

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

In the Matter of)
)
Applications for Assignment of Licenses of Urban) WT Docket No. 05-169
Comm-North Carolina, Inc., Debtor-in-Possession,)
to Cricket Licensee (Reaction), Inc.) File Nos. 0002526701 and 0002526699

MEMORANDUM OPINION AND ORDER

Adopted: September 19, 2006

Released: September 19, 2006

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us applications filed by Urban Comm-North Carolina, Inc., Debtor-in-Possession ("Urban Comm") and Cricket Licensee (Reaction) Inc. ("Cricket" and, together with Urban Comm, the "Applicants") seeking Commission consent to the full or partial assignment of 13 broadband Personal Communications Services ("PCS") C and F block licenses (the "Application").

1 ULS File Nos. 0002526701 and 0002526699 (filed March 20, 2006). Specifically, Cricket would acquire 10 megahertz of broadband PCS C and F block spectrum in the following BTAs: Asheville-Hendersonville, NC (BTA020), Florence, SC (BTA147), Myrtle Beach, SC (BTA312), Orangeburg, SC (BTA335), Sumter, SC (BTA436), Charleston, SC (BTA072), Goldsboro-Kinston, NC (BTA165), Greenville-Washington, NC (BTA176), New Bern, NC (BTA316), Roanoke Rapids, NC (BTA377), and Rocky Mount-Wilson, NC (BTA382).

2 47 C.F.R. § 1.2111 (requirements for unjust enrichment payments for assignment or transfer of control of licenses subject to installment payments); § 24.714 (requirements for unjust enrichment payments for partial assignment or transfer of broadband PCS licenses subject to installment payments).

3 See Application, Exhibit 1 at 1.

4 47 U.S.C. § 310(d).

5 47 C.F.R. §§ 1.2111, 24.714.

II. BACKGROUND

A. Description of the Applicants

2. Urban Comm was the winning bidder of 10 broadband PCS C block licenses in Auction No. 5,⁶ and 13 broadband PCS F block licenses in Auction No. 11.⁷ Urban Comm financed payment for these licenses through the Commission's installment payment program.⁸ Urban Comm is a wholly-owned subsidiary of Urban Comm Mid-Atlantic, Inc., Debtor-in-Possession ("Urban Comm MA"), which is wholly owned by Urban Communicators PCS Limited Partnership ("Urban Comm LP").⁹ In 1998, Urban Comm, Urban Comm MA, and Urban Comm LP (collectively, the "Debtors") initiated Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court").¹⁰ These bankruptcy proceedings remain pending.¹¹

⁶ Call Signs KNLF372, KNLF373, KNLF374, KNLF375, KNLF376, KNLF377, KNLF378, KNLF379, KNLF380, KNLF381. The Commission conditionally granted these broadband PCS C block licenses to Urban Comm on September 17, 1996. See "FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA Licenses, Final Down Payment Due by September 24, 1996," *Public Notice*, 11 FCC Rcd 11316 (1996).

⁷ Call Signs KNLG239, KNLH707, KNLH708, KNLH709, KNLH710, KNLH711, KNLH712, KNLH713, KNLH714, KNLH715, KNLH716, KNLH717, and KNLH718. These broadband PCS F Block licenses were conditionally granted on April 28, 1997. See "FCC Announces Grant of Broadband Personal Communications Services D, E, F Block BTA Licenses Balance of Winning Bids (D and E Block) and Final Down Payment (F Block) Are Due by May 12, 1997," *Public Notice*, 13 FCC Rcd 1286 (1997).

⁸ See 47 C.F.R. §§ 1.2110, 24.711, 24.716 (1999). In 1997, the Commission suspended installment payments for broadband PCS licenses pending resolution of requests filed by certain licensees to restructure their installment payment obligations. See *Installment Payments for PCS Licenses, Order*, 12 FCC Rcd 17325 (1997). Shortly thereafter, the Commission determined that installment payments will not be used in the immediate future as a means of financing small business participation in our auction program. See Amendment of Part 1 of the Commission's Rules – Competitive Bidding, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 397 ¶ 38 (1997).

⁹ See Application, Exhibit 1 at 2.

¹⁰ *Id.* Urban Comm, Urban Comm MA, and Urban Comm LP are debtors and debtors-in-possession under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. Section 101 *et seq.*, as amended (the "Bankruptcy Code"), having commenced cases under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court on October 28 and November 5, 1998. See *In re Urban Communicators PCS Limited Partnership, et. al.*, Nos. 98-B-47996 (REG), 98-B-47997 (REG), and 98-B-10086 (REG), jointly administered (Bankr. S.D.N.Y. 1998).

¹¹ Prior to the current Application, Urban Comm filed two other applications for Commission consent as part of its bankruptcy reorganization. One application sought Commission consent to a *pro forma* transfer of control of Urban Comm from Urban Comm MA to Urban Comm LP, through merging Urban Comm MA into Urban Comm. The Commission granted its consent to this *pro forma* transfer of control on June 3, 2005. The other application sought Commission consent to the full or partial assignment of ten broadband PCS licenses from Urban Comm to Celco Partnership d/b/a Verizon Wireless ("Verizon Wireless"). The Wireless Telecommunications Bureau ("Bureau"), acting under delegated authority, granted consent to the assignment of licenses from Urban Comm to Verizon Wireless on June 2, 2005. The parties consummated the assignment of licenses to Verizon Wireless on July 13, 2005, leaving Urban Comm holding 13 broadband PCS F block licenses and 7 partial (i.e., 10 or 20 megahertz) broadband PCS C block licenses. After consummation of this proposed transaction, Urban Comm will continue to hold 8 licenses, and has applied for consent to assign 5 of these licenses to Verizon Wireless. See *Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications, and Designated Entity Reportable Eligibility Event Applications Accepted for Filing, Public Notice*, Report No. 2625 (rel. Aug. 23, 2006).

3. Cricket is a wholly-owned subsidiary of Leap Wireless International, Inc. (“Leap”).¹² According to the Application, the instant transaction will permit Leap to expand its service significantly and deploy its service model in thirteen additional markets.¹³ Also, from a competitive standpoint, the Applicants maintain that this proposed transaction will not result in competitive harm because all of the licenses being assigned represent new market acquisitions and that, upon the closing of the transaction, Cricket’s spectrum holdings will not exceed 10 MHz in any of the subject areas.¹⁴

B. Proposed Transaction

4. Urban Comm and Cricket entered into an Agreement to Purchase FCC Licenses (the “Purchase Agreement”) dated as of March 1, 2006.¹⁵ Pursuant to the Purchase Agreement and subject to all appropriate Commission and Bankruptcy Court approvals, Urban Comm seeks to assign 13 C and F Block PCS licenses to Cricket, free and clear of any encumbrances.¹⁶ Consequently, consistent with approvals sought and subsequently obtained from the Bankruptcy Court and as described below, the Applicants filed the Application seeking Commission consent to the assignment of licenses from Urban Comm to Cricket.

5. On March 14, 2005, the Debtors entered into an agreement with the Commission regarding the installment payment obligations incurred by Urban Comm with respect to its broadband PCS C and F block licenses (“Settlement Agreement”).¹⁷ The Bankruptcy Court approved the Settlement Agreement on April 4, 2005.¹⁸ The Settlement Agreement, in conjunction with the Purchase Agreement, requires, in relevant part, that Cricket deliver to the Commission a portion of the purchase price in satisfaction of the Commission’s claims related to the licenses.¹⁹ Specifically, under the Settlement Agreement, which contemplates that Urban Comm would seek the Commission’s regulatory approval to assign its licenses to a third party, Cricket will pay directly to the Commission a mutually agreed-to amount defined as an “Alternative Cash Payment.”²⁰ On, March 31, 2006, as required by the terms of the Settlement Agreement, the Bankruptcy Court issued an Order approving the sale of certain licenses from Urban Comm to Cricket, subject to the necessary Commission regulatory approvals.²¹

¹² See Application, Exhibit 1 at 2.

¹³ *Id.* at 6.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 2-4.

¹⁶ *Id.* at 4-5.

¹⁷ A copy of the Settlement Agreement is attached to the Application as Exhibit 2.

¹⁸ See *In re Urban Communicators PCS Ltd. Partnership, et al.*, Nos. 98 B 47996, 98 B 47997, 98 B 10086 (REG) (Bankr. S.D.N.Y. Apr. 4, 2005) (approving and authorizing terms and conditions of the proposed settlement agreement with the Commission).

¹⁹ Application, Exhibit 1 at 4; Settlement Agreement at ¶¶ 1(e), 4.

²⁰ The Application refers to the negotiated payment amount as the “FCC Direct Payment.” Application, Exhibit 1 at 9. The Settlement Agreement refers to the negotiated payment amount as the “Alternative Cash Payment.” Settlement Agreement at ¶¶ 1(e), 4(a). As explained in the Application and the Settlement Agreement, the amount of the Alternative Cash Payment is established by the terms of the Settlement Agreement and represents a negotiated payment amount owed for each license as well as a per diem interest rate for each license accruing from and including January 1, 2005 through and including the Date of the Closing of the transaction. *Id.* We will refer to this amount herein as the Alternative Cash Payment.

²¹ See *In re Urban Communicators PCS Ltd. Partnership, et al.*, Nos. 98 B 47996, 98 B 47997, 98 B 10086 (REG) (Bankr. S.D.N.Y. March 31, 2006) (approving and authorizing terms and conditions of the proposed transaction).

6. In the Application before us, the Applicants argue that the assignment of licenses from Urban Comm to Cricket is in the public interest and will benefit competition in the markets included in the Application.²² Moreover, the Applicants request that the Commission, as part of its approval of the Application, grant waivers of sections 1.2111 and 24.714 of the Commission's rules.²³ Specifically, the Applicants request a waiver of section 1.2111 to the extent that the Alternative Cash Payment does not fully satisfy Urban Comm's obligations regarding the C or F block licenses at issue as well as a waiver of section 24.714 for any spectrum that is disaggregated to Cricket.²⁴

7. In addition to their request for waiver of the payment provisions of sections 1.2111 and 24.714, the Applicants request a waiver of the timing provision in section 24.714(c) of the Commission's rules.²⁵ Section 24.714(c)(2)(ii) requires a partitionee or disaggregatee to pay its apportioned payment obligation within 30 days of the public notice conditionally granting the partial assignment application.²⁶ The Applicants request that the Commission waive the timing provision in section 24.714(c)(2)(ii) to allow for the Alternative Cash Payment to be made on the date of consummation of the transaction, which, under the Agreement, will occur beyond the 30 days allowed under the rule.²⁷

8. Regarding construction, the Applicants claim that the relevant five-year construction requirements set forth in section 24.203 of the Commission's rules have been satisfied with respect to each of the thirteen licenses.²⁸ On December 6, 2004, Urban Comm filed a Request for Tolling to allow the construction to be deemed to have been completed within the five-year construction period. On June 1, 2005, the Commission issued an Order granting the requested tolling relief, and accepting the notifications of construction filed by Urban Comm as to each of the licenses.²⁹ On March 15, 2006, Urban Comm filed an additional request for tolling of the ten-year construction period for the subject licenses, which remains pending.³⁰

9. The Bureau placed the Application on public notice on March 29, 2006.³¹ No oppositions or other comments were filed in response to the public notice.

²² Application, Exhibit 1 at 5-7.

²³ *Id.* at 9-11.

²⁴ *Id.* The Applicants argue that the "FCC Direct Payment" should cover any payment obligations owed by Cricket pursuant to section 24.714 of the Commission's rules for disaggregated spectrum, but in the event it does not, request a waiver for Cricket's payment obligations. *Id.* at 10.

²⁵ *Id.*.

²⁶ 47 C.F.R. § 24.714(c)(2)(ii).

²⁷ Application, Exhibit 1 at 10.

²⁸ *Id.* at 4.

²⁹ *Id.* at 4; *see also* Urban Comm-North Carolina, Inc., Call Signs KNLF372 et al., File Nos. 0001939409 et al., Order, DA 05-1561, 20 FCC Rcd 9993 (2005) (*Urban Comm Tolling*).

³⁰ Application, Exhibit 1 at 5.

³¹ See Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, and *De Facto* Transfer Lease Applications Accepted for Filing, *Public Notice*, Report No. 2451 (rel. Mar. 29, 2006).

III. DISCUSSION

A. Public Interest Determination in Accordance with Section 310(d)

10. In considering an application for an assignment of licenses, the Commission must determine, pursuant to Section 310(d) of the Communications Act, whether the Applicants have demonstrated that the proposed assignments will serve the public interest, convenience, and necessity.³² In applying our public interest test, we must assess whether the proposed transaction complies with the specific provisions of the Communications Act, the Commission's rules, and federal communications policy.³³ If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.³⁴ The Commission then employs a balancing test weighing any 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.³⁵ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.³⁶

11. As a threshold matter, the Commission must determine whether the parties meet the requisite qualifications to hold and assign licenses under Section 310(d) of the Communications Act and the Commission's rules.³⁷ 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 designation for hearing.³⁸ As a

³² 47 U.S.C. § 310(d).

³³ See, e.g., Nextel Partners, Inc. and Sprint Nextel Corporation Applications for Approval of Transfer of Control, File Nos. 0002444650, *et al.*, *Memorandum Opinion and Order*, FCC 06-84, ¶ 7 (rel. June 20, 2006) (“*Sprint-Nextel-Nextel Partners Order*”); SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05-65, *Memorandum Opinion and Order*, 20 FCC Rcd 18290, 18300 ¶16 (2005) (“*SBC-AT&T Order*”); Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, WC Docket No. 05-75, *Memorandum Opinion and Order*, 20 FCC Rcd 18433, 18442-43 ¶ 16 (2005) (“*Verizon-MCI Order*”); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 13976 ¶20 (2005) (“*Sprint-Nextel Order*”); Applications of Western Wireless Corporation and ALLTEL Corporation, WT Docket No. 05-50, *Memorandum Opinion and Order*, 20 FCC Rcd 13053, 13062 ¶17 (2005) (“*ALLTEL-Western Wireless Order*”); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21542-43 ¶ 40 (2004) (“*Cingular-AT&T Wireless Order*”).

³⁴ See, e.g., *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶16; *Verizon-MCI Order*, 20 FCC Rcd at 18442-43 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20.

³⁵ See, e.g., *Sprint Nextel-Nextel Partners Order* at ¶ 7; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13062-63 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40.

³⁶ See, e.g., *Sprint-Nextel-Nextel Partners Order* at ¶ 7; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976-77 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21542-43, ¶ 40.

³⁷ See 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; see also *Sprint Nextel-Nextel Partners Order* at ¶ 10; *SBC-AT&T Order*, 20 FCC Rcd at 18379 ¶ 171; *Verizon-MCI Order*, 20 FCC Rcd at 18526 ¶ 183; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

³⁸ See, e.g., *Sprint Nextel-Nextel Partners Order* at ¶ 10; *SBC-AT&T Order*, 20 FCC Rcd at 18379 ¶ 171; *Verizon-MCI Order*, 20 FCC Rcd at 18526 ¶ 183; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063-64 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44. See

(continued...)

required part of our public interest analysis, however, Section 310(d) obligates the Commission to consider whether the proposed assignee is qualified to hold Commission licenses.³⁹ Here, the qualifications of the assignor have not been challenged, and we see no reason to reevaluate the qualifications of Urban Comm in this proceeding. Similarly, no issues have been raised with respect to the basic qualifications of Cricket, as assignee. Thus, we find no reason to reevaluate the qualifications of Cricket at this time.

12. 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 promote and enhance competition in the relevant market, ensure diversity of license holdings, accelerate private sector deployment of advanced services, and manage the spectrum in the public interest.⁴⁰ In this transaction, Cricket proposes to acquire, pursuant to the assignment of licenses, 10 megahertz of broadband PCS spectrum in 13 Basic Trading Areas ("BTA").⁴¹ According to the Application, Cricket and its affiliated entities do not currently hold licenses or offer services in any of these markets.⁴² The Applicants state that, post-transaction, Cricket will hold 10 megahertz of spectrum in each relevant market, and that the transaction does not increase Cricket's spectrum holdings in any of the subject service areas.⁴³ Therefore, we conclude that competitive harms are unlikely as a result of this transaction.

13. The Applicants assert that this transaction will serve the public interest in three principal ways.⁴⁴ First, the assignment of licenses will allow Cricket and its affiliated entities to deploy the Cricket service model in thirteen new markets.⁴⁵ Second, it will increase Cricket's operating efficiency.⁴⁶ Third, the transaction will increase the amount of spectrum actually used to provide services to consumers and will facilitate the resolution of a long-standing bankruptcy proceeding.⁴⁷ In addition, the Applicants maintain that the transaction will have no countervailing adverse effect on competition because it will

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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.*

³⁹ *See, e.g., Sprint Nextel-Nextel Partners Order* at ¶ 10; *SBC-AT&T Order*, 20 FCC Rcd at 18379 ¶ 171; *Verizon-MCI Order*, 20 FCC Rcd at 18526 ¶ 183; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24 [check this cite]; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

⁴⁰ *See Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd. at 13064-5 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41; *GM-News Corp. Order*, 19 FCC Rcd at 483-84 ¶ 16; *Nextel-WorldCom Order*, 19 FCC Rcd at 6244 ¶ 29; *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)).

⁴¹ Application, Exhibit 1 at 3.

⁴² *Id.*; Exhibit 2.

⁴³ *See* Application, Exhibit 1 at 7.

⁴⁴ Application, Exhibit 1 at 5-6.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.*

⁴⁷ *Id.*

bring a new competitor to each BTA served by the licenses.⁴⁸ Insofar as Urban Comm's bankruptcy delayed delivery of service in the relevant geographic markets, the Applicants contend that assignment of the licenses to Cricket will not result in the elimination of an active competitor in any market, but rather the creation of a new one.⁴⁹ On balance, we find that this proposed transaction is in the public interest as it allows Cricket to expand its footprint into new markets.

B. Requests for Waiver

14. We next turn to our determination regarding the Applicants' requests for waiver of sections 1.2111 and 24.714 of the Commission's rules, which are necessary if the transaction is to proceed as contemplated by the terms of the Settlement Agreement and Purchase Agreement. For the reasons articulated below, we find that the Applicants have satisfied the Commission's standard for waiver to the extent described herein.⁵⁰ Therefore, we grant Urban Comm a limited waiver of the full payment provisions of sections 1.2111 and 24.714 of the Commission's rules, and we grant Cricket a waiver of the timing provisions of section 24.714 so that the Applicants may consummate the proposed transaction.⁵¹

15. Sections 1.2111(c) and 24.714(c) of the Commission's rules govern the assignment of broadband PCS licenses financed under the Commission's installment payment program.⁵² The Applicants argue that a waiver of these rules may be necessary because the Commission is not receiving full payment of the installment debt, which includes the outstanding principal, unpaid interest, and late fees, on the licenses that would be assigned to Cricket.⁵³ Although both rules are intended to prevent unjust enrichment, they impose the obligation to pay the outstanding debt on different parties depending on whether the assignment is full or partial (*i.e.*, a partition of the market or disaggregation of spectrum). Under section 1.2111(c), the licensee must pay on or before consummation the entire outstanding installment debt associated with the licenses that it wishes to fully assign to non-eligible parties. Under section 24.714(c), the outstanding balance owed by the licensee (including accrued and unpaid interest) is apportioned between the licensee and the disaggregatee, with each party being responsible for its proportionate share.⁵⁴ As the Commission found in the *NextWave-Cingular Order*,⁵⁵ section 24.714 does not anticipate that the disaggregatee will be responsible for paying more than its *pro rata* portion of the unpaid principal and two quarters of interest and late fees.⁵⁶ Thus, in the instant transaction, in addition to

⁴⁸ *Id.* at 7.

⁴⁹ *Id.*

⁵⁰ 47 C.F.R. § 1.925.

⁵¹ 47 C.F.R. §§ 1.2111, 24.714.

⁵² 47 C.F.R. §§ 1.2111, 24.714.

⁵³ Application, Exhibit 1 at 9-11.

⁵⁴ 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 No. 03-217, Memorandum Opinion and Order, 19 FCC Rcd 2570, 2586-87, ¶38 (2004) (*NextWave-Cingular Order*). In the case of disaggregation, the balance shall be apportioned based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum allocated to the licensed area. See 47 C.F.R. § 24.714(c).

⁵⁵ *NextWave-Cingular Order*, 19 FCC Rcd at 2586-87 ¶ 38.

⁵⁶ *Id.* The Commission reasoned that section 24.714 did not contemplate that interest and late fees could accrue and go unpaid for longer than two quarters without the license automatically canceling for failure to pay under section 1.2110(g)(4)(iv). *Id.*

its proportionate share of the entire outstanding principal obligation owed for the disaggregated licenses, Cricket is required to pay an apportioned share of two quarters of accrued and unpaid interest and late fees associated with that outstanding principal. All interest and any late fees above this amount that is owed to the Commission for the disaggregated spectrum that is being assigned to Cricket remain the obligation of Urban Comm, and, as discussed in detail below, are included in the limited waiver of section 24.714 that we grant to Urban Comm. Accordingly, Cricket's payment obligation for the two disaggregated C block licenses included in the Applications is at most \$15.1 million.⁵⁷ Thus, applying the Alternative Cash Payment (which is approximately \$25 million) to this obligation fully satisfies Cricket's payment responsibilities. Therefore, we find that Cricket does not require a waiver of the full payment provision of section 24.714.

16. We now turn to Urban Comm's payment obligations. First, with respect to the two disaggregated licenses, Urban Comm, as we noted above, is obligated pursuant to section 24.714 to pay all interest and any late fees beyond that owed by Cricket under that rule for the spectrum that is to be assigned to Cricket. Second, with respect to the proposed full assignment of the other eleven licenses, Urban Comm is required by section 1.2111 to pay the full amount of the remaining unpaid principal, the accrued interest, and any late fees.⁵⁸ We note that, after subtracting from the Alternative Cash Payment the maximum amount that Cricket could owe for the two disaggregated C block licenses, the remainder (approximately \$10 million) is sufficient to fully satisfy Urban Comm's obligation under section 1.2111 for outstanding principal on the eleven licenses it proposes to assign. However, what remains of the Alternative Cash Payment thereafter (*i.e.*, the amount left after subtracting the maximum amount Cricket could owe for the disaggregated C block licenses and Urban Comm's outstanding principal for the full assignments) is insufficient to fully pay the accrued interest and any late fees that Urban Comm owes under sections 1.2111 and 24.714. Thus, to facilitate approval of the assignment of licenses to Cricket as described in the Application, we have been asked to grant Urban Comm a limited waiver of the full payment provisions in sections 1.2111 and 24.714 with respect to its portion of accrued interest and any late fees.

17. As noted above, the Applicants acknowledge that the Commission's rules require licensees participating in the Commission's installment payment program to satisfy their auction-related debt obligations in order to assign, disaggregate, or transfer control of a license that is subject to installment payments to an entity that is not eligible to participate in the installment payment program.⁵⁹ The Applicants request, however, that the Commission either "explicitly state that delivery of the FCC Direct Payment[s] ... constitutes full payment, and satisfies all conditions, required under Sections 1.2111 and 24.714," or waive those rules to the extent it finds waiver is necessary to consummate the proposed transaction.⁶⁰

18. We deny the Applicants' request that the Commission should simply find that the amount of the payment negotiated as a matter of settlement satisfies the payment obligations arising from sections 1.2111 and 24.714 of the Commission's rules. Consistent with the Commission's finding in the *NextWave-Cingular Order*, the existence of a negotiated settlement agreement between a licensee and the government does not automatically relieve the Applicants of their regulatory obligations under the

⁵⁷ This calculation is an approximate amount and includes two quarterly payments of interest based on the original principal obligation, interest, and late fees based on those payment amounts. As stated below, *see infra* para. 22, we are not in this decision reaching any determination regarding how long or how much interest or late fees have accrued for the licenses under sections 24.714 and 1.2111 of the Commission's rules.

⁵⁸ 47 C.F.R. § 1.2111.

⁵⁹ Application, Exhibit 1 at 11.

⁶⁰ *Id.* at 9.

Commission's rules.⁶¹ Rather, in circumstances where the implementation of a settlement agreement results in a departure from the Commission's rules, the Commission must apply the legal standard in section 1.925 of its rules to consider whether it should grant any necessary waivers. Accordingly, if we are to approve the assignment of licenses to Cricket as described in the Application, we must grant Urban Comm a limited waiver of the full payment provisions of sections 1.2111 and 24.714 as well as a waiver to Cricket regarding the timing provisions of section 24.714 pursuant to section 1.925 of the Commission's rules.

19. As a general matter, to obtain a waiver, a party must show either that: (i) the underlying purpose of the applicable rule would not be served, or would be frustrated by its application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or the applicant has no reasonable alternative.⁶² We agree with the Applicants that the unique facts and circumstances of the Urban Comm bankruptcy proceeding and the Settlement Agreement render a strict application of the installment payment unjust enrichment rules to the present circumstances contrary to the public interest.⁶³ We recognize that, without a waiver of the unjust enrichment rules, the proposed transaction will fail, and the licenses will remain subject to the continued uncertainties inherent in the bankruptcy process. On the other hand, approval of the proposed transaction and grant of a limited waiver to Urban Comm, as described herein, serves the public interest. Specifically, grant of a limited waiver will allow this spectrum to be put into immediate use for the benefit of consumers. Since Cricket does not currently hold spectrum in any of the relevant markets and Urban Comm has few, if any, subscribers, the transaction will add a new competitor.⁶⁴

20. Moreover, we believe that granting a limited waiver of sections 1.2111 and 24.714 to Urban Comm is consistent with the Commission's statutory obligations under Section 309(j) of the Communications Act and Commission precedent.⁶⁵ As the Applicants argue, the proposed transaction will promote the efficient use of spectrum and the rapid deployment of services for the benefit of the public.⁶⁶ Such an outcome is consistent with the Commission's statutory obligation in Section 309(j)(3)(A)-(B) to promote competition and to speed the deployment of services for the benefit of the public.⁶⁷ We are also mindful that the recovery of approximately \$25 million for the benefit of the U.S. Treasury is consistent with the intent of Section 309(j)(3)(C) of the Act, "to recover for the public a portion of the value of the public spectrum resource."⁶⁸ As the Commission found in the *NextWave-Cingular Order*, continued litigation will only hinder the Commission's ability to recover such value.⁶⁹ The proposed assignment of licenses from Urban Comm to Cricket will end the uncertainty surrounding the licenses as a result of the Urban Comm bankruptcy proceedings. Here, as in the case of the

⁶¹ *NextWave-Cingular Order*, 19 FCC Rcd at 2588-89 ¶¶ 42-43 (Commission found that approval of the transaction required waiver of the unjust enrichment rules).

⁶² 47 C.F.R. § 1.925; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Thomas Radio Co. v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972) *cert. denied*, 409 U.S. 1027, 93 S.Ct. 461 (1972).

⁶³ This finding is consistent with past Commission precedent. *See NextWave-Cingular Order*, 19 FCC Rcd at 2588.

⁶⁴ *See Application*, Exhibit 1 at 7.

⁶⁵ 47 U.S.C. § 309(j).

⁶⁶ *Application*, Exhibit 1 at 7.

⁶⁷ 47 U.S.C. § 309(j)(3)(A)-(B).

⁶⁸ 47 U.S.C. § 309(j)(3)(C).

⁶⁹ *NextWave-Cingular Order*, 19 FCC Rcd at 2589-90 ¶ 45.

NextWave bankruptcy, it is unclear how long it would take to achieve the recovery of a portion of the value of the public spectrum resource through the bankruptcy process.⁷⁰ We therefore believe that under these unique circumstances, granting a limited waiver is entirely consistent with the Commission's statutory obligations in Section 309(j)(3)(C) of the Communications Act.⁷¹

21. Additionally, we do not believe that approval of the proposed transaction and grant of a limited waiver results in any unjust enrichment as contemplated by the Commission's rules. 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.⁷² More importantly, while we recognize that the acceptance of the Alternative Cash Payment results in less than full payment under the Commission's rules and would be otherwise impermissible absent these particular circumstances, on balance, we conclude that the present circumstances (including full payment of Urban Comm's principal obligation) are similar to those the Commission considered in the *NextWave-Cingular Order*, finding in favor of the grant of a limited waiver.⁷³

22. In granting this limited waiver, we follow the precedent set by the Commission in the *NextWave-Cingular Order*, and do not reach any determination regarding how long or how much interest or late fees have accrued under section 1.2111 or section 24.714. Instead, because the Department of Justice executed the Settlement Agreement, on the Commission's behalf, and has exercised its discretion under the Debt Collection and Improvement Act to grant debt forgiveness for any monies owed above the Alternative Cash Payment (subject to the Commission's necessary regulatory approvals that we have provided herein), we need not define the specific amount of the interest and late fees owed for the licenses in order to determine that the public interest will be served by a grant of a limited waiver of the full payment provision of sections 1.2111 and section 24.714 regarding those obligations. The payment the Commission will receive from this transaction fully satisfies the outstanding principal and at least a portion of the interest and any late fees that Urban Comm owes under sections 1.2111 and 24.714 in connection with the 13 licenses. The grant of a limited waiver of Urban Comm's obligation to render the full payment owed under sections 1.2111 and 24.714 allows the transaction described in the Purchase Agreement to be consummated as the Applicants and the United States Government intended. This in turn allows for resolution of longstanding litigation with respect to the licenses included in the proposed transfer of control. As the Commission noted in the *NextWave-Cingular Order*, such action has significant benefits to the public.⁷⁴

23. As a final matter, we grant Cricket a waiver of the 30-day requirement in section 24.714. In the *NextWave-Cingular Order*, the Commission allowed the parties to make their payment obligations consistent with a settlement agreement reached between the debtor and the Department of Justice because it found that it served the public interest to have finality in the transaction.⁷⁵ We find that the public interest would likewise be served in this case and, therefore, grant Cricket a limited waiver of the timing

⁷⁰ See *id.* In the *NextWave-Cingular Order*, the Commission further noted that there was no guarantee that the value recovered through the bankruptcy process would ultimately be any greater than that which had been negotiated through the settlement reached in the Settlement Agreement, and it was entirely possible that it could be less and could take far longer to obtain. *Id.*

⁷¹ 47 U.S.C. § 309(j)(3)(C).

⁷² Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-235, *Second Report and Order*, 9 FCC Rcd 2348, 2394 ¶ 258 (1994).

⁷³ *NextWave-Cingular Order*, 19 FCC Rcd at 2590 ¶ 46.

⁷⁴ *Id.*

⁷⁵ *Id.* at 2590-91 ¶ 47.

provision of section 24.714(c) of the Commission's rules so that payment can be made upon the consummation of the transaction.

IV. CONCLUSION

24. Pursuant to our review under Section 310(d) of the Communications Act, we find that approval of the Application will serve the public interest, convenience, and necessity.⁷⁶ In addition, we grant Urban Comm a limited waiver of the full payment provision of sections 1.2111 and 24.714 of the Commission's rules, as described herein, and Cricket a waiver of the timing requirements of section 24.714.

V. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that, pursuant to 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 approval for the assignment of licenses from Urban Comm to Cricket are GRANTED, conditioned upon the Commission's receipt of the Alternative Cash Payment specified by the Settlement Agreement.

26. Additionally, to the extent described herein, we GRANT a limited waiver to Urban Comm of the full payment provision of section 1.2111 and 24.714 of the Commission's rules, 47 C.F.R. §§ 1.2111, 24.714.

27. Additionally, to the extent described herein, we GRANT a limited waiver to Cricket of the timing requirements of section 24.714, 47 C.F.R. § 24.714, to permit the consummation of the assignment after the 30 days required under the rule.

28. 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

Catherine W. Seidel
Acting Chief
Wireless Telecommunications Bureau

⁷⁶ 47 U.S.C. § 310(d).