



Federal Communications Commission  
Washington, D.C. 20554

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DA 03-2835

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Washington, DC 20004

James H. Barker  
William S. Carnell  
Latham & Watkins  
Counsel for Leap Wireless International, Inc.  
555 Eleventh Street, N.W.  
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Washington, DC 20004-2505

Re: Requests of T-Mobile USA, Inc. and Leap Wireless International, Inc. for Waiver of Bid  
Withdrawal Payment Obligations

Dear Messrs. Calaff, Barker and Carnell:

This letter grants the separate requests of T-Mobile USA, Inc. ("T-Mobile") and Leap Wireless International, Inc. ("Leap") for waiver of the bid withdrawal payment rule and relieves T-Mobile's subsidiary, VoiceStream PCS BTA I License Corporation ("VoiceStream"),<sup>1</sup> and Leap of withdrawal payments incurred during Auction No. 35.

**Background.** In Auction No. 35, the Commission made available 422 Personal Communications Services ("PCS") licenses in the C and F spectrum blocks. Much of that spectrum had been previously licensed to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively "NextWave") and Urban Comm-North Carolina, Inc. ("Urban Comm") and was the subject of the NextWave litigation and Urban Comm proceedings.<sup>2</sup> Thus, prior to the start of Auction No. 35, we

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<sup>1</sup> VoiceStream is now a wholly-owned subsidiary of T-Mobile. *See* Petition for A Declaratory Ruling Or, In the Alternative, For A Waiver of the Commission's Withdrawal Penalty Rules of T-Mobile USA, Inc., at ii (filed Jan. 24, 2003) ("*T-Mobile Bid Withdrawal Waiver Request*").

<sup>2</sup> Those proceedings are described in greater detail in the *Auction 35 Final Refund Order*. *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, 17 FCC Rcd 23,354, 23,355-57 ¶¶ 2-4 (2002) ("*Auction 35 Final Refund Order*"). As described in that order, after the conclusion of Auction No. 35, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), in *NextWave v. FCC*, ruled that Section 525 of the Bankruptcy Code, which provides that a "governmental unit" may not "revoke" a bankrupt's or debtor's license "solely because such bankrupt or debtor ... has not paid a debt that is dischargeable ... under this title," prevented the cancellation of

cautioned prospective bidders that some licenses were, or might become, subject to the final outcome of those proceedings.<sup>3</sup> In addition, we informed bidders that the Commission would return the payments made by winning Auction No. 35 bidders “in the event that such bidders are subsequently required to surrender licenses won to prior applicants or license holders as a result of final determinations reached in pending proceedings,” but that it could not pay interest on any refunded amounts.<sup>4</sup>

Both VoiceStream and Leap participated in Auction No. 35. Both placed high bids that they withdrew during the course of the auction.<sup>5</sup> In each case at the close of the auction, the winning bid was lower than the bid that was withdrawn for the license at issue.<sup>6</sup> Pursuant to 1.2104(g)(1) of the Commission’s rules,<sup>7</sup> both VoiceStream and Leap were subject to bid withdrawal payments equal to the difference between the amount withdrawn and the amount of the subsequent winning bid.<sup>8</sup> Neither entity contested the application of the rule at that time. Both entities paid their respective bid withdrawal payments.<sup>9</sup>

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licenses held by NextWave. *See id.*, 17 FCC Rcd at 23,556 ¶ 3. Subsequent to the release of the *Auction 35 Final Refund Order*, the Supreme Court issued its ruling in the NextWave litigation, affirming the D.C. Circuit’s *NextWave* decision. *See FCC v. Nextwave Personal Communications, Inc.*, 123 U.S. 832 (2003).

<sup>3</sup> *See* “C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000; Notice and Filing Requirements for 422 Licenses in the C and F Block Broadband PCS Spectrum Auction; Minimum Opening Bids, Upfront Payments and Other Procedural Issues for Final Auction Inventory,” *Public Notice*, 15 FCC Rcd 19,485, 19,493-4 (2000) (“*Auction No. 35 Procedures Public Notice*”).

<sup>4</sup> *Id.*, 15 FCC Rcd at 19,493-94.

<sup>5</sup> In round 31 of the auction, VoiceStream placed a gross high bid of \$54,776,000 on the C5 block license for the Richmond, VA Basic Trading Area (the “Richmond License”). VoiceStream subsequently withdrew its high bid in round 67. In round 38, Leap placed a gross bid of \$3,822,000 on the block C3 license for the Melbourne-Titusville, FL BTA (the “Melbourne License”), and withdrew that bid in round 91. Additional information concerning Auction No. 35, including round results and auction outcomes, may be found on the Commission’s web site at: <http://wireless.fcc.gov/auctions/>. The Richmond and Melbourne Licenses covered spectrum that was initially won at auction by NextWave, and was thus directly affected by the *NextWave* litigation. *See* “Wireless Telecommunications Bureau Announced the Return to Active Status of Licenses to NextWave Personal Communications Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation,” *Public Notice*, DA 01-2045, Attachment B (rel. Aug. 31, 2001) (listing licenses affected by return to active status of licenses to NextWave pursuant to judicial mandate).

<sup>6</sup> Salmon PCS, LLC subsequently bid upon and was declared the winning bidder for the Richmond License at the close of the auction. Leap was the winning bidder for the Melbourne License, having submitted a bid lower than the amount that it had withdrawn earlier in the auction.

<sup>7</sup> *See* 47 C.F.R. § 1.2104(g)(1).

<sup>8</sup> *See* “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 2339, Attachment C (2001).

<sup>9</sup> VoiceStream’s bid withdrawal payment amounted to \$4,639,000. Leap’s bid withdrawal payment was \$268,000. *See id.*, Attachment B.

On November 14, 2002, the Commission offered relief to all Auction No. 35 bidders that won licenses for spectrum that had previously been licensed to NextWave and Urban Comm.<sup>10</sup> The Commission found that its decision to allow such winning bidders to request dismissal of long-form applications for that spectrum and refund associated down payments was justified by the specific circumstances faced by those auction winners, namely “the concurrence of a unique situation where capital and spectrum were tied up for more than two years by litigation, and the worsening economic conditions in the wireless industry [that] have had a substantial adverse effect on consumers.”<sup>11</sup> The Commission also determined that it would afford such bidders “complete monetary relief,” and would not assess any default payments or impose other restrictions on bidders that elected such relief.<sup>12</sup> In so doing, the Commission observed that it had no evidence that these eligible winning bidders were insincere in their attempts to acquire Auction No. 35 licenses.<sup>13</sup> Eligible winning bidders, including the ultimate high bidders on the licenses at issue here, sought and obtained the dismissals and complete refunds of down payments permitted by the *Auction 35 Final Refund Order*.<sup>14</sup>

Subsequently, on January 27, 2003, the U.S. Supreme Court issued its ruling in the *NextWave v. FCC* litigation.<sup>15</sup> The Supreme Court affirmed the D.C. Circuit decision holding that section 525 of the Bankruptcy Code prohibited the Commission from canceling licenses issued to NextWave pursuant to a prior auction when NextWave, after filing for bankruptcy, failed to make the required installment payments to which it had agreed.<sup>16</sup>

VoiceStream’s parent, T-Mobile, filed a request on January 24, 2003 seeking relief from the bid withdrawal obligation that VoiceStream incurred in Auction No. 35.<sup>17</sup> T-Mobile specifically seeks return of its full bid withdrawal payment.<sup>18</sup> T-Mobile contends that the unique circumstances following Auction

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<sup>10</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, 17 FCC Rcd 23,354 (2002) (“*Auction 35 Final Refund Order*”).

<sup>11</sup> *Id.*, 17 FCC Rcd at 23,362 ¶ 10.

<sup>12</sup> *Id.* at 23,365 ¶ 15.

<sup>13</sup> *Id.* at 23,366 ¶ 17.

<sup>14</sup> See “Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for 156 C and F Block Broadband Personal Communications Services (PCS) Licenses,” *Public Notice*, Attachment A, 17 FCC Rcd 24,492 (2002) (dismissing VoiceStream and Salmon applications, among others); “Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for 49 C and F Block Broadband Personal Communications Services (PCS) Licenses,” *Public Notice*, Attachment A, 17 FCC Rcd 25,263 (2002) (dismissing Leap applications, among others).

<sup>15</sup> See *FCC v. Nextwave Personal Communications, Inc.*, 123 U.S. 832 (2003).

<sup>16</sup> See *id.*

<sup>17</sup> See *T-Mobile Bid Withdrawal Waiver Request*. See also Supplement to Petition for A Declaratory Ruling Or, In the Alternative, For A Waiver of the Commission’s Withdrawal Penalty Rules of T-Mobile USA, Inc. (filed Jan. 30, 03) (“*T-Mobile Supplement*”).

<sup>18</sup> *T-Mobile Bid Withdrawal Waiver Request* at 1.

No. 35, including the ultimate withdrawal of the winning bid pursuant to the *Auction 35 Final Refund Order*, “*ex post facto* nullified the basis for the imposition” of a bid withdrawal payment.<sup>19</sup> Because the winning bids for this license have effectively been erased, T-Mobile argues, there is no longer a basis to calculate and assess any bid withdrawal payment.<sup>20</sup> T-Mobile also contends that grant of a waiver in these circumstances would not compromise the integrity of the Commission’s competitive bidding rules and would have the result of affording VoiceStream similar treatment to those bidders that withdrew bids but were not liable for bid withdrawal payments because higher winning bids were submitted on the withdrawn licenses.<sup>21</sup> On February 26, 2003, Leap filed a similar request.<sup>22</sup> Leap supports T-Mobile’s arguments, and requests a refund of its bid withdrawal payment.

**Discussion.** We waive Section 1.2104(g)(1) of the Commission’s rules<sup>23</sup> and will refund the withdrawal payments made by VoiceStream and Leap. Section 1.925(b)(3)(i) of the Commission’s rules authorizes grant of a rule waiver where the underlying purpose of the rule would not be served by application of the rule in the particular case, and such waiver would promote the public interest.<sup>24</sup> Section 1.2104(g)(1) imposes on withdrawing bidders an obligation to compensate the government for lost revenue resulting from withdrawn bids where no subsequent winning bid is placed that exceeds the withdrawn bid.<sup>25</sup> In designing this rule, the Commission intended to balance potentially competing objectives: on the one hand, it sought to provide bidders with flexibility to aggregate licenses efficiently in simultaneous multiple round auctions; while on the other hand, the Commission recognized the potential threat to the auction process posed by unconstrained bid withdrawals.<sup>26</sup> The Commission therefore devised a bid withdrawal rule based on a compensation principle.<sup>27</sup> Not only does this rule precisely compensate the government for the loss of revenue that results from bid withdrawals, but it also maintains the integrity of the auction process by deterring strategic or frivolous bidding activity that distorts price information and reduces the efficiency of the auction mechanism.<sup>28</sup> Prior to the start of

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<sup>19</sup> *Id.* at ii, 14.

<sup>20</sup> *Id.* at ii, 15; *T-Mobile Supplement* at 2-3.

<sup>21</sup> *T-Mobile Bid Withdrawal Waiver Request* at iii, 11-15.

<sup>22</sup> See Petition of Leap Wireless International, Inc. For a Declaratory Ruling or, in the Alternative, For a Waiver of the Commission’s Withdrawal Penalty Rules, and Comments in Support of VoiceStream PCS BTA I License Corporation (filed Feb. 26, 2003).

<sup>23</sup> 47 C.F.R. § 1.2104(g)(1).

<sup>24</sup> 47 C.F.R. § 1.925(b)(3)(i). See also 47 C.F.R. § 1.3 (waiver of rules for good cause).

<sup>25</sup> 47 C.F.R. § 1.2104(g)(1).

<sup>26</sup> See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2373-74 ¶¶ 150-153 (1994) (“*Competitive Bidding Second Report and Order*”) (establishing bid withdrawal payment requirement).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Auction No. 35, we also announced that bidders would be limited to withdrawing their bids in no more than two rounds of the auction.<sup>29</sup>

We find that the purposes of the bid withdrawal payment rule would not be served by holding VoiceStream and Leap to their bid withdrawal payments under these specific circumstances where the licenses at issue were later finally determined to be unavailable to the subsequent winning bidders.<sup>30</sup> Given this unavailability, had VoiceStream and Leap not withdrawn their bids, the government would not have been able to collect the additional value represented by these bids. Thus, the withdrawn bids do not represent any lost revenue opportunity for the government and the compensation principle underlying the bid withdrawal payment rule is not implicated by a return of the bid withdrawal payments. Moreover, neither VoiceStream nor Leap exceeded the two-bid withdrawal limit for Auction No. 35, and they made the required payments without condition, protest, or delay. Thus, in withdrawing the bids, they assumed the risk that they would have to compensate the government pursuant to Section 1.2104(g) in the event that the winning bids on the subject licenses did not exceed the withdrawn bids,<sup>31</sup> and they demonstrated the degree of sincerity required by the rule by making their bid withdrawal payments on a timely basis after the lower winning bids were announced.<sup>32</sup> Accordingly, we do not believe that the rule's objective of providing bidders with appropriate incentives to avoid withdrawing bids (particularly in the late stages of an auction) will be frustrated by granting a waiver in these circumstances. Since the retention of the bid withdrawal payments would constitute something of a windfall for the government, and since similarly situated parties as VoiceStream and Leap<sup>33</sup> are not liable for any bid withdrawal payments, we find that application of the rule would be inequitable and would therefore not serve the public interest in this case.

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<sup>29</sup> See *Auction No. 35 Procedures Public Notice*, 15 FCC Rcd at 19,520-21 (bid withdrawal procedures for Auction No. 35) (“[W]e continue to recognize the important role that bid withdrawals play in an auction, *i.e.*, reducing risk associated with efforts to secure various geographic area licenses in combination...”).

<sup>30</sup> Under policy announced prior to the auction, winning bidders for this spectrum would have been entitled to the return of their payments (had they had not done so pursuant to the *Auction No. 35 Final Refund Order*). See *Auction No. 35 Procedures Public Notice*, 15 FCC Rcd at 19,493-4 (payments to be returned upon final determination of unavailability); *Auction 35 Final Refund Order*, 17 FCC Rcd 23,354 (providing certain bidders with opportunity to seek dismissal of long form applications and refund of payments).

<sup>31</sup> See *T-Mobile Bid Withdrawal Waiver Request* at 13.

<sup>32</sup> See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *Public Notice*, DA 01-211, Report No. AUC-35-H (Auction No. 35), Attachment B (rel. Jan. 29, 2001).

<sup>33</sup> Given the intended purposes of the rule and its usual operation, we see no significant difference between VoiceStream and Leap, on the one hand, and, on the other hand, those bidders who, within the specified limit for a given auction, have withdrawn bids that do not result in any loss of potential auction revenue.

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**Conclusion.** For the above reasons, the requests of T-Mobile and Leap for waiver of Section 1.2104(g)(2) are granted. The full bid withdrawal payment in the amount of \$4,639,000 will be refunded to the VoiceStream's payor of record, and an amount of \$268,000 will be refunded to Leap's payor of record, consistent with the attached refund procedures and pursuant to all other applicable federal law. This action is taken pursuant to authority delegated by the *Auction 35 Final Refund Order*, and Sections 0.331 and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925.

Sincerely,

Margaret W. Wiener, Chief  
Auctions and Industry Analysis Division  
Wireless Telecommunications Bureau

Attachment – Refund Procedures

cc: Cheryl A. Tritt  
*Counsel for T-Mobile*

## Refund Procedures for Bid Withdrawal Payments

- For each payor of record, submit an Automated Clearing House Vendor/Miscellaneous Payment Enrollment Form (“ACH form”) (see attached sample).<sup>34</sup> You may obtain additional copies of this form at <http://www.fms.treas.gov/pdf/3881.pdf>.

The ACH form may be either faxed or mailed to the Commission. The fax number is: (202) 418-2843. The mailing address is: Federal Communications Commission, Office of the Managing Director, Attention: Auctions Accounting Group, Room 1-C864, 445 12<sup>th</sup> St. SW Washington, D.C. 20554. If you have any questions concerning the completion of this form, please contact Gail Glasser at (202) 418-0578.

- Submit a letter (along with the ACH form) signed by the payor of record, requesting a refund.
- The Commission will calculate the amount of the applicable refund.

Refunds will be processed within approximately ten business days of the Commission’s receipt of the ACH form and accompanying letter from the payor of record.

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<sup>34</sup> Refunds will be processed via ACH credits. ACH is a domestic funds transfer system providing an electronic parallel to the Federal Reserve check clearing system. ACH is governed by the Rules of the National Automated Clearing House Association. Generally, speaking, an ACH is an instrument for moving money electronically from one participating financial institution to another.

ACH VENDOR/MISCELLANEOUS PAYMENT  
 ENROLLMENT FORM

OMB No. 1510-0056

This form is used for Automated Clearing House (ACH) payments with an addendum record that contains payment-related information processed through the Vendor Express Program. Recipients of these payments should bring this information to the attention of their financial institution when presenting this form for completion.

<b>PRIVACY ACT STATEMENT</b>	
<p>The following information is provided to comply with the Privacy Act of 1974 (P.L. 93-579). All information collected on this form is required under the provisions of 31 U.S.C. 3322 and 31 CFR 210. This information will be used by the Treasury Department to transmit payment data, by electronic means to vendor's financial institution. Failure to provide the requested information may delay or prevent the receipt of payments through the Automated Clearing House Payment System.</p>	

<b>AGENCY INFORMATION</b>		
FEDERAL PROGRAM AGENCY: _____		
AGENCY IDENTIFIER: _____	AGENCY LOCATION CODE (ALC): _____	ACH FORMAT: <input type="checkbox"/> CCD+ <input type="checkbox"/> CTX <input type="checkbox"/> CTP
ADDRESS: _____ _____		
CONTACT PERSON NAME: _____		TELEPHONE NUMBER: ( ) _____
ADDITIONAL INFORMATION: _____		

<b>PAYEE/COMPANY INFORMATION</b>	
NAME: _____	SSN NO. OR TAXPAYER ID NO. _____
ADDRESS: _____ _____	
CONTACT PERSON NAME: _____	TELEPHONE NUMBER: ( ) _____

<b>FINANCIAL INSTITUTION INFORMATION</b>	
NAME: _____	
ADDRESS: _____ _____	
ACH COORDINATOR NAME: _____	TELEPHONE NUMBER: ( ) _____
NINE-DIGIT ROUTING TRANSIT NUMBER: _ _ _ _ _ _ _ _ _	
DEPOSITOR ACCOUNT TITLE: _____	
DEPOSITOR ACCOUNT NUMBER: _____	LOCKBOX NUMBER: _____
TYPE OF ACCOUNT: <input type="checkbox"/> CHECKING <input type="checkbox"/> SAVINGS <input type="checkbox"/> LOCKBOX	
SIGNATURE AND TITLE OF AUTHORIZED OFFICIAL: (Could be the same as ACH Coordinator)	TELEPHONE NUMBER: ( ) _____



#### Instructions for Completing SF 3881 Form

1. Agency Information Section - Federal agency prints or types the name and address of the Federal program agency originating the vendor/miscellaneous payment, agency identifier, agency location code, contact person name and telephone number of the agency. Also, the appropriate box for ACH format is checked.
2. Payee/Company Information Section - Payee prints or types the name of the payee/company and address that will receive ACH vendor/miscellaneous payments, social security or taxpayer ID number, and contact person name and telephone number of the payee/company. Payee also verifies depositor account number, account title, and type of account entered by your financial institution in the Financial Institution Information Section.
3. Financial Institution Information Section - Financial institution prints or types the name and address of the payee/company's financial institution who will receive the ACH payment, ACH coordinator name and telephone number, nine-digit routing transit number, depositor (payee/company) account title and account number. Also, the box for type of account is checked, and the signature, title, and telephone number of the appropriate financial institution official are included.

#### Burden Estimate Statement

The estimated average burden associated with this collection of information is 15 minutes per respondent or recordkeeper, depending on individual circumstances. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Financial Management Service, Facilities Management Division, Property and Supply Branch, Room B-101, 3700 East West Highway, Hyattsville, MD 20782 and the Office of Management and Budget, Paperwork Reduction Project (1510-0056), Washington, DC 20503.