments here appropriately focus on the mechanics of the auction process, we urge the Commission to use this process to adopt auction rules that advance identifiable policy goals and give auction participants maximum flexibility to bid, raise capital and operate telecommunications businesses post-licensing. We agree that the Commission should standardize its rules for all services yet to be auctioned, and particularly, where indicated below, these rules should supersede existing service-specific auction rules.

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[2] *Notice* at para. 4.

III. THE COMMISSION SHOULD SIMPLIFY ITS RULES GOVERNING DESIGNATED ENTITIES

NextWave agrees with the Commission's proposal to continue its practice of making small business determinations on a service specific basis, taking into account the capital requirements necessary for each service. Furthermore, we agree that for all future auctions, small business determinations be made solely in terms of gross revenues.[3] As the Commission reasoned in the *Notice*, gross revenues are a straightforward and generally reliable measure of whether a business is indeed "small."[4] Elsewhere the Commission has said it believes that "a company's gross revenues is a more accurate indicator of its size than is its net worth or annual profits" and furthermore that "[a] gross revenues test is a clear measure for determining the size of a business and is an established method of determining size eligibility for various types of federal programs that aid small businesses."[5]

NextWave suggests that the Commission clarify that an entity (or its successors) that was eligible to participate in an auction when first conducted, should be eligible to participate in any subsequent re-auction of properties that result from license defaults. In such cases, the Commission should not apply a current gross revenue test to determine eligibility. Any other rule penalizes entities that succeed and grow in the interim.

NextWave also agrees with those commenters that support the simplification of the control group rules as proposed by the Commission.[6] In its *Notice*, the Commission proposes to use a simpler "controlling interest threshold" to determine whether an entity qualifies as a small

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[3] *Notice* at para. 20

[4] *See, e.g.*, Comments of the American Mobile Telecommunications Association, Inc. (AMTA) at 5.

[5] *See, Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Sixth Memorandum Opinion and Order, PP Docket No. 93-253, (rel. Sept. 10, 1997) at para. 69, *see also* 13 C.F.R. § 121.902.

[6] *See, e.g.*, AMTA at 7.

business.[7] In calculating gross revenues, the Commission would include the gross revenues of the controlling principals of the applicant and their affiliates, and make its determination based solely on whether the controlling principals have *de jure* and *de facto* control over the company. Companies would not have to adopt artificial and complex "control group" structures in order to comply with the eligibility rules. In theory, such rules were designed to provide a simple, well defined "safe harbor" for determining control. Rigidity is an attractive property; it may be extracting a high price in terms of inflexibility. Application of traditional control tests is better. This rule change would also eliminate much of the complexity of the control group structure, relying instead on existing standards and case law. As has been borne out in auction licensing processes to-date, despite complex control group rules, the Commission ultimately evaluates who controls a company based on its assessment of both *de jure* and *de facto* control of the company.

NextWave agrees with commenters that any such rule change should apply to existing service-specific auction rules.[8] Furthermore, the Commission should allow existing licensees to restructure their ownership accordingly.

IV. NEXTWAVE URGES THE COMMISSION TO CONTINUE TO OFFER SMALL BUSINESSES INSTALLMENT PAYMENTS AT REASONABLE INTEREST RATES

NextWave agrees with those commenters that urge the Commission to continue to offer installment payments to small businesses.[9] As the Commission states in its *Notice*, "installment payment plans have been a useful tool for small businesses to access capital."[10] The installment payment provision of the auction rules have unambiguously generated the desirable policy

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7 *Notice* at para. 28.

8 *See, e.g.*, Comments of Pocket Communications, Inc. at 3.

9 *See, e.g.*, Comments of Merlin Telecom, Inc. at 4 and Comments of Pocket at 4.

10 *Notice* at para. 34.

outcome of encouraging new entry and competition in the wireless industry. The Commission should think carefully before discarding a mechanism that has proven to work.

In contrast, experience has demonstrated that bidding credits are of limited value, even when they are quite large. Evidence from previous auctions is that bidders "bid through" the bidding credits, and simply pay a market-dictated price for spectrum, not a discounted value.[11] Requiring that these so-called "discounts" be paid back in the event of default or license transfer effectively imposes a premium payment on entrepreneurial bidders, beyond the early payment of their remaining debt to the government. To the extent the Commission retains its unjust enrichment provisions regarding bidding credits, NextWave supports the Commission implementing a provision that provides a scale of decreasing payment liability based on the number of years that a license is held by a designated entity.[12]

We agree with the Commission that a reasonable assumption regarding a business's cost of capital, in this case the rate of interest on government installment payments, is an important component of a bidder's business plan.[13] The current approach of determining interest rate levels at the time of license award is predicated on an assumption that such awards will be nearly contemporaneous with the end of an auction. The lengthy history of C block licensing belies this assumption, and turns interest-setting into a gamble. Interest should be set at a level that might reasonably approximate the bidder's expectation during the auction. In order to give some degree of certainty during the auction, as discussed in its *Notice*, the Commission should

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[11] *See* P. Cramton, *The FCC Auctions: An Early Assessment*, University of Maryland at 13-14 (July 15, 1996). *See also* Comments of Pocket at 4.

[12] We assume that the Commission's proposal that a licensee must pay back 20 percent of its bidding credit after 10 years, in fact means only *through* year 10 and thus would be consistent with current service rules requiring an unjust enrichment penalty only during the term of initial license grant. *See, e.g.,* 47 C.F.R. §24.712(b)(1) (1996).

[13] *Notice* at para. 37.

calculate a licensees' interest rate at the coupon rate of interest offered in the most recent Treasury auction preceding the close of the auction.[14] In this way, bidders would be fairly well-informed as to what interest rate they would be charged.[15] Unless markets are exceedingly volatile, there would likely be little or no change from the rate during the auction and the rate eventually charged.

V. COMMENTS ON SPECIFIC AUCTION MECHANISMS

A. *"Real Time Bidding" Would Disadvantage The Small Business*

The Commission proposes to modify its current simultaneous multiple round auction process to allow bidding on a continuous basis within a combined bid submission/bid withdrawal period. After each fixed period of "real-time bidding," the Commission proposes to open a "discrete closed bidding period."[16] NextWave agrees with Nextel that this proposal is "misguided" and, if adopted, would do more harm than good.[17] Shortening auctions simply as a goal in itself is not necessarily good spectrum policy. Even the slowest auctions to-date have resulted in licenses being awarded more quickly than the Commission's other methods of deciding between mutually exclusive license applicants, comparative hearings and lotteries.[18] Furthermore, other targeted, less burdensome, mechanisms exist for increasing the speed of an

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14 *Id.*

15 *See, e.g.*, Comments of AMTA at 10.

16 *Notice* at paras. 79-84.

17 *See* Comments of Nextel Communications, Inc. at 3.

18 *See* Jonathan Blake, "FCC Licensing: From Comparative Hearings to Auctions," *Federal Communications Law Journal*, Vol. 47, No. 2, at 180. The comparative hearing process often took more than a decade to award licenses. *See also* Thomas Hazlett, "Spectrum Auctions – Only A First Step," *The Wall Street Journal*, Dec. 20, 1994. According to Mr. Hazlett:

> The cost of this (cellular lottery) delay was staggering. Economist Robert J. Michaels and I estimated in a 1993 study that expenditures designed to land these licenses – such as application mills that hired talk-show host Mike Douglas to do TV commercials – cost society between $500 million and $1 billion. Yet this pales beside the findings of another study that the *10-year lag* in bringing cellular services to market cost consumers and producers $87 billion (emphasis added).

auction, such as increasing the number of rounds per day, establishing a minimum opening bid, increasing eligibility requirements (as was done in the D, E, & F block auction) or, as NextWave describes below, reducing insincere withdrawal activity by creating a Fourth Stage. These mechanisms enable the Commission to accelerate the pace of an auction without imposing burdens on auction participants. In contrast, real-time bidding is particularly burdensome in that it would require that a company's senior management be available full-time throughout an auction, limiting severely the conduct of other outside business and as a result, penalizing small bidders. In addition, real-time bidding would require that a bidder remain online for long periods of time to monitor activity in all markets. This is an extremely expensive proposition[19] and unfairly penalizes small bidders that do not have the resources to analyze all bidding activity on a real-time basis.

Furthermore, real-time bidding likely will increase the incidence of erroneous bidding because bidders will have less time to prepare, verify, and submit bids. Even with a break between bid submission periods, bidders have placed erroneous bids, which have adversely affected the efficiency of the auction process.[20]

Finally, NextWave believes that real-time bidding may increase the incidence of emotional or irrational bidding. The current system, which provides a break in between bid submission periods, offers bidders a "cooling down" period whereby bidders analyze the auction data and make rational bid decisions.

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[19] The online charge for the C-block and DEF-block auction was $2.30 per minute.

[20] *See Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions*, Order, FCC 96-203 (rel. May 3, 1996). *See also Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision*, Order, DA 96-706 (rel. May 6, 1996).

B. *The Commission Should Consider Establishing Minimum Opening Bids, But Should Avoid Determining Maximum Bid Increments*

The FCC proposes to establish a minimum opening bid for all auctions.[21] In general, NextWave agrees with the Commission that a minimum opening bid increases the likelihood that the public receives fair market value for the spectrum being auctioned and can help to move the auction to a more rapid close. Furthermore, a minimum opening bid will elevate bids to their final price more quickly, thus hastening the close of the auction. However, NextWave further proposes that the minimum bid level gradually be reduced if no bids are received in a particular market. Such mechanism will assure that a specific license will be auctioned if the value that the market assigns to a license is below the FCC-established minimum opening bid.

NextWave does not support the Commission's proposal to disallow jump bidding, which it describes as bidding above the minimum bid increment by establishing a maximum bid increment.[22] Such a change only will prolong the close of the auction. Contrary to the Commission's statement that jump bids "conceal information,"[23] jump bids actually provide significant information to the extent that such bids reveal a bidder's strong intent to win a license or to force another bidder into the open. NextWave agrees with Nextel that "a party intent on obtaining a license – even for a very high price – would be forced by the Commission's proposal to bid on it incrementally, thus potentially dragging out the length of the auction proceeding."[24] Such a Commission proposal is inconsistent with the Commission's stated intention for implementing real-time bidding, i.e., "to move the auction along more quickly."[25]

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21 *Notice* at para. 86.
22 *Notice* at para. 88.
23 *Id.*
24 *See* Comments of Nextel at 8.
25 *Notice* at para. 81.

C. *The Commission Should Discourage Misuse Of Bid Withdrawals*

NextWave agrees with the Commission that bid withdrawals are a necessary tool that allow bidders to shift bidding strategies or correct erroneous bids.[26] Bid withdrawals are particularly important in simultaneous, multiple round auctions, where there are many interdependent licenses. However, NextWave has observed that the misuse of bid withdrawals, or insincere bidding, can extend the close of the auction.

NextWave understands that by allowing all bidders to use this important tool, certain bidders may attempt to "game" the system. NextWave has observed that misuse of bid withdrawals, while inappropriate at any time in an auction, is particularly problematic when used at the end of an auction to the extent that such behavior prolongs the auction. To help alleviate this problem, NextWave recommends that a Fourth Stage be created, after which a bidder that withdraws from a market may not re-bid in the same market. A Fourth Stage could be triggered when bid activity falls below a certain level, such as five percent of the bidding units, indicating that the auction is nearly ended. Such a proposal will allow bidders the flexibility to use bid withdrawals as the Commission intends, while still ensuring that the auction closes within a reasonable amount of time.

VI. IT IS IN THE PUBLIC INTEREST TO PERMIT PRE-GRANT CONSTRUCTION

The Commission proposes to extend the pre-grant construction rules to all auction winners, regardless of whether petitions to deny have been filed.[27] NextWave emphatically

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[26] *Notice* at para. 93. *See also* Comments of AT&T Wireless Service, Inc. ("AT&T") at 5.

[27] *Notice* at para. 109.

agrees with the Commission that this proposal is in the public interest.[28] Such a proposal will decrease the time penalty imposed on legitimate applicants, and may decrease the incentive to file a frivolous pleading. Allowing all auction winners to begin construction, at their own risk, prior to license grant will result in a rapid deployment of new services and competition to the consumers.

VII. CONCLUSION

For the foregoing reasons, NextWave respectfully urges the Commission to adopt the changes to its auction rules as described herein.

Respectfully submitted,

Janice Obuchowski/CMR

Janice Obuchowski
Executive Vice President
NextWave Telecom Inc.
1101 Pennsylvania Avenue, NW
Washington, DC 20004
202/347-2771

Charla M. Rath
Kevin M. Christiano

April 16, 1997

[28] *See also* Comments of Airadigm Communications, Inc., *et al.*, at 18, AirTouch Paging and Powerpage, Inc. at 13, AMTA at 17, Cellular Telecommunications Industry Association (CTIA) at 1, Paging Network, Inc. at 16, and Personal Communications Industry Association (PCIA) at 6.

CERTIFICATE OF SERVICE

I, Kay Hawkins, hereby certify that on the 16th day of April, 1997, a true copy of the foregoing Reply of NextWave Telecom Inc. was mailed via regular mail by the U.S. Postal Service:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Mr. Gerald P. Vaughan
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Mr. Dan Phythyon
Acting Chief, Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Kathleen O'Brien Ham
Chief, Auctions Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Ms. Sue McNeil
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5114-A
Washington, D.C. 20554

Mr. Robert M. Pepper
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W.
Room 822
Washington, D.C. 20554

Mr. Mark Bollinger
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5322
Washington, D.C. 20554

Cathleen A. Massey
AT&T Wireless Services, Inc.
1150 Connecticut Ave., N.W.
4th Floor
Washington, D.C. 20036

Mark A. Stachiw, Esq.
AirTouch Paging
Three Forest Plaza
12221 Merit Drive, Suite 800
Dallas, TX 75251

John A. Prendergast
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, N.W.
Suite 300
Washington, D.C. 20037

James H. Barker
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004

Carl W. Northrop
E. Ashton Johnston
Paul, Hastings, Janofsky & Walker
1299 Pennsylvania Ave., N.W.
Tenth Floor
Washington, D.C. 20004-2400

Joe D. Edge
Mark F. Dever
Drinker Biddle & Reath
901 Fifteenth Street, N.W.
Suite 900
Washington, D.C. 20005

J. Jeffrey Craven
Janet Fitzpatrick/Jeffrey L. Ross
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037-1350

Christine M. Crowe
Paul, Hastings, Janofsky & Walker, LLP
1299 Pennsylvania Ave., N.W.
Tenth Floor
Washington, D.C. 20004

Alan R. Shark
American Mobile Telecommunications
Association, Inc.
1150 18th Street, N.W., Suite 250
Washington, D.C. 20036

Wendy Chow
Michael F. Altschul
Randall S. Coleman
CTIA
1250 Connecticut Ave., N.W., Suite 200
Washington, D.C. 20036

Jonathan D. Blake
Ellen P. Goodman
Erin M. Egan
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044

Gary M. Epstein
Teresa D. Baer
Susan E. McNeil
Latham & Watkins
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505

Don Lounibos
ISTA
409 Mendocino Ave., Suite C
Santa Rosa, CA 95401-8513

Caressa D. Bennet
Anne E. Linton
Bennet & Bennet, PLLC
1019 19th Street, N.W., Suite 500
Washington, D.C. 20036

Frederick M. Joyce
Christine McLaughlin
Joyce & Jacobs, LLP
1019 19th Street, N.W.
14th Floor, PH-2
Washington, D.C. 20036

Mary E. Brooner
Manager, Telecommunications Strategy & Regulation
Motorola, Inc.
1350 I Street, N.W.
Washington, D.C. 20005

David Cosson
L. Marie Guillory
National Telephone Cooperative Association
2626 Pennsylvania Ave., N.W.
Washington, D.C. 20037

Judith St. Ledger-Roty
Paul G. Madison
Kelley Drye & Warren LLP
1200 - 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Katherine M. Holden
Lauren A. Carbaugh
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Robert L. Hoggarth
Senior Vice President for Narrowband and Paging
PCIA
500 Montgomery Street, Suite 700
Alexandria, VA 22314

William R. Richardson, Jr.
Lynn R. Charytan
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

Louis Gurman, Esquire
Stephen E. Holsten, Esquire
Gurman, Blask & Freedman, Chartered
1400 Sixteenth Street, N.W.
Suite 500
Washington, D.C. 20036

Kay Hawkins