

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, DC 20554

In the Matter of )  
)  
Amendment of the Commission's Rules )  
Regarding Installment Payment Financing for )  
Personal Communications Services (PCS) )  
Licensees )

WT Docket No. 97-82

RECEIVED

DEC 29 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**PRIMECO PERSONAL COMMUNICATIONS, L.P.  
OPPOSITION TO PETITIONS FOR RECONSIDERATION**

PrimeCo Personal Communications, L.P. ("PrimeCo"),<sup>1</sup> hereby submits the following brief opposition to petitions for reconsideration of the Commission's *Second Report and Order* filed in the above-referenced proceeding.<sup>2</sup> For the reasons discussed herein, PrimeCo opposes those petitions requesting alternative installment payment obligations for C/F Block licensees and urges the Commission to affirm the *Second Report and Order*. Prompt action on the reconsideration petitions is also important to ensure prompt deployment of competitive PCS services.

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<sup>1</sup> PrimeCo is the broadband A/B Block PCS licensee or is the general partner/majority owner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Fort Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami and Honolulu.

<sup>2</sup> *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-342 (released October 16, 1997) ("*Second Report and Order*").

## DISCUSSION

In establishing the competitive bidding program, Congress gave the Commission considerable discretion in balancing Section 309(j) objectives.<sup>3</sup> The Commission adopted an installment payment program and accompanying eligibility requirements for winning bidders in the C and F Block auction to further Section 309(j)'s objective of "promoting economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."<sup>4</sup> By statute, the Commission is also required to promote of other important objectives, including rapid service deployment, efficient spectrum use, and, in designing a competitive bidding system, the Commission was further mandated "to adopt *safeguards to protect the public interest* in the use of the spectrum . . . ."<sup>5</sup> The broadband PCS auction and payment rules were clearly established in accord with these objectives and all potential bidders were advised that the rules would be enforced and that competitive forces would determine who succeeded.<sup>6</sup>

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<sup>3</sup> 47 U.S.C. § 309(j); *see Omnipoint Corp. v. FCC*, 78 F.3d 620, 632-39 (D.C. Cir. 1996); *Deferral of Licensing of MTA Commercial Broadband PCS, Memorandum Opinion and Order*, 11 FCC Rcd 3214, ¶ 21 (Wireless Telecom. Bur. 1995), *aff'd*, 11 FCC Rcd 17052, ¶ 10 (1996).

<sup>4</sup> 47 U.S.C. § 309(j)(3).

<sup>5</sup> *Id.* § 309(j)(3)-(4) (emphasis added).

<sup>6</sup> *See* 47 C.F.R. § 1.2110(e)(4) (license granted to entity that elects installment payments is "conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan."); *see also IVDS Payment Order*, 11 FCC Rcd. 1282, 1284 (1995); Speech by Chairman Reed E. Hundt before the Cellular Telecommunications Industry Association, March 25, 1996.

Within months of license awards, however, it became clear that some C Block licensees had bid too much and that private capital markets were unwilling to finance the installment payment obligations of certain C Block licensees. Thereafter, and due in part to requests from C and F Block licensees to modify their installment payment obligations, the Wireless Telecommunications Bureau ("Bureau") suspended the deadline for payment of installment payments for C and F Block licensees in, respectively, March and April of 1997. In June 1997, the Bureau sought comment on various alternative installment payment arrangements. Later that month, the Bureau conducted a Public Forum to discuss these issues, and the Commission established a Task Force to evaluate proposed financing arrangements. The *Second Report and Order* followed, in which the Commission made some modifications to the payment obligations undertaken by C Block licensees but sought to maintain the basic integrity of the auction process and the Commission's licensing procedures.

The record in this proceeding is immense and reflects a broad spectrum of opinion. PrimeCo submits that the *Second Report and Order* reflects a reasonable balancing of the Commission's statutory obligations under the circumstances and, while not perfect, should not be modified on reconsideration. Notwithstanding the amnesty option and other changes made to the installment payment requirements, a number of petitioners now advocate more sweeping forgiveness of C Block licensees' installment payment obligations, including further deferral of payment obligations,<sup>7</sup> an expansion of

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<sup>7</sup> See, e.g., GWI PCS at 2-3; NextWave at 22-24; OneStop at 2; see also On Que at 2.

the installment payment period to 20 years,<sup>8</sup> and a reduction of licensees' debt obligations.<sup>9</sup> Petitioners' arguments on behalf of more generous installment payment terms were acknowledged and discussed at length in this proceeding — and were appropriately disposed of in the *Second Report and Order*.<sup>10</sup>

As the Commission made clear in the *Second Report and Order*, a fundamental restructuring of the installment payment terms previously established and agreed to would contravene the Commission's established auction objective of awarding licenses to parties who value them the most and are most likely to rapidly deploy service.<sup>11</sup> It would also undermine, in a very dangerous way, the integrity of the Commission's auction licensing process. The Commission therefore properly rejected proposals to more significantly reduce C Block debt obligations, stating that:

- it did “not wish to adopt temporary solutions such as those that might only postpone these difficulties and further prolong uncertainty . . . [or] to adopt proposals that result in a dramatic forgiveness of the debt owed.”
- “there is no certainty the long term financial outlook facing many licensees would be improved”;

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<sup>8</sup> See, e.g., Alpine PCS at 12-13; Northern Michigan PCS at 6.

<sup>9</sup> See, e.g., Alpine PCS at 13 n.6; DigiPH at 10.

<sup>10</sup> See *Second Report and Order* ¶¶ 17-20, n.39, and Separate Opinions of Commissioners Ness, Chong and Quello. The Commission's actions are afforded considerable deference and will be overturned only if arbitrary and capricious. See *Connecticut Dept. of Public Utility Cont. v. FCC*, 78 F.3d 842, 849-51 (2d Cir. 1996); *Omnipoint v. FCC*, 78 F.3d at 632; *People of the State of California v. FCC*, 75 F.3d at 1365. As discussed *infra*, the Commission addressed petitioners' arguments at length, not simply dismissing them “in a footnote.” See *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

<sup>11</sup> *Second Report and Order* ¶¶ 17-20, 66.

- such a result “would be unfair to other bidders, and would gravely undermine the credibility and integrity of [the Commission’s] rules”; and
- dramatic forgiveness “could be interpreted as the Commission picking winners and losers on an unsupportable basis, instead of the marketplace determining winners based upon an auction.”<sup>12</sup>

The Commission concluded that the *Second Report and Order* will “help resolve the financing issues facing C block licensees and restore certainty to the marketplace, while at the same time helping the Commission meet its statutorily mandated public interest considerations set forth under Section 309(j) of the Communications Act.”<sup>13</sup>

The Commission’s objections to dramatic restructuring of installment payment obligations, as well as the policy objectives underlying the *Second Report and Order* “menu options,” follow the Commission’s Section 309(j) mandate and should be affirmed.<sup>14</sup> While PrimeCo believes that Commission enforcement of the original installment payment and default rules was in fact warranted, the limited relief provided to C Block licensees in the *Second Report and Order* reflects a reasonable balancing of Congress’ statutory objectives and marketplace considerations and should be affirmed.

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<sup>12</sup> *Id.* ¶¶ 18-19. Just last week, the Commission confirmed its policy of protecting “the integrity of the auction process” by “preventing insincere bidding”, citing to the “need to swiftly assess the qualifications of licensees in order to ensure the rapid deployment of telecommunications services for the public.” *Carolina PCS I Limited Partnership, Memorandum Opinion and Order*, FCC 97-417, ¶¶ 16- (released December 24, 1997) (imposing five percent late payment penalty for failure to timely submit down payment).

<sup>13</sup> *Second Report and Order* ¶ 21; *see also id.* ¶ 7 (limiting eligibility at reauction to qualified entrepreneurs and original C Block bidders and C Block licensees); ¶¶ 43-45 (disaggregation), ¶¶ 54-58 (amnesty), ¶¶ 64-66 (prepayment).

<sup>14</sup> The reasons advanced by PrimeCo earlier in this proceeding in opposition to the initial requests for reductions/revisions to the C Block licensees’ financial obligations remains relevant on reconsideration, and PrimeCo hereby incorporates those comments by reference. A copy of PrimeCo’s earlier comments is attached.

**CONCLUSION**

For the reasons discussed herein and in PrimeCo's earlier filing in this proceeding, the Commission should promptly affirm the *Second Report and Order* and reject petitioners' various requests to revisit and revise the C Block license payment "menu options."

Respectfully submitted,

**PRIMECO PERSONAL COMMUNICATIONS, L.P.**



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December 29, 1997

**PRIMECO PERSONAL COMMUNICATIONS, L.P.  
OPPOSITION TO PETITIONS FOR RECONSIDERATION**

**ATTACHMENT**

**PrimeCo Reply Comments in WT Docket No. 97-82  
filed July 8, 1997**

**STAMP & RETURN**

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Broadband PCS C and F Block )  
Installment Payment Issues )

WT Docket No. 97-82  
DA 97-679

**REPLY COMMENTS OF  
PRIMECO PERSONAL COMMUNICATIONS, L.P.**

**PRIMECO PERSONAL COMMUNICATIONS, L.P.**  
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**REPLY COMMENTS OF  
PRIMECO PERSONAL COMMUNICATIONS, L.P.**

PrimeCo Personal Communications, L.P. ("PrimeCo"), an A and B block PCS licensee,<sup>1</sup> submits this reply to the numerous comments filed in this proceeding on June 23, 1997, and made at the Wireless Telecommunications Bureau's ("Bureau") June 30, 1997 Public Forum.<sup>2</sup>

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<sup>1</sup> PrimeCo is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc), and PCS Nucleus, L.P. (owned by AirTouch PCS Holding, Inc. and U S WEST PCS Holdings, Inc.). PrimeCo is the broadband PCS licensee or the sole general partner/majority owner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Forth Worth (Licensee: Dallas MTA, L.P.), San Antonio (Licensee: San Antonio MTA, L.P.), Houston (Licensee: Houston MTA, L.P.), New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami, and Honolulu.

<sup>2</sup> 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 (released June 2, 1997) ("*Public Notice*"); Public Notice, *Commission to Hold Public Forum Regarding Broadband PCS C and F Block Installment Payment Issues*, WT Docket No. 97-82, DA 97-1267 (released June 17, 1997).

## SUMMARY

PrimeCo is not opposed to the original request to change the frequency of installment payments from quarterly to annually. However, PrimeCo does oppose the myriad of subsequent requests which seek to change the core economic bargain which auction winners agreed to prior to the auction — whether through forgiveness of debt principal and/or interest, extending the term of the debt, or other fundamental changes to the agreed-to bargain. There is a substantial question whether the Commission has the legal authority to adopt any of these additional proposals. Further, adopting such changes retroactively would disserve the public interest because it would undermine the auction process and spectrum valuation and may negatively impact service deployment.

## I. INTRODUCTION/BACKGROUND

The impetus for this proceeding began on March 13, 1997, when nine C block licensees asked the Commission to reform their promissory notes so their installment payments, due March 31, 1997, could be made annually rather than quarterly.<sup>3</sup> The petitioners argued that annual payments would provide them with greater flexibility to time additional fund-raising activities and would allow them to focus their near term energy on infrastructure build-out. The petitioners noted that grant of the relief would not require a rule charge or waiver because the frequency of installment payments (quarterly vs. annually) was not specified in Commission rules. Petitioners stated that the payment timing change would facilitate a quicker time-to-

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<sup>3</sup> See Letter from Thomas Gutierrez, *et al*, to Michele C. Farquhar, Chief, Wireless Telecommunications Bureau dated March 13, 1997 (“Gutierrez Letter”).

market for small business licensees, which would, in turn, also allow C Block licensees to start generating revenues more quickly.<sup>4</sup>

On March 31, 1997 the Bureau released a three paragraph order suspending indefinitely C block installment payments.<sup>5</sup> Because this *Suspension Order* was issued late in the day,<sup>6</sup> certain C block licensees were unaware of this action and submitted their quarterly installment payments. The next month the Bureau also suspended installment payments due by F block licensees.<sup>7</sup>

Subsequent to the release of the *Suspension Order*, C block licensees and certain of their business partners began requesting changes to the C block licensees' payment obligations. MCI Telecommunications Corporation, which has a resale arrangement with NextWave Communications, Inc., argued that C block licensee installment payments should be suspended altogether during the first five years of the license term.<sup>8</sup> Fortunet Communications, L.P. endorsed this MCI proposal but recommended that the Commission make additional changes to rules regarding control group requirements and transfer restrictions.<sup>9</sup> General

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<sup>4</sup> *Id.* at 3.

<sup>5</sup> *See Order, Installment Payments for PCS Licenses*, DA 97-649 (Wireless Telecommunications Bureau released March 31, 1997) ("*Suspension Order*").

<sup>6</sup> As a result, the *Suspension Order* was published in the April 1, 1997 *Daily Digest*.

<sup>7</sup> *See Public Notice, FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses*, DA 97-883 (released April 28, 1997).

<sup>8</sup> *See Letter from Leonard Sawicki, MCI Telecommunications, to William Caton, FCC Secretary dated May 1, 1997 ("Sawicki Letter")*.

<sup>9</sup> *See Letter from James Barker and Michael Wroblewski, Counsel to Fortunet Communications, to William Caton, FCC Secretary dated May 9, 1997*.

Wireless Inc. then proposed that the Commission instead reduce the debt owed by C Block licenses by over 60%.<sup>10</sup>

The Bureau requested public comment on these and other relief proposals on June 2, 1997.<sup>11</sup> For the most part, the comments predictably reflected the posture of the filing parties.

For example:

- C block licensees which submitted their quarterly payments because they were unaware of the March 31 *Suspension Order* have requested a refund plus interest;<sup>12</sup>
- Unsuccessful C block auction participants, which made important investment and bidding decisions in reliance on the rules now proposed for retroactive change, opposed any reformation and urged the Commission to maintain its past practice of enforcing the rules and re-auctioning defaulted licenses;<sup>13</sup>
- C block licensees capable of meeting their current commitments and therefore not needing relief have nonetheless endorsed the reform proposals;<sup>14</sup>
- Some C block licensees asked the Commission to adopt more radical changes (e.g., right to return licenses during five years without penalty and with full

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<sup>10</sup> See General Wireless Informal Proposal, dated May 6, 1997.

<sup>11</sup> See *Public Notice*. Curiously, the Bureau's Public Notice did not ask whether any of these proposals should be adopted, but rather asked "which options would be most appropriate for a restructuring of broadband PCS C and F block debt." *Id.* at 2. In stating the issue in this fashion, PrimeCo presumes the Bureau has not prejudged the outcome of this proceeding.

<sup>12</sup> See, e.g., ComScape Telecommunications of Charleston Licensee, Inc. at 1-2; DiGiPH PCS, Inc. at 2 ("[T]he only parties benefitting from the Commission's Order are those C block licensees that did not intend to tender the March 31, 1997" payment.); Horizon Personal Communications at 4-5; The Small Business Coalition at 9-10.

<sup>13</sup> See, e.g., Community Service Comms., Inc. at 1-9; Pioneer Telephone Ass'n, Inc. at 4; see also Comcast Corp. at 7-10.

<sup>14</sup> See, e.g., ClearComm, L.P. at 1-4; Horizon at 1-15; Meretel Comms. L.P. at 1-5; Small Business Coalition at 3-9.

refund of all past payments; and the postponement of the first principal payment obligation to three years after the license term expires);<sup>15</sup>

- Some F block licensees opposed any refinancing arrangement on the basis that such action would negatively impact their spectrum values and business strategies;<sup>16</sup>
- Other F block licensees argued that any relief extended to C block licensees should be extended to them as well;<sup>17</sup> and
- Licensees in other wireless services argued that any relief extended to PCS licensees should be extended to them also.<sup>18</sup>

In addition, some parties which submitted the proposals on which the *Public Notice* sought comment have now taken the position that even deeper relief is now needed. For example, MCI stated in its comments that its original proposal to suspend payments for five years — a proposal made only two months ago — is already “too little, too late,” and that, in its view, the Commission should now reduce C block auction prices “to levels *below* the A- and B-Block prices.”<sup>19</sup>

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<sup>15</sup> See, e.g., R&S PCS, Inc. at 13-14; Americall Int’l. at 7.

<sup>16</sup> See, e.g., Airadigm Comms., Inc. at 1-5; Conestoga Wireless Co. at 2-3 (“Any after-the-fact restructuring of the C Block debt would therefore undercut our competitive strategy and sharply reduce the value of our licenses.”); Northcoast Comms., LLC at 7 (reforming C block debt obligation would “seriously threaten existing financing opportunities for F block licensees.”); Pioneer at 1-5.

<sup>17</sup> See, e.g., Central Wireless Partnership at 1-4; Holland Wireless LLC *et al.* at 1-6; Tennessee L.P. 121 at 1-8.

<sup>18</sup> See, e.g., Creative AirTime Services at 1-9 (extend to SMR); CONXUS Comms. at 1-11 (extend to narrowband PCS).

<sup>19</sup> MCI at 2, 3 (emphasis added).

Finally, other parties (including other broadband PCS licensees) have urged the Commission to enforce its rules as written because of concerns regarding the legal and policy ramifications of retroactively changing the rules.<sup>20</sup>

## **II. PRIMECO DOES NOT OPPOSE A CHANGE IN THE INSTALLMENT PAYMENT INTERVALS FROM QUARTERLY TO ANNUAL PAYMENTS**

PrimeCo does not oppose the original request that C block installment payments be made annually, rather than quarterly — so long as the change is implemented in a revenue-neutral manner.<sup>21</sup> The payment frequency was not established prior to the auction and is not, therefore, a fundamental component of the conditions with which the auction participants agreed to comply.<sup>22</sup> As the petitioners note, annual payments would allow C and F block licensees to focus their energy on network build-out and would give them greater flexibility to secure additional funding. Given the large number of C and F block licensees, an annual payment schedule would give licensees flexibility to seek additional funding when competition for funding is less congested or when market conditions may be more favorable.

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<sup>20</sup> See, e.g., Comments of BellSouth Corp., Sprint Spectrum L.P.

<sup>21</sup> In this regard, PrimeCo also does not oppose prepayment of C and F block installment loans so long as the government is made whole in terms of net present value.

<sup>22</sup> See BellSouth at 8.

**III. THERE IS A SUBSTANTIAL QUESTION WHETHER THE COMMISSION HAS THE LEGAL AUTHORITY TO REFORM OUTSTANDING DEBT OBLIGATIONS**

There is a substantial question whether the Commission has the legal authority to reform outstanding debt obligations, a subject most debt restructure proponents do not even address.<sup>23</sup> As several commenters note, federal statutes would appear to preclude the Commission from compromising any claim owed the Federal Treasury exceeding \$100,000.<sup>24</sup> Moreover, reformation of past debt obligations would also appear to contravene the prohibition on retroactive rulemaking.<sup>25</sup>

**IV. THE COMMISSION SHOULD PRESERVE THE INTEGRITY OF THE AUCTION PROCESS AND SPECTRUM VALUATION**

Unsuccessful C block auction participants and certain successful F block licensees argue with some force that changing the auction payment rules now — *after* the auction — is fundamentally unfair as they relied on the existing rules in deciding either to withdraw from the C block auction or in later submitting high bids in the F block auction.<sup>26</sup> PrimeCo submits that an

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<sup>23</sup> Debt restructure proponents also do not address the Commission's recent decision refusing to adopt debt restructure proposals similar to those made here. *See IVDS Payment Order*, 11 FCC Rcd 1282, 1284 (1995).

<sup>24</sup> *See BellSouth* at 10-13; *Cook Inlet Region, Inc. et al.* at 28.

<sup>25</sup> *See BellSouth* at 25-27; *Community Service* at 9; *Northcoast* at 4-6. Indeed, even without regard for Title 31 of the U.S. Code, there is also a substantial legal question whether the Commission has the authority to change debt obligations prospectively when the changes would alter the outcome of the auction. *See BellSouth* at 27-28.

<sup>26</sup> *See supra* at 4-5.

equally important consideration is maintaining the integrity of spectrum valuation and future auctions.

Until the March 31 *Suspension Order*, the Commission had consistently rejected post-auction requests to modify or waive its auction payment rules — including the very types of debt restructuring proposals now made by certain C block licensees and their beneficiaries.<sup>27</sup> This strict enforcement policy was perhaps most succinctly summarized by Chairman Hundt, who said “Forget about it” in response to suggestions that the Commission might do what it is now being asked to do:

I’m indifferent to the prices: people are bidding of their own free will. But I have heard that some bidders believe that the FCC will forgive the down payment due when the auction is over, and even may forgive the principal payments which begin six years later. In the event that anyone knows anyone who thinks such thoughts, I have some advice you can pass on them: *Forget about it.*<sup>28</sup>

As numerous commenters note, any Commission decision to now change its past practice of strictly enforcing its auction payment rules would undermine the integrity of all future auctions.<sup>29</sup> Regardless of the warnings the Commission might include in any debt restructuring

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<sup>27</sup> See *IVDS Payment Order*, 11 FCC Rcd. at 1283-1284. Other commenters cite numerous Commission orders strictly enforcing the payment rules, and PrimeCo will not repeat them here.

<sup>28</sup> Speech by Chairman Reed E. Hundt, “To Loop or not to Loop: Is that the Question?” before the Cellular Telecommunications Industry Association (March 26, 1996)(emphasis added), <http://www.fcc.gov/Speeches/Hundt/speh613.txt>. PrimeCo was therefore surprised by the Chairman’s recent statement, made during the pendency of this proceeding, that the Commission “should offer to restructure the debt of licensees who still owe the government money for their licenses.” Speech by Reed E. Hundt, “Spectrum Policy and Auctions: What’s Right, What’s Left,” before Citizens for a Sound Economy (June 18, 1997).

<sup>29</sup> See, e.g., ALLTEL Comms., Inc. at 3; Comcast at 4 and 11-12; Conestoga at 5; Cook *et al.* at 15-18; Omnipoint Corp. at 8-9; Pioneer at 5; SpectrumWatch at 2; Sprint at 2.

order,<sup>30</sup> the fact is that all will know that in the future successful bidders may not be required to pay what they bid. If auction participants cannot rely on the certainty of the rules in place at the time of the auction, it will be impossible for any bidder to make intelligent, market-based bids. Moreover, the investment community will be unable to reliably value wireless firms and their business plans if spectrum valuation becomes so unsettled and uncertain. As Omnipoint explains:

[H]ow do bidders in future auctions know when to stop bidding? For example, the bidder in a future auction can legitimately question whether its bid or that of an auction competitor will ever be paid under the terms in place at the time of the auction. The bid prices at auction would simply mean that the first deposit is an option on the size of the anticipated post-auction restructuring that can be obtained from the Commission.<sup>31</sup>

If there is no certainty that the rules in force during the auction will be applied after the auction, licenses will no longer be awarded to those who value the license the most. Rather, they will be awarded to those firms willing to take the biggest gamble that the Commission will liberalize the payment terms — and perhaps even reduce the debt principal — after the auction is completed.

In addition, the investor community has advised the Commission that a debt restructure plan for one group of licensees could negatively impact the value of spectrum assigned and purchased by other licensees.<sup>32</sup> It would be fundamentally unfair, if not unlawful, for the

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<sup>30</sup> See, e.g., Public Notice, *Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules*, DA 96-481 (April 4, 1996) (“The Commission’s rules concerning default payments will be strictly enforced in all auctions.”).

<sup>31</sup> Omnipoint at 8.

<sup>32</sup> *PCS Week*, Vol. 6, No. 27, “Everything Goes on the Table as C-Block Restructuring Rebate Begins In Earnest with Comments and Public Forum,” at 3 (July 2, 1997) (“Lehman Brothers analyst John Bensché pointed out that any restructuring plan would tend to depress the comparative value of those A/B-block licenses, setting up a vicious circle.”) (“*Everything Goes on the Table*”).

government to take retroactive action benefitting one set of licensees at the expense of others. Again, a restructure plan will undermine the entire competitive bidding process and spectrum valuation.

**V. DEBT RESTRUCTURE PROPONENTS HAVE NOT DEMONSTRATED THEIR ENTITLEMENT TO RELIEF**

One fact is clear from the comments: not all C block licensees are encountering financing problems. Some licensees are building their systems (with some systems partially operational) — and timely paying their debt obligations.<sup>33</sup>

Those licensees having difficulty obtaining financing attribute their situation to a market “meltdown” which occurred following the close of the C block auction.<sup>34</sup> At the outset, PrimeCo submits it is questionable whether a change in the capital markets can appropriately be characterized as a “changed circumstance” since, as the original nine petitioners noted in the Gutierrez Letter, capital markets are “inherent[ly] volatil[e] and seasonal.”<sup>35</sup> Thus, and as a general rule, no debtor should have a right to refinance its debt simply because the market changed after the debt was incurred and the debt documents executed.

Further, the debt restructure proponents have not demonstrated the validity of their basic allegation that there “currently exists a severe shortage of capital to finance Block C and F

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<sup>33</sup> This point is also acknowledged by debt restructure proponents. *See, e.g.,* Alpine PCS, Inc. at 7 (“[N]ot every C and F Block licensee’s situation is dire.”).

<sup>34</sup> *See* Statement of Roger Linquist, CEO, General Wireless, during the Public Forum on Broadband PCS C and F Block Installment Payment Issues (June 30, 1997).

<sup>35</sup> Gutierrez Letter at 3. NextWave also recognizes “generally” that “auction participants can be expected to realize . . . that markets change, and [that they] must bid accordingly . . . .” NextWave at 18.

PCS ventures.”<sup>36</sup> Investment community representatives, in their presentations at the June 30 Public Forum, stated that adequate investment funds have been and remain available (as evidenced by InterCel’s successful financing one month ago). According to the investment community, the problem faced by some C block licensees is instead caused by the fact that these licensees paid too much for their licenses relative to both their own business plans and later, relative the prices paid by bidders in subsequent auctions.<sup>37</sup>

Any government relief package will be welcomed by C Block licensees. But the Commission’s charge is to promote the public interest. The American public may have serious difficulty with a government relief package extended to firms which, in retrospect, paid too much for spectrum; the public may also be troubled by a government decision to change its rules for the benefit of a few after the fact, when others made important business decisions based on the rules as they existed at the time — whether they withdrew from the C block auction or were later successful at the D, E, and F block auction and based their bids and business strategies on the prices paid during the C block auction; finally, the public may be troubled if the value of the government relief package exceeds what other bidders were ready, willing and able to pay for the spectrum. As SpectrumWatch has stated:

Overbidding, less-than-sound business plans, and reports speculating on defaults have all contributed to a cool investment climate. Now these license holders are seeking federal relief

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<sup>36</sup> Alpine at 2.

<sup>37</sup> Bear, Stearns & Co., Inc. at 1 (“The essence of the C-block problem is that the value of the FCC obligation exceeds the value that equity investors are currently willing to assign to the entire company.”); BIA Capital Corp. at 1 (“The higher prices, coupled with the proliferation and low prices of spectrum auctioned subsequently have created the perception to investors of increased risk among C Block companies.”).

claiming “market conditions have changed” — conditions that they helped to create.

If the investment markets are “increasingly cautious,” shouldn’t the FCC be cautious as well? In fact, shouldn’t the FCC be more cautious as it is charged with protecting the public and taxpayers’ interests?<sup>38</sup>

Indeed, and as noted above, the Commission has already rejected proposals to restructure debt obligations after an auction has been completed, stating:

In implementing its auction authority, the Commission sought to allow the marketplace to determine the value of auctioned licenses. Bidders must conduct their own due diligence prior to the auction and base their bids on their own license valuations. The Commission has imposed bid withdrawal and default remedies to deter insincere bidding, but the Commission cannot prevent bidders from making uneconomic bidding decisions. . . . We therefore deny the petitions on this [debt restructure issue].<sup>39</sup>

Similarly, and less than two weeks ago, in the context of the broadband PCS auction, the Commission again emphasized the importance of strict adherence to the payment rules to maintain the basic integrity of spectrum auctions:

We also note that the integrity of the auction process is dependent on winning bidders timely satisfying their payment obligations. That such payments are timely made is an important and necessary indication to the Commission that the winning bidder is financially able to meet its obligations on the license and intends to use the license for the provision of service to the public.

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We do not accept NatTel’s argument that dismissal of its application for License B-492 contravenes Commission policy to rapidly process C block licenses in an effort to rapidly deploy new

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<sup>38</sup> SpectrumWatch at 1.

<sup>39</sup> *IVDS Payment Order*, 11 FCC Rcd at 1284.

services. While the Commission generally favors such rapid deployment, this goal must be balanced against the integrity of the auction process. If the auction process is compromised, delays in service are more likely to occur. Thus, the integrity of the auction process depends on both rapid service deployment and the timely meeting of payment obligations.<sup>40</sup>

PrimeCo cannot agree with the assertion of some debt restructure proponents that the Congressional mandate of diverse ownership “will not be met” if some C block licensees fail.<sup>41</sup> It is important for the Commission to distinguish between the success (or failure) of individual licensees and the success (or failure) of entrepreneurial ownership of PCS licenses. Just as the antitrust laws are designed to “promote competition, not competitors,” so too here, the Commission’s responsibility is to promote entrepreneurial ownership, not guarantee the success of each and every C block licensee.

PrimeCo also questions the assertion that debt restructure will result in C block systems becoming operational sooner than would occur through a re-auction of defaulted licenses. First of all, there is no assurance that under-financed licensees will succeed with a debt restructure; their problems may be caused not by market conditions but rather by their business plans, management teams, or other factors which the Commission cannot assess.<sup>42</sup> In addition, the comments in this proceeding make apparent that any debt restructure plan will be challenged in court. The delays associated with these appeals may well tie-up these “re-structured” licenses for years, and a court reversal would again place the Commission in the position it faces today.

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<sup>40</sup> *National Telecom PCS, Inc., Memorandum Opinion & Order*, FCC 97-192, ¶¶ 14, 16 (Wireless Telecommunications Bureau, released June 19, 1997).

<sup>41</sup> *Americall Int’l.* at 4.

<sup>42</sup> *See, e.g., Everything Goes on the Table* at 1 (“‘Even with a restructuring,’ Lowenstein [of the Yankee Group] said, ‘there is no guarantee these companies will make it.’”).

**VI. ANY GOVERNMENT RELIEF WILL BE OVERBROAD AND MAY NOT ACHIEVE ITS DESIRED OBJECTIVE**

The Commission should acknowledge at the outset that it does not have the same flexibility over debt restructuring as do private firms, which generally have the flexibility to deal with each debtor individually — and differently. This means, then, that any relief package which the Commission adopts will likely be extended to those who need the package and those who do not need the package — either because they will succeed without the package or fail in spite of it. In the past, the Commission has taken the position that “we do not believe that the auctions of some defaulting bidders justify modifying the payment terms of non-defaulting bidders.”<sup>43</sup>

Moreover, developing the “right” relief package will be difficult. As even debt restructure proponents acknowledge, “it is unlikely that there exists a single solution appropriate for all C Block licensees” because “each licensee faces different capital requirements” and each licensee has “already made a series of distinct choices which reflect individualized planning and implementation.”<sup>44</sup> Moreover, even if the Commission could develop one “right” relief package, there is no assurance that the package it develops based on the market today will be adequate for the market tomorrow.<sup>45</sup>

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<sup>43</sup> *IVDS Payment Order*, 11 FCC Rcd at 1284.

<sup>44</sup> Small Business Coalition at 7-8.

<sup>45</sup> For example, MCI advised the Commission in May that suspending installment payments for five years would have the effect of enabling “most of the licensees in jeopardy . . . to overcome their short-term financing problems.” Sawicki Letter at 1. Now, only two months later, MCI asserts that even this proposal is “too little, too late” and that it now believes that C block prices “must be adjusted to levels *below* the A- and B-Block prices.” MCI at 2-3 (emphasis added).

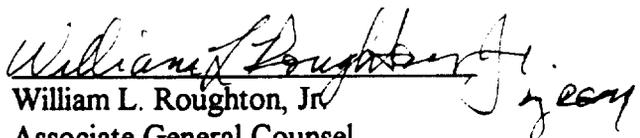
Finally, market forces are so robust and complex that the Commission can never be assured that its relief package will achieve the desired objective. For example, the Bureau no doubt adopted its March 31 *Suspension Order* with the hope that it would provide relief to C block licenses, and based on representations that the change would improve financing arrangements and speed service deployment. But as NextWave has now acknowledged, this decision has had the "unintended consequence" of actually "exacerbat[ing] . . . capital markets' level of uncertainty and reluctance to finance new wireless start-ups."<sup>46</sup>

### CONCLUSION

PrimeCo acknowledges that the Commission has been placed in a very difficult position. It now appears that some C block licensees may have bid beyond their means, with the result that service to the public may well be delayed. In these circumstances, it is imperative the Commission act expeditiously to enforce its rules as written.

Respectfully submitted,

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Date: July 8, 1997

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<sup>46</sup> NextWave at 13 n.21.