

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

In the Matter of	)	
	)	
Summit Wireless WOW, LLC, Debtor-In-Possession, Summit Wireless Billings, LLC, Debtor-In-Possession, Summit Wireless, LLC, Debtor-In-Possession	)	File Nos. 0001895955, 0001896022, 0001896051
	)	
and	)	
	)	
Summit Wireless Liquidating Trust	)	
	)	
Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 8, 2004**

**Released: December 8, 2004**

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. We have before us three related applications filed by Summit Wireless WOW, LLC, Debtor-In-Possession, Summit Wireless Billings, LLC, Debtor-In-Possession, and Summit Wireless, LLC, Debtor-In-Possession (the “Summit DIPs”) together with Summit Wireless Liquidating Trust (the “Liquidating Trust” and collectively with Summit DIPs, the “Applicants”) seeking approval for the assignment of broadband Personal Communication Services (“PCS”) licenses (the “Licenses”) from the Summit DIPs to the Liquidating Trust (the “Assignment Applications”).<sup>1</sup> The Applicants also seek a waiver of section 1.2111(c) of the Commission’s rules,<sup>2</sup> to the extent necessary, to allow for the transfer of the Licenses from the Summit DIPs to the Liquidating Trust in accordance with the terms of a settlement between the Federal Communications Commission (“Commission” or “FCC”) and the debtors that is embodied in a

<sup>1</sup> See ULS File Nos. 0001895955, 0001896022, 0001896051, filed October 20, 2004.

<sup>2</sup> *Id.* at Exhibit E (“Waiver Request”).

Consent Motion filed by the Summit DIPs with the agreement and consent of the Commission<sup>3</sup> (the “Settlement”), a Liquidating Trust Agreement,<sup>4</sup> and an Order of the United States Bankruptcy Court For the Southern District of Mississippi.<sup>5</sup>

2. As discussed below, we conclude, pursuant to our review under Section 310(d) of the Communications Act of 1934, as amended (the “Communications Act”), that approval of the Assignment Applications will serve the public interest, convenience, and necessity.<sup>6</sup> Moreover, we grant the Applicants a limited waiver of certain of the payment and timing requirements of section 1.2111(c) of the Commission’s rules to facilitate the settlement of the Commission’s claims against the Summit bankruptcy estate and to permit the Liquidating Trust to undertake the disposition of the Licenses in accordance with the terms of the Settlement, the *Liquidating Trust Agreement*, the *Consent Motion*, and the Bankruptcy Court’s *Sale Order*.<sup>7</sup>

## II. BACKGROUND

3. On July 24, 2003, Summit voluntarily sought protection under Chapter 11 of the United States Bankruptcy Code in the Bankruptcy Court for the Southern District of Mississippi (“Bankruptcy Court”).<sup>8</sup> Subsequent to filing for bankruptcy, Summit filed applications with the Commission for approval of the involuntary assignment of the Licenses to the Summit DIPs.<sup>9</sup>

4. On May 10, 2004, Summit and the Summit DIPs (collectively the “Debtors”) filed a motion with the Bankruptcy Court seeking authority under Section 363 of the United States Bankruptcy Code to sell assets outside the ordinary course of business and free and clear of liens, claims and interests, but subject to the Commission’s first priority liens and security interests relating to installment debt on the

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<sup>3</sup> See *Motion Pursuant to § 363 For Authority to Sell Assets Outside the Ordinary Course of Business and Free and Clear of Liens, Claims and Interests*, Case Nos. 03-04323-5, U.S. Bankruptcy Court (S.D. Miss.) (May 10, 2004) (“*Consent Motion*”).

<sup>4</sup> Assignment Applications at Exhibit D, Liquidating Trust Agreement between William H. Crispin, Trustee for the Summit Wireless Liquidating Trust and QUALCOMM, Incorporated (July 27, 2004) (“*Liquidating Trust Agreement*”).

<sup>5</sup> See Assignment Applications at Ex. B, *Order Authorizing Sale of Assets Free and Clear of Liens, Claims and Interests*, Case Nos. 03-04323-5, U.S. Bankruptcy Court (S.D. Miss.) (July 16, 2004) (“*Sale Order*”).

<sup>6</sup> 47 U.S.C. § 310(d).

<sup>7</sup> 47 C.F.R. § 1.2111(c)(1). The Commission has previously clarified that the approval of an assignment or transfer that results in installment payment unjust enrichment is conditioned upon the full payment of the required unjust enrichment payment on or before the consummation date. See *In Matter of Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 15,239, 15,314 at ¶ 37 (2000).

<sup>8</sup> Voluntary Petition Under Chapter 11, *In re: Summit Wireless, LLC et al.*, Case No. 09-04323 JEE (Bankr., S. D. Miss.) filed July 24, 2003.

<sup>9</sup> See ULS File Nos. 0001610650, 0001610645, 0001610641, filed February 17, 2004.

Licenses as well as the Commission's regulatory authority.<sup>10</sup> The Commission, the Debtors, the Department of Justice, and the Debtors' pre-petition secured lender, QUALCOMM Incorporated ("Qualcomm"), reached a Settlement embodied in the *Consent Motion*.<sup>11</sup> The *Consent Motion* was filed to gain Bankruptcy Court approval of the terms of the Settlement and in satisfaction of a Bankruptcy Court authorized credit agreement between the Debtors and Qualcomm.<sup>12</sup> In the *Consent Motion*, the Debtors stated that Qualcomm had, in accordance with its rights, offered a credit bid for all of the Licenses in the amount of \$20 million to be credited against the over \$30 million in outstanding obligations that were owed by the Debtors to Qualcomm.<sup>13</sup> As further detailed in the *Consent Motion*, if the Debtors accepted and the Court approved the credit bid, the Licenses could be transferred from the Summit DIPs to a Liquidating Trust, subject to the Commission's liens and security interests and applicable regulatory requirements.<sup>14</sup> In accordance with the terms of the Settlement and the *Liquidating Trust Agreement*, the Trustee would then hold, market and dispose of the Licenses for the benefit of Qualcomm, after repaying the outstanding indebtedness to the FCC.<sup>15</sup>

5. Pursuant to the Settlement and as explained in the *Consent Motion* and the *Liquidating Trust Agreement*, the Trustee must abide by certain terms in its disposition of the Licenses.<sup>16</sup> In relevant regard, if the Trustee can find a buyer for the Licenses, and the necessary prior Commission approval for such a sale is obtained, the proceeds of any such sale will be applied first to the outstanding debt owed to the Commission, and the balance, if any, will be paid to Qualcomm.<sup>17</sup> Furthermore, in accordance with the terms of the Settlement and the *Liquidating Trust Agreement*, the Trustee cannot accept an offer for a license that does not satisfy, in full, all "outstanding indebtedness" owed to the Commission.<sup>18</sup> If the Trustee is unable to find a buyer under those terms, the Trustee will return such license to the Commission for cancellation in exchange for the forgiveness of the indebtedness owed with respect to the license.<sup>19</sup> The Commission and the Department of Justice authorized the Debtors to state that the Government consented to the granting of the *Consent Motion* and the terms stated therein.<sup>20</sup>

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<sup>10</sup> See *Consent Motion* at ¶¶ 7, 11.

<sup>11</sup> See generally, *Consent Motion*.

<sup>12</sup> *Id.* at ¶¶ 5-6.

<sup>13</sup> *Id.* at ¶ 8.

<sup>14</sup> *Id.* at ¶ 9.

<sup>15</sup> *Id.* at ¶¶ 9-12; see also *Liquidating Trust Agreement* at Article 6.

<sup>16</sup> See *Consent Motion* at ¶ 11; *Liquidating Trust Agreement* at Article 3.3(a); *Sale Order* at ¶¶ 11-14.

<sup>17</sup> *Consent Motion* at ¶ 11; *Liquidating Trust Agreement* at Article 3.3(a).

<sup>18</sup> For the purposes of the *Sale Order* and granting the relief requested in the *Consent Motion*, the Settlement specifically defines "outstanding indebtedness" to the FCC. See *Consent Motion* at ¶ 11; see also *infra* para. 6.

<sup>19</sup> *Consent Motion* at ¶ 11; see also *Sale Order* at ¶ J.

<sup>20</sup> *Consent Motion* at ¶ 25. We note that the Commission's consent to the *Consent Motion* did not constitute the regulatory consent that is required before the Debtors' Licenses can be assigned to the Liquidating Trust. That (continued...)

6. On July 16, 2004, the Bankruptcy Court issued the *Sale Order* approving the *Consent Motion*.<sup>21</sup> As outlined in the *Consent Motion*, the Liquidating Trust could then seek a buyer for the Licenses consistent with the terms of the Settlement, including that “[a]ny offer to purchase the FCC licenses from the Liquidating Trust shall include the prepayment in cash of all outstanding FCC Debt and specifically shall not involve the assumption of any of the outstanding FCC Debt on the Auction 5 and 11 Licenses....”<sup>22</sup> Pursuant to the definition of “outstanding indebtedness to the FCC” that was agreed to in the Settlement and included in the *Consent Motion*, the *Sale Order* confirms that “for determining the amount the FCC must be paid upon the sale of any license for which debt is owing to the FCC, the outstanding indebtedness to the FCC is defined as the unpaid principal debt on the license, plus any pre-petition accrued interest and/or penalties, as reflected in the proofs of claim filed by the FCC in these cases; plus post-petition interest on the unpaid principal debt at the interest rate specified in the applicable promissory note executed by Summit in favor of the FCC, running from the Petition Date until the date of entry of this Order. . . .”<sup>23</sup>

7. After the Bankruptcy Court released the *Sale Order*, the Summit DIPs filed the instant Assignment Applications seeking the Commission’s consent to assign the Licenses to the Liquidating Trust and requesting waiver of certain aspects of the unjust enrichment provisions in section 1.2111(c) of the Commission’s rules.<sup>24</sup> The Assignment Applications were placed on public notice by the Wireless Telecommunications Bureau on October 27, 2004.<sup>25</sup> No petitions to deny or comments were filed.

### III. DISCUSSION

#### A. Public Interest Considerations

8. In considering assignment applications, the Commission must determine, pursuant to Section 310(d) of the Communications Act, whether the Applicants have demonstrated that the proposed assignment of licenses will serve the public interest, convenience, and necessity.<sup>26</sup> The legal standards that govern our public interest analysis require that we weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest.<sup>27</sup> In applying our public interest test, we must assess whether the

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consent is addressed herein. Thus, the Debtors continue to hold the licenses until the consummation of the transaction approved herein.

<sup>21</sup> *Sale Order* at ¶¶ 11-14.

<sup>22</sup> *Sale Order* at ¶¶ J-K; M.

<sup>23</sup> *Id.* at ¶ K.

<sup>24</sup> *See* Assignment Applications filed on October 20, 2004.

<sup>25</sup> Wireless Telecommunications Bureau Assignment of Licenses Authorization Applications, Transfer of Control of Licensee Applications, and De Facto Transfer Lease Applications Accepted for Filing, *Public Notice*, Report Number 1974 (October 27, 2004).

<sup>26</sup> 47 U.S.C. § 310(d).

<sup>27</sup> *See, e.g.*, Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC, WT Docket 03-217, (continued....)

proposed transaction complies with the specific provisions of the Communications Act, the Commission's rules, and federal communications policy.<sup>28</sup> Our public interest analysis considers the likely competitive effects of the proposed transaction and whether such assignments raise significant anticompetitive concerns.<sup>29</sup> In addition, we consider the efficiencies and other public interest benefits that are likely to result from the proposed assignment of the licenses.<sup>30</sup>

9. As a threshold matter, the Commission must determine whether the Applicants meet the requisite qualifications to hold and assign licenses under Section 310(d) of the Act and the Commission's rules.<sup>31</sup> As a general rule, the Commission does not re-evaluate the qualifications of assignors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.<sup>32</sup> Because no petitions were filed

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*Memorandum Opinion and Order*, 19 FCC Rcd. 2570, 2580-81, ¶ 24 (2004) (*Cingular-NextWave Order*); General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd. 473, 483, ¶ 15 (2004) (*GM-News Corp. Order*); WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee, WC Docket No. 02-215, *Memorandum Opinion and Order*, 18 FCC Rcd. 26484, 26492-93, ¶ 12 (2003) (*WorldCom Order*); Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, MB Docket No. 02-70, *Memorandum Opinion and Order*, 17 FCC Rcd. 23246, 23255, ¶ 26 (2002); Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee), CS Docket No. 01-348, *Hearing Designation Order*, 17 FCC Rcd. 20559, 20574, ¶ 25 (2002) (*EchoStar-DirectTV HDO*); VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee, IB Docket No. 00-187, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779, 9789, ¶ 17 (2001) (*Deutsche Telekom-VoiceStream Order*); Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, CC Docket No. 98-184, *Memorandum Opinion and Order*, 15 FCC Rcd. 14032, 14046, ¶ 22 (2000) (*Bell Atlantic-GTE Order*); Applications to Assign Wireless Licenses from WorldCom Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., WT Docket No. 03-203, *Memorandum Opinion and Order*, 19 FCC Rcd. 6232, 6241-42, ¶ 23 (WTB, MB 2004) (*Nextel-WorldCom Order*); Global Crossing LTD. (Debtor-in-Possession), Transferor, and GC Acquisition Limited, Transferee, IB Docket No. 02-286, *Order and Authorization*, 18 FCC Rcd. 20301, 20315-16, ¶ 17 (IB, WTB, WCB 2003) (*Global Crossing Order*).

<sup>28</sup> See, e.g., *Cingular-NextWave Order* at 2580-81, ¶ 24; *GM-News Corp. Order* at 483-84, ¶ 16; *EchoStar-DirectTV HDO* at 20574, ¶ 25; *Nextel-WorldCom Order* at 6241-42, ¶ 23; *TeleCorp-Tritel Order* at 3721-22, ¶ 12.

<sup>29</sup> See, e.g., *Cingular-NextWave Order* at 2580-81, ¶ 24; *WorldCom Order* at 26492-93, ¶ 12; *Global Crossing Order* at 20315-16, ¶ 17; *Nextel-WorldCom Order* at 6241-42, ¶ 23.

<sup>30</sup> See, e.g., *Cingular-NextWave Order* at 2580-81, ¶ 24; *WorldCom Order* at 26492-93, ¶ 12; *Global Crossing Order* at 20315-16, ¶ 17; *Nextel-WorldCom Order* at 6241-42, ¶ 23.

<sup>31</sup> 47 U.S.C. § 310(d). See 47 C.F.R. § 1.948. See also, e.g., *Cingular-NextWave Order* at 2581-82, ¶ 25; *GM-News Corp. Order* at 483, ¶ 15; *WorldCom Order* at 26493-94, ¶ 13; *Deutsche Telekom-VoiceStream Order* at 9790, ¶ 19; *Global Crossing Order* at 20316-17, ¶ 18; *Nextel-WorldCom Order* at 6242, ¶ 24; Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless, WT Docket No. 03-19, *Memorandum Opinion and Order*, 18 FCC Rcd. 6490, 6492 ¶ 5 (WTB-CWD 2003) (*Verizon-Northcoast Order*).

<sup>32</sup> See, e.g., *Cingular-NextWave Order* at 2581-82, ¶ 25; *GM-News Corp. Order* at 485, ¶ 18; *WorldCom Order* at 26493-94, ¶ 13; *Deutsche Telekom-VoiceStream Order* at 9790, ¶ 19; Applications of SBC Communications Inc. and BellSouth Corporation, WT Docket No. 00-81, *Memorandum Opinion and Order*, 15 FCC Rcd. 25459, 25465, ¶ 14 (2000) (*SBC-BellSouth Order*); Applications of Vodafone AirTouch, PLC and Bell Atlantic (continued...)

regarding these Assignment Applications, we find no reason to re-evaluate the qualifications of the Summit DIPs. Also, as a part of our public interest analysis, Section 310(d) requires the Commission to consider whether the proposed assignee or transferee is qualified to hold Commission licenses.<sup>33</sup> In this proceeding, no issues have been raised with respect to the basic qualifications of the Liquidating Trust, and our review of the Assignment Applications (which attest to the Trust's qualifications) reveals no independent reason to examine further the Liquidating Trust's qualifications. Based on our review of the Assignment Applications, we find that the Liquidating Trust is qualified to acquire the Licenses.

10. Finally, when evaluating the likely competitive effects and public interest benefits of a proposed transaction, the Commission performs a case-by-case review of the transaction in order to fulfill the Commission's statutory mandate to preserve and enhance competition in relevant markets, ensure diversity of license holdings, accelerate private sector deployment of advanced services, and manage the spectrum in the public interest.<sup>34</sup> Neither the Assignment Applications nor our own analysis leads to the conclusion that there is likely to be substantial competitive harm as a result of this transaction. Furthermore, no petitions were filed arguing that this transaction would result in competitive harm. Therefore, we find that the potential benefits outweigh any potential harm and that the proposed transaction is in the public interest.

#### **B. Request for Waiver of the Unjust Enrichment Rules**

11. As indicated above, the Applications also include a request for waiver of limited aspects of the Commission's unjust enrichment rules to the extent necessary to allow for the transfer of the Licenses to the Liquidating Trust in accordance with the terms of the Settlement, the *Liquidating Trust Agreement*, the *Consent Motion*, and the Bankruptcy Court's *Sale Order*.<sup>35</sup> In sum, because certain of the Licenses in the proposed transaction are subject to the Commission's installment financing program, the transfer of such licenses requires an unjust enrichment analysis. Many of the licenses in the instant transaction were eligible to be paid for in installments because the bidder who won them at auction qualified as either a small or very small business.<sup>36</sup> With respect to broadband PCS licenses, an entity will be considered a small business or very small business if it, together with its affiliates, has less than \$40 million or \$15

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Corporation, WTB Rpt. No. 371, *Memorandum Opinion and Order*, 15 FCC Rcd. 16507, 16513, ¶ 14 (2000) (*Bell Atlantic-Vodafone AirTouch Order*); *Global Crossing Order* at 20316-17, ¶ 18; *Nextel-WorldCom Order* at 6242, ¶ 24; *Verizon-Northcoast Order* at 6492, ¶5; *TeleCorp-Tritel Order* at 3722, ¶ 13. See also Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee's basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. See *id.*

<sup>33</sup> See, e.g., *Cingular-NextWave Order* at 2581-82, ¶ 25; *GM-News Corp. Order* at 486-87, ¶ 23; *WorldCom Order* at 26493-94, ¶ 13; *EchoStar-DirecTV HDO* at 20574, 20576, ¶¶ 25, 28; *SBC-BellSouth Order* at 25465, ¶ 14; *Bell Atlantic-GTE Order* at 14227, ¶ 429; *Bell Atlantic-Vodafone AirTouch Order* at 16513, ¶ 14; *Nextel-WorldCom Order* at 6242, ¶ 24.

<sup>34</sup> See *GM-News Corp Order* at 483-84, ¶ 16; *EchoStar Direct TV HDO* at 20574, ¶ 26. See also 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd. 22668, 22696, ¶ 55 (2001), citing 47 U.S.C. §§ 301, 303, 309(j), 310(d).

<sup>35</sup> See *supra* para 7; see also generally, *Waiver Request*.

<sup>36</sup> See 47 C.F.R. § 24.711(c).

million, respectively, in average annual gross revenues for the preceding three years.<sup>37</sup> Only eligible entities are permitted to participate in the Commission's installment payment program, and where the transfer of a license to an ineligible entity is contemplated, the Commission must ensure that it recoups any unjust enrichment.<sup>38</sup>

12. For assignments of spectrum licenses, section 1.2111 of the Commission's rules places the obligation on the assignor to ensure that the Commission receives full payment of any outstanding debt where the assignee is not eligible to participate in the installment financing program.<sup>39</sup> Specifically, section 1.2111(c)(1) states, "[i]f a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval."<sup>40</sup> In the context of the proposed transaction, our rules therefore place the responsibility of full payment at the transfer of certain of the Licenses with the Summit DIPs. The Applicants' *Waiver Request* concedes that "[a]bsent a waiver in this case, the Summit DIPs, bankrupt entities, would be required to pay the unjust enrichment payment upon assignment to Summit Wireless Liquidating Trust, an entity with few assets, created solely to market the licenses for eventual assignment to a qualified entity, in accordance with the Bankruptcy Court's *Order* and subject to FCC approval."<sup>41</sup>

13. The Applicants therefore maintain that a waiver of certain aspects of section 1.2111(c) is necessary so that the payment of the outstanding installment debt can be made to the Commission by the Liquidating Trust in accordance with the terms of the Settlement, the *Liquidating Trust Agreement*, the *Consent Motion* and the Bankruptcy Court's *Sale Order*. Specifically, the Applicants explain that a waiver of the timing of Section 1.2111(c) is necessary "so as to defer the payment until the consummation of the eventual assignment of the licenses from the Summit Wireless Liquidating Trust to qualified third-party buyers."<sup>42</sup> Further, the Applicants request "that Summit Wireless Liquidating Trust be made responsible for the payment since, at the time the payment will be made, it is likely that Summit DIPs will not be in existence."<sup>43</sup>

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<sup>37</sup> See 47 C.F.R. § 24.720(b).

<sup>38</sup> 47 C.F.R. § 1.2111(c).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* The Commission has previously clarified that the approval of an assignment or transfer that results in installment payment unjust enrichment is conditioned upon the full payment of the required unjust enrichment payment on or before the consummation date. See In the Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 15,239, 15,314 at ¶ 37 (2000).

<sup>41</sup> See generally, *Waiver Request*.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

14. Additionally, given the definition of “outstanding indebtedness to the FCC” agreed to in the Settlement and included in the *Consent Motion*, the *Liquidating Trust Agreement* and the *Sale Order*, we recognize that the amount of outstanding interest contemplated by the terms of the proposed transaction is insufficient to cover all of the accrued interest that the Summit DIPs might possibly owe under section 1.2111.<sup>44</sup> Thus, as a regulatory matter, if we are to approve the transfer of the Licenses to the Liquidating Trust pursuant to the Settlement and as described in the *Liquidating Trust Agreement*, the *Consent Motion*, and the *Sale Order*, we find that we must grant the Applicants a limited waiver of the payment provisions of section 1.2111 with respect to the payment of a limited portion of the interest otherwise payable under the rule.

15. Pursuant to section 1.925 of the Commission’s rules, the Commission may grant a request for a rule waiver if the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant would be in the public interest.<sup>45</sup> Alternatively, the Commission may grant a request for waiver if, in view of the unique or unusual factual circumstances of the specific situation, application of the rule would be inequitable, unduly burdensome or contrary to the public interest or the entity requesting the waiver has no reasonable alternative.<sup>46</sup> For the reasons described below, we find that the Applicants have met the standard for a limited waiver of certain of the payment and timing requirements of section 1.2111(c) of the Commission’s rules.

### C. Resolution of Issues Arising from Bankruptcy Litigation

16. As previously discussed, the Commission’s unjust enrichment rules require that the assignor ensure that the Commission is fully compensated for any outstanding debt, including remaining unpaid principal, interest and any late fees accrued through the date of assignment on or before the consummation, as a condition of approval of the transaction. Here, however, the terms of the Settlement necessitate a waiver of three limited aspects of the Commission’s regulatory requirements under section 1.2111(c). Specifically, if the Commission is to grant the transfer of the Licenses from the Summit DIPs to the Liquidating Trust pursuant to the Settlement, the *Consent Motion* and the *Sale Order*, we must grant the Applicants a waiver of: (1) the requirement that all accrued interest as defined in section 1.2111(c) must be paid in full ; (2) the requirement that the payment of outstanding debt must be paid on or before consummation; and (3) the requirement that the assignor is responsible for the payment to the

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<sup>44</sup> For instance, section 1.2111(c) of the Commission’s rules contemplates that interest accrues on the installment debt “through the date of the assignment or transfer as a condition of approval.” 47 C.F.R. § 1.2111(c). Accordingly, because the Settlement and the Court’s *Sale Order* specifically define outstanding indebtedness to the FCC with regard to the calculation of certain amounts of accrued interest, the DOJ and the Commission as creditor have consented to receive a slightly lesser amount of interest than that which might accrue under the rules insofar as the Settlement provides that interest would initially cease in July 2004, on a date prior to the voluntary transfer of the Licenses to the Trust—a transfer which shall occur upon the release of this Order and pursuant to the relief we grant herein. We also note that the *Sale Order* reflects the possibility that the Liquidating Trust may in certain circumstances incur an obligation to pay additional interest to the Commission after the date of the assignment of the Licenses, pursuant to terms of the Settlement. See *Sale Order* at ¶ K. Payment of such interest in satisfaction of the terms of the Settlement is outside the context of the issues we need to consider for purposes of ruling on the instant waiver petition.

<sup>45</sup> 47 C.F.R. § 1.925(a)(3).

<sup>46</sup> *Id.* Additionally, section 1.3 of the Commission’s rules provides authority for a rule waiver upon a showing of good cause. 47 C.F.R. § 1.3



Commission. In considering each of these aspects of the rule and the proposed transaction, we find that the Settlement serves the public interest and that, therefore, the Applicants have met the Commission's waiver standard with respect to each of the Commission's regulatory requirements.

17. As a general matter, we find that the Settlement serves the public interest and will ultimately benefit consumers. But for the Settlement, the Summit bankruptcy may have been prolonged for far longer, thereby leaving valuable spectrum to languish. Moreover, by reaching the Settlement reflected in the terms of the *Sale Order*, the United States Government has been ensured of the recovery of debts owed to the Commission and absent such recovery under the agreed to terms, the Government has been ensured that the Licenses must be returned to the Commission in exchange for debt forgiveness. For these reasons as well as those we discuss below, we find that the grant of a limited waiver to allow for the disposition of the Licenses in accordance with the terms of the Settlement, the *Liquidating Trust Agreement*, the *Consent Motion* and the *Sale Order* does not undermine the underlying purpose of the unjust enrichment rule.

18. First, because the Settlement reflected in the *Consent Motion* and the *Sale Order* provides for the payment of the entire principal amount owed to the Commission<sup>47</sup> as well as the relevant late fees and the majority of any accrued interest for those licenses that were subject to installment payment financing, we recognize that, at most, we need only grant a waiver of certain limited amounts of interest that could have otherwise accrued under section 1.2111(c) of the Commission's rules. On balance, we find that strict enforcement of the rule's interest payment requirement is not warranted in this case and that the grant of a limited waiver does not undermine the underlying purpose of the unjust enrichment rules.

19. The general purpose of the Commission's unjust enrichment rules is "to prevent designated entities from profiting by the rapid sale of licenses acquired through the benefit of preference policies."<sup>48</sup> Here, similar to the decision the Commission faced in *Cingular-NextWave*,<sup>49</sup> we are confronted with a request to determine whether the proffer of a significant payment, which fully satisfies the Applicants' obligations to pay the entire principal amount owed, and most of the interest owed, warrants a departure from the strict application of the Commission's installment payment unjust enrichment rules. Moreover, we have been asked to do so in the context where the proffered payment has been determined to be an acceptable Settlement by the United States Government in a negotiated agreement with a licensee whose debt under the installment payment program will ultimately be forgiven and licenses will be returned if the Licenses cannot be disposed of in accordance with the terms of the Settlement.<sup>50</sup> Under these circumstances, we find, consistent with the Commission's decision in *Cingular-Nextwave*, that the Settlement's terms reflected in the Court's *Sale Order* warrant a limited waiver of section 1.2111(c)'s requirement to pay all of the interest that could have accrued under the rule.

20. We reach this determination mindful of the fact that the recovery of the "outstanding indebtedness to the FCC" as defined by the Settlement and embodied in the *Sale Order* will benefit the U.S. Treasury and is consistent with the intent of Section 309(j)(3)(C) of the Act, "to recover for the public

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<sup>47</sup> See *supra* para 6; see also *Sale Order* at ¶ K (explaining that the Settlement defines outstanding indebtedness to the FCC to include the repayment of all principal.).

<sup>48</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-235, 9 FCC Rcd. 2348, 2394, ¶ 258 (1994) (*Competitive Bidding Second R&O*).

<sup>49</sup> See, e.g., *Cingular-NextWave Order* at 2588-2589, ¶ 43.

<sup>50</sup> See *Sale Order* at ¶ J.

a portion of the value of the public spectrum resource.”<sup>51</sup> Continued litigation in bankruptcy may only hinder our ability to recover such value. Moreover, the approval of the proposed transaction is not the type of “rapid sale of licenses acquired through the benefit of preference policies” that the Commission’s anti-trafficking rules were designed to prevent.<sup>52</sup> Instead, in the instant transaction, the acceptance of Qualcomm’s credit bid was reached through a process supervised and approved by the Bankruptcy Court rather than as the result of capitalizing upon preferences reserved for designated entities.<sup>53</sup> Moreover, the interest at issue here is limited, and a waiver of the obligation to pay it will not encourage abuse of these preference policies. Thus, for these reasons, granting a limited waiver of the amount of interest that could have accrued under a strict interpretation of section 1.2111(c) does not undermine the underlying purpose of the rule.

21. Second, while the terms of the Settlement, *Liquidating Trust Agreement*, *Consent Motion* and *Sale Order* contemplate that the Applicants will satisfy the debt owed to the Commission under section 1.2111(c), albeit, as explained above, with a limited waiver of certain accrued interest, those terms do not provide that such payment be made until after a grant and prior to consummation of a subsequent transfer to a qualified entity – an arrangement that specifically conflicts with the timing requirement of section 1.2111(c).<sup>54</sup> Under the Commission’s rules, payment of any remaining unpaid principal and accrued interest is required on or before consummation of the assignment of licenses to the Liquidating Trust.<sup>55</sup> The purpose of this timing requirement is two-fold: (a) to ensure that full payment is made promptly, and (b) to prevent the unjust enrichment that a non-designated entity would receive if it were given the opportunity to participate in an installment program reserved for those eligible for such a benefit.

22. In applying the timing aspect of the rule to the particular facts of this case, however, we find that strict application of this requirement would neither serve its underlying purpose nor the public interest. Rather, on balance, we find that a limited waiver is warranted. In granting this waiver, we take into account the primary public interest benefit arising from the arrangement outlined in the Settlement and the *Sale Order* – *i.e.*, the favorable settlement of the Commission’s claim in the Summit bankruptcy case, which will allow for the expeditious recovery of the obligations owed to the Commission under section

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<sup>51</sup> See 47 U.S.C. § 309(j)(3)(C).

<sup>52</sup> See *Cingular-NextWave Order* at 2590, ¶ 46 (citing *Competitive Bidding Second R&O* at 2394, ¶ 258).

<sup>53</sup> See *Sale Order* at ¶¶ 11-12.

<sup>54</sup> 47 C.F.R. § 1.2111(c). The Commission has previously clarified that the approval of an assignment or transfer of control that results in installment payment unjust enrichment is conditioned upon the full payment of the required unjust enrichment payment on or before the consummation date. See *In Matter of Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 15239, 15314, ¶ 37 (2000). Thus, we must grant a limited waiver of the timing of section 1.2111(c) in order to permit the implementation of the Liquidating Trust Agreement.

<sup>55</sup> 47 C.F.R. § 1.2111(c). Specifically, section 1.2111(c)(1) states “[i]f a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.”

1.2111(c), without the delay of further litigation.<sup>56</sup> We also take into account the public interest benefit of implementing the decision of the Bankruptcy Court in the *Sale Order*.<sup>57</sup> In light of these benefits, it is clear that the prompt and certain payment component of our rule is best served by the grant of a limited waiver.<sup>58</sup>

23. Moreover, we find that such waiver will not frustrate the unjust enrichment purpose of the timing component of the rule. As stated above, the timing provision of the rule prevents non-designated entities from being unjustly enriched by participating in a payment program that was intended to benefit only eligible small businesses. There is no such unjust enrichment arising from the present circumstances. Under the terms of the Settlement, the *Liquidating Trust Agreement*, the *Consent Motion* and the *Sale Order*, the Liquidating Trust is not continuing to participate in the Commission's installment plan and is therefore not subject to section 1.2110 of the Commission's rules. Instead, in order to resolve the bankruptcy proceeding, the Commission as a creditor of the Summit DIPs, has consented to the relief requested in the *Consent Motion*, which was subsequently granted in the *Sale Order*, in order to ensure the receipt of the payments due to the Commission without the need for further litigation in the bankruptcy court proceeding. Thus, the timing of payment to the Commission contemplated under the terms of the Settlement, *Liquidating Trust Agreement*, *Consent Motion*, and *Sale Order* does not frustrate the underlying purpose of the rule.

24. Accordingly, we grant, to the extent necessary, a limited waiver of the timing provisions of section 1.2111(c) so that the Settlement may be implemented.<sup>59</sup> We therefore consent to the assignment of the Licenses from the Summit DIPs to the Liquidating Trust, including any licenses that have outstanding installment debt, and we will allow the payment of outstanding installment obligations to the Commission to be paid on or before consummation of the transfer of any such license to a subsequent qualified entity, subject to the Commission's regulatory authority and the terms of the Settlement, *Liquidating Trust Agreement*, the *Consent Motion* and the *Sale Order*. Thus, while the outstanding indebtedness to the FCC, as agreed in the Settlement and described in the *Sale Order*, will be calculated at the time of the consummation of the assignment of the Licenses to the Liquidating Trust, we will waive the rule to allow this payment to be made as we describe above.

25. Finally, with respect to the rule's requirement that the assignor be responsible to render payment of the installment debt obligation, here too, we find that the strict application of the rule is not warranted and that grant of a waiver will not undermine the purpose of the rule. As noted above, the Applications before us seek approval to assign the Licenses from the Summit DIPs (assignors) to the Liquidating Trust. As explained in the *Waiver Request*, the Liquidating Trust is "an entity with few assets, created solely to market the licenses for eventual assignment to a qualified entity, in accordance with the

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<sup>56</sup> Applications for Consent to Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from Leap Wireless International, Inc. and its subsidiaries, Debtors-In-Possession and Leap Wireless International, and its subsidiaries, WT Docket 03-263, *Memorandum, Opinion & Order*, 19 FCC Rcd. 14909, 14926-14927, ¶ 34 ("*Leap Order*").

<sup>57</sup> See *LaRose v. FCC*, 494 F.2d 1145, 1150 (D.C. Cir. 1974).

<sup>58</sup> See *Leap Order* at 14926-14927, ¶ 34.

<sup>59</sup> See *Cingular-NextWave Order* at 2590, ¶ 47 (2004) (relying on implementation of settlement agreement and Department of Justice grant of debt forgiveness as significant factors in granting limited waiver of regulatory full payment requirement under Section 1.2111).

Bankruptcy Court's *Order* and subject to FCC approval."<sup>60</sup> The Applicants therefore request "that Summit Wireless Liquidating Trust be made responsible for the payment since, at the time the payment will be made, it is likely that Summit DIPs will not be in existence."<sup>61</sup> In the proposed transaction, the Settlement contemplated that payment to the Commission would not occur until the subsequent Commission approval of transfer of a license to a third-party qualified buyer. Yet, in accordance with our regulatory requirements, the entity that received the benefit of the designated entity policies, here the Summit DIPs, is the entity that bears responsibility for ensuring the Commission is fully compensated. In the instant transaction, however, strict adherence to this requirement is not practical and is incompatible with the terms of the Settlement to assign the Licenses. Further, because the Settlement provides that the Liquidating Trust will remain subject to the same responsibilities that we would have imposed on the current licensee (i.e., payment of obligations owed, or cancellation of licenses and return of the spectrum with debt forgiveness), we believe it is appropriate to grant a waiver to allow the Liquidating Trust to be the entity ultimately responsible for the obligations owed or that may ultimately be forgiven under section 1.2111(c) in this transaction.<sup>62</sup> As noted above, because the terms of the Settlement embodied in the *Sale Order* do not result in unjust enrichment as contemplated by the rules, grant of a waiver of this aspect of the rule does not frustrate its underlying purpose.

#### IV. CONCLUSION

26. We find that, pursuant to our review under Section 310(d) of the Communications Act, approval of the Assignment Applications will serve the public interest, convenience, and necessity.<sup>63</sup> The licenses in this transaction that remain in the Commission's installment financing program are subject to section 1.2111(c), however, we grant a limited waiver of certain of the payment and timing aspects of the rule, as described above, to allow for the transfer of the Licenses to the Liquidating Trust as contemplated by the terms of the Settlement, the *Liquidating Trust Agreement*, the *Consent Motion*, and the Bankruptcy Court's *Sale Order*.<sup>64</sup>

#### V. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 309(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j), 310(d), the applications seeking consent for the assignment of C and F block Personal Communications Services licenses from the Summit DIPs to the Liquidating Trust are GRANTED.

28. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. §§ 1.3, 1.925, we GRANT a limited waiver of section 1.2111(c) of the Commission's rules, 47 C.F.R. § 1.2111(c) to the extent described herein.

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<sup>60</sup> See generally, *Waiver Request*.

<sup>61</sup> *Id.*

<sup>62</sup> See *supra* para 5.

<sup>63</sup> 47 U.S.C. § 310(d).

<sup>64</sup> 47 C.F.R. § 1.2111(c).

29. These actions are taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John B. Muleta  
Chief  
Wireless Telecommunications Bureau