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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

JUN 23 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re )  
 )  
Broadband PCS C and F Block ) WT Docket No. 97-82  
Installment Payment )  
Restructuring )

**COMMENTS OF  
NEXTWAVE TELECOM, INC.**

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COMMENTS OF NEXTWAVE TELECOM INC.

NextWave Telecom, Inc. ("NextWave"),<sup>1/</sup> by its attorneys, hereby submits its comments in response to the Commission's Public Notice in the captioned proceeding. For the reasons set forth below, NextWave submits that the public interest would be served by expeditiously restructuring installment payment obligations.

**I. EXECUTIVE SUMMARY**

When Congress granted to the Commission authority to conduct auctions, it directed the Commission to devise auction procedures that would ensure that DEs have an opportunity to forcefully participate in wireless competition. Despite the Commission's best efforts, this has yet to happen. The irrefutable facts present a

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<sup>1/</sup> NextWave, through its subsidiaries NextWave Personal Communications, Inc. and NextWave Power Partners, Inc., holds Broadband Personal Communications Services ("PCS") licenses in 95 Basic Trading Area ("BTA") markets, having a cumulative 1996 population of 163,000,000. For the most part, these licenses are held in the C Block or F Block, and are held pursuant to Commission rules especially designed for Congressionally-recognized designated entity ("DE") groups such as NextWave. NextWave is the single largest auction high bidder for PCS, having made PCS auction pledges to the federal government of \$4.9 billion and having already paid \$504 million to the U.S. Treasury. NextWave is also uniquely positioned in that it is the only one of the major auction participants to have adopted a "carrier's carrier" operational strategy. That strategy will lead to added competition and customer choice via aggressive promotion of wireless resale.

confluence of events under neither the Commission's nor the new competitors' control that have undermined rapid entry into the market. These include court-imposed stays; *Adarand*; a sluggish A and B Block auction followed by a highly competitive C Block auction that yielded unanticipated higher prices for C Block properties<sup>2/</sup>; major changes in the financial markets during which public traded wireless stocks lost significant value; and Designated Entities' ultimately reaching capital markets far later than anticipated, thus missing the financing window that was available to A and B Block licensees. In this pursuit, C Block licensees have already paid over \$1 billion to the government, representing approximately 28.5% of the amount paid for the A Block licenses and the B Block licenses (excluding payments made for pioneer preference licenses). Under such circumstances restructuring is both equitable and appropriate--and the only way for the Commission to comply fully with its Congressional mandate to provide opportunities for DEs.

Expeditious restructuring can be successful under at least two fundamentally different approaches. One involves substantial deferral of payment obligations, but with all principal and interest eventually being paid. Another prepayment incentive approach hinges on an upfront, considerable discount in payment obligations coupled with a two year period for repayment of the

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<sup>2/</sup> See *Wireless Services, Spectrum Auctions, and Competition in Modern Telecommunications*, Thomas J. Duesterberg and Peter K. Pitsch (May, 1997).

entire revised loan amount. NextWave can accept either plan, with the critical caveats set forth herein. Our baseline proposal is full payment over a deferred payment period. Other C Block licensees may prefer the accelerated prepayment option. The Commission should allow licensees to select either option.

## II. ALTERNATIVE PROPOSALS

For all of the reasons set forth elsewhere in these comments, the restructuring question now before the Commission is not whether to restructure, but how to do so.<sup>3/</sup> In response to the Commission's invitation to comment on various restructuring proposals, NextWave retained the respected financial investment firm of BT Wolfensohn to provide consultation on this matter.<sup>4/</sup> Appendix A, hereto, is a copy of BT Wolfensohn's responsive report, entitled "Overview of Telecommunications Financing Considerations"

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<sup>3/</sup> These restructuring proposals are, of course, in addition to, and not instead of, more sweeping non-service specific reforms already under consideration by the Commission. See Section IV, *infra*. See, also, the Commission's Order and Notice of Proposed Rulemaking, IB Dkt. No. 97-142, FCC 97-195, \_\_\_ FCC Rcd \_\_\_ (rel. June 4, 1997), wherein the Commission has proposed rules to implement the recently signed World Trade Organization ("WTO") Agreement.

<sup>4/</sup> BT Wolfensohn, a division of BT Securities Corp. (or "BTSC") provides financial advisory services to domestic and international corporations and financial institutions. BT Wolfensohn focuses on providing objective advice for its clients in strategic transactions including mergers, acquisitions, divestitures, restructuring and joint ventures. The firm was found by current World Bank President James D. Wolfensohn in 1981. Paul Volcker joined the firm in 1988. The firm merged with BTSC in 1996 and Paul Volcker currently serves on the Board of Directors of Bankers Trust New York Corporation, the parent of BTSC. Further details regarding BT Wolfensohn's qualifications are set forth in the BT Wolfensohn Report.

(the "BT Wolfensohn Report"). With BT Wolfensohn's assistance, NextWave has determined its baseline approach which it sets forth below.

**A. Reschedule Interest & Principal Payment Over Longer License Term**

1. The Restructuring Plan. This plan includes the following five elements: a) maintaining the existing principal obligation to the federal government; b) maintaining the existing interest rate (6.5% for NextWave, and likely for all others); c) providing for annual payments, in arrears; d) permitting, for the first eight years, licensees to add interest obligations, including interest on unpaid interest, to existing principal balances, rather than requiring cash payments; e) paying cash interest on the principal balance in years 9-20; and f) extending the maturity of principal accreted interest to a twenty year "bullet" payment.

2. Rationale. This restructuring plan properly addresses the financial needs of telecommunications ventures through their natural business "life-cycle" and keeps the federal government whole. Thus, in the truest sense this is a restructuring and not a discounting of payment obligations.

3. NextWave's Position. This is NextWave's baseline restructuring plan. As BT Wolfensohn has indicated in Appendix A, the FCC can restructure the C Block debt in a manner that would assist C Block licensees in obtaining financing necessary to build out their networks. BT Wolfensohn Report, at 6. Furthermore, "[B]y altering these basic terms [principal maturity and interest

accretion method], we believe the FCC can effect a restructuring which should allow NextWave to gain access to capital markets and proceed with its business plan".<sup>5/</sup> BT Wolfensohn Report, at 4. In essence, this rescheduling of debt presents several public policy benefits.

The proposal ensures that all capital raised in the early years by entrepreneurs remains dedicated to the rapid build out of networks and to the promotion of facilities-based competition that is at the heart of the C Block policy. Rescheduling the debt simply reflects the recognition that even payment of interest only in the earliest years of infrastructure build out does not coincide with approaches that have normally been taken to financing the build out of start up networks.<sup>6/</sup> This approach enables C Block participants to access capital markets for purposes of repayment to the government when these markets are available. The history of

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<sup>5/</sup> BT Wolfensohn also believes that a successful restructuring from a capital markets perspective may need to address the actual and implied seniority of FCC debt obligations as well as specific FCC build-out and timing requirements.

<sup>6/</sup> Given the enormous upfront capital that must be devoted to building a network from the ground up, including salaries to a very substantial new work force, microwave relocation payments, the cost of leasing cell sites across the country, the cost of network equipment, as well as the cost of actually selling to wholesale or retail customers, payment of interest payments in the earliest years when cash flow is negative or only nominally positive has turned out not to be a realistic scenario. In fact, while NextWave has raised approximately \$600 million dollars, over 85% of these funds have been paid already into the Federal Treasury. This fact is indicative of the enormous burden that further payments at present to the government places upon NextWave or any other entrepreneurial company.

the last three years in the financial markets is suggestive of the difficulties of accessing these markets on a predetermined schedule.<sup>7/</sup>

The telecommunication business life cycle as depicted by BT Wolfensohn demonstrates that this form of restructuring is a common aspect of infant industry financing. This proposal recognizes and addresses the financing needs of telecommunications ventures in each of these three basic life phases: "start up" (when significant investment is needed with limited, if any, revenue from operations); "build-out" (when there are substantial capital needs offset by limited but growing revenues and cashflows); and "maturity" (when capital demands are greatly reduced, revenues and cashflows from operations are positive, and significant repayment is much more practical).

The BT Wolfensohn Report notes that the operational characteristics of a start-up telecommunications venture, including heavy investment in network design and construction, limited service offering and limited, if any, revenues, determine the need for and access to sources of financing.<sup>8/</sup> In particular, BT Wolfensohn notes that access to capital is critical, but limited,

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<sup>7/</sup> NextWave's direct experience is a case in point. Just as NextWave was in the final stages of preparation for a Spring, 1997 high yield debt offering, the Board of Governors of the Federal Reserve ("Federal Reserve") increased its federal funds target rate, derailing most momentum in the high yield debt market for new startups, and stopping communications offerings cold.

<sup>8/</sup> BT Wolfensohn Report, at 8-9.

and that "providers of capital to telecom start-ups recognize the inherent long-term nature in the projects and are often willing to provide equity or interest-deferred debt."<sup>9/</sup> Furthermore, they conclude that "telecom start-ups must constantly revise their financing strategies and may often renegotiate terms of outstanding instruments as their business plans change and to respond to volatile market conditions."<sup>10/</sup>

Numerous case studies support BT Wolfensohn's position. The BT Wolfensohn Report provides detail from four telecommunications industry cases--MCI from 1973 to 1981, McCaw from 1984-1993, Nextel Communications from 1990-1996, and Omnipoint for the current period.<sup>11/</sup> Each of these case studies demonstrates generally how a company's creditors and investors need to remain flexible in order to ensure a company's survival through difficult financial periods, particularly when competing against larger, entrenched incumbents.

The BT Wolfensohn Report analyzes the current state of the financial market vis a vis C Block licensees, and concludes that the FCC can restructure the C Block debt in a manner that would assist C Block licensees in obtaining financing to enable the licensees to build out their networks. BT Wolfensohn Report, at 36. The Pocket Communications bankruptcy filing undermined equity

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<sup>9/</sup> Id. at 6.

<sup>10/</sup> Id.

<sup>11/</sup> BT Wolfensohn Report, Section II.

markets well beyond the low point they had already reached, given the lower relative prices paid in the D, E and F auctions. Since the close of the C Block auction, the public market trading values of telecommunications companies similar to the C Block licensees generally have seen dramatic deterioration of their equity value. See *BT Wolfensohn Report* at 30. The high yield bond market has also experienced a significant drop as well as extreme volatility for PCS companies over the last six months. *Id.* These forces continue to argue for restructuring via deferral of payment obligations.

There is at least one other critical benefit associated with this proposal: It permits carriers to invest in infrastructure and deploy their networks rapidly. This market will immediately translate into lower prices for wireless, more consumer choice, more jobs and increased revenues to the government. The proof of this assertion is found in the history of the companies that BT Wolfensohn profiles in its case studies where the flexible relationship each had with its creditors during its difficult financial times ultimately resulted in better telecommunications services to the American consumer. The FCC may ensure that similar benefits accrue to the consumers of PCS services.

Finally, NextWave could also accept a similar deferral plan with a 15 year payback period. *BT Wolfensohn Report*, at 5. Unlike NextWave's benchmark restructuring plan, BT Wolfensohn believes that market acceptance of this plan would require that the

government forgive three years of interest in the early years of the license term.

**B. Reduce Principal & Allow Accelerated Prepayment**

1. The Restructuring Plan: Near term prepayment with substantial discounts.

2. Rationale: This proposal frees the FCC from its dual role of chief regulator and banker in an environment of constant change.<sup>12/</sup> This option would also lift a considerable marketplace burden that has precluded successful financing of C Block debt requirements. The financial community has balked at the prospect of, in all cases, financing in the face of subordination to government debt, including possible changes in the management of that debt.<sup>13/</sup> Under a prepayment option, C Block entities could pledge the proceeds from sale of their franchises as collateral to

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<sup>12/</sup> This conflict was definitely not the subject of extensive deliberation by Congress or in the early stages of the PCS rulemaking, whose chronology is reflected in Appendix B. Only with the wisdom of experience has it become obvious that this dual approach is clearly burdensome to both the Commission and to C Block licensees. As an example, from a licensee's perspective, the obligation to sign notes and the content of those notes never was noticed in the FCC's rulemaking proceedings. Further, UCC compliance was not an issue. However, these notes have become a serious impediment to both commercial and equipment financing. Conversely, the FCC likely did not anticipate dramatic shifts in the marketplace and the workout issues that have presented themselves.

<sup>13/</sup> In fact, this subordination feature and its possible absence or limitation in the bankruptcy context has established a counter-incentive for all those C Block players, including NextWave, that do not seek to pursue this course.

debt holders and could also avoid the constraint of subordination of all debt to government debt.

3. NextWave's Position: Nextwave also supports a prepayment incentive option, but only if the discount will permit financing in the current market environment. Two points are clear. First, that discount would have to produce a net price lower than that associated with the basket of A and B Block licenses and in the lowest range of values proposed by General Wireless, Inc., in its informal proposal included in the Commission's recent Public Notice<sup>14/</sup>; and C Block licensees would require a minimum of two years in which to make payment.

This discount is warranted because the A and B Block licensees have operated with the benefit of approximately two years of lead time to market and do not operate under the C Block control group and alienation restraint rules, which diminish the financial market valuation of these franchises substantially. Second, financial market conditions have dramatically deteriorated for wireless properties since the A and B Block licensing. A two year payment period would be necessary before any required prepayment to provide confidence in the ability of the licensees to access the capital markets to fund both the prepayment of the licenses and other operating expenditures.

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<sup>14/</sup> Public Notice, WT Dkt. 97-82, DA 97-82, June 2, 1997 (the "Public Notice");

### III. BACKGROUND AND PUBLIC INTEREST CONSIDERATIONS

#### A. The C Block Auction And Licensing

The Omnibus Budget Reconciliation Act of 1993<sup>15/</sup> authorized the use of competitive bidding to license various wireless services. It also mandated that DEs (i.e. small businesses, including rural telephone, women and minority-owned companies) be ensured an opportunity to participate in the provision of such services.<sup>16/</sup> Pursuant to this clear Congressional mandate, the FCC set aside two broadband PCS spectrum blocks, the C and F Blocks, for DE's.<sup>17/</sup> The Commission scheduled the C Block spectrum auction to proceed quickly, recognizing the need to minimize "headstart" problems. *Sixth Report and Order, PP Dkt. No.93-253, 11 FCC Rcd 136 (1995)*. The C-Block auction was scheduled to begin 75 days after the conclusion of the A and B Block auction. Due to imposition of a virtually unprecedented number of court-imposed stays,<sup>18/</sup> and an unexpected landmark

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<sup>15/</sup> Pub. L. No. 103-66, Title VI, Sec. 6002(b), 107 Stat. 312 (1993) (the "1993 Budget Act").

<sup>16/</sup> 47 U.S.C. Sec. 310(j)(4)(D); see also *id.* Sec. 309(j)(3)(B).

<sup>17/</sup> In so doing, it established strict criteria with which potential bidders must comply in order to qualify as a bidder in such auction. See, e.g. 47 CFR § 24.709.

<sup>18/</sup> *Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. Mar. 15, 1995) (order granting stay); *Omnipoint Corporation v. FCC*, No. 95-1374 (D.C. Cir. July 27, 1995) (order granting stay); and *Cincinnati Bell Telephone Co. (Nos. 94-3701, 95-3023)*; *BellSouth Corporation (Nos. 94-4113, 95-3315)*; and *Radiofone, Inc. (No. 95-3238) v. FCC* (6th Cir., Oct., 18, 1995) (order granting stay).

Supreme Court decision,<sup>19/</sup> the C Block auction did not begin until December 18, 1995. It closed on May 6, 1996.

The significant and unexpected delay in starting the C Block auction allowed the A and B Block winners, comprised primarily of incumbent cellular providers affiliated with the Bell companies and long distance carriers, to gain an even greater competitive edge over new entrants, both as to accessing capital markets and as to building their facilities.<sup>20/</sup>

The effects of this delay on small businesses such as NextWave have been devastating. They are especially apparent in the inability by many C Block licensees to attract capital. The public equity market for wireless telecommunications was very strong throughout 1995 and through the first half of 1996, only to erode in late 1996 and in 1997. The high yield debt market for new entrants is now also very weak. Specifically, in the aftermath of the decision of the Federal Reserve to raise interest rates, high yield bond prices declined significantly. The primary focus of the market for new high yield issues became offerings from companies with long operating histories and established track records. Necessarily, this left the entrepreneurs that participated in the

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<sup>19/</sup> *Adarand Constructors, Inc. v. Peña*, 315 US 200, 115 S. Ct. 2097 (1995).

<sup>20/</sup> At the time of NextWave's actual licensing, the headstart was 19 months.

C Block auction without viable financing.<sup>21/</sup> Just last week C Block licensee Chase Telecommunications, L.P.'s high yield debt offering was postponed due to difficulties in the high yield market. *Reuters Newswire*, June 20, 1997.

This wholesale reluctance of the capital markets to fund wireless new entrants threatens to suffocate C Block network build out and, ultimately, new wireless competition, despite the strengths of underlying business cases--unless the Commission quickly restructures installment payment plan obligations.

**B. NextWave's Participation**

As the Commission is well aware, NextWave participated meaningfully in the C Block and the subsequent D, E and F Block auctions, as a small business. NextWave has already paid more than \$504 million to the U.S. Treasury. This is the largest amount among entrepreneurs, and the fifth largest amount among the companies that participated in all of the Broadband PCS auctions.<sup>22/</sup>

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<sup>21/</sup> Ironically, one unintended consequence of the positive recent FCC decision to suspend the license repayment plan has been exacerbation of the capital markets' level of uncertainty and reluctance to finance new wireless start-ups. See *Installment Payment Plans for PCS Licenses*, DA 97-649 (Wir. Bur., rel. March 31, 1997).

<sup>22/</sup> The amount paid by NextWave to-date is greater than the amount paid by many of the larger PCS licensees, including GTE, CNF Aerial, BellSouth, Cox Cable Communications, Western Wireless, Omnipoint, Ameritech Wireless Communications, Powertel PCS Partners, Southwestern Bell and US West Communications.

1. **NextWave's Carrier's Carrier Strategy**  
**Ensures Robust Competition**

Even in their infancy, the impact of C Block licensees on the wireless industry has been significant. NextWave alone has already signed up more than 25 resellers, many of whom are new entrants to the wireless industry. NextWave has received commitments to purchase in excess of 35 billion minutes of use on its PCS networks.<sup>23/</sup> Of this amount, 70 percent has been committed to by small businesses that view resale as the only viable means of entering an industry dominated by large, well-capitalized, branded incumbents.<sup>24/</sup>

NextWave stands alone among the major wireless carriers in advocating the uniquely pro-competitive carriers' carrier business strategy. It provides existing licensees the ability to expand quickly and easily their geographic footprint at a very low capital cost.

Participants in the C Block are actively working together to deploy infrastructure in compatible fashions; to forge roaming

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<sup>23/</sup> The total number of wireless minutes "consumed" in 1995 was 34 billion. See *Projecting Wireless Telecommunications Growth*, CIBC Wood Gundy (February 11, 1997).

<sup>24/</sup> For example, in May 1997, NextWave entered into a relationship with the National Wireless Resellers Association ("NWRA") pursuant to which NWRA members would be eligible to purchase PCS minutes at a flat rate with no monthly access charges or roaming fees for calls made over the NextWave network. In announcing the NextWave relationship, the NWRA stated that "the agreement with NextWave presents new opportunities for our members and will foster competition." See National Wireless Resellers Association, "NWRA, NextWave Sign MOU to Promote PCS Resale," press release (May 16, 1997.)

agreements; and generally to build the C Block into a competitive force nationwide. As a result, NextWave can provide small carriers with the ability to compete on a local, regional or national scale with established, branded incumbents.<sup>25/</sup>

**2. NextWave Has Already Made Substantial Investment in Its PCS Network**

Over the past 18 months, NextWave has aggressively pushed the development and construction of its PCS network in seven different regions across the United States. The primary focus of NextWave's PCS network construction activity has been in New York, Los Angeles, Houston, Washington, D.C./Baltimore, San Diego, Boston, San Antonio, Orlando, Cleveland, and Denver. Today, seven switch sites have been acquired and are under construction. More than 1,300 cell sites have been designed, and over 300 site leases have been signed. Another 900 leases have been negotiated, with over 30% ready to be fully executed. NextWave has also identified and pre-qualified thousands of additional cell sites throughout seven regions of the country that would expand its PCS network coverage by the end of 1998. Over 90% of the microwave links needed to clear the spectrum have been relocated for initial network launch in 1998. Furthermore, NextWave has been operating CDMA-based PCS test and development systems with three different network vendors in San Diego, Washington, D.C., and San Antonio, Texas. The cumulative investment in the network exceeds \$80 million to date,

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<sup>25/</sup> The NextWave network includes all top 10 BTA markets, and 40 of the top 50 BTA markets.

and current vendor financing commitments amount to more than \$1.4 billion. Unfortunately, however, after NextWave's inability to launch a high yield debt offering this spring and Pocket's bankruptcy, NextWave has had to throw on the brakes to this forward momentum.

**C. Restructuring Would Further the Public Interest**

A primary goal of both the 1993 Budget Act and the 1996 Telecommunications Act was to foster competition, thereby creating more consumer choice of services at more competitive prices.<sup>26/</sup> A corollary benefit has been raising revenues for the Treasury through spectrum auctions.<sup>27/</sup> Without a healthy C Block, it is unlikely that we will ever achieve what Chairman Hundt recently identified as "the Holy Grail of Telecom Policy: the substitution of cost-effective wireless communication for wireline

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<sup>26/</sup> As Chairman Hundt recently observed: [I]n markets where the cellular duopoly is supplemented by even a single PCS carrier, statistics show a 25% drop in price. Speech by FCC Chairman Reed E. Hundt to the Federal Communications Bar Association ("FCBA") (April 30, 1997).

<sup>27/</sup> For example, the payments already made to the U.S. Treasury by C-Block licensees, in excess of \$1 billion, can fund a host of critical government programs including: The National Institute of Mental Health; The National Center for Human Genome Research; The National Eye Institute; The National Institute of Child Health and Human Development; The National Institute on Aging; The National Institute on Alcohol Abuse and Alcoholism; The National Institute on Drug Abuse; and The Violent Crime Reduction Programs.

It is further recognized that when Congress passed the 1993 Budget Act, the Congressional Budget Office estimated that, over that five year period, revenues of \$7.6 billion would be generated for the U.S. Treasury. Today, the Treasury already has collected more than \$11 billion. This is 45% more than anticipated.

telephony".<sup>28/</sup> Concentration of the telephone industry, especially in this emerging technology which promises real competition in local loop, is neither in the public interest nor consistent with the very core Congressional mandate that accompanied the Congressional grant of auction authority to the Commission. Accordingly, Commission rule changes that implement a straightforward Congressional mandate are clearly appropriate and permissible. Similarly, strong and vibrant C and F Block licensees are necessary to protect against continued licensee concentration within wireless.

**D. Restructuring is a Wholly Appropriate Response to Unanticipated and Unprecedented Intervening Developments**

An overriding goal of the 1993 Budget Act was to grant certain special benefits for DEs, providing an opportunity to compete in the new wireless environment. Whereas various parties are likely to present sharply differing views as to why those special developments never materialized, it is beyond question that, as evidenced by the disparity between A and B Block, and C Block prices, the DE licensees have not been provided the pricing benefits intended by Congress.

The initial scheduling of interest and principal payments as reflected in Section 24.711 (b) (3) reflects the best efforts of the Commission and of the commenting parties, at the time that the rules were written, to develop a plan that would enable

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<sup>28/</sup> See, Speech by FCC Chairman Reed E. Hundt to the Federal Communications Bar Association ("FCBA") (April 30, 1997).

entrepreneurs to enter this capital-intensive infrastructure business under a realistic framework.<sup>29/</sup> Unexpected, and in many instances unprecedented, developments that ensued after the Commission's payment rules were crafted now warrant revision of the existing rules governing payments. See Section II A, *supra*.

Sound public policy also warrants further refinement of the payment schedule based on the experience of parties in the C Block during and after the auction. See, e.g., *Nationwide Wireless Network Corp.*, 9 FCC Rcd 3635 91994) (in the context of Narrowband PCS, the Commission has authority to revise payment obligations of pioneer's preference winners based upon its experience in licensing via auctions). Furthermore, although auction participants can be expected to realize generally that markets change, and must bid accordingly, it would be extreme to expect that anyone could have anticipated the extraordinary drop in wireless marketplace valuations as shown in the BT Wolfensohn Report. BT Wolfensohn Report at 30. Similarly, although it also may be reasonable to expect that auction participants should anticipate that additional spectrum will come to market over time, no one, not even the

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<sup>29/</sup> Existing FCC rules provide for smaller payments in initial years, while entrepreneurs build out their networks, coupled with payment of principal in later years, when internally generated cash flow can sustain larger payments. This approach was conceptually correct and obviously well intended.

Commission, could have anticipated the impact of the Congressionally mandated 2.3 GHz auctions.<sup>30/</sup>

**IV. Additional Rule Modifications Are Needed to Facilitate Capital Formation And Industry Stability**

Restructuring licensee payment obligations as set forth above will yield the best procompetitive results only in conjunction with rule modifications to facilitate PCS licensees' raising sufficient capital to compete in the broadband wireless marketplace. While there are many items of importance, the proposals discussed below focus upon necessary changes in the control group and attribution rules, abolishing "unjust enrichment" restrictions and modifying permit licensee notes to standardize the licensees to obtain purchase money and working capital financing on cost-effective terms.<sup>31/</sup>

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<sup>30/</sup> See letter of February 5, 1997, to The Honorable Ernest F. Hollings from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, FCC, where Ms. Farquhar explained "Furthermore, the accelerated time frame required for this auction has required the Commission to truncate the normal steps we take prior to auctions to help educate both the telecommunications industry and the financial community. In the normal course, spectrum is allocated at least a year or more before an auction is held...Given the short period of time between the adoption of final rules and the commencement of this auction, potential bidders may not have had sufficient time to identify potential services, formulate business plans, and secure the capital necessary to achieve a successful auction."

<sup>31/</sup> Additionally, NextWave continues to believe that some modification of the foreign ownership limitations would be appropriate.

**A. Control Group and Attribution Rules Should Be Simplified**

Section 24.709 governs eligibility for frequency Blocks C and F. It reflects the Commission's difficult task in formulating a rules to encourage entrepreneurial entry while still allowing sufficient flexibility to attract the massive investment capital infusion necessary to construct and operate wireless systems of the scale necessary to successfully compete. The Rule has some 60 subparts. It is among the most complicated rules ever promulgated by the Commission. A complete overhaul of the rule is in order with the goal of substantially simplifying and reducing the confusion engendered by these restrictions. Two particular aspects of this rule present immediately pressing issues. The so-called "25 percent exception" included in Section 24.709(b)(3) provides that the gross revenues and total assets of a person or entity holding no more than a 25 percent interest in a Block C or F PCS license is not considered under that rule's eligibility test as long as that person is not part of the licensee's control group. In its recently promulgated NPRM,<sup>32/</sup> the Commission proposed to abandon this approach and to substitute a provision which would attribute the gross revenues and net worth only of controlling entities. See NPRM at para. 28, citing Tenth Report and Order, PP Docket No. 93-253, 5 CR 244 (1996).

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<sup>32/</sup> Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making in WT Dkt. 97-82, \_\_\_ FCC Rcd \_\_\_, FCC 97-60 ("NPRM").

NextWave urges that Section 24.709(b)(3) be revised so that only the gross revenues of controlling entities are relevant. Persons who are not in control, or part of a control group, by definition do not control the licensee and thus, their revenues need not even be considered. Retaining this artificial limit of 25 percent for non-attributable investment hinders a PCS entity's ability to raise capital at a time when licensees literally cannot afford any unnecessary impediments to funding. Absent a compelling need to limit minority investment in a PCS venture--and NextWave fails to see any such need--abolishing this limitation will increase PCS licensees' flexibility in raising capital and thereby serve the public interest.

**B. The Commission Should Modify C and F Block Notes to Subordinate Them to Equipment and Working Capital Loans Necessary for Construction and Operation of PCS Facilities**

In order to attract the levels of vendor and other forms of financing that are required to build out the C Block networks, NextWave would also recommend that the Commission adopt rules that provide for some level of subordination of the government debt to encourage lenders to extend financing on terms that are as favorable as those provided to A and B Block licensees. In the context of vendor financing provided to A and B Block licensees, vendors are able to secure their financing by the proceeds from the sale of the licenses.

NextWave would propose that the Commission provide for subordination to the extent of at least 10% of a C Block licensees'

aggregate bid, which would equate to the level of proceeds already received by the government with respect to the C Block licenses.

**V. The Commission is Fully Empowered to Restructure C Block Payment Terms Now**

The Commission's legal authority to restructure C-Block payment terms is beyond question. More than sufficient notice has been provided, and there is no need to issue any further notice of proposed rulemaking or establish any further avenue for public comment. Absent expeditious action, Congressional and Commission goals in establishing the C-Block to encourage meaningful competition, entrepreneurship and participation by designated entities<sup>33/</sup> would be thwarted. Accordingly, the public interest requires prompt Commission action on these proposals.

**A. The Commission Has Provided More Than Adequate Notice of Its Intent to Revise DE Payment Terms and Other Auction Rules**

The law is clear that proper notice has been provided if a rule finally adopted is "a logical outgrowth" of an original proposal. See *American Medical Ass'n v. United States*, 887 F.2d 760 (7th Cir. 1989). The key issue is whether affected parties would be deprived of notice and an opportunity to respond. See *AFL-CIO v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985). Moreover, an agency has the discretion to give notice of either the proposed

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<sup>33/</sup> See, e.g., *Fifth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994). See, also, 47 U.S.C. Sec. 309(j)(4)(D). This goal, in turn, followed from Congress making clear its instruction to the Commission to ensure that small businesses, and members of minority groups and women be "provided an opportunity to participate in the provision of spectrum-based services."