

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Disposition of Down Payments and  
Pending 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.

WT Docket No. 02-276

**REPLY COMMENTS OF CELLCO PARTNERSHIP  
d/b/a VERIZON WIRELESS**

Pursuant to Section 1.415 of the Commission's rules, Verizon Wireless hereby submits its reply comments in the above-captioned proceeding.<sup>1</sup>

**I. THERE IS AN OVERWHELMING CONSENSUS THAT THE UNPRECEDENTED CIRCUMSTANCES OF AUCTION 35 REQUIRE THE COMMISSION TO GRANT RELIEF.**

Except for one lone individual opposing relief,<sup>2</sup> commenters in this docket agree that the Commission must permit Auction 35 winning bidders to opt out of any remaining obligations. Given that the Commission has already taken official notice of the current economic plight of the

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<sup>1</sup> As noted in Verizon Wireless's opening comments, *see* Comments of Cellco Partnership d/b/a/ Verizon Wireless, *Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licenses to NextWave Personal Communications, Inc., NextWave Power Partners, Inc. and Urban Comm — North Carolina, Inc.*, WT Docket No. 02-276, at 2 n.1 (filed Oct. 11, 2002) ("*Verizon Opening Comments*"), Verizon Wireless and the Commission are in litigation over the legality of the *Partial Refund Order* in the Court of Appeals for the District of Columbia Circuit, and Verizon Wireless has filed suit seeking damages arising from the Commission's breach of contract, illegal exaction, and taking of property in the Court of Federal Claims. As with our opening comments, nothing in these Reply Comments should be construed as acquiescence in any legal position taken by the Commission or the United States in those proceedings.

<sup>2</sup> *See* Comments of Joseph Friedman ("*Friedman Comments*"). (All comments referred to herein were filed in the above-captioned proceeding.) Friedman's sole, and erroneous, basis for opposing relief is discussed *infra* at pp. 6-7.

wireless industry, it is unsurprising that no commenter contests this issue.<sup>3</sup> Nor is there any real dispute that the continuing uncertainty and enormous contingent liability created by the Commission's position regarding Auction 35 has been a substantial contributing factor to these economic woes.

This is not a case in which the current state of the economy supplies an *excuse* for a licensee's failure to meet a clearly established payment obligation.<sup>4</sup> Rather, the situation of Auction 35 winners — large and small alike— is fundamentally different from any circumstance the Commission has confronted in the past. Never before has the Commission faced a situation where it has been legally disabled from delivering spectrum licenses after the close of an auction. Never before have auction winners been placed in the position of performing all the obligations of winning bidders without receiving any benefit from the licenses won at auction. Never before have applications been held in “pending” status for more than 20 months, not because of issues as to qualification, but because of the Commission's inability to quiet title on the spectrum. These circumstances are unique and present a different and far more compelling case for relief than the C-Block restructuring or any other waiver proceeding.

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<sup>3</sup> The economic throes of the wireless industry have, if anything, intensified since the Commission issued its *Partial Refund Order*. Between March 26, 2002 and September 30, 2002, the market capitalization of wireless service providers and rural wireless service providers has plummeted by more than 40 percent, while the market capitalization of tower manufacturers and wireless equipment manufacturers fell by 70.7 and 48.6 percent, respectively during the same period. See <http://finance.yahoo.com/?u> (last visited Oct. 16, 2002); Standard & Poor's Research Insight. Since the *Partial Refund Order*, more than 48,600 wireless service provider and equipment manufacturer workers lost their jobs. See <http://www.forbes.com> (last visited Oct. 16, 2002). Indeed, since September 30, two weeks after the Commission initiated this proceeding, 11,700 workers in the wireless industry have lost their jobs. See *id.*

<sup>4</sup> See, e.g., *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Second Report and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 16436 (1997) (“*C-Block Restructuring I*”).

The unique circumstances of Auction 35 render the Commission's task a simple one. It need not be concerned with the complaints of licensees in other auctions, who do not have standing in this proceeding and are in no way similarly situated to Auction 35 winners. Nor need the FCC consider any monetary or non-monetary penalties. The record is clear that Auction 35 winners placed their winning bids in good faith and have fulfilled all of their obligations to date. There is simply no wrongful conduct to punish or deter. What the Commission must do is act swiftly and decisively to allow Auction 35 winners to opt out of their winning bids and receive the refund of their remaining deposits. This will ensure maximum positive effect on an industry that desperately needs the new capital expenditure that relief from contingent liability would stimulate.

Nor can there be any real dispute that the Commission has the power to grant "opt out" relief in this proceeding, without changing any existing rules or regulations. Only a few commenters appear to question this authority by suggesting that some alteration of existing regulations is required.<sup>5</sup> As Verizon Wireless demonstrated in its opening comments, the Commission's existing regulations never contemplated the unique circumstances of Auction 35, and therefore no *modification* of any existing rules is required in order to grant relief.<sup>6</sup> The Commission need only exercise its public interest authority under Section 309(j), as it has done in the past.<sup>7</sup> Moreover, to the extent any regulation is applicable, it is Section 1.934(e)(2), which

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<sup>5</sup> See Comments of PCS Partners, L.P., at 2 (filed Oct. 11, 2002) ("*PCS Partners Comments*") ("[A]ny *modification* of the Commission's rules in connection with Auction 35 should apply equally to all of the Commission's auctions and all auction participants." (emphasis added)); Comments of Lafayette Communications Company L.L.C., at 3 (filed Oct. 11, 2002) ("*Lafayette Comments*") ("[T]he Commission similarly must *adjust* its rules and procedures by allowing bidders to opt out of their auction bids." (emphasis added)); Comments of Black Crow Wireless, L.P., at 6 & n.7 (filed Oct. 11, 2002) ("*Black Crow Comments*") ("[R]evising the auction process post close of the auction is nothing new." (emphasis added)).

<sup>6</sup> See *Verizon Opening Comments*, at 16-18.

<sup>7</sup> See *id.*

permits the Commission to dismiss applications without prejudice where the licenses are unavailable.<sup>8</sup> Application of this provision would require no modification of existing regulations. Finally, even if the Commission takes the view that there are applicable obligations or default provisions that must be waived, the exercise of its waiver authority operates to suspend the rules under the unique circumstances of Auction 35, not to modify them as to any and all past and future auction winners.<sup>9</sup>

## **II. WINNING BIDDERS FOR CONTESTED NEXTWAVE AND URBAN COMM SPECTRUM ARE NOT SIMILARLY SITUATED TO AUCTION WINNERS WHO WERE AWARDED THEIR LICENSES.**

Despite the obvious difference between Auction 35 winning bidders, who have never received the contested licenses, and *licensees* who are unable to meet payment obligations after accepting delivery of their licenses, two commenters argue that the Commission should permit *any* winning bidder from any auction that is unable to meet its payment obligations to opt out for a full refund.<sup>10</sup> Ignoring the same distinction, another commenter suggests that there must be “parity” in treatment between the original C-block licensees and the Auction 35 winning bidders.<sup>11</sup> These arguments are flawed because they attempt to elide critical differences between their authors and the Auction 35 winners.

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<sup>8</sup> See *id.* at 19.

<sup>9</sup> See *id.* at 20-22; see also *infra* at pp. 4-7.

<sup>10</sup> See Comments of Eldorado Communications, LLC (filed Oct. 11, 2002) (“*Eldorado Comments*”); Comments of Alpine PCS, Inc. (filed Oct. 11, 2002) (“*Alpine Comments*”). Eldorado did not participate in Auction 35, and it has already forfeited money it had paid to the Commission before it opted to return the licenses it had won in Auction 5. Accordingly, as the Commission found with respect to Eldorado’s opposition to Auction 35 winners’ *Joint Request for Immediate Refund of Auction 35 Down Payments for NextWave Licenses*, Eldorado has no standing to protest a Commission decision to permit Auction 35 winners to opt out without penalty. See *Requests for Refunds of Down Payments Made in Auction No. 35*, Order, 17 FCC Rcd 6283, 6284 ¶ 1 n.5 (2002) (“*Partial Refund Order*”).

<sup>11</sup> See *PCS Partners Comments*.

First, because the contested licenses have never been tendered to Auction 35 winners, and thus Auction 35 winners have never had use of the spectrum associated with those contested licenses, Auction 35 winners are not similarly situated to any auction winners that have accepted delivery of spectrum licenses. In fact, the case of Auction 5 winners, such as Eldorado Communications, LLC (“Eldorado”), is the inverse of the case presented here. The Commission fulfilled all its auction obligations to those licensees, and they nonetheless sought modification of payment obligations that they had agreed to in advance. Far from “play[ing] by the rules,” Auction 5 licensees sought to change the rules after the Commission had performed its side of the auction bargain.<sup>12</sup> They were given use of their licenses, and only thereafter sought to keep them at a discounted rate or return them free of charge after use.<sup>13</sup> Auction 35 winners have never been (and will never be) in the position of electing to keep or return licenses from which they have derived some measurable value.

Second, Eldorado’s and Alpine PCS Inc.’s (“Alpine”) focus on the superficial similarity between the economic hardships facing Auction 35 winners and other licensees misses the point. As explained above, although numerous licensees in the past and present have undoubtedly faced economic hardships that have made it difficult, if not impossible, to comply with their payment obligations, the mere presence of economic hardships is not why Auction 35 winners seek and require relief. Here, the deleterious effects of the Commission’s inability to deliver the spectrum licenses are *in themselves* a substantial factor causing the economic hardships. None of the Auction 5 winners—or any other winners in any government auction of which we are aware—

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<sup>12</sup> *Eldorado Comments*, at 5.

<sup>13</sup> Given that Verizon Wireless and the other winning bidders stood ready and able to take delivery for a reasonable period of time following the close of the auction, and subsequently engaged in extensive settlement discussions in which they were willing to pay their full bid prices for the licenses, Eldorado’s accusation that the “Auction No. 35 winners have sought at every turn to escape from liability for their Auction No. 35 bids” is wholly unfounded. *Id.* at 6.

has been exposed to a 20-month period of substantial contingent liability without receiving any value in return. Nor does the enforcement of a continuing and indefinite obligation to pay serve any public interest goal underlying Section 309(j) or the Commission's rules. By contrast, enforcing a payment schedule agreed to by an Auction 5 winner that has received delivery is fully consistent with past Commission precedent and *does* serve the goal of auction integrity. For these reasons, neither Auction 5 winners nor Auction 35 winners that have received their licenses are similarly situated to winning bidders for contested NextWave and Urban Comm licenses.<sup>14</sup>

A few commenters argue that the Auction 35 participants were aware at the time they placed their bids that the licenses were subject to pending litigation, and therefore, by implication, the Auction 35 participants assumed the risk associated with that litigation.<sup>15</sup> As Verizon Wireless explained in its opening comments, neither the Commission nor the Auction 35 participants could have anticipated the events that unfolded after the close of the auction.<sup>16</sup> Both viewed the central purpose of the auction as putting the contested spectrum to immediate use. Thus, both parties' primary purpose for entering into the auction process in the first place was frustrated by events outside their control. The Commission itself has acknowledged publicly that this unanticipated turn of events placed the validity of Auction 35 into "considerable doubt" and that Auction 35 was "voided" and "largely arguably nullified."<sup>17</sup> In light of these candid

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<sup>14</sup> Where the parties are not similarly situated, and the factual differences between the parties are relevant to the purposes of the Telecommunications Act, the Commission need not treat the parties similarly. *See, e.g., Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965); *East Alabama Medical Center v. Shalala*, 925 F. Supp. 27, 33-34 (D.D.C. 1996).

<sup>15</sup> *See Friedman Comments; Eldorado Comments*, at 4-5; Comments of Nextel Communications, Inc., at 1 n.6 (filed Oct. 11, 2002) ("*Nextel Comments*").

<sup>16</sup> *See Verizon Opening Comments*, at 3-4, 12 n.39, 25-26.

<sup>17</sup> *Id.*; Petition for Certiorari at 13, *FCC v. NextWave Personal Communications Inc.*, No. 01-653 (U.S. filed Oct. 19, 2001).

admissions by the Commission, any suggestion that Auction 35 winners knowingly undertook the risks associated with a massive contingent liability of indefinite duration should be dismissed.

### **III. THE COMMISSION MUST NOT PROHIBIT AUCTION 35 WINNING BIDDERS WHO OPT OUT FROM PARTICIPATING IN FUTURE AUCTIONS.**

Nextel Communications, Inc. (“Nextel”), alone recommends that the Commission grant relief only on the condition that Auction 35 winners who choose opt out “be barred for at least three years from acquiring the [NextWave and Urban Comm] licenses,” whether by auction or through the secondary market.<sup>18</sup> This is clearly an attempt by Nextel to ensure that it will face no meaningful competition for these licenses if the Commission ever were to be in a position to reauction them. There is no public interest or other justification for imposing such a penalty on Auction 35 winners.

As Nextel concedes, the Commission has taken this drastic measure only where it was necessary to punish or deter gaming or to prevent unjust enrichment.<sup>19</sup> Because of the unique circumstances of Auction 35, there is no such need for debarment. First, as explained in Verizon Wireless’s opening comments, Auction 35 winners did not engage in speculation or gaming.<sup>20</sup> Auction 5 licensees, because they had use of the licenses at issue and could gain perspective on their actual value once in hand, were well positioned to game the system and repurchase the precise licenses they were already using at a discounted price in a short time following their returning them to the Commission. Auction 35 winning bidders have never enjoyed possession

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<sup>18</sup> *Nextel Comments*, at iii.

<sup>19</sup> *See Verizon Opening Comments*, at 10; *see also C-Block Restructuring I*, 12 FCC Rcd 16436, 16457 ¶ 42. In fact, even in the C-block restructuring context, the Commission did not debar licensees who chose blanket amnesty from reacquiring the licenses at any future time. *See id.* at 16462 ¶ 54 (“Licensees electing the amnesty option will be eligible to bid for any and all licenses at the reauction.”).

<sup>20</sup> *See Verizon Opening Comments*, at 23-25.

of the contested licenses and thus are not in the position to engage in the same “gaming” that was of concern in Auction 5.<sup>21</sup> Auction 35 winning bidders were ready and able to accept the licenses at their full bid prices for a reasonable time after the close of the auction.<sup>22</sup>

Second, contrary to Nextel’s suggestion, if the Commission were to permit opt out without penalty, Auction 35 winners would receive no unjust enrichment or “windfall.”<sup>23</sup> They have never had use of the licenses and they have already suffered tremendous losses due to the retention of their deposits without interest and the perpetuation of the enormous contingent liability.<sup>24</sup> The only “windfall” from Nextel’s proposal would be reaped by Nextel and other non-Auction 35 winners if they were permitted to bid in skewed auctions wherein Auction 35 winners, which serve close to 75% of all wireless consumers, cannot participate. Such a result would compromise the ability of future auctions to identify the highest and best user of those licenses and reduce auction proceeds to the detriment of the public fisc.<sup>25</sup>

Third, because the application of the Commission’s auction rules to the unique situation presented here was far from “ascertainably certain” at the close of the auction, well-established principles of administrative law prevent the Commission from imposing any penalty in this

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<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> *Nextel Comments*, at 12. Nextel’s position that granting opt out to Auction 35 winners would give the largest cellular providers “yet *another* regulatory windfall” is made no more persuasive by the listing of favorable regulatory actions in other cases, all but one of which took place at least fourteen years ago, before the use of PCS spectrum was even fully viable. *See id.* at 12-13. Nextel has not explained how any of these lawful actions taken by the Commission created a “windfall” of any sort for large cellular providers.

<sup>24</sup> *See Verizon Opening Comments*, at 4-8.

<sup>25</sup> *See id.* at 2-3,12-13.

case.<sup>26</sup> Accordingly, the Commission should not condition opt out on debarment or any other penalty.<sup>27</sup>

Finally, we note that the Commission, in its *Sept. 12, 2002 Notice*, suggests that, under either proposed opt-out scenario, dismissal of the winning bidders' applications would be "with prejudice."<sup>28</sup> In the context of the Commission's rules regarding dismissal of wireless applications, the phrase "with prejudice" is a defined term that operates to prohibit the Commission from "accept[ing] another application from the applicant for the same purpose for a period of one year."<sup>29</sup> We respectfully submit that, despite the Commission's use of the phrase "with prejudice," it could not have intended to foreclose the option that dismissal be "without prejudice." This is because, in each proposed scenario, the Commission specifically inquires whether a winning bidder that chooses opt out "should be barred from participating in reauction

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<sup>26</sup> See *id.* at 25-26 (citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000)).

<sup>27</sup> Likewise, there is no justification for requiring winning bidders to relinquish their legal claims against the Commission. The only entity to suggest that, as a condition to waiver, winning bidders "should agree to give up any pending or future litigation claims against the Commission related to their Auction No. 35 bids," offered no explanation for why such an "exchange" should be required. See *Lafayette Comments*, at 5 & n.10. Regardless of which legal route the Commission selects in granting relief to Auction 35 winners, relinquishment of legal claims against the Commission pending in other fora is not a valid consideration in the Commission's decision and would be unlawful. See *Verizon Opening Comments*, at 26 n.76. In fact, requiring compromise of legal claims would be tantamount to demanding a monetary payment for the exercise of regulatory authority. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (An agency decision will be struck down as arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider."). In addition, as noted in our opening comments, making the exercise of regulatory authority hinge on the surrender of a due process or takings claim would likely constitute an unconstitutional condition. See *Verizon Opening Comments*, at 26 n.76; *Dolan v. City of Tigard*, 512 U.S. 374, 385-86 (1994). The compromise of Verizon Wireless's claims against the Government is the proper subject of negotiation outside of this proceeding.

<sup>28</sup> See *Commission Seeks Comment on Disposition of Down Payments and Pending 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.*, Public Notice, WT Docket No. 02-276, at 4 (Sept. 12, 2002) ("*Sept. 12, 2002 Notice*").

<sup>29</sup> 47 C.F.R. § 1.934(a).

of licenses or otherwise obtaining such licenses for a period of time.”<sup>30</sup> As Verizon Wireless has noted throughout its opening comments and this reply, the applications should be dismissed without penalty or prejudice.

#### **IV. THE COMMISSION MUST ACT QUICKLY TO PERMIT WINNING BIDDERS IMMEDIATELY TO OPT OUT.**

Several commenters have offered suggestions as to the structure and timing of the opt-out process.<sup>31</sup> To Verizon Wireless the particular mechanics of opt-out are far less important than allowing bidders to opt-out immediately. It has already been twenty months since the close of Auction 35. Further delay and uncertainty can only compound the harms that inaction is causing to the wireless industry and the broader economy. The Commission should issue its order granting relief forthwith, and that order should make bidders’ elections to opt out effective upon filing with the Commission. The same procedure used to refund a portion of the Auction 35 deposits earlier this year can be easily employed for bidders to exercise their opt out option and apply for return of the remaining funds on deposit.<sup>32</sup>

#### **V. CONCLUSION**

For the foregoing reasons, and those given in our Opening Comments, the Commission should permit Auction 35 winners to opt out of their winning bids for spectrum licenses previously granted to NextWave and Urban Comm. A carrier’s decision to opt out should result

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<sup>30</sup> *Sept. 12, 2002 Notice*, at 4-5.

<sup>31</sup> *See* Comments of Alaska Native Wireless, L.L.C. (filed Oct. 11, 2002) (“*Alaska Native Comments*”); *Black Crow Comments*, at 5; Comments of Salmon PCS, LLC, at 21-23 (filed Oct. 11, 2002) (“*Salmon Comments*”).

<sup>32</sup> *See Partial Refund Order*, 17 FCC Rcd at 6292, ¶ 17 (specifying use of Automated Clearing House Vendor forms).

in immediate and automatic dismissal of applications without prejudice and expeditious refunds of remaining monies on deposit.

Respectfully submitted,

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