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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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MAY - 8 1998

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

PETITION FOR RECONSIDERATION

I. Introduction

NextWave Telecom Inc. ("NextWave" or the "Company"), pursuant to section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, respectfully requests reconsideration of certain aspects of the Order On Reconsideration of the Second Report and Order in the above-captioned proceeding ("*Restructuring Order*").[1] By that order, the Commission provided licensees with options for financing the purchase of their C-block licenses, including options to return spectrum to the Commission in exchange for debt reduction. A recent federal bankruptcy court ruling involving the holder of one of the largest number of C-block licenses ("*GWI Decision*")[2] has thrown into question critical assumptions on which the *Restructuring Order* is premised and has created a financial downdraft that is severely disrupting financing markets for C-block licensees. These changed circumstances compel reconsideration so the Commission can establish a rational framework of options for licensees that promotes the build out of their

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1 Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Order On Reconsideration of the Second Report and Order, 63 Fed. Reg. 17111 (Apr. 8, 1998).

2 *In re GWI PCS, Inc.* No. 397-39676-SAF-11 (Bankr. N.D. Tex, April 24, 1998)

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competitive PCS networks and avoids incentives to seek alternative financing arrangements in bankruptcy.

II. The *GWI Decision* Compels Reconsideration

Barely two weeks after public notice of the *Restructuring Order*, a federal bankruptcy court ruled against the Commission on a constructive fraudulent transfer cause of action brought by C-block licensee General Wireless Inc. ("GWI"). The court ruled that the fair market value of those licenses in January 1997, when the Commission effectively transferred them to GWI by granting its license applications, was $166 million and not the $1.06 billion GWI bid for the licenses at the May 1998 close of the C-block auction, as the Commission had contended. [3] Taking into account the $106 million GWI already had paid the government for the licenses, the court avoided $894 million of GWI's obligations to the government, an amount equal to 84 percent of GWI's winning bid. Even more importantly, the court ruled that GWI would retain the beneficial ownership and use of the licenses, assuming capital markets respond favorably to an approved chapter 11 reorganization plan for GWI.

Throughout the Commission's consideration of the C-block debt restructuring proceeding, NextWave has consistently asked the Commission to adopt restructuring options that would provide start up entrepreneurs with commercially reasonable means of financing their C-block network build outs. At the same time, NextWave has worked diligently with the investment community since the grant of its licenses in January 1997 to effectuate a successful build out of its own network. NextWave appreciates that the Commission, since suspending C-block debt payments on March 31, 1997, believes it has

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[3] *Id.*

achieved a restructuring solution that would afford C-block companies a realistic chance to execute on their business plans.

The *GWI Decision* presents licensees with an alternative, and potentially superior, financial arrangement compared to the options the Commission made available to the C-block in the *Restructuring Order*. In the wake of that decision, the reality is that licensees face an entirely different decision making framework that substantially impacts their current financing activities. Put simply, the options offered by the Commission must now be weighed against an alternative financing arrangement in bankruptcy that is profoundly different than the outcome on which the Commission's *Restructuring Order* is based. That result compels reconsideration of the Order.

III. The Commission's C-block Policies Should Promote Build Outs Not Bankruptcies

The Communications Act requires the Commission to promote the participation of designated entities in wireless telecommunications and to facilitate the rapid introduction of spectrum-based service to the public with a minimum of regulatory delay.[4] The Commission also has underscored the importance of maintaining public confidence in the auction process, and ensuring fair and impartial treatment of all auction participants and other licensees.[5] To accomplish these goals, the Commission performs the dual roles of C-block regulator and commercial lender.[6] Restructuring the financing

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4 *See* 47 U.S.C. § 309(j)(3)(A)-(B); *Restructuring Order,* at para.7.

5 *See Restructuring Order*, at para. 7.

6 The Commission voluntarily adopted the role of commercial lender after determining that market entry might be more inviting to designated entities if they had access to below-market financing. *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532 at paras. 135-136 (1994). The Act authorizes the Commission to adopt the role of commercial lender. 47 U.S.C. § 309(j)(4)(A).

options available to C-block licensees in the wake of the *GWI Decision* is consistent with all of these goals.

Such restructuring will unambiguously further the regulatory goals Congress expressly established for the Commission in the Communications Act. Creating incentives to avoid bankruptcy proceedings and build out competitive wireless networks is the fastest way to introduce the provision of spectrum-based services by designated entities to the public. It also would be consistent with the policy guidance of several senior members of Congress, who recently informed the Commission that it should "establish reasonable means for the C-block licensees to move rapidly through the regulatory process and build out their competitive networks."[7] Creating stronger incentives to build networks and avoid the disruptive effects of bankruptcy would not harm other auction participants or other licensees. Just the opposite is true. Absent rapid Commission action, there is a significant likelihood that many C-block licensees may be forced to select bankruptcy in order to access potentially more favorable financing alternatives, and that will harm other auction participants and licensees by delaying the C-block reauction and depressing spectrum values overall.

There is a very real possibility that the Commission's C-block policy will disintegrate. It will be replaced by a game of "bankruptcy roulette" in which the Commission and individual licensees face off in bankruptcy proceedings around the country. Even if the Commission "wins" some of these cases, C-block spectrum as a

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[7] March 25, 1998, letter from the Honorable Thomas Bliley, the Honorable John D. Dingell, and the Honorable W.J. Tauzin, to FCC Chairman William E. Kennard, at 2. These Members of Congress also expressed their belief that "piecemeal [C-block] solutions in bankruptcy proceedings serve to undermine the statute and contravene the important policy objectives of Section 309(j) of the Communications Act." *Id.*

whole will be a wasting asset throughout the many years it will take for the litigation and appeals processes to run their course.

Against this background, NextWave respectfully requests that the Commission modify its rules so that the financing options available therein offer licensees a reasonable means of building out their networks. It is contrary to every conceivable policy consideration for the Commission to act in ways that require licensees to pursue a course of bankruptcy in order to access potentially superior alternative financing options.

IV. The FCC Must Postpone the June 8, 1998 Election Date

Under the *Reconsideration Order*, C-block licensees must inform the Commission in writing by June 8, 1998, whether they will continue under the existing installment payment plan or select one or a combination of the alternative options.[8] This "Election Day" notification requires C-block entities to surrender for *cancellation* the originals of all licenses affected by their choice.[9] It is wholly unreasonable for licensees to be forced to take such irreversible action so soon after the *GWI Decision*. Furthermore, the Commission has yet to complete actions on related issues that materially effect C-block licensees' ability to assess their options.

As indicated *supra*, the bankruptcy order irrevocably changes the landscape for C-block financing and build out. In the aftermath of this decision, C-block licensees must now examine the implications, in a very limited timeframe, of what essentially is a fifth restructuring option. Such a change in the landscape was not anticipated by the FCC

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8 *See gen. Restructuring Order.*

9 *See* Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, 12 FCC Rcd 16436 (1997) at paras. 73-76.

when it chose June 8 as the Election Date, nor by C-block licensees and their potential investors as they conducted their analysis of their financing and build out options in light of the March 24 *Reconsideration Order.*[10] The full spectrum of C-block licensees, from those that are already offering PCS service to those that intend to amnesty all their licenses, have a fiduciary duty to investors and creditors to consider the implications of the *GWI decision* for their companies. Only the FCC can offer these companies the time necessary to make a fully considered decision. Deferring the June 8th Election Date is necessary to allow markets and licensees an adequate opportunity to analyze the *GWI Decision* and absorb its impact.[11]

The FCC must recognize that the *GWI Decision* is a major event with collateral consequences for all C-block licensees. At a minimum, the FCC's duties as both a regulator and a creditor require that it defer the Election Date so as not to cause unintended commercial harm to C-block licensees.

There are other strong reasons for the Commission to defer the Election Date. As FCC Chairman Kennard noted in his March 30, 1998 letter to House Telecommunications Subcommittee Chairman Tauzin, there are various issues of importance to C-block licensees, including those surrounding the FCC's designated entity

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10 Indeed, one C-block licensee, Omnipoint, announced its Election Date intentions prior to the GWI decision. *See Omnipoint Plans to Reduce Debt by $300 Million Under New FCC 'C-Block' License Options,* Omnipoint press release, April 20, 1998.

11 Consistent with existing Commission policy, deferring the Election Date would result in a concomitant deferral of the date on which C block payment obligations resume, to some time "at least 30 days after the revised Election Date." *See In the Matter of Amendment of the Commission's Rules Regarding Installment Pasyment Financing for Personal Communications Services (PCS) Licenses,* Order, WT Docket No. 97-82, FCC 98-28 (rel. Feb. 24, 1998) at para. 3. NextWave respectfully requests that the Commission clarify this point.

control group and attribution rules, that the Commission has yet to resolve.[12] The FCC Chairman stated that he planned to ask the Commission to resolve these issues by May, well before the Election Date.[13] Furthermore, in the same letter, Chairman Kennard promised that the Wireless Bureau was to have issued in April a series of Public Notices explaining every aspect of the election process. The FCC Chairman also agreed that the Department of Justice will play a significant role in this process and that "[t]he Wireless Bureau and the Office of the General Counsel are coordinating closely with the Department of Justice to insure that the procedures are as clear and unambiguous as possible." [14]

To date, the Commission has yet to resolve C-block ownership issues or release a series of Public Notices outlining "clear and unambiguous" procedures for election.[15] Even if the *GWI Decision* had never been issued, the lack of clarity regarding ownership rules and Department of Justice coordination would require delay of the Election Date.

For the FCC to proceed as though the *GWI Decision* is a minor event with no collateral consequences on other C-block licensees would be tantamount to using its regulatory power to consciously achieve a commercial result harmful to those licensees. Actions of that nature are disfavored under established law, and invite litigation of a

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12 *See* March 30, 1998, letter from FCC Chairman William E. Kennard to the Honorable W.J. Tauzin at 2.

13 *Id.* Chairman Kennard assured Chairman Tauzin that the Commission would resolve these issues by May, "well in advance of the election date and would therefore allow C Block licensees to make business decision with full knowledge of the governing rules."

14 *Id.*

15 The Commission's Wireless Telecommunications Bureau released a single Public Notice on this subject, announcing the Election Date, payment and late payment dates and further indicating that other Public Notices outlining specific procedures would follow in the "near future." *See Wireless*

whole new range of commercial issues. NextWave is strongly committed to pursuing every reasonable means of financing its network build out, and cannot conceive how litigation of new issues will further anyone's interests.

V. Conclusion

For the forgoing reasons, NextWave respectfully requests that the Commission grant this petition for reconsideration.

Respectfully submitted,

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May 8, 1998

Telecommunications Bureau Announces June 8, 1998 Election Date For Broadband PCS C Block Licensees, Public Notice, DA 98-741, rel. Apr. 17, 1998.

Certificate of Service

I, Tricia Hall, hereby certify that on this 8th day of May, 1998, a copy of the attached Petition for was mailed via U.S. Post Office, first class postage prepaid, to the following:

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