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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Amendment of Part 1 of the Commission's) WT Docket No. 97-82
Rules – Competitive Bidding Proceeding)

PETITION FOR RECONSIDERATION

NextWave Telecom Inc. (“NextWave” or the “Company”), pursuant to section 1.429 of the Commission’s rules, 47 C.F.R. § 1.429, respectfully requests reconsideration of certain aspects of the Order on Reconsideration of the Third Report and Order, and Fifth Report and Order, in the above-captioned proceeding.¹ In that recently released order (“*Auctions Revision Order*” or “*Order*”), the Commission materially, and unlawfully, modified rules relating to its small business installment payment program for licensees in the broadband PCS Entrepreneur Blocks. Several aspects of the *Order* warrant reconsideration.

NextWave supports the Commission’s goal of moving to a reasonable, uniform and streamlined set of general competitive bidding rules for all auctionable services.² To date, the agency’s administration of its auction program has fallen far short of that goal. Even though all of the service-specific rules are purportedly designed to serve the same fundamental goals and purposes, there has been no uniformity in their scope or in their application, either between services or within the same service. For example, the *Order* reveals that the Commission has

¹ Amendment of Part 1 of the Commission’s Rules – Competitive Bidding, WT Docket No. 97-82, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, FCC 00-274, 65 Fed Reg. 52323 (Aug. 29, 2000) (“*Order*”).

² *Id.* at 1.

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failed “to assess late payment fees or cancel” the licenses of certain installment payment licensees,³ while at the same time it is pushing aggressively to confiscate and reauction NextWave’s PCS licenses.⁴ The Commission apparently has allowed certain licensees to retain their licenses and make (or withhold) installment payments in manners other than prescribed by rule, on an “informal” basis.⁵ And the *Order* suggests that an unspecified number of licensees are currently subject to an unknown set of payment, debt restructuring and “automatic” cancellation rules different from those applied to licensees.⁶ Thus, by its own words and actions, the FCC has demonstrated that its auction “rules” are shaped and administered on a non-public basis in accordance with unknown criteria. Such agency action is forbidden by law.⁷

The *Order* carries this unfortunate history forward in two particularly egregious respects. Each is discussed hereafter, in turn.

1. DEFAULT PAYMENTS

From the time of the initial C block auction up to release of the *Order*, the Commission’s policies and rules have provided that licensees who default on installment payment obligations and whose licenses are subsequently cancelled and reauctioned may recover all or a portion of their down payments, after the FCC is made whole upon mitigating its damages and after three percent penalty payments have been applied. In its litigation against NextWave in the company’s on-going bankruptcy reorganization proceeding, the Commission represented this to

³ *Id.* at n. 55

⁴ *See* NextWave Personal Communications, FCC 00-335, released Sept. 6, 2000.

⁵ *See Order* at n.87.

⁶ *See id.* at n.91.

⁷ *See* New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361, 366 (D.C. Cir. 1987); Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

be its own understanding of the result of a licensee's default in a non-bankruptcy context.⁸ In the *Order*, however, the Commission veers wildly off this well established path and purports to "clarify" that upon default, installment payment licensees shall forfeit their licenses and be subject to a payment obligation equal to the remaining unpaid portion of their high bid, regardless of the amount the Commission obtains in a subsequent reauction of their licenses.⁹ The purported "clarification" is in fact a new rule, and is invalid on three separate grounds.

First, even if the Commission could apply this new rule to future auction participants, it cannot do so to prior licensees. The change represents impermissible retroactive rulemaking in that it unreasonably affects the future legal consequences of past actions.¹⁰ NextWave relied on default penalty provisions in existence at the time of the initial C and F block PCS auctions when the company decided to participate in those auctions. The Commission is not legally empowered to alter those rules now, retroactively, to the detriment of NextWave.

Second, the Commission cannot interpret its regulations to cut off a party's rights where the agency has "failed to give fair notice of its interpretation."¹¹ Here the situation is far worse than a mere failure to give notice. The Commission has routinely and consistently given notice that a defaulting licensee will be subject to the same penalties as defaulting auction high

⁸ See Brief for Appellant, FCC, to the United States Court of Appeals for the Second Circuit, at 54 (The "3% assessment set forth in 47 C.F.R. 1.2104(g)(2) is the proper measure for determining the portion of NextWave's down payments that should stay with the FCC ..."). The Second Circuit relied on that representation. See *In Re NextWave Personal Communications, Inc.*, 200 F.3d 43, 58 (2nd Cir. 1999).

⁹ See *Order* at pp. 38-39; see also FCC's Br. in Opp. in *NextWave Personal Communs. Inc. v. FCC*, U.S. Sup. Ct. No. 99-1980, at 21-22 n.13 (filed Sept. 8, 2000) (asserting that under modified rules, "[d]efaulting licensees . . . are liable for the full amount they owe, without any mitigation based on the amount the FCC obtains when the licenses are re-auctioned.").

¹⁰ See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); *id.* at 216-24 (Scalia, J., concurring).

¹¹ *Trinity Broadcasting of Florida Inc. v. FCC*, 211 F.3d 618, 628-32 (D.C. Cir. 2000).

bidders.¹² The agency cannot now wipe away these past statements through a purported “clarification.”

Third, the purported clarification is illogical and unreasonable. The Commission’s off-stated rationale for its default provisions is to deter insincere bidding and provide auction participants an incentive to fulfill their bids.¹³ Under the purported clarification, however, an entity that defaults immediately after the close of an auction, and never makes a single down payment on its bid, will likely be assessed a far smaller penalty than an entity that completes the licensing process, makes all of its down payments and, conceivably, many installment payments as well. In short, the new rule will accomplish precisely the opposite result from that intended by the Commission. That such a result constitutes arbitrary and capricious agency action is too obvious to require citation to authority.

For all of the foregoing reasons, the Commission’s purported clarification of its default penalty rules must be reconsidered.

2. RESTRUCTURING RULE

The *Order* continues the Commission’s assault on the “restructuring” rule adopted prior to the initial C block auction rule in a way that, overall, materially harms installment payment participants and must be reconsidered. Under the original version of the rule, licensees were

¹² See, e.g., In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5564 (1994) (“After bidding closes, a defaulting auction winner (i.e., a winner who fails to remit the required down payment within the prescribed time, fails to pay for a license, or is otherwise disqualified) will be assessed an additional penalty of three percent ...”) (emphasis added); Letter to John A. Prendergast, Esq., DA 99-690, released April 9, 1999 (Wireless Telecommunications Bureau) (“A licensee that chooses to default, rather than comply with the payment obligation, will, therefore, still be obligated to make the Commission whole for the amount of the winning bid, subject to any mitigation of damages as a result of a subsequent auction of a license for the same spectrum.”).

¹³ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348 (1994), at paras. 147-155.

entitled to an automatic, penalty-free, 90-day grace period before they were considered to be in default on a scheduled payment.¹⁴ The *Order* attempts to justify modifications to the rule that originally were announced, without prior notice, in the Part 1 Third Report and Order in this Docket.¹⁵ Such modifications replace the original rule structure with one in which a payment received anytime within 90 days following its scheduled due date will be assessed a 5 percent penalty, and a payment received anytime thereafter, up to 180 days after the original due date, will be assessed a 10 percent penalty (for a cumulative penalty of 15%).¹⁶

As originally adopted, the restructuring rule provided for fixed payment grace periods in a manner consistent with commercial practices, and established a process for licensees to work through short-term financing issues without disrupting their commercial operations. That process would provide greater certainty to financial arrangements with investors and vendors, who would know that there would be a period during which a licensee would be entitled to breathing room to respond to short term issues, as necessary, thereby protecting their investments in a licensee's network and business operations – and establishing an incentive structure that would enable a licensee to attract investor and vendor financing in the first instance. NextWave bid in the initial C and F block auctions in reliance on the rule as originally written, and attracted investment and vendor financing support on that basis.

¹⁴ See 47 C.F.R 1.2110(e)(4) (1994).

¹⁵ See *Order* at paras. 16-28; Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, WT Docket No. 97-82, ET Docket No. 94-32, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 374 (1997) ("Part 1 Third Report and Order").

¹⁶ See *Order* at para. 17.

The rule modifications announced by the Commission materially change the factors on which NextWave participated in the auctions and harm the company, its creditors and investors. The modifications unreasonably reallocate creditor-debtor benefits and burdens, and constitute impermissible retroactive rulemaking because they materially and detrimentally alter the legal consequences of past actions.¹⁷

These criticisms are not blunted by the explanations offered by the Commission for the rule modifications. The driving force behind the rule revision is the Commission's conclusion that it "may not have the necessary resources" to administer the arrangement contemplated in the original rule.¹⁸ While the Commission is undoubtedly in the best position to evaluate its own resources, it is fundamentally unfair (and unlawful) for it to use such an evaluation, and its regulatory power, to benefit itself while imposing new burdens on installment payment participants who relied to their detriment on the rule as originally written.¹⁹ The fact that the Commission now blithely concludes after-the-fact that such reliance was "misplaced"²⁰ is irrelevant as a legal matter. Such reliance was reasonable and bars attempts by the Commission to displace it.²¹

The installment payment program establishes a contractual relationship between the Commission and licensees, as manifested by the existence of note and security agreements that

¹⁷ See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); *id.* at 219 (Scalia, J., concurring).

¹⁸ See Part 1 Third Report and Order, at para. 110.

¹⁹ See *Lynch v. United States*, 292 U.S. 571, 579 (1934); see also *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

²⁰ See *Order* at para. 13.

²¹ *Trinity Broadcasting of Florida Inc. v. FCC*, 211 F.3d 618, 628-32 (D.C. Cir. 2000).

the Commission chose to impose on licensees. That relationship binds both parties unless they mutually agree otherwise, just as the documents say. The Commission's claim that references in the notes and security agreements to "then-applicable" rules means that licensees have agreed to be bound by whatever future rule changes the Commission cares to impose is absurd.²² In entirely analogous circumstances, such a interpretation was previously advanced by the government and rejected by the Supreme Court out-of-hand.²³

Commercial reliance on those contracts is undermined when the Commission takes actions to change its obligations merely by amending its rules. Except in narrow circumstances not present here, federal agencies that attempt to relieve themselves of contractual obligations through the exercise of their regulatory powers open themselves to suits for monetary damages under standard principles of contract law.²⁴ In the case of NextWave and other Entrepreneur Block licensees, such damages could easily total billions of dollars. In modifying the restructuring rule, the Commission has failed to consider this important potential consequence of modifying its restructuring rule, and, as a result, the modification is arbitrary and capricious and contrary to reasoned decision-making.²⁵ Accordingly, it must be reconsidered.

²² See *Order* at para. 26.

²³ See *United States v. Winstar Corporation*, 116 S.Ct. 2432, 2472 (1996) ("...[T]he Government's suggestion that the parties meant to say only that the regulatory treatment laid out in these documents would apply as an initial matter, subject to later change at the Government's election, is unconvincing. It would, indeed, have been madness for the respondents to have engaged in these transactions with no more protection than the Government's reading would have given them, for the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed.") (internal citation omitted).

²⁴ See *id.*, 116 S.Ct. at 2464; *California Federal Bank v. United States*, 1997 WL 780936 (Fed.Cl.), Dec. 22, 1997.

²⁵ See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). This failure to consider the potential financial consequences to the Commission (and taxpayers) also renders the Commission's "clarification" of its default penalty rule, discussed *supra*, arbitrary and capricious.

CONCLUSION

NextWave respectfully requests that the Commission grant this petition for reconsideration for the reasons discussed herein.

Respectfully submitted,



Michael R. Wack
NextWave Telecom Inc.
601 13th Street, N.W.
Suite 320 North Tower
Washington, DC 20005
202-661-2083

September 28, 2000

CERTIFICATE OF SERVICE

I, Ian Heath Gershengorn, hereby certify that the foregoing "NextWave's Petition for Reconsideration," was served this 28th day of September 2000 via hand delivery on the following:

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 - 12th Street, SW
Washington, DC 20554

The Honorable William E. Kennard
Federal Communications Commission
445 - 12th Street, SW
Washington, DC 20554

The Honorable Susan Ness
Federal Communications Commission
445 - 12th Street, SW
Washington, DC 20554

The Honorable Michael Powell
Federal Communications Commission
445 - 12th Street, SW
Washington, DC 20554

The Honorable Harold Furchtgott-Roth
Federal Communications Commission
445 - 12th Street, SW
Washington, DC 20554

The Honorable Gloria Tristani
Federal Communications Commission
445 - 12th Street, SW
Washington, DC 20554

Christopher Wright
Office of the General Counsel
Federal Communications Commission
445 - 12th Street, SW, Room 3-C252
Washington, DC 20554

Kathy Brown
Office of Chairman Kennard
Federal Communications Commission
445 - 12th Street, SW, Room 8-B201
Washington, DC 20554

Clint Odom
Office of Chairman Kennard
Federal Communications Commission
445 - 12th Street, SW, Room 8-B201
Washington, DC 20554

Mark Schneider
Office of Commissioner Ness
Federal Communications Commission
445 - 12th Street, SW, Room 8-B115
Washington, DC 20554

Peter Tenhula
Office of Commissioner Powell
Federal Communications Commission
445 - 12th Street, SW, Room 8-A204
Washington, DC 20554

Bryan Tramont
Office of Commissioner Furchtgott-Roth
Federal Communications Commission
445 - 12th Street, SW, Room 8-A302
Washington, DC 20554

Adam Krinsky
Office of Commissioner Tristani
Federal Communications Commission
445 - 12th Street, SW, Room 8-C302
Washington, DC 20554

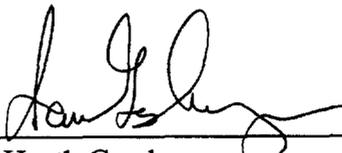
James D. Schlichting, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 3-C207
Washington, DC 20554

Diane Cornell, Associate Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 3-C207
Washington, DC 20554

Kathleen O'Brian-Ham, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 3-C207
Washington, DC 20554

Kelly Quinn
Legal Assistant to the Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 3-C207
Washington, DC 20554

International Transcription Services, Inc.
445 12th Street, S.W.
Room CY-B400
Washington, D.C. 20054



Ian Heath Gershengorn