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October 23, 1998

Via Hand Delivery

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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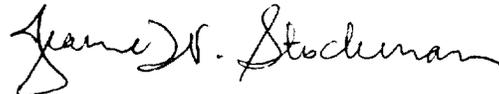
Re: DiGiPH PCS, Inc.
Fourth Report and Order, WT Docket No. 97-82

Dear Ms. Salas:

On behalf of DiGiPH PCS, Inc. ("DiGiPH"), transmitted herewith are an original and four (4) copies of DiGiPH's Petition for Reconsideration of the following FCC action: In the Matter of Amendment to the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket 97-82, Fourth Report and Order, rel. August 19, 1998.

If you have any questions with respect to this matter, please do not hesitate to call.

Very truly yours,



Jeanne W. Stockman

Enclosures

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

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OFFICE OF THE SECRETARY

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

To: The Commission

PETITION FOR RECONSIDERATION

DiGiPH PCS, Inc.

Michael K. Kurtis
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SUMMARY

The Fourth R&O announces the terms under which C block spectrum that has been returned to the FCC pursuant to its restructuring options will be reaucted. The Fourth R&O sets forth that the FCC intends to proceed with a reauction of returned C block spectrum prior to resolution of the outstanding bankruptcies of the three (3) largest C block licensees: NextWave Personal Communications, Inc. (“NextWave”); Pocket Communications, Inc. (“Pocket”); and GWI PCS, Inc. (“GWI”). In light of the uncertainty surrounding the GWI bankruptcy ruling, and the terms under which the FCC has concluded to proceed with this reauction, *bona fide* operating C block licensees, such as DiGiPH, are being asked to formulate business plans and commit funds at reauction without having any way of assessing the true value of the licenses on which they are being asked to bid. By proceeding with the C block reauction without the bankrupt markets, markets which represent virtually every major population center and nearly two-thirds of the United States population, the Commission only exacerbates the problems and uncertainty which has plagued the C block since the close of the original auction. The pending nature of the GWI bankruptcy ruling, which to date the FCC has been unsuccessful in overturning, sets a ceiling of 16 cents-on-the-dollar on reauction bids. DiGiPH fears that an unintended consequence of the FCC proceeding as announced will be that all C block licenses will be severely devalued, threatening the future of operating C block licensees, such as DiGiPH, that have justifiably relied upon and acted in accordance with FCC Rules. A reauction on the scale envisioned by the FCC in the Fourth R&O will neither appreciably increase competition in the wireless marketplace, nor reasonably speed deployment in “rural-only” markets until the bankruptcies affecting the major markets are resolved, calling into question the FCC’s rationale for moving forward in light of the serious drawbacks to doing so. Accordingly, DiGiPH

requests that the FCC reconsider its decision to proceed with a reauction until the status of the bankrupt licenses can be ascertained.

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

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

To: The Commission

PETITION FOR RECONSIDERATION

DiGiPH PCS, Inc. ("DiGiPH"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the Commission's Fourth Report and Order¹ in the above-referenced proceeding. In support thereof, the following is respectfully shown:

BACKGROUND

The Fourth R&O announces the terms under which C block spectrum that has been returned to the FCC pursuant to its restructuring options will be reauctoned. In the Fourth R&O, the FCC announces plans to proceed expeditiously with a reauction of returned C block spectrum. In light of the uncertainty surrounding the GWI bankruptcy ruling,² and the terms under which the FCC has

¹In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Fourth Report and Order, rel. August 19, 1998 ("Fourth R&O"). DiGiPH participated in the underlying rulemaking proceeding but did not raise this issue previously because other commenters raised this issue before the Commission.

²In re GWI PCS, Inc., BK No. 397-39676-SAF-11, Bench Ruling (Bankr. N.D. Tex.1998) ("GWI Ruling").

concluded to proceed with this reauction, *bona fide* operating C block licensees, such as DiGiPH, are being asked to formulate business plans and commit funds at reauction without having any way of assessing the true value of the licenses on which it is being asked to bid. By proceeding with the C block reauction without the bankrupt markets, markets which represent virtually every major population center and nearly two-thirds of the United States population, the Commission only exacerbates the problems and uncertainty which has plagued the C block since the close of the original auction. DiGiPH fears that an unintended consequence of the FCC proceeding as announced will be that all C block licenses will be severely devalued, threatening the future of operating C block licensees, such as DiGiPH, that have justifiably relied upon and acted in accordance with FCC Rules. Accordingly, DiGiPH requests that the FCC reconsider its decision to proceed with a reauction until the status of the bankrupt licenses can be ascertained.

ARGUMENT

I. THE FCC MUST REFRAIN FROM TAKING ACTIONS THAT DEPRESS THE VALUE OF C BLOCK SPECTRUM AND JEOPARDIZE THE FUTURE OF OPERATING C BLOCK LICENSEES.

A. Proceeding to Reauction Without the Bankrupt Licenses Will Result in a Reauction Limited to Rural Markets

The Fourth R&O announces that the Commission will proceed to reauction returned C Block licenses, but states that the reauction will exclude the licenses of those entities that have filed for bankruptcy.³ As the Commission is aware, the three (3) largest C Block entities have filed for bankruptcy: NextWave Personal Communications, Inc. (“NextWave”); Pocket Communications, Inc. (“Pocket”); and GWI PCS, Inc. (“GWI”). Attached hereto as Exhibit A is a map which shows

³Fourth R&O ¶ 8.

the licenses which will be excluded from the reauction. There are a total of 120 licenses tied up in bankruptcy. Although these licenses represent less than 25% of the total licenses that were available in the C block auction, significantly, these 120 licenses represent 61.4% of the population of the United States. As illustrated in the attached map, these licenses encompass virtually every major population center in the country. If the FCC concludes to exclude these licenses and proceed with a rural-only reauction, marketplace uncertainty will cause further harm to already wounded C block licensees.

B. Proceeding With the Rural-Only Reauction Denies Prospective Bidders the Ability to Accurately Assess Potential Market Values.

Unlike cellular service, when the FCC licensed PCS it elected *not* to mandate technological compatibility between operating systems. As a result, licensees have widely deployed three (3) competing, incompatible protocols to date. DiGiPH has deployed GSM technology throughout its markets. Both the A and B Block licensees in the New Orleans MTA elected to deploy CDMA protocol. Pocket, the C block auction winner for the BTAs which comprise the major population centers within the New Orleans MTA, had, like DiGiPH, elected to deploy GSM technology. Additionally, none of the D, E, or F Block licensees for the New Orleans BTAs has, to DiGiPH's knowledge, elected to deploy GSM technology. The reauction, as presently scheduled by the FCC as set forth in the Fourth R&O, will not include the Pocket markets. To further complicate matters, the Commission has allowed Pocket to make a "contingent" June 8, 1998, election in the event that the proposed agreement in bankruptcy is not accepted. Under that "contingent" election, Pocket indicated that it would elect to return 15 MHz of the New Orleans BTA.

As it presently stands, DiGiPH, a potential bidder for BTAs within the New Orleans MTA,

is being asked to determine the value of and bid for the rural-only portions of the New Orleans MTA, and other similarly situated metropolitan areas, without knowing what the status of the licenses for the most critical BTAs within that MTA. Indeed, even if DiGiPH were to ultimately win the remaining BTAs within the New Orleans MTA, the absence of New Orleans would leave a significant void between DiGiPH's existing markets and the remaining BTAs. The bottom line is that, absent New Orleans, the remaining BTAs have little if any value to DiGiPH. With New Orleans operating as a GSM system, either by DiGiPH or another carrier, the value of the remaining BTAs within the New Orleans MTA increases dramatically. Clearly, there is no basis upon which DiGiPH can make a reasoned business decision to assign a market value for those licenses which the FCC intends to offer at the scheduled reauction.

Significantly, an unintended consequence of the FCC decision to proceed to reauction as planned is that the FCC may prejudice operating carriers that have made certain technology selections. With respect to the BTAs in the New Orleans MTA, while DiGiPH obviously is not privy to any other parties' planned business strategy, a potential bidder which elects a technology other than GSM would be in a position to bid for the rural BTAs with the knowledge that, regardless of the outcome of any bankruptcy, a compatible technology will be available for its subscribers within the all-important New Orleans BTA. The result is that a business plan, such as DiGiPH's, which is wholly dependent upon the ultimate outcome of a bankruptcy, cannot support bids as high as a business plan which knows it will at least have a roaming partner. This places DiGiPH, and indeed the whole GSM community, at a significant disadvantage in the reauction with respect to certain markets. While DiGiPH understands that it is not the FCC's duty to ensure the success or failure of any technology or given licensee, the integrity of the Commission's auction process

mandates that the FCC ensure a level and equitable playing field when it comes to empowering auction participants to formulate their business plans.

While the previous example sets forth DiGiPH's direct concern, the same concerns echo across the country for every technology. For example, in major markets where the A and B block carriers selected the GSM and IS-136 protocols, NextWave or GWI likely represent potential CDMA deployment. Likewise, potential bidders with an interest in CDMA deployment are confronted with the same issue in certain rural markets surrounding the NextWave and GWI major markets as DiGiPH faces in New Orleans. As learned in the cellular licensing process, a major market license can stand on its own. A rural market, however, is wholly dependent upon the availability of compatible service within the major metropolitan area.

Since the close of the original C block auction, countless sources have constantly second-guessed whether C block licensees' bids at the original auction could be supported. Proceeding with the reauction as set forth in the Fourth R&O would only ensure that no bidder at reauction could possibly justify any bid that was in any way tied to the outcome a bankruptcy proceeding. The FCC must reconsider taking action which, in essence, deprives bidders of basic information necessary to formulate a business plan and which will have the effect of devaluing C block licenses.

C. The Fourth R&O Fails to Consider the Devaluation of Existing C Block Licenses That Will Occur As a Result of Excluding the Bankrupt Licenses from the Reauction.

Aside from the above-referenced issues that preclude bidders from formulating a business case for licenses auctioned on a piecemeal basis as proposed in the Fourth R&O, other factors associated with the FCC's decision will result in a devaluation of C block spectrum with serious consequences. The most valuable C block licenses are those which cover urban areas, the United

States' major population centers. Yet, virtually every major market will be excluded from the upcoming reauction. Thus, by excluding the bankrupt licenses from reauction, the FCC is guaranteeing that the only licenses which will be available in the upcoming reauction will be for rural markets. Not only do rural markets, by their nature, not command as great a price-per-pop as top-tier urban markets, but, as discussed above, the uncertainty surrounding the bankrupt top-tier licenses will have the effect of further depressing the value of the rural markets. Aside from the technological issues discussed above, many entities will simply be unable to formulate a financable business plan for rural markets when they do not know when the corresponding urban market license will be available for acquisition and cannot be assured of obtaining such license in the future. In DiGiPH's case, the net result is that any bid for such rural markets would have to reflect the fact that DiGiPH would have to hold these licenses until such time as the fate of the New Orleans market is decided. Significantly, DiGiPH's maximum bid would have to reflect the realization that absent ultimate favorable resolution of the New Orleans market, the nearby rural-only island market might never be commercially viable. As the Commission has recognized in developing its auction rules for this spectrum, these licenses are highly interdependent and this interdependence directly impacts the value bidders assign specific licenses and markets.⁴ Excluding the most significant markets from the reauction injects a tremendous amount of uncertainty into the bidders' analysis. This uncertainty in the marketplace means lower bid prices and depressed spectrum values.

The Fourth R&O fails to consider how excluding the bankrupt licenses from the reauction will devalue existing C block licenses and threaten the continued viability of operating C block

⁴Review of Pioneer's Preference Rules, 75 Rad. Reg. 2d 1088, 1094 (1994) ("highly interdependent licenses should be grouped together and put up for bid at the same time . . . most broadband PCS licenses will be significantly interdependent").

entities. Operating C block licensees, such as DiGiPH, are those licensees which have justifiably relied on the FCC's rules and managed to succeed in spite of unfavorable market conditions and the unintended consequences of regulatory actions. By scheduling a reauction which excludes nearly all major markets, the FCC cannot reasonably expect that the average-per-pop price of the reauctioned markets will be anything but substantially less than the original bid price. The reauction's dramatically depressed prices will have a significant adverse impact on operating C block licensees because it will devalue their licenses, impair their collateral and constrain their ability to obtain further financing to continue their build-out activities. This will severely jeopardize operating C block entities' ability to continue competing in the wireless marketplace.

The impact on existing licensees will be two-fold. First, a drastic reduction in the prices bid at the rural-only reauction will only heighten concern that original C block auction bidders overbid for their markets. Where licensees such as DiGiPH have relied upon financing which exceeds 100% of the value of the hard assets, lenders have relied upon the intrinsic value of the licenses, and what might be available from proceeds on a subsequent sale thereof, to support their lending decisions. A dramatic devaluation of those licenses would convert an "asset" to a liability where the amount owed under the original bid is far in excess of the perceived reduced value after a rural-only C block reauction. Second, as set forth more fully above, at the core of every operating C-Block licensees' business case is the ability to have its subscribers roam in nearby major markets. A reauction strategy which significantly diminishes the chances for successful bidding by technologically-compatible bidders hurts every existing licensee where a nearby major market's status remains unresolved.

D. A Rural-Only Reauction Will Not Appreciably Increase Competition in the Wireless Marketplace.

The FCC attempts to justify its decision to proceed with the reauction by citing the competitive benefits that will be realized in the wireless marketplace.⁵ A reauction which excludes licenses which cover 61.4% of the U.S. population, however, will neither stimulate competition nor expedite the offering of C block service to the American consumer. Those entities that do win rural licenses will likely delay buildout plans until the status of the adjacent urban markets is certain. Indeed, if DiGiPH were to win the available New Orleans BTA markets at reauction, DiGiPH would *not* be in a position to deploy those markets until such time as the pivotal major market's status was resolved. Stated quite simply, there would be little opportunity for a rural-only system in today's era of nationwide service. Clearly, in this competitive reality, proceeding as presently planned can do nothing to expedite service to the public unless and until the bankrupt license issues are resolved. C block licensees, which, by definition, have limited financial means, cannot risk expending the resources to build-out a rural market (1) when roaming is unavailable in the adjacent major market because the C block license is tied up in bankruptcy; and (2) only to discover months or years later they may be unable to enter a roaming agreement with the C block licensee in the adjacent major market. Delayed buildout means delayed competition, and thus, it is unlikely that the wireless consumer will derive any real benefit from a reauction which excludes the bankrupt properties. Further, once operating C block entities' licenses are devalued as a result of this reauction, their continued presence in the marketplace will be threatened. If operating C block licensees are unable to obtain additional financing as a result of the disparity between their bids and the reauction bids,

⁵Fourth R&O ¶ 8.

the presence of C block carriers in the market may actually decrease as a result of proceeding with a reauction that excludes the bankrupt licenses. Because it is unlikely there will be any significant increased competition in the wireless marketplace as a result of hastily proceeding with a reauction that excludes the bankrupt licenses, the Fourth R&O should be reconsidered.

E. Postponing the Reauction Until After the Pending Bankruptcy Proceedings Have Been Resolved Will Eliminate Uncertainty Created by the GWI Ruling.

On April 24, 1998, the United States Bankruptcy Court in the Northern District of Texas (Dallas Division) ruled that the award of GWI PCS, Inc.'s ("GWI") C block licenses in January 1997 for \$1.06 billion constituted a fraudulent conveyance under federal bankruptcy rules.⁸ The court held that between the time the C block auction closed in May 1996 and GWI's licenses were awarded, C block licenses were severely devalued and worth much less than the \$1.06 billion GWI had bid.⁹ The court revalued the transaction at \$166 million, reducing GWI's debt to the federal government by almost 85%, or \$850 million. Under the court's ruling, GWI will be permitted to keep its C block licenses and will be able to apply down payment funds on deposit with the federal government to amounts owing.¹⁰ Despite the GWI Ruling, and numerous petitions for reconsideration to the contrary, the FCC proceeded with the June 8, 1998 Election Date and the July 31, 1998 Payment Resumption Date. While the FCC has vigorously pursued an appeal of this decision, the FCC has neither been able to persuade a federal district court, nor a federal appellate court, to stay the bankruptcy court's decision for any significant period of time.

⁸GWI Ruling at 31.

⁹Id. at 31-32.

¹⁰Id. at 43.

Although the GWI Ruling is not yet final, this precedent will have a significant impact on a reauction that is conducted before this matter is ultimately resolved. In reducing the GWI debt, the court based its decision on a finding that C block licenses as a whole had been devalued by subsequent Commission actions such that the issuance of those licenses constituted a fraudulent conveyance. While the FCC is vigorously pursuing an appeal of that ruling, the fact remains that as of now, there is valid case law supporting the proposition that the FCC's actions subsequent to the close of the C block auction devalued *all* C-Block spectrum by 84%. This will establish a ceiling on the amount entities will bid in the upcoming reauction if this proceeding is not resolved before the reauction. Further, the 16 cents on the dollar figure represents a blended valuation of GWI's urban and rural markets including the value of the Atlanta, Georgia BTA. With that major market having a 16 cent valuation, the rural-only markets cannot support anywhere near that price without that pivotal major market. Therefore, a rural-only reauction may have a ceiling of substantially less than 16 cents on the dollar. The only way to prevent the GWI Ruling from setting a ceiling on reauction bids at 16% of the original bids, or even less, is to postpone the reauction until the GWI Ruling has been resolved. If the FCC prevails, the stigma associated with the GWI result will be removed. If the FCC fails, then the resolution of the status of the major markets, even if at a reduced value, will at least maximize the remaining value in the rural-only markets.

CONCLUSION

In light of the foregoing, DiGiPH respectfully requests that, in light of the uncertainty created by proceeding with the reauction prior to resolution of the bankruptcy proceedings of the three largest C block entities, the FCC reconsider its decision in the Fourth R&O to proceed with an auction that precludes the bankrupt licenses, and therefore virtually every major market in the United

States, from the upcoming reauction. The Fourth R&O fails to address the risks to operating C block licensees, the American taxpayer, and the competitive landscape of the wireless marketplace of hastily proceeding with a reauction which excludes the bankrupt licenses. These risks threaten the very future of operating C block licensees. Postponing the reauction until the bankrupt licenses can be included will confer greater benefits on the American taxpayer and the wireless consumer than proceeding with a rural-only reauction. Most importantly, however, having an all-inclusive reauction minimizes the risk that the licenses of existing C block operators will be devalued and encourages their continued presence in the wireless marketplace.

DiGiPH respectfully submits that with all that has happened in the C block's history to date, it is incumbent on the FCC to take steps now which shore up what little is left of that original spectrum auction. If the FCC is unwilling to do that, it should at least fully consider the unintended consequences of rushing again into a plan which cannot have any real hope of speeding C block service to the public. Therefore, DiGiPH respectfully requests the FCC to reconsider the Fourth

R&O and postpone the upcoming reauction until the bankruptcy proceedings have been resolved and an all-inclusive C block reauction can occur.

Respectfully Submitted,

DiGiPH PCS, Inc.



~~Michael K. Kurtis~~
Jeanne W. Stockman
Its Attorneys

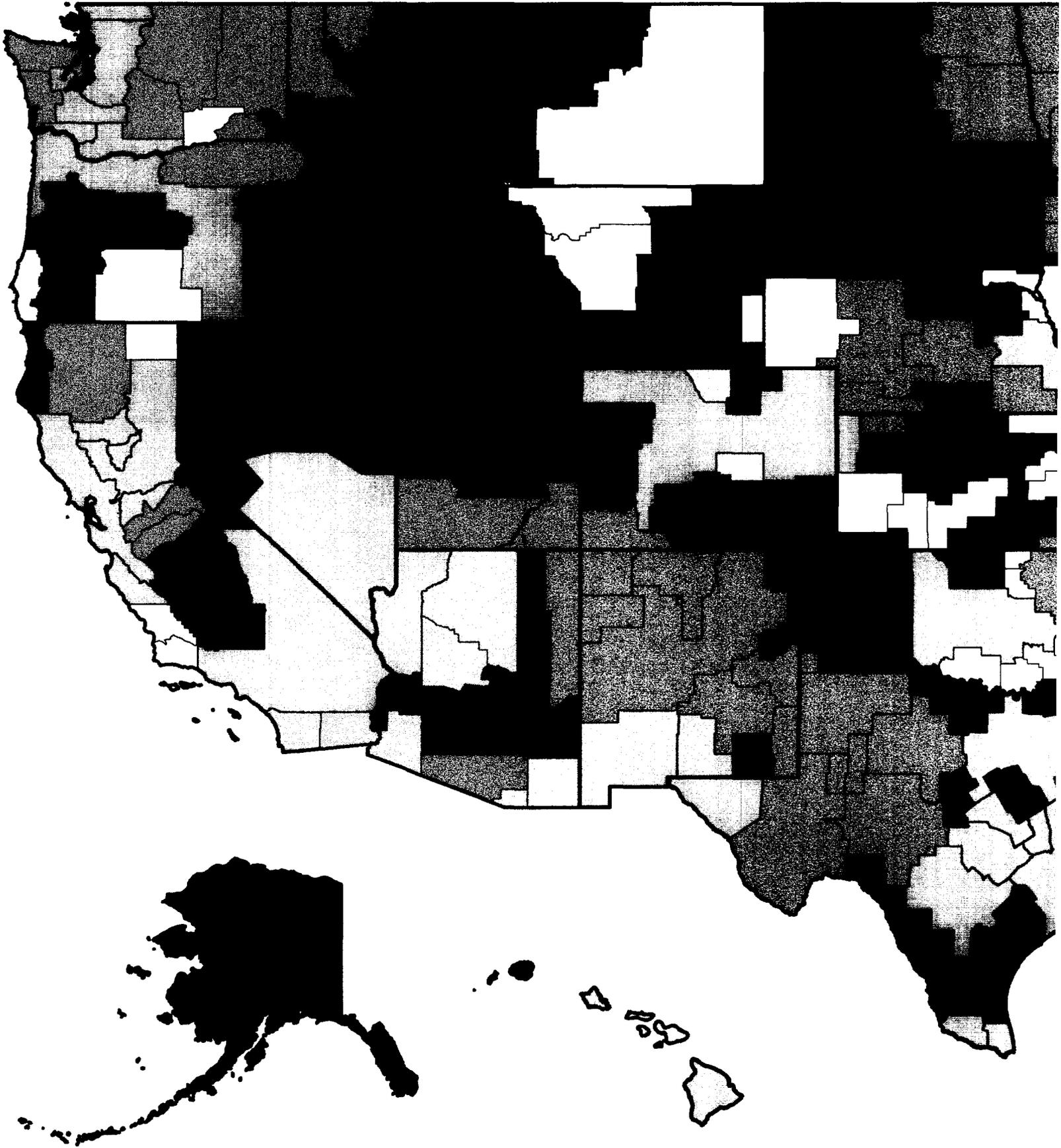
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Dated: October 23, 1998

EXHIBIT A

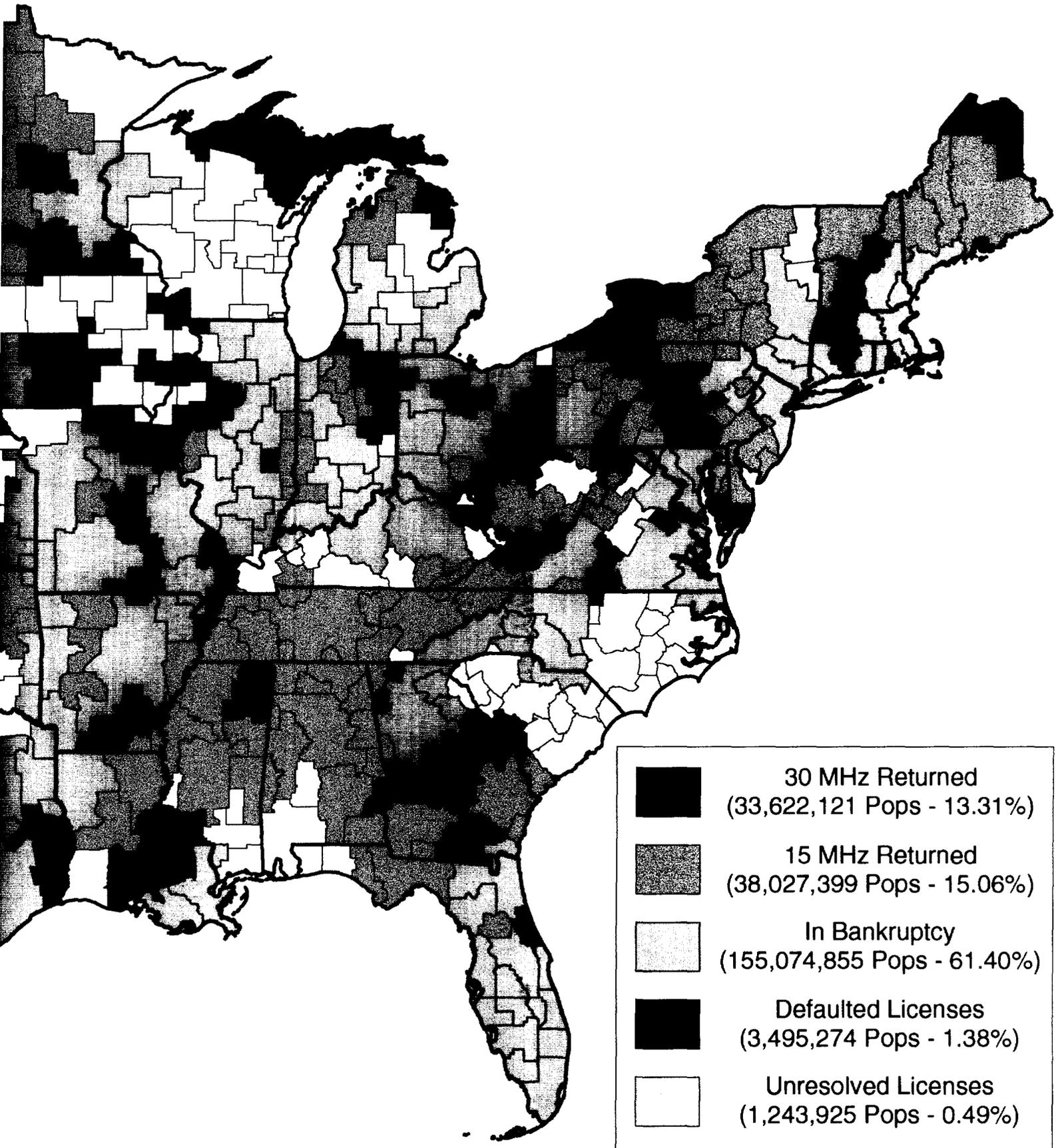
Current Status of

As of



C Block Licenses

1/15/98



	30 MHz Returned (33,622,121 Pops - 13.31%)
	15 MHz Returned (38,027,399 Pops - 15.06%)
	In Bankruptcy (155,074,855 Pops - 61.40%)
	Defaulted Licenses (3,495,274 Pops - 1.38%)
	Unresolved Licenses (1,243,925 Pops - 0.49%)
	30 MHz Licenses Intact (21,093,145 Pops - 8.35%)