

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Disposition of Down Payments and Pending) WT Docket No. 02-276
Applications for Licenses Won During Auction)
No. 35 for Spectrum Formerly Licensed to)
Nextwave Personal Communications Inc.,)
NextWave Power Partners, Inc., and Urban)
Comm-North Carolina, Inc.)

To: The Commission

REPLY COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC (“Cingular”) hereby replies to the comments of Nextel Communications, Inc. (“Nextel”) submitted in response to the Commission’s *Public Notice* regarding the disposition of down payments and pending applications for licenses won in Auction 35 that have yet to be awarded.¹ Nextel does not oppose relief to Auction 35 applicants. Rather, it seeks to bar applicants (and their affiliates or investors), who avail themselves of debt relief the Commission may grant by authorizing dismissal of some or all of their applications for the yet-to-be granted (and still unavailable) Auction 35 licenses, from subsequently acquiring such licenses or spectrum for three years. Nextel’s rationale is makeweight at best and constitutes another transparent attempt to grab future spectrum without any real auction competition.² As shown herein, Nextel’s punitive proposal must be rejected.

¹ *Public Notice*, FCC 02-248 (rel. Sept. 12, 2002) (“*Public Notice*”).

² See Comments of Nextel Communications, Inc., WT Docket No. 02-55, at 49-64 (filed May 6, 2002) (seeking to acquire 10 MHz of unencumbered, nationwide spectrum without an auction); Reply Comments of Nextel Communications, Inc., WT Docket No. 02-55, at 8, 61-68 (filed Aug. 7, 2002) (same); see also Comments of Cingular Wireless LLC and ALLTEL (continued on next page)

Nextel begins its comments by quoting grossly out of context the previous filings of various carriers in the *Restructuring Proceeding*³ and relies on the fact that certain applicants who took advantage of FCC relief were penalized there.⁴ Nextel claims that its motivation is simply “to preserve the integrity” of FCC auctions.⁵ This is hardly the case.

Nextel wants the Commission to punish innocent Auction 35 participants who were ready and willing to pay the amount bid and put the spectrum into use had the licenses been available. By contrast, in the *Restructuring Proceeding*, licenses had been issued but the licensees asked for relief because they could not make the payments on which their licenses were conditioned.⁶ Given the multitude of imminent defaults,⁷ the FCC had a real auction integrity problem in granting amnesty and other relief to the “winners.” Thus, depending upon the relief elected, the

Communications, Inc., WT Docket No. 02-55, at 11-13 (filed May 6, 2002); Further Comments of ALLTEL Communications, Inc., AT&T Wireless Services, Inc., Cingular Wireless LLC, Coupe Communications, Inc., Nokia Inc., Southern LINC, and United States Cellular Corporation, WT Docket No. 02-55, at 12-17 (filed Sept. 23, 2002).

³ See *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Second Report and Order*, 12 F.C.C.R. 16436 (1997), *recon.*, *Order on Reconsideration of the Second Report and Order*, 13 F.C.C.R. 8345 (1998), *further recon.*, *Second Order on Reconsideration of the Second Report and Order*, 14 F.C.C.R. 6571 (1999) (collectively, the “*Restructuring Proceeding*”); see also *U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000) (upholding the restructuring scheme).

⁴ See Comments of Nextel Communications, Inc., WT Docket No. 02-276, at i-iii, 5-12 (filed Oct. 11, 2002) (“Nextel Comments”).

⁵ *Id.* at 9-10.

⁶ See Comments of Cingular Wireless LLC, WT Docket No. 02-276, at 9-10 (filed Oct. 11, 2002) (“Cingular Comments”).

⁷ See, e.g., Curt Harler, *FCC Blockbuster; FCC Offers Payment Scheme to Buyers of C Block Wireless Spectrum*, Communications International, Dec. 1997 (describing the “spectre of default on the billions of dollars bid for C-block spectrum rights”); *C Block Companies Disappointed By Penalties, Lack of Incentives on Debt*, Mobile Communications Daily, Oct. 6, 1997 (describing concerns of key legislators of “large-scale defaults”).

FCC penalized licensees by retaining certain payments and/or limiting their ability to reacquire surrendered licenses for two years from the start date of the reauction.⁸

In the present situation, auction integrity is not at issue; the good faith of the applicants has been established. Relief is not being sought because winning bidders were unable to pay the prices bid – as evidenced by their timely upfront and down payments. Rather, the licenses have not been available and will not be available for the foreseeable future.⁹ Thus, the premise on which the FCC held the auction – to promptly issue licenses to expedite service to the public – has failed to materialize.¹⁰

Nextel also argues that restricting the future acquisition of spectrum by Auction 35 applicants is consistent with past statements of several major telecommunications providers, including Cingular’s parents, BellSouth Corporation (“BellSouth”) and SBC Communications Inc. (“SBC”).¹¹ The statements attributed to BellSouth and SBC, however, were made during 1997 while the Commission was considering restructuring options for C Block licensees who were in imminent default.¹² Again, unlike the present situation, auction integrity was truly at issue, and thus those statements were well-considered. They have no applicability to the instant situation where compliance with the FCC’s auction payment rules is not at issue.

⁸ See *Order on Reconsideration of the Second Report and Order*, 13 F.C.C.R. at 8357-71.

⁹ See Cingular Comments at 4 & n.9; see also Mark Rockwell, *NextWave: No End In Sight*, Wireless Week, Oct. 14, 2002.

¹⁰ See Cingular Comments at 2-5.

¹¹ See Nextel Comments at 6-8.

¹² See, e.g., Letter to William F. Caton, FCC, from David G. Frolio, BellSouth, in WT Docket No. 97-82, at 2 (Aug. 15, 1997) (“It would be fundamentally unfair to parties like BellSouth that participated without success in the auction to permit the winners *to relinquish their licenses* and then to purchase the same or different licenses.”) (emphasis added), *quoted in* Nextel Comments at 7-8.

Lastly, Nextel argues that if Cingular (and AT&T Wireless) were allowed to participate in a “‘discount’ re-auction . . . [by] assuming a similar financial interest in new *front* companies, such opportunism would frustrate the Commission’s goals of protecting the integrity of its auctions and preventing unjust enrichment.”¹³ Nextel, however, ignores the fact that the FCC fully reviewed Cingular’s relationship with Salmon PCS, LLC (“Salmon”)¹⁴ and found the public interest would be served by granting it licenses.¹⁵ Thus, Nextel has created a “straw man” in order to argue that Cingular (and others) should be excluded from future auctions. The insinuation of some sort of fraudulent arrangement without *any* foundation is bad enough. Urging the Commission to penalize carriers based on literally nothing is irresponsible and ignores fundamental notions of administrative due process.¹⁶

In the final analysis, Nextel’s positions demonstrate how desperate it is to acquire spectrum without a meaningful auction (or any auction at all¹⁷). It is not coincidental that Nextel’s proposal would preclude virtually every major wireless carrier from competing for the spectrum on which it was the high bidder in Auction 35. This position undermines both the

¹³ Nextel Comments at 11 (emphasis added).

¹⁴ As noted in its comments, Cingular is the holder of a non-controlling ownership interest in Salmon. *See* Cingular Comments at 1 n.1.

¹⁵ *See Public Notice*, “Wireless Telecommunications Bureau Grants Forty-Five C and F Block Broadband Personal Communications Services (PCS) Licenses,” DA 01-2355 (rel. Oct. 10, 2001). The grants became final 40 days after issuance. *See* 47 C.F.R. §§ 1.106(f), 1.115(d), 1.117(a).

¹⁶ *See, e.g., KPMG, LLP v. SEC*, 289 F.3d 109, 116 (D.C. Cir. 2002); *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000).

¹⁷ *See supra* note 2.

integrity of the Commission's auction process and the goal of Congress to ensure that spectrum is awarded to the entity that values it the most and will put it to its highest and best use.¹⁸

CONCLUSION

For the foregoing reasons, Nextel's self-serving proposal to restrict the future acquisition of spectrum by Auction 35 applicants electing relief should be rejected.

Respectfully submitted,

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¹⁸ See Cingular Comments at 7 & n.21.