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

In the Matter of	)	
	)	
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, Ind. and Urban Comm -- North Carolina, Inc.	)	WT Docket No. 02-276

To: The Commission

REPLY COMMENTS

The record in this proceeding makes clear that the Commission should take immediate action to resolve the negative impact on the Auction No. 35 high bidders of the outstanding obligations which remain more than twenty months following the close of the auction because of the Commission's inability to grant certain licenses. Cook Inlet/VS GSM V PCS, LLC ("Cook Inlet")[1] urges the Commission to adopt a solution to this problem that can be implemented promptly and without administrative complexity.

I. BY ACTING IN THIS PROCEEDING, THE COMMISSION WOULD NOT BE GRANTING RELIEF FROM ITS AUCTION RULES BUT RESOLVING EQUITABLY THE PROBLEM ARISING FROM THE UNIQUE AND UNFORESEEN REALITIES OF AUCTION NO. 35.

The question at issue in this proceeding is whether the Auction No. 35 winners should remain bound to contingent obligations that are tied to spectrum the Commission is not in a position to award. Cook Inlet believes that the Commission should allow each winning bidder to

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[1] Cook Inlet/VS GSM V PCS, LLC, the high bidder on 22 licensed in Auction No. 35. is controlled by Cook Inlet Region, Inc. Cook Inlet Region, Inc. is an Alaska Native Regional Corporation organized under the Alaska Native Claims Settlement Act. *See* 43 U.S.C. §§ 1601 *et seq*.

elect either to dismiss its pending application and be relieved of all associated auction obligations or to reaffirm its commitment to the auction results. While Cook Inlet, the other parties and the Commission itself have used the term "relief" to describe such a resolution, Cook Inlet believes this term inaccurately describes the action that the Commission is considering. Winning bidders are not seeking relief from, a waiver of, or modification to the Commission's rules in the traditional sense. As a result of the on-going litigation surrounding spectrum previously licensed to NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively "NextWave"),[2] it is the Commission that is unable to deliver the licenses which Cook Inlet is qualified to hold and for which Cook Inlet has been prepared to pay. More than a matter of semantics, this proceeding is not about granting "relief," but rather about resolving problems stemming from adverse court decisions beyond the control of the winning bidders, applying principles of fairness, and protecting the integrity of the auction process.

Cook Inlet and other Auction No. 35 high bidders have complied with the Commission's auction rules, have been found qualified to hold licenses won in Auction No. 35, and have been prepared to pay for those licenses.[3] The purpose of the default rules is to establish disincentives in the form of default penalties in order to prevent bidders from violating the

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[2] As many commenters have noted, the licenses previously held by Urban Comm - North Carolina ("Urban Comm") should be treated similarly to the NextWave licenses. *See e.g.,* Comments of T-Mobile USA, Inc. at 1-2 and Comments of Salmon PCS, LLC at 3-4.

[3] Cook Inlet is qualified to hold the remaining twenty-one licenses for which it bid, just as it was found qualified to hold the single license it was awarded in Auction No. 35. On July 27, 2001, the Commission announced that it was prepared to grant one of the twenty-two licenses on which Cook Inlet was the high bidder. *See Wireless Telecommunications Bureau Announces It Is Prepared to Grant Sixty-Two C And F Block Broadband Personal Communications Services (PCS) Licenses Upon Full And Timely Payment*, Public Notice, DA 01-1785 (July 27, 2001). On August 10, 2001, Cook Inlet submitted its full payment for this license and the Commission granted the license on August 22, 2001.

Commission's auction rules. Because Auction No. 35 winners have complied with the Commission's rules, there is no justification for the imposition of financial penalties or a restriction on eligibility to participate in future auctions or to acquire this spectrum on the secondary market. Based on this distinction, the Commission should allow each auction winner to elect either to dismiss its applications for the licenses previously issued to NextWave and Urban Comm or to recommit to its obligation to pay for those licenses if and when they become available for the Commission to grant. Dismissal by the winning bidders of their pending applications in this unique circumstance would not be wrongful behavior to which the default rules apply.

II. THE COMMISSION'S ACTION IN THIS PROCEEDING SHOULD BE LIMITED TO AFFECTED AUCTION NO. 35 PARTICIPANTS.

Cook Inlet cannot emphasize enough the difference between the circumstances surrounding Auction No. 35 and any other auction conducted by the Commission, including Auction No. 5. In no previous auction has the Commission faced a legal impediment – in this case, the mandate by the United States Court of Appeals for the District of Columbia[4] – to awarding a license to a qualified winning bidder. Any Commission action taken in this proceeding addresses a unique set of circumstances and will be limited to the affected winning bidders in Auction No. 35.

The argument made by several commenters, including Eldorado Communications, LLC, for "parity" in treatment between Auction No. 35 winners and other past or future auction

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[4] *See NextWave Personal Communications Inc. v FCC*, 254 F.3d 130 (D.C. Cir. 2001), cert. granted, __U.S. __, 122 S.Ct. 1202 (2002); *See also Wireless Telecommunications Bureau Announces The Return To Active Status Of License to NextWave Personal Communications, Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation*, Public Notice, DA 01-2045 (Aug. 31, 2001).

winners is beyond the scope of this proceeding.[5] Eldorado goes so far as to argue that the Auction No. 35 winners should remain subject to their contingent obligations unless the Commission's decision here provides some additional benefit to Auction No. 5 high bidders.[6] The Commission is not considering modifying or waiving a rule of general applicability here, but rather resolving the issues affecting only Auction No. 35. Therefore, any decision made in this proceeding should not and would not apply to Auction No. 5 or any other past or future auction. The Commission should not be distracted by these arguments, which have no bearing on the issues surrounding Auction No. 35.[7]

Eldorado's argument misses the fundamental difference between Auction No. 35 and Auction No. 5 – that the Commission cannot grant the licenses – when it argues that Eldorado should be entitled to a return of its deposit forfeited when it failed to make its installment payments. In Auction No. 5, the Commission could and did timely grant winning bidders the licenses on which they were the high bidder. After receiving their licenses, many Auction No. 5

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[5] *See* Comments of Eldorado Communications LLC at 1-2 & 4-5 ("Eldorado Comments"). In addition, the Commission should reject the arguments of PCS Partners and Alpine to apply a decision in this context to other auctions and future auctions. *See* Comments of Alpine PCS, Inc. 2-3 ("Alpine Comments") and Comments of PCS Partners, L.P. at 2 ("PCS Partners Comments").

[6] Eldorado Comments at 4-6. Eldorado is the only commenter to urge the Commission to continue to bind the Auction No. 35 winners to their contingent obligations.

[7] Eldorado, Alpine and PCS Partners were not participants in Auction No. 35 and therefore should not be subject to any decision made in this context. Not only was Eldorado not an applicant in Auction No. 35, it eschewed numerous other opportunities to preserve and protect its claims against NextWave and the Commission arising out of Auction No. 5. Eldorado did not petition the Commission to deny the NextWave long form application filed in Auction No. 5 or participate in any of the licensing proceedings related to the NextWave licenses. Eldorado did not petition the D.C. Circuit to review the Commission's orders that created the C and F Block restructuring options by which Eldorado now feels disadvantaged. Eldorado did not oppose the Commission decision to reauction the NextWave spectrum. Eldorado did not participate in any of the NextWave bankruptcy proceedings. Eldorado should not now be allowed to assert its rights in a proceeding that has no bearing on Auction No. 5 – the only auction in which Eldorado claims to have been disadvantaged by NextWave and the Commission.

winning bidders defaulted on their obligations to make installment payments. Thus, in Auction No. 5, the *Commission's* ability to grant the licenses to the winning bidders was never at issue; instead, many *bidders* were unable to make timely installment payments on the licenses awarded to them and elected for amnesty, defaulted or both.

To prevent widespread defaults in Auction No. 5, the Commission adopted a voluntary amnesty program, which enabled bidders to reduce their financial obligations and preserved the results of the auction to the extent possible.[8] In granting amnesty, the Commission was justified in imposing default penalties. Unlike Auction No. 5, the Auction No. 35 winners have not received their licenses, are not in default and are not seeking amnesty. Auction No. 5 and Auction No. 35 are therefore incomparable and the Commission should not delay its decision in this proceeding to consider irrelevant arguments or address unrelated issues.

III. THERE IS NO JUSTIFICATION FOR RESTRICTING THE AUCTION NO. 35 WINNING BIDDERS FROM ACQUIRING THIS SPECTRUM IN THE FUTURE.

Cook Inlet and the other Auction No. 35 winners have demonstrated in their initial comments that auction integrity would not be compromised by Commission action here because none of the auction winners have defaulted on any of their auction obligations. In fact, there is no rational basis to suggest that the solution proposed by the Commission and overwhelmingly supported in the comments filed will undermine the integrity of Auction No. 35 in particular or the auction process in general. Over 150 uncontested licenses from Auction No. 35 already have been granted and paid for in full. Thus, the auction results have been an effective mechanism to award

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[8] *See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, Second Report and Order, 12 FCC Rcd 16,436 (1997); *recon.*, Order on Reconsideration of the Second Report and Order, 13 FCC Rcd 8345 (1998); *further recon.*, Second Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 6571 (1999).

some of the spectrum from Auction No. 35, and each bidder has already demonstrated that its bids were sincere. Furthermore, adopting a solution to the difficulties faced by bidders to whom the Commission cannot award the outstanding licenses is fair and appropriate. If the Commission were to continue to hold the down payments and attempt to bind the Auction No. 35 winners to contingent obligations resulting from a fundamental inability of the Commission to award licenses through no fault or failure of the winning bidders, participation in future auctions would most certainly be impacted as would the ultimate results of such auctions. Therefore, as Cook Inlet explained in its comments, by implementing an equitable and reasonable solution to the Auction No. 35 problem, the Commission will bolster, not undermine, the integrity of the auction process as an appropriate and effective mechanism to award licenses for the future.

There is no justification to restrict winning bidders from acquiring the Auction No. 35 spectrum through reauction or on the secondary market. Such a result would undercut the perceived fairness and integrity of the auction process. Nextel Communications, Inc. is the only party that argues the Commission should restrict Auction No. 35 winners' abilities to reacquire Auction No. 35 spectrum.[9] As a disappointed bidder, Nextel's argument that a three year restriction on the Auction No. 35 winning bidders' eligibility to acquire this spectrum is necessary to preserve the integrity of Auction No. 35 is self-serving.[10] Seemingly, Nextel's motivation is enhance its ability to obtain such spectrum by disqualifying competing parties and driving down the price of the spectrum that it may seek to acquire either through reauction or on the secondary

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[9] *See generally* Comments of Nextel Communications, Inc. ("Nextel Comments"). Even Nextel does not oppose giving Auction No. 35 winning bidders the option to reclaim the remainder of their down payments and to cancel all contingent payment obligations. *See* Nextel Comments at 14.

[10] *See* Nextel Comments at 1-2.

market.[11] Such an outcome would thwart the principle that spectrum should be granted to those who value it most highly.[12]

Nextel attempts to cloak its argument in concerns about auction integrity, citing to other carriers' past calls for strict adherence to the auction rules.[13] As explained above, participants in Auction No. 35 have followed the Commission's rules to the letter. The difficulties in this auction have arisen not because of any rule violation but because the Commission is unable to grant the licenses. This inability has forced winning bidders to continue to carry a potential future financial liability, the negative effect of which is further compounded by the dramatic economic recession affecting the telecommunications industry. Therefore, Nextel's reliance on statements made concerning the amnesty program implemented after Auction No. 5 or any other prior auction is misplaced.

Nextel's argument that winning bidders who choose to dismiss their applications should be prevented from acquiring these licenses from NextWave or Urban Comm on the secondary market is especially suspect.[14] If this spectrum were to become available from NextWave or Urban Comm on the secondary market, it would be because NextWave prevailed in its litigation. At that point in time, the results of Auction No. 35 would necessarily have been cancelled and the Commission could not reasonably restrict the Auction No. 35 bidders' eligibility for that spectrum. Such a restriction would be inconsistent with the fact that Auction No. 35 was

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[11] *See id.* According to Nextel, Nextel was an active participant in Auction No. 35 but withdrew because of the high bids for the spectrum.

[12] *See* 47 U.S.C. § 309(j).

[13] *See* Nextel Comments at 5-8.

[14] *See id.* at 9.

not the mechanism by which this spectrum was assigned. There is simply no valid justification for denying to a high bidder in Auction No. 35 the ability to acquire this spectrum in the future.

While giving auction winners the opportunity to dismiss their applications at this stage will not undermine Auction No. 35, discounting the bid prices of these licenses after the fact, as proposed by some commenters, would be detrimental to the auction process.[15] The public policy behind the Commission's auction authority is to assign spectrum to the party that values it most highly based on the market information available at the time of the auction. In addition, if the Commission now agreed to discount the Auction No. 35 high bids across the board, the Commission, and not the market, would become the arbiter of spectrum valuation, a result contrary to the fundamental public policy supporting the spectrum auctions in the first place.

IV. ANY SOLUTION TO THE AUCTION NO. 35 PROBLEM MUST BE QUICK AND SIMPLE TO ADMINISTER.

Cook Inlet, like many other parties, believes any solution to the Auction No. 35 problem regarding the NextWave licenses must be resolved expeditiously. There is clear consensus among the comments filed about the importance of the Commission's prompt action. In fact, nearly all of the comments filed recommend alleviating the significant burden on the Auction No. 35 winners resulting from the money remaining on deposit with the Commission and the outstanding contingent liability related to these licenses. This restriction on capital assets impacts all winning bidders and is exacerbated by the economic downturn and resulting tightening of capital markets, and is especially burdensome for small business winners like Cook Inlet. Contrary to Eldorado's argument that allowing auction winners to opt out of Auction No. 35

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[15] *See* Comments of Black Crow Wireless, L.P. at 4-5; Alpine Comments at 1 & 3.

would favor large companies at the expense of "genuinely small businesses,"[16] the small business winners, who comprise a majority of the Auction No. 35 winners and a majority of the parties affected in this proceeding, would benefit directly from any solution implemented by the Commission. The fact that Eldorado is not eligible to benefit from a decision here does not diminish the benefit that would be gained by small businesses, the advantage to this sector of the economy of releasing the tied-up capital, or the equity in resolving the unique problems surrounding Auction No. 35 generally.

Cook Inlet believes that prompt action by the Commission in this proceeding is crucial. As a result, Cook Inlet is concerned that certain alternatives will complicate and therefore delay the Commission's decision in this proceeding. Other parties have proposed that bidders be given the ability to defer the decision to opt-out of Auction No. 35 until a later date. These proposals raise significant issues for the Commission because they would, in effect, provide bidders with options on the licenses and allow opt-out decisions to be made based on future prevailing market values rather than on the market information known at the time of Auction No. 35. Cook Inlet urges the Commission to focus its attention on a straight-forward and timely remedy and not unintentionally delay implementation of a much needed resolution.

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[16] Eldorado Comments at 2 & 5.

To speed resolution, the Commission should adopt a solution that can be implemented quickly and easily. For this reason, Cook Inlet supports the all or nothing, opt-in or opt-out approach described in its comments. Cook Inlet continues to believe that allowing the Auction No. 35 winners to elect either to dismiss their pending applications or to remain committed to the auction results is the simplest, clearest and most equitable solution.

Respectfully submitted,

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