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June 30, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W. #TW 204B
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Reply Comments of Twenty First Wireless, Inc. to the Amendment of the Commission's
Rules Regarding Installment Payment Financing for Personal Communications Services
(PCS) Licenses WT Docket No. 97-82

Dear Ms. Secretary:

Attached are reply comments of Twenty First Wireless, Inc. for the above-captioned proceeding
(an original and nine copies) that I am submitting as legal counsel for Twenty First Wireless, Inc.

Sincerely,

Bruce Fein

Bruce Fein
Attorney at Law

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June 30, 2000

Before the
Federal Communications Commission
Washington, D.C. 20554

IN RE:

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

To: The Commission

Re: REPLY COMMENTS OF TWENTY FIRST WIRELESS, INC.

Submitted by: Bruce Fein
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Summary

1. Nothing in the Comments legally justifies the abandonment by the Commission of its longstanding 30 MHz C block licenses subject to restricted bidding. No substantial evidence disproves the Commission's initial conclusion in this proceeding that 30 MHz licences were necessary for the viability of very small and small entrepreneurs who are initial entrants in the wireless market and who would operate without an existing wireless network. Without 30 MHz C block licenses, the ability of entrepreneurs, especially very small Native American businesses like Twenty First Wireless, to attract the investment capital needed for third generation or pioneering wireless services that will be the backbone of profitability will be no more than a pipedream; a 10 MHz license for that category of entrepreneur would be akin to a munificent bequest in a pauper's will, and would derogate from the Commission's statutory obligation to facilitate wireless entry by Native Americans.

2. None of the Comments confute that very small Native American entrepreneurs enjoy unique legal status and preference under the law that the Commission is compelled to honor. They suffer

in their inability to attract capital from historic discrimination against tribes and tribal members. A Native American auction advantage would pivot on a tribal, not a racial classification, and thus would not be constitutionally suspect under the Fifth Amendment. Native American businesses on tribal lands are uniquely handicapped in obtaining credit because tribal immunity prevents foreclosure of tribal property by lenders. As regards C block licenses whose markets include tribal lands, tribes prefer for cultural and economic reasons to be served by Native Americans, as indicated by the Attached Exhibit A (Letter from the Seneca Tribe to Twenty First Wireless). Thus, the Commission should treat Native American very small entrepreneurs in its C block auction rules with more affirmative action than any other class of bidder, including license transfers, payment schedules, long-term management contracts, and bidding credits. Such a salute to Native American wireless providers would not only be consistent with the Commission's recent policy statement regarding wireless service on tribal lands, but would also be a trivial impairment of the spectrum efficiency, competition, innovation, and revenue raising goals of Congress. Extrapolated from past experience in this very proceeding, Native American bidders on forthcoming C block licenses will be countable on a single hand with fingers left over.

3. If Congress coveted open market competition, simpliciter, to govern auction rules in its 1993 statute, then it would never have enumerated competing objectives of equal dignity in section 309(j)(3) that the Commission must equally accommodate, even if the objectives risk undercutting efficiency and rapid deployment of new technologies. In other words, the Commission's statutory mandate renounces a "free competition 'uber alles'" theme for auction rules. Yet that is exactly the leitmotiv of several of the Commission's proposed auction rules, and is echoed in several of the Comments equally insolent of the Commission's non-competition congressional directive enshrined in section 309(j)(3).

Discussion and Analysis

A. 30 MHz C Block Licenses and Restricted Bidding

4. In 1994, the Commission insisted that 30 MHz C block licenses were necessary for offering a menu of wireless services that would make entrepreneurial businesses economically viable. The Commission has assembled no new reliable factual foundation to support a contrary conclusion. Assertions regarding the economic prospects of small or very small new entrant entrepreneurs with an isolated 10 MHz Block C licenses extrapolated from the Comments are conflicting. OPM Auction Co., U.S. Airwaves, Inc., SBC Communications, Inc., and Alpine PCS, Inc. inter alia, deny that such a relatively narrow bandwidth could accommodate the emerging and economically vital wireless services, especially for new entrants like Twenty First Wireless with no existing spectrum upon which to build, that will be indispensable to profitability. Other Comments take an opposing view. The burden of proof, however, should be on proponents of change to safeguard the reliance planning interests of would-be bidders, to protect settled marketplace expectations, and to avoid heightening regulatory risks associated with erratic policy somersaults. Regulatory change for light and transient causes is wrongful under the Administrative Procedure Act because it smacks of arbitrariness or caprice.

5. The proponents of change have fallen far short of discharging their burden of persuasion. They speculate that a 10MHz license, standing alone, might offer competitive wireless service, but the speculation rests on countless business and technological imponderables that when cobbled together remain distant from substantial evidence. Coke thought Classic Coke would set the gold standard for soda sales, and Ford thought the same of the Edsel in the auto industry. Despite tens of millions or more spent on marketing research, both prophecies proved wildly misconceived. And remember all the forecasts about HDTV as the inevitable heavy weight champion of the broadcast industry, video phones capturing the imagination of the consumer, and low earth orbiting satellites as a telecommunications El Dorado? Guesses and hunches when added together still make guesses and hunches, not substantial evidence as the APA requires. On the other hand, the recent annals of high tech history are replete with examples of supersonic growth from very modest beginnings (like that of Twenty First Wireless), including Microsoft, Cisco, Amazon.com, AOL, E-bay, and Yahoo.

6. If the Commission remains faithful to its 30 MHz C block restricted auction plan, no congressional objective would be seriously compromised. The most advanced and economically viable wireless services would be offered; very small and small entrepreneur licensees would be promoted because of their ability to attract investment capital that is lured by profit forecasts; and, federal revenues would be enhanced in restricted bidding because a 30 MHz license is worth more than 3 disassembled 10 MHz licenses. On the other hand, to splinter a 30 MHz C block license into three equal parts would undeniably threaten to shipwreck very small and small entrepreneurs. Shipwrecks are not a certainty, but substantial evidence does not require certitudes. What is required is a level of confidence that a reasonably prudent man or woman would rely upon in making important public policy under section 309(j)(3). And in light of the record before the Commission, prudence dictates sticking with 30 MHz C block licenses with restricted bidding because that auction plan creates the least risk of seriously subverting any among the ensemble of congressional goals embraced in that latter statute.

B. Unique Legal Status and Treatment of Native Americans.

7. Not a single syllable in the Comments or other material before the Commission contradicts the unique legal status Native American entrepreneurs enjoy under section 309(j)(3), the Constitution, and the Commission's own policy elaborated in its June 8, 2000 Statement (FCC 00-207) aiming to promote wireless service on tribal lands. Indian tribes further enjoy a unique trust relationship with the federal government, including the Federal Communications Commission.

8. From the Trail of Tears to the Sand Creek Massacre to General Phil Sheridan's ugly quip that the only good Indian is a dead Indian to recurring broken treaty promises, Native Americans have been victims of discrimination based on tribal status. Vestiges of that overt discrimination continue today. Native Americans are generally handicapped in the market for investment capital because of their historical exclusion from business opportunities and experience. How many Native Americans own or operate Fortune 500 companies? How many sit on the boards of directors of blue chip corporations? How many enjoy informal networks of friendships that penetrate the elite of the business world? Is it surprising that Native Americans in the capially

intensive telecommunications industry are as or more invisible than Ralph Ellison's *The Invisible Man*? In sum, there is a sound basis for the Commission to conclude that past discrimination against Native Americans based on tribal affiliation in capital markets requires special affirmative measures to make the playing field level in C block auctions. Remedial measures marching to that drummer would easily pass constitutional scrutiny.

9. The doctrine of tribal sovereign immunity fortifies the case for unique affirmative measures to benefit Native Americans in C block auctions. That immunity generally prohibits suits against federally recognized tribes. Tribes own reservation lands; and, when occupied by Native American businesses like Twenty First Wireless on the Seneca reservation in New York, are off limits as security for creditors. Thus, bankers are especially reluctant to lend to Twenty First Wireless or would-be clones. No other identified class in section 309(j)(3) confronts such a discrete business disadvantage.

10. Special bidding advantages for Native Americans are also justified by cultural and tribal economic considerations. As the attached letter from the Seneca tribe demonstrates, tribal authorities prefer receiving wireless service from Native American businesses because of their cultural affinity and inspiration to other tribal members or businesses. The Commission's June 8 policy statement obliges consultation with tribal governments prior to implementing regulatory actions that significantly affect tribes, as the auction rules for C block licenses undeniably do. To adopt such rules without such consultations would be a flagrant violation of that policy and the Administrative Procedure Act. The Seneca tribe letter thus justifies special Commission treatment of Twenty First Wireless, at least for the 30 MHz C block license in New York that includes Seneca lands in the wireless market to be served.

11. The unique bidding advantages proffered by Twenty First Wireless for C block auctions in its June 22, 2000 Comments are fourfold and calculated to bolster very small entrepreneur Native American viability in the intensely competitive wireless market by upgrading their ability to command investment capital and to operate efficiently and profitably: a 10 year license payment schedule; immediate transferability of a license; an attribution safe harbor for long-term management contracts with telecommunications veterans that would accommodate mentoring of Twenty First Wireless or other new Native American wireless entrant; and, a special bidding credit above that of all other very small and small entrepreneurs for C block licenses that will serve tribal lands. As amplified above, these auction advantages are fully justified by the Constitution, section 309(j)(3), and the Commission's own wireless policy towards tribal nations and tribal lands.

12. Finally, endorsing the Native American auction advantages recommended by Twenty First Wireless would leave other policy objectives of the Commission virtually undisturbed. At this time, Twenty First Wireless knows of no other Native American very small entrepreneur that is contemplating bidding in the forthcoming C block auction. Thus, the market impact of the advantages would be inaudible, yet would nevertheless honor the congressional and Commission aspiration for a Native American presence in the wireless telecommunications industry.

C. Section 309(j)(3) is not a coronation of open market competition.

13. The Commission's C block auction rules must operate within the confines of 47 U.S. Code, section 309(j)(3). Since Congress did not address all the particulars of competitive bidding auction rules, under the Chevron ruling of the United States Supreme Court, *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Commission's bidding systems command some but not unlimited judicial deference. They must neither be arbitrary nor capricious nor manifestly contrary to the statute.

14. Section 309(j)(3) directs the Commission to pursue the following objectives in fashioning systems of competitive bidding: rapid deployment of new technologies; promoting economic opportunity and marketplace competition; dispersal of licenses among a wide variety of applicants, including small businesses, rural phone companies, and businesses owned by minority groups and women; recovery of revenue for the U.S. Treasury; avoidance of unjust enrichment; and, efficient use of the electromagnetic spectrum. These objectives enjoy equal statutory dignity. Some are in conflict, such as open marketplace competition and federal revenues as opposed to license dispersal to include small businesses, Native Americans, and rural phone companies.

15. What the Chevron precedent and the APA require is a reasoned explanation by the Commission supported by substantial evidence for C block auction rules that justify the balance struck among the multiple goals of section 309(j)(3). What the Commission cannot do either de facto or de jure is to abandon or to marginalize a statutory objective. Yet that is what the Commission's latest proposed unrestricted bidding rules and fracturing of 30 MHz C block licenses would accomplish. Very small and small new entrant entrepreneurs, especially Native American businesses, would not be viable participants in the C block auctions; even if a 10 MHz license were won, it would be like winning a white elephant, a pyrrhic victory not worth the economic investment.

16. If the Commission is to relegate the license dispersal objective of Congress to the caboose of the section 309(j)(3) train, it must convincingly show a causal nexus between the policy change and the enhancement of other objectives that command no higher congressional sanction. This the Commission has not done. It has neither quantitatively estimated nor explained how the proposed auction changes would accelerate the deployment of new technologies, nor how competition would be strengthened over the status quo, nor how much additional public revenue would be raised, nor how spectrum efficiency would climb and by what percentage. Of course, neither Chevron nor the APA requires the Commission to proceed with Euclidean exactitudes; but more than ex cathedra conclusions are demanded. See *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Insurance*, 463 U.S. 29 (1983). The grandfather rule is emblematic. The Commission has never persuasively explained how treating current telecommunications oaks as acorns in C block license auctions as if they had remained in swaddling clothes for years would either strengthen competition, add acceleration in the deployment of new technologies, jump spectrum efficiency, or increase license dispersal among small businesses, rural phone companies, or Native Americans. The Commission is simply grandfathering for the sake of grandfathering. At best it might be argued that grandfathering protects the business reliance interests of former

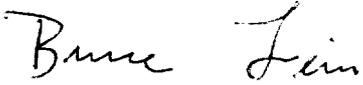
acorns. But if the Commission is serious about protecting reliance interests, then why is it proposing to cast into the sea the reliance interests of very small and small entrepreneurs who have planned on restricted bidding for 30 MHz C block licenses? To both celebrate and denigrate reliance interests in the same rulemaking would mark a high water point in agency caprice.

16. The Commission enjoys latitude under Chevron to re-balance the multiple objectives of section 309(j)(3) in fashioning auction rules for C block licenses. But the change in calculation must be reasonably explained in terms of statutory objectives and buttressed by substantial evidence. See *State Farm*, supra, at 57. The Commission has not surmounted that legal hurdle insofar as proposes to fractionate 30 MHz C block licenses, sharply curtail restricted bidding, or endorse grandfathering.

Conclusion

For the reasons elaborated above, the Commission should continue to auction 30 MHz C block licenses subject to restricted bidding, but with special advantages for very small Native American entrepreneurs with regard to payment schedules, license transfers, long-term management contracts, and service on tribal lands both to remedy past discrimination and to promote Indian tribal culture and economic opportunity.

Respectfully submitted,

By: 

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June 30, 2000

Seneca Nation of Indians

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To Whom It May Concern:

In consideration of the Federal Communications Commission's initiative outlined in their Public Release of June 8, 2000 Titled... "Federal Communications Commission Takes Steps to Promote access to Telecommunications on Tribal Lands." As President of and on behalf of The Seneca Nations of Indians, I endorse 21st Wireless, Inc. a T.P.S. Company. T.P.S. is a Native American owned company that currently possesses an Indian Traders License with our nation and has their corporate offices located on our reservation.

Historically our Nation has been underrepresented in the field of telecommunications and it is my strong conviction that the successful deployment and implementation of next generation wireless products and services should be facilitated through a Native American controlled telecommunications company.

Sincerely,

Duane J. Ray
President