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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

WT Docket No. 97-82

PETITION FOR RECONSIDERATION

NEXTWAVE TELECOM INC.

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I. INTRODUCTION

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 Third Report and Order in the above-captioned proceeding.¹ In that order (“*Auctions Revision Order*” or “*Order*”), the Commission materially modified, and in some instances eliminated, rules relating to its small business installment payment program for licensees in the broadband PCS Entrepreneur Block (“C block”). Several aspects of the *Order* warrant reconsideration.

II. ARGUMENT

**A. LATE PAYMENT ASSESSMENTS MUST BE IMPLEMENTED
IN A COMMERCIALY REASONABLE MANNER**

The *Order* revises the Commission’s “late payment” rule in a way that, overall, materially harms installment payment participants and should be reconsidered. Under the original version of the rule, which was adopted prior to the Entrepreneur Block auction, licensees

¹ Amendment of Part 1 of the Commission’s Rules – Competitive Bidding, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Third Report and Order, FCC 97-413, 63 Fed. Reg. 2315 (Jan. 15, 1998) (“*Auctions Revisions Order*” or “*Order*”).

were entitled to an automatic, penalty-free, 90 day grace period before they were considered to be in default on a scheduled payment.² The *Order* replaces that structure with one in which a payment received anytime within 90 days following its scheduled due date will be assessed a 5 percent penalty, and a payment received anytime thereafter, up to 180 days after the original due date, will be assessed a 10 percent penalty (for a cumulative penalty of 15%).³

NextWave does not object to the concept of providing for additional grace periods in the installment notes which could be utilized only with the payment of reasonable late fees. The provision of additional fixed grace periods is consistent with commercial practices and establishes a process for licensees to work through short-term financing issues without disrupting their commercial operations. Such a process also will provide greater certainty to financial arrangements with investors and vendors, who will know that there is a period during which they can respond to short term issues, as necessary, to protect their investments in a licensee's network and business operations. All other things being equal, "certainty" is an objective worth achieving in every commercial transaction.

In this instance, however, all other things are not equal. "Certainty" is being achieved at an unreasonable price from the borrower's point of view. Prior to the revision, installment payment participants had a right to an automatic, penalty-free, deferral period of 90 days, as well as the right to seek additional penalty-free grace periods by demonstrating a commercially reasonable basis to their lender, the Commission. Those rights have been unilaterally eliminated under the revised rule, and have been replaced by the "certainty" that to obtain a payment

² See 47 C.F.R. 1.2110(e)(4) (1994). The original rule also granted licensees the right to petition for a fundamental restructuring of their payment schedules. That aspect of the rule is discussed in these comments *infra*, at Section B.

³ See Order at paras. 106-107.

deferral of even a single day, licensees must pay stiff penalties automatically. NextWave respectfully submits that this revision is an impermissible and unreasonable reallocation of creditor-debtor benefits and burdens from a commercial standpoint.

This imbalance is underscored by reference to the apparent driving force behind the rule revision, which is the Commission's conclusion that it "may not have the necessary resources" to evaluate the deferral request contemplated under the original rule.⁴ While the Commission is undoubtedly in the best position to evaluate its own resources, it is fundamentally unfair for it to use such an evaluation, and its regulatory power, to benefit itself while imposing new burdens on installment payment participants.⁵

NextWave believes it is a more reasonable allocation of risk and benefits to: (1) retain the penalty-free 90 day automatic grace period that was available under the pre-revised section 1.2110; (2) apply the new late payment penalties to the two additional 90 day grace periods available under that version of the rule; (3) make the availability of those additional periods automatic; and (4) apply the late payment fees on a monthly basis at a more customary commercial rate, such as 1.5 percent per month. This late payment framework is more consistent with commercial practices, and it creates incentives for licensees to keep their accounts current. In contrast, under the "penalty cliff" established by the Commission, a licensee that is one day late with a payment has no incentive to pay until the 90th day.

This proposed payment structure also is mutually beneficial to all concerned. The Commission would be relieved of the burden of evaluating petitions for those two additional 90

⁴ See *id.*, at para. 110.

⁵ See *Lynch v. United States*, 292 U.S. 571, 579 (1934); see also *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

day grace periods, and installment payment participants would obtain the benefit of receiving such deferrals automatically (albeit, only upon paying penalties). NextWave would be willing to modify its notes to reflect such a revised late payment structure, and it respectfully urges the Commission to adopt this approach on reconsideration.

B. THE ORDER UNLAWFULLY ELIMINATES A LICENSEE’S ESTABLISHED RIGHT TO REQUEST RESTRUCTURE OF ITS INSTALLMENT PAYMENTS

The Commission must reinstate language in section 1.2110 of the rules that grants licensees the right to seek long-term restructuring of their installment payment obligations. Well before the start of the C block auction, the Commission adopted section 1.2110(e)(4)(ii) of its rules, which expressly provided for that type of installment payment restructuring. As originally written, the rule addressed the grant of grace periods during which installment payments may be suspended for up to six months; stated that the Commission would “otherwise approve a restructured payment schedule” upon an appropriate showing of a need for relief; and listed the factors to be used to evaluate such requests.⁶ Any question whether the rule contemplated a restructuring that alters payment terms fundamentally, beyond a temporary grace period, is settled by reference to the Commission’s discussion of the rule when it was adopted:

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.⁷

⁶ 47 C.F.R. §1.2110(e)(4)(ii) (1994).

⁷ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 2348, 2391 (1994) (emphasis added); *see also, e.g.*, Public Notice, Wireless Telecommunications Bureau Starr Clarifies “Grace Period” Rule for IVDS “Auction” Licenses Paying By Installment Payments, 10 FCC Rcd 10724 (1995) (“[T]he FCC may in its discretion extend or grant additional grace periods where circumstances warrant.”).

The language providing for long-term restructuring of installment payments was eliminated when section 1.2110 was rewritten to reflect the Commission's newly adopted "automatic" late payment penalties. The Commission did not provide notice, an opportunity to comment, or any rationale for this material change to the rule, as required by the Administrative Procedure Act ("APA"). Vendors and investors took comfort that, if necessary, the opportunity to request commercially reasonable restructuring plans provided a process where unforeseen financing issues could be addressed to protect their investments in a licensee's network and business. NextWave respectfully requests that the Commission reinstate this commercially valuable procedure.

C. THE COMMISSION MUST HARMONIZE ITS REGULATORY AND CONTRACTUAL ACTIVITIES

NextWave also respectfully urges the Commission to take steps to harmonize its regulatory and contractual activities concerning the installment payment program. The installment payment program establishes a contractual relationship between the Commission and licensees that binds *both* parties unless they *mutually* agree otherwise. Commercial reliance on those contracts is undermined when the Commission takes actions to change its obligations merely by amending its rules.⁸ The Commission's unilateral exercise of its regulatory powers

⁸ See *Order*, at para. 111. Such action also entails risk for the Commission. Except in narrow circumstances not present in the Entrepreneur Block context, Federal agencies that relieve themselves of contractual obligations through the exercise of their regulatory powers open themselves to suits for monetary damages under standard principles of contract law. See *United States v. Winstar Corporation*, 116 S.Ct. 2432, 64 USLW 4739 (Jul. 1, 1996). This precedent was applied recently in connection with the Federal Deposit Insurance Corporation's administration of contractual agreements with members of the industry it regulates. See *California Federal Bank v. United States*, 1997 WL 780936 (Fed.Cl.), Dec. 22, 1997.

can have a profoundly detrimental effect on licensees, even when the opposite result is seemingly intended.⁹ Such actions create an extremely difficult environment for licensees.

The note and security agreement requirement imposed on licensees provides an example of how failure to harmonize commercial and regulatory processes has undercut the Entrepreneur Block. Even prior to the C block auction, the Commission was put on notice by the financial community that requiring private debt to be subordinated to the Commission's spectrum payment claims would harm the public interest by inhibiting licensees' abilities to raise capital.¹⁰ The Commission not only ignored this prescient counsel, it waited until months after the auction ended to inform winning bidders of the requirement, and then imposed it as a *fait accompli* condition of license without following notice and comment procedures required by the Administrative Procedure Act ("APA").¹¹ It is not easy for private companies to operate in a world in which commercial obligations can be (and are) imposed by their governing regulatory agency outside the context of *either* APA procedures *or* the standard process of contract negotiations.

NextWave recognizes the opportunity to enter wireless markets that the Entrepreneur Block program has provided the Company and other small businesses, and it is grateful for that

⁹ See NextWave Reply to Oppositions to Petition for Reconsideration, WT Docket No. 97-82, filed Jan. 14, 1998, at pp. 3-5.

¹⁰ See NationsBank Petition for Limited Reconsideration of the Fifth Memorandum Opinion and Order, PP Docket No. 93-253, filed Dec. 19, 1994 ("NationsBank Petition"). To NextWave's knowledge, the NationsBank Petition, and other petitions raising similar issues, are still pending before the Commission, over three years after they were filed.

¹¹ The note and security agreement requirement was imposed on Entrepreneur Block licensees by the Wireless Telecommunications Bureau ("Bureau") in September 1997. See *Public Notice*, FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' Block BTA Licenses, DA 96-1553, rel. Sept. 17, 1996. The legal basis of the Bureau's action has never been clear because, at that time, no provision of the Commission's rules established such a requirement. The Commission added the requirement through a rule amendment that took effect seven months after the Bureau's action.

opportunity. NextWave also has already paid the federal government \$500 million, and invested \$80 million more toward network build-out activity, in a demonstration of its commitment to the overarching goals of the Entrepreneur Block program – increasing competition and consumer choice. The Company respectfully suggests that greater harmony of the Commission’s regulatory and commercial activities is required to facilitate the achievement of those goals. The willingness of vendors, investors, resellers and other entities to enter into commercial relationships with licensees is dependent on such regulatory balance. At a minimum, the Commission should publicly define, and reconcile, the procedures that govern its actions in its congressionally-designated role as a regulator, and those that govern its actions in its voluntarily-adopted role as a party to commercial contracts.

D. ADDITIONAL CLARITY IS NEEDED REGARDING THE APPLICATION OF DEFAULT PENALTY PROVISIONS TO INSTALLMENT PAYMENTS

The *Order* at paragraphs 115-116 clarifies that the Commission will not apply the penalty provisions of Section 1.2104(g) to licensees who default on an installment payment. NextWave agrees with the Commission’s conclusions that “the risk of losing its license should provide a licensee a strong incentive to avoid default . . . ,” and that “the conditions on the face of each license and the terms of the notes and security agreements executed by licensees provide the Commission appropriate remedies that will ensure that defaulted licenses are returned to the Commission for reauction and that all outstanding debts, as well as the Commission’s costs are recoverable.”¹²

NextWave notes, however, that in the context of reaffirming its cross default policies, the *Order* can be interpreted as suggesting that the Commission *will* apply Section 1.2104(g)

¹² *Order*, at para. 116.

penalties (renamed “default payments”) to licensees that default on installment payments. The language states in relevant part:

In addition, by making licensees who default on an installment payment subject to the default payment set forth in Section 1.2104(g)(2), we create an additional deterrent to licensees considering default as a solution to financing shortfalls. . . Accordingly, upon default on an installment payment, a license will automatically cancel without further action by the Commission, the licensee will become subject to the default payment set forth in Section 1.2104(g) of our rules (*see* Section III.D.5, *supra*). . . .¹³

To further complicate matters, the referenced section III.D.5 includes language indicating that the Commission will *not* apply the penalties in Section 1.2104(g) to installment payment defaults. Moreover, the new Section 1.2104(g) rule text appended to the *Order* shows that while the Commission changed the rule to clarify how penalties will be calculated, the Commission did not include new language in the rule specifying that nonpayment of installment payment obligations is an example of post-auction default that would oblige payment of the three percent penalty. Thus, both the language of the *Order* and the new rules appended thereto indicate that the Commission does not intend to apply this rule to defaults on installment payments. NextWave respectfully requests that the Commission clarify on reconsideration that this is the correct reading of its action.

E. ADDITIONAL CLARITY IS NEEDED REGARDING APPLICATION OF UNJUST ENRICHMENT PROVISIONS TO ENTREPRENEUR BLOCK BIDDING CREDITS

The *Order* modifies Part 1 and Part 24 unjust enrichment rules concerning the repayment of bidding credits in the event a license is transferred to an entity that is ineligible for such credits.¹⁴ The application of the revised rules to Entrepreneur Block licenses remains somewhat

¹³ *Id.* at para. 122.

¹⁴ *See id.*, at paras. 55-56.

unclear, however, because the *Order* does not discuss the relationship between those rules and another Commission rule that limits the transfer of such licenses. The Commission should clarify this issue on reconsideration.

The newly revised Part 1 and Part 24 unjust enrichment rules provide that a license transfer from a designated entity to a non-designated entity during the first five years of a license term shall be approved only upon repayment to the government of any bidding credit the designated entity received during an auction.¹⁵ Thereafter, the obligation to reimburse the government for bidding credits is eliminated. The revised rules also provide that during years three through five of the license term, the percentage of the bidding credit that must be reimbursed diminishes with each passing year.

Application of the revised rules to Entrepreneur Block licenses remains unclear, however, because the *Order* does not discuss their relationship to section 24.839 of the Commission's rules, which precludes such licenses from being transferred to any non-entrepreneur during the first five years of the license term. Without further revision, Part 24 will contain two seemingly conflicting rules. One rule will state that unjust enrichment penalties must be paid for transfers to non-entrepreneurs during years three through five of a license term (section 24.716), while another will bar such transfers altogether during those years (section 24.839).

Cross referencing the two rules would be one way to mitigate this conflict. That would allow a reader to determine that the Section 24.839 bar on transfers of Entrepreneur Block licenses to non-entrepreneurs extends only through the fifth year of an initial license term, and

¹⁵

See id.

that repayment of bidding credit(s) is not required in connection with any transfers thereafter, pursuant to Section 24.716. This reading appears to be the Commission's intended result.¹⁶

Even this clarification, however, leaves open the question why Entrepreneur Block licensees remain subject to transfer restrictions in years three through five, when other licensees are allowed to transfer spectrum subject to the repayment of bidding credits. The Commission has not adequately articulated a rationale for distinguishing between PCS entrepreneurs and entities in other services that are entitled to bidding credits. Such credits convey identical benefits to all licensees that receive them. It is unreasonably discriminatory for the Commission's rules to penalize only one subset of licensees who qualify for such credits. NextWave respectfully requests that the Commission eliminate this unreasonable discrimination on reconsideration.

III. CONCLUSION

NextWave respectfully requests that the Commission grant this petition for reconsideration for the reasons discussed herein.

Respectfully submitted,



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¹⁶ See *id.*, at para. 56.

Certificate of Service

I, Kay Hawkins, hereby certify that on this 17th day of February, 1998, a copy of the attached *Petition for Reconsideration* of NextWave Telecom Inc. was mailed via U.S. Post Office, first class postage prepaid, to the following:

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