

B. Discussion

51. As provided under the *Second Report and Order*, when a licensee disaggregates an MTA, it will receive full credit for the portion of the down payment applicable to the spectrum retained from a license (i.e., 50 percent of the down payment made on the original 30 MHz license). However, on reconsideration, we modify our decision that licensees electing the disaggregation option receive no refund or credit for the portion of the down payment applicable to the returned spectrum. For each disaggregated license for which the licensee elects to resume installment payments, rather than prepay, we will provide a credit of 40 percent of the down payment applicable to the 15 MHz of spectrum that is returned to the Commission. The 40 percent credit may only be used to reduce the amount owed on the 15 MHz of spectrum retained from the same BTA license that generated the credit. The credit, at the licensee's option, may be applied either to Suspension Interest and/or to reduce the principal outstanding.¹³³ Any installment payments previously submitted for a disaggregated license for which the licensee elects to resume installment payments will be credited as described in the *Second Report and Order* (i.e., toward Suspension Interest).¹³⁴

52. We derived the 40 percent credit because when it is combined with the 100 percent credit associated with the retained spectrum, the licensee will receive a credit of 70 percent of the total down payment for the original 30 MHz license. We have decided to allow this additional credit because we are persuaded by the argument of several parties that the credit permitted under the disaggregation option should be consistent with the 70 percent credit permitted under the prepayment option.¹³⁵ We believe the disparity that existed under the *Second Report and Order* was unfair to licensees that were precluded from electing prepayment. Furthermore, allowing this additional credit will advance the purposes of the disaggregation option. Disaggregation benefits both licensees and consumers because it provides a means for licensees to remain in a market area at a significantly reduced cost. By having their outstanding debt decreased by 50 percent, licensees improve their ability to finance their retained spectrum and build out their networks. In addition, disaggregation is pro-competitive because it provides a means for other competitors to enter a market area. It also gives unsuccessful bidders an

¹³³ See The Honorable Albert R. Wynn *ex parte* filing at 1-2 (licensees electing disaggregation should be allowed "to apply their excess down payments and interest payments they have made to their upcoming installment payments, thereby providing them, in exchange for actual money already paid to the U.S. Government, a brief extension of time to complete their financing").

¹³⁴ *Second Report and Order*, 12 FCC Rcd at 16,456 para. 40.

¹³⁵ Omnipoint Petition at 8-9; McBride Petition at 1-2; AmeriCall Opposition at 6. See also ClearComm Petition at 18-21 (if the Commission refuses to allow licensees full use of their down payments, then licensees electing disaggregation should at least not be subject to a greater penalty than those electing prepayment). *But see* AirGate Opposition at 12 (the Commission's decision to retain 50 percent of the down payment is reasonable).

As discussed above, a licensee that selects the amnesty option and chooses to bid on its returned licenses in the reauction will not receive credit for any of its down payment made on its returned licenses. We believe a licensee's opportunity to bid on its returned licenses is equitable compensation for not receiving any down payment credit.

opportunity to rebid on spectrum in market areas in which they were initially outbid. We believe the additional 40 percent credit will promote these benefits of disaggregation and will help licensees that have expressed an interest in disaggregation to take advantage of this option and continue their plans to provide service in their license areas.

53. We believe a 40 percent credit is warranted when a licensee resumes installment payments on a disaggregated MTA because the licensee remains in the MTA and continues building out its network in order to serve those consumers. We will not provide such a 40 percent credit to licensees that resume installment payments on a license in a different MTA. In contrast to a licensee that uses the 40 percent credit to resume installments on the retained portion of the disaggregated license, a licensee that seeks to apply a 40 percent credit from down payments made on licenses returned under an amnesty election would have, under those circumstances, abandoned service to the entire licensed area affected by that election. We believe that licensees that surrender licenses should not receive a credit for abandoning those markets unless they use the credit to prepay retained licenses.

54. We also revise the approach adopted in the *Second Report and Order* to provide for a combination of disaggregation and prepayment. As we have discussed, there are many advantages to both prepayment and disaggregation, and we believe a combination of the two should be encouraged because it offers the benefits of both options. For example, the licensee continues to build out its network in the market area, the Commission is relieved from its position of lender, and competing entities have the opportunity to bid on the returned spectrum. Therefore, if a licensee disaggregates an MTA and prepays the outstanding principal owed on the retained portion of the MTA, we will provide the licensee with a higher percentage of credit as an incentive to choose both disaggregation and prepayment. Instead of a 40 percent credit, a licensee that elects both disaggregation and prepayment will receive credit for 70 percent of the down payment applicable to the returned spectrum.¹³⁶ This 70 percent credit will be added to the licensee's Prepayment Credit which, as explained above, may be used to prepay any retained MTAs with 30 MHz licenses and/or the retained portions of any MTAs that have been disaggregated. Allowing this 70 percent credit is consistent with our policy of providing a 70 percent credit for 30 MHz licenses that are returned to the Commission. In both cases, the credit is 70 percent of the down payment associated with the amount of spectrum that is returned. In addition, any installment payments previously submitted for the licenses in an MTA that is both disaggregated and prepaid will be added to the licensee's Prepayment Credit.

55. If a licensee elects both disaggregation and prepayment for an MTA, the licensee must prepay the principal owed on the 15 MHz of spectrum retained from each BTA license in the MTA. However, if a licensee's Prepayment Credit is insufficient to make full prepayment on the entire MTA, then the affordability exception will apply. Thus, the licensee will be required to prepay only what it can afford and it must return the rest of the spectrum to the Commission for reauction. As with prepayment of full 30 MHz licenses, the exception will not apply if any "new money" is added to make prepayment, and the exception may be applied to only one MTA.

¹³⁶ The portion of the down payment applicable to the returned spectrum is the equivalent of 50 percent of the down payment made on the original 30 MHz license.

56. We received numerous requests to allow licensees to receive credit for their entire down payment under the disaggregation option.¹³⁷ We consider it inadvisable to provide full credit because we believe that to do so would undermine the integrity of the auction process.¹³⁸ As the Commission concluded in the *Second Report and Order*, allowing licensees to use their entire down payment would be unfair to those C block licensees electing to continue under the existing installment payment plan and to bidders that were unsuccessful in the auction.¹³⁹ We note that we already provide a substantial credit, and we believe that providing any further credit would not be sound public policy. As Fidelity Capital observes, if a licensee "believes the Commission is not providing an attractive disaggregation policy, then it is free to disaggregate its spectrum privately to another qualifying entity."¹⁴⁰

57. Because numerous benefits are conferred under the disaggregation option, we disagree with NextWave, ClearComm, and other parties that not providing a refund or credit for all of the down payment constitutes a penalty or forfeiture.¹⁴¹ Under disaggregation, the Commission forgives up to half of a licensee's outstanding debt, an action that will facilitate investment and growth by making more funds available to licensees for build-out. In addition, the Commission provides low-cost, long-term financing for the retained spectrum. Furthermore, the Commission renders a valuable service by providing an efficient and cost-effective mechanism for transferring spectrum that licensees otherwise might have been forced to resell in the secondary market at great risk. In exchange, the Commission receives the disaggregated spectrum

¹³⁷ See Airtel Petition at 1; Alpine Petition at 9; Cellexis Petition at 6; Cellnet Petition at 2; Christensen Petition at 1; ClearComm Petition at 6-18; 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; NextWave Petition at 10-15; New Wave Petition at 1; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 5; UCNI Petition at 2; URS Greiner Petition at 1; Wireless Nation Petition at 2; ClearComm Opposition at 2-4; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Third Kentucky Opposition at 2; ClearComm Reply at 3-6; Hyundai Reply at 4-7; Wireless Ventures Reply at 3; CX Systems *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; Cyber Sites *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.

¹³⁸ See Communications Act § 309(j), 47 U.S.C. § 309(j).

¹³⁹ *Second Report and Order*, 12 FCC Rcd at 16,468 para. 65; see also Sprint Opposition at 4-5.

¹⁴⁰ Fidelity Capital Opposition at 4-5 (the present terms of the disaggregation option are fair). *But see* ClearComm Reply at 7 (Fidelity Capital's argument favoring private disaggregation overlooks the fact that the Commission can more efficiently redistribute the disaggregated spectrum).

¹⁴¹ NextWave Petition at 10-15 (no rational basis exists for the penalty because no rule has been violated and no default or bid withdrawal has occurred); ClearComm Petition at 6-18 (there is no equitable or legal justification for the penalty because disaggregating licensees willingly surrender a *pro rata* portion of spectrum); ClearComm Reply at 2-6 (by imposing a penalty on disaggregating licensees, the Commission's action is inconsistent with that of a reasonable commercial lender). See, e.g., Cellexis Petition at 6; Hyundai Petition at 4-7; Meretel Petition at 3; MFRI Petition at 4; New Wave Petition at 2; ClearComm Opposition at 2-4; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Hyundai Reply at 4-7.

and retains a portion of the down payment applicable to that spectrum. Therefore, retention of part of the down payment is not a penalty; rather, it is the fair and reasonable price for receiving the benefits of disaggregation.

58. We are not persuaded that we should add even greater flexibility to the disaggregation option. We decline to adopt MFRI's suggestion that we allow C block licensees to retain the 15 MHz of spectrum adjacent to the F block if they also hold the F block license for the same BTA.¹⁴² Allowing certain C block licensees to disaggregate a different portion of spectrum would create a patchwork pattern of spectrum blocks in the reauction and would limit the opportunity for F block licensees to aggregate larger spectrum blocks by bidding on contiguous spectrum in the reauction. To promote consistency and simplicity in the reauction, we also reject McBride's request that we allow licensees the choice to disaggregate 10, 15, or 20 MHz of spectrum.¹⁴³ Allowing licensees to disaggregate different pieces of spectrum would create inefficiency in the market and would limit the potential for aggregation, thereby decreasing the value of spectrum in the reauction and delaying service to the public. Finally, we disagree with Alpine and Urban Communicators that disaggregation should be permitted on a BTA-by-BTA basis, rather than on an MTA-by-MTA basis.¹⁴⁴ As AirGate notes, disaggregation on an MTA-by-MTA basis will promote participation in the reauction because licensees are prohibited from selectively retaining 30 MHz of spectrum in only the most desirable BTAs.¹⁴⁵

59. NextWave and Cellexis argue that the build-out exception permitted under the amnesty option should be extended to licensees selecting the disaggregation option.¹⁴⁶ Under our modified approach, a build-out exception is unnecessary because licensees have the flexibility to determine which MTAs to retain and which to surrender. Nonetheless, as stated in the *Second Report and Order*, a build-out exception was never needed under the disaggregation option

¹⁴² MFRI Petition at 6.

¹⁴³ McBride Petition at 5. In addition, McBride claims that, by allowing the entry of more competitors through disaggregation, the Commission has frustrated expectations that a maximum of six PCS licenses would exist in each market (one each for blocks A through F). *Id.* at 2. McBride's argument is misplaced because Section 24.714 of the Commission's rules permit broadband PCS licensees in blocks A through F to disaggregate any amount of spectrum through the marketplace to qualified entities. 47 C.F.R. § 24.714. Moreover, it has always been the Commission's goal to encourage the widest participation in the wireless market, in accordance with Congress' mandate. *See* Communications Act § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

¹⁴⁴ Alpine Petition at 9; Urban Communicators Petition at 9. Alpine offers no rationale for a BTA-by-BTA requirement, and Urban Communicators makes an unpersuasive claim that an MTA-by-MTA requirement provides little relief for licensees that hold licenses in only one MTA. A licensee disaggregating spectrum in its only MTA would receive all the benefits of disaggregation, including the forgiveness of half its outstanding debt.

¹⁴⁵ AirGate Opposition at 14-15; *see also Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

¹⁴⁶ NextWave Petition at 15-16; Cellexis Petition at 6. In addition, a number of parties argue generally that licensees should be allowed to retain licenses in which they have made significant build-out. *See* 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.

because, unlike the original amnesty option, the disaggregation option was never an "all-or-nothing" proposition.¹⁴⁷ Under the original amnesty option, a licensee was required to surrender all licenses except for those in MTAs in which it satisfied the build-out requirement. By comparison, disaggregation was permitted on an MTA-by-MTA basis, and so licensees were never compelled to disaggregate spectrum in all their MTAs.

60. Finally, we affirm the statement in the *Second Report and Order* that upon acceptance of the election notice, the disaggregated spectrum will be deemed returned to the Commission.¹⁴⁸ Further, after disaggregation, notwithstanding the fact that a disaggregating licensee will continue to hold in its possession a 30 MHz license, that license will no longer authorize use of the 15 MHz of spectrum that is surrendered to the Commission but will continue to be valid with respect to the 15 MHz of spectrum that is retained.

IX. ELECTION PROCEDURES

A. Background

61. In the *Second Report and Order*, the Commission established January 15, 1998, as the deadline for C block licensees to elect to continue under the existing installment payment plan or to elect one of the three alternative options.¹⁴⁹ The Commission also required, *inter alia*, C block licensees whose elections would necessitate ongoing payments to execute any necessary financing documents pursuant to appropriate requirements and time frames established by the Bureau. The Commission specified procedures to be followed by licensees electing to continue under their existing notes or electing disaggregation, amnesty, or prepayment.

62. On January 7, 1998, we changed the election date to February 26, 1998, in order to allow licensees to submit their elections after final disposition of arguments raised on reconsideration.¹⁵⁰ On February 24, 1998, we issued an order changing the election date to 60 days after publication of this *Order on Reconsideration* in the *Federal Register*.¹⁵¹

B. Discussion

63. Moving the election date was an appropriate action given the large number of petitions for reconsideration filed in this proceeding. The revised deadline has provided sufficient time for us to respond to arguments raised on reconsideration so that licensees can be assured of regulatory certainty before making their elections. The postponement satisfies the requests of

¹⁴⁷ *Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

¹⁴⁸ *Id.*, 12 FCC Rcd at 16,470 para. 73.

¹⁴⁹ *Id.*, 12 FCC Rcd at 16,470 para. 70.

¹⁵⁰ *Election Date Order I* at para. 2.

¹⁵¹ *Election Date Order II*.

several parties that the date be delayed.¹⁵² We deny, however, other requests for a still longer postponement.¹⁵³ Licensees already have had several months in which to consider the options under the *Second Report and Order*, and we believe that 60 days after publication in the *Federal Register* will provide sufficient time for any reevaluation that may be necessary in light of the modifications we make in this Order.¹⁵⁴

64. We disagree with Omnipoint that NextWave should be required to make its election in advance of other C block licensees.¹⁵⁵ Omnipoint claims that NextWave is so dominant in the market that its election decision will have a dramatic impact on the relative value of choices made by the other licensees.¹⁵⁶ Omnipoint argues that, for example, other licensees might be reluctant to surrender spectrum if they knew NextWave was keeping its spectrum because reauction opportunities would be severely limited without the return of any NextWave licenses.¹⁵⁷ We agree with NextWave that all C block licensees should be treated equally, and we will not discriminate against one licensee in order to grant others a competitive advantage.¹⁵⁸

65. In the *Second Report and Order*, the Commission inadvertently omitted reference to the requirement that F block licensees execute fully and deliver timely all necessary financing documents. Consequently, we now clarify that F block licensees, as well as C block licensees, must execute and deliver all necessary financing documents pursuant to appropriate requirements and time frames as will be established by the Bureau in a forthcoming public notice on

¹⁵² See, e.g., Horizon Petition at 2 (requesting that the election deadline be moved to March 15, 1998); MFRI Opposition at 2; Third Kentucky Opposition at 2; RFW *ex parte* filing at 1-2. But see AirGate Opposition at 15-16 (the January 15, 1998, election date should be maintained).

¹⁵³ See NextWave Petition at 19-22 (before requiring licensees to make an election, the Commission should resolve control group issues, clarify the role of the Department of Justice, and adopt final World Trade Organization implementation rules); Polycell Opposition at 4-5 (same as NextWave); Duluth PCS, et al. Opposition at 4-5 (same as NextWave); Omnipoint Petition at 13-14 (before licensees relinquish valuable spectrum assets, the Commission should clarify its position on bankruptcy and its jurisdiction to engage in debt forgiveness); Omnipoint Opposition at 13-14 (before licensees are required to make irreversible elections, the Commission should issue final decisions on the note interest rate, the procedures for implementing resumption of payments, election filing procedures, the Commission's position on bankruptcy, and the role of the Department of Justice). MFRI asks that the election date be postponed until the bid signaling practices in the D, E, and F block auction have been resolved. MFRI Petition at 3. We note that on September 5, 1997, the Commission announced the implementation of click-box bidding, one purpose of which is to prevent bid signaling practices. See "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, 12 FCC Rcd 13,449 (WTB 1997).

¹⁵⁴ See Northern Michigan Petition at 10 (the election date should be at least 60 days after the release of the order on reconsideration of the *Second Report and Order*).

¹⁵⁵ Omnipoint Petition at 6-8; Omnipoint Reply at 2-5.

¹⁵⁶ Omnipoint Petition at 6.

¹⁵⁷ *Id.* at 7-8.

¹⁵⁸ NextWave Opposition at 2.

procedures. We modify the *Second Report and Order* to require both C and F block licensees that fail to execute fully and deliver timely to the Commission any required financing documents to pay on the payment resumption date all unpaid simple interest accruing from the date of license grant through the payment resumption date.¹⁵⁹ The Bureau's forthcoming public notice also will set forth updated election procedures for C block licensees, reflecting our modifications to the *Second Report and Order*.

X. REAUCION

A. Timing

66. On January 7, 1998, we announced that the C block reauction would begin on September 29, 1998.¹⁶⁰ In light of the postponement of both the election date and the payment resumption date, as discussed above, it will be necessary to establish a new reauction date. We delegate to the Bureau the authority to establish the reauction date. We instruct the Bureau to issue a public notice announcing the new date at least three months in advance of the start of the reauction.

67. CPCSI, a winning bidder for nine licenses in the C block auction whose license grants were subject to resolution of an Application for Review pending at the time of the release of the *Second Report and Order*, asks the Commission not to begin the reauction until final action on its Application for Review or, in the event no such action occurs, until the Pocket and GWI bankruptcy proceedings conclude.¹⁶¹ Because the Commission granted CPCSI's Application for Review on December 24, 1997,¹⁶² CPCSI's request is moot and there is no need to address the merits of CPCSI's request.

¹⁵⁹ See *Second Report and Order*, 12 FCC Rcd at 16,471 para. 76 (requiring payment of all Suspension Interest, which included interest only through the previous payment resumption date of March 31, 1998).

¹⁶⁰ See *Election Date Order I* at para. 3. The Commission has proposed including the following licenses in the reauction: (1) all licenses representing the disaggregated spectrum surrendered to the Commission under the disaggregation option; (2) all licenses surrendered to the Commission by licensees taking advantage of the Commission's prepayment or amnesty options; and (3) all PCS C block licenses currently held by the Commission as the result of previous defaults. See *Further Notice*, 12 FCC Rcd at 16,474 para. 83.

¹⁶¹ CPCSI Petition at 4-9. *But see* AirGate Opposition at 16 (encouraging the Commission to reject CPCSI's Application for Review in time for those licenses to be included in the reauction and arguing that the reauction should not be delayed by the bankruptcy proceedings).

¹⁶² See *Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding BTA Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Frequency Block C, Memorandum Opinion and Order*, FCC 97-417 (released December 24, 1997).

B. Eligibility

1. Background

68. The *Second Report and Order* specified that all entrepreneurs, all entities that had been eligible for and had participated in the original C block auction, and all current C block licensees would be eligible to bid in the reauction.¹⁶³ The Commission, however, created an exception for incumbent licensees: for a period of two years from the start date of the reauction, C block licensees (defined as qualifying members of the licensee's control group, and their affiliates) that opted for the disaggregation or prepayment options would be prohibited from reacquiring, either through the reauction or through any secondary market transaction, any spectrum or licenses that they surrendered to the Commission under those options.¹⁶⁴ Such licensees, however, would be permitted to bid on spectrum or licenses surrendered by other licensees, provided that such licensees were not affiliates.¹⁶⁵ Licensees electing the amnesty option would be eligible to bid for any and all licenses at the reauction, with no restrictions on post-auction acquisitions.¹⁶⁶

2. Discussion

69. The only reauction eligibility issues set forth in the *Second Report and Order* ripe for reconsideration in this phase of the proceeding are those related directly to whether and how a licensee's election of a particular payment option should affect its eligibility to participate in the reauction of, or reacquire an ownership interest in, surrendered spectrum. We defer to other phases of WT Docket No. 97-82 additional eligibility issues, including the qualifications of entities that have defaulted on payments to participate in the reauction¹⁶⁷ and the use of a "controlling interest" approach rather than "control group" structures to determine financial size in the C block, as well as in all auctionable services.¹⁶⁸ We note that, in its comments filed in response to the *Further Notice*, Nextel Communications, Inc. challenges the Commission's ruling

¹⁶³ *Second Report and Order*, 12 FCC Rcd at 16,448 para. 22; see also *Further Notice*, 12 FCC Rcd at 16,474 para. 84.

¹⁶⁴ *Second Report and Order*, 12 FCC Rcd at 16,457, 16,470 paras. 42, 69.

¹⁶⁵ *Id.*, 12 FCC Rcd at 16,457 para. 42; see also *id.*, 12 FCC Rcd at 16,470 para. 69.

¹⁶⁶ *Id.*, 12 FCC Rcd at 16,462 para. 54.

¹⁶⁷ Comment is sought on this issue in the *Further Notice*, 12 FCC Rcd at 16,474 para. 84.

¹⁶⁸ NextWave Petition at 20; accord Duluth PCS, et al. Opposition at 4-5; Polycell Opposition at 4-5; cf. AmeriCall Opposition at 7-8 (arguing that the 10 percent control group institutional investor rule, 47 C.F.R. § 24.709(b)(5)(i)(C), and the 25 percent nonattributable ownership limit, 47 C.F.R. § 24.709(b)(3)(i), should be eliminated because they unnecessarily restrict access to capital from noncontrolling investors). Comment is sought on this issue in *Part 1 Third Report and Order*; see also Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5693 n.17, 5703 paras. 11, 28 (1997).

in the *Second Report and Order* that participation in the C block reauction is limited to qualified entrepreneurs.¹⁶⁹ In their petitions for reconsideration, Cellexis and RFW respond to Nextel's arguments and urge the Commission not to reconsider its decision.¹⁷⁰ We address Nextel's challenge here, notwithstanding the fact that Nextel's request was not filed as a petition for reconsideration of the *Second Report and Order*. We conclude that Nextel has not provided a convincing rationale for deviating from the public interest goals articulated by the Commission in the *Second Report and Order*.¹⁷¹ Consequently, we affirm the Commission's earlier ruling to limit eligibility for participation in the reauction to applicants meeting the current definition of "entrepreneur."¹⁷²

70. On reconsideration, we make a change to the eligibility requirements, which already has been discussed above, and also a clarification. As we stated previously, a licensee that elects the amnesty option for an MTA and opts to receive partial credit for down payments on its returned licenses in that MTA will not be eligible to reacquire those licenses through either reauction or any secondary market transaction for a period of two years from the start date of the reauction. This restriction also applies to the licensee's affiliates. Likewise, if a licensee disaggregates an MTA, neither it nor its affiliates may bid on the returned spectrum in the reauction or reacquire it through a secondary market transaction for two years after the start date of the reauction. Licensees that return licenses under the amnesty option or spectrum under the disaggregation option are not precluded from bidding in the reauction on licenses or spectrum returned by other non-affiliated licensees (or from later reacquiring those licenses or spectrum in post-auction transactions). We clarify that the term "affiliate" is defined by our competitive bidding rules in the *Part 1 Third Report and Order*.¹⁷³

71. Several parties believe that we should revise our bidding eligibility requirements.¹⁷⁴ Sprint, for example, agrees with the Commission's decision to exclude C block licensees that choose disaggregation or prepayment from bidding on their surrendered spectrum at reauction, but contends that the Commission undermines the integrity of the auction process by not similarly limiting the ability of licensees that select the amnesty option.¹⁷⁵ Sprint believes that the lack of

¹⁶⁹ See Comments filed by Nextel Communications, Inc. on November 13, 1997 at 7-9.

¹⁷⁰ See Cellexis Petition at 7-8; RFW Petition at 6-7. See also MFRI Reply at 6-7 (expressing concern that large incumbents advocate opening the C block reauction to all bidders); Wireless Ventures Reply at 4 (same).

¹⁷¹ See *Second Report and Order*, 12 FCC Rcd at 16,448 para. 22.

¹⁷² *Id.*

¹⁷³ 47 C.F.R. § 1.2110(b)(4); *Part 1 Third Report and Order* at paras. 29-30.

¹⁷⁴ Compare Northern Michigan Petition at 6 (licensees electing disaggregation should be allowed to participate in the reauction) and Cellexis Petition at 6 (the C block reauction should be open to all non-defaulting C block licensees, irrespective of the chosen option) with Antigone/Devco Opposition at 5-6 (bidders electing any of the special relief options should be barred from participating in any future C block reauctions).

¹⁷⁵ Sprint Petition at 3-4.

such a restriction will unjustly enrich licensees that select the amnesty option and then bid for the same spectrum at a likely discount.¹⁷⁶ NextWave, on the other hand, claims it is unreasonably discriminatory to preclude entities choosing disaggregation or prepayment from reacquiring their surrendered spectrum for two years while allowing entities choosing the amnesty option to reacquire their spectrum immediately either by reauction or through secondary markets.¹⁷⁷

72. We believe our modified approach addresses both these arguments. In response to NextWave, we note that licensees electing disaggregation and/or prepayment for one MTA now can choose to return licenses in other MTAs and bid on those licenses in the reauction. However, in response to Sprint, we point out that licensees electing amnesty for an MTA must forgo their entire down payment if they wish to bid on their returned licenses for that MTA. We believe that this cost sufficiently mitigates any concern of unjust enrichment.

XI. MISCELLANEOUS MATTERS

A. Cross Defaults

73. The *Second Report and Order* provided that if a licensee defaulted on a C block license, the Commission would not pursue cross default remedies with regard to the licensee's other licenses in the C or F blocks.¹⁷⁸ In other words, if a licensee defaulted on a given C block license but was meeting its payment obligations on its other C or F block licenses, the Commission would not declare the licensee to be in default with respect to those other C or F block licenses. We disagree with CIRI that, by not imposing cross default remedies, we encourage auction participants to bid speculatively and then "cherry-pick" among the licenses they ultimately decide to keep by simply defaulting on the ones they no longer desire.¹⁸⁰ As explained earlier, we have implemented numerous procedures to safeguard against "cherry-picking." Moreover, we believe that by not imposing cross default remedies, we encourage regional financing. Even if a licensee's holdings in one region have proven unattractive to the financial market, the same licensee's holdings in other markets may be financially sound. Therefore, we will not depart from the decision in the *Second Report and Order*. We note that licensees that ultimately default will continue to be subject to debt collection procedures.¹⁸¹

¹⁷⁶ *Id.* at 2-3; Sprint Opposition at 3.

¹⁷⁷ NextWave Petition at 18-19; *accord* Polycell Opposition at 8-9; Duluth PCS, et al. Opposition at 8-9.

¹⁷⁸ *Second Report and Order*, 12 FCC Rcd at 16,472-73 para. 79.

¹⁷⁹ *Id.*

¹⁸⁰ See CIRI Petition at 6-8. *But see* AmeriCall Opposition at 8-11 ("Suffering default penalties is not an encouragement to 'cherry-pick.'").

¹⁸¹ 47 C.F.R. § 1.2110(f)(4)(iv).

B. No Extension of C Block Relief to Other Licensees

74. We reject various requests to grant F block licensees the same relief provided to C block licensees.¹⁸² Cellular Holding contends that C and F block licensees should be treated similarly because: (1) both are licensed to provide broadband PCS; (2) they were granted their licenses within 7.5 months of one another; (3) Section 24.709 of the Commission's rules governs bidder eligibility for both blocks; (4) their market boundaries are identical; (5) they will have nearly the same amount of spectrum if C block licensees choose disaggregation; and (6) they both compete with larger, more experienced competitors that received a head-start.¹⁸³ Cellular Holding, however, ignores the fact that C and F block licensees are not similarly situated with respect to the most relevant factor -- the need for financial relief.

75. After careful review, the Commission determined in the *Second Report and Order* that "the nature and extent of any financing difficulties faced by the C block licensees appear to be different from any such problems facing entrepreneurs in the F block."¹⁸⁴ C block prices were higher, on average, than F block prices.¹⁸⁵ We disagree with several parties that argue that the Commission's explanation in the *Second Report and Order* fails to justify disparate treatment.¹⁸⁶ The difficulties in financing the unexpectedly high prices bid in the C block auctions is a sufficiently distinguishing basis for limiting relief to C block licensees. As further justification, we agree with AmeriCall that the C block situation was the result of a unique set of mostly unpredictable events, including litigation and resulting licensing delays and the lack of a simultaneous non-entrepreneur auction that could have been used to ease price pressures.¹⁸⁷

76. The need for C block relief was due to exceptional and urgent circumstances, and because it is essential to maintain the integrity of the auction process, only the most exigent situation would cause us to offer such relief. Even in addressing the C block financing situation, the Commission provided options that offered only limited relief so as to be fair to bidders that withdrew from the auction. We therefore are not persuaded by Central Oregon's claim that F block licensees should be granted relief because A, B, and C block licensees have a competitive

¹⁸² Central Oregon Petition at 2-4; Cellular Holding Petition at 2-5; Duluth PCS, et al. Opposition at 10; Polycell Opposition at 10; Eldorado Reply at 2-4.

¹⁸³ Cellular Holding Petition at 2-3.

¹⁸⁴ *Second Report and Order*, 12 FCC Rcd at 16,447 para. 20.

¹⁸⁵ See "D/E/F Band PCS Auction Results in Lower Spectrum Prices But Another Win for CDMA Proponents," U.S. Telecommunications, SBC Warburg Inc. (January 28, 1997) (D, E, and F spectrum prices 75 percent lower than C band auction); Donaldson, Lufkin & Jenrette, *The Wireless Communications Industry* (Spring 1997) at 20 ("D, E and F Auction Prices Surprisingly Low").

¹⁸⁶ See Central Oregon Petition at 2-4; Omnipoint Opposition at 12; Eldorado Reply at 3-4.

¹⁸⁷ AmeriCall Opposition at 3-4. See also NextWave Reply at 3.

advantage given their earlier licensing date and their larger amounts of spectrum.¹⁸⁸ We also reject Omnipoint's argument that C block options should be available to entrepreneurs with D, E, and F block licenses because C block relief will change the relative values of those licenses.¹⁸⁹ These arguments do not present sufficiently compelling reasons to apply the "extraordinary procedures" we adopted for C block licensees to D, E, and F block licensees.¹⁹⁰ In addition, CONXUS, the only party to address this issue, argues that narrowband PCS entities should receive relief comparable to that afforded C block licensees because they compete in the same consumer and financial markets and face similar circumstances.¹⁹¹ The record in this reconsideration proceeding is insufficient to adopt global changes affecting narrowband PCS entities, but we note that payment matters for these entities are currently being examined in another proceeding before the Commission.¹⁹²

C. Issues Addressed in Other Proceedings or Requiring Action by Congress

77. A number of parties make requests involving issues either that will be, or have been, addressed in other proceedings or that require action by Congress. For example, several petitioners urge the Commission to reduce the interest rate for C block installment payments.¹⁹³ The Bureau will address this issue in a forthcoming order. With respect to Northern Michigan's request that we allow commercial lenders to acquire a security interest in licenses, we note that we previously resolved the issue in another proceeding.¹⁹⁴

¹⁸⁸ Central Oregon Petition at 2-4.

¹⁸⁹ Omnipoint Petition at 9-10; Omnipoint Opposition at 11-12.

¹⁹⁰ *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2.

¹⁹¹ CONXUS Petition at 3-5; CONXUS Opposition at 2-8; CONXUS Reply at 4-10. CONXUS claims its experience is similar to the C block situation, including delays in market entry, its problems in raising capital, high bid amounts, a post-auction rule change, and the lack of a simultaneous non-entrepreneur auction.

¹⁹² See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS, PP Docket No. 93-253, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12,972 (1997).

¹⁹³ Northern Michigan Petition at 8-9 (interest rate for C block licensees should be standardized at 6.5 percent); Alpine Petition at 11-12 and Alpine Reply at 6-8 (interest rate should be reduced to 5.56 percent); McBride Petition at 4 (the Commission should set the interest rate uniformly at 5.75 percent).

¹⁹⁴ Northern Michigan Petition at 8. See also McBride Petition at 4. Our position on this issue was addressed in Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, FCC 97-60 (released February 28, 1997) at para. 12 ("debtors may grant to other parties a subordinated security interest in the proceeds of an authorized assignment or transfer of the license to a third party, provided however that any such security interest shall be subordinated to and in no way inconsistent with the Commission's security interest in the license").

78. TAP encourages the Commission to seek Congressional authority to award tax certificates to entities that provide investment capital to C block licensees.¹⁹⁵ Section 309(j)(4)(D) of the Communications Act mandates that, in seeking to ensure that designated entities are "given the opportunity to participate in the provision of spectrum-based services," the Commission shall "consider the use of tax certificates."¹⁹⁶ By allowing a tax deferral of the gain realized on an investment, tax certificates provide a significant means of enhancing the value of an investment in an enterprise, and we believe that a tax certificate program for spectrum-based services would be as beneficial to the wireless industry as the Commission's tax certificate programs were for the broadcast and cable industries.¹⁹⁷ However, in view of Congress' repeal in 1995 of Section 1071 of the IRS Code,¹⁹⁸ which granted the Commission authority to use tax certificates to promote Commission policies, we believe that legislative action would be necessary before we could provide such tax relief. Accordingly, we urge Congress to review the positive impact of the Commission's previous tax certificate programs and to grant us the authority to establish a similar program for wireless enterprises, which we believe would promote competition in the telecommunications industry by encouraging investment in new services.

XII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Supplemental Final Regulatory Flexibility Analysis

79. The Supplemental Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is attached at Appendix C.

B. Paperwork Reduction Act Analysis

80. This Order contains a modified information collection that was submitted to the Office of Management and Budget requesting emergency clearance under the Paperwork Reduction Act of 1995.

C. Ordering Clauses

81. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i),

¹⁹⁵ TAP Reply at 4-10. *See also* McBride Petition at 5.

¹⁹⁶ Communications Act § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

¹⁹⁷ *See* TAP Reply at 5-6 (citing Erwin G. Krasnow, "A Case for Minority Tax Certificates," *Broadcasting & Cable*, December 15, 1997, at 80) (the Commission's tax certificate program greatly increased minority ownership of broadcast and cable entities and "gave minority entrepreneurs increased access to the market for broadcast and cable properties, gave them a chip at the bargaining table and opened doors at financial institutions that had been closed").

¹⁹⁸ Pub. L. No. 104-7, § 2, 109 Stat. 93, 93-94 (1995).

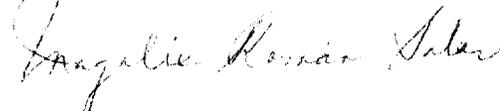
303(r), and 309(j), the petitions for reconsideration filed in response to the *Second Report and Order* are GRANTED IN PART and DENIED IN PART, as provided herein.

82. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the modifications to the Commission's rules, as described herein and in Appendix B, ARE HEREBY ADOPTED. These modifications shall become effective 60 days after publication of this *Order on Reconsideration of the Second Report and Order* in the *Federal Register*.

83. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

84. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Order on Reconsideration of the Second Report and Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A

Petitions for Reconsideration

1. Airtel Communications, Inc. ("Airtel")
2. Alpine PCS, Inc. ("Alpine")
3. AmeriCall International, L.L.C. ("AmeriCall")
4. Carolina PCS I Limited Partnership ("CPCSI")
5. Cellexis International, Inc. ("Cellexis")
6. Cellnet ("Cellnet")
7. Cellular Holding, Inc. ("Cellular Holding")
8. Central Oregon Cellular, Inc. ("Central Oregon")
9. Christensen Engineering & Surveying ("Christensen")
10. ClearComm, L.P. ("ClearComm")
11. CONXUS Communications, Inc. ("CONXUS")
12. Cook Inlet Region, Inc. ("CIRI")
13. CVI Wireless
14. DiGiPH PCS, Inc. ("DiGiPH")
15. Federal Network
16. Fox Communications
17. General Wireless, Inc. ("GWI")
18. Horizon Personal Communications, Inc. ("Horizon")
19. Hyundai Electronics America ("Hyundai")
20. Koll Telecommunication Services ("Koll")
21. Leifer, Marter Architects ("Leifer, Marter")
22. McBride, Vincent ("McBride")
23. Merotel Communications, L.P. ("Merotel")
24. MFRI Incorporated ("MFRI")
25. NextWave Telecom Inc. ("NextWave")
26. New Wave Inc. ("New Wave")
27. Northern Michigan PCS Consortium L.L.C. and Wireless 2000, Inc. ("Northern Michigan")
28. Omnipoint Corporation ("Omnipoint")
29. One Stop Wireless of America, Inc. ("One Stop Wireless")
30. OnQue Communications, Inc. ("OnQue")
31. Prime Matrix Wireless Communications ("Prime Matrix")
32. RFW PCS Inc. ("RFW")
33. Sprint Corporation ("Sprint")
34. United Calling Network, Inc. ("UCNI")
35. Urban Communicators PCS Limited Partnership ("Urban Communicators")
36. URS Greiner, Inc. ("URS Greiner")
37. Wireless Nation, Inc. ("Wireless Nation")

Oppositions

1. AirGate Wireless, L.L.C. ("AirGate")
2. ALLTEL Communications, Inc. ("ALLTEL")
3. AmeriCall International, L.L.C. ("AmeriCall")
4. Antigone Communications Limited Partnership and PCS Devco, Inc. ("Antigone/Devco")
5. AT&T Wireless Services, Inc. ("AT&T")
6. ClearComm, L.P. ("ClearComm")
7. CONXUS Communications, Inc. ("CONXUS")
8. Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. ("Duluth PCS, et al.")
9. Fidelity Capital
10. MFRI Incorporated ("MFRI")
11. NextWave Telecom Inc. ("NextWave")
12. Northcoast Communications, L.L.C. ("Northcoast")
13. Omnipoint Corporation ("Omnipoint")
14. Polycell Communications, Inc. ("Polycell")
15. PrimeCo Personal Communications, L.P. ("PrimeCo")
16. Sprint Corporation ("Sprint")
17. Third Kentucky PCS "Third Kentucky")

Replies to Oppositions

1. **Alpine PCS, Inc. ("Alpine")**
2. **Cellexis International, Inc. ("Cellexis")**
3. **ClearComm, L.P. ("ClearComm")**
4. **CONXUS Communications, Inc. ("CONXUS")**
5. **CX Systems Int'l, Inc. ("CX Systems")**
6. **Eldorado Communications, L.L.C. ("Eldorado")**
7. **Federal Network**
8. **Frontier Corporation ("Frontier")**
9. **Hyundai Electronics America ("Hyundai")**
10. **MFRI Incorporated ("MFRI")**
11. **NextWave Telecom Inc. ("NextWave")**
12. **Omnipoint Corporation ("Omnipoint")**
13. **RFW PCS Inc. ("RFW")**
14. **Telecommunications Advocacy Project ("TAP")**
15. **Third Kentucky Cellular Corp. ("Third Kentucky")**
16. **Wireless Ventures, Inc. ("Wireless Ventures")**

Ex Parte Filings

1. AirGate Wireless, L.L.C. ("AirGate"), February 9, 1998
2. AmeriCall International, L.L.C. ("AmeriCall"), March 12, 1998
3. Christensen Engineering & Surveying ("Christensen"), December 19, 1997
4. ClearComm, L.P. ("ClearComm"), February 23, 1998
5. ClearComm, L.P. ("ClearComm"), March 13, 1998
6. Congressman Gary L. Ackerman, January 15, 1998
7. Congressman Xavier Becerra, February 3, 1998
8. Congresswoman Sue W. Kelly, December 31, 1997
9. Congressman Albert R. Wynn, February 9, 1998
10. CX Systems Int'l, Inc. ("CX Systems"), December 10, 1997
11. Cyber Sites, L.L.C. ("Cyber Sites"), December 1, 1997
12. Datacomm Research Company, February 20, 1998
13. Dorne & Margolin, December 1, 1997
14. Florida Power Corporation ("Florida Power"), December 19, 1997
15. Gilder Technology Group, Inc., February 16, 1998
16. Joint filing by 43 companies, February 20, 1998
17. Kabbara Engineering ("Kabbara"), December 26, 1997
18. LaBarge Clayco Wireless, L.L.C. ("LaBarge Clayco"), December 24, 1997
19. Leifer, Marter Architects ("Leifer, Marter"), December 17, 1997
20. Members of the Congressional Hispanic Caucus, February 5, 1998
21. MJA Communications Corp. ("MJA"), December 22, 1997
22. New Wave Inc. ("New Wave"), January 20, 1998
23. New Wave Inc. ("New Wave"), February 17, 1998
24. NextWave Telecom Inc. ("NextWave"), January 21, 1998
25. OPM USA, Inc. ("OPM"), December 23, 1997
26. Praxis Telecom, January 26, 1998
27. Prudential Securities Inc., February 26, 1998
28. R&S PCS, Inc., February 11, 1998
29. RFW PCS Inc. ("RFW"), December 23, 1997
30. Senator Barbara Boxer, February 13, 1998
31. Senators Richard H. Bryan and Harry Reid, January 29, 1998
32. Senator Thomas Daschle, February 11, 1998
33. Senator J. Robert Kerrey, February 12, 1998
34. Specialty Teleconstructors Inc. ("Specialty Teleconstructors"), December 19, 1997
35. Structure Consulting Group ("Structure Consulting"), December 22, 1997
36. Wireless Nation, Inc. ("Wireless Nation"), January 23, 1998
37. Xway, Inc. ("Xway"), December 16, 1997
38. 2001 Personal Communication, Inc., January 8, 1998

APPENDIX B**Revised Rules**

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 303(r), unless otherwise noted.

2. Section 1.2110 is amended by revising paragraph (f)(4)(ii), (iii), (iv) to read as follows:

§ 1.2110 Designated Entities

* * * * *

(f) * * *

(4) * * *

(i) * * *

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in subsection (i) above, the licensee will automatically be provided with a subsequent 90-day grace period, except that no subsequent automatic grace period will be provided for payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998). * * *

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default, except that C and F block licensees shall be in default if their payment due on the payment resumption date, referenced in subsection (ii) above, is more than ninety (90) days delinquent.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, will be declared in default, its license will automatically cancel, and will be subject to debt collection procedures.

* * * * *

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 24 – PERSONAL COMMUNICATIONS SERVICES

3. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332, unless otherwise noted.

4. Section 24.709 is amended by revising paragraph (b)(9)(i), (ii) (A) - (B) to read as follows:

§ 24.709 Eligibility for licenses for frequency Blocks C and F.

(a) * * *

(b) * * *

(9) *Special rule for licensees disaggregating or returning certain spectrum in frequency block C.*

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the auctions for frequency block C, which began on December 18, 1995, and July 3, 1996, will be eligible to bid in a reauction of block C spectrum surrendered pursuant to Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998).

(ii) The following restrictions will apply for any reauction of frequency block C spectrum conducted after March 24, 1998:

(A) Applicants that elected to disaggregate and surrender to the Commission 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for such disaggregated spectrum until 2 years from the start of the reauction of that spectrum.

(B) Applicants that surrendered to the Commission any of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for the licenses that they

surrendered to the Commission until 2 years from the start of the reauction of those licenses if they elected to apply a credit of 70% of the down payment they made on those licenses toward the prepayment of licenses they did not surrender.

(C) * * *

* * * * *

APPENDIX C

Supplemental Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act ("RFA"),¹ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking ("Notice")* in WT Docket No. 97-82.² The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. A Final Regulatory Flexibility Analysis ("FRFA") was incorporated in the *Second Report and Order and Further Notice of Proposed Rule Making ("Second Report and Order")*.³ The Commission received 37 petitions for reconsideration in response to the *Second Report and Order*. This FRFA analyzes the modifications adopted in response to those petitions for reconsideration.

A. Need for, and objectives of, this Order.

This *Order on Reconsideration of the Second Report and Order ("Order")* is designed to assist C block broadband personal communications services ("PCS") licensees to meet their financial obligations to the Commission while at the same time helping the Commission meet its goal of ensuring rapid provision of PCS service to the public. The *Order* provides a variety of relief mechanisms to assist C block licensees that are experiencing difficulties in meeting the financial obligations under the installment payment plan. The relief provided to C block licensees will speed deployment of service to the public by easing lenders' 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 advances Congress' objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public."⁴

B. Summary of significant issues raised by public comments in response to the IRFA.

There were no comments filed in response to the IRFA; however, in this proceeding we have considered the economic impact on small businesses of the modifications we have adopted. See Section E of this Supplemental FRFA, *infra*.

¹ 5 U.S.C. § 604.

² Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 97-60 (released February 28, 1997).

³ 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).

⁴ Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

C. Description and estimate of the number of small entities to which rules will apply.

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁶ In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.⁷ Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration ("SBA").⁸

This *Order* applies to broadband PCS C and F block licensees. The Commission, with respect to broadband PCS, defines small entities to mean those having gross revenues of not more than \$40 million in each of the preceding three calendar years.⁹ This definition has been approved by the SBA.¹⁰ On May 6, 1996, the Commission concluded the broadband PCS C block auction. The broadband PCS D, E, and F block auction closed on Jan. 14, 1997. Ninety bidders (including the C block reauction winners, prior to any defaults by winning bidders) won 493 C block licenses and 88 bidders won 491 F block licenses. Small businesses placing high bids in the C and F block auctions were eligible for bidding credits and installment payment plans. For purposes of our evaluations and conclusion in this FRFA, we assume that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees potentially affected by this *Order*, are small entities.

D. Description of the projected reporting, recordkeeping, and other compliance requirements.

C block licensees must file notice of their elections with the Wireless Telecommunications Bureau no later than the election date. The election date will be 60 days after publication of the *Order* in the *Federal Register*. The *Order* increases the reporting requirements of the *Second Report and Order* to the extent that elections now may be made for each Major Trading Area

⁵ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

⁶ 5 U.S.C. § 601(6).

⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

⁸ 15 U.S.C. § 632.

⁹ See 47 C.F.R. § 24.720(b)(1).

¹⁰ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 (1995); Implementation of Section 309(j) of the Communications Act-- Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5581-84 (1995); 47 C.F.R. §§ 24.320(b), 24.720(b).

("MTA").¹¹ Formerly, licensees were required to make the same election for all their licenses.

E. Steps taken to minimize the significant economic impact on small entities, and significant alternatives considered.

As noted in the FRFA of the *Second Report and Order*, the Commission analyzed the significant economic impact on small entities and considered significant alternatives.¹² The modifications adopted on reconsideration will further reduce the burden on C block licensees, which are small businesses. These modifications include:

- (1) Elections on an MTA-by-MTA basis. Licensees now will have the flexibility to make elections on an MTA-by-MTA basis, and so are not compelled to make the same election for all their licenses. This modification will afford C block licensees greater flexibility in fashioning a restructuring plan.
- (2) Additional flexibility for licensees. The Commission added flexibility to the amnesty option by offering licensees the choice between receiving a credit for their returned licenses or having the opportunity to bid on their return licenses in the reauction. The Commission also provided additional flexibility by allowing licensees to combine disaggregation with prepayment.
- (3) Higher percentage of down payment credit. By crediting a higher percentage of the down payment under disaggregation, the Commission better enables these small businesses to remain in the wireless market. The Commission provides even more credit to licensees choosing a combination of disaggregation and prepayment in order to encourage licensees to take advantage of the benefits of both these options.
- (4) Thirty-day extension of the non-delinquency period for payments not made on the resumption date. The Commission's 30-day extension is intended to help licensees that are experiencing last-minute delays in raising capital by providing them additional time to complete their fund-raising efforts.
- (5) Clarification of the Affordability Exception. The Commission's clarification of the affordability exception provides an objective means for licensees to implement the exception. It eliminates any doubt or confusion regarding the scope of the term "afford," and it is an easy, bright-line test to administer.

The Commission believes that it is in the public interest to adopt the above modifications in order to facilitate rapid introduction of service to the public without further regulatory or marketplace delay. The Commission's decision minimizes the potential significant economic impact on small entities by permitting C block licensees to choose among a variety of alternative solutions to reduce their debt to the Commission. The intent of this *Order* is to alleviate, to some

¹¹ See *Second Report and Order*, Appendix C.

¹² *Id.*

extent, the financial difficulties faced by these small entities by providing options that: (1) achieve a degree of fairness to all parties, including losing bidders in the C block auction; (2) continue to promote competition and participation by smaller businesses in providing broadband PCS service; and (3) avoid solutions that merely prolong uncertainty.

The Commission rejected proposals for a further deferral of the payment resumption deadline because licensees already have had a sufficient deferral period. In addition, the Commission does not wish to adopt temporary solutions that might only postpone the difficulties faced by the C block licensees and further prolong uncertainty. There is no guarantee that an extended deferral period would improve the long term financial outlook facing many licensees. The Commission also rejected arguments that licensees should receive full credit for down payments made on licenses or spectrum returned to the Commission for reauction. The Commission already provides substantial use of a licensee's down payment. Moreover, providing full credit would be unfair to unsuccessful bidders that withdrew from the C block auction.

F. Report to Congress.

The Commission shall send a copy of the *Order*, including this Supplemental FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. See 5 U.S.C. § 801(a)(1)(A). A copy of the *Order* and this FRFA (or summary thereof) will be published in the *Federal Register*. See 5 U.S.C. § 604(b). A copy of the *Order* and this FRFA will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

**Statement of
Commissioner Susan Ness
Concurring in Part, Dissenting in Part**

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for C block Personal Communications Service (PCS) Licensees, WT Docket No. 97-82

I concur in today's decision to the extent it affirms the Commission's decision of September 25, 1997, and dissent to the extent it does not. I am pleased that the majority has generally adhered to the framework established last fall. But I do not support the revised package of options being afforded to C block licensees, which I believe is an excessive and potentially counterproductive government intervention in the marketplace. In addition, I am troubled by the majority's willingness to indefinitely delay reauction of returned licenses.

My disagreements with the majority are real, and they are substantial, but they are also respectful. As with many of the judgments the Commissioners are called upon to make, reasonable people can disagree. So here.

Although I supported the Commission's prior decision, I have welcomed the opportunity to think anew on these issues. Reconsideration presents an opportunity -- and a duty -- to consider the matter with a fresh eye. I have used the reconsideration process to test the facts and logic undergirding the Commission's prior decision, to seek additional information and ideas, and to deliberate with a new group of colleagues who bring diverse backgrounds and fresh insights to the process.

And yet this process has left unshaken the core convictions that were central to my thinking last September. Spectrum auctions cannot achieve their full promise as a method of assigning rights to use the public airwaves if, after the fact, government interposes itself into the marketplace to alter market outcomes and favor one group of competitors over another group of competitors.

It remains my view that the C block auction, like the other spectrum auctions the Commission has administered, was run fairly. At the time of the auction, the playing field was level. Everyone believed they were playing by the same rules. Each bidder was on notice to take our rules into consideration when they bid, including the installment terms. Every bid, by every bidder, was entirely voluntary.