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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 21, 1998

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

ORIGINAL

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

Dear Ms. Salas:

NextWave Telecom Inc.

On behalf of NextWave Telecom Inc. ("NextWave" or "company"), undersigned counsel met yesterday with Peter Tenhula, Legal Advisor to Commissioner Powell, and met today with Daniel Phythyon of the Wireless Telecommunications Bureau, to discuss issues in the above-referenced proceeding. The views I expressed reflect the positions and ideas previously presented to the Commission in the company's written filings. My discussion with Mr. Tenhula focused, in particular, on the company's January 14, 1998, reply to oppositions to pending reconsideration petitions. A copy of that filing is attached.

In accordance with Section 1.1206 of the Commission's rules, an original and two copies of this ex parte memorandum and attachment are being submitted to you today. Please direct any questions concerning this matter to me, at 202-347-2771.

Sincerely,

Michael R. Wack

Michael Wack
VP Regulation & Senior Counsel

cc: Daniel Phythyon (w/o attachment)
Peter Tenhula (w/o attachment)

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List A B C D E

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
	)	
Amendment of Part 1 of the Commission's	)	
Rules – Competitive Bidding Proceeding	)	

STAMP AND RETURN

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REPLY TO OPPOSITIONS

I. Introduction

NextWave Telecom Inc. ("NextWave" or the "Company"), pursuant to section 1.429(g) of the Commission's rules, 47 C.F.R. § 1.429(g), herein replies to certain pleadings filed in opposition to reconsideration of Second Report and Order in the above-captioned proceeding ("*Restructuring Order*").[1] Lacking any persuasive legal or policy arguments, opponents of the Entrepreneur Block rely instead on a drumbeat repetition of the terms "fairness" and "auction integrity," and reiterate unsupported claims that the Commission lacks authority to alter its rules in accordance with current circumstances. In point of fact, the Commission is *required* to change its rules where, as here, circumstances warrant.[2] Doing so would be entirely consistent with the novel nature of all the Commission's C block proceedings, which have always been characterized by experimentation and change. The pending pro-Entrepreneur Block reconsideration petitions are solidly

1 *Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services* (PCS) Licenses, Second Report and Order, 12 FCC Rcd 16436 (1997).

2 See *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979).

grounded in legal, factual and equitable considerations. The Commission should act accordingly and grant those petitions.

II. Argument

A. The Equities In This Proceeding Strongly Favor The Petitioners

The record demonstrates that reasoned changes in the Restructuring Order will result in a rapid build out of competitive Entrepreneur's Block networks, which will increase consumer choice while lowering wireless rates for residential customers. Those results are not good for incumbents, so no one should be surprised that the largest incumbents and their allies oppose the requested modifications.[3] Their pleadings invoke terms such as "fairness" and "auction integrity," but those words have meaning only when assessed within a particular factual context. The facts in *this* proceeding make clear that equitable considerations favor the petitioners.

During the period preceding the Entrepreneur's Block auction, Congress and the Commission unambiguously signaled to capital markets that the federal government was committed to expanding opportunities for new entry into the wireless marketplace by small businesses. NextWave and other licensees decided to participate in the auctions based, in part, on those public commitments. NextWave alone has already paid the federal government half a billion dollars for the right to enter the PCS marketplace. Those funds were raised on the strength of the Company's business plan, which capital markets recognized as financially sound. The bids pledged in the C block auction did not alter that market perception. NextWave raised several hundred million dollars of investment after the auction ended.[4]

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3 *See, e.g.*, Oppositions of AT&T Wireless Services Inc., PrimeCo Personal Communications, L.P., and Sprint Corporation, WT Docket No. 97-82, filed Dec. 29, 1997.

4 This post-auction fundraising success puts the lie to claims by various opponents that Entrepreneur's Block financial difficulties are the result of exuberant bidding. As the Congressional Budget Office and

In considering the pending reconsideration petitions, the Commission must give substantial weight to how the government's own actions since then have contributed materially to the current financial state of the Entrepreneur's Block. During that period the Commission understandably struggled to harmonize its multiple, brand new roles of auctioneer and commercial banker with its traditional role as regulator. Several of the Commission's actions helped create perceptions in financial markets that undercut the confidence of those markets, especially with regard to new entrant funding:

- After collecting hundreds of millions of dollars of spectrum payments from winning bidders, the Commission did not act on even uncontested license applications for months, thus exacerbating the head start enjoyed by the incumbent, well-financed licensees.

- The Commission subsequently forced licensees to sign commercially unreasonable security agreements and notes that it developed and unilaterally imposed, without due process, well after the auction closed. That action undercut licensees' efforts to obtain vendor financing, which traditionally has been a principal source of new entrant funding in the wireless market.

- The Wireless Telecommunications Bureau ("Bureau") delayed action on certain license applications, including NextWave's, until almost a year after the auction.[5]

- Spectrum licensing was conducted in a disjointed and arbitrary manner. The government excluded certain technologies and industry sectors from auctions altogether, either by law, regulation, or agency practice, for reasons that financial markets found difficult to reconcile.[6] This fueled uncertainty in capital markets.

For the Entrepreneur's Block, the action with the broadest repercussions occurred when, only weeks after the Commission conditionally granted NextWave's licenses, and four months

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other neutral observers already have concluded, the manner in which the Commission structured the C Block auction almost guaranteed that bids therein would be relatively higher than those in the A/B auction.

5 More than a year has past since then, and the Commission still has not acted on requests to review the Bureau's determinations.

6 In addition, Congress required the Commission to auction a block of spectrum in short order as a means of balancing the budget, which first created an environment of instability for the financial community, and subsequently contributed to a collapse of spectrum values. *See, e.g.*, "Sale of FCC Licenses in Several States Nets Budget Pocket Change," Wall Street Journal, June 3, 1997 at 1.

before NextWave's first installment payment would be due and payable -- *and while the Company was in the midst of a public financing transaction* -- the Wireless Bureau suspended interest payments on an open-ended basis. The open-ended nature of that suspension, albeit well-intended, injected tremendous uncertainty into financial markets. It triggered market forces that prevented even the strongest new entrants from proceeding with the commercial enjoyment of their C block licenses. An already challenging financial market closed completely, for all practical purposes, due to uncertainty created solely by government action.

In a very real sense, government action since the close of the Entrepreneur's Block auction afforded NextWave a six week window of opportunity – the period between the release of its licensing order and the Bureau's interest payment suspension – to enjoy commercial use of its licenses and to access capital markets. However well intentioned the Commission's decisions, the agency must bear responsibility for their real world impact. License payments and network investments were made with an expectation that the Commission would act in a manner that fosters the use of C block licenses and, at a minimum, does not interfere with such use.

This perspective is not NextWave's alone. The Office of Chief Counsel for Advocacy for the U.S. Small Business Administration (SBA) has characterized the unilateral suspension of payments as a material change, and admonished the Commission accordingly:

> The license agreement between the FCC and C block winning bidders is essentially a contract. Therefore, the FCC operates not only as regulator and banker/debt-collector, but also serves in the capacity of government-as-contractor. As a matter of law, there is an implied condition in any contract that neither party will do anything that will 'hinder, delay, or prevent performance by the other party' in the absence of a right reserved or express language to the contrary. . . .
>
> [The] suspension interjected even more uncertainty into this proceeding which directly affects the ability of a small business licensee to secure and keep investors and partners,

> execute business plans and construct their systems. The Bureau issued the suspension with noble intentions and as a means to help prevent future bankruptcies or defaults. However, the unilateral suspension of installment payments to a date uncertain, has in effect, put some licensees in a worse position than they were in prior to the suspension. The suspension has created a misperception that all C block licensees are in trouble causing further uncertainty about the viability of C block licensees to compete. This unanticipated stigma on C block as a whole has inhibited licensees from performing their contractual obligations to construct their systems and thus, has increased the cost of doing business considerably.[7]

The Commission's examination of restructuring issues last summer could have yielded an equitable resolution that would have enabled carriers to resume the rapid commercialization of their licenses, as contemplated by the Congress in its public policy mandate for the Entrepreneur's Block. The proceeding was widely perceived in financial markets as a referendum on the Commission's commitment to abide by its self-adopted commercial banking responsibilities and allow small businesses a reasonable opportunity -- not a guarantee of success -- to participate in wireless markets. The restructuring options not only failed to provide any commercially reasonable solutions, but sought to *penalize* entrepreneurs. This is wholly unreasonable and must be corrected on reconsideration.

B. A Graduated Resumption of Payments Is Reasonable And Will Further The Goals Of The Commission And Congress

The record in this Docket contains substantial legal, policy and congressional support for modest assistance with near-term interest obligations. This would allow licensees to construct their networks and generate revenue streams that will enable them to pay their obligations to the government in full, plus interest. Sprint and AirGate Wireless urge the Commission to ignore this record evidence and reject requests to provide any interest assistance.[8] They claim that such assistance would be unfair to failed C block bidders, and they argue (inconsistently) that such

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7 Comments of Office of Advocacy, U.S. Small Business Administration, WT Docket No. 97-82, filed Sept. 9, 1997, at 4-5. (footnotes omitted) ("SBA Letter")

8 Sprint Opposition at 5; AirGate Wireless Opposition at 10.

assistance would *both* unjustly enrich existing licensees and merely postpone their financial collapse. These contentions are wholly unfounded.

Given events of the past 18 months, it is unjust and unreasonable to require licensees wishing to retain their 30MHz licenses to immediately resume their former payment schedules. To do so effectively will force many licensees to simply return all or most of their spectrum to the Commission.[9] Principles of equity and fairness dictate that small business licensees desiring to retain their 30MHz licenses should be afforded relief such that the resumption of license installment payments is phased in on a graduated basis to provide licensees with a reasonable opportunity to re-engage their businesses after having been disrupted in capital markets as a result of the Commission's very mixed signals. The SBA came to a similar conclusion in its analysis of these proceedings.[10]

Consistent with routine commercial practices, the Commission should modify the installment payment schedule so that licensees electing to retain their full 30MHz licenses are permitted to resume payments under the following graduated schedule, which covers only the first twelve quarterly payments that come due (the "Graduated Payment Period"):

- 25% of the quarterly installment payment shall be paid with respect to each of the first four quarterly payments;
- 50% of the quarterly installment payment shall be paid with respect to each of the next four quarterly payments; and

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9 Alternatively, some licensees may file for bankruptcy. *See* Omnipoint Petition for Reconsideration, WT Docket No. 97-82, filed Nov. 24, 1997, at 13.

10 ". . . The Office of Advocacy recommends either the grant of a short-term deferral in combination with an extension of the five year construction deadline or a long-term deferral with an extension that would serve as compensation for the harm caused by the FCC's unilateral suspension of installment payments." *See* SBA Letter at 6.

- 75% of the quarterly installment payment shall be paid with respect to each of the next four quarterly payments.

Following the Graduated Payment Period, all quarterly payments would be due and payable at the full amount due under the notes. As part of the graduated resumption of payments, Suspension Interest (as defined in the Order) and all interest deferred under the graduated payment schedule would be capitalized and added to the principal amount of the notes.[11] The graduated payment schedule allows a licensee a reasonable opportunity to re-establish its commercial and financial relationships as it renews its license installment payments. The capitalization of Suspension Interest addresses the fact that the licenses were rendered commercially unusable during the period of the instant proceedings.

The graduated payment schedule is consistent with principles of fairness, as well as well as the Commission's objective of rapidly deploying Entrepreneur's Block spectrum in service to the public. The integrity of the Commission's rules also is maintained through this action. Under the graduated payment schedule there is no forgiveness or reduction of the current nominal debt, and small business licensees continue to make payments in each regularly scheduled period. The amount of deferred interest is modest, and the assistance period is short in duration. The graduated payment schedule addresses the considerations of business disruption and the resumption of payments in a fair and balanced manner.

The graduated payment schedule also ensures fairness to all parties. Small business licensees are fairly and appropriately afforded an opportunity to retain their licenses and

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11 At a minimum, the Commission should modify the current Suspension Interest payment schedule, pursuant to which NextWave, alone among licensees, is required to make its first payment this coming March 31, and then a second payment almost immediately thereafter, on April 30. This schedule is extremely burdensome and plainly discriminatory, and should be altered so that NextWave is treated like all other licensees.

recommence their businesses, with minimal allowance for the hardship that has resulted. The relief is modest with no windfall to small business licensees. There is no unjust enrichment.[12]

C. The Options Menu Should Be Made More, Not Less, Flexible

Omnipoint and Sprint have asked the Commission to eliminate certain options.[13] It would be more reasonable to improve the existing menu by making it more consistent and integrated. To do so will more effectively address the needs of differently situated licensees, especially the smallest licensees, and will promote more immediate deployment of their networks. For example, thus far the Commission has attempted to address "cherry picking" concerns in very different ways. An "all or nothing" requirement is imposed under the amnesty option to prevent cherry picking, while an "MTA rule" is used to address that same concern under the prepayment and disaggregation options. The Commission should simply apply the MTA rule across all options. Moreover, the Commission should allow licensees to select options on an MTA basis. Establishing an MTA rule across the board eliminates any concern that permitting flexible selection of options would result in cherry picking. It also would resolve the dispute on the existing record concerning the current discriminatory availability of the "build out" exception under the amnesty option.

D. The Prepayment Option Should Be Modified To Acknowledge The Value Of Forgone Installment Financing

Various parties argue, inexplicably, that Entrepreneur's Block licensees should be denied an NPV adjustment to their nominal bids under the prepayment option, despite the wealth of record

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12 Using a cost-of-capital rate of 15 percent, the change in the NPV of NextWave's licenses would be approximately 3.8 percent. If a 6.5 percent adjustment rate were used, the NPV actually *increases* by an amount slightly less than 1 percent in NextWave's case.

13 Omnipoint Opposition at Summary and 9; Sprint Opposition at 3.

evidence contradicting such claims.[14] This is akin to arguing that the cost of goods acquired in Canadian dollars should not be adjusted on the balance sheets of U.S. companies to reflect currency exchange differences. Indeed, the Security and Exchange Commission ("SEC") *requires* installment plan participants to discount their FCC debt obligations to reflect a "market rate of interest in recording the liability at the date of acquisition of the PCS license."[15] Doing so is necessary to accurately present the size of the PCS debt in light of the licensee's higher cost of capital compared to the government rate of interest.

The Commission should be particularly concerned by Omnipoint's claim that making an NPV adjustment would be "outside normal commercial practices."[16] In its August 14, 1997, 10Q SEC filing, Omnipoint reports that the "favorable financing terms" it obtains under the Commission's F Block installment payment plan "require" the company "to record the debt at a net present value" lower than its nominal bid amount. The discount factor Omnipoint uses to calculate the NPV of its F Block debt is well above the Commission's installment financing interest rate. In other words, Omnipoint takes one position on the NPV issues in its SEC filings, and another, wholly contrary position before the FCC. Such conduct is, at best, puzzling.

III. CONCLUSION

The conduct of spectrum policy since the close of the Entrepreneur Block auction has imposed tangible loss and immeasurable hardship on NextWave and other C block licensees', their

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14 *See, e.g.*, Omnipoint Opposition at 5; AirGate Wireless Opposition at 8. Sprint Corporation, at 4, states that it does not object to NPV adjustments based on the interest rates available to licensees at the time of license grant. NextWave demonstrated in its reconsideration petition, at 9, that the 15 percent NPV factor it is recommending is a conservative estimate of the cost of capital to new entrants.

15 *See* Comment 45 of Letter dated July 12, 1996 from the Securities and Exchange Commission to NextWave Telecom Inc.

16 Omnipoint Opposition at 8 (approving of statement in *Restructuring Order* on this point).

families and employees, shareholders, suppliers, contractors and customers. The cost and the brunt of regulation has fallen most directly on them. NextWave respectfully submits that these individuals have been penalized by their commitment to the Commission's stated policy goals which are now gone astray. NextWave to-date has paid $504 million for the right to enter the PCS marketplace. NextWave has performed all its obligations under the Commission's rules, as well as those that were unilaterally and unreasonably imposed on the Company under the Commission's notes and security agreements. Having performed all its obligations, NextWave is entitled, without restrictions, to receive the full credit of all monies paid to the FCC and recognition for its investment in the build out of its markets.

What is at stake now is the fundamental fairness of the Commission's spectrum management policies and redress of hardship imposed to these people who invested their livelihood in this competition endeavor. The question is whether the Commission will make appropriate and informed modifications to its original policies, based on an evidentiary record, and act in ways that advance those policies in light of current conditions. The Commission should grant NextWave's petition for reconsideration without further delay.

Respectfully submitted,

NEXTWAVE TELECOM INC.

By: _____

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January 14, 1998

Certificate of Service

I, Kay Hawkins, hereby certify that on this 14th day of January, 1998, a copy of the attached Reply of NextWave Telecom Inc. was mailed via U.S. Post Office, first class postage prepaid, to the following:

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