

EXHIBIT F**CONDITIONAL WAIVER REQUEST**

Pursuant to Section 1.3 of the rules and regulations of the Federal Communications Commission (“FCC” or “Commission”), 47 C.F.R. § 1.3 (1998), and to the extent deemed necessary by the FCC, Progeny LMS, LLC (“Applicant”), hereby requests waiver of certain FCC application processing policies so that it may amend its application to seek FCC recognition that Otto N. Frenzel, III (“Frenzel”) is the owner and controlling party of the Applicant.

I.**BACKGROUND**

The Applicant seeks to amend its long-form auction application (FCC Form 601) (“Application”) to implement a settlement ending litigation between various equity interest holders in the Applicant. As previously discussed with the FCC’s staff, in order to implement the settlement, the parties hereby submit the following amendment, which provides revised ownership information for Progeny LMS, L.L.C.¹ The proposed amendment is fully consistent with the FCC’s policies, although the unusual circumstances of the settlement may require one or more incidental waivers.

For the reasons set forth more fully below, the Commission should accept the amended FCC Form 601 and ownership information for “Progeny LMS, L.L.C.” as the Applicant. Further, the FCC should, if necessary, waive its rules and policies² relating to real-party-in-interest, major changes to applications, post-

¹ The former Exhibit A to the Application states that the Applicant is controlled by Progeny Post, LLC, an entity controlled by Curtis Johnson (“Johnson”). The revised Exhibit A to the Application states that the Applicant is solely owned and controlled by Frenzel. The Taxpayer I.D. Number (“TIN”) specified for the Applicant will be amended to reflect a TIN obtained by Frenzel upon FCC acceptance and processing of the proposed amendments.

² There actually is no rule that prohibits an LMS applicant from amending its long-form application to specify a major ownership change in an auction context. See 47 C.F.R. § 1.927(b) (1999) (no Subpart Q provision governs long-form amendments). However, other similar FCC rules (such as 1.2105(b)(2)) and informal policies appear to indicate that the FCC considers such amendments to result in the application being deemed “newly-filed,” and thus untimely with respect to the applicable filing window. Thus, this request for waiver is conditionally submitted in an abundance of caution, with the recognition that no formal waiver may be required.

auction filing procedures, and any other rules or policies that would otherwise preclude the agency from recognizing the Parties' settlement and Progeny LMS, L.L.C., with the ownership as described herein, as the Applicant.

II.

DISCUSSION

A. **The Public Interest Is Served By Acceptance Of This Amendment And Grant Of The Waiver Request.**

1. **Frenzel Is Fully Qualified To Be An FCC Licensee.**

From the very beginning of the auction process, Frenzel has always remained an identifiable party to the Applicant's efforts to obtain LMS spectrum. For example, Mr. Frenzel was disclosed as an attributable owner of Post, the entity specified on the Form 175 as controlling the Applicant. Further, Frenzel: (i) worked with Johnson to develop a bidding strategy and helped fashion dollar limits on the monetary amount that the Applicant was permitted to bid; (ii) using his own funds, personally submitted the upfront and down payments to the FCC by wire transfer; (iii) met with Johnson on a regular basis to review auction matters; (iv) regularly monitored the auction status during the course of the auction; and (v) agreed to pay, from his own personal funds, the entire balance due for the licenses.

Moreover, as this amended long-form application demonstrates, the Applicant remains fully qualified to hold FCC common carrier licenses. Mr. Frenzel, the controlling party specified in the amendment, is a U.S. citizen, a prominent Indianapolis-area banking executive, and has no history of character issues before the FCC. In fact, Mr. Frenzel has previously held LMS licenses in his name. The Applicant is also financially qualified to hold the LMS licenses obtained in the auction. In addition to having provided 100% of the Applicant's operating funds since its inception, Mr. Frenzel has already personally submitted the required upfront and down payments associated with the Applicant's successful bids, and fully intends to pay, on behalf of the Applicant, the final payment balance when it is due. Moreover, as demonstrated in the amended Exhibit C, the recognition that Mr. Frenzel is the owner and controlling party does not alter the Applicant's status as a "very small business."

2. Acceptance of the Amendment and Grant of the Waiver Are Consistent With FCC Precedent and Goals.

Acceptance of this Amendment and grant of a waiver in this case also would be consistent with FCC precedent in similar cases. For example, in *PCS 2000, L.P.*, 12 FCC Rcd 1681 (1997), the FCC waived its rules in a similar manner to permit an auction applicant to change control in a manner that would result in the applicant becoming more qualified to hold the licenses it obtained during the auction. The Commission also noted that the policy goals of preventing an applicant from improving its comparative position were not implicated in that case because the comparative issues (*i.e.*, mutually exclusive short-form applications), were already resolved by the competitive bidding scheme. In the present case, the Applicant has already prevailed as a winning bidder; thus, the concerns with respect to the permissibility of certain short-form amendments (covered by the rule) are not present. Moreover, in any event, this Amendment is being tendered to effectuate a settlement, not to improve the comparative position of the Applicant.

In *PCS 2000, L.P.*, the Commission also described a two-part test from its controlling case precedent to determine whether such ownership changes should be permitted. *Id.* at ¶ 41. The FCC stated that such changes are permissible if they: (i) are intended to effect a legitimate business purpose, and (ii) present ownership changes that are in the public interest.

In this case, the Applicant meets the two-part test because it seeks to amend its application for the legitimate business purpose of settling a dispute between investors in the Applicant. The FCC has long recognized the value of permitting disputes to be settled in an amicable manner, with encouragement from the agency.³ In fact, the Bureau has recently vigorously promoted settlements in contested licensing cases,

³ See *e.g.*, *National Rural Telecommunications Cooperative*, 10 FCC Rcd 9785, ¶ 3 (1995) (“[A] policy favoring private settlement and alternative dispute resolution conserves Commission resources and is thus in the public interest.”); *Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497, ¶ 198 (1997) (“Encouraging parties to settle their disputes is in the interests of the Commission and the parties.”); *Use of Alternative Dispute Resolution Procedures*, 6 FCC Rcd 5669 (1991) (“[T]he Commission will make every effort possible to resolve appropriate disputes through mediation, arbitration, settlement negotiation, negotiated rulemaking and other means of dispute resolution where the parties involved consent to their use and where such practice is consistent with our statutory mandate.”). Accordingly, based on the foregoing, there can be no dispute that voluntary settlements of contested licensing matters serve the public interest.

waiving its “greenmail” rules where appropriate. *See e.g., Public Notice* No. DA 99-1734, released August 30, 1999. This request is thus consistent with the FCC’s goals, and in the public interest.

B. Acceptance of the Amendment and Grant of the Waiver Will Not Adversely Affect Other Bidders And The Public.

Other bidders in the auction will not be harmed by the acceptance of this amended Form 601. The other bidders in the auction either obtained LMS licenses for their perceived market value or declined to obtain those licenses in situations where the FCC's minimum bid amount exceeded the perceived market value. Thus, when a particular auction participant declined to raise a high bid placed by the Applicant, that decision was likely unrelated to who controlled the Applicant.⁴ By way of example, neither Frenzel nor Johnson possess any market power in the wireless communications industry. Thus, each bidder in the auction always had the unimpaired power to obtain whatever LMS license it valued the most highly; this post-auction amendment does not change that fact.

Further, neither the FCC nor interested members of the public will be deprived of the opportunity to scrutinize the qualifications and intentions of the controlling party of the Applicant if the FCC places this amended long-form application on *Public Notice* and makes it available for inspection in the same manner as those applications submitted by the other auction winners.

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Based on the foregoing, the Applicant contends that approval of this amendment and, if needed, grant of a waiver of the FCC's rules in this case will serve the public interest by ensuring the most expeditious provision of service to the public. Such approval and grant will not result in licensee default, and will not result in the award of licenses to a person that is unable to meet the requirements of the Communications Act. Moreover, the actions requested of the FCC herein are fully consistent with FCC precedent and goals and will

⁴ In any case, FCC-auctioned licenses are generally freely assignable (with FCC consent) when licenses are issued after the close of an auction. Accordingly, the Parties could accomplish the same result sought herein (albeit with some delay) by simply conveying the licenses after they have been issued to a Johnson-controlled entity. Thus, no bidder could have a realistic expectation that the entity it may be bidding against will always maintain the same ownership or always hold and control the license(s) at issue. In today's dynamic telecommunications market, a recognition of a different controlling party in this manner cannot be said to have trampled any party's protected interests or expectations.

not harm any other bidders in the auction or any other member of the public. Accordingly, Progeny LMS, LLC requests that the FCC accept and approve the amendment filed herewith and, if needed, waive its rules as requested herein.

Respectfully submitted,

Progeny LMS, LLC

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By: _____

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