

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**PETITION FOR EXPEDITED CLARIFICATION OR
RECONSIDERATION OF FORTUNET COMMUNICATIONS, L.P.**

On March 24, 1998, the Commission released its *Order on Reconsideration of the Second Report and Order* ("Reconsideration Order") in the above-captioned proceeding,¹ which revises and clarifies the menu of repayment options that C-Block licensees will be permitted to choose on the upcoming election date of June 8, 1998.² By this Petition, Fortunet Communications, L.P. ("Fortunet"),³ respectfully requests that the Commission clarify or reconsider its rules in the above-captioned proceeding in the following two respects.

I. INTRODUCTION

Fortunet respectfully requests the Commission to clarify or reconsider two aspects of its *Reconsideration Order*, and its regime of C-Block payment elections generally, which may

¹ *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82 (released Mar. 24, 1998).

² See Public Notice, *Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C-Block Licensees*, DA 98-741 (released April 17, 1998).

³ Fortunet is a C-Block Licensee and the successor in interest to Fortunet Wireless Communications, L.P., Aer Force Communications, L.P., Southeast Wireless Communications, L.P., New England Wireless Communications, L.P., and High Country Communications, L.P.

be consider minor clarifications or refinements from the Commission's standpoint, but which are extremely important to Fortunet and other C-Block licensees.

First, Fortunet again urges the Commission to rectify the arbitrary and fundamental unfairness that would result from treating those C-Block licensees that made any installment payments less favorably than those who did not make any installment payments at all. For purposes of calculating the pool of credit that may be used to prepay retained MTAs with 30 MHz licenses or retained 15 MHz licenses of any MTAs that have been disaggregated ("Prepayment Credit"),⁴ licensees who made installment payments should be credited with interest, at the installment payment rate of 7% per annum, to put them in a comparable position to licensees who made no payments. The Commission should further clarify that if a licensee does not elect to use all or a portion of installment payments (plus interest thereon) for either prepayment of retained licenses or Suspension Interest, such installment payments or portion thereof (plus interest) will be returned to the licensee. The Commission could fund any such payment from proceeds received on the June 8 election date.

Second, Fortunet requests the Commission to clarify or revise its "affordability exception" in a manner that is entirely consistent with the Commission's MTA-based restructuring policy and the integrity of the C-Block rules, but that will also provide C-Block licensees with necessary added flexibility in making their upcoming payment elections.

II. INTEREST ON PREVIOUSLY SUBMITTED INSTALLMENT PAYMENTS

Because the Wireless Bureau's decision to suspend the C-Block installment payment was released on an interest payment date, many C-Block licensees, including Fortunet's

⁴ *Reconsideration Order* at ¶ 41.

predecessors in interest, were unaware of the suspension of payments and made installment payments. Many other C-Block licensees, including most of the large licensees, made no such payments.⁵ Consequently, in addition to all of the other financing and market disadvantages that C-Block licensees face, those C-Block licensees that paid any installments (in Fortunet's case, an amount of some 3.9 million dollars) have been arbitrarily and unfairly been denied access to those funds, and accrued interest on those funds, while other C-Block licensees have been able to use them.

Fortunet previously has requested that the Commission rectify the inequity of this arbitrary circumstance by returning previously-paid installment payments to C-Block licensees while C-Block restructuring options were being finalized by the Commission.⁶ Fortunet once again requests the Commission to address this issue so that all C-Block licensees will stand on an equal footing in the upcoming June 8, 1998 payment option election.

A failure to rectify this inequity would lead to skewed results and undermine the integrity of the election process. Licensees that did not make installment payments to the Commission in the first instance now are in a better position than those who made such payments, with *more* flexibility to redirect money -- funds that they otherwise would have tied up with the FCC, without earning interest -- towards a desired combination of restructured payment options and retained licenses.

⁵ Such licensees include Pocket Communications, Inc., which now appears as if it will achieve even more flexibility through a bankruptcy filing and proposed reorganization -- to which the Commission itself is a party -- and achieve restructured terms unavailable to any other C-Block licensee. See Public Notice, *Commission Staff Requests Submission of Superior Alternatives to Proposed Agreement to Resolve Pocket Communications Bankruptcy* (released Mar. 23, 1998) ("Pocket Public Notice").

⁶ See Comments of Fortunet Communications, L.P., WT Docket No. 97-82 (June 23, 1997).

Fortunet urges the Commission to clarify that installment payments that have been paid in advance of the C-Block election date will be credited with interest in the calculation of the Prepayment Credit, in order to put them in a comparable position to those licensees that made no payments. In Fortunet's case, the interest on its installment payment is approximately \$295,000.00, and Fortunet should not lose the credit for that interest while licensees who did not pay the Commission installment payments now have access to those funds.

The Commission should further clarify that licensees who do not use all of their previously paid installment payments will be refunded the balance (including interest) net of prepayments on retained licenses and payment of Suspension Interest.⁷ Thus, if a licensee does not elect to credit all installment payments (plus interest thereon) towards either prepayment of retained licenses or Suspension Interest, the installment payments or appropriate portion thereof (plus interest) should be returned to the licensee. This could be accomplished from proceeds received on the June 8 election date.

⁷ The *Reconsideration Order* provides that installment payments will be refunded in connection with a licensee's decision "to return all of its licenses." By contrast, while it is not entirely clear, licensees that elect to "return[] some licenses and retain[] others," may not have the option of regaining access to their installment payments through a refund -- they seem only to be able to credit the money towards "the prepayment of retained licenses or toward Suspension Interest for retained licenses which the licensee does not prepay." *Id.* To the extent that installment payments and down payments are lumped together into a "Prepayment Credit," the Commission states in connection with its "affordability" discussion that it "will not refund any unspent portion of the Prepayment Credit." *Id.* at 43. While this result might make sense for *down* payments -- indeed, the term "Prepayment Credit" has been substituted for the term "Available Down Payments," *Reconsideration Order* at ¶ 41, n. 95 -- failing to refund installment payments is an onerous and disparate penalty that makes little sense in view of the fact that other C-Block licensees will not be penalized in this fashion.

Fortunet requests and expects fair and equal treatment relative to other C-Block licensees. To date that has not been the case.

III. REFINEMENT OF THE AFFORDABILITY EXCEPTION

Under the Commission's Prepayment restructuring option, a licensee will be permitted to credit a 70% portion of down payments already paid on licenses that are returned to the Commission, along with previously paid installment payments, toward a "Prepayment Credit" that may be used to prepay all BTA licenses retained within a given MTA "that [the licensee] can afford."⁸ In the event that a licensee's Prepayment Credit is too small to purchase all BTAs within an MTA, then -- and only then -- may a licensee choose to prepay only certain BTAs. The rest of the licenses must be returned to the Commission for reauction.⁹

Fortunet does not quarrel with the Commission's desire to avoid "cherry picking" of desirable BTAs within an MTA,¹⁰ and supports the Commission's conceptual approach of generally requiring licensees to pursue their payment elections on an MTA-wide basis. However, Fortunet can discern no policy reason to prohibit a licensee from prepaying the BTAs within an MTA that it can "afford" (as the term has been clarified by the Commission), and either (i) resuming installment payments on the remaining BTA licenses within an MTA, or (ii) disaggregating and retaining remaining BTAs within the MTA that it may be able to "afford" with the balance of the Prepayment Credit. Any unused credits should also be available for

⁸ *Id.* at ¶ 41. The *Reconsideration Order* clarifies that "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. *Id.* at ¶ 43.

⁹ *Id.*

¹⁰ *Id.* at ¶ 44.

Suspension Interest and debt service on licenses that continue to be paid for with installment financing.

These refinements would allow C-Block licensees more flexibility in pursuing payment elections, without reducing either the payment obligation owed to the Government or the Commission's goal of ensuring MTA-wide elections to avoid license "cherry picking." Furthermore, the Commission could allow for such flexibility only as a refinement to the "affordability" scenario -- that is, these options would be permitted only where a licensee cannot afford to prepay an entire MTA.

The Commission's "menu" of C-Block restructuring options is an attempt to balance fair modifications of the C-Block rules in response to a variety of disastrous and unforeseen circumstances that have to date stifled C-Block PCS service development with the goals of ensuring certainty and preserving the integrity of the Commission's licensing processes. Fortunet urges the Commission to provide for a bit more flexibility in the manner proposed, as a matter of both fundamental fairness and sound public policy. As C-Block licensees explore their alternatives, including declarations of bankruptcy that already appear to be working in the favor of two other large C-Block licensees,¹¹ the clarifications and modifications proposed will produce a fairer and more attractive election process that will not undercut any of the Commission's overall policy goals.

¹¹ *In Re GWI PCS, Inc.*, Bk. No. 397-39676-SAF-11, Adv. No. 397-3492 (U.S. Bankruptcy Ct., N.D. Tex) (April 24, 1998) (transcript of proceedings); *see also Pocket Public Notice*. Although the fraudulent transfer provisions of the U.S. Bankruptcy Code have a one-year statute of limitations, state fraudulent conveyance laws, which can be used by debtors in possession, bankruptcy trustees and others, typically have limitation periods of four years or longer, rendering bankruptcy a continuing option for C-Block licensees.

IV. CONCLUSION

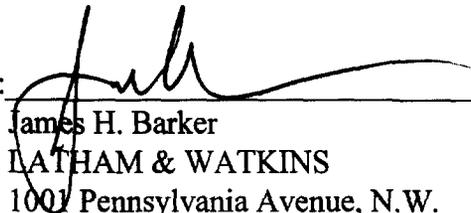
Fortunet respectfully requests that the Commission clarify the upcoming C-Block election process as requested above. Because the option election date is June 8, 1998, Fortunet requests expedited treatment of this Petition.

May 8, 1998

Respectfully submitted,

FORTUNET COMMUNICATIONS, L.P.

By:



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CERTIFICATE OF SERVICE

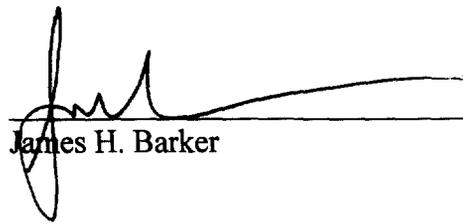
I, James H. Barker, hereby certify that on this 8th day of May, 1998, I caused copies of the foregoing "Petition For Expedited Clarification Or Reconsideration Of Fortunet Communications, L.P." to be served by hand on the following:

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