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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Notice of Ex Parte Communication;
Broadband PCS C and F Block Installment
Payment Restructuring; WT Docket No. 97-82

Dear Ms. Salas:

On behalf of NextWave Telecom Inc. ("NextWave"), undersigned counsel and Michael Regan met on the previous business day with Messrs. John Nakahata and Ari Fitzgerald of Chairman Kennard's office. The purpose of the meeting was to introduce them to NextWave's business case. The attached materials were distributed during the meeting.

An original and two copies of this memorandum and attached materials are being filed in the above-captioned docket today. Please direct any questions concerning this matter to me, at 202-347-2771.

Sincerely,

Michael R. Wack
Vice President, Regulation

cc: John Nakahata
Ari Fitzgerald

Attachment

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
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Amendment of the Commission's	)	
Rules Regarding Installment Payment	)	
Financing For Personal Communications	)	
Services (PCS) Licensees	)	WT Docket No. 97-82
	)	
Amendment of Part 1 of the Commission's	)	
Rules – Competitive Bidding Proceeding	)	

PETITION FOR RECONSIDERATION

NextWave Telecom Inc.
1101 Pennsylvania Avenue
Suite 805
Washington, D.C. 20004
(202) 347-2771

November 24, 1997

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PETITION FOR RECONSIDERATION

NextWave Telecom Inc. ("NextWave" or the "Company"), pursuant to section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, respectfully requests reconsideration of certain aspects of the Second Report and Order in the above-captioned proceeding.[1] In that order, the Commission modified its existing small business financial assistance program to provide C-Block licensees additional options for building out their PCS networks or returning their spectrum to the Commission for reauction.

I. INTRODUCTION

A. STATEMENT OF INTEREST

NextWave, through its subsidiaries NextWave Personal Communications Inc. and NextWave Power Partners Inc., holds broadband PCS licenses in 95 Basic Trading Areas ("BTAs"). Most of these licenses are held pursuant to Commission rules especially

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[1] Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Second Report and Order, WT Docket No. 97-82, FCC 97-342, 62 Fed. Reg. 55375 (Oct. 24, 1997) ("*Restructuring Order*").

designed for Congressionally-recognized designated entities ("DEs"). NextWave already has paid $504 million to the U.S. Treasury for its PCS licenses, an amount that represents the fifth largest payment to the Treasury for PCS spectrum usage.[2] All of the Company's payments have been made in a timely manner. NextWave has never been delinquent on a payment or defaulted on any financial obligation to the government.[3]

NextWave is the only major auction participant to have adopted a "carrier's carrier" operational strategy. That strategy will generate substantial new competition and customer choice by promoting wireless resale, and will open significant new opportunities for minorities', women's and small businesses' entry into the wireless marketplace. NextWave's business case is based on, and made possible by, the opportunities for aggressive, facilities-based competition that Congress and the FCC have attempted to promote through adoption and implementation of the 1993 Budget Act and the 1996 Telecom Act, which seek to promote resale and small business entry into telecommunications markets.

NextWave has demonstrated its commitment to constructing its network and delivering new, competitive service to the public as quickly as possible. To date, NextWave has spent approximately $80 million building out its network in BTAs across the country. This commitment is in accord with Congress' and the Commission's goal of bringing new, competitive service to the public by setting aside a block of spectrum for

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2 Appendix A to this petition lists the 15 companies that have paid the most for PCS spectrum usage to date. At number five on the list, NextWave's payments exceed those of far larger and more established wireless licensees, including GTE, Ameritech, BellSouth, SBC Communications, US West, Cox Cable Communications, Omnipoint, and Western Wireless.

3 NextWave did not have a payment due on March 31, 1997, when the Wireless Telecommunications Bureau suspended installment payments to avert some licensees' expected default on that date. At that time, NextWave's next payment was not due for another four months.

small businesses and entrepreneurs. That goal is achievable, provided there are commercially reasonable restructuring alternatives available to C Block licensees. In the wake of the *Restructuring Order*, C-block companies still face significant difficulty continuing their build-outs because, in general, financial markets are not persuaded that a commercially reasonable debt payment structure is in place.

B. Summary of Petition

NextWave entered the C-Block auctions and has paid the government half a billion dollars thus far for the right to establish a PCS business. From the outset of the restructuring proceedings, NextWave has sought to work with the Commission in good faith to develop a fair resolution of C block financial issues in ways that would allow the most immediate commercial use of the licenses for the purposes mandated by Congress. In response, the *Restructuring Order* imposes draconian financial penalties and restrictions on reauction participation. This is unreasonable and unlawful.

Only two months after NextWave received its licenses, and while the Company was attempting to access the public capital markets, a set of circumstances effectively froze new wireless entrants out of those markets. These circumstances included the suspension of installment payments by the Wireless Telecommunications Bureau, and the Commission's widely reported attempts to transfer to the U.S. Treasury Department the commercial banking functions the Commission had taken upon itself in the original C block auction implementation proceeding. Moreover, while NextWave appreciates the significant time and energy the Commission has devoted to restructuring issues thus far, a commercially viable set of solutions has yet to emerge. Accordingly, NextWave

commercially viable set of solutions has yet to emerge. Accordingly, NextWave respectfully asks the Commission to modify the *Restructuring Order* in the following respects:

- The prices paid under the prepayment option should reflect the net present value ("NPV") of foregone installment financing. By failing to make an NPV adjustment to account for the time value of money, the Commission has effectively increased license prices by a minimum of 40 percent. An NPV adjustment to nominal bid amounts is required to correct this error. The adjustment is not a "discount," and it does not reduce the bid amount in real terms. It is standard commercial practice to make an NPV adjustment any time a debtor "buys back" commercial paper which includes a term payment. The adjustment yields a "Current Note Value" that mirrors the alignment of creditor and debtor interests reflected in the original payment schedule.

- Licensees should be permitted to apply their entire down payments under the disaggregation and prepayment options. The current restrictions constitute unprecedented, unjustified, multi-million dollar fines on C block licensees, none of whom has ever defaulted on a C block obligation.

- The reauction of surrendered spectrum should be open to any C block licensee that has maintained its good standing under the auction rules by meeting all of its payment obligations.

- The Commission should clarify application of the amnesty "built out" exception and incorporate it into the disaggregation and prepayment options. The exception is designed to recognize the beneficial effects to the public of network investment. As currently structured, the exception unreasonably favors entities who concentrated their capital to build out a single market over those who applied capital broadly to build several markets.

- The "election date" by which C block licensees must select from the options menu must be deferred to allow the Commission adequate time to complete work on several matters that are wholly or intrinsically related to implementation of the Restructuring Order. These matters include resolution of pending issues in the Part 1 Rewrite Proceeding concerning C block control group rules, as well as clarification of what role. if any, the Commission intends the U.S. Department of Justice to play in connection with Restructuring Order implementation.

- The Commission should expand the options menu to include a modest deferral of payment obligations, which would allow licensees to devote their capital

their bid in full and all accrued interest within the existing license term.

These modifications of the *Restructuring Order* are rational and lawful means of helping the Commission achieve the public policy objectives sought by Congress in the authorizing legislation for the entrepreneur's spectrum block. Adopting these solutions will ensure that C block networks are built out soon.

II. ARGUMENT

A. SERVICE TO THE PUBLIC WILL BE ACCELERATED BY FOREGOING PENALTIES AND BUILDING FLEXIBILITY INTO THE OPTIONS MENU

1. *The Buyout Option Should Be Modified To Reflect The Net Present Value Of C Block Licenses*

The Commission has crafted an option under which a C block licensee may use 70% of its total down payments, plus any new funds it secures immediately, to purchase any of its licenses at the amount bid, net any bidding credit.[4] The Commission's decision to fix the purchase price at the *nominal* amount bid overlooks the fact that licensees will be required to forego the benefits of installment financing under this option. The bid price must be recalculated to reflect this foregone benefit. Making a "net present value" adjustment does not reduce the amount of the obligation in real terms. Rather, the adjustment actually *maintains* the alignment of debtor and creditor interests that were established in the initial payment schedule. The Commission's failure to recognize the necessity of an NPV adjustment is a plain error of fact that requires

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[4] *See Restructuring Order*, at paras. 6, 59-69.

reconsideration.5 Accordingly, the Commission should modify the prepayment option so licensees pay only the full amount they bid, as calculated in real terms.

The economic value of installment payments is uncontroverted. The Commission was aware of the benefits that installment financing would provide to small businesses and entrepreneurs, and it adopted an installment plan specifically for that reason. As the Commission noted in its *Fifth Report and Order*:

> A significant barrier for most businesses small enough to qualify to bid in the entrepreneur's blocks will be access to adequate private financing to ensure their ability to compete against larger firms in the PCS marketplace... By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to and after the auction. Such low cost government financing will promote long-term participation by these businesses, which because of their smaller size, lack access to sufficient capital to compete effectively with larger PCS licensees.6

The fact that installment payments would significantly reduce the effective bid prices in the C block auction was widely understood by auction participants, and was reflected in their bidding strategies and actual bids. As noted by The Hudson Institute, the average price per POP in the C block was $39.88, an amount that is reduced to $23.93 when the value of installment payments are taken into account.7 Furthermore, auction experts R. Preston McAfee and John McMillan have concluded that "the attractive

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5 *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Inc. Co.*, 463 U.S. 29, 42-44 (1983).

6 Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-53, *Fifth Report and Order*, 9 FCC Rcd 5532 at paras. 135-136 (1994).

7 *See* "Wireless Services, Spectrum Auctions, and Competition in Modern Telecommunications," Thomas J. Duesterberg and Peter K. Pitsch, Volume 1, Number 5, p. 11 (May 1997). The authors used a discount rate of 16.5% in their net present value calculations.

delayed-payment provisions induced bidders to bid relatively high."[8] One such bidder recently explained the impact of installment payments on auction activity:

> The time-value of money, a fundamental basis for any economic analysis, factored heavily into C block bidder's business plans and auction strategies. The initial auction allowed for payment ... over a ten year period. Thus, bidders could justify significantly higher bids and remain within the confines of their business plans and/or auction strategies.[9]

Even parties that previously admonished the Commission not to discount C block prices in a prepayment option acknowledge the value of installment payments and have asked that the Commission consider that value in its decisions regarding a C block reauction. One such commenter to the Commission's *Further Notice* in this docket states that "[u]se of the C block "net bid", however, only accounts for the bidding discount and does not account for the "value" of the installment payments. In order to use the C block prices [as a proxy for determining minimum bid prices in a reauction], the "net price" would have to be adjusted further to reduce the price to reflect the value bidders attached to the installment payment financing."[10] This same bidder noted, "Installment payments provide entrepreneurs access to capital at reasonable interest rates that would not be obtainable in the financial markets. The deferral of interest also provides licensees the breathing room to establish their businesses while servicing the interest on the government debt."[11]

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8 *See Statement of Professors R. Preston McAfee and John McMillan*, NextWave Opposition to Application for Review, File Nos. 00341CWL96 *et al.*, p. 3 (April 1, 1997).

9 *See* Comments of DigiPH PCS, Inc., WT Docket 97-82, (November 13, 1997).

10 *See* Comments of AirGate Wireless L.L.C., WT Docket 97-82 (Nov. 13, 1997) at 8.

11 *See Id.* at 8.

The value of installment payments has been underscored in filings in other auction-related proceedings,[12] and by Members of Congress. For example, Congressmen W.J. "Billy" Tauzin (R-La.) and Edward J. Markey (D-Mass.), expressing support for allowing licensees to prepay their auction obligations, recently informed the Commission:

> Under this [full price buy-out] proposal, current licensees could purchase at 'full price' as many of their existing licenses as they desire with cash up front, for the *net present value* of the 'net bid' prices for such licenses, which could be paid for with the licensee's deposit money (plus any new money that the licensee might immediately muster).[13]

In short, forcing bidders to pay the nominal amount of their net bids, rather than the net present value, imposes a steep penalty by significantly inflating the price in real terms. By ignoring the time value of money, the Commission is *inflating* the effective price.[14] There is no rational basis for imposing such a penalty, and doing so undercuts the Commission's stated goal of giving C Block licensees reasonable and fair options for satisfying their payment obligations and proceeding immediately with network deployment. The Commission should adjust the option to allow licensees to pay only the full economic amount of their bid amounts, as embodied in those bids' net present value.

Determining that value is a straightforward exercise. The standard means of assessing net present value is to determine "the value today of a future payment or series

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12 *See, e.g.*, LBC Communications, Inc., Petition for Further Reconsideration, CC Docket No. 92-297 (September 19, 1997). *See also* WebCel Communications, Inc., LBC Communications, Inc., and Zip Communications, Inc., Joint Application for Review, CC Docket No. 92-297, (October 23, 1997).

13 *See* The Honorable W.J. "Billy" Tauzin and Edward J. Markey, *ex parte* letter, September 16, 1997 (emphasis added).

14 As former Chairman Hundt has noted, "[b]y requiring licensees that elect the option to prepay their licenses at the "nominal" bid price, the plan ignores the time value of money and *inflates* the effective price paid by the licensees that it purportedly seeks to assist. Put simply, the value of a bid paid out over ten years is significantly less – around 40% less – than that same bid in cash." *Restructuring Order, Affirming and Dissenting Separate Statement of Chairman Reed E. Hundt*, at 5.

of payments discounted at the appropriate discount rate."[15] Discounting is "the process of calculating the reduced value of a future sum of money in proportion to the opportunity of earning interest and the distance in time of payment or receipt."[16] The discount rate used in net present value analysis reflects the firm's weighted average cost of capital.

The record in this proceeding supports using a discount rate of at least 15 percent. A number of commenters have noted that the weighted average cost of capital for a typical C block licensee is at least 15%. For example, Americall International, LLC calculated the weighted average cost of capital for a typical C block licensee to be 20.2%.[17] BIA Capital Corp. calculated the weighted average cost of capital to be 20%.[18] Omnipoint Corporation noted that the "standard" discount rate for C block licensees is 15%.[19] The Hudson Institute stated that a "realistic" cost of capital for a C block licensee was 16.5%.[20] Triumph Capital conducted an analysis of recent initial debt offerings by several telecommunications companies that provide "a reasonable proxy to the C-Block. This approach yields a discount rate ranging from approximately 15.0% to 16.5% per annum."[21] The Commission should select a rate within this range to make

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15 *See* Eugene F. Brigham, Fundamentals of Financial Management, Fifth Edition, (1989).

16 *See* Erich A. Helfert, Techniques of Financial Analysis, Eighth Edition, (1994).

17 *See* Comments of Americall International, LLC, WT Docket No. 97-82, (June 23, 1997) at Appendix I.

18 *See* Comments of BIA Capital Corp, WT Docket No. 97-82, (June 23, 1997) at p. 3.

19 *See* Reply Comments of Omnipoint Corporation, WT Docket No. 97-82, (July 8, 1997) at p. 5.

20 *Supra* note 4.

21 *See* Triumph Capital Letter to The Honorable Reed E. Hundt, WT Docket 97-82, (September 23, 1997).

necessary net present value adjustments in calculations of amounts due under the prepayment option.[22]

2. *Licensees Should Be Permitted To Utilize Their Entire Downpayments Under the Disaggregation & Buyout Options*

The Commission's decision to impose huge penalties on licensees, in the form of the loss of 30 percent and 50 percent of their down payments under the buyout and disaggregation options, is wholly unreasonable and must be reconsidered. Imposing this penalty on C block licensees has no basis in fact or law, and is at odds with the Commission's rules and policies. Licensees should be permitted to utilize their full down payments under both options.

It is important at the outset to get some facts straight. Well before the start of the C block auction, the Commission adopted section 1.2110(e)(4)(ii) of its rules, which expressly provides for the restructuring of payment schedules. The rule addresses the grant of "grace periods" during which installment payments may be suspended; states that the Commission may "otherwise approve a restructured payment schedule" upon an appropriate showing of a need for relief; and lists the factors to be used to evaluate such requests.[23] Any question whether the rule contemplates a restructuring that alters payment terms fundamentally, beyond the temporary grace period, is settled by reference to the Commission's discussion of the rule when it was adopted:

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[22] Although the Commission could, in theory, determine the net present value of each C Block licensee's bids by looking at company-specific financial data, such an inquiry would likely be complex and lengthy. The resulting delay would detract from the Commission's goal of placing C block spectrum in service to the public as quickly as possible, and is entirely unnecessary. Where, as here, reasonable surrogates are available, the Commission is empowered to utilize them. *See Illinois Public Telecommunications Assoc. v. FCC,* 117 F.3d 555, *clarified,* 123 F.3d 693 (D.C. Cir. 1997).

[23] 47 C.F.R. §1.2110(3)(4)(ii).

> During this grace period, a defaulting licensee could maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan.[24]

Nothing in the rule itself, or in any Commission order discussing it, even hints that a party requesting restructuring would be subject to *any* financial penalty, much less ones of the magnitude contemplated under the *Restructuring Order*. Absent reconsideration, NextWave's investors would suffer the loss of $142 million under the prepayment option and $237 million under the disaggregation option. Either amount would represent the largest forfeiture imposed in the Commission's history, dwarfing even fines imposed for the repeated, negligent operation of communications facilities that threatened the loss of human life.[25] Imposing such "fines" represents a startling, after-the-fact revision of an established rule that violates settled principles of administrative law.

Statements in the *Restructuring Order* that such penalties represent a "fair balance" of competing interests, and are necessary to maintain the "integrity" of the auction, ring entirely hollow. There is no evidence that the Commission adequately balanced competing considerations in reaching its decision. Although the order repeatedly suggests that restructuring harms unsuccessful bidders (without explaining the nature or extent of such harm),[26] it contains no discussion of the wealth of record evidence demonstrating that restructuring is a lawful and appropriate response to the

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24 *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 2348, 2391 (1994) (emphasis added).

25 *See, e.g.,Centel Cellular Co.*, 11 FCC Rcd 10800 (1996).

26 *See, e.g., Restructuring Order*, at para. 65.

unanticipated and unprecedented events that resulted in C block financial distress. This failure to consider such obviously relevant evidence violates the Administrative Procedure Act and compels reconsideration.[27]

The overlooked record material includes substantial evidence that much of the financial difficulty visited upon C block licensees was unforeseeable and outside of their control. This includes evidence that such distress is at least partially attributable to unexpected administrative policy shifts.[28]

Similarly, the *Restructuring Order* never explains how the integrity of the Commission's rules could be compromised by an action – installment payment restructuring -- that is explicitly authorized under those rules. In this instance, the plain language of a Commission rule authorizes parties to request restructuring. The only discussion of that rule in a Commission order suggests that it is designed to *help* installment plan participants who make reasonable requests to restructure their obligations. The Commission's ex post facto determination that restructuring must financially *harm* licensees, and entail stiff penalties, cannot be squared with any reasonable reading of the rule and requires reconsideration.

There is no doubt that certain of the current options "harm" licensees under any reasonable definition of that word. For example, the absence of an NPV adjustment to nominal bid amounts under the prepayment option effectively increases the price of each

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27 *See Celcom Communications Corp. v. FCC*, 789 F.2d 67, 71 (D.C. Cir. 1986); *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413, 1426 (D.C. Cir. 1983) ("*Church of Christ I*").

28 *See, e.g.*, Comments of the U.S. Small Business Administration, Office of Advocacy, WT Docket No. 97-82, Filed Sept. 9, 1997, at p. 4 ("[T]he FCC's suspension of installment payments, *inter alia*, has triggered market forces that have unexpectedly hindered, delayed and prevented

license by 40 percent. Moreover, licensees are not permitted to use their full down payments to purchase licenses under that option. The combination of these two aspects of the restructuring option means that entities electing the prepayment option effectively must pay nearly twice what they bid for each license.

The Commission's attempt to rationalize such penalties by equating them to assessments due under other auction rules is unavailing. The rules cited by the Commission relate to penalties for bid withdrawals and defaulting on down payment obligations.[29] Earlier this year, the Commission determined that such rules do not even apply in installment payment situations.[30] The Commission cannot lawfully apply penalty rules to entities that the agency already has determined are not subject to such rules.[31]

Even assuming the rules cited by the Commission were otherwise valid,[32] they could not be applied in the instant factual situation. The Commission has invoked the penalty provisions of these rules only in situations where an entity has defaulted on a down payment obligation, on the theory that down payments are unique within the auction process and warrant special treatment. After distinguishing down payment

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licensees from meeting their construction of service requirements, even for those licensees that are not in financial distress."). (footnote omitted)

29 See, e.g., *Restructuring Order*, at para. 65 n.146.

30 *See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Proceeding*, WT Docket No. 97-82, FCC 97-60, rel. Feb. 28, 1997, at paras. 75-77 (Notice of Proposed Rulemaking) ("*Part 1 Rewrite NPRM*"). Although the Commission tentatively has proposed to modify its rules so such penalties would apply to installment payment defaults, that matter is still pending.

31 The Commission cannot disguise the invalidity of its action by claiming it is not enforcing penalty rules against C block entities *per se*, but is only fashioning a restructuring remedy by analogy to those rules. *See Restructuring Order*, at para. 65. The Commission may not achieve a result indirectly that it could not lawfully achieve directly.

32 It is NextWave's understanding that the lawfulness of such assessments is being contested in pending bankruptcy proceedings involving C block licensees.

defaults in that manner, it is irrational and unlawful for the Commission to reverse itself in this proceeding, without explanation, and draw an analogy between down payment and installment payment defaults.

Analogies to default penalties are particularly inapt here because, to NextWave's knowledge, no C block licensee has defaulted on an installment payment obligation. Moreover, even if the analogy to default and bid withdrawal penalties were appropriate on a factual basis, application of those penalties is entirely discretionary. The Commission has failed to provide a reasoned explanation why a penalty should be imposed in this instance. The Commission already has determined that selecting one of the new payment options does not constitute default.[33] Moreover, there is no rational basis for claiming that imposing penalties here will discourage speculation in future auctions in which installment payments will be offered, since the Commission already has eliminated the installment payment program for future auctions.[34]

NextWave is not arguing that auction integrity and fairness to all bidders are unimportant objectives. By the Commission's own admission, however, the overarching objective of auctions is to further the public interest by placing spectrum in use to the public as quickly as possible. Imposing stiff penalties as part of restructuring the installment payment obligations undercuts that objective by hamstringing the ability of non-defaulting licensees to build out their networks to provide service to the public.

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33 *See Restructuring Order*, at paras. 39, 55.

34 *See id.*, at para 101 (*NPRM*). The Commission recently ended the installment payment component of its local multipoint distribution service auction.

Simply put, there is no rational basis for such penalties.[35] No rule has been violated. No default or bid withdrawal has occurred. No adequately explained policy objective has been compromised. Imposing such fines, therefore, is a textbook example of arbitrary and capricious agency action. NextWave respectfully urges the Commission to reverse course and allow licensees to apply their entire down payments under the prepayment and disaggregation options.

3. *The "Built Out" Exception Should Be Incorporated Into The Disaggregation Option*

The Commission should correct the artificial and unreasonable distinction between the amnesty option and the disaggregation option. This distinction exists in the form of a "built out" exception to the amnesty option, whereby certain entities will be permitted to selectively surrender some licenses, retain others, obtain forgiveness of their debt obligations, and participate in a reauction. Although the Commission attempts to justify the exception by saying it will encourage the statutory goal of facilitating service to the public, that same rationale applies with equal force to the disaggregation option. The distinction provides no rational basis for differentiating those options from amnesty. The exception in its current form is unlawful because similar investments could be treated quite differently thereunder for reasons unrelated to the exception's purpose and

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[35] *See Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702, 707-710 (D.C. Cir. 1985) ("*Church of Christ II*") (reasoned decision making requires the FCC to not employ means that undercut its ends).

rationale.[36] The Commission must correct this anomaly on reconsideration by making the built out exception available under the disaggregation option.[37]

The *Restructuring Order* already contains the foundation of a solid rationale for offering a built out exception under both amnesty and disaggregation options, but it requires clarification. The order says the exception was created to respond "to the needs of licensees that have already commenced operations or have otherwise invested significantly in certain of their C block licenses."[38] Yet, in the same paragraph, the order says the exception is available only to entities who have met the Commission's C block build out rule,[39] which requires that an entity initiate "commercial operation." Such statements make it impossible to determine who qualifies for the exception, even as it is currently constituted. For example, it is difficult to assess whether a company would satisfy the five-year build-out requirement if it is offering only limited service.[40]

The Commission should not resolve this issue by tying the exception to an "initiate commercial operations" test. The exception is intended to recognize network build out activities that are beneficial to the public. Using "commercial operations" as the test for such recognition would unreasonably favor entities who applied capital to

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36 *See Melody Music*, 345 F.2d 730 (D.C. Cir. 1965). For example, Carrier X might qualify for the exception by constructing in one BTA, while Carrier Y could install ten times as many similar facilities in multiple BTAs but not qualify for the exception because it was waiting to initiate service until it had deployed facilities on an MTA or nationwide basis.

37 At least one Commissioner voted the item apparently believing that a built out exception was available under all menu options, including disaggregation. *See, Restructuring Order, Separate Statement of Commission Rachelle B. Chong*, at p. 5 & n.12 ("Under each of the options, those who have built out will have an opportunity to keep the licenses where they have built out . . .").

38 *Restructuring Order*, at para. 57.

39 *See id.*

40 For example, in September, a C block licensee announced that it had turned up service in Philadelphia, but was not actively seeking customers. *See Omnipoint Announces 'Soft Launch' of Philadelphia Market*, Omnipoint Press Release (Sept. 25, 1997). It is not obvious how a entity

build a single market over those who applied capital broadly to build several markets. The unfairness of such a standard is readily apparent, as it would put the Commission in the position of determining the public value of individual carrier's network roll out plans *ex post facto*. The Commission has traditionally been reluctant to make such judgments, and the record offers no basis for departing from that policy here.

Instead, the Commission should clarify that the exception encompasses all licensees who "invested significantly" in network build out activities, a standard that already is articulated in the *Restructuring Order*. Adopting this standard would ensure the attainment of the Commission's goal of crediting the efforts of C block entities that have invested significant capital in network deployment.

NextWave and others would satisfy such a standard by any reasonable measure. Even before the Commission launched this docket, NextWave's regional network deployment teams had begun construction in major markets throughout the country. During 1996 and 1997, the Company invested approximately $80 million in the build out of its wireless network. This capital was applied to the full range of network deployment activities, including microwave relocation, antenna site identification, leasing and zoning negotiations, and vendor contracting, RF testing; network system design and engineering; and antenna, base station, controller and switch installations.[41] As of May 1, 1997, approximately 90 percent of the microwave links needed to be cleared to allow our initial network launch had been relocated. More than 1,300 cell sites had been designed, and

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that is not seeking customers could be considered engaged in "commercial operations," as required under the Commission's build out rule.

41 Representative illustrations of this activity are provided in Appendix B.

over 300 site leases had been signed. Another 900 leases had been fully negotiated.[42] NextWave continues to make site lease payments in anticipation of reasonable restructuring options. The Commission should clarify the "built out" exception to recognize these investments and similar ones made by other C block entities.

4. *The C Block Reauction Should Be Open To All Non-Defaulting C Block Licensees*

NextWave urges the Commission to reconsider its decision to bar C block licensees who choose the disaggregation or prepayment options from participating in a reauction of C block spectrum, and from acquiring such spectrum on the secondary market for two years thereafter.[43] Such restrictions are unwarranted, unreasonably discriminatory, and contrary to the Commission's auction and spectrum management policies.

The Commission's principal auction policy objectives have long been understood to be to "encourage growth and competition for wireless services and . . . the rapid deployment of new technologies" by awarding licenses to those who value them most highly.[44] Barring those who select the disaggregation or prepayment options from participating in a reauction undercuts those objectives by artificially restricting competition for licenses. Moreover, by depressing bid prices, the restriction will give entities who participate in the auction a windfall that is wholly unearned. Nothing in the record of this or any other proceeding justifies such a result.

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42 This network construction activity was widely reported upon. *See, e.g.*, RCR, "NextWave Progresses On Its Market Buildout," May 19, 1997, at p. 16.

43 *See Restructuring* Order, at paras. 42, 69.

The restriction also is unreasonably discriminatory. Under the so-called "amnesty" option, the Commission will allow an entity that surrenders *all* of its spectrum to fully participate in any reauction, and to acquire spectrum unimpeded in secondary markets.[45] The *Restructuring Order* does not provide a rational basis for differential treatment of licensees that choose the "amnesty" option and those who choose the prepayment or disaggregation options, and there is none. This disparate treatment constitutes a violation of the Administrative Procedure Act and requires reconsideration.[46] The Commission should eliminate this anomaly by allowing any C block licensee in good standing to participate in a reauction (*i.e.*, licensees who have not defaulted on their payment obligations).

B. *THE FCC MUST COMPLETE ACTION ON ISSUES INTRINSICALLY RELATED TO INSTALLMENT PAYMENT RESTRUCTURING BEFORE REQUIRING LICENSEES TO SELECT ONE OF THE PAYMENT OPTIONS*

Under the *Restructuring Order*, C block licensees must inform the Commission in writing by January 15, 1998, whether they will continue under the existing installment payment plan or selecting one of the new alternative options.[47] This "Election Day" notification is designed to be a nearly irrevocable action by C block entities because they are required to surrender for *cancellation* the originals of all licenses affected by their choice.[48] It is wholly unreasonable for licensees to be forced to make a selection when

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44 *E.g, In the Matter of Implementation of Section 309(j) of the Communications Act,* Second Report and Order, PP Docket No. 93-253, (rel. Apr. 20, 1994) at para. 5.

45 *Restructuring Order* at para. 54.

46 *See Airmark Corp. v. FAA*, 758 F.2d 685, 691-95 (D.C. Cir. 1985).

47 *See Restructuring Order*, at para. 70.

48 *See id.*, at paras. 73-76.

the Commission has not completed action on related issues that will materially effect their ability to assess the options.

1. *Part 1 Rewrite*

For example, in the *Part 1 Rewrite NPRM* in the instant docket, the Commission is proposing to establish uniform rules governing spectrum auctions.[49] In comments filed in response to that NPRM, and in additional filings made in response to the subsequent Public Notice specifically targeted to C block issues, [50] NextWave has articulated its support of certain of the FCC proposals and offered suggestions that are a natural outgrowth of the Commission's efforts. In particular, NextWave has urged the Commission to modify the Part 1 rules to use a simpler "controlling interest threshold" to determine whether an entity qualifies as a small business.[51] The Commission already has determined elsewhere that application of traditional control tests is better than imposing specific equity requirements on the controlling principals.[52] Changes in ownership rules obviously would have critical bearing on which option a licensee would choose to adopt. Thus, the Commission should complete its *Part 1 Proceeding* expeditiously, and allow licensees a commercially reasonable time thereafter to evaluate the alternative payment options provided in the *Second Report and Order*.

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49 *Part I Proceeding*, at para. 4.

50 *See* Public Notice, *Wireless Telecommunications Bureau Seeks Comment On Broadband PCS C and F Block Installment Payment Issues*, WT Docket No. 97-82, DA 97-679, rel. June 2, 1997.

51 *Part I Proceeding*, at para. 28.

52 *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Tenth Report and Order, PP Docket 93-253, (rel. Nov. 16, 1996), at para. 16.

2. *Coordination With Other Federal Agencies*

The *Restructuring Order* contains unexplained statements that cancellation of financial obligations associated with licenses surrendered under the amnesty and disaggregation options, as well as refunds of any installment payments, will be subject to "coordination" with the Department of Justice pursuant to "applicable" federal claims collection standards.[53] Such statements could be interpreted to mean that the Commission believes the U.S. Department of Justice and other federal agencies retain final authority to approve – or deny – cancellation of the notes and security agreements the Commission obliged C block entities to sign as a condition of license.

The question whether the Commission's authority over spectrum auction installment payment policies is exclusive, or must be shared with other federal agencies, is central to this proceeding and is fully briefed.[54] Unless the question is resolved, licensees could be in the untenable position on Election Day of having to surrender their licensees without assurance that the Commission is empowered to uphold its end of the transaction. The *Restructuring Order* is "intolerably mute" on this material issue, and violates the Administrative Procedure Act as a result.[55] Election Day must be deferred

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[53] *See Restructuring Order*, at para. 40 (disaggregation), para. 53 & n.119 (amnesty), and para. 58 & n.123 (refunds). Inexplicably, the discussion of prepayment option does not mention this issue.

[54] BellSouth, among others, has suggested that the Commission's authority over radio licenses must be shared with other agencies, pursuant to Title 31 of the United States Code. *See* BellSouth Comments, WT Docket No. 97-82, filed June 23, 1997, at 10. NextWave demonstrated in a later filing that the Commission has exclusive authority to develop radio licensing and associated policies, including those relating to spectrum auctions. *See* NextWave Reply, WT Docket No. 97-82, filed July 8, 1997, at pp. 16-19. For the Commission's convenience, NextWave will not repeat that demonstration, but incorporates it herein by reference.

[55] *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971).

until a date following the release of a Commission order resolving this critically important issue.

3. *WTO Implementation*

The World Trade Organization (WTO) agreement takes affect on January 1, 1998, and will transform telecommunications fundamentally, especially for start-up companies, by allowing U.S. carriers to access foreign capital markets to an extent heretofore prohibited. While the Commission has proposed rules implementing the WTO agreement,[56] it has not yet adopted final rules. More importantly for present purposes, even if final WTO implementation rules were adopted, released and published in the *Federal Register* tomorrow, those rules could not take affect for 60 days under applicable procedural requirements governing agency action. That date falls eleven days *after* C block Election Day. Such a timeline will substantially hinder the ability of C block licensees to take advantage of the WTO prior to Election Day, thereby denying such licensees the potential benefits of securing foreign equity investment. Deferring Election Day until a brief period after the effective date of the Commission's rules implementing the WTO Agreement is reasonable, and the Commission should take this action on reconsideration.

C. *THE COMMISSION SHOULD EXPAND THE OPTIONS MENU TO PROVIDE FOR A MODEST DEFERRAL*

NextWave continues to support deferral of installment payment obligations for a modest period of time to allow the Company and other C block entities to focus their

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[56] *See In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Order and Notice of Proposed Rulemaking, IB Docket No. 97-142 (rel. June 4, 1997).