



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
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COMMISSION SEEKS COMMENT ON DISPOSITION OF DOWN PAYMENTS AND PENDING APPLICATIONS FOR LICENSES WON DURING AUCTION NO. 35 FOR SPECTRUM FORMERLY LICENSED TO NEXTWAVE PERSONAL COMMUNICATIONS INC., NEXTWAVE POWER PARTNERS, INC. AND URBAN COMM -- NORTH CAROLINA, INC.

WT Docket No. 02-276

Auction Event No. 35

Comment Date: October 11, 2002

Reply Comment Date: October 21, 2002

BACKGROUND

On March 26, 2002, the Commission granted partial refunds of the down payments made by certain winning bidders in Auction No. 35.¹ These winning bidders had made down payments and filed long-form applications for spectrum associated with licenses that had previously been issued to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively "NextWave") and Urban Comm-North Carolina, Inc. ("Urban Comm"). This spectrum, as well as Auction No. 35, continues to be the subject of extensive litigation and pending regulatory proceedings.² Key issues over the effectiveness of the Commission's automatic

¹ Requests for Refunds of Down Payments Made In Auction No. 35, *Order*, FCC 02-99 (rel. Mar. 27, 2002) ("*Partial Refund Order*").

² *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, __ U.S. __, 70 U.S. L.W. 3317, 70 U.S.L.W. 3545, 70 U.S.L.W. 3351 (March 4, 2002) (Nos. 01-653, 01-657); *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999); *Cellco Partnership d/b/a Verizon Wireless v. FCC*, D.C. Cir. No. 02-1110 (filed April 8, 2002); *Cellco Partnership d/b/a Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002); *In re Urban Comm-North Carolina, Inc.*, Case No. 98-B-10086 (REG), Adv. Proc. No. 99/8125A; Applications for Review, dated March 17, 1997 and June 16, 1997, filed by Antigone Communications, L.P. and PCS Devco, Inc.; Petition to Initiate an Investigation and Audit Regarding the Eligibility of NextWave Personal Communications, Inc. and NextWave Power Partners Inc. to Hold C and F Block licenses, filed by Alaska Native Wireless, L.L.C., Verizon Wireless, and VoiceStream Wireless Corporation, dated July 19, 2001; Petition for Reconsideration, filed by Alaska Native Wireless, L.L.C. and VoiceStream Wireless Corporation,

cancellation rules with respect to NextWave's licenses are scheduled for oral argument before the Supreme Court on October 8, 2002.³

Pursuant to the *Partial Refund Order*, the Commission has already refunded approximately \$2.8 billion to the Auction No. 35 winning bidders who have not yet received their licenses, but it retained an amount equal to three percent of the net winning bids for these licenses and maintained the pending status of the applications for these licenses. The total amount still on deposit with the Commission is \$489,548,061. The total amount of these Auction No. 35 winners' obligations, including the refunded down payments, to the government for the former NextWave and Urban Comm licenses won at the auction is \$16,318,268,700. The Commission has already received \$504,419,150 in final payments for other licenses won and granted based on Auction No. 35.

As noted in the *Partial Refund Order*, the Commission was sympathetic to the needs of the auction winners, many of whom are small businesses, to have access to their funds to continue to operate their businesses. At the same time, the Commission held that it must protect the integrity of Auction No. 35 in the event the Commission is ultimately successful in its litigation. It therefore struck a balance between the hardship that would be imposed by continuing to retain the entirety of the down payments and the need to protect the integrity of the auction. Accordingly, it refunded to the payors of record a substantial portion of the monies on deposit.

However, the Commission's *Partial Refund Order* also found, *inter alia*, that the continued litigation associated with particular licenses *did not* relieve the winning bidders of the obligation to pay their full bid amounts for licenses won in Auction No. 35. In this regard, the Commission disposed of matters raised by Verizon in a letter to the Commission's Deputy General Counsel in which Verizon argued that it no longer had an obligation to pay the amount it bid in Auction No. 35 based on the theory that spectrum auctions create contractual relationships between the Commission and winning bidders, and that the Commission's failure to make timely delivery of the licenses rendered the contract void.⁴ No other Auction No. 35 applicant advanced this contract theory. In response to Verizon's letter, the *Partial Refund Order* stated that auctions are a regulatory mechanism for distributing licenses and that the relationship between the Commission and winning bidders of spectrum licenses is governed by the Communications Act, the Commission's competitive bidding regulations, and Public Notices setting forth specific conditions on particular auctions. Those conditions, the Commission stated, included the auction's contingency on the "final" outcome of the *NextWave* litigation.⁵

dated October 12, 2001; Petition to Deny Reinstatement of Licenses, filed by Alaska Native Wireless, L.L.C., and VoiceStream Wireless Corporation, dated August 30, 2001.

³ See *FCC v. NextWave Personal Communications Inc.*, cert. granted, ___ U.S. ___, 70 U.S.L.W. 3317, 70 U.S.L.W. 3545, 70 U.S.L.W. 3551 (U.S. March 4, 2002) (Nos. 01-653, 01-657).

⁴ *Partial Refund Order* at 9-10, para. 14-16.

⁵ *Id.* at 9, para. 15.

Therefore, the Commission held that the fact that spectrum associated with the former NextWave licenses was not yet available for use by the Auction No. 35 winning bidders did not require the Commission to relieve Verizon of its bid obligations.⁶

Verizon challenged the Commission's *Partial Refund Order* in two courts.⁷ In the D.C. Circuit, in case No. 02-1110, Verizon seeks a ruling that the delay in licensing caused by the NextWave litigation entitles Verizon to declare its auction obligations void. In the Court of Federal Claims, in case No. 02-280c, Verizon seeks a declaration nullifying Auction No. 35 as well as consequential damages. We stand by our legal conclusions in the *Partial Refund Order*, and do not through this Public Notice suggest any support for Verizon's legal argument.

DISCUSSION

Since the Commission issued its *Partial Refund Order* several months ago, the state of the capital markets for entities, including the applicants, engaged in the provision of wireless telecommunications services, as well as other telecommunications services, has continued to decline rapidly. Specifically, since March, the Commission has received submissions asserting that unique and troubling financial circumstances have led to difficulties in accessing capital and other problems for companies of all sizes, which in turn has affected the customers they serve.⁸ For instance, these commenters suggest that the impact of continuing contingent liabilities on credit ratings in the midst of a severe downturn in capital markets could potentially frustrate other policy objectives as well as quality of service. Moreover, as we have seen in the past,⁹ market downturns affect the value of spectrum licenses won at auction and licensees' (or applicants') ability to meet auction payment obligations. At the same time, the Commission remains concerned about protecting the integrity of its spectrum auction program.¹⁰ Concerns about the state of the capital markets must be balanced against this important public interest consideration.

⁶ *Id.* at 9, para. 16.

⁷ See *Cellco Partnership d/b/a Verizon Wireless v. FCC*, D.C. Cir. No. 02-1110 (filed April 8, 2002); *Cellco Partnership d/b/a Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002). The case pending in the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is at the briefing stage – Verizon Wireless's opening brief is due November 22, 2002, followed by the FCC's brief on January 8, 2003, and Verizon's reply on February 6, 2003. Oral argument is scheduled for April 15, 2003. In the case pending before the Court of Federal Claims, the government has requested that this case be held in abeyance pending disposition by the D.C. Circuit of the related case and the Supreme Court of the NextWave case.

⁸ See Letter to Michael K. Powell, Chairman, FCC, from Peter C. Crampton, *et al.*, at p.2 (Aug. 16, 2002); See also Letter to Michael K. Powell, Chairman, FCC, from Thomas E. Wheeler, Cellular Telecommunications & Internet Assoc., at p. 2 (Aug. 13, 2002).

⁹ *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 12 FCC Rcd 16,436 (1997) (*C Block Restructuring 2nd R & O*), *on recon.* 13 FCC Rcd 8345 (1998) (*Recon. of C Block Restructuring 2nd R & O*), *aff'd*, *U.S. Airwaves Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000).

¹⁰ *C Block Restructuring 2nd R & O*, 12 FCC Rcd 16,436, para. 2-3 (1997).

Taking official notice of the status of the capital markets and other economic events, the Commission, on its own motion, seeks comment on the observations in the paragraph above and whether it should take further action with regard to the pending applications for licenses won during Auction No. 35 for spectrum formerly licensed to NextWave and Urban Comm.

Specifically, we seek comment on whether we should consider further, *inter alia*, the following scenarios:

(1) Full Refund and Option to Dismiss All Pending Applications. Upon request, the Commission would refund to the payor of record the full amount of monies on deposit with the Commission for the licenses subject to the NextWave litigation and Urban Comm proceedings. The Commission would also provide a period of time for individual applicants to request voluntary dismissal of all of their applications, with prejudice.

Under this scenario, applicants obtaining a full refund and choosing to dismiss their applications would lose all claims to the affected Auction No. 35 licenses.¹¹ Should the Commission prevail in the litigation, new initial licenses for the spectrum would be assigned by auction at a future date. In addition, the Commission would waive, in whole or part, its default rules for these licenses and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards,¹² forgive the debt incurred on them at Auction No. 35. We seek comment on whether it would be advisable to waive the default rules, or to extend debt forgiveness, in whole or in part, to a bidder opting for dismissal of its application(s). In addition, we seek comment on whether a bidder receiving a waiver or debt forgiveness should be barred from participating in the reauction of the licenses or otherwise obtaining such licenses for a period of time.¹³ Finally, we seek comment on whether applicants that would like to keep their applications pending should reaffirm their commitment to their Auction No. 35 obligations or just remain silent.

(2) Selective Opt-Out for Pending Applications. The Commission would grant individual applicant requests for voluntary dismissal of their applications, with prejudice, for certain licenses and not others.

¹¹ In addition to relinquishing any and all claims on the Auction No. 35 licenses, the bidder would also be required to release any other claims against the United States and the FCC arising out of Auction 35.

¹² See 4 C.F.R. Parts 101-105; *C Block Restructuring 2nd R & O*, 12 FCC Rcd 16436, para. 53-58 (1997); *U.S. Department of Justice Approves Debt Forgiveness for Personal Communications Services (PCS) C Block*, DA 98-1051, Public Notice (June 3, 1998).

¹³ We note that in the C-block debt restructuring proceeding, licensees that surrendered licenses pursuant to the various options, under certain circumstances, were deemed ineligible to reacquire their surrendered licenses through reauction or by any other means for a period of two years from the start date of the next reauction. *Recon. of C Block Restructuring 2nd R & O*, 13 FCC Rcd 8345, para. 37 (1998).

Under this scenario, the Commission would provide applicants the opportunity to pick and choose licenses for which to keep the applications pending and which to dismiss.¹⁴ We seek comment on whether all of the down payments should be refunded or only down payments associated with the dismissed licenses. As with the above scenario, applicants choosing to dismiss their applications would lose all claims to the affected licenses. Should the Commission prevail in the litigation, new initial licenses for the spectrum would be assigned by auction at a future date. In addition, the Commission would, in whole or part, waive its default rules for dismissed license applications and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards, forgive the debt on them incurred at Auction No. 35. Again, we seek comment on whether a bidder opting for dismissal of its application(s) and receiving a full or partial waiver of the default payment rules should be barred from participating in the reacquisition of the licenses or otherwise obtaining such licenses for a period of time.

Although the oral argument in the Supreme Court case is fast approaching and the Commission has the utmost confidence in the merits of its case, the Commission and winning bidders in Auction No. 35 still face the possibility of prolonged litigation over such licenses during uncertain and trying economic conditions. We also recognize that should the Supreme Court rule in the government's favor, there may nevertheless be unresolved issues over the licenses, that would prolong the litigation. Depending on the length of the delay, capital market conditions may continue to change, increasing the possibility that winning bidders in Auction 35 will be in a significantly different position than at the time of the auction. Accordingly, we seek comment on the scenarios discussed above based on the changed circumstances since issuance of our *Partial Refund Order*. We also seek comment on whether granting relief under any of the options discussed herein would promote or disserve the public interest objectives outlined in Section 309(j) of the Communications Act, including "promoting economic opportunity and competition" and ensuring "efficient and intensive use of the electromagnetic spectrum."¹⁵

PROCEDURAL MATTERS

Pursuant to 47 C.F.R. § 1.1200(a), the Commission may adopt modified *ex parte* procedures in particular proceedings if the public interest so requires. Accordingly, issues related to this Public Notice will be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206.¹⁶ Designating this matter as "permit but disclose" will provide an opportunity for all interested parties to comment on the policy questions concerning the treatment of the funds on deposit. All other matters concerning Auction No. 35 applications that are the subject of NextWave's Petition to Defer¹⁷ and other

¹⁴ *Id.* at para. 34-37.

¹⁵ 47 U.S.C. § 309(j)(3)(B) & (D).

¹⁶ Parties making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subject discussed. More than a one or two sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b)(2).

¹⁷ NextWave's Petition to Defer or, in the Alternative, to Condition Grant (filed March 9, 2001); Reply Comments

petitions to deny remain restricted, pending further action by Public Notice.

Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before September 30, 2002, and reply comments on or before October 15, 2002. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Marlene H. Dortch, Secretary, Office of the Secretary, Federal Communications Commission.

Action by the Commission on September 11, 2002: Chairman Powell, Commissioners Abernathy and Martin with Commissioner Capps concurring and issuing a statement.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

of Verizon Wireless (filed March 16, 2001).

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

RE: Commission seeks comment on disposition of down payments and pending applications for licenses won during Auction No. 35 for spectrum formerly licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc. (Auction Event No. 35)

I believe that there are strong equitable arguments to support returning the remaining funds on deposit related to Auction 35, and even for dismissing all pending applications related to that auction. But I am frankly somewhat concerned about the timing of today's Public Notice, as drafted. I have been in this town long enough to know that there is something called the Law of Unintended Consequences, and I never underestimate its power. I must, therefore, concur rather than approve of this action.