Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

REPLY COMMENTS OF ALPINE PCS, INC.

ALPINE PCS, INC.

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Alpine PCS, Inc. ("Alpine") replies to the Comments filed in the captioned proceeding. A review of the Comments verifies that nothing has changed that justifies the Commission's proposals to abandon the original Congressional policy objective to promote the establishment of viable, entrepreneur based PCS competition. What has changed is the intensity of the lobbying efforts of large, special interests intent on cannibalizing the remaining entrepreneur block spectrum to advance individual business plans at the expense of broader public interest objectives that will provide greater benefits to consumers. These lobbying efforts blatantly mischaracterize the prospects of successful entrepreneur competition to mask an obscene spectrum grab that will only exacerbate the concentration of licenses and the diminution of competition and innovation from new entrepreneur based competitors.

The record is clear (and has been since 1994) that 10 MHz is insufficient to allow entrepreneurs (or anyone else for that matter) to establish competitive PCS services. Thus, the Commission's proposal to break the C block into 10 MHz licenses and to assign one or two to entrepreneurs per market dooms these entrepreneurs to failure and creates a self-fulfilling

prophecy. If this is the path the FCC feels compelled to take, it should at least be honest and admit that it is abandoning Congress' vision of entrepreneur based competition, and the associated (Congressionally identified) benefits of innovation and new services that would accompany this competition. Sincere entrepreneurs like Alpine, that have complied with the FCC rules and built out markets in reliance on the FCC's covenant to fulfill its Congressional mandate, deserve a forthright admission from the Commission that it is no longer promoting the establishment of viable entrepreneur based competition, and an explanation why that serves the public interest and the goals of Congress. The absence of such a rational, record based explanation on this point will compromise the Commission's proposed rules on appeal.

I. **The Record Does Not Support a Change in the C or F Block Rules.**

A. The APA Standard for Modifying Rules.

Thousands of pages of comment and ex parte filings have now been devoted to this proceeding, but the compiled record does not justify a change in the existing Commission eligibility rules for the C and F blocks under the Administrative Procedures Act.[1] To the extent that an agency seeks to change its rules, it may only make this reversal if it has engaged in reasoned analysis giving the record a "hard look."[2] An agency's rule reversal is arbitrary and capricious in violation of the law if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

[1] 5 U.S.C.§706(2)(A).

[2] *Greater Boston Television Corp v. FCC*, 444 F.2d 841, 850, 852 (D.C. 1970)(stating that the reviewing court will look at the agency's record to penetrate the underlying decision of the agency to satisfy that the agency has exercised a reasoned discretion "with reasons that do not deviate from or ignore the ascertainable legislative intent").

implausible that it could not be ascribed to a difference in view or the product of agency expertise."[3] The agency must address the evidence in the record and base its decision on substantial evidence in the record considered as a whole.[4] The agency must also take into consideration the affected parties' reliance interests.[5]

The Comments in this proceeding make clear that this demanding standard for justifying a change in longstanding rules has not been met. As explained below, this record forcefully and decisively refutes the creative efforts of various large carriers to manufacture "changed circumstances" that, if true, might justify a change in the rules. In this regard, the vast majority of commenters oppose any change in the eligibility rules for the C and F blocks.[6] Moreover, the Commission completely disregards the devastating impact the gutting of the entrepreneur blocks would have on the reliance interests of existing entrepreneur licensees, and those potential licensees that withdrew from the initial C block auction when bids went too high. The Commission also disregards the devastating result the proposed rules will have on the establishment of viable, ubiquitous entrepreneur based competition as intended by Congress.

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[3] *Motor Vehicle Manufacturers Ass. v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29, 43 (1983)(finding the agency's reversal of the rules on seatbelts was not supported by reasoned decision-making); *see also Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. 1995)("It is .. elementary that an agency must conform to its prior decision or explain the reason for its departure from such precedent.").

[4] *FCC v. National Citizens Comm. For Broadcasting*, 436 U.S. 775, 803 (1978).

[5] *Mobile Communs. Corp. of America v. FCC*, 77 F.3d 1399, 1407 (finding the FCC's decision to require payment for a spectrum license by Mtel who was entitled to a pioneer's prefence was not based on reasoned decisionmaking because it was made in the "eleventh hour" and did not take into account Mtel's reliance interest on the FCC's previous decision to not require payment).

[6] *See, e.g.*, the following comments filed on or about June 22, 2000 in this proceeding: Alpine PCS; Twenty First Wireless; Rural Telecom Group; Rural Cellular Association; Ascent; Comscape; Leap Wireless International; Personal Communications Industry Ass'n; Powertel; Small Business Administration; NTCA; Alaska Digital; Telecorp/Tritel; Choice Wireless; OPM Auction; NextWave; Burst Wireless; Northcoast; Carolina PCS; Advanced Telecommunications. Certain of these commenters appear resigned that the Commission is intent on changing the rules, and have provided "support" for various compromise measures that could minimize the damage inflicted on entrepreneurs. *See, e.g.*, Comments of Rural Telecom Group; Comments of Leap Wireless; and Comments of Powertel.

B. The Evolution of the Existing Rules.

In establishing the C and F block rules the FCC followed the requirements of Section 309(j) of the Communications Act to promote the following objectives:

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding the concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses;
>
> (C) recovery of a portion of the value of public spectrum; and
>
> (D) efficient and intensive use of the electromagnetic spectrum.[7]

In initially allocating broadband PCS licenses, the Commission demonstrated great foresight in anticipating the nature of the services that would be provided as PCS evolved, and the amount of spectrum that would be necessary to establish a viable competitive offering. For example, in 1994 the Commission (following the consideration of hundreds of comments) foresaw that :

> PCS will provide a variety of mobile services as well as new services offering communications capabilities not currently available. These services will be provided on an entire family of new communications devices that will include small, lightweight multi-function portable phones, portable facsimile and other imaging devices, new types of multi-channel cordless phones, and advanced paging devices with two-way data capabilities…The ability to provide a complete package of mobile voice and data services could become a significant competitive advantage in the future. Such a package of wireless services, however, may require more than 20 Mhz of spectrum.[8]

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[7] 47 U.S.C. § 309(j)(3).

[8] *Memorandum Opinion and Order*, 9 FCC Rcd. 4957, ¶¶ 3, 56 (1994).

Based upon the extensive record, the Commission increased the initial allocation of C block spectrum from a proposed 20 MHz for entrepreneurs to 30 MHz noting that "[t]he competitive handicaps of a 20 MHz block relative to 30 MHz blocks would not have served our goal of providing a viable competitive opportunity for designated entities."[9] The Commission concluded that three "equal sized 30 MHz blocks will facilitate competition and the rapid development and implementation of the fullest range of PCS services and ensure that PCS is more fully competitive with other mobile radio services."[10] These conclusions have been reaffirmed repeatedly by the Commission,[11] including as recently as February 29, 2000 when the Commission again confirmed that C block reauction would be reserved for entrepreneurs.[12]

No record exists to support the disassembly of the C block into non-competitive 10 MHz licenses.

C. Circumstances Have Not Changed to Justify Disassembling the Entrepreneur Blocks.

In proposing to disassemble the C block, and considering the opening of the F block, the Commission states that "[s]ince 1994, circumstances in the industry have changed…based on the

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[9] *Id.* ¶ 57.

[10] *Id.* ¶ 58.

[11] *See, e.g., Fifth Memorandum Opinion and Order,* 10 FCC Rcd. 403, ¶ 3 (1994) ("[w]e generally conclude that the "entrepreneur' block" concept and the special provisions for designated entities…are the most efficient and effective means to fulfill our statutory mandate to provide for a diverse and competitive broadband marketplace."); Fifth Report and Order, 9 FCC Rcd. 5532, ¶127 ("We believe that designating frequency blocks C and F as entrepreneurs' blocks meets the concerns of most designated entity commenters. Frequency block C provides 30 MHz of spectrum and, thus, satisfies the concerns of those parties who believe they must have this amount of spectrum to compete effectively…Bidders ineligible for the entrepreneurs' blocks will have the opportunity to bid on 99 30 MHz MTA licenses throughout the country, as well as 986 10 MHz BTA licenses nationwide.") *See also Fourth Report and Order*, 13 FCC Rcd. 15743, ¶16 (1998); *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd. 8345, 8375 (1998).

[12] *Fourth Report and Order on Reconsideration*, WT Docket No. 97-82 (rel. Feb. 29, 2000).

demand for spectrum to satisfy congestion, new technology and competitive needs."[13] This conclusion is not only unsupported in the record, it ignores the fact that the Commission foresaw with remarkable clarity in 1994 where the market would evolve today and adopted the present allocation plan to advance Congress' overriding objectives.

1. No Change Has Occurred to Make 10 MHz Sufficient to Provide Competitive PCS Service.

If there is one point that virtually all commenters agree upon it is that 10 MHz is an insufficient amount of spectrum to establish a viable competitive PCS offering.[14] Thus, the Commission's conclusion that 10 MHz is "a viable minimum size for voice and some data services…" is not particularly relevant to the issues in this proceeding. As observed by Twenty First Wireless, Inc., a 10 MHz bandwidth for entrepreneurs will make "their bandwidth offerings instant museum pieces."[15] The Commission has failed to address, and the record does not support, how relegating entrepreneurs to second class, niche players squares with the goals of Congress (and of the FCC from 1994 until recently) to "provide a viable competitive opportunity for designated entities."[16]

If the Commission were to adopt its proposal for the C block, and open the F block, 110 MHz of the original 120 MHz of PCS spectrum would be absorbed by large carriers in the

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[13] *Further Notice* at ¶¶ 25-26.

[14] *See, e.g.*, Comments of Alpine PCS, Inc. at 6-13; Comments of U.S. West at 5; Comments of SBC at 2; Comments of BellSouth at 3; Comments of Small Business Administration at 6; Comments of NTCA at 9; Comments of OPM Auction at 6-7.

[15] Comments of Twenty First Wireless at 4. While there have been some improvements in spectrum efficiency with respect to CDMA, no significant technical gains have been achieved with respect to TDMA technologies. However, 3G is spectrum intense and therefore no carrier with only 10 MHz will be able to rely on gains in efficiency to provide viable services competitively.

majority of large markets.[17] The suggestions of various large carriers that bidding credits would provide entrepreneurs an opportunity to acquire this spectrum in an open bidding environment are unsupported by this record. It is clear that the experience of small businesses in other auctions is simply not relevant here where the largest wireless carriers in the country are lined up to acquire the remaining PCS spectrum in the nation's largest markets.[18]

2. The Record Supports the Ability of Entrepreneurs to Build and Compete.

Several large carriers argue that many entrepreneur markets remain unbuilt and that service is being withheld from the public. In addition, they question the ability of entrepreneurs to construct competitive systems in large markets pointing to the well-publicized bankruptcies of NextWave, Pocket and GWI.[19] Of course, the reason that many markets have not been built is because they are the very markets that have been tied up in the handful of large bankruptcies that were precipitated under the FCC's installment payment program. On the other hand, under the current rules (eliminating installment payments), that will apply to the C block reauction, no bankruptcies have occurred with respect to any PCS licenses awarded to entrepreneurs.

More relevant is the abundant evidence of successful entrepreneur roll out of PCS service.[20] While evidence of such success in large markets has been limited by the bankruptcies

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16 *See* note 9, supra.

17 In light of the fact that no entrepreneurs bid on the 15 MHz C block licenses in the last auction, Alpine agrees that those licenses should be available for open bidding.

18 *See, e.g.,* Comments of PCIA, at 21-24; Comments of Rural Telecom Group at 6.

19 *See, e.g.,* Comments of Voicestream at 1; Comments of Nextel at 6-12; Comments of SBC Communications, Inc. at 4-7; *Further Notice* at 10.

20 Alpine has launched service in four markets, and will roll out three more in November 2000. *See also* Comments of PCIA at 8-9.

of NextWave, GWI and Pocket, other entrepreneurs make it clear that they can compete. For example, Omnipoint constructed and operated a successful PCS service in New York City that demonstrates that entrepreneurs can offer such service.

In this regard, Nextel's predictions that the capital requirements for building larger markets will foreclose entrepreneurs, is based on completely unreliable information (and is also contradicted by the Omnipoint experience). Based on Alpine's computer modeling of the cost to build out the Los Angeles BTA using cdmaONE (using Nextel's estimates for the number of cell sites), Nextel's construction capital cost estimate of $2.1 billion to build out Los Angeles appears to be inflated by about a factor of four. Perhaps Nextel's estimates are inflated because its cost estimates are based on using 3rd Generation WCDMA technology that to Alpine's knowledge is not available and thus Nextel's costs are likely not based on actual manufacturer prices. Or perhaps the estimate is based on Nextel's experience in using less spectrum efficient TDMA based technology. Nextel's assumption that a new carrier has to differentiate itself technically is not borne out by the success of Leap's Cricket service that is provisioned using today's spectrum efficient CDMA technology. Finally, as the sixth or seventh entrant to a major metro market like San Diego, Los Angeles, or Norfolk, a new entrant would enjoy substantially lower network buildout costs for civil expenditures as numerous towers would be available for co-location thereby drastically minimizing construction costs. These issues do not seem to be considered and Nextel's speculation regarding these matters does not add any substance to the record.[21]

[21] It is ironic, however, that Nextel would exhibit such a "can't do" attitude in light of its own history (as Fleet Call) taking on established cellular carriers as a small entrepreneur in the late 1980's. Fleet Call/Nextel's own history as a successful entrepreneur relying on its own ingenuity and innovation in the face of strong competitors is yet another example of why the FCC should permit the current entrepreneur model to unfold as originally intended.

3. The Record Does Not Support Claims of Spectrum Congestion.

The Commission and various large carriers have made vague references to existing spectrum shortages. However, there is no record evidence to support these claims. Even if there were such evidence, the Commission should not be in the business of choosing winners and losers in a competitive market environment.

The fact is that there will always be degrees of spectrum congestion experienced by carriers in various markets. The severity of such congestion will be influenced in part by the efficiency of the technology used by that carrier. The record already reflects the fact that numerous large carriers are utilizing their existing spectrum inefficiently while demanding that the Commission dismantle the entrepreneur blocks so that they can continue with their inefficient practices. The Commission should not reward carriers in this manner. Entrepreneurs, like Alpine,[22] will install new state of the art facilities and help achieve Congress' goal of making efficient and intensive use of the spectrum.

Finally, the fact that there are other reasonable solutions to mitigating the large carriers unspecified congestion concerns weighs heavily against the massive dispossession of spectrum directed at entrepreneurs. In addition to making more efficient use of existing spectrum (e.g. stop marketing analog services to new subscribers in markets that are purportedly spectrum constrained), large carriers can partner with entrepreneurs under existing rules (see Powertel Comments at 4-5). There are also other sources of spectrum such as 700 MHz and fixed wireless bands such as MMDS, LMDS and 39 GHz which can accommodate potential 3G services. Given the fact that the large carriers have not made any effort to identify far less

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[22] Alpine's systems are utilizing spectrum-efficient CDMA technology.

onerous alternatives, the Commission should not turn to entrepreneur block spectrum at the eleventh hour to solve large carriers problems (assuming such problems truly exist). Large carriers with their substantial resources are (or should be) perfectly capable of identifying technical and other marketplace solutions to any short term congestion that may be experienced. To place the entire burden on entrepreneurs is indefensible.

II. The FCC Should Not Breach its Covenant with Entrepreneurs to Promote the Establishment of Viable, Ubiquitous Competition.

Alpine and numerous other entrepreneurs have invested millions of dollars and substantial resources to do their part in fulfilling the goal of Congress (and until recently the FCC) to establish viable, ubiquitous entrepreneur based competition. While investing these energies and resources, the entrepreneurs relied upon the good faith and resolve of the FCC to stand up to the large special interests that have been consistently maneuvering to poach entrepreneur block spectrum and eliminate the specter of entrepreneur competition and innovation. Now at the eleventh hour, after repeatedly rebuffing these special interest efforts to gut the rules, the Commission has suddenly decided that the world has changed and that entrepreneurs should be effectively abandoned. The Commission should reconsider this sudden change of heart and allow the original program to proceed to achieve the goals set by Congress. Based on this record, C block relicensing runs a serious risk of substantial judicial delay as the courts consider the reasonableness of the Commission's actions.[23]

For the foregoing reasons, the Commission should maintain its current C and F block eligibility and license size rules in auction 35.

[23] As noted above, the courts are particularly sensitive to "eleventh hour" actions that do not properly take into account the reliance interests of licensees. *Mobile Communications Corp. v. FCC*, 77 F.3d at 1407.

Respectfully submitted,

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