

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of)
)
Amendment of the Commission's)
Rules Regarding Installment Payment)
Financing for Personal)
Communications Services (PCS))
Licenses)
)

WT Docket No. 97-82
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OFFICE OF THE SECRETARY

REPLY COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.

LEAP WIRELESS INTERNATIONAL, INC.

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Leap Wireless International, Inc., on behalf of itself and its affiliated entities (“collectively, “Leap”), hereby offers the following reply comments in connection with the above-captioned Further Notice of Proposed Rulemaking.¹

The comments in this proceeding have once again broken down along predictable lines. On the one hand, the vast majority of parties agree with Leap that there has been no basis shown for revising the Commission's Entrepreneur's Block rules. On the other, a handful of gigantic carriers have urged either outright elimination of the rules, or proffer transparent fallback proposals that would recapture most of the available C- or F-Block spectrum for their use.

Leap urges the Commission once again to retain the Entrepreneur's Block program. Notwithstanding the conclusory bellowing of the supercarriers, the Commission has already revised its Entrepreneur's Block policy successfully. Beginning with Auction No. 22,

¹ Further Notice of Proposed Rulemaking, WT No. 97-82 (rel. June 7, 2000) ("Further Notice").

Entrepreneurs have very quickly begun to compete vigorously with the large incumbent landline and wireless carriers, and correspondingly, to offer real benefits to consumers. The "spectrum poverty" arguments by the large carriers remain unpersuasive and wholly unsupported.

Although Leap doubts that any rule change can be justified on the current record, if the Commission does choose to adopt a compromise proposal, Leap urges the agency to stay true to the essential proposals set forth in the *Further Notice*, with three clarifications.

First, although the "Two- Tiered" market approach to reconfiguring the Entrepreneur's Block suggested by the Commission may be sound, the Commission must ensure that (i) the pop threshold adopted as the dividing line between the Tiers remains a proxy for separating the nation's very largest wireless markets from the vast majority of markets – including some that are relatively large – in which Entrepreneurs can and will offer vigorous wireless competition, and (ii) Entrepreneurs are permitted to access at least 10 MHz in Tier 1 markets and 20 MHz in Tier 2 markets. Permitting the supercarriers to whittle away either of these fundamental points defeats the entire viability of the proposal.

Second, the F-Block must remain with entrepreneurial companies. The supercarriers have opportunistically seized on the suggestion in the *Further Notice* that this spectrum might be reallocated for their use, but they offer no persuasive factual or policy reason why these important licenses should be taken away from new entrants.

Third, the Commission's current transfer rules should remain in place. On this latter point, the *Further Notice* does not fully apprehend the importance of maintaining the integrity of the Entrepreneur's Block in the aftermarket, and the damage that a relaxation of the rule could cause to Entrepreneurs.

Finally, Leap addresses the company-specific attacks by Nextel, masquerading as proposed rule changes, that are merely attempts to knock Nextel's most formidable Entrepreneurial competitors out of the auction in the event that the basic Entrepreneur's Block framework is maintained.

I. ENTREPRENEURS CAN AND WILL COMPETE IN ALL U.S. MARKETS IF THE COMMISSION GIVES THEM A CHANCE TO DO SO

The assertion by the nation's largest wireless carriers that eradication or significant paring away of the Entrepreneur's Block is required due to changes and consolidation that has taken place in the wireless marketplace is ironic, since it is precisely such consolidation that militates in favor of preserving Entrepreneur's Block eligibility requirements. The Commission created the Entrepreneur's Blocks in part reacting to the observation that "ten large companies -- six Regional Bell Operating Companies (RBOCs), AirTouch (formerly owned by Pacific Telesis), McCaw, GTE and Sprint -- control nearly 86 percent of the cellular industry," and "that nine of these ten companies control 95 percent of the cellular licenses and population in the 50 BTAs that have one million or more people." This consolidation has continued, in the wake of combinations by Bell Atlantic Corporation and Vodaphone AirTouch Plc,² VoiceStream Wireless Corporation and Aerial Communications, Inc.,³ and BellSouth and SBC Communications.⁴

On the other hand, building on the momentum created by the Commission's successful reauction of C-Block PCS licenses in Auction No. 22, Entrepreneurs have already

² Bell Atlantic and Vodaphone have announced that the brand name for this joint venture will be "Verizon Wireless." See Communications Daily, "Verizon Wireless Starts Service With Nationwide Pricing Plan" (April 5, 2000).

³ Public Notice, FCC Bureaus Approve Bell Atlantic Vodafone and VoiceStream/Aerial License Transfers and Assignments – Two New National Wireless Competitors to be Created (rel. Mar. 30, 2000).

⁴ See Communications Daily, "BellSouth and SBC Merge U.S. Wireless Operations" (April 6, 2000).

built a formidable track record of innovative service in an extremely short period of time.

Although carriers such as Nextel continue to seize on pre-Auction No. 22 events to build an impression that only the huge incumbent supercarriers are operationally and financially capable of offering service to the public in metropolitan areas -- and that smaller carrier new entrants are doomed to fail⁵ -- Leap begs to differ, and the fact of Leap's success to date is powerful evidence to the contrary. Consider the following:

- Leap was qualified as an Entrepreneur and Very Small Business under FCC Rules less than a year ago, in July, 1999.⁶ Leap notes that it is the type of Entrepreneur expressly anticipated by the Commission to offer competition to the incumbent supercarriers. Leap is a small, "publicly traded corporation with widely dispersed voting power."⁷ In addition, Leap's President, Susan G. Swenson, has been recognized by Wireless Week as one of the nation's 50 leading executives in the wireless industry, and a "Pioneering Woman of Wireless."⁸
- Leap offers an innovative service called Cricket™, a non-roaming, local, flat-rate wireless service available for \$29.95 a month, payable in advance, with no contract, no credit check, and no complicated calling plans or billing. The Cricket service model offers customers telephone service in areas where they live, work and play that is an affordable alternative to landline telephone service, but that also gives them the added benefit of mobility that wireless provides.
- The Cricket service already has proven to be enormously popular with and useful to consumers. In Nashville and Chattanooga Tennessee, the two markets where Leap has actively deployed the Cricket service, Leap has already gained more than 46,000 subscribers and achieved a total penetration of more than 3.7% on a covered population basis. This kind of success is staggering, particularly when it is understood that *more than half* of Cricket customers have never used wireless before.
- Because Cricket is an inherently local service, the model does not depend upon consolidating spectrum into nationwide "footprints." Leap can offer targeted

⁵ See, e.g., Comments of Nextel Communications, Inc. at 6.

⁶ See *In re Applications of AirGate Wireless, L.L.C.*, Memorandum Opinion and Order, DA 99-1440, FCC File Nos. 0000002035, 000012974 (rel. July 22, 1999) ("*AirGate Order*").

⁷ See 47 C.F.R. §§ 24.709(b)(2); 24.720(m).

⁸ See "Leap Wireless International President Susan G. Swenson Recognized Among 50 Leading Wireless Executives By Wireless Week," www.leapwireless.com/site/pr/releases/022800.html.

competition to wireline and wireless incumbents using 10-20 MHz of spectrum in secondary, mid-sized and even relatively large markets.

- Leap has begun buildout and plans to launch Cricket service in eight markets by the end of calendar year 2000, and twenty-five markets by the end of 2001.
- Leap currently now owns or has the right to acquire C- and F-Block PCS licenses covering 41.7 million potential customers in 27 states to offer Cricket service.
- Wall Street believes in the Cricket service. Leap has been able to raise significant capital in the public debt and equity markets to finance its buildout and expansion of service in the United States.
- The supercarriers have already begun to respond competitively to the Cricket concept, offering flat-rate sounding "bucket plans" that seem intended to replicate (though unsuccessfully) the simplicity and affordability of the Cricket service.

To be sure, Leap faces many competitive challenges ahead. But based solely on its efforts to date combined with the Commission's Entrepreneur's Block rules and policy, Leap has already built a promising track record of service, competition and expansion *in less than one year* of being authorized by the FCC. Thus, while Nextel may assert that small businesses and new entrants "do not have and cannot attract the financial prerequisites to acquire, construct, and deploy a competitive wireless telecommunications system in almost any BTA in the U.S.,"⁹ Nextel is dead wrong. With the Entrepreneur's Block set asides in place to mitigate spectrum acquisition costs, Entrepreneurs like Leap in fact *can* raise money and deploy competitive systems – and Leap has done so -- exactly as Congress and the Commission intended.

II. THE COMMISSION MUST NOT ADOPT A "COMPROMISE" PROPOSAL THAT DISCOURAGES THE EMERGING SUCCESS OF ENTREPRENEURS

Leap continues to believe that there has been no adequate legal or policy basis proffered by any of the large wireless carriers that can justify eliminating the Entrepreneur's Block rules and policy. Nevertheless, if the Commission adopts a version of the compromise

⁹ Comments of Nextel Communications, Inc. at 5-6.

outlined in the *Further Notice*, it should do so without the further distortions proposed by the large carriers, which are merely designed to transfer as much spectrum as possible out of the hands of new entrants that will offer increased competition.

A. Spectrum Must Remain Set Aside for Entrepreneurs in All U.S. Markets

The Entrepreneurs that have offered comment in this proceeding have squarely rebutted the notion that DEs would not find it desirable or would not be able to deploy service in even in the largest of markets. Once again, while that assumption might be valid if a smaller carrier were simply intending to enter the market as a fifth or sixth mobile wireless provider, it is not valid if the DE is providing an innovative service that is not being provided by other carriers. Such is the case with Cricket service today.

It is vitally important that Entrepreneur's Block spectrum be preserved in every U.S. market. However, taking the large carrier pleas for more spectrum at face value, Leap believes that the "Tiered" 10/20 MHz approach set forth in the *Further Notice* could be an acceptable compromise between supercarrier and DE needs, provided that the large carriers do not succeed in redefining the tiers or limiting the available spectrum in a manner that deprives Entrepreneurs of significant competitive opportunities.

1. "Tier 1" Markets Must Be Defined to Encompass Only the Very Largest U.S. Markets

Leap reiterates its view that the Commission's "Tiered" approach to disaggregating C-Block Entrepreneur's Block licenses is workable conceptually, but the Commission must reject categorically the proposals of the large carriers to set the dividing line

between Tier 1 and Tier 2 markets at 1 million pops.¹⁰ This threshold is absurdly low, given the demonstrated capabilities of Entrepreneurs to provide service in much larger markets.

For example, Leap is more than capable of competing against the supercarriers in markets like Nashville, Tennessee – a market of 1,429,000 pops, where Leap has already deployed service with great success. Indeed, Leap has plans to deploy Cricket service in Pittsburgh, PA (2,508, 000 million pops), Phoenix, AZ (2,404,000) pops and possibly even larger markets. While Leap has no plans to serve the largest U.S. markets such as New York, NY (18,051,000) or Chicago, IL (8,182,000), radically reducing the amount of spectrum available to Entrepreneurs in markets above 1 million pops makes no sense in terms of promoting Entrepreneurial competition to the wireless incumbents.

For this reason, Leap believes the line that the Commission has drawn between "large" and "small" markets may not be high enough in terms of population threshold. Even a Tier 1 cut-off of 2.5 million pops could render a severe disservice to Entrepreneurs intent on serving all but perhaps the very largest U.S. markets. For example, Pittsburgh, Pennsylvania is a city with more than 2.5 million potential subscribers where Leap has a pending agreement to acquire Entrepreneur's Block PCS spectrum, and in which Leap intends to roll out the Cricket service model. And while Leap has no current plans to serve the very largest markets in the United States, there are other Entrepreneurs that have indicated their intent to do so.

Leap has proposed that the Commission's geographic threshold for the separation of Tier 1 and Tier 2 markets be 5 million pops, and Leap urges that the Commission adopt this

¹⁰ See, e.g., Comments of Nextel Communications, Inc. at 12; Comments of SBC Communications, Inc. at 3; Comments of US West Wireless, LLC at 5.

number as the "Tier 1" threshold.¹¹ This Tier would allow carriers in the nation's largest markets – such as New York, Los Angeles, San Francisco, and Philadelphia -- to access a tremendous amount of additional spectrum, while preserving the ability of Entrepreneurs to introduce innovative niche services into these markets.

Verizon Wireless takes issue with the Commission's Tier 1/Tier 2 proposal because the Commission would exclude 20 MHz of spectrum "in all but a small number of markets from being opened to all interested bidders."¹² However, that is the entire point. Apart from conclusory assertions, the supercarriers like Verizon simply have not demonstrated why 45 and 55 MHz of spectrum in a particular market is not more than ample to meet their needs. To the extent that their claims are taken on faith to rip open and seize more spectrum from the Entrepreneur's Block, 20 MHz may be justified in the very largest markets, but the additional 10 MHz opened up by the Commission's proposal in the *Further Notice* gives these large carriers plenty of new capacity everywhere else.

Enough is enough. Leap is proving that new wireless market entrants have relied upon and are using Entrepreneur's Block spectrum to offer something different than simply more mobile wireless. The Commission must not blow apart the prospect of this competition by effecting a zero-sum transfer of yet more spectrum from Entrepreneurs to giant carriers that simply have not proven they need it.

¹¹ There is no issue created by the fact that the Commission has based its pop threshold on 1990 census data. *See* Comments of Verizon Wireless at 11. The pop threshold is merely a proxy for market size, and there is no reason that 1990 data will not suffice for purposes of the upcoming auction. If for some reason the auction is delayed so that new 2000 census data becomes available, the Commission can simply re-conform the pop thresholds to match the largest U.S. markets.

¹² *Id.* at 11.

2. A Setaside for Entrepreneurs of 10 MHz and 20 MHz in Tier 1 and Tier 2 Markets, Respectively, Is Critical

The large carrier calls to eliminate any setaside for Entrepreneurs in Tier 1 markets, or to dramatically scale back even further the allocation of spectrum for entrepreneurs in Tier 2 markets, should be rejected.

First, any geographic service cut-off that completely eliminates Entrepreneurial access to any individual U.S. market – for example, by limiting Entrepreneurs only to bidding credits above a certain population level-- is inherently arbitrary and needlessly discriminatory towards DEs.¹³ Entrepreneurs can even the largest U.S. markets and should be afforded at least the opportunity to acquire spectrum to do so. 20 MHz is more than enough for large carriers to expand service in the nation's largest markets.¹⁴

In Tier 2 markets, however, the Commission simply cannot decrease by more than 10 MHz the spectrum currently made available to Entrepreneurs. Given that markets below 5 million pops (and certainly the 2.5 million pops proposed in the *Further Notice*), are the primary markets in which DEs are deploying, and will continue to be so, it is important that the Commission not only continue to provide these companies with access to Entrepreneur's Block spectrum, but also ensure that these companies maintain a viable spectrum allocation that will provide them with the ability to bring innovative voice and data offerings to market. Unlike larger carriers, newer entrepreneurial companies have the advantage of being able to deploy the most current technology in conjunction with targeted, efficiently designed systems. Thus, while a nationwide supercarrier may need to add 10 MHz of spectrum to an existing 30 MHz allocation

¹³ See *Further Notice* at ¶ 29.

¹⁴ Leap reiterates that it is important that the license created to serve Tier 2 be a 20 MHz license that will ensure an Entrepreneur's ability to access enough spectrum to offer voice and data services.

to deploy wireless data offerings, a newer entrant such as Leap can deploy an innovative voice and data offering using far less spectrum, such as 20 MHz.

For this same reason, however, relegating DEs to 10 MHz only in Tier 2 markets should *not* be an option. Even using the most efficient technology, combined voice and data is a tall order. DEs should not be denied the opportunity to roll out such combined offerings. This was an opportunity guaranteed them in the existing C-Block allocation (either 15 or 30 MHz licenses), and it should not be taken away now. The Commission should maintain a disaggregated 20 MHz set aside for Entrepreneurs in Tier 2.

3. Existing 10 MHz F-Block Licenses Must Remain As Entrepreneur's Blocks

The Commission should preserve existing F-Block allocations. Although the Commission has given large carriers the "opening" to grab for this spectrum as well, and they have, the extremely weak showing of capacity need by the large carriers does not justify taking yet another 10 MHz from Entrepreneurs.

This is especially true given the reliance interests of Entrepreneurs. They banked upon *all* components of the Entrepreneur's Block policy as the key to mitigating spectrum acquisition costs as a primary barrier to entry in the wireless marketplace. These providers have built business plans around *both* the C- and F-Blocks, and there has been no rational basis proffered by either the supercarriers or the Commission to further undercut the ability of Entrepreneurs to compete by removing another source of spectrum that Entrepreneurs thought they could count upon.

B. It is Critical That Current C- and F-Block Transfer Restrictions Be Maintained.

The comments reflect a mixed consensus with respect to the Commission's proposal to relax entrepreneurial transfer restrictions. However, Leap urges the Commission to

recognize that maintaining the integrity of the Entrepreneur's Block program is as fundamentally important in the aftermarket as it is in the auction context.

As Leap has stated, a restricted aftermarket in Entrepreneur's Block spectrum remains an important tool to ensure that Entrepreneurs are able to acquire additional spectrum. Large carriers can and do "warehouse" and "land bank" PCS spectrum, regardless of whether there is an imminent need to use it or not. These carriers are understandably reluctant to make additional spectrum available to competitors. So if the transfer restrictions are relaxed prematurely, there is a much higher likelihood that spectrum acquisition opportunities for Entrepreneurs will evaporate quickly, never to return.

Of equal concern, however, are the opportunities for gamesmanship and outright coercion that a relaxation of the transfer restrictions will bring. For example, large carriers will now be free to put in place a variety of mechanisms in their dealings with Entrepreneurs that are designed to force immediate sales of C- and F-Block licenses in the context of bidding or financial arrangements – a development that is absolutely anathema to the Commission's historical efforts to protect the ability of Entrepreneurs to control their own destiny and the fate of their licenses.¹⁵ Indeed, for a publicly traded Entrepreneur such as Leap, it is even conceivable that a supercarrier could effect a hostile takeover in the face of such a rule change, with the assurance that the Commission's rules now permit an immediate aftermarket transfer of DE licenses.

Such results are not in the public interest. Entrepreneurs are in a critical phase of growth and development in the CMRS marketplace. It is imperative that the 5-year holding rule be preserved.

¹⁵ See *Fifth Memorandum Opinion and Order* at ¶¶ 80-86.

III. THE COMMISSION SHOULD REJECT NEXTEL'S ATTEMPTS TO SABOTAGE SUCCESSFUL ENTREPRENEURS

As a fallback to its extreme general positions with respect to elimination of the Entrepreneur's Block rules, Nextel has also included in its comments specific attacks on successful Entrepreneurs -- and smaller, invidious tweaks to the eligibility rules -- in order to try to minimize their chances of succeeding in the scheduled reauction of Nextwave's licenses later this year in the event that the Entrepreneur's Block is retained. These attempts should be flatly rejected.

1. There is No Reason to for the Commission to Revisit Its Rules Regarding DE Eligibility Calculations

With respect to Leap, Nextel first suggests that the Commission should change its rule requiring DE applicants to base their financial qualification showings on audited financial statements. The reason that Nextel has proposed this change is that it knows that Leap will have no problem qualifying to bid for the Nextwave licenses in November under current qualification rules, but thinks that it can create a potentially exclusionary problem for Leap by persuading the Commission to require more current financial information. However, Nextel's proposed change on this point is unnecessary, and even if adopted, would not have the effect that Nextel desires.

First, the Commission's PCS rules, as well as Part 1 of the Commission's rules, which governs all wireless services, state that applicants for licenses must evidence their gross revenues and total assets using year-end "audited financial statements."¹⁶ Although it Nextel is correct that the Commission could require the use of more current financial information, there is no

¹⁶ See, e.g., 47 C.F.R. § 24.720(g) (total assets are required to be evidenced by "the most recent audited financial statements" of the applicant if such statements are available); 47 C.F.R. § 24.720(f) (gross revenues are required to be evidenced by "audited financial statements for the relevant number of the most recently completed" calendar or fiscal years); 47 C.F.R. § 1.2110(m) (same); *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994), at ¶ 126 (for purposes of determining size eligibility for transfers and assignments among DEs, "we will use the most recently available audited financial statements").

reason to expect that the use of more recent unaudited asset or revenue figures in wireless applications will give a fairer or more accurate picture of the applicant's financial qualifications at the time the application is filed. To the contrary, departing from a clear, bright-line test that uses credible audited numbers could open a Pandora's Box in terms of facilitating intentional or unintentional manipulation of Entrepreneur's Block eligibility calculations.¹⁷

Indeed, the Commission appears to have adopted this reasoning in considering and rejecting a proposed rule change virtually identical to the one that Nextel advocates here. In establishing rules to govern its auction of F-Brock PCS licenses, for example, the Commission expressly revisited and affirmed the use of calendar or fiscal year end audited financial statements for purposes of assessing DE eligibility, after requesting "comment on whether applicants should continue to be allowed to rely on either fiscal years or calendar years in providing their gross revenues, or whether they should instead base their size calculations on the most recent four quarters so that the Commission receives the most current information available."¹⁸ While some parties argued, as Nextel does, that companies should be allowed (or required) to use current quarterly data, the Commission declined to deviate from its mandate for annual audited data, stating that "an applicant's determination of average gross revenues will be based on the three most recently completed fiscal or calendar years."¹⁹

¹⁷ It is well understood that interim quarterly financial statements filed by public companies with the Securities and Exchange Commission, for example, are in fact not "audited financial statements," and they explicitly are not required by the SEC to be formally audited by outside accountants. Leap's most recent Form 10-Q, for example, informs the public that its "interim condensed consolidated financial statements have been prepared by the Company without audit, in accordance with the instructions to the Form 10-Q and, therefore, do not include all information and footnotes necessary for a fair presentation of its financial position, results of operations, cash flows and stockholders' equity in accordance with generally accepted accounting principles." Leap Form 10-Q at 6.

¹⁸ Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding, *Report and Order*, WT Docket No. 96-59 (rel. June 24, 1996), at ¶ 134.

¹⁹ *Id.* at ¶ 141.

There is no reason for the Commission to change its rules with respect to audited financials. The only reason that Nextel is proposing such a change is because Nextel thinks that it would create an eligibility problem for Leap. But Nextel's belief on this point is misguided.

The crux of Nextel's position with respect to DE financial information showings is reflected in the following statement:

Because entities usually take several months to get their end of year audited financial statements, under a literal interpretation of the rules, Leap may seek to use its audited financial statements from 1999 to slip in under the \$500 million total asset cap.²⁰

This statement is misplaced, however, because there is no need for Leap to "slip in" under the total asset requirement – under current rules, Leap clearly is eligible to bid for the Nextwave licenses, even if its assets *were* to exceed \$500 million.

2. Preservation of the "Graceful Growth" Rule and Policy Is A Prerequisite for Promoting Competition to Supercarriers Like SBC, AT&T and Nextel

One of Nextel's tactics at the Commission of late is to suggest that Leap has somehow "outgrown" its eligibility to hold C- or F-Block licenses.²¹ But Nextel does not dispute the fact that Leap already holds a number of C- and F-Block PCS licenses, and that Leap met the Commission's DE eligibility criteria at the time it received these licenses. In light of these facts, and given the circumstances surrounding Leap's asset growth, the Commission's rules state unambiguously that Leap remains eligible to acquire the licenses at issue, and additional licenses, even assuming *arguendo* that its total assets exceeded \$500 million.

Section 24.709(a)(3) of the Commission's rules expressly addresses the circumstances of when a C-Block licensee, once granted a license at auction or pursuant to a license transfer or assignment, will have its maintenance of C-Block eligibility jeopardized by asset or revenue

²⁰ Comments of Nextel Communications, Inc. at 21.

²¹ See, e.g., Nextel Communications, Inc., Comments or, In the Alternative, Petition to Deny (May 26, 2000)

growth. The rule states that, once a company has qualified to hold a C- or F-Block license, "increased gross revenues" and "increased total assets" "shall not be considered" for eligibility purposes where they are the result of "nonattributable equity investments . . . debt financing, revenue from operations or other investments, business development or expanded service."²² The reason the Commission's rules allowed for such growth without jeopardizing a licensee's continuing ability to hold or acquire Entrepreneur's Block licenses was and remains straightforward: the Commission did not wish to penalize Entrepreneurs for their success. Thus in its *Fifth Memorandum Opinion and Order* the Commission noted its "strong interest in seeing entrepreneurs grow and succeed in the PCS marketplace," such that "normal projected growth of gross revenues and assets, or . . . as a result of a licensee acquiring additional licenses . . . would not generally jeopardize continued eligibility as an entrepreneur's block licensee."²³

This point is echoed in Section 24.839(a)(2), which governs the assignment or transfer of control of C- and F-Block PCS licenses in the aftermarket. That rule states unequivocally that a C- or F-Block license may be transferred if (i) the proposed assignee or transferee meets the eligibility criteria set forth in § 24.709 at the time the application for assignment or transfer of control is filed, or (ii) "the proposed assignee or transferee holds other license(s) for frequency blocks C and F, and, at the time of receipt of such license(s), met the eligibility criteria set forth in § 24.709 of this part."²⁴

Because Leap's eligibility to participate in C- or F-Block auctions cannot be disputed under current rules, Nextel has targeted the Commission's "graceful growth" rule as well,

²² 47 U.S.C. § 24.709(a)(3).

²³ *Fifth Memorandum Opinion and Order* at ¶ 27.

²⁴ 47 U.S.C. § 24.839(a)(2) (emphasis added).

characterizing it as a "loophole" that is being "exploited" by Leap and other successful Entrepreneurs. But that claim is nonsense.

The problem of Entrepreneurs "growing out" of the financial caps is not a new one. As mentioned above, it was expressly addressed by the Commission when the C- and F-Block eligibility rules were created, and the Commission made a sensible policy cut. As Entrepreneurial new entrants entered the wireless marketplace by virtue of the C- and F-Block setasides, the Commission decided that they would not be penalized by fund raising activity or business expansion necessary to become viable competitors to wireless and wireline incumbents.

Indeed, Leap provides a case history as to how such growth would work. The Commission found Leap qualified to hold four F-Block and 36 C-Block PCS licenses in an order released by the Commission in July, 1999, after exhaustive consideration of Leap's DE qualifications.²⁵ The order confirmed Leap's status as a Publicly Traded Corporation with Widely Dispersed Voting Stock Power and a Very Small Business under Commission rules.²⁶ Nextel does not (and cannot) now take issue with those findings.

As Leap introduced the novel Cricket model into the wireless marketplace, it has sought to rapidly build out, finance and expand its business. Thus, to the extent that Leap may experience asset growth since it first qualified as an Entrepreneur's Block licensee, such growth has been or will be the result of business development and expansion of service into new markets via the acquisition of additional licenses and equipment, and public debt and equity financings – *all* of which are precisely the types of asset growth that "shall not be considered" for eligibility purposes under Section 24.709(a)(3). For example, in February, 2000, Leap completed public

²⁵ See *In re Applications of AirGate Wireless, L.L.C.*, Memorandum Opinion and Order, DA 99-1440, FCC File Nos. 0000002035, 000012974 (rel. July 22, 1999) ("*AirGate Order*"), at ¶¶ 16-17, ¶ 44.

²⁶ See 47 C.F.R. § 24.709(b)(2); 24.720(m).

debt and equity offerings that raised gross proceeds of approximately \$902 million, which increased Leap's assets by approximately \$640 million attributed to the net proceeds of the offerings (net of underwriter and placement fees, offering expenses and the repayment of all outstanding borrowings under Leap's credit agreement with Qualcomm, Incorporated). However, because the debt portion of the offering was clearly "debt financing," and the equity portion of the offering was clearly "nonattributable equity investment,"²⁷ under Section 24.709(a)(3), the resulting "increased assets" would not jeopardize Leap's eligibility to hold or acquire C- or F-Block PCS licenses, by express operation of the rule.²⁸

The Commission's rules recognize that the policy underlying the Entrepreneur's Block would be eviscerated if DE-qualified companies were stopped dead in their tracks from pursuing activities such as expanding operations, building out systems, acquiring new licenses, and raising money, all of which require asset expansion. Thus, the Commission has made it clear that this type of growth will not "jeopardize an applicant's continued eligibility as an entrepreneur's block licensee."²⁹

That policy remains sound, and is critical at this juncture to maintain. While Leap, for example, may have been successful at fund raising in the public markets, it is a new wireless entrant, with a less than two-year operating history, in the midst of rapidly building out markets

²⁷ "Nonattributable equity investments" are defined in the Commission's rules to mean "from sources whose gross revenues and total assets are not considered under the exceptions" (including the PTC Exception) set forth in Section 24.709(b). See 47 C.F.R. § 24.709(a)(3). Equity investments by widely dispersed members of the public pursuant to the offering clearly are from sources whose revenues and assets are not attributed to Leap under that section.

²⁸ It is in explicit recognition of this capacity to grow that the second prong of the transfer rule, Section 24.839(a)(2), requires existing licensees like Leap that have already established their DE qualifications (as opposed to new applicants) to show *only* that at the time of receipt of their license(s), they met the eligibility criteria set forth in Section 24.709 (even if the licensee has experienced nonattributable asset and revenue growth of the type mentioned in Section 24.709(a)(3)).

²⁹ *Fifth Memorandum Opinion and Order* at ¶ 27.

covering some 41 million pops to compete with gigantic mobile wireless carriers and landline telephone companies. Leap has no multi-billion dollar "war chest" to compete head-to-head with carriers like Nextel with respect to spectrum acquisition (even with bidding credits), and Nextel knows it.

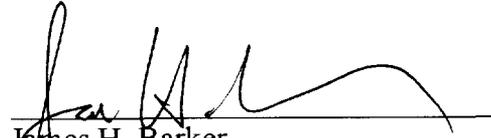
Relative to the supercarriers, Leap is still only a promising upstart. However, Leap is large enough to have the "financial ability to provide sustained competition" in the wireless marketplace," precisely as the Commission intended.³⁰ The Commission's "graceful growth" policy recognizes and encourages the scarce capital resources of Entrepreneurs to go where they are needed most, *i.e.*, to raise money and finance the buildout and development of competitive services, without having to fear that their underlying eligibility to expand will be jeopardized. While Nextel may not welcome the competition engendered by this policy, it is sound, and should not be changed.

IV. CONCLUSION

There is little record basis for the Commission to change the Commission's Entrepreneur's Block rules. However, if the Commission does insist upon moving forward with changes to its Entrepreneur's Block rules and policy, those changes should not be ones that eviscerate the benefits that Entrepreneurial companies are bringing and will continue to bring to U.S. consumers. Accordingly, Leap in the event that the rules are revised, Leap urges the Commission to do so in accordance with the proposals set forth above.

³⁰ *Fifth Report and Order*, 9 FCC Rcd 5532, 5586, ¶ 123 (1994).

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