

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

In the Matter of)
Requests for Refunds of Down Payments)
Made In Auction No. 35)

Order

Adopted: March 26, 2002

Released: March 27, 2002

By the Commission:

I. INTRODUCTION

1. This Order grants in part, and denies in part, a Joint Request for refund of down payments made by certain winning bidders ("Petitioners") in Auction No. 35. Petitioners seek a full refund of the down payments made 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"). In accordance with the procedures set forth below, the Commission will refund to the payors of record a substantial portion of the monies on deposit for spectrum formerly licensed to NextWave and Urban Comm, but will retain an amount equal to three percent of the net winning bids for these licenses. In addition, the Commission will maintain the pending status of the applications for these licenses. As discussed below, neither the Commission's determination to refund, in part, certain deposits nor the continued litigation associated with particular licenses relieves winning bidders of the obligation to pay their full bid amounts for licenses won in Auction No. 35. Should the Commission prevail in its ongoing litigation with NextWave, winning bidders in the auction will be required to either pay their full bid amounts or be subject to default payments. This Order applies to all bidders in Auction No. 35 that won licenses covering spectrum previously licensed to either NextWave or Urban Comm, including those bidders that filed petitions or other pleadings seeking relief similar to that requested in the Joint Petition. We note that Eldorado Communications, LLC ("Eldorado") filed an

1 Joint Request for Immediate Refund of Auction No. 35 Down Payments for NextWave Licenses filed on January 4, 2002 by 3DL Wireless, LLC, 3G PCS, LLC, Alaska Native Wireless, L.L.C., Cellco Partnership d/b/a Verizon Wireless ("Verizon"), Cook Inlet/V5 GSM V PCS, LLC, DCC PCS, Inc., Lafayette Communications Company, L.L.C., Leap Wireless International, Inc., MCG PCS II, Inc., Northcoast Communications, L.L.C., Salmon PCS LLC, SVC BidCo, L.P., and VoiceStream PCS BTA I License Corporation ("Joint Request").

2 Retaining on deposit three percent of the total net winning bids for licenses affected by the NextWave and Urban Comm bankruptcies is the equivalent of refunding eighty-five percent of the minimum amount required to be on deposit for such licenses.

3 Specifically, this Order applies to the 13 winning bidders cited in n.1, as well as the following 9 winning bidders that were not parties to the Joint Request: Black Crow Wireless, L.P., Mint GSM, Poplar PCS-Central, Scott Reiter, SLO Cellular, Theta Communications, Unbound PCS, LLC, Vincent McBride, and Last Wave Partners, LP. We note (continued....)

opposition to the Joint Petition to which the Joint Petitioners and other parties seeking refunds filed a Joint Reply.⁴ We conclude that Eldorado lacks standing to challenge the request for refund.⁵ Further, we reject arguments made by Verizon Wireless (“Verizon”) that it is entitled to avoid its obligation to pay the full amount of its winning bids for licenses previously issued to Nextwave should such licenses be granted.⁶ As stated below, Verizon continues to be bound by the Commission’s auction rules to pay its full bid amount.

(Continued from previous page)

that LastWave Partners, LP, Black Crow Wireless, L.P. and Unbound PCS, LLC each filed separate requests for refunds of down payments made in Auction No. 35 for spectrum that was previously licensed to NextWave. *Request For Immediate Refund of Auction No. 35 Down Payment for NextWave License* filed by LastWave Partners, LP on January 7, 2002; *Request for Refund of Downpayments* filed by Black Crow Wireless, L.P. on January 25, 2002; *Request for Refund of Downpayments* filed by Unbound PCS, LLC on February 6, 2002. In addition, Vincent McBride and Scott Reiter have filed similar requests for refunds. See letters from Vincent McBride and Scott Reiter to Michael K. Powell, Chairman, Federal Communications Commissions dated July 9, 2001, July 16, 2001, August 25, 2001 and October 22, 2001; see also letter from Donald J. Evans, counsel for Vincent McBride and Scott Reiter, to Kathleen O’Brien Ham, Deputy Chief, Wireless Telecommunications Bureau, dated October 31, 2001.

⁴ *Eldorado Communications, LLC Opposition to Joint Request for Immediate Refund of Auction No. 35 Down Payments for NextWave Licenses*, dated January 17, 2002; *Joint Reply to Opposition of Eldorado Communications, LLC to the Joint Request for Immediate Refund of Auction No. 35 Down Payments for NextWave Licenses*, dated January 29, 2002.

⁵ Eldorado won C block licenses in Auction No. 5, the initial C block auction. Pursuant to the Commission’s financial restructuring plans for C block licensees, Eldorado opted to return the licenses it won without penalty and forfeit the money already paid. Wireless Telecommunications Bureau Announces Broadband Personal Communications Services; C Block Elections, *Public Notice*, DA 98-1168, 13 FCC Rcd 16705 (WTB June 16, 1998) (see Blytheville PCS, LLC, Southern Arkansas PCS, LLC, and Tupelo PCS, LLC, which are subsidiaries of Eldorado). Eldorado opposes the request by certain Auction No. 35 winners to be refunded their down payments. Eldorado argues that grant of a refund would be unfair in light of the fact that some Auction No. 5 winners forfeited their down payments. Eldorado did not participate in Auction No. 35. The relevant factor in determining whether a party has standing to protest a Commission action “must be based on injury caused by that action - - that petitioner must show that it is adversely affected or aggrieved by some change flowing from the Commission action protested.” *James Robert Meachem and June H. Meachem*, 12 Rad. Reg. 1427, 1429 (1955) (emphasis in the original). In other words, the party must be “able to establish that a grant of the instant application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature.” *Time Warner Entertainment*, 10 FCC Rcd 9300, 9302, ¶ 17 (1995) (quoting *Pinelands, Inc.*, 7 FCC Rcd 6058, 6063, ¶ 18 (1992)). Eldorado has failed to show a sufficient connection to the challenged action to establish that it would be injured thereby - - Eldorado’s forfeit of its down payment stands regardless of whether the Commission refunds down payments to Auction No. 35 winning bidders.

⁶ Letter to John Rogovin, Deputy General Counsel, Federal Communications Commission, from S. Mark Tuller, Vice President-Legal and External Affairs, General Counsel and Secretary, Verizon Wireless, dated March 5, 2002.

II. BACKGROUND

2. In Auction No. 35, 35 bidders won 422 Personal Communications Services (PCS) licenses in the C and F spectrum blocks for a total of approximately \$16.9 billion dollars in net bids.⁷ The spectrum associated with 259 of the licenses sold in Auction No. 35 was formerly held by either NextWave or Urban Comm.⁸ These licenses automatically cancelled, under the Commission's rules, due to non-payment of the associated license debt while NextWave and Urban Comm were in bankruptcy.⁹ Licenses for the spectrum formerly licensed to NextWave and Urban Comm were subsequently included in Auction No. 35. Of the 35 winning bidders in Auction No. 35, 22 bidders won licenses for spectrum on which previous licenses had automatically cancelled. The net amount bid for those licenses in Auction No. 35 was approximately \$16.3 billion. Shortly after the close of an auction, pursuant to Section 1.2107 of the Commission's rules, each winning bidder was required to have on deposit a down payment amount equal to twenty percent of its net winning bids.¹⁰ Accordingly, the Commission currently has on deposit from Auction No. 35 approximately \$3.3 billion in down payments for licenses covering spectrum previously held by NextWave and Urban Comm.

3. After the conclusion of Auction No. 35, the United States Court of Appeals for the D.C. Circuit, in *NextWave v. FCC*, ruled that Section 525 of the Bankruptcy Code prevented the cancellation of licenses held by NextWave solely for non-payment of installment payments owed on those licenses.¹¹ The United States and the Commission filed a Petition for Writ of Certiorari, asking the Supreme Court of the United States to review that decision.¹² The Petition was granted on March 4, 2002.¹³ Consistent with the mandate issued by the D.C. Circuit implementing its holding in *NextWave v. FCC*,¹⁴ the Wireless

⁷ C and F Block Broadband PCS Auction Closes; Winning Bidders Announced; Down Payments Due February 12, 2001, FCC Forms 601 and 602 Due February 12, 2001; Ten-Day Petition to Deny Period, *Public Notice*, DA 01-211 (WTB Jan. 29, 2001).

⁸ NextWave held spectrum associated with 216 of the licenses sold in Auction No. 35, and Urban Comm held spectrum associated with 43 of the licenses sold in Auction No. 35.

⁹ 47 C.F.R. § 1.2110(e)(4)(iii) (1997).

¹⁰ 47 C.F.R. § 1.2107.

¹¹ *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. 3551 (U.S. March 4, 2002) (Nos. 01-653, 01-657) ("*NextWave v. FCC*"); 11 U.S.C. § 525.

¹² *FCC v. NextWave Personal Communications, Inc.*, No. 01-653, *petition for writ of certiorari filed* (U.S. October 19, 2001). *See also Arctic Slope Regional Corporation, et al., v. NextWave Personal Communications, Inc.*, No. 01-657, *petition for writ of certiorari filed* (U.S. October 19, 2001).

¹³ *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. 3551 (U.S. March 4, 2002) (Nos. 01-653, 01-657).

¹⁴ *Id.*

Telecommunications Bureau (“Bureau”) returned to active status, subject to “litigation and/or regulatory matters,” licenses that had previously been issued to NextWave.¹⁵ On February 5, 2002, Verizon filed with the D.C. Circuit Court of Appeals a Petition to Enforce the Mandate.¹⁶ In that Petition, Verizon argued that the Commission had violated the D.C. Circuit’s mandate in *NextWave v. FCC* by returning to active status licenses previously issued to NextWave while retaining the related down payments.¹⁷ Verizon asked the court to compel compliance with its mandate by ordering the Commission to refund the full amount of Verizon’s down payment for the NextWave licenses and to confirm that Verizon’s obligations with respect to Auction No. 35 have been extinguished.¹⁸ The court denied Verizon’s petition, stating that the relief sought did not fall within its mandate.¹⁹

4. The issue of whether Section 525 of the Bankruptcy Code²⁰ displaces the Commission’s rules, which provide that licenses obtained at auction automatically cancel upon the winning bidder’s failure to make timely installment payments to fulfill its winning bid, is also the subject of ongoing regulatory proceedings between Urban Comm and the Commission.²¹ Thus, spectrum won in Auction No. 35 that was associated with licenses previously granted to NextWave and Urban Comm continues to be the subject of bankruptcy litigation and pending regulatory proceedings.²²

5. Prior to the commencement of Auction No. 35, the Bureau issued a series of three public

¹⁵ Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave Personal Communications Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation, *Public Notice*, DA 01-2045, 16 FCC Rcd 15970 (WTB Aug. 31, 2001).

¹⁶ *NextWave Personal Communications, Inc. v. FCC*, No. 01-1402, *Petition to Enforce the Mandate* (filed February 5, 2002).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *NextWave Personal Communications, Inc. v. FCC*, No. 01-1402, (D.C. Cir. March 1, 2002).

²⁰ 11 U.S.C. § 525.

²¹ *See, e.g.*, Petition for Reconsideration, filed by Urban Comm-North Carolina, Inc., on October 6, 2000; Petition for Stay of Auction No. 35, filed by Urban Comm-North Carolina, Inc., on October 6, 2000; Amended Petition for Writ of Mandamus, filed by Urban Comm-North Carolina, Inc., on November 13, 2001.

²² *See, e.g.*, *NextWave v. FCC; 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; and Petition for Reconsideration, filed by Alaska Native Wireless, L.L.C. and VoiceStream Wireless Corporation, 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.

notices notifying bidders of their due diligence obligations in connection with licenses included in the auction.²³ Specifically, the Bureau stated that:

certain judicial proceedings that may relate to the licenses available in Auction No. 35 are pending or may be subject to further review. Resolution of these matters could have an effect on the availability of spectrum included in Auction No. 35 and the auction is subject to such matters. Some of these matters (whether before the Commission or the courts) may not be resolved by the time of the auction. The Commission will continue to act on matters before it, but it makes no representations as to the resolution of judicial proceedings. Potential bidders are solely responsible for identifying associated risks, and investigating and evaluating the degree to which such matters may affect their ability to bid on or otherwise acquire licenses in Auction No. 35.²⁴

The Bureau also clarified the circumstances under which the Commission would return payments to winning bidders of Auction No. 35.²⁵ The Bureau stated that:

the Commission will return the payments made by winning bidders of licenses in Auction No. 35 in the event that such bidders are subsequently required to surrender licenses won to prior applicants or license holders as a result of *final* determinations reached in pending proceedings. The Commission, however, will not pay interest on the returned payments as it lacks legal authority to do so.²⁶

6. In October of 2001, the Bureau issued a public notice modifying its *ex parte* procedures with respect to issues related to down payments made by Auction No. 35 winning bidders.²⁷ In addition, Commission staff participated in settlement negotiations with NextWave and the Auction No. 35 winners of spectrum previously held by NextWave. A settlement agreement was drafted and was made contingent on congressional approval in the form of implementing legislation by December 31, 2001. Such

²³ C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000; Revised List of Available Licenses; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedural Issues, *Public Notice*, DA 00-2038, 15 FCC Rcd 17251 (WTB Sept. 6, 2000); C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000; Notice and Filing Requirements for 422 Licenses in the C and F Block Broadband PCS Spectrum Auction; Minimum Opening Bids, Upfront Payments and Other Procedural Issues for Final Auction Inventory, *Public Notice*, DA 00-2259 15 FCC Rcd 19485 (WTB Oct. 5, 2000) (“*October 5 Public Notice*”); Auction of Licenses for C and F Block Broadband PCS Spectrum; Status of FCC Form 175 Applications to Participate in the Auction, *Public Notice*, DA 00-2614, 15 FCC Rcd 22466 (WTB Nov. 17, 2000).

²⁴ See, e.g., *October 5 Public Notice*, 15 FCC Rcd at 19493 (emphasis omitted).

²⁵ *October 5 Public Notice*, 15 FCC Rcd at 19493-19494.

²⁶ *October 5 Public Notice*, 15 FCC Rcd at 19493 (footnotes omitted, emphasis added).

²⁷ Wireless Telecommunications Bureau Modifies Ex Parte Procedures for Issues Related to Deposits by Auction No. 35 Winning Bidders, *Public Notice*, DA 01-2388 (rel. Oct. 12, 2001).

legislation was not enacted. Most recently, in addition to seeking a full refund of its deposits, Verizon filed a letter with the Commission arguing that it is relieved of its obligation to pay the amount it bid in Auction No. 35 for licenses previously issued to NextWave.²⁸ Also, DCC PCS, Inc. (“DCC PCS”) filed a letter asking the Commission to refund all but 15 percent of each applicant’s down payments.²⁹

III. DISCUSSION

7. In their Joint Request, Petitioners seek a full refund of their collective \$3,110,695,690 down payment for the 197 licenses they won in Auction No. 35 that were associated with licenses previously issued to NextWave.³⁰ Petitioners also request a full refund of their collective \$93,418,150 down payment for the 41 licenses they won that were associated with spectrum formerly held by Urban Comm.³¹

8. Petitioners argue that the Commission should return their deposits because it cannot grant the licenses they won within “any reasonable time.”³² Petitioners state that as a result of the decision in *NextWave v. FCC*,³³ and as reflected in the Bureau’s return of certain licenses to “active status,” the Commission is currently “prohibited” from issuing the former NextWave licenses to Auction No. 35 winners.³⁴ Petitioners further contend that even if the Commission were ultimately to prevail in litigation against NextWave, such a resolution would likely not come for a number of years, thereby preventing the Commission from granting the licenses in a reasonable time.³⁵ Petitioners claim that pre-auction public notices assured Auction No. 35 bidders that the Commission would return their down payments in these circumstances because the licenses are now unavailable and have been surrendered to NextWave.³⁶ Petitioners also argue that the statute and regulations governing spectrum auctions expressly contemplate

²⁸ Letter to John Rogovin, Deputy General Counsel, Federal Communications Commission, from S. Mark Tuller, Vice President-Legal and External Affairs, General Counsel and Secretary, Verizon Wireless, dated March 5, 2002.

²⁹ Letter to Michael K. Powell, Chairman, Federal Communications Commission, from Everett R. Dobson, President and CEO, DCC PCS, Inc. dated March 14, 2002.

³⁰ Joint Request at 3.

³¹ *Id.*

³² *Id.* at 4-6.

³³ *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. 3551 (U.S. March 4, 2002) (Nos. 01-653, 01-657).

³⁴ Joint Request at 4-5; *see* Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave Personal Communications Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation, *Public Notice*, DA 01-2045, 16 FCC Rcd 15970 (WTB Aug. 31, 2001).

³⁵ Joint Request at 5.

³⁶ *Id.* at 5-6.

that licenses will be granted expeditiously after the close of an auction, not three or four years later.³⁷

9. Petitioners assert that any delay in refunding down payments will cause “irreparable harm” to winners of spectrum formerly licensed to NextWave and Urban Comm.³⁸ Specifically, Petitioners contend that the Commission’s holding of more than \$3.1 billion in down payments, has cost Petitioners at least \$430,000 per day in lost interest and a total of at least \$140 million through the date of the Joint Request.³⁹ Petitioners maintain that this loss of funds causes them to forego other actions to initiate, expand, or improve service to their customers.⁴⁰ Petitioners further insist that any delay in refunding Petitioners’ down payments will compromise the willingness of carriers to bid on reclaimed spectrum in future auctions.⁴¹ Finally, Petitioners assert that their good-faith participation in settlement negotiations provides a reason for expediting refunds.⁴²

10. Pursuant to our rules, the Commission is not required to refund to winning bidders monies held on deposit pending license grant.⁴³ Winning bidders are required to submit a substantial down payment to ensure that licensees have the financial ability to attract the capital necessary to deploy and operate their systems and to protect the United States Government against default.⁴⁴ In instances in which a winning bidder defaults on its bid obligation after having submitted the required down payment, the Commission retains a portion of the money on deposit equal to three percent of the net winning bid amount for the relevant license, pending assessment of the final default payment.⁴⁵ In adopting its rules, the Commission has made clear that it has the discretion to retain on deposit up to twenty percent of the winning bid amount.⁴⁶ Our default payment rules are intended to maintain the integrity of the auction process by discouraging defaults.⁴⁷ The policy of retaining a portion of a bidder’s monies to satisfy, at

³⁷ *Id.* at 5 (citing 47 U.S.C. § 309(j)(8)(C); 47 C.F.R. §§ 1.2107(b)-(c), 1.2108(b)-(c), and 1.2109(a)).

³⁸ *Id.* at 3-4, 6-7.

³⁹ *Id.* at 3-4.

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 7.

⁴² *Id.*

⁴³ 47 C.F.R. § 1.2107(b).

⁴⁴ Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, 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, 427, ¶ 90 (1997) (“*Part 1 Third Report and Order*”).

⁴⁵ *Part 1 Third Report and Order*, 13 FCC Rcd at 433, ¶ 102.

⁴⁶ *Part 1 Third Report and Order*, 13 FCC Rcd at 433, ¶ 102.

⁴⁷ *Part 1 Third Report and Order*, 13 FCC Rcd at 433, ¶ 101.

least in part, any potential default payment helps to ensure that default payments are made in a timely manner.⁴⁸

11. In public notices issued prior to the commencement of Auction No. 35, the Bureau stated that the Commission would refund monies on deposit to winning bidders if they were required to surrender licenses won to prior applicants or license holders as a result of “final determinations” reached in pending proceedings.⁴⁹ Final determinations on the disposition of the licenses in question have not yet been made. The U.S. Supreme Court recently granted the Commission’s Petition for Writ of Certiorari in *NextWave v. FCC*, and the case is pending.⁵⁰ Moreover, any change in the status of the licenses at issue is expressly conditioned on the outcome of the pending litigation.⁵¹ We note, too, that in three public notices issued prior to Auction No. 35, the Bureau provided applicants with ample notice of their due diligence obligations concerning the licenses included in the auction.⁵² The amount applicants bid in the auction should have reflected a calculation of those risks associated with the licenses. In light of the clear notice given to Auction No. 35 bidders, the Commission is not required at this time to return the down payments made by Petitioners.

12. Although winning bidders continue to be bound by their bid obligations, we recognize that we have some discretion with respect to the amount of their down payments we maintain on deposit. We are sympathetic to the needs of Petitioners, many of whom are small businesses, to have access to their funds to continue to operate their businesses. At the same time, we must protect the integrity of Auction No. 35 in the event the Commission is ultimately successful in its litigation and a bidder

⁴⁸ *Part 1 Third Report and Order*, 13 FCC Rcd at 433-434, ¶¶ 101, 102.

⁴⁹ *See, e.g., October 5 Public Notice*, 15 FCC Rcd at 19493.

⁵⁰ *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. 3551 (U.S. March 4, 2002) (Nos. 01-653, 01-657).

⁵¹ Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave personal Communications Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation, *Public Notice*, DA 01-2045, 16 FCC Rcd 15970 (WTB Aug. 31, 2001).

⁵² *October 5 Public Notice*, DA 00-2259, 15 FCC Rcd at 19492-19494; C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000; Revised List of Available Licensees; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedural Issues, *Public Notice*, DA 00-2038, 15 FCC Rcd 17251 (WTB Sept. 6, 2000); Auction of Licenses for C and F Block Broadband PCS Spectrum; Status of FCC Form 175 Applications to Participate in the Auction, *Public Notice*, DA 00-2614, 15 FCC Rcd 22466 (WTB Nov. 17, 2000).

subsequently defaults on its payment obligations. We therefore will strike a balance between the hardship that would be imposed by our continuing to retain the entirety of the down payments and our need to protect the integrity of the auction.

13. Specifically, we find that it will best serve the public interest to return the bulk of the down payments, but to retain on deposit three percent of the net winning bids. Such an action will give the bidders access to the bulk of their money. It will at the same time preserve the integrity of the auction because we retain sufficient money to cover any future default payments.⁵³ Accordingly, we partially waive Section 1.2107(b) of our rules requiring that down payments be held by the Commission until resolution of the licensing proceeding by award of the license, default of the bidder, or a finding that the bidder is unqualified.⁵⁴ We will maintain the pending status of the applications at issue. Should the Commission prevail in the NextWave litigation, winning bidders in Auction No. 35 will be required to pay the full amount of their winning bids or be subjected to default payments under our rules.

14. The foregoing analysis disposes of the matters raised by Verizon in a recent letter to the Commission.⁵⁵ There, Verizon argued that it no longer has an obligation to pay the amount it bid in Auction No. 35. It bases that claim on the theory that spectrum auctions create contractual relationships between the Commission and winning bidders, and the Commission's "fail[ure] to make timely delivery of the licenses," renders the contract void. Verizon maintains that "[n]othing in the terms of the auctions suggests that the Commission may delay delivery of the licenses."

15. Auctions are a regulatory mechanism for distributing licenses. 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. Here, as described above, those conditions included the auction's contingency on the final outcome of the *NextWave* litigation. As the Seventh Circuit observed in another auction case, *United States v. Weisbrod*, 202 F.2d 629, 633 (7th Cir. 1953), "[i]f one does not wish to bid . . . with the conditions attached, his alternative is to make no bid."

16. That the former NextWave licenses are not currently available for use by Auction No. 35 winning bidders is not a valid ground for relieving Verizon of its bid obligation. By participating in the auction, Verizon assumed a known risk of delay; indeed, the Bureau emphasized that "[p]otential bidders are solely responsible for identifying associated risks, and investigating and evaluating the degree to which such matters may affect their ability to bid on or otherwise acquire licenses in Auction No. 35."⁵⁶

⁵³ See 47 C.F.R. § 1.2104(g). In the event of a default, the Commission retains funds on deposit equal to three percent of the total winning bid amount, and has the discretion to retain an amount of up to twenty percent of the winning bid amount. *Part 1 Third Report and Order*, 13 FCC Rcd at 433, ¶ 102.

⁵⁴ 47 C.F.R. § 1.2107(b).

⁵⁵ Letter to John Rogovin, Deputy General Counsel, Federal Communications Commission, from S. Mark Tuller, Vice President-Legal and External Affairs, General Counsel and Secretary, Verizon Wireless, dated March 5, 2002.

⁵⁶ *October 5 Public Notice*, 15 FCC Rcd at 19493 (emphasis omitted).

Verizon's contention that "[n]othing in the terms of the auctions suggests that the Commission may delay delivery of the licenses" is therefore incorrect.⁵⁷ We also note that changes in the market value of licenses after the close of an auction do not affect a winning bidder's binding obligation to pay its high bid. Market valuations of licenses routinely fluctuate, but a bidder's obligation to pay its bid amount does not.

17. The Commission will refund to the payors of record a substantial portion of the monies on deposit for spectrum formerly licensed to NextWave and Urban Comm only upon compliance with the following procedures:

- For each payor of record, submit an Automated Clearing House Vendor/Miscellaneous Payment Enrollment Form ("ACH form") (see sample attached to this Order).⁵⁸ Additional copies of this form may be accessed at <http://www.fms.treas.gov/pdf/3881.pdf>. Please leave blank the "Agency Information" section. Only complete the "Payee/Company" and "Financial Institution" sections of the form.
- Submit a letter (along with the ACH form) signed by the payor of record, requesting a refund. The Commission will calculate the amount of the applicable refund.

The ACH form and the letter from the payor of record must be either faxed or mailed to the Commission. The fax number is: (202) 418-2843. The mailing address is: Federal Communications Commission, Office of the Managing Director, Attention: Auctions Accounting Group, Room 1-C863, 445 12th St. SW Washington, D.C. 20554. Any questions concerning the completion of this form should be directed to Gail Glasser at (202) 418-0578 or Tim Dates at (202) 418-0496.

Subject to interagency coordination, actual refunds should occur within approximately 30 days of the Commission's receipt of the ACH form and accompanying letter from the payor of record.

⁵⁷ See Letter to John Rogovin, Deputy General Counsel, Federal Communications Commission, from S. Mark Tuller, Vice President-Legal and External Affairs, General Counsel and Secretary, Verizon Wireless, dated March 5, 2002.

⁵⁸ Refunds will be processed via ACH credits. An ACH is an instrument for moving money electronically from one participating financial institution to another. ACH is a domestic funds transfer system providing an electronic parallel to the Federal Reserve check clearing system. ACH is governed by the Rules of the National Automated Clearing House Association.

IV. ORDERING CLAUSES

18. IT IS ORDERED that the Joint Request is GRANTED IN PART AND DENIED IN PART to the extent set forth above.

19. IT IS FURTHER ORDERED that 47 C.F.R. § 1.2107(b) of the Commission's rules is waived to the extent necessary to permit a refund of certain down payments made in Auction No. 35 as set forth above.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Federal Communications Commission

ACH VENDOR/MISCELLANEOUS PAYMENT ENROLLMENT FORM

OMB No. 1510-0056

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

PRIVACY ACT STATEMENT

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

AGENCY INFORMATION

Form section for Agency Information including fields for Federal Program Agency, Agency Identifier, Agency Location Code (ALC), ACH Format (CCD+, CTX, CTP), Address, Contact Person Name, Telephone Number, and Additional Information.

PAYEE/COMPANY INFORMATION

Form section for Payee/Company Information including fields for Name, SSN No. or Taxpayer ID No., Address, Contact Person Name, and Telephone Number.

FINANCIAL INSTITUTION INFORMATION

Form section for Financial Institution Information including fields for Name, Address, ACH Coordinator Name, Telephone Number, Nine-Digit Routing Transit Number, Depositor Account Title, Depositor Account Number, Lockbox Number, Type of Account (Checking, Savings, Lockbox), Signature and Title of Authorized Official, and Telephone Number.

Federal Communications Commission

Instructions for Completing SF 3881 Form

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

Burden Estimate Statement

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

