

# WIRELESS 2000 PCS

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May 27, 1998

The Honorable William Kennard  
Federal Communications Commission  
1919 M. Street, N.W., Room 814  
Washington, D.C. 20554

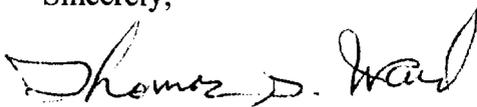
Re: Support of Petition to Stay the Election Date; WT Docket No. 97-82

Dear Mr. Kennard:

Third Kentucky Cellular Corp. is a C and F block licensee in the Kentucky area holding four (4) licenses, and has been an active participant in the above docket concerning C block financing restructuring.

Attached, please find a copy of the Stay Petition filed by NextWave Telecom, Inc. on May 22, 1998 requesting that the Commission postpone the June 8, 1998 Election Date for C block licensees. Third Kentucky Cellular Corp., d/b/a Wireless 2000 Telephone Co. is in full support and agreement of the arguments set forth in the attached Petition. Third Kentucky Cellular Corp. hereby respectfully requests the Commission to postpone the Election Date for the reasons set forth in the Attachment.

Sincerely,



Thomas G. Ward  
President

cc: The Honorable Susan Ness  
The Honorable Harold Furchtgott-Roth  
The Honorable Michael Powell  
The Honorable Gloria Tristani  
Secretary Magalie Roman Salas

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )

)  
Amendment of the Commission's )  
Rules Regarding Installment )  
Payment Financing For Personal )  
Communications Services (PCS) )  
Licensees )

WT Docket No. 97-82

RECEIVED  
MAY 21 1998  
COMMUNICATIONS SECTION

**PETITION FOR STAY**

Michael Wack  
Michael Regan  
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May 22, 1998

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## **SUMMARY**

NextWave Telecom Inc. ("NextWave") respectfully requests that the Commission stay the C block "Election Date" of June 8, 1998. For the reasons set forth herein, the Election Date be stayed until a date not less than thirty days following: (1) resolution of procedural and substantive issues concerning the role of the U.S. Department of Justice ("DOJ") in implementing the alternative financing options the Commission has adopted in this proceeding; (2) Commission action on pending control group ownership and affiliation rules; and (3) Commission action that, in the wake of its proposed settlement in the Pocket bankruptcy proceeding and the recent federal bankruptcy court ruling involving General Wireless, Inc. (*GWI Decision*), establishes a framework of options for C block licensees that promotes the build out of their competitive PCS networks and eliminates distorted incentives to seek alternative financing arrangements in bankruptcy.



control group ownership and affiliation rules; and (3) Commission action that, in the wake of its proposed settlement in the Pocket bankruptcy proceeding and the recent federal bankruptcy court ruling involving General Wireless, Inc. (*GWI Decision*),<sup>3</sup> establishes a framework of options for C block licensees that promotes the build out of their competitive PCS networks and eliminates distorted incentives to seek alternative financing arrangements in bankruptcy.

#### I. INTRODUCTION

In the short time since the FCC adopted the *Second Restructuring Order* in this Docket, both the Commission and the wireless industry have been subjected to unprecedented developments and uncertainty.<sup>4</sup> Until certain critical components of that uncertainty are removed, the C-Block designated entities ("DEs") for which Congress specifically charged the Commission with creating competitive opportunities are simply not in a position to make any informed decision.

Most importantly, issues that go to the core of the decisions each licensee must make on Election Day remain unresolved. The Commission and the DOJ have yet to announce whether C block restructuring options involving license surrender

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<sup>3</sup> See *In Re GWI PCS, Inc.* No. 397-39676-SAF-11 (Bankr. N.D. Tex., Apr. 24, 1998).

<sup>4</sup> On May 8, 1998, numerous parties requested reconsideration of the *Second Restructuring Order*. Many of those parties requested relief which, if provided, would materially alter the license payment options available to many C block licensees, and would impact the decision making process of virtually every C block licensee.

and removal of associated debt obligations require the DOJ's approval, or, if such approval is required, what the procedures for securing such approval will be. Without certainty on this issue, C-Block licensees cannot know the effectiveness of any election they may make. In addition, certain core changes to the Commission's control group structure and affiliation rules that directly impact C-Block licensees remain in limbo.

Finally, while Congress has repeatedly admonished the Commission not to create a skewed regulatory approach that encourages bankruptcy rather than build out, this circumstance now exists. First, contemporaneous with its publication of the Restructuring Order, the Commission, whose staff had consistently advised C block participants in the Restructuring Process that there would be no separate deals in bankruptcy, officially entertained such a settlement in the Pocket proceeding. Further, 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 GWI. The *GWI Decision* has made the options offered by the Commission to C block licensees totally impracticable within the current time schedule. Taken individually or as a whole, these considerations warrant staying the Election Date.

## II. STANDARD

The Commission employs a four-factor test in determining

whether to stay an order.<sup>1/</sup> The test requires assessment as to whether (1) a movant is likely to prevail on the merits; (2) a movant will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest. These factors are not to be applied rigidly; rather, "[t]he test is a flexible one".<sup>2/</sup> As the Commission has recently recognized, "a stay may be granted based on a high probability of success and some injury, or vice-versa".<sup>2/</sup> In the current situation, all four factors support granting the instant motion and thereby staying the Election Date.

### III. ARGUMENT

#### A. The Commission Has Publicly Conceded That C Block Licensees Currently Lack Information Critical To The Election Date Decision Process

On March 30, 1998, Chairman Kennard wrote a letter responding to questions posed by the leadership of the House Commerce Committee concerning resolution of unresolved, critical issues such as the Commission's Part 1 Re-write of attribution and control group rules,<sup>3</sup> and coordination with the Department of Justice on debt forgiveness procedures for licensees electing

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<sup>1/</sup> Memorandum Opinion and Order, 12 FCC Rod 21872, DA 97-2622, rel. Dec. 17, 1997 (Com. Car. Bur.) ("PCIA Stay Order"); Virginia Petroleum Jobbers Ass'n v. FCC, 259 F.2d 921, 925 (D.C. Cir. 1958); Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

<sup>2/</sup> Populacion Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986).

<sup>2/</sup> PCIA Stay Order, at n. 22, citing Quone v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985).

<sup>3</sup> Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, FCC 97-413, rel. Dec. 31, 1997.

to return some or all of their C-Block spectrum. In that letter, Chairman Kennard conceded that resolution of these issues is critical to allowing C-Block licensees "to make business decisions with full knowledge of the governing rules." In his letter, Chairman Kennard also noted that the Commission would consider these issues in a timely manner so that licensees could make informed and meaningful decisions, specifically stating that the Commission would "insure adoption of the rules well in advance of the election date."

Chairman Kennard's letter demonstrates that the Commission fully appreciates that action on key issues is a prerequisite to holding an Election. As of this date, however, such action has not occurred. It is wholly unreasonable, arbitrary, and capricious for the Commission to force licensees to make critical business decisions involving the waiver of property rights without adequate information. Against this background, NextWave respectfully submits that it has made a substantial case on the merits, and that a stay should be granted in this instance.

**B. Absent a Stay, NextWave  
Will Suffer Irreparable Harm**

The next factor to be addressed in any stay ruling, irreparable harm, also weighs strongly in favor of granting a stay in this instance. Here, a movant need demonstrate only harm which cannot be remedied for the "money, time, and energy necessarily

expended in the absence of a stay".<sup>9/</sup> It is well settled that injury is "irreparable" if no practical remedy exists to repair it.<sup>10/</sup> Thus, even where there are pending administrative appeals, if the proceeding is too protracted, equity may intervene.<sup>11/</sup> Even recoverable administrative monetary loss may constitute irreparable harm "where the loss threatens the very existence of a movant's business".<sup>12/</sup>

Were NextWave and other C-Block licensees forced to select from the current menu of options, the Commission would effectively guarantee substantial and irreparable harm to such licensees. Absent Commission action on the DOJ, Part 1 Rewrite, and GWI/Pocket Issues licensees will be forced to choose from a menu whose procedural foundation remains unconstructed. Given this uncertainty, business plans cannot be firmly negotiated. If licensees are forced to turn in one or more of their licenses under these circumstances, those licenses, which represent the essential charter of any wireless business, are gone. There are no articulated Commission procedures for retrieving them.

Even if subsequent recapture were a hypothetical possibility as an administrative matter, recapture would be unavailing as a matter of commercial fact. NextWave paid more than one-half

<sup>9/</sup> Virginia Petroleum, *supra*, 259 F.2d at 925.

<sup>10/</sup> Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 356, at n.9 (D.C. Cir. 1972), *rev'd on other grounds*, 415 U.S. 1 (1974), *vacated*, 466 F.2d and 495 F.2d 1074 (D.C. Cir. 1974).

<sup>11/</sup> See, Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 591 (1926).

<sup>12/</sup> See, Wisconsin Gas Co. v. WERC, 758 F.2d 569, 574 (D.C. Cir. 1985).

billion dollars for the property rights that derive from its C-Block licenses. Those licenses were acquired pursuant to a carefully crafted business plan. NextWave has entered into commercial relationships with equipment vendors and customers, based on that business plan. Any forfeiture of licenses would necessarily disrupt that plan and those relationships. The resulting disruption and losses could not be restored even if the licenses ultimately were retrieved because it is a fact of commercial life that, once vendors and customers move to establish new relationships, they are generally unwilling and often unable to resume their former relationships. Put simply, moving forward with an election while key issues remain unclarified, is a violation of the Commission's statutory charter to license spectrum in the public interest and its fiduciary responsibilities in its role as commercial lender to C block licensees.

NextWave and all other C block licensees do not have the option of retaining all of their licenses and allowing Election Day to pass without making an election, on the chance that the FCC or a court eventually will resolve pending issues. The Commission has made clear that Election Day is a one-time-only, all-or-nothing proposition, and that any entity that fails to choose alternative options that day has forsworn such alternatives forever. Thus, absent a stay, NextWave will be irreparably harmed.

C. A Stay Would Not Harm  
Other Interested Parties

On this issue, a movant needs to show that issuance of a stay would not have a "serious adverse effect" on other interested persons.<sup>13/</sup> The injury to other parties cannot be speculative or slight; rather, others must suffer some serious and palpable injury resulting from a grant of this petition. The only two categories of interested parties affected by this petition are: (1) other C Block licensees similarly situated to NextWave; and (2) potential participants in a C block reauction. No one in either category will suffer any measurable harm, much less a serious adverse effect, as a result of staying the Election Date.

The vast majority of C-Block Licensees would be relieved to have additional time to assess their options, work out disaggregation or partitioning arrangements, or otherwise finalize plans with respect to their spectrum. All face the same decision making process as NextWave, and today all have the same incomplete information on which to base such an important determination. In any event, grant of a stay would not delay any decision that they may desire to take. Indeed, the Commission has received numerous Petitions for Further Reconsideration that request action on the issues discussed herein prior to requiring licensees to make an election. None of those petitions have been acted upon at this writing. Thus, a stay would benefit, not harm, this category of interested party.

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<sup>13/</sup> Virginia Petroleum, supra, 259 F.2d at 925.

Potential applicants for the upcoming FCC re-auction of C-Block spectrum also will not be harmed by a stay. Any argument that a stay could delay their entry into the marketplace is theoretical, not real. It is also speculative. There is no certainty, or even near certainty, that granting a stay will delay re-auctions, or that potential participants in such re-auctions will be the high bidder on any spectrum auctioned therein. In any event, whatever delaying effect a stay may have upon re-auctions is entirely within the Commission's discretion. Rapid and appropriate action by the Commission on the issues discussed herein will ensure that delay, if any, will be de minimis.

In sum, no substantial harm will come to any other interested party as a result of granting of this petition.

**D. Granting This Petition Will  
Further The Public Interest**

The interests of private litigants must give way to the realization of public purposes.<sup>14/</sup> In assessing where the public interest lies, the Commission must look first to its congressional mandate. When Congress granted to the Commission authority to conduct auctions, it directed the Commission to make genuine opportunities available to small business.<sup>15/</sup> The mandate is a continuing one, as the Commission recognized when it determined that restructuring was necessary.

Congress' directive covers both substantive and procedural

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<sup>14/</sup> Virginia Petroleum, *supra*, 259 F.2d at 925.

<sup>15/</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Sec. 6002(b), 107 Stat. 312 (1993).

decisions. In determining whether to grant this motion, the Commission must assess whether inaction will impair the opportunities available to small business. As detailed above, the Commission's decision to grant or deny a stay will undoubtedly have material and permanent consequences to NextWave and other similarly situated licensees.

Granting this petition will further the public interest. Giving NextWave and other C block licensees the information they need to make rational choices on election day will foster competition, preserve the economic viability of numerous small businesses, and expedite administrative action on the underlying issues which have lead to this petition.

Expediting administrative action is perhaps the key consideration here. NextWave has expressed its views to the Commission on all of the currently unresolved issues discussed in this petition. While NextWave believes those views should be adopted by the Commission, the overarching point here is how important is it for the Commission to make considered decisions and announce them expeditiously, prior to election day.

The public interest also favors preserving the viability of existing entities that have paid over \$1 billion to the federal government and commenced the construction and build-out of competitive PCS networks. Grant of a stay would also serve the public interest by enhancing competition. Business strategies advanced by C-Block licensees are consistent with, and in fact facilitate, the Commission's goals concerning the provision of

competitive telecommunications services and the participation of small businesses, women and minorities in the provision of such services. C block licensees should be given every reasonable opportunity to succeed in the marketplace, both because of what they have contributed to date and because of how they are positioned to contribute in the future by rapidly deploying competitive PCS services across the country.

#### IV. CONCLUSION

NextWave has demonstrated herein a reasonable basis for staying the Election Date. The decisions licensees must make when that day arrives involve, potentially, the voluntary alienation of their ultimate charter as regulated wireless carriers -- their licenses. It is nonsensical for NextWave and others to be required to make such decisions when the Commission itself has publicly admitted that information critical to the decision making process is not yet available. Under those circumstances, NextWave likely will prevail on the merits of its pending further reconsideration petition, which requests action on the DOJ, Part 1 Rewrite, and GWI issues prior to Election Day. NextWave also will be harmed irreparably in the absence of a stay. Other interested parties will not be injured in any meaningful way by grant of a stay, and the public interest would be served by such grant. For these reasons, NextWave respectfully requests that the instant petition be granted.

NextWave also respectfully requests that the Commission act on this request expeditiously.

Respectfully submitted,



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May 22, 1998

## Certificate of Service

I, Tricia Hall, hereby certify that on this 22th 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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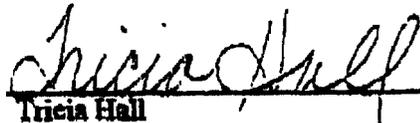
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