

April 18, 2008

FILED/ACCEPTED

APR 18 2008

Federal Communications Commission
Office of the Secretary

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Alpine PCS, Inc.
Motion for Stay
Order, DA 07-338 and DA 08-338/AU Docket No. 08-46

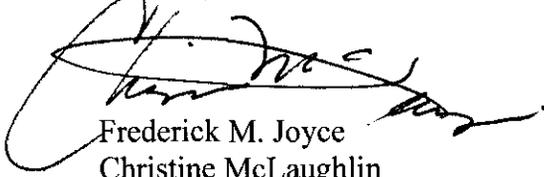
Dear Ms. Dortch:

Transmitted herewith, on behalf of Alpine PCS, Inc., please find the original and four (4) copies of its Motion for Stay in the above-referenced proceedings.

Please also find enclosed an additional copy of the Motion. Please date-stamp that copy and return it to our courier, who is waiting.

Thank you for your attention to this matter. If you have any questions or require additional information concerning this matter, kindly contact the undersigned.

Sincerely,



Frederick M. Joyce
Christine McLaughlin

Enclos.

cc: Service List (via e-mail)

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

FILED/ACCEPTED

APR 18 2008

Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
ALPINE PCS, INC.)	
Request for Waiver of Automatic)	
Cancellation Rules for Auction No. 5,)	DA 07-338
C Block Licenses for Santa Barbara)	
(Mkt. No. 406-C) and San Luis Obispo)	
(Mkt. No. 405-C), and Request for Debt)	
Restructuring)	
)	
)	
Auction of AWS-1 and Broadband PCS)	DA 08-767
Licenses Scheduled for July 29, 2008)	AU Docket No. 08-46

To: The Secretary
Attn: Chief, Wireless Telecommunications Bureau

MOTION FOR STAY

Alpine PCS, Inc. ("Alpine"), by its attorneys and pursuant to Sections 1.43 and 1.44 of the Commission's Rules, 47 C.F.R. § 1.43, 1.44, hereby respectfully requests that the Wireless Telecommunications Bureau (the "WTB" or "Bureau") stay or revise its Auction Order, DA 08-338 (released April 4, 2008) with respect to the above-referenced PCS licenses that have been designated for re-auction in Auction 78. These PCS licenses are subject to a Petition for Reconsideration that is pending before this Bureau of its January 29, 2007 order ("Order"; DA 07-338), and, a Request for Debt Restructuring that is pending before the Office of the Managing Director (the "Restructuring Request").

Alpine filed a Motion for Stay on February 28, 2007, concurrently with its Petition for Reconsideration of the Order denying Alpine's referenced waiver request. To date, no action has been taken on that Motion. Consequently, Alpine hereby requests that the Bureau stay or revise its

Auction Order, and remove the referenced licenses from the proposed auction, to ensure that Alpine's rights are not irreparably harmed pending reconsideration and renegotiation of its FCC debt. In support thereof, the following is respectfully submitted:

Summary of Relevant Facts

As stated in greater detail in its Petition for Reconsideration, Alpine obtained the subject PCS licenses in 1996, following Auction No. 5. Alpine timely complied with the five-year coverage requirements, commenced operation of these stations, and until 2002, timely made every payment that was required of it under the installment payment plan. Alpine complied with its payment obligations despite extraordinary costs it had incurred in siting and zoning proceedings in the California communities covered by the licenses due to actions of local authorities beyond Alpine's control.

In early 2001, Lucent Technologies, Inc. reneged on commitments to provide vendor financing to Alpine. Alpine tried to obtain alternate financing; however, due to the widespread depression in the telecommunications industry, and the tremendous disparity between the FCC debt and the actual value of the Licenses, it was unsuccessful. In late July of 2002, prior to the end of the second quarterly grace period provided for by 47 C.F.R. § 1.2100(g)(4)(ii), Alpine filed the Restructuring Request; a few days later, it filed its Waiver Request with the Bureau, seeking additional time to resume payments for the subject licenses.

Well over four years after timely requesting a waiver of the FCC's rules and renegotiation of its debt, the Bureau, on January 29, 2007, released an order denying Alpine's requests. The FCC's inaction helped trigger a series of calamitous financial and operational events that are spelled out in detail in Alpine's Petition for Reconsideration.

Good Cause Exists for Granting a Stay.

The Bureau may grant a stay pending review of a petition for reconsideration “in its discretion.” *See* 47 C.F.R. §1.102(b)(2). That standard is more flexible than the judicial standard for obtaining injunctive relief. For instance, the FCC may grant a stay pending reconsideration even where the petitioner has *not* shown any likelihood of success on the merits. *See, e.g., Angeles Broadcasting Network*, 59 R.R. 2d 758 (1985) (stay granted to avoid interruption of service to the public despite agency conclusion that petition lacked merit). In other cases, the Commission has granted a stay though there was no showing of “irreparable injury,” which is typically necessary to obtain a judicial injunction. *See Lompoc Valley Cable TV*, 1 R.R. 2d 1081 (1964) (stay granted due to “policy questions” raised by the petitioner).

Even under the traditional “four-prong test” for obtaining a judicial stay or injunctive relief, the FCC has held that in administrative proceedings “[t]here is no requirement that there be a showing as to each criterion. The relative importance of the four criteria will vary depending upon the circumstances of the case. If there is a particularly overwhelming showing in at least one of the factors, we may find that a stay is warranted notwithstanding the absence of another one of the factors.” Implementation of Sections 309(j) and 337 of the Communications Act as Amended, Order, WT Docket No. 99-87, 18 FCC Rcd. 25491 at ¶ 6 (December 3, 2003) (footnotes omitted).

Alpine’s request for a Stay meets the FCC’s flexible standards. With respect to the “likelihood of success on the merits,” Alpine’s petition for reconsideration raises many serious questions that are at least “fair ground” for agency review. *See, e.g., Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977) (injunctive relief may be granted when the petitioning party submits questions that are serious, substantial, difficult, doubtful and “fair ground”

for litigation).

Here are just a few examples of some of the "serious and substantial" questions that Alpine has raised in its Petition for Reconsideration. With respect to Alpine's waiver request, the FCC has failed to treat similar supplicants in a similar manner, without any justification under the Communications Act. The Order failed to explain why Alpine, which had paid over \$13 million to the FCC in debt payments, and timely constructed both of its Licensed PCS networks, should have been treated any differently and surely far worse than NextWave Communications, a bankrupt PCS licensee that was granted substantial relief from the FCC's automatic forfeiture rules and its debt payment obligations. That disparate treatment alone would be legal grounds for reversal of the Order. See Committee for Community Access v. FCC, 737 F.2d 74, 77 (D.C. Cir. 1984) ("The agency cannot silently depart from previous policies or ignore precedent.").

The Order also ignored relevant evidence before the Commission, including the havoc wreaked on the telecommunications industry by the actions of NextWave and "sham" designated entity participants in Auction No. 5. Moreover, the FCC's failure to afford any consideration whatsoever to Alpine's Restructuring Request violated the Commission's debt collection rules. The FCC's obligation to provide "serious consideration of meritorious applications for waiver" is by now an incontrovertible tenet of appellate review of this agency's actions. See WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). With regard to Alpine's well-reasoned waiver request, the FCC gave no consideration to Alpine's unique and compelling circumstances, instead expressing concern about the sanctity of the C block auctions. This lack of serious analysis for pending waiver requests cannot pass muster under applicable public interest standards. Id.

Alpine is not in default on the Licenses; the FCC will be in breach of its contractual obligations toward Alpine if it makes Alpine's PCS licenses available to third parties at auction. *See* Petition for Reconsideration at pp. 16-18.

There are two contracts that govern the FCC's loan arrangement with Alpine (both of which were drafted by the FCC and its attorneys): (1) an Installment Payment Plan Note,¹ and (2) a Security Agreement² (collectively the "Loan Agreements"). Quoted below are the relevant "default" provisions from the Note:

A default under this Note ("Event of Default") shall occur upon any or all of the following: a. non-payment by Maker of any Principal or Interest on the due date as specified hereinabove if the Maker remains delinquent for more than 90 days and (1) Maker has not submitted a request, in writing, for a grace period or extension of payments, if any such grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission; or, (2) Maker has submitted a request, in writing, for a grace period or extension of payments, if any such grace period of extension of payments is provided for in the then-applicable orders and regulations of the Commission, and following the expiration of the grant of such grace period or extension or upon denial of such a request for a grace period or extension, Maker has not resumed payments of Interest and Principal in accordance with the terms of this Note (emphasis added).

Consistent with the express terms of the Note, Alpine timely submitted in writing a request for an "extension of payments" for all of its License debt obligations. *See* Waiver Request at 3, 6-7; Supplement at 5. Because of that timely request, Alpine was never in default under the Notes, and, it is not in default under either Note to this day. Pursuant to the contract terms, Alpine would not be in default until such time as the FCC formally and finally denies its request for extension of its payment obligations. By its Petition, Alpine continues to timely exercise its right to request an extension of

¹ Copies of the Notes for each of the subject licenses are attached to Alpine's Petition for Reconsideration as Exhibit Thirty-Two and Exhibit Thirty-Three.

² Copies of the Security Agreements for each of the subject licenses are attached to Alpine's Petition for Reconsideration as Exhibit Thirty-Four and Exhibit Thirty-Five.

the debt payments. Any FCC action to enforce the “cancellation” of the Licenses pending final adjudication of Alpine’s Request would constitute a breach of the Notes.

It is well-settled law that every contract, including the Loan Agreements at issue in this matter, imposes on the parties thereto an implied obligation of good faith and fair dealing, as well as an obligation to cooperate and not hinder performance. See Restatement (Second) of Contracts, sec 205 (1981); Tecom, Inc. v. United States, 66 Fed.Cl. 736, 770 (Fed.Cl. 2005). See also Uniform Commercial Code § 1.203. The FCC’s Security Agreements and Notes were subject to the covenant of good faith and fair dealing that is implicit in every contract. The re-auctioning of Alpine’s licenses would put the FCC in breach of these covenants and of its contractual and legal obligations toward Alpine, and raise serious damages issues.

Alpine will suffer irreparable harm absent a stay. The Commission’s failure to give timely and good faith consideration to Alpine’s Request has destroyed its business and that of its affiliated entities, including a rural cellular operator that had provided service to the public for many years. If the Commission takes any action to re-auction the Licenses, any hope of preserving Alpine’s remaining assets and business goodwill could be irretrievably lost. A subsequent victory on reconsideration will not suffice to undo the harm that the FCC’s auction of these licenses would cause to Alpine’s business reputation, not to mention the significant financial investment that will be squandered if a stay is not granted. “[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor *or loss of goodwill*, the irreparable injury prong is satisfied.” Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994) (emphasis added). Consequently, the “irreparable harm” element of the four-part test has been met. Third parties will not be harmed by a grant of this stay with respect

Third parties will not be harmed by a grant of this stay with respect to these two licenses. The FCC has made 88 licenses available for "reauction," removal of these two licenses will have no material impact on available spectrum, or the public's coffers. No major carriers were providing service in the subject rural markets when Alpine constructed and operated its facilities; hence, it cannot be claimed that there's now some pent-up demand in these areas for these licenses. In any event, no entity but Alpine has any legitimate interests in these particular licenses. If anything, the FCC would be causing unnecessary harm to any third parties that might squander unnecessary funds and time bidding on licenses that may never be available to them.

Finally, the public interest will be served by a stay of the Auction with respect to Alpine's PCS licenses. The public interest warrants that when a Designated Entity such as Alpine approaches the FCC in good faith to request renegotiation of an FCC debt, the FCC will honor Section 1.1915 of its Rules and Section 902 of the Federal Claims Collection Standards. *See* 47 C.F.R. § 1.1915. The proposed sale by the FCC of the licenses that are at the heart of Alpine's pending renegotiation request can hardly be deemed to comply with the letter and spirit of the FCC's rules and these government standards concerning federal debts. Rather, going forward with the auction of Alpine's license will send a clear message to all FCC debtors, and to the wireless investment community, that the FCC simply cannot be trusted to honor its contractual and regulatory obligations, or to negotiate in good faith with spectrum debtors.

The FCC itself has previously articulated that it is in the public's interest to provide for a restructuring of debts associated with the widespread financial turmoil in the telecommunications sector. In July of 2002, at the same time that Alpine submitted its Restructuring Request, FCC Chairman Michael Powell was testifying before Congress about the need to take drastic legal and

regulatory steps to “manag[e] the current turmoil” in the telecommunications industry and to “stabiliz[e] the industry over time.” See Written Statement of Michael K. Powell Before the Senate Committee on Commerce, Science and Transportation, “Financial Turmoil in the Telecommunications Marketplace: Maintaining the Operations of Essential Communications” (July 30, 2002), available at http://hraunfoss.fcc.gov/edocs_public/attachment/DOC-224797A1.pdf (“Powell 7/02 Testimony”) at ii. Chairman Powell described in stark terms the dire prevailing conditions of the telecom sector:

While the corporate scandals are dominating the headlines, it is very important for us to focus on the broader distress that has hit the telecommunications sector. I again applaud the Committee for taking up this important discussion. Clearly, the telecommunications industry is riding on very stormy seas. This is an industry where nearly 500,000 people in the United States alone have lost their jobs and approximately \$2 trillion of market value has been lost in the last two years. By some estimates the sector is struggling under the weight of nearly \$1 trillion in debt.

Id. at 6.

In laying out to Congress his recommendations for helping the recovery of the telecom industry, Chairman Powell testified as follows: “Though the problems are significant, recovery can be achieved if several critical steps are taken.” Id. at ii. Among the “six critical elements” he recommended for “managing the current turmoil and stabilizing the industry over time,” and of central relevance to Alpine's Request was this statement of FCC policy: “It is difficult to imagine the industry stabilizing without some modest and prudent restructuring.” Id. That is precisely what Alpine presented to the FCC in its Request: a “modest and prudent” request to restructure its FCC license debt. The FCC should honor that policy pledge, remove Alpine's licenses from the upcoming Auction, and proceed to consider in good faith Alpine's request for renegotiation of its FCC debts.

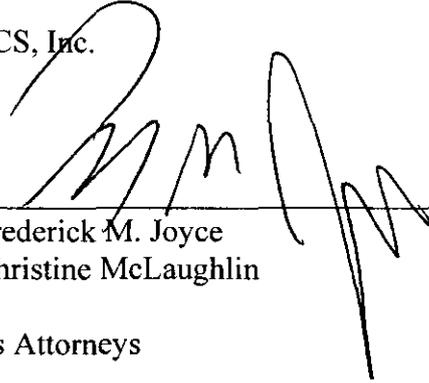
Conclusion

For all the foregoing reasons, Alpine respectfully requests that the Bureau grant this Motion and stay the Auction Order or revise that order to remove the above-referenced PCS licenses from auction pending the Bureau's review of Alpine's Petition for Reconsideration and Restructuring Request.

Respectfully submitted,

Alpine PCS, Inc.

By:



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Date: April 18, 2008

CERTIFICATE OF SERVICE

I, Elaine Simons, a Legal Administrative Assistant in the law firm of Venable LLP, hereby certify that on April 18, 2008, a copy of the foregoing **Motion for Stay** was sent by e-mail to the following:

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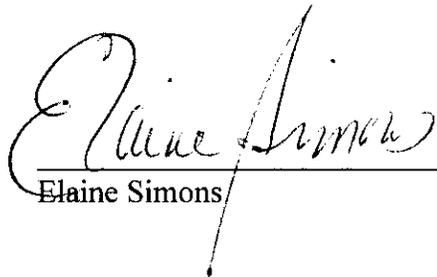
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