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**Before the  
FEDERAL COMMUNICATION COMMISSION  
Washington, DC 20554**

In the Matter of )  
)  
Applications for Consent to Assign Licenses From ) WT Docket No. 03-217  
) DA 03-3031  
NextWave Personal Communications, Inc. and )  
NextWave Power Partners, Inc., Assignors, ) File Nos. 0001461949, 0001462008,  
) 0001462060, 0001462065,  
To ) 0001462358, 0001462360,  
) 0001462372, 0001462378,  
Subsidiaries of Cingular Wireless LLC, Assignees ) 0001462417, 0001462499,  
) 0001462500, 0001462559, and  
) 0001462570

To: Wireless Telecommunications Bureau

**OPPOSITION TO PETITIONS TO DENY**

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## SUMMARY

Cingular Wireless LLC (“Cingular”) opposes the Comments submitted by Nextel Communications, Inc. (“Nextel”) and the Petition to Deny filed jointly by Eldorado Communications, LLC and NY Telecom, LLC (“Joint Commenters”) against the captioned transfer applications. Both filings are without merit and, if not denied, should be dismissed as procedurally deficient because they lack the required affidavit from a person with personal knowledge of the facts. If not dismissed or denied, the filings should be treated as informal comments. The Joint Commenters also lack standing to challenge the proposed transaction because they would not be injured by a grant and a denial of the waiver would not redress their alleged injury.

Nextel raises a frivolous challenge to Cingular’s character qualifications. Nextel claims that Cingular failed to cooperate in resolving interference with Anne Arundel County, but conveniently omits critical facts from the very decision it relies on, including:

- The Wireless Telecommunications Bureau (“Bureau”) granted Cingular’s petition to preempt the County’s attempts to regulate interference;
- Cingular’s alleged failure to cooperate was reviewed by the Bureau and did not result in any finding that Cingular lacked character or violated a Commission rule;
- The Bureau lauded Cingular’s current efforts to address interference; and
- Nextel was (and remains) the primary source of interference to the County.

Cingular’s character qualifications are well-established and have never previously been questioned. Nextel’s challenge is transparently motivated by Nextel’s desire to keep the NextWave spectrum from being put to competitive use.

Nextel and the Joint Commenters oppose the requested waiver of Sections 1.2111(c) and 24.714 of the Commission’s rules. Their arguments, however, reflect a misunderstanding of the Communications Act, the law applicable to rule waivers, the unjust enrichment rules, and the proposed transaction. Their opposition to the waiver simplistically suggests, contrary to the court’s ruling in *WAIT Radio*, that because the proposed transaction does not adhere strictly to the unjust enrichment rules, a waiver would be inappropriate. Conveniently ignored are the competing public interest factors that counsel in favor of the requested unjust enrichment rule waiver, such as: (i) allowing the spectrum to be promptly put to efficient use; (ii) maximizing monetary recovery on a significant portion of the spectrum auctioned to NextWave; (iii) facilitating the emergence of a designated entity from bankruptcy, and (iv) promoting competition in the CMRS marketplace. The Joint Commenters argue that the waiver should be denied because it would result in disparate treatment. In light of the Supreme Court’s decision, however, the FCC had no choice but to give full effect to NextWave’s bankruptcy status.

Finally, although Nextel claims that the transaction should be classified as a “permit-but-disclose” proceeding, it fails to demonstrate any reason why the Commission should deviate from the general rule that classifies the proceeding as restricted. This request is just another attempt to delay the proposed transaction.

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To: Wireless Telecommunications Bureau

**OPPOSITION TO PETITIONS TO DENY**

Cingular Wireless LLC (“Cingular”), by its attorneys, hereby opposes the Comments filed by Nextel Communications, Inc. (“Nextel”)<sup>1</sup> and the Petition to Deny jointly filed by Eldorado Communications, LLC and NY Telecom, LLC (“Joint Commenters”)<sup>2</sup> concerning the captioned applications. As discussed below, both filings are without merit and, if not denied, should be dismissed as procedurally deficient. If not dismissed or denied, the filings should be deemed informal comments and treated accordingly.

**I. THE OPPOSITIONS SHOULD BE DISMISSED BECAUSE THEY FAIL TO COMPLY WITH STATUTORY REQUIREMENTS**

As a preliminary matter, the filings by Nextel and the Joint Commenters violate the statutory requirements of Section 309(d) of the Communications Act and therefore should be

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<sup>1</sup> Comments of Nextel Communications, Inc., WT Docket No. 03-217 (Nov. 5, 2003).

<sup>2</sup> Petition to Deny filed by Eldorado Communications, LLC and NY Telecom, LLC, WT Docket No. 03-217 (Nov. 5, 2003) (“Joint Comments”).

dismissed or, if not dismissed, deemed informal objections.<sup>3</sup> Under the statute, a petitioner must submit “specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest].”<sup>4</sup> The allegations “shall . . . be supported by affidavit of a person with personal knowledge thereof.”<sup>5</sup> Allegations that consist of “ultimate, conclusory facts or more general affidavits . . . are not sufficient.”<sup>6</sup> Neither Nextel nor the Joint Commenters have complied with this threshold requirement.

Nextel characterizes its own filing as “comments,” not as a petition to deny.<sup>7</sup> None of its factual allegations are supported by an affidavit, let alone an affidavit from an individual with personal knowledge. For example, Nextel makes character allegations against Cingular arguing that its actions with regard to Anne Arundel County may disqualify it from receiving a grant of the instant assignment applications. It is well established that intent to deceive and a pattern of willful violations of FCC rules are essential elements of an adverse character finding.<sup>8</sup> Thus, by necessity, Nextel had to include an affidavit of a person with personal knowledge of any such

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<sup>3</sup> See 47 C.F.R. § 1.939(g) (“The Commission may dismiss any petition to deny that does not comply with the requirements of this section . . .”).

<sup>4</sup> 47 U.S.C. § 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

<sup>5</sup> 47 U.S.C. § 309(d)(1) (emphasis added); see also 47 C.F.R. § 1.939(d).

<sup>6</sup> *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 n.11 (D.C. Cir. 1987); see also *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 629 (D.C. Cir. 1978) (“[A]llegations on information and belief, supported by general affidavits, . . . are not sufficient.”).

<sup>7</sup> *Knox Broadcasting, Inc.*, 12 F.C.C.R. 3337, 3337 (1997) (“*Knox Broadcasting*”) (“The filing of a petition to deny establishes a filer’s ‘party’ status, provided that the filing satisfies the statutory requirements. . . . [H]ad [the filer] filed comments . . . , this action would not permit us to treat [filer] as a ‘party to the proceeding’ . . .”).

<sup>8</sup> See *infra* note 34.

intent or willfulness by Cingular.<sup>9</sup> No affidavit was supplied. Thus, the Nextel filing cannot be treated as a petition to deny.

With respect to the Joint Commenters, a single three-sentence affidavit is attached which states only that NY Telecom would participate in any re-auction of NextWave spectrum.<sup>10</sup> Thus, the affidavit is supplied only to buttress NY Telecom's standing argument. It in no way supports the allegations set forth in the pleading.<sup>11</sup>

As a result, the filings by Nextel and the Joint Commenters do not comply with the statutory petition to deny standards and should be dismissed or, at most, treated as informal objections.<sup>12</sup>

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<sup>9</sup> See, e.g., *Application of New Hampshire for Facilities in the Public Land Mobile Service at Various Locations in the State of New Hampshire*, 11 F.C.C.R. 5258, 5262 (WTB 1996) (“Mr. Pearson’s affidavit does not support a conclusion that M&J intended to deceive this Commission. Deceptive intent is the essence of misrepresentation or lack of candor.”). Indeed, personal knowledge of violations in the interference context is particularly important given the fact that the Commission has recognized that incidents of interference to public safety licensees occur despite the fact that most commercial licensees are operating within their licensed parameters. See *Improving Public Safety Communications in the 800 MHz Band*, 17 F.C.C.R. 4873, 4881-82 (2002).

<sup>10</sup> See Joint Comments, Exhibit 1 at 1.

<sup>11</sup> For example, Joint Commenters contend that granting the applications will “stifle competition.” See Joint Comments at 6.

<sup>12</sup> See *Knox Broadcasting*, 12 F.C.C.R. at 3337; see also *Infinity Holdings Corp. of Orlando*, 11 F.C.C.R. 17813, 17816 n.10 (1996) (“We note that Press did not file a petition to deny . . . . [W]e will treat the press petition as an informal objection . . . .”); *National Broadcasting Co.*, 11 F.C.C.R. 10779, (1996) (“Since the pleading was not supported by an affidavit . . . , it did not meet the petition to deny requirements of Section 309(d)(1) . . . and was correctly treated as an informal objection.”); *Citicasters Co.*, 14 F.C.C.R. 3619, 3619-20 (1999) (treating a pleading styled as a “Petition to Deny” but not supported by an affidavit or declaration under oath as an informal objection); *City of Galveston*, 14 F.C.C.R. 12274, 12275 (WTB/PWD 1999) (where allegations in a filing seeking to deny grant were not supported by an affidavit of a person with personal knowledge, the filing was deemed “procedurally deficient as a petition to deny” and treated as “an informal objection”).

## II. THE JOINT PETITION SHOULD BE DISMISSED BECAUSE PETITIONERS LACK STANDING

In order to establish standing, parties challenging an application must “allege sufficient facts to demonstrate that grant of the application would cause the petitioner to suffer a direct injury.”<sup>13</sup> Under this standard, a petitioner must establish that: (i) the injury can be traced to the challenged action (causation); and (ii) the injury would be prevented or redressed by the relief requested (redressability).<sup>14</sup> Neither Eldorado nor NY Telecom can satisfy these elements. The subject assignment applications are unrelated to either entity’s claimed injury. As a result, the FCC should dismiss the joint filing.<sup>15</sup>

NY Telecom states that it has standing to challenge the assignment applications because it is “ready willing and able” to participate in a re-auction of the NextWave spectrum.<sup>16</sup> As a threshold matter, this position is inconsistent with the fact that notice of a court-supervised auction of the NextWave spectrum at issue here was given<sup>17</sup> and no one, including Eldorado

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<sup>13</sup> *Friends of the Earth*, 17 F.C.C.R. 201, 203 (CWD 2002), *aff’d*, *Memorandum Opinion and Order*, FCC 03-277 (rel. Nov. 10, 2003); *Los Angeles Cellular Telephone Company*, 13 F.C.C.R. 4601, 4604 (WTB/CWD 1998).

<sup>14</sup> *Friends of the Earth*, 17 F.C.C.R. at 203 (citing *Los Angeles Cellular Telephone Company*, 13 F.C.C.R. at 4604).

<sup>15</sup> *See, e.g., DCC PCS, Inc.*, 18 F.C.C.R. 11452, 11457-58 (2003) (dismissing petition to deny for lack of standing); *Alaska Native Wireless, L.L.C.*, 17 F.C.C.R. 4231, 4235 (2002) (same), *aff’d*, 16 F.C.C.R. 11640 (2003).

<sup>16</sup> *See* Joint Comments at 2-3 & nn.5-6 (citing *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000); *DIRECTV v. FCC*, 110 F.3d 816 (D.C. Cir. 1997); *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599 (D.C. Cir. 2002).

<sup>17</sup> *See* Order Under 11 U.S.C. §§ 105(a), 363 and 1146(c) of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002, 6004 and 9019: (A) Approving Bidding Procedures for the Submission of Higher and Better Offers for the Sale of Rights and Interests in Certain Licenses; (B) Authorizing Payment of Break-Up Fee and Expense Reimbursement in the Event a Higher or Better Offer or Competing Proposal Is Approved and Consummated; (C) Establishing Sale as Contingent Upon Approval of the FCC Term Sheet; and (D) Approving Form of Notice of Auction and Settle Hearing and Related Deadlines With Respect To Sale and Settlement, Case No. 98-B 21529 (entered Aug. 21, 2003 in the United States Bankruptcy Court for the Southern District of New York) at 3 & Exhibit A; *see also The Wall Street Journal*, (continued on next page)

and/or NY Telecom, elected to participate.<sup>18</sup> Moreover, the Commission attempted to re-auction the NextWave spectrum once in Auction 35, and NY Telecom did not bid for, or qualify to bid for, any of the licenses.<sup>19</sup>

Assuming NY Telecom's readiness to participate in a re-auction is correct, its reliance on case law is misplaced. The cases establish that "a disappointed *bidder* need . . . show . . . that it *was able and ready to bid* and that the decision of the Commission *prevented it from doing so on an equal basis*."<sup>20</sup> Indeed, an entity "that was not qualified to bid in particular markets in an auction has no standing to file a petition to deny the winning bidders' applications in those markets."<sup>21</sup> NY Telecom was not a qualified bidder in any of the auctions in which NextWave acquired its licenses (including those subject to the instant applications).<sup>22</sup> Thus, the "disappointed bidder" case law cited by NY Telecom is simply inapplicable.

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August 26, 2003, at p. B4; *The Wall Street Journal*, August 27, 2003, at p. B7; *The Wall Street Journal*, August 28, 2003, at p. B8.

<sup>18</sup> Order Under 11 U.S.C. §§ 105, 363 and 1146(c) of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002, 6004 and 9019 (A) Approving the Terms and Conditions of an Agreement for the Sale of the Debtors' Rights and Interests in Certain Designated Licenses; (B) Authorizing the Sale Free and Clear of All Liens, Claims and Encumbrances, Subject Only to FCC Regulatory Review and Approval and HSR Approval; (C) Authorizing Debtors to Satisfy Certain Secured Indebtedness Related to Such Licenses; and (D) Approving Settlement and Releases Between the Debtors and the FCC with Respect to Claims Related to Such Designated Licenses (entered Sept. 25, 2003 in the United States Bankruptcy Court for the Southern District of New York) at 3 ("*Bankruptcy Sale Order*"); *see also In re: NextWave Personal Communications Inc.*, Case No. 98-B 21529, Notice of Proceeding with Sale Hearing on Cingular Purchase Agreement (U.S. Bkptcy. Ct., S.D.N.Y., filed Sept. 22, 2003).

<sup>19</sup> *See Public Notice*, "Auction of Licenses for the C and F Block Spectrum," 15 F.C.C.R. 23887 (2000).

<sup>20</sup> *High Plains*, 276 F.3d at 605 (emphasis added) (citing *U.S. Airwaves*, 232 F.3d at 231-32; *DIRECTV*, 110 F.3d at 829).

<sup>21</sup> *Alaska Native Wireless, L.L.C.*, 18 F.C.C.R. 11640, 11644-45 (2003) (citing *High Plains*, 276 F.3d at 605).

<sup>22</sup> *See High Plains*, 276 F.3d at 605 (denying standing where petitioner "did not compete" in the relevant auction for the licenses at issue and the petitioner does not "allege that the award of those licenses somehow deprived it of a valid auction process").



NY Telecom's claimed injury stems not from an inability to participate in the original auctions more than six years ago on an equal basis. Rather, it stems from the Commission's subsequent decision to toll the NextWave construction period rather than declare the NextWave licenses cancelled and available for a *re*-auction in which NY Telecom could participate *today*. This alleged injury is too remote to afford standing to challenge the subject assignment applications. The Bureau has already resolved NY Telecom's position favorable to NextWave.<sup>23</sup> That decision is effective (although not final). Moreover, the likelihood of success of the application for review is remote because there is no merit to the argument that NextWave's construction period should not have been tolled during the period its licenses were cancelled.<sup>24</sup> Finally, even a hypothetical grant of the application for review would not automatically make the spectrum available for re-auction, as the FCC could grant a waiver of its rules based on the unique circumstances of the NextWave litigation. Because the alleged injury is too remote from a grant of the subject applications, there is no causation.<sup>25</sup> Nevertheless, an expeditious ruling on the application for review would put the matter to rest.

NY Telecom's inability to acquire the spectrum in a re-auction is also not redressed by denial of these applications. Denial of the applications simply places the spectrum back in the hands of NextWave subject to continuing bankruptcy court oversight; it does nothing to further favorable action by the Commission on NY Telecom's application for review. Only if NY

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<sup>23</sup> See *NextWave Personal Communications Inc.*, 18 F.C.C.R. 3235 (2003), *app. rev. pending*.

<sup>24</sup> See *Public Notice*, 16 F.C.C.R. 15970 (2001); NextWave Settlement Agreement (Nov. 15, 2001).

<sup>25</sup> NY Telecom suggests that its pending application for review provides an independent basis for standing, citing to the *AirGate* decision. See Joint Comments at 3 n.10 (citing *AirGate Wireless, L.L.C. and Cricket Holdings, Inc.*, 14 F.C.C.R. 11827 (WTB 1999)). That Bureau decision does not stand for the proposition that a pending application for review can confer standing; at best, it leaves the question open. See *id.* at 11844.

Telecom's application for review is granted, and NextWave's licenses are declared null and void for failure to timely construct, is there even a *potential* for re-auction. Grant of the assignment applications is too far removed from a hypothetical grant of the application for review to confer standing.<sup>26</sup>

Eldorado's standing arguments fare no better. Eldorado participated against NextWave in the original C Block auction, and therefore claims to have standing to challenge the assignment applications. The cases it relies upon, however, establish that an entity qualified to bid on licenses won by a competitor has standing to challenge the long-form application of the winning bidder<sup>27</sup> – not that the qualified entity can challenge future applications to assign those licenses already awarded. As is the case with NY Telecom, Eldorado's claimed injury is simply too far removed from a grant of the assignment applications to afford standing.

Eldorado's alleged injury flows from its election to return its licenses as part of the Commission's restructuring process, which was affirmed long ago and has become final,<sup>28</sup> while NextWave sought bankruptcy protection. Eldorado complains about inequitable treatment, but its claimed injury stems from its *choice* not to seek bankruptcy protection and the protection ultimately afforded by the courts – not the Commission

Grant of the subject applications will have no impact upon the loss of the Eldorado licenses, so there can be no injury caused by the grant. Nor is the element of redressability

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<sup>26</sup> See, e.g., *Ranger Cellular and Miller Communications, Inc. v. FCC*, No. 02-1155, slip op. at 9 (D.C. Cir. Nov. 14, 2003) (petitioners lack standing where it is merely speculative that a favorable decision will redress their injuries). NY Telecom's suggestion in a footnote that it has derivative standing through an unspecified ownership interest of "certain" NY Telecom partners in Eldorado, see Joint Comments at 6 n.17, is unsupported and in any event unavailing because Eldorado itself lacks standing, as discussed below.

<sup>27</sup> See Joint Comments at 4 n.13 (citing *Baker Creek Communications, L.P.*, 13 F.C.C.R. 18709, 18709 & n.1 (PSPWD 1998); *NextWave Licensing Order*, 12 F.C.C.R. 2030, 2034 (WTB 1997)).

<sup>28</sup> See *U.S. Airwaves*, 232 F.3d at 236.

present. Denial of the applications will not restore the Eldorado licenses and will not lead to a re-auction of the NextWave spectrum, as noted above. Eldorado's ability to acquire licenses in a hypothetical future re-auction also does not confer standing. Only if *NY Telecom*'s application for review is granted does *Eldorado* have the remote potential to participate in a re-auction. Accordingly, like NY Telecom, Eldorado's claimed injuries are too remote from the challenged action to confer standing. Thus, the Commission should dismiss the petition to deny filed by NY Telecom and Eldorado.

### **III. NEXTEL'S CHALLENGE TO CINGULAR'S CHARACTER IS FRIVOLOUS AND SHOULD BE SUMMARILY DISMISSED**

Nextel has previously indicated that if a competitor files an opposition to a transaction involving the NextWave licenses which has been approved by a bankruptcy court, the motive likely "lie[s] in keeping this spectrum from competitive use. . . ."<sup>29</sup> Yet, Nextel now challenges Cingular's character qualifications to acquire the subject licenses based solely on its unsworn and baseless claim that there was an "egregious failure [by Cingular] to cooperate with Anne Arundel County (the "County") in resolving interference problems with the County's public safety communications network."<sup>30</sup> Nextel, however, knows full well the facts and even heavily relies on the Anne Arundel County decision without mentioning that the Wireless Telecommunications Bureau ("Bureau") (i) granted Cingular's request to preempt the County's attempts to regulate interference, (ii) after reviewing the very conduct Nextel raises here, found no instance of bad faith or misconduct by Cingular, and (iii) found that Nextel was the primary

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<sup>29</sup> Letter from Daniel F. Akerson, Chairman, Nextel Communications, Inc. to The Honorable Thomas Bliley, Chairman, Committee on Commerce, U.S. House of Representatives at 3 (Oct. 1, 1999) ("Nextel Letter").

<sup>30</sup> Nextel Comments at 18.

source of interference to the County. Thus, Nextel's challenge is both frivolous and made for the sole purpose of delaying the proposed transaction.<sup>31</sup>

Under Section 309(d) of the Communications Act of 1934, a party filing a petition to deny must make specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.<sup>32</sup> The Commission bases its threshold determination on an evaluation of the petition and supporting affidavits.<sup>33</sup>

Nextel's challenge to Cingular's character qualifications fails to establish a *prima facie* case. The challenge does not involve the necessary elements of (i) misrepresentation or lack of candor with intent to mislead the FCC, or (ii) a pattern of willful violations of the Communications Act or FCC rules.<sup>34</sup> Thus, even if Nextel's claim was correct, the alleged

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<sup>31</sup> Cf. 47 C.F.R. §1.52 (stating that a signatory to a petition to deny certifies that there is good ground to support the pleading and that "it is not interposed for delay").

<sup>32</sup> 47 U.S.C. § 309(d)(1); see *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998); *Astroline Communications Co., L.P. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

<sup>33</sup> As noted above, the subject "petitions" lack the required supporting affidavits.

<sup>34</sup> The *Character Policy Statement* indicates that the Commission relies on the truthfulness and reliability of licensees. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1188-91 (1986) ("*Character Policy Statement*"); see also *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 F.C.C.R. 3252 (1990), modified 7 F.C.C.R. 6564 (1992); *Vodafone AirTouch, Plc and Bell Atlantic Corp.*, 15 F.C.C.R. 16507, 16515 n.40 (WTB/IB 2000) (stating that "[p]rinciples of character qualification apply equally in the wireless context"); *Richard A. Burton*, DA 03-2607, at ¶¶ 8-9 (WTB/PSPWD Aug. 7, 2003) (citing *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 F.C.C.R. at 3252); *William L. Zawilla*, 18 F.C.C.R. 14938, 14964-65 (2003); *Family Broadcasting, Inc.*, 16 F.C.C.R. 4330, 4335-36, 4337-38 (2001) (citing *Character Policy Statement*, 102 FCC 2d at 1209-1210); *Trinity Broadcasting of Florida, Inc.*, 10 F.C.C.R. 12020, 12062 (1995) (citing same), modified 14 F.C.C.R. 13570 (1998); *Dixie Broadcasting, Inc.*, 8 F.C.C.R. 4386, 4402 (1993) (citing same at 1225-29). With regard to the latter, the willingness or unwillingness to comply with the Communications Act and the FCC's rules and the willfulness of the misconduct is particularly important. See *Character Policy Statement*, 102 FCC 2d at 1188-91, 1227-28; see also *Virginia RSA 6 Cellular Limited Partnership*, 6 F.C.C.R. 405, 407 (1991), modified 7 F.C.C.R. 11099 (1992).

conduct would not support a conclusion that Cingular was unqualified.<sup>35</sup> *No* proclivity to violate FCC rules has been demonstrated or alleged.<sup>36</sup> Nextel also ignores the fact that Cingular is a nationwide CMRS provider and has been found legally, technically, and otherwise qualified numerous times.<sup>37</sup> Through its subsidiaries, affiliates, and predecessors-in-interest, it has been providing CMRS for approximately twenty years. A single instance of alleged neglect in a single county is more indicative of Cingular's pattern of compliance with the Commission's rules than a nationwide proclivity toward non-compliance.<sup>38</sup> Accordingly, Nextel's character claims should be summarily disposed.

In any event, Nextel's discussion of interference resolution within Anne Arundel County omits critical facts and contains half-truths despite the fact that Nextel fully participated in the Anne Arundel County proceeding and relies on the *AAC Order*.<sup>39</sup> For example, it never

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<sup>35</sup> *Texas RSA 1 Limited Partnership*, 7 F.C.C.R. 6584 (1992).

<sup>36</sup> *Character Qualification in Broadcast Licensing*, 102 FCC 2d 1179, 1190-91 (1986), *recon. granted in part, denied in part*, 1 F.C.C.R. 421 (1986) (character inquiries will be narrowed to focus on the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies).

<sup>37</sup> *See, e.g., FCC Public Notice*, "WTB Grants Consent to Assign F Block PCS License," 18 F.C.C.R. 17717 (2003); *FCC Public Notice*, "WTB Grants Consent for the Assignment of Licenses to AT&T Wireless Services, Inc., Cingular Wireless LLC, Meriwether Communications LLC, and Skagit Wireless, LLC," 18 F.C.C.R. 9975 (2003); *FCC Public Notice*, "WTB Grants Consent for the Full and Partial Assignment and Transfer of Control of Licenses to Implement GSM Corridor, LLC Joint Venture," 18 F.C.C.R. 1845 (2003); *Applications of SBC Communications Inc. and BellSouth Corp.*, WT Docket No. 00-81, *Memorandum Opinion and Order*, 15 F.C.C.R. 25459 (WTB/IB 2000).

<sup>38</sup> Even if Cingular's alleged initial refusal to cooperate did constitute a willful violation of an unidentified rule, the Commission has indicated that a single instance will not be grounds for designating an application for hearing on character grounds. *See National Page, Inc.*, 1 F.C.C.R. 508 (1986). Equally important, the Bureau recently noted that Cingular is properly addressing interference issues with Anne Arundel County. *Petition of Cingular Wireless LLC for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission*, WT Docket No. 02-100, *Memorandum Opinion and Order*, 18 F.C.C.R. 13126 (2003) ("*AAC Order*") (Application for Review pending).

<sup>39</sup> Nextel Comments at 18-19.

discloses that Cingular's alleged temporary failure to cooperate was brought to the Bureau's attention and did not result in a "bad faith" finding, character issue, or rule violation of any kind.

The Commission first became involved with Anne Arundel County interference issues in late 1998, after the County complained to the FCC.<sup>40</sup> After several meetings with the County and CMRS carriers (including Cingular's predecessor), FCC staff concluded that "[f]rom the beginning, it appeared that the affected receivers were at fault and not the [CMRS] transmitters."<sup>41</sup> More recently, the Bureau observed:

[these] meetings were helpful in establishing *productive working relationships and addressing many of the County's interference concerns*. Nevertheless, due to the engineering challenges created by operating public safety and commercial systems on nearby frequencies, some interference issues *inevitably remained*.<sup>42</sup>

In 1999, the County decided that it should acquire a new public safety system to replace its antiquated system and to remedy the interference problems it was still experiencing.<sup>43</sup> It hired a consultant to evaluate the interference problem. The consultant identified 61 "dead" spots in the County's system caused by the normal operations of CMRS systems in the county and concluded that "the interference was *primarily caused by Nextel* and secondarily by Cingular."<sup>44</sup>

The County subsequently adopted an ordinance designed to give the County unilateral authority to resolve interference between the County's system and CMRS systems.<sup>45</sup> Cingular filed a petition for a declaratory ruling preempting the County's attempts to regulate interference

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<sup>40</sup> AAC Order, 18 F.C.C.R. at 13126.

<sup>41</sup> Letter from Charles Magin, District Director, Compliance and Information Bureau (Columbia Office), FCC to Bill Taylor, Chief of Telecommunications, Anne Arundel County Telecommunications Division at 1 (Feb. 9, 1999).

<sup>42</sup> AAC Order, 18 F.C.C.R. at 13127.

<sup>43</sup> 18 F.C.C.R. at 13128.

<sup>44</sup> *Id.*

<sup>45</sup> 18 F.C.C.R. at 13128-29.

– an area exclusively reserved for the FCC.<sup>46</sup> Nextel fully participated in the proceeding and supported Cingular’s preemption petition,<sup>47</sup> and never alleged that Cingular had acted in bad faith. Incredibly, Nextel fails to disclose that Cingular’s petition was granted.

After reviewing the record, the Bureau noted the County’s allegation that Cingular initially may have been reluctant to cooperate with the County, but concluded that:

Based on the record, it appears that the technical staffs of the County and the carriers are currently addressing interference issues contemplated by the *Best Practices Guide*. For example, Cingular works with the County and coordinates with other carriers to resolve any interference with the County’s public safety system caused by Cingular’s operations. The record also indicates that Cingular has designated an RF engineering contact to coordinate with the County and to provide the County site data, internal company interference test data, configurations to optimize sites for reduced interference, and operational dates for new sites. Cingular has reported that it regularly monitors for potential interference cases through a national website and that when it learns of a potential case of interference, the company responds to the relevant parties, often before Cingular’s involvement with the interference becomes known. As a result of those and other efforts, the CMRS carriers and the County have reduced the 61 dead spots claimed in the County’s original filings to 21.<sup>48</sup>

Moreover, although the County alleged that Cingular was *initially* reluctant (in July 2001) to provide requested information, Nextel fails to mention that the County recognized that Cingular ultimately provided the requested information in November 2001.<sup>49</sup>

As noted in status reports filed with the Commission on October 6, 2003, the number of interfering sites has been significantly reduced through the use of Best Practices and will be

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<sup>46</sup> Petition for Declaratory Ruling filed by Cingular Wireless LLC (Apr. 23, 2002).

<sup>47</sup> See Nextel *Ex Parte* Presentation, WT Docket No. 02-100 at 2 (Jan. 28, 2003) (stating that “[t]he Commission should promptly grant Cingular’s pending Petition for Declaratory Ruling . . .”).

<sup>48</sup> 18 F.C.C.R. at 13139-40.

<sup>49</sup> See County Fact Sheet at 2.

reduced to eight once the County deploys new radios.<sup>50</sup> The number of problem sites will be reduced to four once the County deploys additional facilities to cure dead spots within its system.<sup>51</sup>

In sum, there is no merit to Nextel's character allegation. Although never revealed in Nextel's Petition, this matter has already been disposed of by the Bureau and, in any event, does not begin to meet the elements of a character charge. Moreover, it is disingenuous for Nextel to raise this issue given its knowledge that the matter was resolved in Cingular's favor and the record evidence demonstrating that Nextel is the primary interferer. Thus, Nextel has knowingly submitted a baseless allegation for the purpose of delaying the proposed transaction.<sup>52</sup> This allegation should be summarily rejected.

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<sup>50</sup> Cingular 90 Day Status Report, WT Docket No. 02-100 at 1 (Oct. 6, 2003).

<sup>51</sup> See Letter from James R. Hobson, Counsel for Anne Arundel County, to Marlene H. Dortch, Secretary, FCC, at 4 (July 17, 2003). Cingular contributes to interference at three of these sites and has already mitigated interference at two. Testing of these mitigation steps has not been completed at one site because the County is still waiting for Nextel to complete an antenna swap. Additional details regarding interference mitigation were provided in Cingular's 90 day status report in WT Docket No. 02-100.

<sup>52</sup> See *Radio Carrollton, Inc.*, 69 FCC 2d 1139, 1150-51 (1978) (stating that, in determining whether delay was a "primary and substantial" purpose, the Commission considers whether information has been withheld that would be relevant to a determination of the issues raised; the absence of any reasonable bases for the allegations raised in the petition to deny; economic motivation indicating a delaying purpose, among other factors). Although Cingular's efforts to resolve interference in the County have already been evaluated by the Bureau, Nextel's role has never been fully investigated. In originally seeking Commission approval for its ESMR system, Nextel's predecessor-in-interest Fleet Call asserted that ESMR operations reduced the threat of interference and promised to insulate public safety systems from interference. Fleet Call Waiver Request at 33. Yet, nearly two years ago, the County's consultant identified Nextel as the primary source of interference to the County's public safety system. Rather than immediately eliminate the interference as promised, Nextel dragged its feet. It refused to provide public safety systems the "full and continuing protection" from interference that existed prior to ESMR operations. Nextel *now* claims that public safety interference caused by Nextel cannot be resolved without 800 MHz rebanding. See, e.g., *Ex Parte* Letter to Marlene H. Dortch, Secretary, FCC, from Regina M. Keeney, Counsel for Nextel, in WT Docket No. 02-55 (Nov. 3, 2003).



#### **IV. THE COMMISSION SHOULD REJECT THE OPPOSITIONS TO THE REQUESTED WAIVER OF THE UNJUST ENRICHMENT RULES**

##### **A. The Unjust Enrichment Rules Need Not Be Rigidly Applied**

Nextel and the Joint Commenters oppose the requested waiver of the unjust enrichment rules. In essence, their opposition is grounded in the absolutist position that such a waiver cannot be squared with “the Commission’s statutory duty to prevent unjust enrichment.”<sup>53</sup> The arguments made against the waiver boil down to the position that, because a grant of the requested waiver would “violate[] Section 1.2111(c)(1) of the Commission’s rules,” the waiver “would flout Commission precedent and policies.”<sup>54</sup> As the court pointed out in *WAIT Radio*, however, it would be “manifest error” for the Commission “to deny a waiver on the ground that there would be a violation in the absence of a waiver sought.”<sup>55</sup> Put another way, arguing that a rule would be violated if a waiver is granted is “a tautology inevitable in an application for waiver” and does not present “a reason for denial.”<sup>56</sup>

The unjust enrichment rules are not “unwaiveable rules.”<sup>57</sup> As Nextel and the Joint Commenters admit, the Commission has previously entertained waivers of the unjust enrichment rules.<sup>58</sup> In fact, Nextel has acknowledged that some circumstances do exist in which “it has been appropriate to relieve parties of at least some of their auction obligations.”<sup>59</sup> As explained both

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<sup>53</sup> Nextel Comments at 8; *see also* Joint Petition at 7-9.

<sup>54</sup> Nextel Comments at 3, 7.

<sup>55</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 n.12 (D.C. Cir. 1969).

<sup>56</sup> 418 F.2d at 1158.

<sup>57</sup> Unwaiveable rules are rarely adopted because the Commission’s “discretion to proceed . . . through general rules is intimately linked to the existence of a safety-valve procedure for consideration of an application for exemption based on special circumstances.” 418 F.2d at 1157. Thus, the Commission’s ability to consider waivers is of “pivotal importance in sustaining the system of administration by general rule.” 418 F.2d at 1158.

<sup>58</sup> *See* Nextel Comments at 12-14; Joint Petition at 9.

<sup>59</sup> Nextel Comments, WT Docket No. 02-276 at ii, 7 (Oct. 11, 2002).

in the captioned applications and below, the proposed transaction presents unique circumstances with clear public interest benefits warranting the grant of a waiver.

Nextel alleges that waiving the unjust enrichment rules would undermine the integrity of the Commission's spectrum auctions and thus run counter to Section 309(j) of the Communications Act.<sup>60</sup> Nextel omits to mention the Section 309(j) goals which the requested waiver would serve. It also fails to recognize that the various statutory objectives set forth by Congress for the Commission's competitive bidding program are often at odds with one another, and that the Commission is routinely placed in the position of balancing these competing objectives.

Section 309(j) contains "various and partially conflicting" public interest objectives.<sup>61</sup> Although Section 309(j) directs the Commission to take unjust enrichment concerns into account, it also directs the FCC to further a number of competing objectives, including:

- the development and rapid deployment of new services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;<sup>62</sup>
- the promotion of efficient and intensive spectrum use;<sup>63</sup> and
- the recovery of a portion of the value of the public spectrum resource made available for commercial use.<sup>64</sup>

The courts and the Commission also have recognized that Section 309(j) does not require the Commission to exalt enforcement of the unjust enrichment rules over all other public interest

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<sup>60</sup> Nextel Comments at 9.

<sup>61</sup> *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 F.C.C.R. 16266, 16269-70, 16278-79 (2000) ("*Sixth Report*").

<sup>62</sup> 47 U.S.C. § 309(j)(3)(A).

<sup>63</sup> 47 U.S.C. § 309(j)(3)(D).

<sup>64</sup> 47 U.S.C. § 309(j)(3)(C).

goals. Rather, “the Commission may choose to sacrifice some degree of fairness or integrity [in the auction process] in order to gain other important objectives” such as “competition,” “speedy deployment of services,” and “efficient use of the spectrum.”<sup>65</sup> In balancing the competing objectives of Section 309(j), the Commission’s judgment will be upheld if it “can show that its resolution ‘reasonably advances at least *one* of those objectives and [that] its decisionmaking process was regular.’”<sup>66</sup>

Nextel recognized these varied and conflicting goals when it argued that the public interest justified rule waivers that would have enabled *it* to acquire the NextWave licenses out of bankruptcy in 1999.<sup>67</sup> Nextel negotiated an agreement with the Commission and the U.S. Department of Justice acknowledging that the acquisition of NextWave’s licenses would require a waiver not only of the Commission’s unjust enrichment rules, but also of the ban on the transfer of Entrepreneurs’ Block licenses to non-qualifying entities (47 C.F.R. § 24.839(a)).<sup>68</sup> Nextel argued that such relief “is consistent with the FCC’s auction authority” and recognized

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<sup>65</sup> *U.S. Airwaves*, 232 F.3d at 234; *Sixth Report*, 15 F.C.C.R. at 16278-79. Similarly, the Commission has previously rejected the commenters’ claim that Section 309(j)(4)(D) somehow requires the Commission to ensure that small businesses acquire spectrum and thrive. *Compare Sixth Report*, 15 F.C.C.R. at 16278 (finding that Section 309(j) only requires that “small businesses be given the *opportunity* to participate in the provision of spectrum-based services”) with Nextel Comments at 7-8; Joint Comments at 8-9. In any event, the consummation of the proposed transaction will advance the goal articulated in Section 309(j)(4)(D) by aiding NextWave in its effort to emerge from bankruptcy as an operating provider of wireless services.

<sup>66</sup> *U.S. Airwaves*, 232 F.3d at 233 (quoting *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999)) (emphasis added). Moreover, in November 2001, the United States Government and the Commission recognized that “the best way to serve the public interest . . . is to resolve the [NextWave] Litigation as expeditiously as possible . . . and thereby avoid further delay in the use of the Covered Spectrum.” See NextWave Settlement Agreement (Nov. 15, 2001).

<sup>67</sup> See, e.g., Nextel Letter at 1, 2-4.

<sup>68</sup> See Letter from FCC Chairman William E. Kennard to The Honorable Thomas Bliley, Chairman, Committee on Commerce, U.S. House of Representatives (Sept. 27, 1999), at Exhibit B – Term Sheet for Comprehensive Settlement and Joint Plan of Reorganization, Section I.B.

that the various objectives of Section 309(j) can sometimes be in conflict.<sup>69</sup> It concluded that the Commission's has the authority to "decide how much precedence particular policies will be granted when several are implicated in a single decision."<sup>70</sup> Nextel also emphasized that its proposed acquisition would facilitate resolution of the bankruptcy dispute between the U.S. government and NextWave, allowing long-fallow spectrum to be put to use promptly.<sup>71</sup>

Not surprisingly, Nextel's current comments fail to mention these earlier positions. The public interest factors upon which Nextel relied in 1999 are no less operative today. Accordingly, Nextel's current disingenuous arguments to the contrary should be rejected as without merit.

**B. The Waiver Requested Here Would Advance the Public Interest**

Virtually all of the goals of Section 309(j) would be advanced by a grant of the requested waiver. The transaction would allow spectrum to be put to efficient use for the benefit of consumers, maximize the U.S. Treasury's recovery on behalf of taxpayers on a significant portion of the spectrum auctioned to NextWave, facilitate NextWave's eventual emergence from bankruptcy (thereby helping that small business participate in the provision of spectrum-based services), preserve auction integrity, and promote competition in the CMRS marketplace. In addition, grant of the waiver would serve to accommodate the purposes underlying the Bankruptcy Code.

By granting the requested waiver, the Commission will effectuate the first step in resolution of the NextWave bankruptcy. This bankruptcy has triggered multiple judicial proceedings involving novel legal questions regarding the interplay between the

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<sup>69</sup> See Nextel Letter at 2 (*quoting Melcher v. FCC*, 134 F.3d 1143, 1154 (D.C. Cir. 1998)).

<sup>70</sup> See *id.*

<sup>71</sup> Nextel Letter at 1.

Communications Act and the Bankruptcy Code. These proceedings have drawn the attention of the U.S. Bankruptcy Court for the Southern District of New York, the U.S. District Court for the Southern District of New York, the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the District of Columbia Circuit, and ultimately the United States Supreme Court,<sup>72</sup> and created uncertainty regarding the possession and use of a significant swath of spectrum for several years.

The Commission originally awarded licenses to use these frequencies over six years ago, but they have not been put to widespread commercial use, preventing public enjoyment of wireless services provided over these frequencies. The Commission cancelled NextWave's licenses and reconfigured the PCS C Block in an attempt to put NextWave's spectrum into the hands of entities that would put it to use. Since the U.S. Supreme Court ruled that the cancellation violated bankruptcy law, the Commission has had no choice but to advance its objectives regarding the NextWave spectrum through its participation in NextWave's bankruptcy case.<sup>73</sup> Grant of the requested waiver will finally effectuate that process and permit the efficient use of the subject spectrum. In contrast, rigid application of Sections 1.2111 and 24.714 would prevent the deployment of services to the public over the spectrum covered by the subject licenses without additional judicial and administrative delay.

Moreover, the requested relief will allow the government to recover the maximum value for the spectrum. The \$1.4 billion purchase price for the subject licenses was established after an

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<sup>72</sup> Although Nextel and the Joint Commenters claim that the requested waiver also should be denied because the circumstances presented here are not unique, the fact that the Supreme Court decided to review the case speaks for itself. *See* Joint Petition at 8-9; Nextel Comments at 10-11, 12-14.

<sup>73</sup> Despite the Commission's best efforts, the intervention of the Supreme Court prevented the FCC from treating NextWave in the same manner as other designated entities. Accordingly, the "fairness" concerns of the Joint Commenters are misplaced. *See* Joint Comments at 6, 8-9.

auction process supervised by the Bankruptcy Court failed to produce a superior offer.<sup>74</sup> The government and NextWave reached a negotiated settlement of their respective claims regarding the licenses, the terms of which provide for the government to be paid \$714 million, which amount represents an accelerated payment of the entire unpaid principal owed for the licenses, as well as approximately \$27 million in interest.<sup>75</sup>

Nextel and the Joint Commenters incorrectly presume that by denying the requested waiver of the unjust enrichment rules, the Commission will somehow be able to secure a larger payment for the licenses. NextWave is in bankruptcy because it could not afford to pay the price bid. The proposed transaction is predicated upon effectuation of a settlement between NextWave, the Commission and NextWave's creditors that calls for a \$714 million direct payment to the FCC at closing and a mutual release of claims by the government and NextWave. If the requested waiver is denied, this transaction will disintegrate, leaving the licenses in the bankruptcy estate and offering little or no opportunity for the FCC to be paid anything – unless a new purchaser surfaces and the bankruptcy and FCC processes are repeated. Indeed, if the settlement is not effectuated, the government could be left in the uncertain position of having its claims decided through further litigation. Thus, denial of the waiver will not increase the amount recouped by the FCC. Instead, a denial will return the matter to the *status quo* where the

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<sup>74</sup> *Bankruptcy Sale Order* at 3. As Nextel has recognized, the bankruptcy process affords any interested party an opportunity to present a higher bid on the NextWave spectrum. *See* Nextel Letter at 3.

<sup>75</sup> *See* Term Sheet for Agreement Regarding the §363 Sale of Rights and Interests in Certain Licenses, filed with the U.S. Bankruptcy Court for the Southern District of New York as Exhibit B to the Motion Pursuant to Sections 105, 363 and 1146(c) of the Bankruptcy Code (filed by Debtors on August 5, 2003). The Department of Justice has approved the Term Sheet and the transactions and releases contemplated therein. *See* Transcript of Hearing re Approval of Sale, Case No. 98-21529 (U.S. Bkptcy. Ct., S.D.N.Y., Sept. 25, 2003) at p. 5. By ensuring that NextWave pays the full price bid for the licenses, as well as a substantial amount of interest, the Commission is preserving the integrity of the auction process.

spectrum is tied-up in bankruptcy. Simply put, in order for American taxpayers to recover \$714 million and for consumers to obtain the benefits of the commercial services on the subject spectrum without additional judicial or administrative delay, the Commission must grant the requested relief.<sup>76</sup>

As detailed in the captioned applications, allowing the proposed transaction to proceed will promote competition by enabling Cingular to expand its footprint in some areas, thereby adding a competitor to the market and giving consumers increased choice among wireless competitors and access to the wide array of state-of-the-art voice and data products and services that Cingular offers. In addition, the proposed transaction will allow Cingular to expand its network capacity and services.<sup>77</sup> By easing spectrum constraints in these markets, Cingular will be able to achieve operational efficiencies and offer a more robust range of services to meet the needs of new and existing subscribers. Grant of the requested waiver is necessary to the achievement of these public interest benefits.

Finally, as noted in the captioned applications, the Bankruptcy Court has found that “[a]pproval at this time of the Purchase Agreement and the FCC Term Sheet and the consummation of the transactions contemplated thereby is in the best interests of Debtors, their creditors, and their estates” and that “the proposed resolution of the claims between the FCC and the Debtors with respect to the Designated Licenses as detailed in the FCC Term Sheet, is fair

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<sup>76</sup> See 47 U.S.C. §§ 309(j)(3)(A), (C). The first specific objective Congress laid out for the Commission in granting auction authority was “the development and rapid deployment of new technologies, product, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.” 47 U.S.C. § 309(j)(3)(A).

<sup>77</sup> The Commission has recognized that there is a shortage of available spectrum for the provision of new services and that the public interest would be served by permitting large carriers to acquire C and F Block spectrum to alleviate this shortage. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Order on Reconsideration*, 16 F.C.C.R. 1343, 1348 (2001).

and equitable . . . .”<sup>78</sup> The Commission has recognized that enabling parties to consummate court-approved bankruptcy sales for the benefit of creditors furthers “the equitable purposes of the Federal Bankruptcy Act” and contribute to a finding of “substantial public interest benefits.”<sup>79</sup> In addition to producing the public interest benefits described above, Commission grant of the requested waiver would advance the public interest by accommodating the purposes underlying the Bankruptcy Code.

Emphasizing Cingular’s size and commercial success, Nextel argues that the requested waiver should be denied because Cingular would be unjustly enriched.<sup>80</sup> This argument reflects a fundamental misunderstanding of both the rules and the proposed transaction.

The unjust enrichment rules were adopted “to prevent *designated entities* from profiting by the rapid sale of licenses acquired through the benefit of our preference policies.”<sup>81</sup> The rules thus prevent a designated entity from obtaining unjust enrichment either by (i) rapidly selling a license for a profit to a non-designated entity or (ii) obtaining a profit by virtue of installment payments or bidding credits.<sup>82</sup> Here, there has been no rapid sale of the licenses. The licenses at issue were all initially awarded more than six years ago and NextWave already has satisfied its

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<sup>78</sup> See *Bankruptcy Sale Order* at ¶¶ 12, 25.

<sup>79</sup> See *Space Station System Licensee, Inc. and Iridium Constellation LLC*, 17 F.C.C.R. 2271, 2289 (IB 2002).

<sup>80</sup> Nextel Comments at 8-11.

<sup>81</sup> *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 F.C.C.R. 2348, 2394 (emphasis added), *recon. granted in part* 9 F.C.C.R. 5532 (1994); see also *id.* at 2394 (“It would be unjust and inconsistent with the will of Congress for . . . preferred licensees to obtain a license with the government’s help, transfer that license *after a short period of time* to an entity that was not entitled to special treatment at the auction, and appropriate for themselves the difference between the full market value of the license and the discounted price which they paid the government for that license.”) (emphasis added).

<sup>82</sup> See *Winstar LMDS, LLC*, 17 F.C.C.R. 7084, 7087-88 (WTB/AIAD 2002).



construction obligations.<sup>83</sup> Moreover, grant of the waiver would not permit NextWave to “profit” from its participation in the Commission’s installment payment program. NextWave is in bankruptcy, and the disposition of the remainder of the purchase price for the licenses not being paid to the government is in the hands of the Bankruptcy Court. Indeed if any “enrichment” of NextWave were to follow at all from the transaction, it would have to be the result of a court judgment, and thus could not be said to be “unjust.”<sup>84</sup>

The proposed transaction would not permit Cingular to obtain the subject licenses at a discount.<sup>85</sup> As noted above, it has agreed to pay full market value for the spectrum. The allocation of the purchase price between the government and NextWave was part of the negotiated settlement involving both the Commission and the Department of Justice. Denial of the waiver will not result in Cingular increasing the purchase price it has agreed to pay for the subject licenses. Instead, the transaction will fall apart (as the commenters hope).

### **C. Prior Waiver Denials Are Inapposite To The Present Case**

The cases cited by Nextel and the Joint Commenters purportedly to bolster denial of the requested waiver are inapposite.<sup>86</sup> In *Winstar LMDS, LLC*, the FCC rejected a requested waiver of the entire amount due under the unjust enrichment rules with regard to bidding credit recapture.<sup>87</sup> The FCC stated that the parties were aware of the unjust enrichment rules and should have factored the required payments into the purchase price, and that denial of the waiver

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<sup>83</sup> See *NextWave Personal Communications Inc.*, 18 F.C.C.R. 3235 (WTB 2003); FCC Form 603, File No. 0001461949, Exhibit 1 at 3-6.

<sup>84</sup> The Bankruptcy Court has already found that “[t]he resolution articulated in the FCC Term Sheet satisfies [the Bankruptcy law] standards, and represents a fair and equitable settlement which enables the Debtors and the FCC to resolve a portion of the disputes between them without resorting to additional litigation.” *Bankruptcy Sale Order* at ¶ 21.

<sup>85</sup> Nextel Comments at 10; Joint Petition at 7.

<sup>86</sup> See Nextel Comments at 11-14; Joint Petition at 9.

<sup>87</sup> 17 F.C.C.R. at 7084.

would not scuttle the transaction.<sup>88</sup> Unlike *Winstar*, here the FCC is a party to the bankruptcy proceeding and approved a settlement in full satisfaction of the debt owed by NextWave, with full knowledge that this would preclude recovery of the full amount of interest.<sup>89</sup> Unlike *Winstar*, the transaction before the Commission here will unravel – and the public interest benefits concomitant with it will be denied – unless the requested waiver is granted. Moreover, *Winstar* involved a complete waiver of the bidding credit recapture rule. Here, NextWave has agreed to pay all of the unpaid principal balance owed on the licenses, plus some amount of interest.<sup>90</sup>

*D&E Communications, Inc.* also is distinguishable because it involved a straight-forward transfer and an accompanying request for waiver of the unjust enrichment rules.<sup>91</sup> A waiver was sought to permit a designated entity to transfer licenses to a former designated entity that had grown beyond the eligibility limitations without triggering a recapture of bidding credits. At issue in *D&E Communications* was whether the transferee's eligibility was to be judged as of the time of the original auction of the licenses to be transferred, or as of the time of application for Commission approval of the transfer. The Commission confirmed that a former designated entity that had grown beyond the eligibility limits did not retain eligibility to assume the benefit of bidding credits in a transfer context.<sup>92</sup> Thus, the case does not present similar issues to those present here. In addition, unlike the present case, *D&E Communications* did not involve the settlement of complicated bankruptcy issues that have for years tied up spectrum nationwide.

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<sup>88</sup> 17 F.C.C.R. at 7090.

<sup>89</sup> As a party to the settlement, the FCC is presumed to have factored satisfaction of the unjust enrichment rules into the settlement agreement. *See* 17 F.C.C.R. at 7090.

<sup>90</sup> Based on Nextel's calculations, the FCC would receive approximately \$27 million toward interest. *See* Nextel Comments at 2.

<sup>91</sup> 15 F.C.C.R. 61 (WTB/AIAD 1999).

<sup>92</sup> 15 F.C.C.R. at 65-68.

#### **D. The Instant Case Is Unique**

Nextel and the Joint Petitioners seek to demonstrate that the requested waiver fails to meet the applicable waiver standard because there is nothing unique about the NextWave case. However, this case involves circumstances that are so unique and unusual that U.S. Supreme Court involvement was required to sort them out. That fact speaks for itself. The FCC has already recognized the “unique” set of circumstances involving the NextWave licenses.<sup>93</sup> Indeed, Nextel itself previously justified *its* proposal to acquire NextWave licenses based upon the uniqueness of the NextWave situation.<sup>94</sup> The circumstance present here – involving a proposed assignment of NextWave spectrum to a non-designated entity – are no less unique because someone other than Nextel is the proposed assignee.

For the foregoing reasons, the oppositions to the waiver request lack merit and should be rejected and the requested relief should be granted expeditiously.

#### **V. THE COMMISSION SHOULD REJECT NEXTEL’S REQUEST TO ALTER THE “RESTRICTED” NATURE OF THE PROCEEDING**

This proceeding has been classified as “restricted” by Public Notice, DA 03-3031, issued October 6, 2003. Nextel claims that the transaction should be re-classified as a “permit-but-disclose” proceeding.<sup>95</sup> Pursuant to 47 C.F.R. §1.1208, however, a proceeding shall be classified as restricted if the proceeding is not specifically listed as exempt in §1.1204(b) or as permit-but-disclose in §1.1206(a).<sup>96</sup> The rule also specifies that waiver proceedings should be classified as

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<sup>93</sup> See *Disposition of Down Payment and Pending Applications by Certain Winning Bidders in Auction No. 35, Requests for Refunds of Down Payments Made in Auction No. 35*, WT Docket No. 02-276, *Order and Order on Reconsideration*, 17 F.C.C.R. 23354, 23362 (2002).

<sup>94</sup> See Nextel Letter at 1-2.

<sup>95</sup> Nextel Comments at 20.

<sup>96</sup> 47 C.F.R. §1.1208.

restricted.<sup>97</sup> The purpose behind the rule is that such proceedings are classic adjudicatory proceedings, unlike rulemakings which propose rules of general applicability. This case presents no exception.

Moreover, the Commission traditionally has classified a proceeding as restricted whenever an opposition to an application or request is filed.<sup>98</sup> In rejecting proposals to alter this approach, the Commission expressed considerable concern that the designation of proceedings as permit-but-disclose may create the appearance of unfairness.<sup>99</sup> Accordingly, the Commission amended its rules to specify that *most* proceedings would be classified as restricted.<sup>100</sup>

Nextel has failed to demonstrate why the Commission should deviate from the rule. Nextel has not shown how the public interest would benefit by designating the transaction as “permit-but-disclose.” The transaction has been placed on public notice, so there has been a full opportunity for public comment.<sup>101</sup> Therefore, changing the *ex parte* status of this proceeding from restricted to “permit-but-disclose” would have minimal affect on the public’s ability to participate, while unnecessarily creating an open-ended comment period.

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<sup>97</sup> *Id.*

<sup>98</sup> See *Amendment of 47 C.F.R. Sec. 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, *Report and Order*, 12 F.C.C.R. 7348, 7353 (1997).

<sup>99</sup> 12 F.C.C.R. at 7351-52.

<sup>100</sup> 12 F.C.C.R. at 7352.

<sup>101</sup> The Joint Commenters appear to claim that the Commission would effectively shut the public out of the proceeding unless it issues a new public notice seeking comment on the transaction. Joint Comments at 2. This claim is without merit. The applications were already placed on public notice and parties opposing the transaction were given ample time to prepare responsive pleadings.

## CONCLUSION

The filings made by Nextel and the Joint Commenters should be dismissed or denied. At most, these filings should be treated as informal comments. Nevertheless, even if the filings were considered, they fail to justify a denial of the above-captioned applications. For the foregoing reasons, the applications should be granted with all necessary waivers attendant thereto.

Respectfully submitted,

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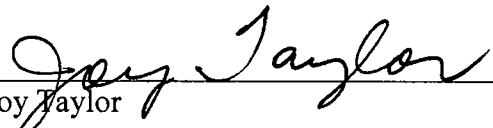
November 17, 2003

## CERTIFICATE OF SERVICE

I, Joy Taylor, do hereby certify that on this 17th day of November 2003, a copy of the foregoing Opposition to Petitions to Deny was served by U.S. Mail, first-class postage prepaid to the following:

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