

FCC MAIL SECTION

Federal Communications Commission

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Before the
Federal Communications Commission
Washington, D.C. 20554

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

**ORDER ON RECONSIDERATION
OF THE SECOND REPORT AND ORDER**

Adopted: March 23, 1998

Released: March 24, 1998

By the Commission: Commissioners Ness and Powell concurring in part, dissenting in part, and issuing separate statements; Commissioner Tristani issuing a statement.

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I. INTRODUCTION

1. On September 25, 1997, the Commission adopted a *Second Report and Order and Further Notice of Proposed Rule Making* ("*Second Report and Order*" and "*Further Notice*") establishing March 31, 1998, as the deadline for broadband Personal Communications Services ("PCS") C and F block licensees to resume installment payments.¹ In addition, the Commission offered C block licensees a choice of three alternative payment options in lieu of resuming payments under the terms of the original payment plan. The three options were intended to provide limited relief to C block licensees experiencing financial difficulties, while preserving the fairness and integrity of the auction process.

2. In response to the rulings in the *Second Report and Order*, we received 37 petitions for reconsideration, 17 oppositions to the petitions, 16 replies to the oppositions, and 38 *ex parte* filings.² After considering the arguments raised in those filings, we generally affirm the framework established in the *Second Report and Order*, but we make a few modifications designed to provide C block licensees greater flexibility in making their elections. We believe that these changes improve upon the *Second Report and Order* by allowing more existing licensees to adjust their business plans and remain in the wireless market to compete against other providers, while also providing for the return of spectrum to the Commission so that other entrepreneurs will have opportunities to obtain broadband PCS licenses in a reauction. In a forthcoming Order, we will address comments filed in response to the *Further Notice*, which covers rules for the reauction of returned C block licenses.

II. BACKGROUND

3. Consistent with Congress' mandate to promote the participation of small businesses and other "designated entities" in the provision of spectrum-based services,³ the Commission limited eligibility in the initial C block auctions to entrepreneurs and small businesses. The C block auction concluded on May 6, 1996, and the subsequent reauction of defaulted licenses concluded on July 16, 1996, with a total of 90 bidders winning 493 licenses. The winning bidders were permitted to pay 90 percent of their net bid price over a period of ten years, paying

¹ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997).

² A list of the parties that filed pleadings in response to the *Second Report and Order*, and the abbreviations used to refer to such parties, is attached as Appendix A. Although CX Systems and Dorne & Margolin filed petitions for reconsideration after the filing deadline, we will accept their filings as *ex parte* filings. For the sake of consistency, we refer to filings as oppositions if they were filed at the time oppositions were due, even if they are supportive of arguments raised in the petitions.

³ Communications Act of 1934, as amended ("Communications Act") § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

only interest for the first six years and paying both interest and principal for the remaining four years.⁴

4. On March 31, 1997, the Wireless Telecommunications Bureau (the "Bureau") suspended the deadline for payment of installment payments for all C block licensees.⁵ The suspension was implemented in response to a joint request from several C block licensees seeking modification of their installment payment obligations and to allow more time for discussions with other federal agencies concerning "the transfer of responsibilities for certain debt functions related to [the installment payment] program."⁶ On April 28, 1997, the Bureau extended the suspension to F block licensees.⁷ As mentioned above, on September 25, 1997, the Commission ended this suspension and established March 31, 1998, as the deadline for C and F block licensees to resume their installment payments.⁸

5. After reviewing various proposals for relief, the Commission decided in the *Second Report and Order* to allow each C block licensee to elect one of three options for all of its licenses in lieu of continuing payments under the licensee's original installment payment plan.⁹ Each of the three options -- disaggregation, amnesty, and prepayment -- was intended to provide limited relief to financially troubled licensees without harming the integrity of the auction process.¹⁰ The Commission determined that further relief for F block licensees was unnecessary.¹¹

6. In the *Second Report and Order*, the Commission required C block licensees to file a written election notice on or before January 15, 1998, specifying whether they would resume payments under the terms of the original installment payment plan or would proceed under one of the alternative options.¹² On January 7, 1998, we postponed the election date until February 26, 1998, in order to resolve issues raised on reconsideration before licensees submitted

⁴ See 47 C.F.R. § 24.711(b)(3). The net bid price is equal to the winning bid less any bidding credit for which the licensee was eligible. See 47 C.F.R. § 24.712.

⁵ See *Installment Payments for PCS Licenses, Order*, 12 FCC Rcd 17,325 (WTB 1997).

⁶ *Id.*, 12 FCC Rcd at 17,325 para. 1.

⁷ See "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883 (released April 28, 1997) at 2.

⁸ *Second Report and Order*, 12 FCC Rcd at 16,448 para. 21.

⁹ See *id.*, 12 FCC Rcd at 16,444-46 paras. 15-17.

¹⁰ See *id.*, 12 FCC Rcd at 16,437-38 para. 2.

¹¹ *Id.*, 12 FCC Rcd at 16,447 para. 20.

¹² *Id.*, 12 FCC Rcd at 16,470 para. 70.

their elections.¹³ In addition, we announced that the reauction of spectrum surrendered by C block licensees pursuant to their elections would begin on September 29, 1998.¹⁴ On February 24, 1998, we revised both the February 26, 1998, election date and the March 31, 1998, payment resumption date.¹⁵ We changed the election date to 60 days from publication of this Order in the *Federal Register* and the payment resumption date to at least 30 days after the new election date.¹⁶

III. OVERVIEW

7. The Commission determined in the *Second Report and Order* that it would serve the public interest to provide a variety of relief mechanisms to assist C block licensees that were experiencing difficulties in meeting the financial obligations under the installment payment plan. The Commission believed the "extraordinary procedures" it adopted to offer relief to C block licensees appropriately balanced a number of important policy goals.¹⁷ In formulating a resolution to the complex issues involved, one of the Commission's foremost objectives was to preserve the integrity of the auction process and to maintain public confidence in the stability of the Commission's auction rules.¹⁸ The Commission also believed it was essential to ensure fair and impartial treatment for all auction participants, including winning bidders, unsuccessful bidders, and licensees in competing services.¹⁹ At the same time, the Commission was cognizant of its statutory mandate to promote economic opportunity and to encourage broad participation in the provision of spectrum-based services.²⁰ In addition, the Commission attempted to

¹³ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-2 (released January 7, 1998) at para. 2 ("*Election Date Order I*").

¹⁴ *Id.* at para. 3.

¹⁵ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-28 (released February 24, 1998) ("*Election Date Order II*").

¹⁶ *Id.* at paras. 2-3. The Bureau will issue a public notice setting forth the procedures for filing an election notice.

¹⁷ *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2.

¹⁸ *Id.*, 12 FCC Rcd at 16,437-38 paras. 2-3. *But see* MFRI Reply at 2-6 (the real solution to maintaining auction integrity is to resolve bid signaling practices; a modest adjustment to the installment payment plan is not related to auction integrity); Hyundai Reply at 2-3 (auction integrity is not a sufficient basis for denying relief).

¹⁹ *Second Report and Order*, 12 FCC Rcd at 16,437-38 paras. 2-3.

²⁰ *Id.*, 12 FCC Rcd at 16,437-38 para. 2 (citing Communications Act § 309(j)(3)(A), (B), 47 U.S.C. § 309(j)(3)(A), (B)).

implement a workable solution in a timely manner that would facilitate rapid introduction of service to the public without further regulatory or marketplace delay.²¹

8. We believe the approach adopted in the *Second Report and Order* largely accomplishes these objectives. The relief provided C block licensees will speed deployment of service to the public by easing lenders' and investors' concerns regarding regulatory uncertainty and by potentially making more capital available for investment and growth. By facilitating the provision of service to consumers, the Commission advanced Congress' objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public."²² In addition, the mechanisms the Commission created to help these small businesses remain viable competitors in the marketplace furthered its statutory mandate to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses"²³ However, out of fairness to bidders that withdrew from the auction and to maintain the integrity of the auction process, the Commission rejected proposals that would have significantly altered the amounts paid for individual licenses. Mindful of the effect its decision would have on future auctions, the Commission opted for a more modest approach.

9. Although we believe the decision adopted in the *Second Report and Order* largely should be maintained, we believe that certain aspects of the adopted approach were overly restrictive. A number of petitioners claim that the options presented by the Commission do not provide economically viable alternatives for financially troubled licensees.²⁴ Indeed, a frequent complaint expressed throughout the numerous petitions is that the available options fall short of providing meaningful relief. We also received several letters from members of Congress asking that we take additional measures to assist C block licensees.²⁵

²¹ *Id.*, 12 FCC Rcd at 16,437-39 paras. 2, 4-5.

²² Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

²³ Communications Act § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

²⁴ *See, e.g.*, New Wave Petition at 2 (the presented options are not economically viable for numerous licensees and the punitive damages levied will impede network build-out and possibly lead to widespread bankruptcies); GWI Petition at 2 (a major reduction in the license debt is the only commercially viable way for many small businesses to obtain necessary funding); One Stop Wireless Petition at 1 (the options offered do not work for C block licensees); OnQue Petition at 1 (the Commission's options do not provide any stability); Omnipoint Petition at 13 (without further clarification of the Commission's position on bankruptcy, bankruptcy may be a licensee's lowest risk alternative); RFW Reply at 3 (the Commission's punitive provisions likely will increase the number of bankruptcy filings).

²⁵ The Honorable J. Robert Kerrey *ex parte* filing at 1; The Honorable Barbara Boxer *ex parte* filing at 1-2; The Honorable Albert R. Wynn *ex parte* filing at 1-2; The Honorable Xavier Becerra *ex parte* filing at 1-2; Members of the Congressional Hispanic Caucus *ex parte* filing at 2; The Honorable Richard H. Bryan and The Honorable Harry Reid *ex parte* filing at 1; *see also* The Honorable Sue W. Kelly *ex parte* filing at 1; The Honorable Thomas Daschle *ex parte* filing at 1; The Honorable Gary L. Ackerman *ex parte* filing at 1.

10. After reviewing the extensive record on reconsideration, we believe that a radical departure from the *Second Report and Order* is not warranted.²⁶ The *Second Report and Order* created an innovative solution to requests from C block licensees needing financial relief. Certain requirements, however, may constrain many C block licensees from making use of the relief measures offered. We believe that, with a few adjustments to the adopted approach, we can better effectuate the Commission's intent to provide C block licensees a limited measure of relief under the unique but varied circumstances presented. We therefore will leave the basic framework intact, but we will alter it slightly to allow licensees to be more flexible in making their elections for licenses in different geographic areas, to use more of the down payments already on deposit, and to be more flexible in the use of those down payments. We believe that this approach improves upon the *Second Report and Order* by better enabling C block licensees to remain participants in the wireless market, which will promote competition and the delivery of new services to the public.

11. First, we will eliminate the requirement that a licensee must make the same election for all its licenses. Instead, a licensee may make different elections for the different Major Trading Areas ("MTAs") in which it holds licenses. The election made for an MTA will apply to every Basic Trading Area ("BTA") license held by the licensee in that MTA. As under the *Second Report and Order*, the possible elections include resumption of payments, amnesty, prepayment, or disaggregation. As part of the modifications to the adopted approach, we will also permit a combination of disaggregation and prepayment. Resumption of payments and prepayment of 30 MHz licenses will remain essentially the same as in the *Second Report and Order*. We will, however, modify the amnesty and disaggregation options, as follows.

12. Under the revised amnesty option, a licensee may return to the Commission licenses in any MTA it wishes so long as it returns all its BTA licenses within the MTA. The entire outstanding debt on the returned licenses will be forgiven. For each MTA that is returned, the licensee will have two choices, and its decision will apply to all its BTA licenses within the MTA. If the licensee wishes to bid on those licenses it returns in the reauction, none of the down payment associated with such licenses will be available, consistent with the *Second Report and Order*. Alternatively, the licensee may opt to forgo the opportunity to bid on its returned licenses in exchange for a credit of 70 percent of the down payment made on the licenses. This credit may be used to prepay the entire principal owed for a retained MTA with 30 MHz licenses. This, essentially, is the prepayment option as adopted in the *Second Report and Order*. Alternatively, we permit a combination of prepayment and disaggregation, so that the licensee

²⁶ See AT&T Opposition at 2 (the options offered in the *Second Report and Order* provide sufficient financial relief without undermining the integrity of the auction process); PrimeCo Opposition at 5 ("the *Second Report and Order* reflects a reasonable balancing of Congress' statutory objectives and marketplace considerations and should be affirmed"); Fidelity Capital Opposition at 5 (the *Second Report and Order* "presents a fair and balanced plan to provide relief to struggling C-Block licensees, while not disadvantaging licensees who are successfully building out their systems"); Northcoast Opposition at 4 (significant change would be fundamentally unfair to licensees that have honored their financial commitments); AirGate Opposition at 5-6 (the financing options available to C block licensees, including the Commission's original installment payment plan, are more generous than financing offered to any participants in other auctions); Frontier Reply at 2 (significant relief would be unfair to bidders that were unsuccessful in the auction process).

may prepay the entire principal owed for the retained 15 MHz licenses of an MTA that has been disaggregated.

13. As under the *Second Report and Order*, a licensee that disaggregates an MTA may continue making installment payments on the retained spectrum. However, for each disaggregated license, the licensee will now receive credit for 40 percent of the down payment applicable to the returned 15 MHz of spectrum. This 40 percent credit may be applied only to the 15 MHz of spectrum retained from the same license. It may be used to reduce the principal outstanding and/or to pay "Suspension Interest" (i.e., all unpaid simple interest accruing from the date of license grant through March 31, 1998). Because the down payment applicable to the retained spectrum will be considered the down payment for that spectrum and the licensee thus retains 100 percent of that portion of the down payment, the licensee in effect receives a blended credit of 70 percent of the total down payment made on the full 30 MHz license.

14. Alternatively, under our modified approach, a licensee will be allowed to prepay a disaggregated MTA. In that case, the licensee will receive credit for 70 percent of the down payment applicable to the returned spectrum. Because the licensee retains 100 percent of the portion of the down payment associated with the retained portion of the license, the licensee in effect receives a blended credit of 85 percent of the total down payment. The 70 percent credit may be applied toward the prepayment of a retained MTA with 30 MHz licenses (so long as the retained 15 MHz license is prepaid) and/or toward the prepayment of the retained 15 MHz licenses of an MTA that has been disaggregated.

15. In addition, we adopt the following limited modifications: (1) we extend to 90 days the 60-day non-delinquency period for payments not made on the payment resumption date, and we impose a 5 percent late payment fee for payments made within this 90-day non-delinquency period; (2) we instruct the Bureau to modify the payment schedules of all C and F block licensees so that all payments will be due on the same date; (3) we eliminate the build-out exception to the amnesty option because it is rendered moot by our modified approach; and (4) for purposes of the rule that a licensee electing prepayment that does not have sufficient funds to prepay all its BTA licenses within an MTA may prepay only the BTA licenses within the MTA that it can afford, we clarify that a licensee can "afford" as many BTA licenses within an MTA that it can prepay using only the amount of credit available to the licensee for prepayment.

IV. MTA-BY-MTA ELECTIONS

A. Background

16. Under the *Second Report and Order*, a licensee was not permitted to make more than one election. Therefore, whatever election was chosen would apply to all licenses held by the licensee. For practical purposes, there was a limited mixing of options to the extent that payments would have to be resumed under the terms of the original installment plan with respect to any licenses not halved under the disaggregation option and any licenses retained under the build-out exception to the amnesty option. Licensees were precluded, however, from forming any other combinations among the options. For example, a licensee could not prepay some licenses and disaggregate others.

B. Discussion

17. By offering a menu of options, the Commission attempted to accommodate the fact that different licensees face different circumstances. However, the requirement that a licensee make the same election for all its licenses failed to account for the situation where a licensee faces different circumstances in its different license areas. We believe that licensees will be able to take better advantage of the varied benefits of the options if they are allowed to make different elections for the different areas in which they hold licenses. Therefore, we eliminate the requirement that a licensee must make the same election for all its licenses. We agree with NextWave and other parties that instead we should allow a licensee to make one election for each MTA in which it holds licenses.²⁷ In other words, the same election must be applied to each BTA license held in a given MTA, but different elections may be selected for different MTAs. For this purpose, the available elections that may be applied to an MTA are the resumption of payments under the existing installment payment plan, amnesty, prepayment, disaggregation, and a combination of disaggregation and prepayment. These elections are discussed in detail below.

18. We believe the MTA is the appropriate unit for making an election for similar reasons that the Commission previously determined it was an appropriate cut-off point.²⁸ We do not believe licensees should be permitted to make elections on a BTA-by-BTA basis. As the Commission stated in the *Second Report and Order*, allowing options to be applied at the BTA level would threaten the interdependency of licenses and would limit the potential for aggregation of licenses within an MTA.²⁹ It also would permit licensees to "cherry-pick" the most desirable markets within an area.³⁰ The return of only the less desirable markets would discourage participation in the reauction and could substantially delay the deployment of service to those areas. This danger does not exist at the MTA level because MTAs are large enough market areas that the value of an MTA would not be diminished if it was surrendered and its neighboring MTAs were not.

19. By allowing elections to be made on an MTA-by-MTA basis, we enable licensees to make election decisions that are not based solely on the elements of each option, but rather on their own business plans and financial situation. For example, a licensee may be successfully financing its license holdings on the east coast but experiencing difficulties in financing its west coast holdings. Under the approach adopted in the *Second Report and Order*, the prepayment option was the only means by which the licensee could return its west coast licenses while

²⁷ NextWave Reply at 8; *ex parte* letter jointly filed by 43 companies on February 20, 1998, at 1. We also received letters from members of Congress generally supporting greater flexibility regarding licensees' ability to choose which licenses may be returned. The Honorable Xavier Becerra *ex parte* filing at 1; Members of the Congressional Hispanic Caucus *ex parte* filing at 2.

²⁸ *Second Report and Order*, 12 FCC Rcd at 16,455, 16,458, 16,463-64, 16,469 paras. 38, 44, 57, 67.

²⁹ *Id.*, 12 FCC Rcd at 16,463, 16,469 paras. 56, 67.

³⁰ *Id.*, 12 FCC Rcd at 16,455, 16,463-64, 16,469 paras. 38, 56-57, 67.

keeping its east coast licenses.³¹ We believe that the decision to retain or surrender licenses in an MTA should depend on the particular circumstances surrounding those licenses. The decision should not be driven by the terms of the options or by unrelated circumstances in other areas, which might dictate a universal election unsuitable for the licenses in that MTA.

20. Further, we believe that MTA-by-MTA elections will promote rapid deployment of service to the public.³² Licensees will have more opportunity to localize their business plans by surrendering licenses in markets where success now seems unlikely due to financial difficulties. As a result, they will be able to focus on providing service in those markets where they have retained their licenses. In addition, the surrendered licenses presumably will be reaucted to entities better positioned to provide service in those license areas. Indeed, we anticipate that MTA-by-MTA elections will produce a more robust and competitive reaucted. We expect more licenses to be returned for reaucted because a licensee choosing disaggregation or resumption will now be free to surrender licenses it was reluctant to keep, but was forced to do so under the previous terms of those elections. Allowing those licenses to be reaucted to entities that are more committed, or better able, to serve those markets will stimulate competition and benefit consumers. Furthermore, permitting elections on an MTA-by-MTA basis will not undermine the integrity of the auction process because licensees still must pay the full amount of their licenses.

V. RESUMPTION OF PAYMENTS

A. Background

21 In the *Second Report and Order*, the Commission rescinded, effective March 31, 1998, the Bureau's prior suspension of the deadline for all broadband PCS C block and F block installment payments.³³ All payments due and owing after March 31, 1998, were to be made in accordance with the terms of each licensee's Note, associated Security Agreement, and the Commission's Orders and regulations.³⁴ The Commission stated that all rules regarding installment payments and defaults for the broadband PCS C and F blocks would remain in effect, except as modified by the *Second Report and Order*.³⁵ The Commission ruled that any licensee that failed to remit the payment due on March 31, 1998, and remained delinquent for more than 60 days (in other words, failed to make the March 31, 1998, payment on or before May 30, 1998), would be in default on its license. As the Commission noted, the 60-day non-delinquency

³¹ Note, however, that under the build-out exception to the original amnesty option, the licensee could retain any licenses that satisfied the build-out requirement. *Id.*, 12 FCC Rcd at 16,463-64 para. 57.

³² See Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

³³ *Second Report and Order*, 12 FCC Rcd at 16,449-50 para. 25.

³⁴ *Id.*

³⁵ *Id.*

period was an exception to existing Commission rules that provide for an automatic 90-day non-delinquency period for each installment payment.³⁶

22. The Commission directed in the *Second Report and Order* that Suspension Interest would become due and payable over a two-year period, beginning on March 31, 1998, on which date broadband PCS C and F block licensees would be required to submit one-eighth of the Suspension Interest.³⁷ After March 31, 1998, one-eighth of the Suspension Interest was to be paid along with each regular installment payment on each subsequent payment due date until the Suspension Interest had been fully paid.³⁸ Payment due dates would conform to those indicated in the Notes executed by the licensees.³⁹

23. On February 24, 1998, we issued an order revising the March 31, 1998, payment resumption date.⁴⁰ We stated that the payment resumption date would be at least 30 days after the date on which C block licensees must file a written election notice specifying their decision to resume payments under the terms of the original installment payment plan or to proceed under one of the alternative options. The election date was postponed in the same February 24, 1998, order to 60 days after publication of this reconsideration order in the *Federal Register*.⁴¹ As we stated in that order, the Bureau will announce the specific dates for election and payment resumption as soon as this reconsideration order is published.⁴²

B. Discussion

24. By the time they must resume making payments, C and F block licensees will have enjoyed a respite from their payment obligations substantially longer than one year. Several parties, however, seek a much longer deferral of the payment deadline.⁴³ We do not find their

³⁶ *Id.* See also 47 C.F.R. § 1.2110(f)(4)(i).

³⁷ *Second Report and Order*, 12 FCC Rcd at 16,449-51 paras. 25-27. For those C block licensees that retained licenses under the disaggregation option or under the build-out exception to the amnesty option, the Suspension Interest would be adjusted accordingly. C block licensees that elected the prepayment option or surrendered all licenses under the amnesty option would not be charged Suspension Interest.

³⁸ *Id.*

³⁹ *Id.* We previously provided specific examples of the schedule for paying the Suspension Interest. See *id.*, 12 FCC Rcd at 16,450-51 para. 27 and nn.53-54.

⁴⁰ *Election Date Order II*.

⁴¹ *Id.* The election date had been postponed once before on January 7, 1998. *Election Date Order I*.

⁴² *Election Date Order II* at para. 3.

⁴³ See Alpine Petition at 13 and Alpine Reply at 8-9 (suggesting a moratorium on interest payments for up to five years); Cellexis Petition at 1, 5 and Cellexis Reply at 2-5 (supporting an earlier proposal by the U.S. Small Business Administration ("SBA") for a five-year deferral); McBride Petition at 5 (proposing elimination of all

requests persuasive. No matter what deadline we establish, it is inevitable that some licensees will seek more time to pay. As stated in the *Second Report and Order*, a more extensive deferral would be unfair to unsuccessful bidders that might not have withdrawn from the auction had they known of deferral opportunities.⁴⁴ The Commission properly rejected a further deferral because it did "not wish to adopt temporary solutions such as those that might only postpone these difficulties and further prolong uncertainty."⁴⁵ We agree with parties that urge the Commission to reject any attempts to extend further the suspension of payments.⁴⁶

25. Although we will not grant the lengthy postponement requested by some parties, we will provide modest relief by extending the non-delinquency period for licensees that fail to meet the payment resumption deadline. In response to Urban Communicators' request, we will extend to 90 days the automatic 60-day non-delinquency period applicable to payments due on the payment resumption date.⁴⁷ As mentioned above, the Commission's rules allow a 90-day non-delinquency period for all other installment payments.⁴⁸ Although we stated in the *Second*

payments for the first seven years, with no interest on the debt for the first five years); Merotel Petition at 1-2 (asking the Commission to reconsider the deferral issue); MFRI Petition at 3 (endorsing a suspension of all payments until the end of the fifth year of the license, with the balance of principal and interest paid over the remaining five years of the license); NextWave Petition at 4-5, 22-25 (proposing a "modest deferral" to facilitate network deployment, while requiring payment in full with accrued interest within the existing license term); NextWave Reply at 5-8 (proposing resumption of payments phased in on a graduated basis for first three years); New Wave Petition at 1, 2 (requesting a deferral spanning a period of five or more years); Northern Michigan Petition at 5-6 (indicating a preference for an additional two-year suspension); One Stop Wireless Petition at 2-3 (seeking consideration of SBA proposal for short-term deferral combined with extension of five-year construction deadline, or long-term deferral with no change in construction deadline); OnQue Petition at 2 (supporting a two-year deferral from December 31, 1996); RFW Petition at 1, 4-5 (recommending a five-year deferral of principal and interest payments); Urban Communicators Petition at ii, 2, 5-7 (asking for an extension of the suspension until March 31, 1999, and two additional one-year deferrals, so long as licensees make certain demonstrations of financial ability and substantial construction progress and pay an interest rate increased by 0.5 percent for the deferral period); CONXUS Opposition at 6 (agreeing with NextWave and Alpine); Duluth PCS, et al. Opposition at 5 (advocating a five-year deferral of payment obligations); and Polycell Opposition at 5 (same as Duluth PCS, et al.). See also The Honorable Barbara Boxer *ex parte* filing at 1 (asking the Commission to consider a "limited deferral"); The Honorable Albert R. Wynn *ex parte* filing at 1 (requesting that the payment resumption date be extended by six months).

⁴⁴ *Second Report and Order*, 12 FCC Rcd at 16,446-47 para. 18.

⁴⁵ *Id.*

⁴⁶ See, e.g., Antigone/Devco Opposition at 6 ("The public treasury is harmed by every deferral of payments."); AirGate Opposition at 10 ("as time elapses, the prospect for repayment diminishes"); Sprint Opposition at 5 ("further delay puts C block licensees at a competitive disadvantage, making attracting investment capital difficult; creates a cloud of uncertainty over the wireless sector; and unjustly enriches defaulting licensees by affording them financing opportunities not available to those who in good faith fulfilled their payment obligations"); Northcoast Opposition at 3-4 ("additional C Block installment payment rule changes would be bad policy because it would create uncertainty as to how the Commission will handle situations of licensee default that occur outside of the C Block context").

⁴⁷ Urban Communicators Petition at 7-8.

⁴⁸ 47 C.F.R. § 1.2110(f)(4)(i).

Report and Order that a shorter non-delinquency period was justified in light of the one-year payment suspension,⁴⁹ we now believe that it is preferable to make the length of that non-delinquency period consistent with our rule for all other payments. We are providing this 30-day extension to assist licensees that are experiencing last-minute delays in raising capital. We believe that by offering this additional time, we will help these licensees complete their fund-raising efforts.

26. Consistent with our rule for all other payments, payments made within this 90-day non-delinquency period will be assessed the 5 percent late payment fee that we recently adopted.⁵⁰ However, in light of the more than one-year suspension and this expanded non-delinquency period, we believe that a subsequent grace period is not warranted. Therefore, there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period.⁵¹ Subsequent payments, due after the initial resumption payment, will be subject to the rules adopted in the *Part I Third Report and Order*.

27. Under this plan, the Suspension Period (as defined in the *Second Report and Order*) will still end on March 31, 1998.⁵² All interest accrued from the date of license grant through March 31, 1998, (i.e., Suspension Interest) will continue to be payable over eight equal payments. Interest accrued from April 1, 1998, through the payment resumption date will be due on the payment resumption date, in addition to one-eighth of the Suspension Interest. We believe that this plan will require licensees continuing under an installment payment plan, either through resumption or disaggregation, to demonstrate their financial viability by making a reasonable payment on the payment resumption date. This payment will evidence the ability of licensees to access the capital necessary to both service their government debt obligations and provide service to the public. In addition, we instruct the Bureau to modify the payment schedule so that all C and F block installment payments will be due on a quarterly basis, beginning on the payment resumption date.

28. We reject Urban Communicators' suggestion that Suspension Interest be forgiven, as well as its alternative proposals that Suspension Interest be paid either in a balloon at the end of the ten-year installment payment period or over six years in conjunction with other interest

⁴⁹ *Second Report and Order*, 12 FCC Rcd at 16,449-50 para. 25.

⁵⁰ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, FCC 97-413 (released December 31, 1997) at para. 106 ("*Part I Third Report and Order*") (reconsideration pending). See 47 C.F.R. § 1.2110(f)(4)(i).

⁵¹ See *Part I Third Report and Order* at para. 106; 47 C.F.R. § 1.2110(f)(4)(ii). But see The Honorable Albert R. Wynn *ex parte* filing at 1 (the Commission's newly adopted 180-day payment period should apply to C block licensees).

⁵² See *Second Report and Order*, 12 FCC Rcd at 16,448 para. 21 (the Suspension Period was defined as "the period beginning with the date on which each license was conditionally granted through and including March 31, 1998").

payments.⁵³ Because the Commission already has provided sufficient relief by granting the one-year suspension, we will neither forgive nor defer payment of the Suspension Interest. The Commission has accommodated licensees sufficiently by allowing payment of the Suspension Interest over eight equal payments.

29. We also reject requests from parties seeking a deviation from the payment schedule and from amounts established by the licensees' Notes.⁵⁴ We are providing all C block licensees with an array of alternative payment options, designed to accommodate licensees' various needs. These options were developed and are now being modified in an effort to balance complex and competing interests, with the recognition that it is impossible to devise alternatives that satisfy every entity with an interest in this proceeding. The record before us does not provide a sufficient basis for creating additional payment choices; indeed, there is opposition to our doing so.⁵⁵ Moreover, as explained above and in the *Second Report and Order*, the Commission purposefully adopted an approach that does not significantly alter the amounts paid for individual licenses.⁵⁶ Retroactively changing the payment terms would be unfair to other applicants that might have bid differently under more relaxed payment terms.

30. Finally, we will not adopt the proposal made only by DiGiPH that the Commission somehow compensate those licensees that timely made the March 31, 1997, payment and, as a

⁵³ Urban Communicators Petition at 8-9.

⁵⁴ Alpine asks that: (1) principal and interest payments be spread over a period of 20 years; (2) principal and interest payments be paid annually, rather than quarterly; and (3) the accrual of interest be suspended from the date of license grant until 90 days after the issuance of reauctoned licenses. Alpine Petition at 12-13, n.6; *see also* Alpine Reply at 8. Alpine also argues that licenses awarded in the original C block auction have diminished in value and, on that basis, urges the Commission to reduce the price for each "so affected" license by 15 percent per year until 90 days after the grant of reauctoned licenses. Alpine Petition at 13 n.6. DiGiPH similarly maintains that reauction will result in lower prices for licenses than at the original auction and therefore requests that the Commission reduce the debt of original licensees in an amount equal to the average reduction in cost for licenses sold at reauction. DiGiPH Petition at 8-11. Northern Michigan states that cash flow projections are not sufficient to support principal repayment over only four years and believes that beginning principal payments in year six is feasible if repayment occurs over 15 years. Northern Michigan Petition at 5-6. In addition, Northern Michigan and McBride seek relaxation of the construction requirements for C block licensees but fail to present convincing rationales for their proposals. *See* Northern Michigan Petition at 9; McBride Petition at 5.

⁵⁵ *See* AT&T Opposition at 3 ("Bidders in any Commission auction understand that there is no guarantee of business success even if they win a license. The Commission should not now create an expectation that it will shield applicants or licensees from the results of bad business decisions, or take actions that suggest that some licensees are 'too big to fail.' The menu of options the Commission provided in the *Order* will provide most C-block licensees with sufficient financial relief to permit them to continue to participate in the wireless marketplace, although it may be on a reduced basis."); *see also* PrimeCo Opposition at 4 ("[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 the most likely to rapidly deploy service." [citation omitted]).

⁵⁶ *Second Report and Order*, 12 FCC Rcd at 16,438-39 para. 5.

consequence, did not benefit from a suspension of that payment obligation.⁵⁷ Compensating licensees for complying with Commission rules would establish a precedent we consider inadvisable.⁵⁸ Furthermore, if a licensee opts to return all its licenses, we will refund any installment payments previously submitted for those licenses. If a licensee returns some licenses and retains others, the licensee will be allowed to apply previously submitted installment payments toward the prepayment of retained licenses or toward the Suspension Interest for retained licenses which the licensee does not prepay. For example, if a licensee elects resumption of payments for an MTA, any installment payments previously submitted for a BTA license within that MTA will be applied toward the Suspension Interest owed for that license, as described in the *Second Report and Order*.⁵⁹ The treatment of installment payments with respect to the disaggregation and prepayment options is specified below. Therefore, because installment payments will either be refunded or credited, we believe additional compensation is unnecessary.

VI. SURRENDER OF LICENSES FOR REAUCION (AMNESTY)

A. Background

31. In the *Second Report and Order*, the Commission adopted an amnesty option under which a C block licensee would be permitted to surrender all of its licenses in exchange for relief from its outstanding debt.⁶⁰ The Commission would waive any applicable default payments, subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards.⁶¹ Licensees electing this option would not have their down payments returned; however, neither would they be deemed in default or delinquent in meeting government debt obligations.⁶² In addition, they would be eligible to bid for any and all licenses in the reauction⁶³ and would not be restricted in making post-auction acquisitions.⁶⁴

⁵⁷ See DiGiPH Petition at 7-8.

⁵⁸ Moreover, the Commission has no explicit authority to pay interest to licensees, which was one of DiGiPH's suggestions. *Id.* at 8. For example, unsuccessful bidders in Commission auctions do not earn interest on their upfront payments or down payments. Rather, the accrued interest on these funds is transferred to the Telecommunications Development Fund. See Communications Act § 309(j)(8)(C), 47 U.S.C. § 309(j)(8)(C); 47 C.F.R. §§ 1.2106(a) and 1.2107(b).

⁵⁹ *Second Report and Order*, 12 FCC Rcd at 16,451 n.54 para. 27.

⁶⁰ *Second Report and Order*, 12 FCC Rcd at 16,462-64 paras. 53-58.

⁶¹ *Id.*, 12 FCC Rcd at 16,462 para. 53. See also 4 C.F.R. Parts 101-105.

⁶² *Second Report and Order*, 12 FCC Rcd at 16,462-63 para. 55.

⁶³ *Id.*, 12 FCC Rcd at 16,462 para. 54.

⁶⁴ *Id.*, 12 FCC Rcd at 16,439-40 para. 6.

32. Subject to one exception, licensees availing themselves of the amnesty option would be required to surrender all of their licenses to the Commission.⁶⁵ The sole exception to this "all-or-nothing" rule allowed licensees that met or exceeded the five-year build-out requirement on September 25, 1997, the date of adoption of the *Second Report and Order*, to keep licenses for built-out markets.⁶⁶ Specifically, a licensee utilizing this exception would be allowed to retain any built-out BTA, on the condition that it also keep any additional BTAs in the MTA where the built-out BTA is located and that it pay for all of those retained licenses under the terms of their original notes.⁶⁷

33. The Commission noted in the *Second Report and Order* that, although the Bureau had suspended installment payments on C block licenses on March 31, 1997, some licensees had made installment payments after the suspension.⁶⁸ In addition, some licensees had made their regularly scheduled installment payments prior to the suspension.⁶⁹ The Commission directed the Bureau to refund any installment payments made (whether due on or before March 31, 1997) on any license surrendered under the amnesty option and announced that it would forgive payment of any due, but unpaid, installment payments for any surrendered license.⁷⁰ Licensees retaining licenses under the build-out exception were to pay over eight equal payments (beginning with the payment due on March 31, 1998) all Suspension Interest applicable to the retained licenses. All installment payments previously made by the licensee on any of its licenses would be applied to reduce the Suspension Interest applicable to the retained licenses, and any amounts remaining would be refunded.⁷¹

B. Discussion

34. In keeping with our decision on reconsideration to allow licensees to make elections on an MTA-by-MTA basis, we modify the amnesty option to permit licensees to select that option for as many of their MTAs as they choose. Because amnesty no longer requires an

⁶⁵ *Id.*, 12 FCC Rcd at 16,463 para. 56.

⁶⁶ *Id.*, 12 FCC Rcd at 16,463-64 para. 57.

⁶⁷ *Id.*

⁶⁸ *Id.*, 12 FCC Rcd at 16,464 para. 58. Some of these payments were installments due on March 31, 1997; others were amounts due on December 31, 1996, but not paid until March 31, 1997, based on the Commission's automatic 90-day non-delinquency rule. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

"all-or-nothing" choice, we also eliminate as moot the build-out exception.⁷² Our decision is consistent with DiGiPH's recommendation that licensees be permitted "to return licenses for all BTAs on a per MTA basis, separate and apart from having met the five-year build out provisions"⁷³ The change also satisfies Alpine's request that licensees be entitled to turn in any or all of their licenses under amnesty.⁷⁴

35. The Commission originally adopted the "all-or-nothing" requirement for the amnesty option in order to prevent licensees from "cherry-picking" only the most desirable MTAs.⁷⁵ The Commission believed that facilitating a "cherry-picking" scheme would limit the potential for licenses to be aggregated, which would decrease their value to bidders in the reauction.⁷⁶ On reconsideration, we find persuasive DiGiPH's contention that requiring licensees to keep or surrender entire MTAs, rather than BTAs, will sufficiently limit "cherry-picking."⁷⁷ We also agree with DiGiPH's position that applying the amnesty option on an MTA-by-MTA basis does not carry a risk of "cherry-picking" significantly different from that connected with the original disaggregation option.⁷⁸

36. Several parties object to the fact that a licensee does not receive any refund of its down payment under the amnesty option.⁷⁹ As the Commission explained in the *Second Report*

⁷² NextWave's request that the Commission "clarify" that the build-out exception encompasses all licensees that "invested significantly" in network build-out activities is now moot. See NextWave Petition at 17. See also Airtel Petition at 1; Christensen Petition at 1; CVI Wireless Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; URS Greiner Petition at 1; Dorne & Margolin *ex parte* filing at 1. Also moot is Omnipoint's suggestion that we allow licensees to disaggregate licenses retained under the build-out exception. See Omnipoint Petition at 5-6; Omnipoint Reply at 1-2. Permitting licensees to make elections on an MTA-by-MTA basis eliminates any need for Omnipoint's proposal because licensees are free to disaggregate licenses in any built-out MTAs they wish to retain.

⁷³ DiGiPH Petition at 4-7. DiGiPH offered this recommendation as an alternative to its suggestion that the Commission extend the date by which licensees would have to have met the five-year build-out requirement for the build-out exception. *Id.* See also NextWave Reply at 8.

⁷⁴ Alpine Petition at 9-10.

⁷⁵ *Second Report and Order*, 12 FCC Rcd at 16,463 para. 56.

⁷⁶ See *id.*, 12 FCC Rcd at 16,469 para. 67.

⁷⁷ DiGiPH Petition at 4-5.

⁷⁸ *Id.* See also NextWave Reply at 8 ("[T]he 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.").

⁷⁹ See Alpine Petition at 9-10; Hyundai Petition at 6 (contending that "forfeiture of up to 100 percent of a down payment does not appear rationally related to any harm"); Hyundai Reply at 4-7; McBride Petition at 2, 4 (claiming that the amnesty option is punitive in nature and requesting "100 percent return of all down payments, plus all the interest payments"). See also AmeriCall Opposition at 5-7 ("fairness and equity require at least that the forfeiture in an amnesty or disaggregation election be no greater than the forfeiture by a licensee electing prepayment

and Order, its intent in retaining the down payment was to ensure that licensees electing the amnesty option and participating in the reauction of their surrendered licenses do so without the undue advantage of having all of their original funds available to repurchase the same spectrum they surrendered.⁸⁰ The Commission further explained that licensees selecting amnesty would benefit substantially by avoiding being declared in default and thereby being freed from assessments of delinquencies and other collection costs associated with default payments.⁸¹ The rationale of the *Second Report and Order* continues to be valid. If we were to allow C block licensees to return their licenses, receive a refund of their down payments, and participate in the reauction, we would undermine the integrity of the auction process by placing amnesty licensees in virtually the same position they would have occupied had the initial C block auction never taken place.

37. Nevertheless, we recognize that because all elections now are being applied on an MTA-by-MTA basis, licensees are permitted to return licenses in certain MTAs and retain licenses in other MTAs, as with the prepayment option under the *Second Report and Order*. Thus, licensees electing the amnesty option have the following choice. For licenses in each MTA returned under the amnesty option, the licensee may choose either to: (1) receive no credit for its down payment(s) but remain eligible to bid in the reauction on all its licenses in the returned MTA (pure amnesty), or (2) obtain credit for 70 percent of its down payment and forgo for a period of two years from the start date of the reauction eligibility to reacquire the licenses it surrendered pursuant to this option through either reauction or any other secondary market transaction (amnesty/prepayment).⁸² For purposes of this two-year eligibility restriction, a licensee includes qualifying members of the licensee's control group and their affiliates.⁸³ The 70 percent credit must be applied toward prepayment of the entire principal owed for a retained MTA with 30 MHz licenses and/or toward prepayment of the entire principal owed for the retained 15 MHz licenses of an MTA that has been disaggregated. Providing an additional choice within the amnesty option substantially increases the level of flexibility available to licensees and enables them to formulate new business plans that may be more attractive to lenders and investors. It also reflects a suggestion made by Alpine that licensees not participating in the C

...").

⁸⁰ *Second Report and Order*, 12 FCC Rcd at 16,462-63 para. 55.

⁸¹ *Id.*; see also 47 C.F.R. § 1.2110(f)(4)(iii), (iv). We note that both AmeriCall and Omnipoint ask that we establish specific timing goals for providing refunds to licensees electing the amnesty option. AmeriCall Petition at 3; Omnipoint Opposition at 14. The Bureau will address this issue in a forthcoming public notice on procedures.

⁸² As mentioned above, if a licensee opts to return all its licenses, we will refund any installment payments previously submitted for those licenses.

⁸³ See Section X.B.2. below for the definition of "affiliate."

block reauction lose a substantially smaller portion of their down payment than that lost by licensees that do participate.⁸⁴

VII. PREPAYMENT

A. Background

38. In the *Second Report and Order*, the Commission offered C block licensees the option to prepay the outstanding principal debt obligations for any licenses, on an MTA basis, that they elected to retain, subject to the restriction described below. The remaining licenses were required to be surrendered to the Commission for reauction.⁸⁵ In exchange, the Commission would forgive the debt on the surrendered licenses, and any associated payments owed.⁸⁶ A licensee electing this option would make its prepayment by using 70 percent of the total of all down payments made on the licenses it surrendered to the Commission, plus 100 percent of any installment payments previously paid for all licenses (collectively, "Available Down Payments"),⁸⁷ plus any "new money" it was able to raise.⁸⁸ The remaining portion of the down payment applicable to the surrendered licenses would not be refunded or credited but simply would be retained by the Commission.⁸⁹ Licensees would be prohibited from bidding on their returned spectrum in the reauction or from reacquiring it in the secondary market for two years from the start of the reauction. Licensees could, however, bid on spectrum or licenses surrendered by other licensees, provided such licensees were not affiliates.

39. The requirement that a licensee had to prepay all its BTA licenses within those MTAs that it selected for prepayment prevented "cherry-picking" because licensees could not

⁸⁴ See Alpine Petition at 9-10 ("[W]ith respect to the amnesty option, the Commission should revise the requirement for the forfeiture of down payments so that licensees have some incentive to accept this option. For those entities *not* participating in the re-auction, a substantially lesser penalty, keyed at most to the estimated cost incurred in re-auctioning the spectrum, would be a more appropriate means of insuring the integrity of the Commission's auction processes than total loss of the down payment. As to those entities who would desire to bid on such spectrum in the re-auction, a penalty of at most 30 percent of the previously made down payment would be appropriate.").

⁸⁵ *Second Report and Order*, 12 FCC Rcd at 16,467-70 paras. 64-69.

⁸⁶ *Id.*, 12 FCC Rcd at 16,467 para. 64.

⁸⁷ We clarify that the term "Available Down Payments," as used in paragraph 64 of the *Second Report and Order*, was intended to include both 70 percent of the down payment made on surrendered licenses and any installment payments previously submitted for those licenses. *Id.*

⁸⁸ *Id.* Since the *Second Report and Order* established that interest already paid is to be wholly credited toward prepayment under this option, Urban Communicators' request to that effect is moot. Urban Communicators Petition at 10.

⁸⁹ *Second Report and Order*, 12 FCC Rcd at 16,467 para. 64.

prepay only the most desirable BTA licenses within a given MTA and then surrender the rest.⁹⁰ The one exception to this rule was that any licensee lacking sufficient funds to prepay every BTA license within a chosen MTA would be permitted to prepay only those BTA licenses within that MTA that it could afford.⁹¹ The licenses for the remaining BTAs within that MTA which the licensee could not afford to prepay would be surrendered to the Commission.

B. Discussion

40. By providing a license free and clear of debt and payment conditions, prepayment makes it easier for licensees to raise the additional capital necessary to build out their systems and deploy new services. Thus, consumers benefit by receiving service sooner. Prepayment also removes the Commission from the role of lender, which sometimes may conflict with its responsibilities as a regulator.⁹² In addition, prepayment benefits the public because it assures taxpayers of full payment of licenses. Indeed, we have implicitly expressed our preference for prepayment by eliminating installment payments as a means of financing small business participation for the immediate future.⁹³

41. Under our modified approach, the prepayment option remains essentially the same as set forth in the *Second Report and Order*. For any 30 MHz licenses that are returned to the Commission, the licensee may continue to apply 70 percent of the down payment made on those licenses toward the prepayment of the entire outstanding principal owed in retained MTAs. The licensee may pool any down payment amounts that have been designated for prepayment, plus installment payments previously paid on any returned licenses.⁹⁴ We will refer to this pool of credit as a licensee's "Prepayment Credit."⁹⁵ This Prepayment Credit may be used to prepay any retained MTAs with 30 MHz licenses. As will be discussed in more detail below, it also may be used to prepay the retained 15 MHz licenses of any MTAs that have been disaggregated.

42. As under the *Second Report and Order*, any "new money" that is used to make prepayment must be submitted on or before the election date. Unlike under the *Second Report*

⁹⁰ *Id.*, 12 FCC Rcd at 16,469 para. 67.

⁹¹ *Id.*

⁹² See FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 (released October 9, 1997) at 39-40.

⁹³ *Part 1 Third Report and Order* at paras. 38-40.

⁹⁴ As described below, down payment amounts may also come from disaggregated licenses if the licensee uses the credit for prepayment. The treatment of installment payments previously submitted for disaggregated licenses is also described below.

⁹⁵ The term "Prepayment Credit" is essentially a substitution for the term "Available Down Payments," updated to account for the additional flexibility provided under our modified approach.

and Order,⁹⁶ affiliated licensees will be allowed to combine their Prepayment Credits.⁹⁷ However, any affiliated licensees that choose to pool their Prepayment Credits will be considered one licensee for purposes of making elections. Therefore, the elections made by those affiliates must be made in concert and must be made on an MTA-by-MTA basis, as is required of individual licensees.⁹⁸ Credit pooling does not require the participation of all of a licensee's affiliates. Any affiliate that chooses not to pool its credit along with its other affiliates will be considered an individual licensee for purposes of making elections. We believe on reconsideration that allowing this flexibility is consistent with the fact that, for purposes of the reauction, we consider a licensee and its affiliates to be the same entity. It also will prevent licensees from being disadvantaged if, without such a rule, they would have been precluded from electing prepayment by virtue of the fact that they transferred BTA licenses to affiliates.

43. In response to a request from DiGiPH, we make one important clarification. DiGiPH argues that, because affordability is a concept subject to differing interpretations, the Commission should further define its requirement that a licensee must prepay all of those BTA licenses within the MTA "that it can afford."⁹⁹ We clarify that, for purposes of this exception, a licensee can "afford" to prepay all of its BTA licenses within that MTA if it can prepay all BTA licenses using only its Prepayment Credit. If this amount is not enough to prepay all its BTA licenses within an MTA, the licensee must prepay as many BTA licenses in the MTA as this amount will allow and must surrender for reauction the remaining BTA licenses that it cannot afford to prepay.¹⁰⁰ Only under these circumstances may a licensee choose, within the given MTA, which BTA licenses to prepay and which to surrender. Once a licensee adds any "new money" at all to make prepayment, the affordability exception does not apply, and the licensee must add sufficient "new money" that, when added to its Prepayment Credit, is adequate to prepay all its BTA licenses within its chosen MTAs. A licensee claiming the affordability exception may choose only one MTA in which it will apply, and it must prepay all its BTA licenses within all other MTAs selected for prepayment. The Commission will not refund any

⁹⁶ *Second Report and Order*, 12 FCC Rcd 16,467 n.144 para. 64.

⁹⁷ See Section X.B.2. below for the definition of "affiliate."

⁹⁸ Therefore, if affiliated licensees decide to pool their credits, then all BTA licenses held by any of those affiliates must be surrendered for credit in any MTA where one of their BTA licenses is surrendered for credit. Similarly, those affiliated licensees must collectively select MTAs for prepayment, and all BTA licenses held by any of those affiliates in those selected MTAs must be prepaid, subject to the affordability exception. Likewise, if those affiliated licensees choose to disaggregate an MTA, then all BTA licenses held by any of those affiliates in that MTA must be disaggregated, and so on.

⁹⁹ DiGiPH Petition at 11-12.

¹⁰⁰ *But see* ClearComm *ex parte* filing at 1 (urging the Commission to allow licensees to prepay one or more BTA licenses in an MTA while retaining, and resuming payments on, the remaining BTA licenses in the MTA).

unspent portion of the Prepayment Credit.¹⁰¹ We believe retaining any unspent portion of the Prepayment Credit is a reasonable price for relieving the requirement that all BTA licenses in all MTAs be prepaid. The affordability exception also will apply to disaggregated MTAs that the licensee wishes to prepay.

44. This clarification provides an objective means for licensees to implement the affordability exception. It eliminates any doubt or confusion regarding the scope of the term "afford," and it is an easy, bright-line test to administer. In addition, we believe the restrictions we impose on the affordability exception minimize a licensee's ability to "cherry-pick" among BTAs. Therefore, we reject Omnipoint's request that the Commission eliminate the affordability exception, or in the alternative, grant all licensees unlimited flexibility under all options to select which BTA licenses to retain and which to surrender.¹⁰²

45. We reject arguments claiming that the prepayment option should be revised or eliminated because it benefits only certain licensees.¹⁰³ Each of the payment relief options presented to C block licensees is designed to strike a fair balance of competing interests, with benefits and obligations appropriate to varying circumstances. Although these options are intended to provide distinct choices for licensees, they adhere to a consistent set of principles. Moreover, the available choices complement each other to provide a range of alternatives to the various C block licensees experiencing financial difficulties. Because it is an important component in this package of options and because we continue to believe it is sound as a matter of policy, we decline to eliminate the prepayment option. A menu of options is provided because

¹⁰¹ For example, assume a licensee owns 30 licenses held in 3 MTAs as follows: 2 licenses in MTA #1, 12 licenses in MTA #2, and 16 licenses in MTA #3; that each license cost \$100,000; that the licensee made a down payment of \$10,000 on each license leaving \$90,000 as the debt on each license; and that the licensee made no installment payments. If the licensee chooses to prepay the licenses in MTA #1, its Prepayment Credit will be \$196,000 (28 x \$10,000 down payment for each license not being prepaid x 70 percent). Utilizing its Prepayment Credit of \$196,000, the licensee can "afford" to prepay all of its licenses in MTA #1. The unspent portion of its Prepayment Credit [\$196,000 less (2 x \$90,000) = \$16,000] will be retained by the Commission.

If instead the licensee decided to prepay licenses in MTA #3, it can only "afford" to prepay 2 of those 16 licenses calculated as follows: 2 x \$90,000 = \$180,000 needed to prepay; Prepayment Credit is calculated as follows: 28 x \$10,000 x 70 percent = \$196,000. The licensee may elect which 2 licenses to prepay and must surrender the remaining 14 licenses. The Commission will retain the unspent portion of the Prepayment Credit, which is \$16,000 [\$196,000 less (2 x \$90,000) = \$16,000]. If, however, the licensee elects to add "new money" to its Prepayment Credit, it *must* add enough "new money" to the Prepayment Credit to prepay the remaining 14 licenses in MTA #3 (i.e., 14 x \$90,000 less \$16,000 = \$1,244,000 of "new money" needed). The licensee may not add only \$74,000 of "new money" and prepay a third license while surrendering the remaining 13 unprepaid licenses.

¹⁰² Omnipoint Opposition at 9; Omnipoint Reply at 2.

¹⁰³ See McBride Petition at 2-3 (the prepayment option favors large bidders that have multiple licenses from which to choose, whereas small bidders seeking to keep licenses with payment relief are forced to disaggregate); Central Oregon Petition at 6 (single licensees get no benefit from the buy-out option); Omnipoint Reply at 2 (the prepayment option should be eliminated because "it amounts to nothing other than an opportunity for a handful of the largest bidders to 'cherry-pick' licenses").

no single solution would be appropriate for every situation; therefore, eliminating any one option would prejudice those licensees for which it may be best suited.

46. We note that we received numerous requests to allow licensees to use their entire down payment under the prepayment option.¹⁰⁴ We will maintain our rule that licensees electing the prepayment option will receive no refund or credit for 30 percent of the down payment made on 30 MHz licenses they surrender to the Commission. We believe that retention of this portion of the down payment is necessary to preserve the integrity of the auction process.¹⁰⁵ Furthermore, to return the entire down payment would undermine the purpose of the down payment -- to help ensure performance on a licensee's debt obligation.¹⁰⁶ We disagree with parties that characterize retention of a portion of the down payment as punitive,¹⁰⁷ a penalty,¹⁰⁸ or a forfeiture.¹⁰⁹ We view 30 percent of the down payment as the fair and reasonable price for receiving the benefits of this option.¹¹⁰ We also note that AirGate correctly characterizes the prepayment option as a method

¹⁰⁴ See Airtel Petition at 1; Alpine Petition at 10; Cellexis Petition at 6; Cellnet Petition at 2; Christensen Petition at 1; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; Meretel Petition at 3; MFRI Petition at 4; New Wave Petition at 1; NextWave Petition at 10-15; OnQue Petition at 2; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 5; UCNI Petition at 2; Urban Communicators Petition at 10; URS Greiner Petition at 1; Wireless Nation Petition at 2; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Third Kentucky Opposition at 2; CX Systems *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1. See also Hyundai Petition at 4-7; Christensen *ex parte* filing at 1; Florida Power *ex parte* filing at 1; Kabbara *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1; MRFI Reply at 1; Wireless Ventures Reply at 3.

¹⁰⁵ See Communications Act § 309(j), 47 U.S.C. § 309(j).

¹⁰⁶ See Communications Act § 309(j)(4)(B), 47 U.S.C. § 309(j)(4)(B); In the Matter of BDPCS, Inc., *Order*, 12 FCC Rcd 6606 (WTB 1997), *application for review pending*.

¹⁰⁷ See, e.g., Alpine Petition at 8; RFW Petition at 5; MFRI Petition at 4.

¹⁰⁸ See, e.g., NextWave Petition at 10-15; Duluth PCS, et al. Opposition at 5-6; Polycell Opposition at 5-6.

¹⁰⁹ See, e.g., AmeriCall Opposition at 5-7; Hyundai Reply at 4-6.

¹¹⁰ Several parties asking the Commission to reject petitioners' request to use the entire down payment under the prepayment option reiterate the Commission's discussion on this matter in the *Second Report and Order*. See Sprint Opposition at 4-5 (arguing that giving full credit would be unfair to unsuccessful bidders and to licensees that resume payments under their existing obligations); Antigone/Devco Opposition at 3-5 (asking the Commission to retain 30 percent of the down payment to preserve the integrity of the auction process). Although Omnipoint recognizes that retaining the 30 percent down payment on surrendered licenses is not punitive, we disagree with its reasoning that it accounts for reaction costs to the government. See Omnipoint Opposition at 3-5.

of providing licensees with more flexibility in using their down payments than is permitted under current rules.¹¹¹

47. We disagree with NextWave, Cellexis, and other parties that the Commission should account for the net present value of forgoing installment payments,¹¹² or otherwise discount the principal amount due under the installment payment plan.¹¹³ As Sprint points out, the Commission has considered this argument extensively and properly rejected it.¹¹⁴ In the *Second Report and Order*, the Commission stated that a licensee should be required to pay the face value of its auction bid.¹¹⁵ Accounting for the net present value of forgoing installment payments would rewrite the auction results because it would have the effect of changing the amounts bid for licenses.¹¹⁶ Therefore, to do so would be unfair to those bidders that withdrew from the auction under the assumption that the winning bid amounts represented the prices that

¹¹¹ AirGate Opposition at 13. AirGate notes that it would support "a limited exception" to permit licensees that elect to prepay all of their C block licenses to use all of their down payment toward the cash purchase price. *Id.* at 13 n.22. No such exception is necessary, given that AirGate's scenario is no different from paying off the entire installment debt early.

¹¹² See NextWave Reply at 8-9 (net present value accurately presents the size of PCS debt in light of the licensee's higher cost of capital compared to the government rate of interest); Cellexis Reply at 6 (by charging nominal value rather than net present value, the Commission is raising the effective price of the license). See also Airtel Petition at 1; Alpine Petition at 10; Cellexis Petition at 6-7; Cellnet Petition at 2; Central Oregon Petition at 4-6; Christensen Petition at 1; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; MFRI Petition at 4-5; New Wave Petition at 1; NextWave Petition at 5-10; Northern Michigan Petition at 7; OnQue Petition at 2; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 6; URS Greiner Petition at 1; UCNI Petition at 2; Urban Communicators Petition at 10; Wireless Nation Petition at 2; Meretel Petition at 2; Polycell Opposition at 9; Duluth PCS, et al. Opposition at 9; Third Kentucky Opposition at 2; Christensen *ex parte* filing at 1; CX Systems *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1; Florida Power *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1; Wireless Ventures Reply at 3.

¹¹³ Compare Alpine Petition at 10 (a 59 percent discount from the face amount of the note would account for the present value of the Commission's financing) with NextWave Petition at 5-10 (arguing for a discount rate of at least 15 percent) and Third Kentucky Opposition at 2 (same as NextWave). See also Meretel Petition at 2 (prepayment is not a viable option unless the prepaid amount is equal to or below that of the price paid for A and B block licenses).

¹¹⁴ Sprint Opposition at 4.

¹¹⁵ *Second Report and Order*, 12 FCC Rcd at 16,468 para. 66. See also *id.*, Separate Statement of Susan Ness, 12 FCC Rcd at 16,511 ("In my view, the price bid is the price bid. Bidders were not offered a cash versus credit price.").

¹¹⁶ See AirGate Opposition at 7-9 (a reduction in bid amounts would translate into a rewrite of the auction results).

would be paid for the licenses.¹¹⁷ Because we continue to support the policy that auction bids should be paid at their face value, we will not discount the principal due.¹¹⁸ Although the Commission provides favorable terms for financing the bid price, the cost of an installment payment plan is the interest that accrues over time. The benefit to a licensee for early pay-off of its financial obligations is the savings in the amount of interest that otherwise would be owed.¹¹⁹ We believe this trade-off provides a further reason for not discounting the principal.

48. We decline to provide further flexibility under the prepayment option. Cellexis requests that the Commission grant the five-year build-out exception provided under the amnesty option to licensees choosing the prepayment option.¹²⁰ A build-out exception is not needed because, under our modified approach, licensees are permitted to retain any MTAs they wish, whether built-out or not. Regardless, even under the approach adopted in the *Second Report and Order*, a build-out exception was unnecessary because licensees had the discretion to choose which MTAs to prepay and which to surrender, as opposed to the "all-or-nothing" approach under the original amnesty option.¹²¹ In addition, we decline MFRI's request to allow a licensee that holds both C and F block licenses to use its C block down payment to purchase for cash its F block licenses.¹²² We do not believe such flexibility is warranted because the reduction of debt associated with prepayment will help those licensees address their capital needs in servicing their F block debt. Finally, Urban Communicators argues that the requirement that prepaying licensees must purchase all BTA licenses held within an MTA is unfair to licensees that have licenses in only one MTA.¹²³ We disagree. This restriction is essential to prevent "cherry-picking," and a licensee that cannot avail itself of this option can either choose another option or limit its purchases under the affordability exception, if applicable.

¹¹⁷ See Omnipoint Opposition at 6-7 (a net present value discount would be fundamentally unfair to other bidders in the auction that properly relied on the Commission's rule that high bidders must pay the entire nominal amount of their bids or their licenses automatically cancel).

¹¹⁸ Moreover, if we were to discount the debt at a licensee's cost of capital it would be impossible to determine accurately a cost of capital for all licensees. The cost of capital varies for each licensee because it is based on a licensee's individual cost of debt and equity and on the ratio of debt to equity. Therefore, no single discount rate would be appropriate for every licensee. See Omnipoint Opposition at 6-8 (a net present value discount "would be impossible to implement in a manner that is fair and avoids unjust enrichment, because all parties -- including each Block C licensee and the U.S. Government -- have separate costs of capital").

¹¹⁹ See ALLTEL Opposition at 2-4; Northcoast Opposition at 5; Antigone/Devco Opposition at 2; Fidelity Capital Opposition at 3-4.

¹²⁰ Cellexis Petition at 6.

¹²¹ See *Second Report and Order*, 12 FCC Rcd at 16,469 para. 68.

¹²² MFRI Petition at 5.

¹²³ Urban Communicators Petition at 10. *But see* AirGate Opposition at 14-15 (licensees should not be permitted to return licenses on a BTA-by-BTA basis).

VIII. DISAGGREGATION OF SPECTRUM FOR REAUTION

A. Background

49. In the *Second Report and Order*, the Commission offered C block licensees the option to disaggregate a portion of their spectrum and return it to the Commission for reaution.¹²⁴ Licensees electing the disaggregation option would return one-half (i.e., 15 MHz of 30 MHz) of their spectrum from each of their BTA licenses within the MTAs in which they chose to disaggregate spectrum.¹²⁵ In other words, licensees would not be required to disaggregate spectrum for all of the licenses they hold, but they would have to disaggregate spectrum for all of the licenses they hold in a given MTA if they disaggregated spectrum for one license in that MTA. The returned spectrum would have to be at 1895 - 1902.5 MHz paired with 1975 - 1982.5 MHz, which is spectrum contiguous to the F block.¹²⁶

50. In exchange, the Commission would reduce by 50 percent the amount of debt that was owed on a 30 MHz license before it was disaggregated.¹²⁷ Fifty percent of the down payment made on the 30 MHz license would be considered the down payment for the retained 15 MHz of spectrum, but the Commission would not provide a refund or credit for the remaining 50 percent of the down payment.¹²⁸ Licensees were required to repay over eight equal payments (beginning with the payment due on March 31, 1998) all Suspension Interest, adjusted to reflect the reduction in debt obligation.¹²⁹ Any installment payments that were paid prior to the suspension would be credited in full against those amounts.¹³⁰ Licensees were prohibited from bidding on their returned spectrum in the reaution or from reacquiring it in the secondary market for two years from the start of the reaution.¹³¹ Licensees could, however, bid on spectrum or licenses surrendered by other licensees, provided such licensees were not affiliates.¹³²

¹²⁴ *Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

¹²⁵ *Id.*

¹²⁶ *Id.*, 12 FCC Rcd at 16,456 para. 39.

¹²⁷ *Id.*, 12 FCC Rcd at 16,456 para. 40.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*, 12 FCC Rcd at 16,457 para. 42.

¹³² *Id.*