

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of
NEXTWAVE PERSONAL
COMMUNICATIONS INC. AND NEXTWAVE
POWER PARTNERS INC.
Petition for Declaration of Compliance With, and
Clarification of, Broadband PCS Construction
Deadline; or in the Alternative, for Waiver and
Extension of First Construction Deadline
File Nos. 0000855872, et al.

ORDER

Adopted: March 3, 2003

Released: March 3, 2003

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order we address a "Petition for Declaration of Compliance With, And Clarification Of, Broadband PCS Construction Deadline, Or In The Alternative, For Waiver and Extension of First Construction Deadline" (Petition) filed by NextWave Personal Communications Inc. (NPCI) and NextWave Power Partners Inc. (NPPI) (collectively referred to as NextWave or the Company) on April 18, 2002. For the reasons set forth below, we substantially grant NextWave's request to toll the license construction deadlines for 90 C and F block PCS licenses (Licenses or License) for 703 days from the original, five-year construction deadlines, subject to the conditions set forth in this Order.

II. BACKGROUND

2. In its Petition, NextWave seeks clarification that the construction periods for the Company's C and F Block PCS licenses (License or Licenses) were tolled for a total of 703 days, or, in the alternative, seeks a waiver or extension of the initial construction deadline for the C Block PCS Licenses for 597 days, in the event the Commission denies the tolling request.

3. NextWave asserts that tolling for 703 days is appropriate to cover two relevant periods of time: (a) the "License Cancellation Period (597 days)" - the period between January

1 The Commission took the position that the Licenses canceled automatically on October 30, 1998, pursuant to Section 1.2110 (See 47 C.F.R. § 1.2110(e)(4)(iii) (1997)) of the Commission's rules. See also, In the Matter of (continued....)

12, 2000² and August 31, 2001,³ during which the Commission maintained that the Licenses were canceled; and (b) the “Settlement Agreement Tolling Period (106 days)” – the period between September 17, 2001 and December 31, 2001, which is the tolling period contemplated by the settlement agreement entered into by NextWave, the United States, and certain Auction 35 winners (NextWave Settlement Agreement or Settlement Agreement).⁴ NextWave argues that tolling is required since possession of a valid license is a precondition to an enforceable construction requirement” and that tolling (or the alternative request for a waiver) is the only remedy where the right to hold a license is in question.⁵ Furthermore, tolling was, according to NextWave, “required by law” where, as here, the regulatory requirements “were expressly tolled [by the Settlement Agreement].”⁶

4. On May 16, 2002, NY Telecom, LLC (NY Telecom) filed a request to have the Petition placed on public notice for comment (“Request”).⁷ NY Telecom claims that the Commission has historically sought comment on PCS extension or waiver requests because it has recognized that such requests “involve[] broad public policy issues.”⁸ In support of its Request, NY Telecom provided the results of “drive-by” testing it performed at selected sites in NextWave’s C Block markets on various dates in January 2002, starting on January 4. The tests, according to NY Telecom, showed no signal on the 4th and limited activity later in the month in two of the four markets surveyed.⁹ Based on the tests, NY Telecom claims that NextWave did not comply with its original build-out deadlines. Should the Commission hold that the

(...continued from previous page)

Public Notice DA 99-49 Auction of C and F Block Broadband PCS Licenses, NextWave Petition for Reconsideration, *Order on Reconsideration*, 15 FCC Rcd. 17500 (2000). The D.C. Circuit found the cancellation to be improper pursuant to certain provisions of the Bankruptcy Code, overturning the FCC’s denial of NextWave’s request for reconsideration of the cancellation of the Licenses. *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130 (D.C.Cir. 2001) (*NextWave*), *aff’d*, ___ U.S. ___, 123 S. Ct. 832 (2003) (*NextWave v. FCC*).

² NextWave has maintained in its various court challenges that the “effective date” of cancellation did not occur until notice of the purported cancellation. NextWave claims in its Petition that notice was not given until the January 12, 2000 Public Notice announcing Auction 35, which included licenses for the same spectrum covered by the Licenses. Auction of C and F Block Broadband PCS Licenses, *Public Notice*, 15 FCC Rcd 693 (WTB Jan. 12, 2000).

³ See Wireless Telecommunications Bureau Announces 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, 16 FCC Rcd 15970 (WTB Aug. 31, 2001), implementing the D.C. Circuit’s mandate in *NextWave*.

⁴ See “Settlement Agreement by and Among the United States of America, the Federal Communications Commission, NextWave Telecom Inc. and Certain Affiliates and Participating Auction 35 Winning Bidders,” dated November 15, 2001, at www/fcc.gov/headlines2001/html. Paragraphs 24(a) (Termination of the Agreement with Respect to All Parties) and 28 (Tolling of Regulatory Requirements) of the Settlement Agreement set forth the terms of tolling under that document. The Settlement Agreement was executed by John Rogovin, FCC Deputy General Counsel, on November 26, 2001.

⁵ Petition at 8.

⁶ *Id.*

⁷ “Request for Public Proceeding Regarding NextWave’s Construction Obligations and Revocation of Licenses That Are Not Timely Constructed,” File No. 0000855872 *et al.*, dated May 16, 2002.

⁸ Request at 3.

⁹ Request at 2, Attachment A.

construction notifications were untimely, NY Telecom argues that the Licenses should be revoked and the underlying spectrum immediately relicensed by auction. In addition, NY Telecom argues that public comment is necessary “to consider the fundamental fairness of changing the rules for NextWave” but not for others who also participated in the same auction (Auction 5) as NextWave for C Block PCS licenses.¹⁰ In response, NextWave maintains that the construction notifications were in compliance with the Commission’s rules and were timely due to the tolling provided by the Settlement Agreement. The Company, therefore, opposes NY Telecom’s request for public comment. In addition, NextWave seeks dismissal of the Request on the grounds that NY Telecom does not have standing to bring what NextWave believes to be frivolous claims for which NY Telecom is not entitled to relief.¹¹ NY Telecom filed a reply that generally reiterated its previous arguments.¹²

5. There are three different construction deadlines at issue: (1) for the 63 C Block Licenses, the five-year construction deadline was January 3, 2002;¹³ (2) for 22 F Block Licenses, the construction deadline was April 28, 2002; and (3) for the remaining 5 F Block Licenses, the construction deadline was June 27, 2002.¹⁴

III. DISCUSSION

6. We are persuaded that it would be inequitable to hold NextWave to the original License build-out deadlines, given the Commission’s assertion of license cancellation prior to the *NextWave* decision. In addition, NextWave took the representations contained in the Settlement Agreement to mean it was entitled without seeking further Commission action to the tolling period set forth in the Agreement. We believe such reliance was reasonable under the circumstances. Accordingly, NextWave is granted 703 additional days from the original five-year construction deadline for each License to meet its buildout obligations. *See* Appendix A attached for a list of the Licenses and new construction deadlines.

7. In light of the position that the Commission took with regard to cancellation of the Licenses and the subsequent negotiated Settlement Agreement Tolling Period discussed in the Petition, we recognize that application of our buildout deadlines in this instance would be inequitable. We intend to give NextWave a fair opportunity to satisfy the letter and spirit of our construction rules without a cloud over, or uncertainty about, the status of the Licenses. For this reason, we grant their request for tolling.¹⁵ The relief granted to NextWave does not alter or

¹⁰ Request at 4.

¹¹ *See* “NextWave’s Response to NY Telecom, LLC’s Request for Public Comment Regarding NextWave’s Construction Obligations,” File No. 0000855872 *et al.*, dated May 30, 2002 (“NextWave Response”).

¹² “Reply to NextWave,” File No. 0000855872 *et al.*, dated June 6, 2002 (“NY Telecom Reply”).

¹³ The C Block Licenses carry five- and ten-year buildout requirements. *See* 47 C.F.R. § 24.203(a) (2002).

¹⁴ The F Block Licenses carry a single five-year buildout requirement. *See* 47 C.F.R. § 24.203(b) (2002).

¹⁵ *See also Rainbow Broadcasting Company*, 13 FCC Rcd 2100 (1998), *aff’d sub nom. Press Communications v. FCC*, 194 F.3d 174 (D.C. Cir. 1999) (licensee construction period extended due to uncertainty about status of license).

change its obligations to meet the 10-year construction benchmark for its C Block Licenses under Section 24.203(a) of the Commission's rules.¹⁶

8. In light of our decision, we dismiss as moot NextWave's alternative request for a waiver and/or extension of time to complete construction. We will address separately NextWave's request for clarification that it has satisfied the construction requirements set forth in Section 24.203 of the Commission's rules.¹⁷

9. Under the Commission's "designated entity (DE) holding" rules applicable to C and F block licenses, no assignment or transfer of control to non-qualifying entities¹⁸ is permitted within the first five years of the license unless the licensee has met the five-year buildout requirements under Section 24.203 of the Commission's rules.¹⁹ The Commission set the DE holding rules for five years to ensure buildout by the qualifying DE.²⁰ Therefore, because we are granting NextWave's tolling request--which will extend the five-year buildout requirements--we are likewise extending the corresponding DE holding period for the Licenses for the same amount of time: 703 days. Consequently, any request by NextWave to transfer a License within the tolling period must comply with the transfer restrictions under Section 24.839 of the Commission's rules.²¹

10. By virtue of the relief granted to NextWave, NY Telecom's challenge of NextWave's construction notification filings is premature,²² and we therefore dismiss NY

¹⁶ 47 C.F.R. § 24.203(a).

¹⁷ 47 C.F.R. § 24.203.

¹⁸ In other words, those entities that do not meet the criteria established under the Commission's DE rules to hold PCS C and F Block licenses won in closed bidding. See 47 C.F.R. § 24.709 (2002).

¹⁹ See 47 C.F.R. §§ 24.839(a)(6), 24.203 (2002).

²⁰ See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Further Notice of Proposed Rulemaking*, 15 FCC Rcd 9773 (2000) (Commission set the current holding period at five years to guarantee that a C or F block licensee would build out the license); *Id.*, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000) (purpose of restricting transfer of C and F block licenses is to ensure integrity of the set-aside auction process). See also, Amendments of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd 7824, 7863 ¶ 84 (1996)(restrictions on C and F Block license transfers and assignments for five years ensures that an entrepreneur will hold and build out a license at least to the first construction benchmark); see also, Trustee in Bankruptcy for Magnacom Wireless, LLC and Telecom Wrap Up Group, LLC, Petition for Waiver and Extension of Broadband PCS Construction Requirements, *Order*, 17 FCC Rcd 9535 (WTB Comm. Wireless Div. rel. May 24, 2002) (C Block PCS holding period extended to coincide with extension of five-year buildout period); Summit Wireless, LLC and Summit Wireless WOW, LLC, Request for Waiver and Extension of Broadband PCS Construction Requirements, *Order*, 17 FCC Rcd 10,914 (WTB Comm. Wireless Div. rel. June 10, 2002) (F Block PCS holding period extended to coincide with extension of five-year buildout period).

²¹ 47 C.F.R. § 24.839(a)(6).

²² NY Telecom filed its objections based on data that was collected prior to any representations by NextWave that it had constructed in the markets surveyed.

Telecom's request that the Licenses be "revoked and reauctioned."²³ We otherwise deny NY Telecom's request for public comment. Despite NY Telecom's arguments to the contrary, seeking public comment on construction extension requests prior to grant is not required by the Commission's rules²⁴ (or similarly, tolling requests that have the effect of extending construction deadlines). The nature of the service alone does not dictate that public comment be sought under the discretion provided by those rules. Furthermore, NY Telecom's argument that public comment would provide the necessary record for the Commission to grant similar relief to all C Block PCS auction winners is incorrect and unpersuasive. NY Telecom's request would be more appropriately raised in a request for rulemaking,²⁵ but otherwise is found lacking because it has not shown that it or any other auction participant is similarly situated to NextWave or otherwise entitled to the same relief.²⁶

11. In addition, we note that NextWave reserved its right to seek a tolling or waiver of the buildout requirements for its 5 D and E Block PCS licenses.²⁷ While we do not reach a decision here on that issue, we question whether such relief would be justified because those licenses have remained active since the initial grant to NextWave. In addition, the licenses were not the subject of the Supreme Court litigation or included in the NextWave Settlement Agreement.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that, pursuant to authority delegated under Sections 0.331 of the Commission's rules, 47 C.F.R. § 0.331, and subject to the conditions set forth in this Order, the Petition filed by NextWave is partially GRANTED. NPCI and NPPI are given an additional 703 days from the original construction deadline for each of the subject Licenses to meet the Commission's five-year construction requirements under 47 C.F.R. § 24.203. In addition, the DE holding period for each of the Licenses is likewise extended for 703

²³ NY Telecom argued that NextWave failed to make its request for an extension of time prior to the original five-year deadline and therefore no extension of time should be permitted nor should a waiver be granted. NY Telecom Reply at 2. Absent tolling, NextWave would have been required to file a request for extension of time prior to the construction deadline and demonstrate that its failure to meet the deadline was for reasons beyond its control. *See* 47 C.F.R. § 1.946(e)(1) (2002). However, because the tolling period began before the first construction deadline, NextWave's request for additional relief was timely. Moreover, we are dismissing as moot NextWave's alternative requests for relief in the form of a waiver or extension of time (*see* para. 8), and we therefore need not resolve NY Telecom's procedural challenge.

²⁴ *See* 1.933(d)(5) (2002).

²⁵ *See e.g.* In re Applications of ACC-PCS, Inc., 12 FCC Rcd 8449 (WTB, June 27, 1997) (grant of petition to deny based on insufficiency of rule would change rule without following proper notice and comment procedures).

²⁶ *See, e.g.*, In the Matter of Requests for Refunds of Down Payments made in Auction No. 35, *Order*, 17 FCC Rcd 6283 (2002)(Eldorado has failed to show a sufficient connection to the challenged action to establish that it would be injured thereby—Eldorado's forfeit stands regardless of whether the Commission refunds monies to Auction No. 35 winning bidders); *reconsideration denied*, In the Matter of 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, *Order and Order on Reconsideration*, FCC 02-311 (rel. Nov. 14, 2002). *See, also, Metromedia Company*, 7 FCC Rcd 714 (Mobile Svcs. Div. 1992), *aff'd*, 8 FCC Rcd 870 (1993) (petitioner lacked standing because allegation of harm was speculative at best).

²⁷ Petition at 7, fn. 5.

days from the original five-year holding period deadline, but such period for a particular License shall not extend beyond the date upon which NextWave meets its five-year construction requirement. The new construction deadlines are set forth in Appendix A to this Order. NextWave's request for waiver or an extension of time is DISMISSED as moot.

13. IT IS FURTHER ORDERED that NY Telecom's May 16, 2002 request for public comment is DENIED and the challenge to NextWave's construction notification filings contained therein is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham
Deputy Chief
Wireless Telecommunications Bureau