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

In the Matter of	|	
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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 MOUNTAIN SOLUTIONS, INC.

MOUNTAIN SOLUTIONS, INC. ("MS"), by its attorneys and in accordance with the Commission's Rules, hereby submits reply comments with respect to the selective opt-out proposal for entities winning licenses in Auction No. 35 that originally were granted to the above-captioned NextWave entities ("NextWave").[1/] As explained below, MS generally concurs with the initial comments filed by Eldorado Communications, LLC ("Eldorado") in this proceeding. Any relief granted by the Commission to Auction No. 35 winners should, however, also be extended to Auction No. 10 winners, like MS, whose applications have been pending for a protracted period during which general economic and industry-specific conditions have declined significantly.

MS notes first that the degree of relief advocated by many commenting parties is extensive and

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[1/] *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, 2002 FCC Lexis 4498, rel. Sept. 12, 2002 ("Sept. 12, 2002 PN").

unprecedented. These parties, principally large wireless carriers or applicants like Alaska Native Wireless, L.L.C. and Salmon PCS, LLC in which large carriers have made substantial investments, argue for the right to withdraw their pending applications without penalty and receive expeditiously any down payments still held by the Commission, while being released from all payment liability associated with their winning bids. Further, multiple initial comments urge the Commission to afford Auction 35 winners the right to pick-and-choose among their pending applications when exercising the proposed withdrawal option. Most parties arguing for this flexible approach also contend that no prejudice should attach to withdrawal of pending applications— withdrawing applicants should be able to participate in any re-auction of the returned licenses the Commission may conduct when the NextWave litigation is finally resolved. [2/] The motive for this proposal is readily discerned: bidders anticipate being able to reacquire their licenses for substantial discounts from their Auction 35 bids once the NextWave litigation terminates. One commentator, a broadband PCS licensee with five Auction 35 licenses, asserted that even this would be inadequate; therefore, the licensee argued that high bidders should have the right to acquire licenses for

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[2/] By contrast, Nextel Communications, Inc. in its Comments filed October 11, 2002 (p. 9) urges the Commission to bar withdrawing applicants from reacquiring licenses for which they submitted high bids in Auction 35:

> To preserve the integrity of the Commission's spectrum auction program, however, the Commission should bar any winning bidders, their controlling interests, entities with a substantial financial interest in such companies, and their successor and assigns from acquiring the licenses those bidders committed to buy in Auction No. 35. The Commission should bar the acquisition of such spectrum either through re-auction or by any other means for at least three years from the adoption date of a final order resolving the issues raised in the [Sept. 12, 2002 PN].

just sixty (60) per cent of the amount bid.[3/]

Nothing even remotely approaching this vast array of relief options endorsed by most commentators here was ever offered to the small businesses and entrepreneurial entities that won licenses in previous C-Block auctions. Although C-Block spectrum was originally intended for exclusive use by small business entrepreneurs, minorities and women, the Commission was distinctly less solicitous when this group of winning bidders encountered financial pressures arising from changes in business and financial circumstances that were as profound as the economic and telecommunications market-specific developments that proponents now cite to justify unconditional relief from their bid obligations.[4/] When the original C-Block winning bidders found themselves in dire financial straits, the Commission, concerned with the integrity of the auction process, allowed winners only the option of returning all their licenses and forfeiting all down payments, or returning half their licenses and forfeiting half their down payments. [5/]

MS, by contrast, participated in Auction No. 10, the first C-Block re-auction, and was high bidder on two licenses. MS's applications for these licenses have been before the Commission for over six years.[6/] Thus, MS has been a pending applicant for a substantially longer period than the Auction No. 35 applicants who are seeking Commission authorization to walk away "scot-free" from their obligations.

[3/] Comments of Black Crow Wireless, L.P., filed October 11, 2002, pp. 5-6.

[4/] *See e.g.*, Comments of Leap Wireless International, Inc., filed October 11, 2002, p. 2.

[5/] Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees (Second Report and Order and Further Notice of Proposed Rule Making in WT Docket 97-82), 12 FCC Rcd. 16436 (1997), as modified on reconsideration, 13 FCC Rcd. 8345 (1998).

[6/] Auction No. 10 closed in July 1996. *See* Entrepreneurs' C Block Reauction Closes, Public Notice, DA No. 96-1153 (rel. July 17, 1996) (Wireless Telecommunications Bureau).

During the six years that the Commission has withheld action on MS's Auction No. 10 licenses, changes in general economic and industry-specific financial conditions have been of equal or greater magnitude than those discussed in the initial comments of the commentators advocating relief from their Auction 35 commitments.

The large carrier proponents of extensive relief for Auction No. 35 bidders reject any analogy between proposals that allow them to abandon their auction obligations without consequence and discretionary relief that the Commission has provided or could provide to defaulting bidders. These commentators claim that the correct terminology for their proposal is "mutual rescission of obligations," because the Commission is now unable to deliver the licenses offered at Auction No. 35 and "that with the passage of time, the winning bids no longer appropriately reflect the value of the licenses."[7/] MS respectfully suggests that advocates of this view are attempting to re-write history by conveniently ignoring the terms and conditions under which Auction 35 was conducted. The Commission's prefatory Public Notices admonished potential bidders in explicit terms that the outcome of Auction No. 35 was subject to the NextWave litigation, and that licenses otherwise grantable to winning bidders could be indefinitely unavailable as a result thereof.[8/] No Auction No. 35 bidder could reasonably claim ignorance of this significant and critical contingency.

Proponents of the sweeping relief proposals now being considered apparently believe that they can simply disregard the Commission's express, unambiguous and open efforts to condition Auction No.

[7/] Comments of DCC PCS, Inc., filed October 11, 2002, p. 5.

[8/] *See* Requests for Refunds of Down Payments Made In Auction No. 35, 17 FCC Rcd 6283 (2002) at ¶ 5.

35. It appears that many parties asking the Commission to be let off-the-hook were unreasonably optimistic in their pre-Auction 35 assessments of the duration and outcome of the NextWave litigation, and now want to be excused for the consequences of their incorrect forecasts. Should the Commission grant these parties the relief they seek, then there will be no basis for denying comparable treatment to MS, whose applications have been pending far longer,[9/] or to any previous auction participant whose (un-protested) application remains pending. To do otherwise would contradict the Commission's objective of encouraging small business involvement in wireless communications services, undermine the integrity of FCC auctions, and cast serious doubt as to the Commission's commitment to dispensing equitable treatment to all who come before it.

[9/] Thus, any equitable concerns concerning the economic detriment attributable to the NextWave litigation (*e.g.*, opportunity costs, foregone interest, *etc.*) apply with greater force to MS whose applications have been pending years longer than those of the Auction 35 winners.

Accordingly, if relief is granted to Auction No. 35 high bidders, then MS should be able to withdraw its Auction No. 10 applications, and receive a prompt refund in full of its down payments. No default liability should attach for this withdrawal, and MS should be insulated from all shortfall liability based upon the amount bid for its licenses in future auctions. Finally, MS should be accorded any other rights and privileges extended to Auction No. 35 bidders.

Respectfully submitted,

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