

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of )
)

Amendment of the Commission's ) WT Docket No. 97-82
Rules Regarding Installment Payment )
Financing For Personal Communications )
Services (PCS) Licensees )

SECOND REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 1997

Released: October 16, 1997

Comments Due: November 13, 1997

Reply Comments Due: November 24, 1997

By the Commission: Chairman Hundt affirming and dissenting in part and issuing a statement;
Commissioner Quello issuing a separate statement at a later date,
Commissioners Ness and Chong issuing separate statements.

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## I. INTRODUCTION

1. By this *Second Report and Order*, we order resumption of installment payments for the broadband Personal Communications Services (PCS) C and F blocks, with the payment deadline reinstated as of March 31, 1998. We adopt disaggregation, amnesty, and prepayment options designed to assist C block licensees experiencing financial difficulties to build systems that will promote competition or surrender spectrum to the Commission for reauction. These provisions will create opportunities to provide service to the public while maintaining the fairness and integrity of our auctions program. We seek comment on proposed changes to our C block rules to govern the reauction of surrendered spectrum in the C block in the accompanying *Further Notice of Proposed Rule Making*.

## II. EXECUTIVE SUMMARY

2. The extraordinary procedures we adopt today apply to all C block licensees. In considering the many options presented, which range from merely enforcing our existing rules to completely rewriting our rules after the auction closed, we have considered and balanced the following policy goals.

- Maintaining the integrity of the Commission's rules and auction processes.

- Ensuring fairness to all participants in our auctions, including those who won licenses in the auctions and those who did not, as well as licensees in competing services.
- Resolving issues now in a manner that does not merely postpone the problem.
- Complying with the mandate of our auction authority in Section 309(j) of the Communications Act of 1934, as amended ("Communications Act"), that we ensure "that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . ."<sup>1</sup>
- Promoting economic opportunity and competition in the marketplace.<sup>2</sup>

3. Maintaining the integrity of our rules and auction processes is an essential goal. As Senator John McCain observed on September 18, the Balanced Budget Act mandates a series of future spectrum auctions, and the Commission's decisions on C block must not "adversely impact the integrity of the auction process or the confidence that parties would have in the stability of the Commission's auction rules."<sup>3</sup> We are not looking to maximize revenues, but to maintain the integrity for all of our future auctions and to ensure that all participants are treated fairly and impartially. These elements are essential if the financial community is to have the stability it requires to fund the new communications enterprises and services for which this spectrum should be used.

4. We conclude that it is in the public interest to immediately adopt provisions to facilitate use of C block licenses without further regulatory or marketplace delay. Certainty is beneficial to all C block licensees and will foster the increased competition we expect in the marketplace. Many small licensees bid amounts comparable to those of other PCS spectrum, yet are being delayed in acquiring financing for their construction while these matters are pending before the Commission. Some of the larger licensees also find that they can move forward only when we settle the regulatory issues. Our actions today are intended to restore regulatory certainty to the marketplace.

5. Consistent with our goals, we have rejected a number of restructuring proposals that would have dramatically changed the amount bid for licenses, and instead offer relief that is more modest in nature. Our menu approach is intended to provide options to facilitate the rapid

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<sup>1</sup> See 47 U.S.C. § 309(j)(3)(B). See also 47 U.S.C. § 309(j)(4)(D).

<sup>2</sup> See 47 U.S.C. §§ 309(j)(3)(A), (B).

<sup>3</sup> The Honorable John McCain, *ex parte* letter, September 18, 1997.

introduction of service to the public, while recognizing that ultimately the decisions concerning competition and services appropriately are marketplace decisions and should not be determined by government intervention. Our decisions are intended to be fair to current C block licensees, to bidders who were not successful in their attempts to obtain licenses in this spectrum, and to the public desiring new and innovative competitive services.

6. On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their existing installment payment obligations, and because of other debt collection issues, the Wireless Telecommunications Bureau ("Bureau") suspended the deadline for payment of all C block installment payments.<sup>4</sup> On April 28, 1997, the Bureau extended the suspension to F block licensees.<sup>5</sup> We rescind the suspension of payments, effective March 31, 1998. On that date, all F block licensees must resume payments under their original Installment Payment Plan Note (hereinafter in the singular, "Note" and in the plural, "Notes"). Any C block licensee may elect to continue making payments under its Note(s) or may elect one of three options described below. These three options are designed to provide limited relief for C block licensees having difficulty meeting their financial obligations to the Commission while maintaining the fairness and integrity of our auctions program. The election must be made no later than January 15, 1998. Any C block licensee that fails to elect on a timely basis either to continue under its existing Note or one of the available options, will be held to strict adherence with the terms of its existing Note(s). The options are as follows:

- **Disaggregation.** Any C block licensee may elect to disaggregate one-half of its spectrum (15 MHz of its 30 MHz) and surrender such spectrum to the Commission for reauction. A licensee must disaggregate spectrum for *all* of the Basic Trading Area (BTA) licenses it holds within any Major Trading Area (MTA), but need not disaggregate the licenses it holds in other MTAs. In return, the licensee will have the proportionate amount, *i.e.*, 50%, of its down payment on such licenses forgiven. Fifty percent of the down payment for those licenses will be applied towards the debt for the retained spectrum; the licensee will not get a refund or credit of the other 50% of its deposit. The licensee will be prohibited from rebidding for this spectrum, or otherwise acquiring it in the secondary market, for two years from the date of the start of the reauction. C block licensees electing this option will repay over eight equal payments (beginning with the payment due on March 31, 1998) all interest that has accrued and was unpaid due to the payment suspension, adjusted to reflect the reduction in debt obligation. Any prior installment payments made will be credited in full against those amounts.

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<sup>4</sup> See Installment Payments for PCS Licenses, *Order*, DA 97-649 (rel. March 31, 1997).

<sup>5</sup> See "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) at 2.

● **Amnesty.** Any C block licensee may surrender *all* of its licenses, and in return will have all of its outstanding C block debt forgiven. The single exception to the "all-or-nothing" requirement for a grant of amnesty applies to licensees that met or exceeded the five-year build-out requirement by September 25, 1997. Those licensees meeting this build-out exception may retain their built-out BTAs, but must also keep the other BTAs in the MTA where the build-out requirement has been met. The licensee choosing the amnesty option will not have its down payment amounts returned. All installment payments made will be refunded or applied to previously accrued interest for retained markets, subject to applicable federal debt collection laws. The licensee may bid on any of its surrendered licenses or any other licenses in the reauction, and there is no restriction on after-market acquisitions.

● **Prepayment.** Any C block licensee may use an amount equal to 70% of its total down payments for the licenses that it wishes to surrender as a credit toward the prepayment of any of its licenses, at face value of the Note. Subject to the amounts available for license prepayment, a licensee must pay off the outstanding principal debt obligations for all BTA licenses it holds within any single MTA, up to the amount of funds it has available. A licensee may also use additional monies (hereinafter referred to as "new money"), to prepay as many of its Notes as it desires. Installment payments made will be available to the licensee as a credit towards prepaying any of its Notes. Interest accrued from the date of the conditional license grant through the Election Date will be forgiven. Licenses that are not prepaid in accordance with this option must be surrendered to the Commission for reauction, in exchange for the Commission's forgiveness of the corresponding debt and permitting prepayment on other licenses under these terms. The remaining 30% of the down payments plus any unapplied portions of the first 70% of the down payments will not be returned or available to licensees. The licensee may not rebid in the reauction for any of the licenses that the licensee relinquishes, and for a period of two years from the start date of the reauction may not otherwise acquire any such licenses in the secondary market.

7. These options will lead to a reauction of C block spectrum that will be open to all entrepreneurs, all applicants to the original C block auction,<sup>6</sup> and, with the exceptions we outline under the disaggregation and prepayment options, all current C block licensees. In the *Further Notice of Proposed Rule Making*, the Commission seeks comment on proposed rules and procedures for the reauction of any available C block licenses, including auction design, activity requirements, minimum opening bids for each license, application and payment procedures, procedures for filing petitions to deny, and proposals regarding the use of bidding credits.

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<sup>6</sup> *But see*, paragraph 84, *infra* (where we seek comment on restricting participation in the reauction by any entity that has defaulted on any FCC auction payment).



### III. BACKGROUND

8. Incentives to ensure participation by small businesses and other "designated entities" were required by Congress when enacting our authority to conduct auctions, as set forth in Section 309(j) of the Communications Act.<sup>7</sup> In accordance with its statutory mandate, in the *Competitive Bidding Fifth Report and Order*, the Commission established a variety of incentives to encourage small businesses to participate in the auction of C block 30 MHz and F block 10 MHz broadband PCS licenses.<sup>8</sup> Provisions to promote participation by small businesses in broadband PCS included limiting eligibility in the initial C and F block auctions to entrepreneurs and small businesses, offering varying bidding credits, and offering installment payment plans. The installment payment plan for C block permitted licensees that qualified as small businesses to pay 90% of the bid price over a period of ten years, with interest only paid for the first six years and interest and principal for the remaining four.<sup>9</sup> Installment payments for small business F block licensees were limited to 80% of the bid price over ten years, and payments consist of interest only for the first two years, then interest and principal for the remaining eight years.<sup>10</sup>

9. On May 6, 1996 and July 16, 1996, the Commission concluded its broadband PCS C block auctions. Ninety bidders (including the C block reauction<sup>11</sup> winners) won 493 C block licenses. The broadband PCS D, E, and F block auction concluded on January 14, 1997, and

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<sup>7</sup> 47 U.S.C. §§ 309(j)(4)(A), (D).

<sup>8</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) ("*Competitive Bidding Fifth Report and Order*"). Rules were amended in: Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Order on Reconsideration*, 9 FCC Rcd 4493 (1994); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) ("*Competitive Bidding Fifth Memorandum Opinion and Order*"); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Sixth Report and Order*, 10 FCC Rcd 136 (1995). See also Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS, Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824 (1996); Amendment of the Commission's Cellular/PCS Cross Ownership Rule, GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd 7824 (1996).

<sup>9</sup> 47 C.F.R. § 24.711(b)(3). In addition, there were other installment payment options available for bidders qualifying as entrepreneurs. See 47 C.F.R. §§ 24.711(b)(1)-(3). All bidders in the C block auction, however, qualified as small businesses.

<sup>10</sup> 47 C.F.R. § 24.716(b)(3). Entrepreneurs were also eligible for less favorable installment payment terms. See 47 C.F.R. §§ 24.711(b)(1)-(2).

<sup>11</sup> See "18 Defaulted Licenses to be Reauctioned; Reauction to Begin July 3," *Public Notice*, DA 96-872 (rel. May 30, 1996).

88 bidders won 491 F block licenses.<sup>12</sup> Net high bids<sup>13</sup> received for C block 30 MHz licenses, including C block reauction bids, totalled approximately \$10.2 billion; net high bids received for F block 10 MHz licenses totalled \$642.3 million.<sup>14</sup>

10. While many C block licenses were purchased for prices below or comparable to those for the A or B blocks, a handful of large bidders bid extremely high prices per pop for major markets, even adjusted for the value of the government financing we provide. The aggregate results of the C block auction, when measured in average price per pop paid, are markedly higher than the other PCS bands, even after adjusting for financing, and even though many individual small licensees bid prices comparable to those paid for the A and B block PCS licenses.<sup>15</sup>

11. Earlier this year, the Commission received several requests, from both C and F block licensees, for relief associated with the installment payment program.<sup>16</sup> Some licensees sought relatively modest relief (*e.g.*, changing from quarterly to annual payments).<sup>17</sup> Other licensees sought more dramatic restructuring.<sup>18</sup> These requests described a range of apparent difficulties in accessing the capital markets, which many licensees argue were exacerbated by the relatively high prices per MHz per population ("per pop") paid for some of the C block licenses.

12. When formulating its original auction rules in 1994, the Commission considered the possibility of debt restructuring and observed that "if we allow a grace period or restructuring of the payment plan, we would follow our procedures . . . under the Commission's existing

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<sup>12</sup> Bids were not submitted for two F block licenses, the Kokomo-Logansport, IN, BTA (B233) and the Kennewick-Pasco, MT, BTA (B228).

<sup>13</sup> "Net high bid" means the total amount bid less any bidding credit.

<sup>14</sup> Total bids received for all three 10 MHz licenses in the D, E and F block auction were \$2.5 billion.

<sup>15</sup> See June 23, 1997, BT Wolfensohn Report in "*NextWave TeleCom Inc., Overview of Telecommunications Financing Considerations*", attached to NextWave *ex parte* letter, June 23, 1997, and May 6, 1997, *Merrill Lynch High Yield Telecommunications Industry Update*.

<sup>16</sup> See "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, DA 97-82 (rel. June 2, 1997) ("*Installment Public Notice*"). See also Letter from Thomas Gutierrez, Esq., *et al* to Michele C. Farquhar, Esq., Chief, Wireless Telecommunications Bureau (March 13, 1997).

<sup>17</sup> See, *e.g.*, NextWave Comments at 4.

<sup>18</sup> See, *e.g.*, Fortunet Reply Comments at 9.

debt collection rules and procedures."<sup>19</sup> We also said that in deciding whether to grant grace period requests "or to pursue other measures," we would consider a variety of factors, including payment history, how far into the license term the default occurs, and the level of build-out.<sup>20</sup> We noted that if a grace period was granted, a licensee could use that time to "maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan."<sup>21</sup> When we later revisited the issue of licensee default, we stated that we would approve debt restructuring whereby a licensee and its lenders agree that in the event of licensee default on its installment payments, the lenders will cure the default by assuming the payments (barring assumption of license control).<sup>22</sup> Aside from these statements, the Commission has not discussed debt restructuring.<sup>23</sup>

13. *The Notice of Proposed Rule Making* to revise our Part 1 auction rules sought comment on several topics related to auction installment debt.<sup>24</sup> For example, we asked

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<sup>19</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2346, 2389 (1994) ("*Competitive Bidding Second Report and Order*"). The Commission's current rules provide that any licensee whose installment payment is more than 90 days past due shall be in default, unless a "grace period" request is filed. See 47 C.F.R. § 1.2110(e)(4). In anticipation of default on one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. To obtain such relief, licensees may file financial information (e.g., income statements or balance sheets) to demonstrate financial distress. Interest that accrues during the pendency of a grace period is amortized over the remaining term of the license. 47 C.F.R. § 1.2110(e)(4)(ii). Finally, these rules provide that following the expiration of any grace period without successful resumption of payment, or upon denial of a grace period request, or upon default with no such request submitted, the license of an entity paying on an installment basis is cancelled automatically and the Commission will initiate debt collection procedures. 47 C.F.R. § 1.2110(e)(4)(iii).

<sup>20</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. 47 C.F.R. § 1.2110(e)(4).

<sup>21</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391.

<sup>22</sup> See *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 471.

<sup>23</sup> But see "Wireless Telecommunications Bureau Staff Responds to Questions About Broadband PCS C Block Auction," *Public Notice* (rel. June 8, 1995) (addressing grace periods and other default questions).

<sup>24</sup> Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-60 (rel. Feb. 28, 1997) ("*Part 1 Proceeding*").

whether we should offer higher bidder credits in lieu of installment payments, or whether we should require, in an effort to reduce the likelihood of defaults, supplementation of the upfront payment during an auction when the cumulative high bids exceed some multiple of the upfront payment.<sup>25</sup> We sought comment on (1) imposing late payment fees on installment payments; (2) the default provisions of Section 1.2104(g) in the event of installment payment defaults; and (3) revised procedures for granting grace period requests.<sup>26</sup> Many commenters opposed any new fees for late submission of installment payments, and many favored simplified grace period procedures.<sup>27</sup>

14. On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their installment payment obligations, and because of other debt collection issues, the Bureau suspended the deadline for payment of installment payments for all C block licensees.<sup>28</sup> On April 28, 1997, the Bureau extended the suspension to F block licensees.<sup>29</sup>

15. On June 2, 1997, the Bureau, explaining that it had received several proposals from C block licensees regarding alternative financing arrangements and a petition for rule making regarding the issue of broadband PCS C block installment payments, issued the *Installment Public Notice* seeking comment on these proposals and invited any "additional proposals for addressing the C and F block broadband PCS financing terms."<sup>30</sup> The Bureau also sought comment on whether C block licensees should be permitted to prepay their installment debt. In response to the *Installment Public Notice*, the Commission received over 160 filings.<sup>31</sup> The majority of commenters favor some type of relief, including debt restructuring, spectrum

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<sup>25</sup> *Part I Proceeding* at ¶¶ 34, 35.

<sup>26</sup> *Id.* at ¶¶ 70, 74, 77.

<sup>27</sup> See Comments filed in the *Part I Proceeding*, including: Interactive Video Data Trade Association ("ISTA") Comments at 1 and Reply Comments at 4-5; Pocket Comments at 7-8; Merlin Reply Comments at 4. Part I grace period comments: AMTA Comments at 12-13; Cook Inlet Region, Inc. ("CIRI") Comments at 16; Pocket Comments at 7-8; AirTouch Comments at 8; Merlin Reply Comments at 4; Airadigm Reply Comments at 2; ISTA Reply Comments at 5-6.

<sup>28</sup> See *Installment Payments for PCS Licenses, Order*, DA 97-649 (rel. March 31, 1997).

<sup>29</sup> See "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) at 2.

<sup>30</sup> *Installment Public Notice*.

<sup>31</sup> Appendix A contains a list of parties filing comments, reply comments, and *ex parte* comments, and the abbreviated names of the commenters.

disaggregation, or a penalty-free license surrender ("amnesty"), followed by a reauction.<sup>32</sup> Other commenters express disapproval of any relief, and urge the Commission to strictly enforce its rules.<sup>33</sup> These comments were incorporated into the record in this docket.<sup>34</sup>

16. On June 30, 1997, the Bureau conducted a public forum in Washington, D.C. ("FCC Public Forum") to discuss broadband PCS C and F block installment payment issues, including the alternative financing arrangements proposed in connection with the Public Notices issued on June 2, 1997. The FCC Public Forum consisted of two panels. The first discussed whether the Commission should consider modification of its installment payment program,<sup>35</sup> and the second discussed alternative financing arrangements and debt restructuring.<sup>36</sup> FCC staff members and the public audience also participated throughout the discussions.<sup>37</sup> An FCC Task Force also was established which included representatives from the Bureau, the Office of Plans and Policy, the Office of General Counsel, and the Office of Communications Business Opportunities. This Task Force was charged with evaluating proposals for alternative financing arrangements submitted by PCS C and F block licensees and recommending to the Commission how to respond to those proposals.

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<sup>32</sup> See, e.g., NextWave Comments at 16-19; Fortunet Comments at 4-6; GWI Comments at 7-12; Horizon Comments at 13-15; Chase *ex parte* letter, August 11, 1997 at 1-2.

<sup>33</sup> See, e.g., Airadigm Comments at 2-3; ALLTEL Comments at 2; CIRI Comments at 2-3.

<sup>34</sup> We also note that several requests for an extension of the deadline for making payments have been filed with the Bureau pursuant to 47 C.F.R. § 1.2110(e)(4)(ii). In addition, two parties have filed requests for the restructuring of installment payment schedules, and several parties have filed requests for annual, as opposed to quarterly payment schedules. These requests will be addressed separately by the Bureau in accordance with our decision today. Several parties also have filed requests for waiver of the 7 percent interest rate applicable to eligible broadband PCS C block licensees whose licenses were conditionally granted on September 17, 1996, and who elected to utilize the Commission's installment payment plan. See Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes, *Public Notice*, DA 97-1152 (rel. June 2, 1997). These requests also will be addressed separately by the Bureau in accordance with our decision today.

<sup>35</sup> See Cook Inlet Region, Inc., Petition for Rulemaking (filed May 7, 1997). Panelists were Michael Roberts, President, National Association of PCS Entrepreneurs; Roger Linquist, CEO, General Wireless Inc.; Stephen Hillard, CEO, Cook Inlet Communications Inc.; Karen Johnson, President, Fortunet Communications, L.P.; and Shelley Spencer, General Counsel, AirGate Wireless.

<sup>36</sup> See Gutierrez Letter, Sawicki Letter, Barker Letter, and GWO informal proposal (attached to *Installment Public Notice*). Panelists were Norman Frost, Managing Director, Communications Group, Bear Stearns & Co.; John Bensch, Vice President/Senior Wireless Service Analyst, Lehman Brothers; Brian O'Reilly, managing Director-Communications Finance, Toronto Dominion Bank; Gregg E. Johnson, President, BIA Capital Corporation; and Mark Lowenstein, VP-Wireless/Mobile Communications, The Yankee Group.

<sup>37</sup> A videotape of the FCC Public Forum was placed in the record in this docket.

17. Both before and after the FCC Public Forum, numerous comments, reply comments, and *ex parte* letters and presentations were submitted to the Commission as part of this proceeding. Some commenters argue both for and against various proposals for licensee relief, while others argue that the Commission should enforce its rules as they currently exist to preserve the integrity of the auction program. The Commission thus has before it a wide range of proposals from entrepreneur block licensees, financial institutions and investors, equipment vendors, and other interested parties. We also have received a number of letters from individual Senators and Congressmen suggesting various approaches to resolving these issues and urging this Commission to act swiftly.<sup>38</sup> After consideration of the extensive record in this proceeding, we conclude that the options presented in this *Second Report and Order* offer the most appropriate and fair method of resolving C and F block financial concerns.

18. Although some commenters in this proceeding recommend deferral of the C block debt, the Commission declines to further explore these proposals.<sup>39</sup> We do not wish to adopt temporary solutions such as those that might only postpone these difficulties and further prolong uncertainty. Although these approaches would not necessarily result in a reduction of the current nominal debt owed to the Commission, there is no certainty the long term financial outlook facing many licensees would be improved. Finally, we believe that any further deferral of payments would be unfair to unsuccessful bidders who may have withdrawn from

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<sup>38</sup> See The Honorable Christopher S. Bond, *ex parte* letter, July 14, 1997; The Honorable Pete V. Domenici, *ex parte* letter, September 10, 1997; The Honorable James M. Inhofe, Don Nickles, and Conrad Burns, *ex parte* letter, August 7, 1997; The Honorable John McCain, *ex parte* letter, August 19, 1997; The Honorable John McCain, *ex parte* letter, September 18, 1997; The Honorable Daniel Patrick Moynihan, *ex parte* letter, August 4, 1997; The Honorable Rick Boucher, *ex parte* letter, July 25, 1997; The Honorable Richard Burr, *ex parte* letter, August 11, 1997; The Honorable Thomas Davis, *ex parte* letter, July 30, 1997; The Honorable John D. Dingell, *ex parte* letter, September 16, 1997; The Honorable Steny H. Hoyer, *ex parte* letter, August 7, 1997; The Honorable Sue W. Kelly, *ex parte* letter, August 11, 1997; The Honorable W.J. "Billy" Tauzin, *ex parte* letter, August 13, 1997; The Honorable W. J. "Billy" Tauzin and Edward J. Markey, *ex parte* letter, September 16, 1997.

<sup>39</sup> Suggestions in the record addressing "deferral/restructuring" propose that the Commission provide for some period (ranging from 2-20 years) during which installment payments would be deferred. Some of these plans explicitly reduce the "net present value" of the debt (*i.e.*, the discounted value of future cash flows less initial investment), while others leave it unchanged, assuming the government interest rate as the discount rate. See, *e.g.*, BMU Comments at 2; ClearComm Comments at 3 and Reply Comments at 3; Chase Comments at 3; Alpine Comments at 9 and Reply Comments at 11; Horizon Comments at 13; SBC Comments at 9; R&S Comments at 21; Indus Comments at 3; MFRI Comments at 3; Magnacom Comments at 1-2; NABOB Comments at 3-4; RFW Comments at 2; KPCS Comments at 2; Urban Comm Comments at 9 and Reply Comments at 4; PCS Plus Comments at 2; Holland Comments at 3; Eldorado Comments at 2; MCI Comments at 2; Bear Stearns Comments at 3; Fortunet Comments at 4 and Reply Comments at 8; RTFC Reply Comments at 2; NextWave Reply Comments at 20; TRA Reply Comments at 5; The Honorable Thomas Davis *ex parte* letter, July 30, 1997; The Honorable Rick Boucher *ex parte* letter of July 25, 1997.

the C block when prices became too high, but might have remained had deferral opportunities been known.

19. Similarly, we do not wish to adopt proposals that result in a dramatic forgiveness of the debt owed. Although such an approach would not defer the problem, we believe that it would be very unfair to other bidders, and would gravely undermine the credibility and integrity of our rules. In fact, in his remarks at the Senate Hearing on High-Definition Television, Senator Hollings stated, ". . . [r]ules are rules . . . . If they cannot comply with their particular auction bid, out they go, and we will start over again. But this is not welfare. This is business."<sup>40</sup> Other Senators also urged the Commission to maintain the integrity of its rules for benefit of its overall auction program.<sup>41</sup> Other commenters assert that lowering the effective price after the auction unfairly advantages those who bid too high compared with those who withdrew.<sup>42</sup> In effect, the result could be interpreted as the Commission picking winners and losers on an unsupportable basis, instead of the marketplace determining winners based upon an auction. This concern was also expressed by Senator McCain.<sup>43</sup> Such a result would be contrary to our long-held goal to put licenses into the hands of those who value them the most.

20. In addition, we decline to make the disaggregation, amnesty, or prepayment options available to F block licensees. We believe that the nature and extent of any financing difficulties faced by the C block licensees appear to be different from any such problems facing entrepreneurs in the F block. We note that even after considering the difference in the spectrum block size and providing a discount for the government financing, C block prices were higher than F block prices on average. We therefore conclude that the options we adopt today will not apply to F block licensees.

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<sup>40</sup> Transition to Digital Television Hearing Before the U.S. Senate Committee on Commerce, Science and Transportation, 105th Cong., 1st Session (September 17, 1997) (Statement of Senator Hollings).

<sup>41</sup> See The Honorable John McCain, *ex parte* letter, September 18, 1997; The Honorable Paul D. Coverdell *ex parte* letter, September 24, 1997.

<sup>42</sup> See, e.g., AirGate *ex parte* letter, July 22, 1997, attachment at 3; Conestoga Comments at 2-3; Point Comments at 2-3.

<sup>43</sup> See The Honorable John McCain, *ex parte* letter, August 19, 1997. In his letter Senator McCain states, "[t]he law does not, and indeed could not, require the Commission to substantially revise the rules that govern these entities solely for the purpose of guaranteeing their ability to retain licenses. . . .To do so would be to unjustly enrich defaulting bidders. . . [and] unjustly penalize the rest of the bidders in all the PCS auctions who bid reasonably and in reliance on the existing rules."

#### IV. SECOND REPORT AND ORDER

21. As discussed above, we require that C and F block licensees resume their Note payments on March 31, 1998. They will also be required to pay on that date one-eighth of the Suspension Interest, and thereafter, pay one-eighth of the Suspension Interest with each regular installment payment made until the Suspension Interest is paid in full. As used herein, "Suspension Interest" means the entire amount of the unpaid simple interest that was accrued at the rate set forth in each licensee's Note(s) during the period beginning with the date on which each license was conditionally granted through and including March 31, 1998 ("Suspension Period"). After March 31, 1998, payment due dates will conform to those indicated in the Notes executed by the licensees. We believe that there are C block licensees who will elect to continue making payments under their original C block Notes, as described above, which they will be entitled to do. In addition, we adopt three options relating to the rules governing installment payments for the C block. These are designed to help to resolve the financing issues facing C block licensees and restore certainty to the marketplace, while at the same time helping the Commission meet its statutorily mandated public interest considerations set forth under Section 309(j) of the Communications Act.<sup>44</sup>

22. These goals will also be furthered by generally applying the same rules regarding eligibility that were used in the C block auction to the reauction of C block licenses.<sup>45</sup> Thus, all applicants meeting the current definition of "entrepreneur" will be eligible to bid in the reauction. We also will allow all entities that were eligible for and participated in the original C block auction to bid in the reauction. Further, with the exception of incumbent licensees who choose to disaggregate portions of spectrum they currently hold (*see* Section IV.B., *infra*), and those licensees who surrender licenses under the prepayment option (*see* Section IV.D., *infra*), all C block licensees who return licenses to the Commission will be eligible to bid on all markets in the reauction.

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<sup>44</sup> *See* 47 U.S.C. § 309(j)(3)(A)-(E). Any party holding a C block license as of the January 15, 1998 election deadline will be permitted to elect any of the options we adopt.

<sup>45</sup> *See* 47 C.F.R. § 24.709.

## A. Resumption of Payments

23. Background. On March 31, 1997, the Bureau suspended the deadline for payment of all broadband PCS C block installment payments until further notice.<sup>46</sup> By Public Notice issued on April 28, 1997, the Bureau extended the suspension to F block licensees.<sup>47</sup> (The March 31, 1997 Order and April 28, 1997 Public Notice will be referred to collectively as the "*Suspension Order*"). In the *Suspension Order*, we indicated that the suspension would remain in effect until further action to reinstate payment deadlines, and that interest would continue to accrue until such action was taken.

24. Discussion. The majority of commenters in this proceeding, including many members of Congress, agree that the Commission must act quickly to make a decision on what course of action to take.<sup>48</sup> Those favoring restructuring suggest that any further delay will make any relief ineffective because further delay to market puts C block licensees at a competitive disadvantage and makes attracting investment capital to support their build-out even more difficult.<sup>49</sup> In addition, many commenters opposed to restructuring also support a timely decision, believing that a cloud of uncertainty hangs over the wireless sector until the Commission decides what action to take.<sup>50</sup> We therefore believe that it is necessary to remove any uncertainties surrounding the installment payment program by announcing a date certain for the resumption of installment payments.

25. Accordingly, effective March 31, 1998, we rescind the *Suspension Order* and reinstate the installment payment plans for all C and F block licensees. We also direct that all payments due and owing on and after March 31, 1998 be made in accordance with the terms of each licensee's Note, associated Security Agreement, and the Commission Orders and

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<sup>46</sup> See n.28, *supra*. See also Letter from Daniel B. Phythyon, Acting Chief, Wireless Telecommunications Bureau to Mark J. Tauber, Piper & Marbury (April 30, 1997) ("Tauber Letter").

<sup>47</sup> See n.29, *supra*.

<sup>48</sup> See, e.g., ClearComm Comments at 3; Chase Comments at 2; Alpine Comments at 11 and Reply Comments at iii, 9; AmeriCall Comments at 10; MCI Comments at 2 and Reply Comments at 7-8; Cellexis Reply Comments at 2-3; OnQue Reply Comments at 10; NextWave Reply Comments at 5-6; The Honorable W. J. "Billy" Tauzin and the Honorable Edward J. Markey *ex parte* letter, September 16, 1997; The Honorable John Dingell, *ex parte* letter, September 16, 1997; The Honorable John McCain *ex parte* letters of August 19, 1997 and September 18, 1997.

<sup>49</sup> See, e.g., MCI Reply Comments at 7-8 (quoting "Bensche Marks" July 1, 1997, summary of panel discussions at the FCC Public Forum of June 30, 1997).

<sup>50</sup> See, e.g., U.S. Airwaves Reply Comments at 3; Nokia *ex parte* letter, September 15, 1997 at 1; AmeriCall, ClearComm, and Chase, *ex parte* letter, September 17, 1997 at 1.

regulations. All Suspension Interest will become due and payable over a two-year period as discussed in paragraph 27, *infra*. With the exception of the modifications provided in this *Second Report and Order*, all Commission rules regarding installment payments and defaults for the broadband PCS C and F blocks will remain in effect. Any licensee that fails to remit the payment due on March 31, 1998, and remains delinquent for more than 60 days (*i.e.*, fails to make the March 31, 1998, payment on or before May 30, 1998), will be in default on its license.<sup>51</sup> Given the one year suspension, we believe that providing a shorter automatic grace period is justified. *See* paragraph 30, *infra*.

26. We conclude that any licensee that continues under its original Note(s), will be required to pay on March 31, 1998, one-eighth of the Suspension Interest in accordance with the provision of paragraph 27, *infra*. Thereafter, regular payments will become due and payable in accordance with the provisions of the licensee's original Note.<sup>52</sup>

27. We conclude that it could place a significant burden on licensees to require payment of the entire amount of the Suspension Interest on March 31, 1998. We therefore require that broadband PCS C and F block licensees submit one-eighth of the Suspension Interest on March 31, 1998, and one-eighth of the Suspension Interest with each regular installment payment made thereafter until the Suspension Interest is paid in full. After March 31, 1998, payment due dates will conform to those indicated in the Note(s) executed by the licensees. While the first regular installment payment next made after March 31, 1998, will be pro-rated to account for the resumption of payments on March 31, 1998, all regular installment payments thereafter will be in the amounts shown on the amortization schedule attached to and made a part of each Note, as amended, plus the applicable payments of Suspension Interest. For example, for those licensees granted in September, 1996 whose regular installments occur on March 31, June 30, September 30, and December 31 of each year, the next regular payment due after March 31, 1998, will be due on June 30, 1998, and will include the amount of interest accrued from April 1, 1998, through and including June 30, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on September 30, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (*i.e.*, interest from July 1, 1998, through and including September 30, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on each and every December 31, March 31, June 30, and September 30 thereafter until the Note is paid in full. For these licensees, the payment due on December 31, 1999, will be the last payment due that

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<sup>51</sup> *See* 47 C.F.R. § 1.2110(e)(4)(i). The 60-day period is an exception to our existing rules that provide for an automatic 90-day non-default period.

<sup>52</sup> *See* the provisions of paragraph 27, *infra*.

includes any amortized Suspension Interest.<sup>53</sup> All payments after that date will continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee. All installment payments previously made by licensees who elect one of the three options will be applied in accordance with the provisions set forth under the discussion of each option, *see* Section IV., *infra*.<sup>54</sup>

28. We delegate to the Bureau authority to set forth all procedures for implementing the resumption of payments.

29. Broadband PCS C block licensees choosing to surrender their licenses pursuant to the amnesty option described in Section IV.C., *infra* and those surrendering licenses that are not prepaid pursuant to the prepayment option described in Section IV.D., *infra*, will be required to return to the Commission each original Note and Security Agreement for cancellation by the Commission.

30. We will not entertain any requests for an extension of the March 31, 1998 deadline beyond the automatic 60-day non-default period set forth in paragraph 25, *supra*. The *Suspension Order* already has afforded a significant period to licensees during which payments

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<sup>53</sup> For those licenses granted in November, 1996 whose regular installments occur on the last day of May, August, November, and February of each year, the next regular payment due after March 31, 1998, will be due on May 31, 1998, and will include the amount of interest accrued from April 1, 1998 through and including May 31, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on August 31, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (*i.e.*, interest from June 1, 1998, through and including August 31, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on the last day of the month of November, February, May and August thereafter until the Note is paid in full. For these licensees, the payment due in February, 2000 will be the last payment due that includes any amortized Suspension Interest. Any payments after this date would continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee.

For those licenses granted in January, 1997 whose regular installments occur on the last day of April, July, October and January of each year, the next regular payment due after March 31, 1998, will be due on April 30, 1998, and will include the amount of interest accrued from April 1, 1998 through and including April 30, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on July 31, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (*i.e.*, interest from May 1, 1998, through and including July 31, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on the last day of the month of October, January, April and July thereafter until the Note is paid in full. For these licensees, the payment due in January, 2000 will be the last payment due that includes any amortized Suspension Interest. Any payments after this date would continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee.

<sup>54</sup> For example, for a licensee electing to continue making payments under its existing Note, if a licensee had accrued \$100,000 in Suspension Interest during this period and had previously made installment payments totaling \$20,000, then the amount of Suspension Interest would be \$80,000 (no additional interest will be assessed against this amount) and would be payable in eight equal payments of \$10,000.

were not required. Therefore, we intend to deny any requests for a grace period beyond the automatic 60-day non-default period we adopt herein, including any requests made pursuant to Section 1.2110 of the Commission's rules.<sup>55</sup>

31. C block licensees may resume payments under their current Note or elect one of the three options described below.

## **B. Disaggregation of Spectrum for Reauction**

32. Background. Existing Commission rules permit broadband PCS licensees to disaggregate their spectrum.<sup>56</sup> Under these rules, a broadband PCS licensee in the A, B, D, or E block may file an application with the Commission requesting permission to disaggregate any portion of its spectrum to other eligible entities at any time following the issuance of its license.<sup>57</sup> The existing rules also permit a C or F entrepreneur block licensee to disaggregate spectrum to other C and F block eligible entities for the first five years following the issuance of a license.<sup>58</sup> After the first five years of holding a license, an entrepreneur block licensee also may disaggregate to any qualified non-entrepreneur, provided that the non-entrepreneur compensates the federal government through an unjust enrichment payment proportionate to the amount of spectrum disaggregated.<sup>59</sup> If the entrepreneur block licensee has elected to pay using installment payments, the qualified entity receiving the disaggregated spectrum will also be permitted to make installment payments equaling its *pro rata* portion of the remaining government obligation.<sup>60</sup> The rules require that new notes and security agreements be executed by both the former and the new licensee.<sup>61</sup>

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<sup>55</sup> 47 C.F.R. § 1.2110(e)(4)(ii).

<sup>56</sup> Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, *Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 21831 (1996) (partitioning and disaggregation rules now codified at 47 C.F.R. § 24.714) (hereinafter "*Disaggregation Order*").

<sup>57</sup> See 47 C.F.R. § 24.714(a)(1) (parties "shall request an authorization for partial assignment of a license pursuant to Section 24.839").

<sup>58</sup> 47 C.F.R. § 24.714(a)(3).

<sup>59</sup> 47 C.F.R. § 24.714(c)(1).

<sup>60</sup> 47 C.F.R. § 24.714(d)(1).

<sup>61</sup> 47 C.F.R. § 24.714(d)(3)(ii).

33. A number of C block licensees, as well as several financial advisors and equipment manufacturers, have requested that the Commission permit licensees to disaggregate spectrum and surrender it to the Commission for reauction in exchange for a *pro rata* reduction in debt.<sup>62</sup> Generally, these proposals differ in: (1) the amount of spectrum that could be surrendered to the Commission; (2) the amount and form of credit for the spectrum surrendered; and (3) the terms and eligibility requirements for reauction of the disaggregated spectrum.

34. AmeriCall proposes "amnesty by thirds," which would permit each licensee to disaggregate its C block license into three 10 MHz portions, any one of which the licensee could surrender to the Commission for forgiveness of its related installment debt.<sup>63</sup> Under this proposal, surrendered spectrum would be reauctioned and the Commission would retain the down payments made by the initial licensee.<sup>64</sup> AmeriCall suggests allowing a licensee to participate in reauctions of C block spectrum, but only reauctions for spectrum other than that surrendered by the licensee.<sup>65</sup> AmeriCall also suggests that a licensee be required to wait two years before being allowed to reacquire spectrum that it has surrendered to the Commission.<sup>66</sup> AmeriCall proposes that C block licensees continue operating under the terms and conditions of the initial payment obligation, but that the Note be reduced in proportion to the amount of spectrum surrendered and the associated Security Agreements and Uniform Commercial Code ("UCC") filings modified accordingly.<sup>67</sup>

35. A number of other commenters propose that the Commission adopt variations of AmeriCall's disaggregation proposal. BIA Capital's disaggregation proposal generally tracks AmeriCall's proposal, but would allow licensees to surrender 10, 20 or 30 MHz of spectrum.<sup>68</sup> Magnacom proposes that parties be allowed to disaggregate up to 15 MHz of spectrum and

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<sup>62</sup> See, e.g., AmeriCall *ex parte* letter, August 5, 1997 at 1; GWI *ex parte* letter, August 15, 1997 at 1; Magnacom *ex parte* letter, August 13, 1997 at 1; BIA Capital *ex parte* letter, August 4, 1997 at 1-2; Nokia *ex parte* letter, September 16, 1997 at 1; Horizon Comments at 5-6 (all seeking a liberalization of the Commission's current rules for disaggregation to private parties).

<sup>63</sup> AmeriCall *ex parte* letter, August 5, 1997 at 2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> BIA Capital *ex parte* letter, August 4, 1997 at 1-2.

that all payments be applied to the portion of the license retained.<sup>69</sup> Urban Comm advocates that parties be allowed to disaggregate up to 10 MHz of spectrum.<sup>70</sup> In a recent joint filing, AmeriCall, Clearcomm, and Chase support a disaggregation option that would allow a licensee to disaggregate 15 MHz from one or more of the C block licenses it now holds, on a license-by-license basis, and to have its indebtedness reduced proportionately (*i.e.*, by 50%). The disaggregated spectrum would be reauctioned expeditiously and the disaggregating licensee would be precluded from rebidding on spectrum it has disaggregated.<sup>71</sup>

36. Parties advocating a disaggregation option cite a number of benefits. AmeriCall contends its "amnesty by thirds" proposal would help the Commission avoid both wide scale bankruptcies as well as the need for a "bail-out" in the form of radical debt restructuring.<sup>72</sup> It contends that by requiring licensees to forfeit all down payments for the surrendered spectrum, disaggregation imposes a *penalty* on C and F block licensees who choose this option.<sup>73</sup> AmeriCall argues further that spectrum disaggregation benefits participating licensees by allowing them to reduce their debt, which would in turn increase their access to capital markets.<sup>74</sup> AmeriCall contends that because it avoids the "more substantial financial fixes" advocated by other debtors, disaggregation is a fairer proposal, and one less prone to subsequent litigation.<sup>75</sup> Finally, AmeriCall contends that the "amnesty by thirds" proposal is pro-competitive in that it will introduce numerous new competitors, including licensees from other spectrum blocks.<sup>76</sup> GWI indicates that spectrum disaggregation "works well" for C block licensees in small markets where a full 30 MHz of spectrum is not required.<sup>77</sup> Urban Comm cites several public interest benefits deriving from spectrum disaggregation. According to Urban Comm, disaggregation provides spectrum to qualified designated entities without

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<sup>69</sup> Magnacom, *ex parte* letter, August 13, 1997 at 1; *see also* Northern Michigan PCS Consortium, L.L.C. *ex parte* letter, August 14, 1997 (supporting the application of all payments to the debt owed to the FCC).

<sup>70</sup> Urban Comm *ex parte* letter, September 17, 1997 at 4-5.

<sup>71</sup> AmeriCall, ClearComm, and Chase *ex parte* letter, September 17, 1997.

<sup>72</sup> AmeriCall *ex parte* letter, August 5, 1997 at 3-4.

<sup>73</sup> *Id.* at 3.

<sup>74</sup> *Id.* at 4. *See also* GWI *ex parte* letter, August 15, 1997 at 1.

<sup>75</sup> AmeriCall *ex parte* letter, August 5, 1997 at 4.

<sup>76</sup> *Id.* at 5.

<sup>77</sup> GWI *ex parte* letter, August 15, 1997 at 1.

delay, decreases time to market for existing licensees, and injects new competition into the marketplace.

37. In opposition to the disaggregation option, CONXUS, a narrowband PCS licensee, argues that the option does not confer on narrowband licensees benefits comparable to those accorded to broadband licensees since there is insufficient bandwidth in narrowband to allow disaggregation to occur without interfering with nationwide programs.<sup>78</sup> Omnipoint argues that any type of "amnesty solution," including spectrum disaggregation, would require the Commission to adopt rules protecting companies that have substantially built-out their networks.<sup>79</sup>

38. Discussion. In view of the substantial support and public interest benefits accruing from an alternative that would permit a voluntary surrender of spectrum to the Commission while maintaining the fairness and integrity of the auction, we adopt a disaggregation option. Under the disaggregation option we adopt today, any C block licensee may disaggregate a portion of its spectrum from each of its licenses and surrender it to the Commission for reauction.<sup>80</sup> The licensee must disaggregate 15 MHz of spectrum it holds across all BTAs in an MTA. These provisions prevent licensees from selectively surrendering spectrum for which they may believe they paid too much, or otherwise discarding spectrum in markets that may be more difficult to serve (commonly referred to as "cherry-picking" of licenses or spectrum).<sup>81</sup> We limit the ability of licensees to selectively disaggregate spectrum within an MTA also to facilitate attempts by new bidders to aggregate spectrum and initiate service. Because we are allowing disaggregation on an MTA-by-MTA basis, special exemptions for built-out systems -- such as the one we adopt under the amnesty option discussed below in paragraphs 53-58 -- are unnecessary. In cases where a licensee has built-out a BTA, it can choose either to retain all 30 MHz in each of the BTAs it has licenses for in an MTA, or it can operate its built-out system with 15 MHz. We believe that this flexibility, compared to the "all-or-nothing" approach, mitigates the need for a build-out exception for this option.

39. Licensees electing this option will be required to return half of their spectrum at 1895 - 1902.5 MHz paired with 1975 - 1982.5 MHz, which is spectrum contiguous to the PCS F

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<sup>78</sup> CONXUS *ex parte* letter, August 27, 1997 at 1-2.

<sup>79</sup> Omnipoint *ex parte* letter, September 5, 1997 at 2.

<sup>80</sup> See Section V., *infra* (*Further Notice of Proposed Rule Making* requesting comment on rules and procedures for reauction).

<sup>81</sup> For example, if a licensee holds four BTA licenses in MTA No. 4 (comprising Northern California and Northern Nevada), the licensee must choose to disaggregate 15 MHz from each or none of the four BTA markets.

block. The surrender of spectrum adjacent to the F block will provide sufficient contiguous spectrum for both the incumbent and new licensees to offer competitive PCS services.

40. Under the disaggregation option, the Commission will reduce the amount of the debt owed by an amount equal to the *pro rata* portion of the spectrum returned to the Commission, *i.e.*, by 50%, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards.<sup>82</sup> The Commission will retain the *pro rata* portion of the down payments applicable to the spectrum. The following illustrates how this proposal would operate in practice:

*Company X holds a 30 MHz license in a BTA market; paid the Commission \$100,000 in its down payment; and owes the Commission \$900,000 on a net bid of \$1,000,000. Company X could disaggregate 15 MHz and surrender it to the Commission for reacquisition, and the Commission would retain \$50,000 of the down payment. In return, the Commission would reduce the licensee's obligation to the government to \$450,000.*

The face amount of the licensee's Note will be adjusted to reflect the new principal, and the Note will then be amortized from the original date of execution to calculate the payments at the new face amount of the Note. All installment payments made as of March 31, 1997,<sup>83</sup> will be applied to reduce the amount of the Suspension Interest calculated on the new principal balance to be made in eight equal payments beginning March 31, 1998.

41. Where applicable, the existing disaggregation rules will govern this option.<sup>84</sup> However, the broadband disaggregation rules were not designed for the surrender of spectrum to the Commission.<sup>85</sup> Thus, existing rule provisions on designated entity transfer restrictions,<sup>86</sup> unjust enrichment,<sup>87</sup> installment payments, abbreviated license terms<sup>88</sup> and

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<sup>82</sup> See 4 C.F.R. Parts 101-105.

<sup>83</sup> This includes any payments due prior to and on March 31, 1997.

<sup>84</sup> See 47 C.F.R. § 24.714 (broadband PCS partitioning and disaggregation rules).

<sup>85</sup> See *Disaggregation Order*, 11 FCC Rcd 21831.

<sup>86</sup> 47 C.F.R. § 24.714(a)(3).

<sup>87</sup> 47 C.F.R. § 24.714 (c)(1), (2), (3).

<sup>88</sup> 47 C.F.R. § 24.714(e).

construction requirements,<sup>89</sup> restrictions on the amount of spectrum that can be disaggregated,<sup>90</sup> and similar rules will not apply to disaggregation to the Commission authorized by this option. In order to take advantage of the disaggregation option, licensees will be required to make an election consistent with the procedures specified in Section IV.E., *infra*.

42. In order to avoid unjust enrichment, licensees (defined as qualifying members of the licensee's control group, and their affiliates) will be prohibited from bidding in the subsequent reauction for spectrum the incumbent licensee has disaggregated. However, they will be permitted to acquire spectrum for any BTA for which the incumbent licensee has not disaggregated spectrum. We do not believe that it would be fair for these entities to benefit from a reauction after taking advantage of the disaggregation option. This prohibition against subsequent participation in the reauction for the spectrum disaggregated by the same party is supported by a number of commenters.<sup>91</sup> To ensure further against unjust enrichment, these entities will also be barred from reacquiring the spectrum they have surrendered to the Commission through a secondary market transaction for a period of two years from the start of a reauction.<sup>92</sup>

43. We believe that the disaggregation option set forth above is consistent with our goals in this proceeding and serves the public interest. First, this option preserves the credibility and integrity of the Commission's rules. The relief we provide is another means of making more efficient use of the spectrum. It does not provide a windfall or unfair advantage to the C block licensees availing themselves of the disaggregation option. The disaggregating licensee continues to pay for spectrum at its net high bid price,<sup>93</sup> and the Commission receives full payment for the spectrum retained by the licensee. In addition, the Commission will retain 50% of the down payment consistent with the amount of spectrum being surrendered to the Commission. Moreover, disaggregation with a *pro rata* adjustment in debt is consistent with the Commission's rules with regard to private party disaggregation.<sup>94</sup>

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<sup>89</sup> 47 C.F.R. § 24.714(f). Thus, a licensee that disaggregates spectrum to the Commission must still fully fulfill its original construction requirements with regard to the 15 MHz that it retains.

<sup>90</sup> 47 C.F.R. § 24.714(b)(3) ("Spectrum may be disaggregated in any amount").

<sup>91</sup> See Horizon Comments at 14; AmeriCall *ex parte* letter, July 11, 1997; AirGate Wireless, *ex parte* letter, Sept. 9, 1997.

<sup>92</sup> See AmeriCall *ex parte* letter, August 5, 1997 at 2.

<sup>93</sup> See n.13, *supra*.

<sup>94</sup> 47 C.F.R. § 24.714.

44. Second, the disaggregation option is fair and equitable to all interested parties. Losing bidders and other eligible parties will have an opportunity to bid on the disaggregated spectrum in the reauction. Also, by limiting disaggregation of spectrum to 15 MHz blocks on a BTA within an MTA basis, we increase the likelihood that the licenses available for reauction will be in quantities and geographic clusters that are commercially viable. In addition, by providing this limited opportunity to "pick and choose" which licenses to disaggregate, and not requiring the surrender of all 30 MHz of the spectrum it holds in an MTA, we make this option fair to those who have built-out some of their markets.<sup>95</sup> Although this option is not being made available to the narrowband or F block licensees, we do not believe that it is unfair to these parties or to other Commercial Mobile Radio Service ("CMRS") providers. This option does not materially alter the competitive landscape for CMRS services. Given the current state of the market and the Commission's existing rules, it is reasonable to expect that some C block spectrum will be transferred to competitors through reauction or private sale. Our actions here facilitate this process, by reducing the amount of spectrum that would otherwise be marketed in a piecemeal fashion. Moreover, as noted above, other parties will have an opportunity to bid on this spectrum in the reauction and, because of the spectrum's proximity to the F block, the spectrum may be particularly attractive to prospective licensees.

45. Third, the disaggregation option is consistent with our Section 309(j) obligation to promote opportunities for designated entities, including small businesses. According to a number of commenters, including those in the financial community, a reduced government debt burden and the resulting lower cost per MHz pop will enhance prospects for existing small business licensees to attract debt and equity capital.<sup>96</sup> This, in turn, should assist current C block licensees in moving forward with the deployment of their service offerings. Disaggregation will also provide opportunities for other small businesses to enter the PCS market in the future. Finally, by requiring C block licensees to disaggregate the 15 MHz of spectrum adjacent to the F block, we provide opportunities for existing F block licensees to aggregate spectrum in a manner that could benefit their planned or prospective service offerings.

### C. Surrender Licenses for Reauction (Amnesty)

46. Background. In response to our *Installment Public Notice* seeking comment on broadband PCS installment payment issues, a number of commenters express support for an option that would permit C block licensees to surrender their licenses to the Commission for

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<sup>95</sup> See, e.g., Omnipoint *ex parte* letters, August 18, 1997, September 3, 1997, and September 5, 1997 at 2.

<sup>96</sup> BIA Capital, *ex parte* letter, August 4, 1997 at 1.

reauction in exchange for forgiveness of the related debt and any interest and penalties<sup>97</sup> (generally referred to as "amnesty").<sup>98</sup> Commenters have submitted a variety of proposals for the terms of an amnesty option. Horizon states that an amnesty program should be designed to prevent a large scale surrender of licenses, and should encourage return of a license only in advance of a business failure. Horizon would permit a licensee to be selective in surrendering licenses, but would prohibit a licensee from rebidding on any license it surrendered and would prohibit a licensee's participation in the reauction entirely if it surrendered a total of more than five licenses. To facilitate this plan, Horizon asks that we waive our current cross default policies so that a licensee able to construct some, but not all, of its licenses will be able to return those licenses it cannot construct without placing all of its licenses in default. Horizon concludes that adopting such an amnesty plan would serve the public interest by getting licenses in the hands of companies willing and able to provide service to the public.<sup>99</sup>

47. R&S<sup>100</sup> and Cyber Sites<sup>101</sup> propose that the Commission permit C block licensees to surrender their licenses and obtain a full refund of all payments without penalty. GWI suggests that the Commission allow licensees to exchange all licenses in return for a "store credit" equal to 100% of the original down payment, which could be applied to licenses won in a "cash upfront" reauction. GWI contends that there should be no restriction on the licensee's bidding in the reauction.<sup>102</sup> NextWave, too, supports an "amnesty day" for the surrender of licenses and a subsequent reauction, but stresses that licensees should be allowed to retain their most desirable licenses.<sup>103</sup> NextWave submits that the total amount of the original down payments should be credited toward reauction bids "with a reasonable penalty."<sup>104</sup>

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<sup>97</sup> See 47 C.F.R. §§ 24.708(b), 1.2109(c), 1.2104(g)(2).

<sup>98</sup> See, e.g., R&S *ex parte* letter, August 11, 1997 at 1; MCI *ex parte* letter, August 14, 1997 at 2; Urban Comm *ex parte* letter, August 21, 1997; GWI *ex parte* letter, August 4, 1997; NextWave *ex parte* letter, July 29, 1997; El Dorado *ex parte* letter, August 13, 1997 at 2-3.

<sup>99</sup> Horizon Comments at 13-15.

<sup>100</sup> R&S Comments at 13-15.

<sup>101</sup> Cyber Sites Comments at 3.

<sup>102</sup> GWI *ex parte* letter, August 4, 1997.

<sup>103</sup> NextWave *ex parte* letter, July 29, 1997.

<sup>104</sup> NextWave *ex parte* letter, August 5, 1997.

48. Other commenters, including C block licensees AmeriCall<sup>105</sup> and Chase,<sup>106</sup> endorse a "simple amnesty" program pursuant to which a licensee would be obliged to surrender all of its C block licenses in return for forgiveness of its debt and an opportunity to participate in any reauction of the returned licenses or other licenses. Equipment manufacturer Nokia also endorses an amnesty program that would permit a licensee to surrender all of its C block licenses in return for forgiveness of all associated debt and an opportunity to bid at the reauction.<sup>107</sup>

49. Fortunet states that a simple amnesty program does not provide sufficient relief, and asks that licensees receive a refund of their down payments and interest payments made on those licenses surrendered.<sup>108</sup> MCI also supports permitting licensees to surrender all of their C block licenses with no further financial obligation, but suggests that a licensee be permitted to receive only "a fraction" of the down payment already made.<sup>109</sup>

50. In addition to the many commenters who oppose any rule changes, including a grant of amnesty,<sup>110</sup> a number of commenters have resisted implementation of an amnesty plan and have identified various problems specific to the amnesty option. Cook Inlet recommends that the Commission strictly enforce its rules as they currently exist, and take aggressive measures to collect all debt,<sup>111</sup> noting that other alternatives, including an amnesty plan, invite litigation and threaten the auction program's integrity.<sup>112</sup> However, Cook Inlet states that, if an amnesty program is adopted, certain limitations should be imposed, including prohibitions against participation in the reauction of their licenses by those who participate in amnesty (principals and control group members), against participation by any entity in bankruptcy, and against cherry picking among those licenses to be surrendered. In order to expedite reauction, Cook

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<sup>105</sup> AmeriCall *ex parte* letter, July 11, 1997; AmeriCall, ClearComm, and Chase *ex parte* letter, September 17, 1997.

<sup>106</sup> Chase *ex parte* letter, August 11, 1997.

<sup>107</sup> Nokia *ex parte* letter, September 16, 1997.

<sup>108</sup> Fortunet Reply Comments at 5.

<sup>109</sup> MCI *ex parte* letter, August 14, 1997. *See also* Chase *ex parte* letter, August 11, 1997.

<sup>110</sup> *See, e.g.,* ClearComm *ex parte* letter, August 7, 1997, opposing "any substantially penalty-free amnesty" and advocating, *inter alia*, penalties such as denial of future designated entity status.

<sup>111</sup> Cook Inlet *ex parte* letter, August 5, 1997 at 1.

<sup>112</sup> Cook Inlet *ex parte* letter, August 15, 1997.

Inlet suggests that the Commission refund 25% of their down payments to licensees who surrender their licenses -- as "walk away" money.<sup>113</sup>

51. Omnipoint opposes amnesty because "operational" C block companies would be left with no recourse under any of the amnesty proposals, and would face a significant relative disadvantage in accessing capital markets. Omnipoint points out that this might deprive the public of the service that such licensees are providing.<sup>114</sup> Omnipoint states that it and other operational C block licensees have "operating businesses [that] are completely tied to specific C block licenses"<sup>115</sup> and do not have the same flexibility to cancel licenses voluntarily. Omnipoint asserts that these licensees' access to public capital markets will be hampered by policies that would, in effect, reduce per pop prices paid for similar properties *i.e.*, the surrendered C block licenses, and will strand those licensees that have been significantly built-out with licenses that have "artificially higher prices" per pop.<sup>116</sup>

52. Like Omnipoint, Alpine argues that entities like itself, which bid in good faith and intend to construct their markets, will not be helped by an amnesty program.<sup>117</sup> However, Alpine supports an amnesty plan structured to encourage overextended licensees to take prompt remedial action and free up the C block for reauction and subsequent development. Alpine explains that the ability to roam is essential to the viability of its system and to that of other operational C block systems, but cannot be offered to potential customers if significant portions of the C block have not been developed. Therefore, Alpine endorses an amnesty option that would encourage speedy surrender and reauction by permitting licensees to turn in one or more of their licenses and to receive credit for the down payments, to be applied against other obligations.<sup>118</sup>

53. Discussion. We conclude that it serves the public interest as articulated in our goals, Section II, *supra*, to adopt an amnesty option that permits any C block licensee to surrender

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<sup>113</sup> Cook Inlet *ex parte* letter, August 5, 1997 at 2-3. Cook Inlet argues that the Commission would also have to provide compensatory compliance benefit and transition rules for control group parties who are meeting debt obligations and are not subject to bankruptcy (*e.g.*, an additional 10 percent bidding credit in any reauction and relaxed control group and transfer rules). *Id.*

<sup>114</sup> Omnipoint *ex parte* letter, September 5, 1997.

<sup>115</sup> *Id.* at 2.

<sup>116</sup> *Id.* at 3.

<sup>117</sup> Alpine Reply Comments at 9-11.

<sup>118</sup> Alpine *ex parte* letter, September 17, 1997 at 2.

all of its licenses in exchange for relief from its outstanding debt and waive any applicable default payments, subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards.<sup>119</sup> We adopt the amnesty option for purposes of speeding use of the C block spectrum to provide services to the American public. The surrender of licenses under this option will provide qualified parties with an opportunity to obtain C block licenses at the market value of the licenses prevailing at the time of the reauction. The amnesty option we adopt today is equitable to all parties because, while amnesty relieves a licensee from further debt obligations and any applicable default payments, a coordinated surrender of licenses facilitates expeditious reauctioning of the spectrum and will provide new market opportunities for all eligible entities. In addition, we note that rapid reauction of those licenses surrendered will also comply with the Congressional directive that we promote competition and participation in the telecommunications industry by small businesses.

54. A C block licensee must make the amnesty election in accordance with the procedures set forth in Section E, *infra*. The Commission will reauction those licenses surrendered on an expedited basis under the reauction rules discussed in the *Further Notice of Proposed Rule Making* adopted with this *Second Report and Order*. See Section V., *infra*. Licensees electing the amnesty option will be eligible to bid for any and all licenses at the reauction.

55. Licensees electing the amnesty option will not have their down payment returned. This will discourage speculation and ensure that all bidders, new entrants as well as existing licensees, participate in the reauction without undue advantage. Retention of the down payments -- 10% of the bid price for most licensees -- is consistent with our previous decisions and actions affecting C block bidders in that we have retained any payments made by those C block bidders who have failed to make their first or second down payments.<sup>120</sup> We believe that by not finding these licensees in default and assessing any applicable default payments, we are according them a substantial benefit. In forgiving the outstanding debt we afford significant relief to the licensees by allowing them to avoid anticipated defaults. In addition, these licensees will not be deemed in default or delinquent in meeting government

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<sup>119</sup> See 4 C.F.R. Parts 101-105.

<sup>120</sup> See, Mountain Solutions LTD, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B053, B168, B172, B187, B188, B224, B247, B275, B366, and B381, *Order*, 12 FCC Rcd 5904 (1997) (*application for review filed May 28, 1997 pending*); Carolina PCS I Limited Partnership, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, *Order*, DA 97-890 (rel. April 28, 1997) (*application for review filed May 28, 1997 pending*); C.H. PCS, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Order*, 11 FCC Rcd 9343 (1996); BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997), petition for reconsideration granted in part and denied in part, *Memorandum Opinion and Order*, FCC 97-300 (rel. Sept. 29, 1997).

debt obligations. Nor will they be subject to any applicable default payments or in violation of any FCC rules or license conditions. Thus, their creditworthiness, financial qualifications, and other qualifications are preserved should they wish to take part in other federal loan programs<sup>121</sup> or apply for any future spectrum auctions or licenses.<sup>122</sup>

56. Subject to one exception identified below, licensees choosing to take advantage of the amnesty option will be required to surrender *all* of their licenses to the Commission. The requirement that all licenses be surrendered precludes licensees from "cherry picking." The simultaneous multiple-round auction design enables bidders to place bids on many licenses at once and to aggregate desired licenses in a manner that facilitates workable business plans. If we were to permit licensees to "cherry pick" which licenses to surrender, the interdependency of the licenses would be harmed. Licenses surrendered pursuant to such a "cherry picking" scheme might lack the potential for beneficial aggregation within MTAs, and therefore would likely be less valuable to potential bidders and impair business plans of new investors.

57. As an exception to the "all-or-nothing" requirement, licensees that have met or exceeded the five year build-out requirements by September 25, 1997, the date of adoption of this *Second Report and Order*, will not be required to surrender licenses for built-out markets. In addition, these licensees will be permitted to retain those BTA licenses in which such build-out has occurred. However, licensees availing themselves of this exception may not pick and choose BTAs within an MTA but will be required, instead, to keep all of the other BTAs in the MTA in which the build-out requirement has been met and to pay for those licenses under the terms of their Notes. The build-out exception facilitates the achievement of the statutory goal set forth in Section 309(j) that we encourage the rapid provision of service to the public, and responds to the needs of licensees that have already commenced operations or have otherwise invested significantly in certain of their C block licenses. The Commission has an interest in minimizing the competitive impact of the changes that it makes to the auction rules, consistent with its broader policy objectives. The exception we adopt today is one method by which we can ensure that the menu of options available to the C block is fair to those licensees that have rapidly built-out their markets and initiated provision of competitive service.

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<sup>121</sup> Under the Debt Collection Improvement Act ("DCIA"), no person may obtain any federal financial assistance if the person has an outstanding debt with any federal agency which is in a delinquent status. Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3720B. In addition, in the *Part 1 Proceeding*, the Commission adopted a certification procedure as part of changes to the application procedures whereby applicants must certify that the applicant is not in default on any payment for Commission licenses (including down payments) and that it is not delinquent on any non-tax debt owed to any federal agency. Bidders who cannot make this certification may be ineligible for installment payment plans. *Part 1 Proceeding* at ¶ 8.

<sup>122</sup> See 47 U.S.C. §§ 308(b), 309(j)(5).

58. Although the Bureau suspended installment payments on C block licenses on March 31, 1997, some licensees made their installment payments (*i.e.*, installments due on that date, and amounts due on December 31, 1996, but not paid until March 31, 1997, based on our automatic 90-day non-default rule) after the suspension. In addition, prior to the suspension of payments, many C block licensees made their regularly scheduled installment payments. We believe that due to the actions we take in this *Second Report and Order*, it would be unjust and inequitable for C block licensees to be treated differently merely because some C block licensees made prior payments while others did not. Consequently, we direct the Wireless Telecommunications Bureau to refund any installment payments made (whether due on or before March 31, 1997) on any license that is surrendered pursuant to this *Second Report and Order*. In addition, we will forgive payment of any due, but unpaid, installment payments for any surrendered license.<sup>123</sup> For licensees exercising the build-out exception and retaining certain licenses, all previously made installment payments will be applied first to reduce the Suspension Interest applicable to those licenses, and any amounts remaining will be refunded.

#### D. Prepayment

59. Background. In the *Installment Public Notice*, the Bureau sought comment on whether PCS licensees should be permitted to prepay their installment debt at a discount, and on proposals for calculating the net present value of the debt.<sup>124</sup> In his presentation at the FCC Public Forum held on this issue, John Bensché of Lehman Brothers recommended prepayment by bidders as a way to avoid further restructuring in the future and to remove the government from its role as creditor to the wireless industry.<sup>125</sup> Bear Stearns also indicates that a prepayment option will improve the financial flexibility of C block licenses by eliminating the uncertainty surrounding the threat that a license will be revoked for financial reasons because lenders could collateralize their obligations with the licenses, at least indirectly, using the shares of the license-holding entity.<sup>126</sup>

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<sup>123</sup> Forgiveness of this obligation will be subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards. *See* 4 C.F.R. Parts 101-105.

<sup>124</sup> *See Installment Public Notice* at n.6.

<sup>125</sup> Presentation by John Bensché of Lehman Brothers at June 30, 1997, FCC Public Forum on Installment Payment Issues at 3. *See also* NextWave Comments at 9; GWI Reply Comments at 13-14.

<sup>126</sup> *See* Bear Stearns Comments at 4.

60. Other commenters also support some form of prepayment option for C block licensees.<sup>127</sup> In a letter dated September 16, 1997, Representatives Edward J. Markey and W.J. "Billy" Tauzin urged the Commission to consider a "full price buy-out" proposal as part of a menu of options approach. Under this proposal, licensees could purchase at "full price" as many of their existing licenses as they desire with cash up front, for the net present value of the net bid prices for such licenses. They suggested that the licensees be allowed to use any monies on deposit with the Commission and any "new money" that the licensee may immediately muster. They agreed that this option had the benefit of allowing licensees to proceed with build-outs immediately, thereby bringing service to the public as quickly as possible, while also providing a meaningful opportunity for all interested parties to participate in an auction for the bulk of the licenses.<sup>128</sup>

61. Many commenters argue that a prepayment option should include a discount to lower the net high bid price of the licenses below A and B block prices.<sup>129</sup> For example, NextWave believes that a discount to A and B block prices is necessary due to the headstart that A and B block licensees have experienced in time to market, coupled with the restraints of the C block control group rules and the deterioration of the financial market conditions for wireless companies.<sup>130</sup> Other commenters believe that a prepayment discount should reflect the average of D and E block winning bids, with a multiplier of 2.25 applied to secondary and tertiary markets and 3.0 for top 100 markets.<sup>131</sup> In its *ex parte* letter, Triumph Capital suggests that the Commission apply a discount ranging from 15 percent to 30 percent to determine the present value of C block debt to the FCC.<sup>132</sup> GWI proposes to scale the C block bid using the ratio of the A/B block average cash bid to C block average bid. This scale factor would then be multiplied by the actual C block bid for that license to determine the

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<sup>127</sup> See, e.g., ClearComm Comments at 3.

<sup>128</sup> See The Honorable W.J. "Billy" Tauzin and the Honorable Edward J. Markey, *ex parte* letter, September 16, 1997.

<sup>129</sup> See, e.g., ClearComm Comments at 3; Horizon Comments at 10-12; RTFC Comments at 3; Holland Comments at 3-4; Duluth PCS Comments at 1-2; GWI Comments at 8-10; NextWave Comments at 9-10. See also Alpine *ex parte* letter, September 23, 1997.

<sup>130</sup> NextWave Comments at 9-10 and Reply Comments at 22.

<sup>131</sup> Duluth PCS Reply Comments at 1-2.

<sup>132</sup> See Frederick W. McCarthy, Chairman, Triumph Capital to The Honorable Reed E. Hundt, Chairman, Federal Communications Commission *ex parte* letter, September 23, 1997 ("McCarthy Letter").

scaled C block cash bid.<sup>133</sup> This scaled C block bid would then be discounted at a 14 percent discount rate for the government debt to determine the prepayment price.<sup>134</sup> NextWave suggests that a two-year period would be necessary for licensees to fund this prepayment as well as sustain operating expenses.<sup>135</sup>

62. Cook Inlet Region argues that any discounting of the net high bid price for purposes of prepayment would be unfair to the losing bidders in the C block auction and investors and creditors of the bidders in the auction.<sup>136</sup> Omnipoint also believes that a prepayment option is discriminatory against all of the winning bidders except the very large.<sup>137</sup> AirGate Wireless believes that permitting licensees to pay the net present value of their license costs at a discount would have the effect of rewriting the outcome of the C block auction, denying licenses to bidders who expressed through their bids a willingness to pay more than a discounted bid, and thereby arbitrarily choosing winners and losers.<sup>138</sup> Additionally, the SBA does not support a discount in the net bid amounts.<sup>139</sup> The SBA indicates that absent a detailed analysis of the bidders, the bidding process, round activity, financial environment and marketplace circumstances during each of the auctions, including a regression analysis to isolate individual factors, it cannot be determined that the adjusted marketplace value of C block should be based on either A and B block or D-F block bid amounts.<sup>140</sup> The SBA also indicates that "a reduction in principal would seriously undermine the integrity of the auction as well as set a dangerous precedent for small business participation in future auctions."<sup>141</sup>

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<sup>133</sup> GWI Comments at 10-12.

<sup>134</sup> GWI Comments at 9. *See also* Bear Stearns Comments at 3.

<sup>135</sup> NextWave Comments at 10.

<sup>136</sup> Cook Inlet Region *ex parte* letter, September 23, 1997 at 2.

<sup>137</sup> Omnipoint *ex parte* letter, September 23, 1997 at 2.

<sup>138</sup> *See* AirGate Wireless *ex parte* letter, July 18, 1997 at 3.

<sup>139</sup> *See* Jere W. Glover, Chief Counsel, U.S. Small Business Administration and Jenell S. Trigg, Assistant Chief Counsel, Telecommunications, to The Honorable Reed E. Hundt, Chairman, Federal Communications Commission, *ex parte* letter, September 8, 1997 ("Glover Letter").

<sup>140</sup> *Id.* at 5.

<sup>141</sup> *Id.*

63. Other commenters argue that a prepayment option is not viable for small businesses, or that it is otherwise inappropriate. BIA Capital contends that a prepayment option is not feasible because it would require small businesses to trade in debt capital from the government, which costs 7%, for private equity, which has a capital cost ranging from 30% to 40%.<sup>142</sup>

64. Discussion. Under the prepayment option we adopt, any C block licensee may prepay selective licenses subject to the restrictions described in this Subsection IV.D. All licenses that are not prepaid in accordance with this option must be surrendered to the Commission in exchange for a forgiveness of the corresponding debt and any penalties. A licensee selecting this option may apply 70% of the total of all down payments it made on the licenses that it elects to surrender to the Commission ("Available Down Payments"), to a prepayment of the Notes for as many of its licenses it wishes to keep.<sup>143</sup> The remaining down payments not applied to prepayment will be retained by the Commission. Additionally, an incumbent may use any "new money" to prepay as many of its own licenses as it desires. Any installment payments previously made by the licensee for all its licenses will be added to the Available Down Payments to increase the funds available to prepay its Notes. Interest accrued from the date of the conditional license grant through the Election Date will be forgiven. For purposes of this option, the down payment associated with licenses that are transferred as of the Election Date to subsidiaries or affiliates will be considered transferred with the licenses and the corresponding debt.<sup>144</sup>

65. We believe that this prepayment option fairly balances competing interests, while maintaining the fairness and integrity of our rules and auctions. We note that 30% of the down payments is equal to 3% of the net high bids and is consistent with the approach

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<sup>142</sup> BIA Capital Comments at 2-3.

<sup>143</sup> For example, if a licensee held two licenses with net high bids of \$100 and \$200, then the total down payments would equal \$30 (\$10 + \$20). If the licensee elected to keep the \$200 license, the licensee would have \$7 (\$10 x 70 percent) of its down payment from the \$100 license to apply towards the prepayment of the \$200 license's Note. If, on the other hand, the licensee elected to prepay the \$100 license, then the licensee would have \$14 (\$20 x 70 percent) of its down payment from the \$200 license to apply towards the prepayment of the \$100 license's Note.

<sup>144</sup> For example, if ABC Company paid \$100,000 each for two licenses and submitted \$10,000 in down payments for each license, the total down payments submitted by ABC Company would be \$20,000. However, if ABC had subsequently transferred one of its licenses to XYZ Company, a wholly-owned subsidiary, ABC Company would not have any additional money available to purchase its license, and XYZ Company would not have any additional money available to purchase its license. This option, however, is not intended to prohibit additional license transfers consistent with existing Commission rules.

adopted previously for down payments.<sup>145</sup> Under our existing rules, an applicant is subject to a 3% payment if it fails to make the required down payment.<sup>146</sup> Furthermore, previously we have indicated that these payments will discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements.<sup>147</sup> In this manner, we believe it to be most fair to apply this provision to those licensees who seek the relief provided by this option. If licensees were able to use all of their down payment, they would recoup in full what they paid, and there would be no deterrent effect against bidding excessively in the auction or otherwise gaming the process. Thus, in the next auction to which our default payments apply, these rules could be ignored with impunity. Such a result would severely harm our market-based auction program. It would make it impossible to impose the charges we already have imposed in past cases, including in C block cases.<sup>148</sup> Further, we emphasize that permitting C block licensees access to the down payments they previously made for licenses they no longer wish to retain is a substantial benefit and fair to these licensees. To allow them to use 100% of those funds would be unfair to other C block licensees who choose to continue to pay under their existing obligations, and to bidders who were unsuccessful in the auction.

66. While some have argued that C block licensee loan payoffs made under a prepayment plan should be determined using a net present value formula, we decline to discount the Notes. We believe it is fair to other bidders and to the credibility and integrity of our rules for the prepayment to be in the amount of the outstanding debt for the net high bid. In other words, licensees should pay what they bid. To offer deep discounts off the amount of the debt is outside normal commercial practices and otherwise appears to be a "bail-out" of C block licensees who have encountered financial difficulties long after the auction was completed and the financial commitments were made. Debt paid off in advance of the maturity date allows the debtor to reap the benefit of not incurring additional interest due on the principal amount owed. To discount the amount of the principal, as has been suggested, would unfairly permit

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<sup>145</sup> See BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, *Order*, 11 FCC Rcd 14399 (1996) (assessing a \$67,695,653.23 default payment for failure to submit the required down payment for licenses won in the C block auction), *reconsideration denied*, *Order*, 12 FCC Rcd 6606 (1997); and C. H. PCS, Inc., BTA No. B347 Frequency Block C, *Order*, 11 FCC Rcd 22430 (1996) (assessing a \$5,031,232.50 default payment for failure to submit the required down payment for one license won in the C block reaction).

<sup>146</sup> See 47 C.F.R. §§ 1.2104(g)(2), 24.704(a)(2). The defaulted bidder in this instance is subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission, plus a payment equal to three percent of the defaulted bid price. See 47 C.F.R. § 24.704(a)(1), (2). See also, *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 4495 at n.51.

<sup>147</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd.at 2383.

<sup>148</sup> See n.145, *supra*.

a windfall to the licensee electing this option. While we are cognizant of the financial difficulties for some C block licensees, we are also mindful of our duty to the other C block licensees who are successfully meeting their obligations and continuing build-out efforts for wireless services. Therefore, we believe that we strike the proper balance by allowing a licensee the benefit of prepaying its debt obligations, thereby reducing the amount of interest that would be payable over the full term of the Note, while avoiding fundamental changes to our rules that unfairly harm other licensees who followed our rules and who continue to meet their payment obligations.

67. Under this prepayment option, an incumbent must prepay all of the BTA licenses in a particular MTA and cannot arbitrarily select individual BTA licenses in a given MTA to prepay while surrendering other licenses in that MTA, with one exception. We conclude that while a licensee must prepay the debt on all of the BTAs for which it holds licenses in an MTA, we recognize that a licensee may not have sufficient funds available to it to prepay all of its Notes for the BTA licenses in a given MTA. Therefore, any licensee that has enough funds on hand to prepay one or more BTAs within an MTA, but not enough for the entire MTA, must prepay all of those BTAs within that MTA that it can afford. We conclude that a requirement that all licenses in a given MTA be prepaid precludes licensees from "cherry picking." The simultaneous multiple-round auction design discussed in paragraphs 86-89, *infra*, enables bidders to place bids on many licenses at once. If we were to permit licensees to "cherry pick" which licenses in an MTA to prepay and which to surrender under this option, the interdependency of the licenses would be threatened. Licenses surrendered pursuant to such a "cherry picking" scheme would lack the potential for aggregation, and consequently would hold much less value to other bidders in the subsequent reaction.

68. We decline to provide an exception for markets in which the five-year build-out requirement has been met as provided under the amnesty option. Under the prepayment option, licensees have the flexibility to select which markets they will retain subject to the restrictions in paragraph 67, *supra*. For this reason, licensees have the option of selecting and prepaying for licenses where they have invested capital to meet the build-out requirements and not prepaying in an MTA where they have not. We believe that this flexibility, compared to the all or nothing approach of simple amnesty, mitigates the need for this exception.

69. Finally, for a period of two years from the start date of the reaction, licensees (defined as qualifying members of the licensee's control group, and their affiliates) will be prohibited from reacquiring the licenses surrendered pursuant to this option either through a reaction or any other secondary market transaction. We do not believe that it would be fair to other licensees and bidders for these licensees to benefit from a reaction of those licenses after taking advantage of this option. Furthermore, we do not believe that this option should provide opportunities for licensees to "selectively" reduce their license obligations by surrendering a license in hopes of re-obtaining it in a reaction at a lower price.

## E. Election Procedures

70. We conclude that a licensee electing to continue under its existing installment payment plan or electing one of the options set forth in this *Second Report and Order*, must file a written notice of such election with the Wireless Telecommunications Bureau on or before the Election Date ("Election Notice") as specified in this section. As used herein, "Election Date" means January 15, 1998.<sup>149</sup>

71. We require that those licensees electing (i) to continue making payments under their original C block Notes, (ii) the disaggregation option, or (iii) the amnesty option who elect to take advantage of the build-out exception and retain certain of their licenses make the appropriate payment by March 31, 1998 (or by the end of the 60-day grace period allowed, *see* paragraph 25, *supra*), and execute any necessary financing documents pursuant to appropriate requirements and time frames established by the Bureau in order to continue to be eligible under the option chosen.

72. Continuation Under Existing Note(s). Any licensee that wishes to continue making installment payments in accordance with the terms of its original C block Note, must elect to do so by submitting the Election Notice of such election.

73. Disaggregation. For licensees electing the disaggregation option, the Election Notice must include (i) a list of all licenses being disaggregated, (ii) the original of all licenses being disaggregated, and (iii) all originals of the Notes and Security Agreements for those licenses being disaggregated for cancellation by the Commission. Upon acceptance of the Election Notice, the disaggregated spectrum will be deemed returned to the Commission.

74. Amnesty. For licensees electing the amnesty option, the Election Notice must include (i) a list of all licenses being surrendered, (ii) if applicable, a statement indicating that it intends to avail itself of the build-out exception together with a list of those BTA licenses it intends to retain<sup>150</sup> and pertinent information concerning build-out pursuant to the Commission's rules,<sup>151</sup> (iii) the original of all licenses being surrendered, and (iv) all originals of the Notes and Security Agreements for those licenses being surrendered for cancellation by the Commission.

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<sup>149</sup> *See* paragraph 110, *infra*. The Wireless Telecommunications Bureau will provide more information concerning filing procedures in a subsequent public notice.

<sup>150</sup> Those licensees electing to proceed under the build-out exception will be required to adhere to the specific obligations set forth in their Notes and Security Agreements, as modified for those licenses not being surrendered to the Commission. *See* discussion in Section IV.E., *supra*.

<sup>151</sup> 47 C.F.R. § 24.203(c).

75. Prepayment. For licensees electing the prepayment option, the Election Notice must include (i) a list of all licenses being prepaid, (ii) a payment in the amount of any additional "new money" a licensee desires to apply to the prepayment of its licenses, (iii) the original of all licenses not being prepaid in accordance with this option, and (iv) all originals of the Notes and Security Agreements for those licenses not being prepaid for cancellation by the Commission. Notes which are prepaid will be marked "Paid-In-Full" and returned to the licensee.

76. We further conclude that any C block licensee that (i) fails to elect one of the options set forth, Section IV.A.-D., *supra* on or before the Election Date, or (ii) fails to elect on or before the Election Date to continue making payments under its original C block Note(s), or (iii) fails to fully and timely execute and deliver to the Commission (or its agent) any required financing documents within the period of time specified by the Bureau, will not be afforded the opportunity granted to licensees who do make a timely election to repay the Suspension Interest over a period of eight equal payments. In such event, the licensee will be required, on or before March 31, 1998, to make all payments that would have been due under its Note(s) but for the effect of the *Suspension Order*. For example, a licensee whose regular installment due date was March 31, 1997, who did not make payment on that date because of the *Suspension Order*, will owe on March 31, 1998, all payments that were due and payable earlier, but unpaid due to the *Suspension Order*, in addition to the regularly scheduled March 31, 1998, payment.

## F. Cross Defaults

77. Background. In the *Notice of Proposed Rule Making* in this proceeding, we sought comment on whether the Commission should cross default its installment payment plan loans with other installment payment plan loans to the same licensee.<sup>152</sup> We asked if we should cross default licensees across services or blocks (*e.g.*, from PCS licenses to SMR licenses, or from PCS C and F block licenses), whether we should pursue default remedies against single licenses only (*e.g.*, from C block to C block licenses only), and what factors should influence our decision to pursue cross defaults. In response, several commenters specifically requested that the Commission clarify its rules regarding cross default in the context of defaults on installment payments if licenses are held by licensees with the same or overlapping control groups.<sup>153</sup>

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<sup>152</sup> See *Part 1 Proceeding* at ¶¶ 76-78.

<sup>153</sup> See, *e.g.*, ClearComm Reply Comments at 4; BIA Capital Comments at 4.

78. Further, several commenters request the Commission to affirmatively decide that there will be no cross default.<sup>154</sup> BIA Capital states that one perceived disincentive to providing financing to C block licensees is cross default.<sup>155</sup> In this regard, BIA Capital suggests that the Commission quickly clarify its position on cross defaults, and recommends that a default on payments for some licenses not result in cross default on other licenses which the company is using successfully.<sup>156</sup> ClearComm agrees and urges the Commission to allow licensees to place their licenses in separate entities so that potential financiers may invest in specific markets that meet their investment criteria.<sup>157</sup> AmeriCall and Hughes Network Systems state the effectiveness of the disaggregation option can be assured if the Commission clarifies that it will not pursue cross defaults.<sup>158</sup> AmeriCall and Hughes Network Systems state most regional equity funds are unwilling to look at this sector until they are reassured that their investment in one state is sheltered from events in other states that would impact licenses in those different markets.<sup>159</sup>

79. Discussion. We will not pursue cross default remedies against C block licensees who default on installment payments with regard to other licenses in the C or F blocks. For example, if a licensee defaults on a C block license and that licensee holds other C block licenses on which it is making its payments, we will not declare it to be in default on its debt associated with the other C block licenses. Similarly, if a licensee defaults on a C block license, and also holds F block licenses on which it is making its payments, we will not declare it to be in default on its F block debt.

80. This decision is warranted in light of our efforts to provide current C block licensees who are experiencing financing difficulties with options for meeting their financial obligations to the Commission.<sup>160</sup> We emphasize that our decision only addresses the context of a

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<sup>154</sup> See e.g., AmeriCall *ex parte* letter, July 11, 1997; Magnacom *ex parte* letter, August 13, 1997.

<sup>155</sup> BIA Capital Comments at 4.

<sup>156</sup> *Id.*

<sup>157</sup> ClearComm Reply Comments at 4.

<sup>158</sup> AmeriCall and Hughes Network Systems, Inc., *ex parte* letter, September 16, 1997 at 2.

<sup>159</sup> *Id.*

<sup>160</sup> This decision does not affect our policy with regard to defaults on first or second down payments. See Letter to Kenneth Hobbs from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-260 (rel. February 4, 1997). See also BDPCS, Inc. Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230

licensee's default on an installment payment for a C block license upon other licenses held by that licensee in the C or F blocks. We defer to completion of the Part 1 Rule Making our decision on whether to amend more comprehensively our policy of cross defaults. We also emphasize that existing installment payment default rules and license conditions will continue to apply for those particular licenses in default after March 31, 1998. Accordingly, upon default, a license will automatically cancel and the Commission will initiate debt collection procedures against the licensee and accountable affiliates.<sup>161</sup>

## V. FURTHER NOTICE OF PROPOSED RULE MAKING

### A. Proposals Regarding the Reauction of Surrendered Licenses

81. Background. Several commenters suggest that a reauction of C block licenses is the best method by which the Commission can place C block licenses in the hands of licensees capable of constructing systems and offering service to the public rapidly. Triumph Capital, MCI, and Cook Inlet Communications all support a reauction within four to six months.<sup>162</sup>

82. Discussion. Under the options adopted above, licensees have three options for the surrender of licenses or spectrum to the Commission. A reauction of licenses will assure rapid provision of service to the public. A reauction also will ensure that these licenses are available to all applicants in a rapid and fair fashion. A simultaneous reauction of all the licenses turned in to the Commission will benefit all bidders because they will be able to bid for a number of licenses in a single reauction, instead of a series of piecemeal auctions after defaults and revocations, in which opportunities for aggregation might be less favorable.

#### 1. Licenses to be reauctioned

83. We propose that the reauction include the following licenses: (1) all licenses representing the disaggregated spectrum surrendered to the Commission under the disaggregation option; (2) all licenses surrendered to the Commission on or before January 15, 1998, by incumbent licensees who choose to take advantage of the Commission's prepayment or amnesty options; and (3) all PCS C block licenses currently held by the Commission as a result of previous defaults. By including all available licenses in the reauction, the

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(1997).

<sup>161</sup> 47 C.F.R. § 1.2110(e)(4)(iii). *See also* 31 U.S.C. Chapter 37; 4 C.F.R. Parts 101-105; 47 C.F.R. Part 1, Subpart O.

<sup>162</sup> Triumph Capital *ex parte* letter, August 7, 1997 at 1; MCI *ex parte* letter, August 14, 1997 at 2-3; Cook Inlet Communications *ex parte* letter, August 5, 1997 at 3.

Commission can efficiently and fairly speed service to the public. In addition, offering all available licenses will allow for the most efficient aggregation of licenses. We seek comment on this proposal.

## 2. Eligibility for Participation

84. As we stated in the *Second Report and Order*, all entrepreneurs, all entities that applied for the original C block auction, and all current C block licensees with exceptions, are eligible to bid in the reauction. We seek comment on whether we should restrict participation in the reauction to entities that have not defaulted on any FCC payments.<sup>163</sup> Should we presume that an entity's prior default on payments for an FCC license or authorization makes that entity not financially or otherwise fit to acquire a reaucted C block license? Alternatively, we could review financial qualifications through several other means. For instance, we could allow such entity to participate in an auction, but if the applicant is a winning bidder, set for expedited hearing the financial qualifications of the bidder, and allow the applicant to rebut a presumption that it is not financially qualified.<sup>164</sup> Another alternative would be to request that the entity submit more detailed financial information at the application stage, or require that the entity submit a higher upfront payment amount (*e.g.*, a 50% upfront payment requirement) to participate in the reauction. With regard to C block licensees who elect the disaggregation, amnesty, or prepayment options adopted in the *Second Report and Order*, we observe that by making such election and related payments they are not in default on their C block licenses and, thus, would not be restricted from participation in the reauction (except as otherwise set forth in the *Second Report and Order*).

## 3. Reauction Procedures

85. We propose below auction design and application procedures for the reauction of C block licenses.

### a. Competitive Bidding Design

86. We propose that all licenses and spectrum surrendered to the Commission be awarded by means of a simultaneous multiple-round electronic auction. We base this proposal on our desire to quickly auction available licenses and thereby to promote the most efficient assignment of the spectrum. Consistent with our normal practice, the specific procedural requirements of the auction would be set out by Public Notice prior to the auction. In general, we have indicated that the auction procedures chosen for each service should be those that will best promote the policy objectives identified by Congress.<sup>165</sup> We further

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<sup>163</sup> See 47 U.S.C. § 309(j)(5).

<sup>164</sup> See 47 C.F.R. §§ 24.832(e), 1.2108(d)(3).

<sup>165</sup> 47 U.S.C. § 309(j)(3).

concluded in the *Competitive Bidding Second Report and Order* that in most cases the goals set forth in Section 309(j) will be best achieved by designing auctions that award authorizations to the parties that value them most highly. As we explained, such parties are most likely to deploy new technologies and services rapidly, and to promote the development of competition for the provision of those and other services.<sup>166</sup>

87. Also, multiple-round bidding during the auction will provide more information to bidders about the value of licenses than single round bidding. With better information, bidders have less incentive to shade their bids downward in order to avoid the "winner's curse," that is, the tendency for the winner to be the bidder who most overestimates the value of the item being auctioned.<sup>167</sup> Finally, multiple-round bidding is likely to be fairer than single-round bidding. Every bidder has the opportunity to win if it is willing to pay the most for it. Thus, we tentatively conclude that multiple-round bidding would be the best method of auctioning all available licenses and we seek comment on this tentative conclusion.

88. We also tentatively conclude that all surrendered C block licenses should be awarded in a single simultaneous multiple-round auction. A single simultaneous auction will facilitate any aggregation strategies that bidders may have, and it would provide the most information to bidders about license values at a time that they can best put that information to use. We seek comment on this tentative conclusion.

89. Finally, if we adopt simultaneous multiple-round bidding as our method of auctioning all available licenses, we tentatively conclude that bidding should be allowed only by electronic means, rather than by telephone. Given our desire to conduct the reauction quickly, as well as recent improvements in our electronic bidding software, we tentatively conclude that telephonic bidding should be permitted only in exceptional circumstances, to be determined by the Wireless Telecommunications Bureau in each instance.

#### b. Bidding Procedures

90. Subject to the exceptions discussed below, which are designed to speed the reauction process, we tentatively conclude that the reauction should be conducted in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules,<sup>168</sup> as revised,<sup>169</sup> and substantially consistent with the auctions that have been employed in other wireless services. We also propose to use our Part 24 rules applicable to the C block to the extent that such rules do not conflict with our Part 1 rules or rules specifically adopted

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<sup>166</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360.

<sup>167</sup> *Id.* at 2362.

<sup>168</sup> 47 C.F.R. Part 1, Subpart Q.

<sup>169</sup> We initiated a proceeding last February to revise our Part 1 rules. *See Part 1 Proceeding.*

or proposed in this *Second Report and Order and Notice of Proposed Rule Making* for the reauction of C block licenses. Specifically, except as set forth herein, we propose to apply the Part 1 rules regarding competitive bidding mechanisms,<sup>170</sup> bidding application and certification procedures and prohibition of collusion,<sup>171</sup> submission of upfront payment, down payment and filing of long-form applications,<sup>172</sup> procedures for filing long form applications,<sup>173</sup> and procedures regarding license grant, denial and default.<sup>174</sup> We seek comment on this proposal.

91. Activity Rules. We tentatively conclude that, as we have done in other simultaneous multiple-round auctions, we will conduct the reauction in three stages. Three stages, with bidders required to be more active in each stage, serves to provide bidders with the flexibility to pursue backup strategies as the auction progresses. However, because we believe that efficiently assigning these licenses for rapid service to the public and increased competition in the CMRS marketplace requires a swift reauction of the licenses, we propose to use high activity requirements in the reauction. In recent auctions, for example, we have required bidders to be active on 80% of their eligible licenses in Stage I, 90% in Stage II, and 98% in Stage III. We propose to use similar activity levels in the C block reauction and, to further expedite the auction, require the Bureau to use its delegated authority to aggressively schedule bidding rounds, quickly transition into the next stage of the auction when bidding activity falls, and use higher minimum bid increments for very active licenses. We seek comment on these proposals and tentative conclusions.

92. Reserve Price, Minimum Opening Bid, and Minimum Bid Increments. Section 1.2104 of our rules provides that the Commission may establish reserve prices or suggested minimum opening bids.<sup>175</sup> The Balanced Budget Act directed the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid will be established, unless the Commission determines that a reserve price or a minimum opening bid is not in the public interest.<sup>176</sup> This legislative directive establishes a presumption in favor of reserve prices or minimum opening bids in the reauction. A minimum opening bid is the minimum bid price set at the beginning of the auction below which no bids are accepted.

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<sup>170</sup> 47 C.F.R. § 1.2104.

<sup>171</sup> 47 C.F.R. § 1.2105.

<sup>172</sup> 47 C.F.R. §§ 1.2106, 1.2107.

<sup>173</sup> 47 C.F.R. § 1.2108.

<sup>174</sup> 47 C.F.R. § 1.2109.

<sup>175</sup> 47 C.F.R. § 1.2104(d).

<sup>176</sup> Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997) (to be codified at 47 U.S.C. § 309(j)(4)(F)) ("Balanced Budget Act").

Customarily, an auctioneer has the discretion to lower a minimum opening bid in the course of the auction. A minimum opening bid in the C block reauction, more than a reserve price, will help make certain that the public is fairly compensated for spectrum surrendered to the Commission, expedite the auction and give us the flexibility to make adjustments based on the competitiveness of the auction. We seek comment on this proposal. We also seek comment on the methodology we should use to establish minimum opening bids and what factors we should consider in doing so. We propose minimum opening bids for each market equal to 10% of the corresponding high bid for the market in the original C block auction. Such an approach will scale the minimum opening bids in a way that reflects the relative value of the licenses. We also ask that commenters address whether the amount of the minimum opening bid should be capped to ensure that bidding is not deterred on high valuation markets, in particular. Finally, if commenters believe that a minimum opening bid equal to 10% of the high bid in the original C block auction will result in substantial unsold licenses, or is not a reasonable amount, they should explain why this is so, and comment on the desirability of a higher or lower minimum opening bid.

c. Procedural and Payment Issues

93. Pre-Auction Application Procedures. Auction applicants are required to file a short-form application, FCC Form 175, prior to the start of each auction.<sup>177</sup> Although we have previously allowed both electronic and manual filing of such applications, we tentatively conclude that we should require electronic filing of all short-form applications for the reauction. We believe that electronic filing of applications would serve the best interests of auction participants as well as the members of the public monitoring the reauction. We also believe that an electronic filing requirement will help ensure that the reauction will be completed within the time frame contemplated by this *Further Notice of Proposed Rule Making*. We have developed user-friendly electronic filing software and Internet World Wide Web forms to give applicants the ability to easily and inexpensively file and review applications. This software helps applicants ensure the accuracy of their applications as they are filling them out, and assists them in avoiding errors and omissions. In addition, by shortening the time required for the Commission to process applications before the auction, electronic filing will increase the lead time available to applicants to pursue business plans and arrange necessary financing before the short-form deadline. Our experiences from recent auctions show that bidders are confident that the electronic filing system is reliable. For example, in the broadband PCS D, E, and F block auction, 94% of the qualified bidders filed their short-form applications electronically. In the recently completed WCS auction, all winning bidders filed their long-form applications electronically. In addition, we note that in the *Part I Proceeding*, we tentatively concluded that Sections 1.2105(a) and 1.2107(c) of our rules should be amended to require electronic filing of all short-form and long-form applications.<sup>178</sup> We seek comment on this tentative conclusion.

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<sup>177</sup> See 47 C.F.R. § 1.2105(a).

<sup>178</sup> *Part I Proceeding* at ¶ 46.

94. Upfront Payment. The Part 1 rules require the submission of an upfront payment as a prerequisite to participation in spectrum auctions.<sup>179</sup> We propose to set the amount of the upfront payment for the reauction at \$.06 per MHz per pop. We adopted the same upfront payment amount for our most recent broadband PCS auction, the D, E, and F block auction, in which all applicants for all blocks made a \$.06 per MHz per pop upfront payment.<sup>180</sup> In the *Competitive Bidding Second Report and Order*, we indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population (or "pops") covered by the license or licenses for which parties intend to bid.<sup>181</sup> We reasoned that this method of determining the required upfront payment would enable prospective bidders to tailor their upfront payment to their bidding strategies.<sup>182</sup> At the same time, however, we noted that determining an appropriate upfront payment involved balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders.<sup>183</sup> We concluded that the best approach would be to maintain the flexibility to determine the amount of the upfront payment on an auction-by-auction basis because this balancing may yield different results depending upon the particular licenses being auctioned.<sup>184</sup> In light of the our desire that only serious, qualified applicants participate in the reauction, our proposal of a \$.06 per MHz per pop is appropriate. We seek comment on this proposal. We also seek comment on alternative methods of establishing an upfront payment, and in particular, on how the Commission may estimate the present market value of the spectrum to be auctioned.

95. Down Payment and Full Payment. Consistent with the procedures used in prior auctions, we tentatively conclude that every winning bidder in an auction should be required to tender a down payment sufficient to bring its total amount on deposit with the Commission up to 20% of its winning bid within 10 business days after the issuance of a public notice announcing the winning bidder for the license.<sup>185</sup> We seek comment on this tentative conclusion.

96. If a winning bidder makes its down payment in a timely manner, we propose that it file an FCC Form 600 long-form application and follow the long-form application procedures

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<sup>179</sup> See 47 C.F.R. § 1.2106.

<sup>180</sup> 47 C.F.R. § 24.716(a)(1).

<sup>181</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-78.

<sup>182</sup> *Id.* at 2377.

<sup>183</sup> *Id.* at 2378.

<sup>184</sup> *Id.*

<sup>185</sup> See 47 C.F.R. § 1.2107(b).

in Section 1.2107 of the Commission's rules.<sup>186</sup> After reviewing the winning bidder's long-form application, and after verifying receipt of the winning bidder's 20% down payment, the Commission would announce the application's acceptance for filing, thus triggering the filing window for petitions to deny. We note that the Balanced Budget Act of 1997 authorizes the Commission to establish a shortened period for the filing of petitions to deny.<sup>187</sup> In light of this authority, as well as our desire to conclude the reauction process as quickly as possible, we propose that parties then have 15 days following public notice that an application was accepted for filing to file a petition to deny. If, pursuant to Section 309(d) of the Communications Act, the Commission dismisses or denies any and all petitions to deny, the Commission would announce by public notice that it is prepared to award the license, and the winning bidder would then have 10 business days to submit the balance of its winning bid. If the bidder does so, the license would be granted. If the bidder fails to submit the required down payment or the balance of the winning bid or the license is otherwise denied, we would assess a default payment as discussed below. We seek comment on these proposals.

97. Amendments and Modifications of Applications. To encourage maximum bidder participation, we propose to allow applicants to amend or modify their short-form applications as provided in Section 1.2105.<sup>188</sup> In the broadband PCS context, we modified our rules to permit ownership changes that result when consortium investors drop out of bidding consortia, even if control of the consortium changes due to this restructuring.<sup>189</sup> We propose to adopt the same exception to our rule prohibiting major amendments in the reauction. We seek comment on these proposals.

98. Bid Withdrawal, Default and Disqualification. We tentatively conclude that the withdrawal, default, and disqualification rules for the reauction should be based upon the procedures established in our general competitive bidding rules. With regard to bids that are submitted in error, we propose to apply the guidelines that the Commission has fashioned to provide for relief from the bid withdrawal payment requirements under certain circumstances.<sup>190</sup> We seek comment on this approach.

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<sup>186</sup> See 47 C.F.R. § 1.2107. See also, 47 C.F.R. § 24.707.

<sup>187</sup> Balanced Budget Act.

<sup>188</sup> 47 C.F.R. § 1.2105.

<sup>189</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd 6858, 6868 (1994).

<sup>190</sup> See Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, *Order*, FCC 96-203 (May 3, 1996), and Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, *Order*, DA 96-706 (May 6, 1996). See also Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment and Georgia Independent PCS Corp., Application for Review of Request to Waive Bid Withdrawal Payment Provision, *Memorandum Opinion and Order*, 12 FCC Rcd 6382 (1997) (waiving the full bid withdrawal payments assessed

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d. Anti-Collusion Rules

99. In the *Competitive Bidding Second Report and Order*, we adopted rules to prevent collusion in connection with competitive bidding, explaining that these rules, which are codified at 47 C.F.R. § 1.2105, would enhance the competitiveness of both the auction process and the post-auction market structure.<sup>191</sup> We propose to apply these same rules to the reauction of licenses surrendered to the Commission. We seek comment on this proposal.

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against these parties after a finding that the Commission's remote bidding system may have contributed to some confusion leading to the submission of the erroneous bids).

<sup>191</sup> See 47 C.F.R. § 1.2105(c). See also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-88; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245, 7253-7254 (1994); *Erratum*, Mimeo No. 50278, 1994 WL 575828 (October 19, 1994).

e. Designated Entity Provisions

100. We propose to provide small business bidders in the C block reauction with a two tiered bidding credit, which will provide a greater discount to very small businesses. In the C block auction, a winning bidder that qualified as a small business or a consortium of small businesses was able to use a bidding credit equal to 25% of its winning bid.<sup>192</sup> For the reauction, however, we tentatively conclude that we should offer tiered bidding credits, as we did for F block and, more recently, Local Multipoint Distribution Service (LMDS) small business bidders.<sup>193</sup> We propose to define a second tier of small business, which we will refer to as "very small businesses," as entities that, together with their affiliates and persons or entities that hold interest in such entities and their affiliates, have average gross revenues of not more than \$15 million for the preceding three years. Creation of this subcategory of small business enables us to tailor a bidding credit to meet the needs of entities that may be interested in bidding on spectrum surrendered by C block licensees. Thus, we propose a 35% bidding credit for very small businesses and a 25% bidding credit for small businesses. We seek comment on our proposals and tentative conclusions.

101. We also tentatively conclude that an installment payment program will not be offered in the reauction.<sup>194</sup> We have conducted several auctions without installment payments. The Commission must balance competing objectives in Section 309(j) that require, *inter alia*, that it promote the development and rapid deployment of new spectrum-based services and ensure that designated entities are given the opportunity to participate in the provision of such services.<sup>195</sup> In assessing the public interest, we must try to ensure that all the objectives of Section 309(j) are considered. We have found, for example, that obligating licensees to pay for their licenses as a condition of receipt ensures greater financial accountability from

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<sup>192</sup> 47 C.F.R. § 24.712(a).

<sup>193</sup> See 47 C.F.R. §§ 24.717, 101.1107.

<sup>194</sup> Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "*consider* alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B) . . ." See 47 U.S.C. § 309(j)(4)(A) (*emphasis added*). See also Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

While it is clear that, in many instances, the objectives of section 309(j) will be best served by a traditional, "cash-on-the-barrelhead" auction, it is important that the Commission employ different methodologies as appropriate. Under this subsection, the Commission has the flexibility to utilize any combination of techniques that would serve the public interest.

H.R. Rep. No. 103-111 at 255 (1993).

<sup>195</sup> See 47 U.S.C. §§ 309(j)(3) and (4).

applicants.<sup>196</sup> Thus, we tentatively conclude that we should not extend installment payments to winners in the reauction, given the incentives to entrepreneurs established through the various proposals discussed above. We seek comment on these tentative conclusions.

## VI. CONCLUSION

102. In this *Second Report and Order*, we order resumption of installment payments for the broadband PCS C and F blocks, with the payment deadline reinstated as of March 31, 1998. We also adopt options designed to assist C block licensees that are experiencing financial difficulties to build systems that will promote competition, or to surrender spectrum to the Commission for reauction. These options include disaggregation, amnesty, and prepayment. These provisions will create opportunities for C block licensees to provide service to the public while maintaining the fairness and integrity of our auctions program. We also adopt a *Further Notice of Proposed Rule Making* seeking comment on proposed changes to our C block rules to govern the reauction of surrendered spectrum in the C block.

## VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

### A. Regulatory Flexibility Analysis

103. The Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C. The Initial Regulatory Flexibility Analysis is contained in Appendix D.

### B. Paperwork Reduction Act Analysis

104. This *Second Report and Order* contains a modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Second Report and Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due December 1, 1997. OMB comments are due December 1, 1997. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

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<sup>196</sup> See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Reconsideration*, FCC 97-224, 62 Fed. Reg. 41225 (rel. July 10, 1997) ("800 MHz MO&O") at ¶ 130.

105. This *Further Notice of Proposed Rule Making* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Further Notice of Proposed Rule Making*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice of Proposed Rule Making*; OMB comments are due 60 days from date of publication of this *Further Notice of Proposed Rule Making* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

### C. Paperwork Reduction Act Comment Filing Procedures

106. Written comments by the public on the modified information collections in this *Second Report and Order* are due on or before December 1, 1997. Written comments must be submitted by OMB on the modified information collections on or before December 1, 1997. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov) and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov).

107. Written comments by the public on the modified information collections in this *Further Notice of Proposed Rule Making* are due November 13, 1997. Written comments must be submitted by OMB on the modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov) and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov).

#### D. Ordering Clauses

108. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), this *Second Report and Order and Further Notice of Proposed Rule Making* is hereby ADOPTED, and Sections 1.2110 and 24.709 of the Commission's rules are amended as set forth in Appendix B, effective 60 days after publication in the *Federal Register*. The information collection contained in these rules becomes effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

109. IT IS FURTHER ORDERED THAT the Wireless Telecommunications Bureau's *Suspension Order* dated March 31, 1997, suspending the installment payment obligations for Personal Communications Services (PCS) C block licensees, and the subsequent Public Notice dated April 28, 1997, suspending those obligations for PCS F block licensees are rescinded, effective March 31, 1998, and installment payments for C and F block PCS licensees are reinstated as of that date.

110. IT IS FURTHER ORDERED THAT on or before January 15, 1998, the Election Date, all C block broadband PCS licensees must elect either (1) to continue making payments under their original C block Notes, or (2) one of the options set forth in Section IV of this *Second Report and Order*. The Election Notice must be filed on or before January 15, 1998 with the Office of the Secretary, Federal Communications Commission, Washington, DC 20554 (Attn: Wireless Telecommunications Bureau, Auctions and Industry Analysis Division - Election Notice).

111. IT IS FURTHER ORDERED THAT the Secretary shall send a copy of this *Second Report and Order and Further Notice of Proposed Rule Making*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

112. IT IS FURTHER ORDERED THAT, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

#### E. Ex Parte Presentations

113. The *Further Notice of Proposed Rule Making* is a permit but disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).



**F. Comments**

114. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **November 13, 1997**, and reply comments on or before **November 24, 1997**. In addition, a courtesy copy should be delivered to Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 2025 M Street, Room 5202, Washington, DC 20554. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

**G. Additional Information**

115. For further information concerning the *Second Report and Order*, contact Jerome Fowlkes or Sandra Danner, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418-0660. For further information concerning the *Further Notice of Proposed Rule Making*, contact Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418-0660.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

**APPENDIX A**  
**List of Commenters**

Initial Comments

1. Airadigm Communications, Inc. (Airadigm)
2. ALLTEL Communications, Inc. (ALLTEL)
3. Alpine PCS, Inc. (Alpine)
4. AmeriCall International, L.L.C. (AmeriCall)
5. Bay Springs Telephone Company, Inc. (Bay Springs)
6. Bear Stearns
7. BellSouth Corporation
8. BIA Capital Corporation (BIA Capital)
9. Brookings Municipal Utilities (BMU)
10. Central Wireless Partnership (CWP)
11. Chase Telecommunications, Inc. (Chase)
12. ClearComm, L.P.
13. Comcast Corporation
14. Community Service Communications, Inc. (CSCI)
15. ComScape Telecommunications of Charleston License, Inc. (ComScape)
16. Conestoga Wireless Company (Conestoga)
17. CONXUS Communications, Inc. (CONXUS)
18. Cook Inlet Region, Inc., Cook Inlet Western Wireless, PV/SS PCS, L.P., Western Wireless Corporation, AirGate Wireless, L.L.C., Aerial Communications, Inc., TeleCorp, Inc., and Airadigm Communications, Inc. (collectively, CIRI)
19. Creative Airtime Services, L.L.C. (Creative)
20. Cyber Sites, L.L.C.
21. Dewey Ballantine
22. DiGiPH PCS, Inc. (DiGiPH)
23. Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. (collectively, Duluth PCS)
24. Eldorado Communications, L.L.C. (Eldorado)
25. Fortunet Communications, L.P. (Fortunet)
26. General Wireless Inc. (GWI)
27. Holland Wireless, L.L.C., Wireless 2000, Inc., and Northern Michigan PCS Consortium, (collectively, Holland)
28. Horizon Personal Communications, Inc. (Horizon)
29. Indus, Inc.
30. Integrated Communications Group (Integrated)
31. Kansas Personal Communications Services, Ltd. (KPCS)
32. Ken W. Bray
33. Magnacom Wireless, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership (collectively, Magnacom)
34. MCI Communications Corporation (MCI)

35. Meretel Communications Limited Partnership (Meretel)
36. MFRI, Inc.
37. Morris Communications, Inc. (Morris)
38. National Wireless Resellers Association (NWRA)
39. National Association of Black-Owned Broadcasters, Inc. (NABOB)
40. National Association of Black Telecommunications Professionals, Inc. (NABTP)
41. National Telephone Cooperative Association (NTCA)
42. Nextel Communications, Inc. (Nextel)
43. NextWave Telecom, Inc. (NextWave)
44. Northcoast Communications, L.L.C. (Northcoast)
45. Official Committee of Unsecured Creditors of Pocket Communications, Inc. (Pocket Creditors)
46. Omnipoint Corporation
47. OneStop Wireless
48. OnQue Communications, Inc. (OnQue)
49. PCS Plus L.L.C. and McKenzie Telecommunications Group, Inc. (collectively, PCS Plus)
50. Pioneer Telephone Association, Inc. (Pioneer)
51. Pocket Communications, Inc. (Pocket)
52. Point Enterprises, Inc. (Point)
53. R&S PCS, Inc. (R&S)
54. RFW, Inc.
55. Rural Telephone Finance Corporation (RTFC)
56. Small Business Coalition (SBC)
57. SouthEast Telephone Limited Partnership, Ltd. (SouthEast Telephone)
58. Southwestern Bell Mobile Systems (SBMS)
59. SpectrumWatch
60. Sprint Spectrum L.P.
61. Sprint Corporation
62. Tennessee L.P. 121 (Tennessee)
63. Toronto Dominion Bank and Toronto Dominion Securities (collectively, Toronto Dominion)
64. Urban Communicators PCS Limited Partnership (Urban Comm)

### Reply Comments

1. Airtel Communications, Inc. (Airtel)
2. ALLTEL
3. Alpine
4. American Mobile Telecommunications Association, Inc. (AMTA)
5. Antigone Communications Limited Partnership and PCS Devco, Inc. (collectively, Antigone/Devco)
6. BellSouth Corporation
7. Carlson Technologies, Inc. (Carlson)

8. Cellexis International, Inc. (Cellexis)
9. ClearComm, L.P.
10. Comcast Corporation
11. Conestoga
12. CONXUS
13. CIRI
14. Duluth PCS
15. Fortunet
16. GWI
17. GTE Service Corporation (GTE)
18. Ken W. Bray
19. MCI
20. Millison Investment Management, Inc. (MIM)
21. Mountain Solutions LTD, Inc. (Mountain Solutions)
22. Nextel
23. NextWave
24. Northcoast
25. Omnipoint Corporation
26. OnQue
27. PCS Wisconsin, LLC
28. PrimeCo Personal Communications, L.P. (PrimeCo)
29. Radiofone PCS, L.L.C. (Radiofone)
30. R&S
31. RTFC
32. Sprint Spectrum L.P.
33. Stan P. Doyle
34. Telecommunications Resellers Association (TRA)
35. UniDial Communications (UniDial)
36. Urban Comm
37. U.S. Airwaves, Inc.
38. Wireless Nation, Inc.

#### Ex Parte Comments

1. AirGate Wireless, July 18, 1997
2. AirGate Wireless, July 22, 1997
3. AirGate Wireless, September 9, 1997
4. Alpine, September 17, 1997
5. Alpine, September 23, 1997
6. AmeriCall, July 11, 1997
7. AmeriCall, August 5, 1997
8. AmeriCall and Hughes Network Systems, Inc., September 16, 1997
9. AmeriCall, ClearComm, and Chase, September 17, 1997

10. BIA Capital, August 4, 1997
11. Chase, August 11, 1997
12. ClearComm, August 7, 1997
13. Congressman Rick Boucher, July 25, 1997
14. Congressman Richard Burr, August 11, 1997
15. Congressman Thomas Davis, July 30, 1997
16. Congressman John D. Dingell, September 16, 1997
17. Congressman Steny H. Hoyer, August 7, 1997
18. Congresswoman Sue W. Kelly, August 11, 1997
19. Congressman W.J. "Billy" Tauzin, August 13, 1997
20. Congressmen W.J. "Billy" Tauzin and Edward J. Markey, September 16, 1997
21. CONXUS, August 27, 1997
22. Cook Inlet Communications, August 5, 1997
23. Cook Inlet Communications, August 15, 1997
24. Cook Inlet Region, Inc., September 23, 1997
25. El Dorado, August 13, 1997
26. GWI, August 4, 1997
27. GWI, August 15, 1997
28. GWI, August 18, 1997
29. Magnacom Wireless, LLC, August 13, 1997
30. MCI, August 14, 1997
31. NextWave, June 23, 1997
32. NextWave, July 29, 1997
33. NextWave, August 5, 1997
34. Nokia, September 15, 1997
35. Nokia, September 16, 1997
36. Northern Michigan PCS Consortium, L.L.C., August 14, 1997
37. Omnipoint Corporation, August 18, 1997
38. Omnipoint Corporation, September 3, 1997
39. Omnipoint Corporation, September 5, 1997
40. Omnipoint Corporation, September 23, 1997
41. R&S, August 11, 1997
42. Senator Christopher S. Bond, July 14, 1997
43. Senator Paul D. Coverdell, September 24, 1997
44. Senator Pete V. Domenici, September 10, 1997
45. Senators James M. Inhofe, Don Nickles, and Conrad Burns, August 7, 1997
46. Senator John McCain, August 19, 1997
47. Senator John McCain, September 18, 1997
48. Senator Daniel Patrick Moynihan, August 4, 1997
49. Triumph Capital, August 7, 1997
50. Triumph Capital, September 23, 1997 ("McCarthy Letter")
51. Urban Comm, August 21, 1997
52. Urban Comm, September 17, 1997
53. U.S. Small Business Administration, September 8, 1997 ("Glover Letter")



**APPENDIX B  
FINAL RULES**

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 1 - PRACTICE AND PROCEDURE**

1. Section 1.2110 is amended by amending paragraph (e)(4)(i) to read as follows.

**§ 1.2110 Designated Entities**

- (a) \* \* \* \*
- (b) \* \* \* \*
- (c) \* \* \* \*
- (d) \* \* \* \*
- (e) \* \* \*
- (4) \* \* \*

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default, except that broadband PCS frequency block C licensees making the March 31, 1998, interest payment pursuant to their elections under the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, *Second Report and Order*, WT Docket No. 97-82 (rel. Oct. 16, 1997), shall be in default if they are more than sixty (60) days delinquent on such payment.

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 24 - PERSONAL COMMUNICATIONS SERVICES**

2. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

3. Section 24.709 is amended by adding paragraph (b)(9) to read as follows.

**§ 24.709 Eligibility for licenses for frequency Blocks C and F.**

- (a) \* \* \* \*
- (b) \* \* \*

(9) *Special rule for licensees disaggregating or returning certain spectrum in frequency block C.*

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the first auction for frequency block C, which began on December 18, 1995, will be eligible to bid in a reauction of licenses for frequency block C conducted after March 31, 1998.

(ii) The following restrictions will apply for any reauction of frequency block C licenses conducted after March 31, 1998:

(A) Applicants that elected to disaggregate 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in subsection IV.B., Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, *Second Report and Order*, WT Docket No. 97-82 (rel. Oct. 16, 1997), will not be eligible to apply for such disaggregated licenses until 2 years from the start of the reauction of those licenses.

(B) Applicants that surrendered any of their frequency block C licenses as provided in subsection IV.D. (the "prepayment option") Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, *Second Report and Order*, WT Docket No. 97-82 (rel. Oct. 16, 1997), will not be eligible to apply for the licenses that they surrendered to the Commission until 2 years from the start of the reauction of those licenses.

(C) For purposes of this paragraph, *applicant* shall mean the applicant and its affiliates and any present or former qualifying member of a control group and their affiliates.

## APPENDIX C

Final Regulatory Flexibility Analysis  
(Second Report and Order)

As required by the Regulatory Flexibility Act (RFA),<sup>197</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking in WT Docket No. 97-82.<sup>198</sup> The Commission sought written public comment on the proposals in the *Part 1 Proceeding*, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the IRFA.

- A. Need for, and objectives of, the Second Report and Order (Order) in WT Docket No. 97-82

This Order is designed to assist C block broadband personal communications services (PCS) licensees to meet their financial obligations to the Commission while at the same time helping the Commission meet its goals of ensuring the rapid provision of PCS service to the public.

- B. Summary of significant issues raised by public comments in response to the Initial Regulatory Flexibility Analysis (IRFA)

There were no comments filed in response to the IRFA; however, in this proceeding we have considered the economic impact on small businesses of the rules adopted herein. *See* section E, *infra*.

- C. Description and estimate of the number of small entities to which rules will apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.<sup>199</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>200</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small

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<sup>197</sup> 5 U.S.C. § 604.

<sup>198</sup> Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, FCC 97-60 (rel. Feb. 28, 1997) (*Part 1 Proceeding*).

<sup>199</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>200</sup> 5 U.S.C. § 601(6).

Business Act.<sup>201</sup> Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).<sup>202</sup>

This Order applies to broadband PCS C and F block licensees. The Commission, with respect to broadband PCS, defines small entities to mean those having gross revenues of not more than \$40 million in each of the preceding three calendar years.<sup>203</sup> This definition has been approved by the SBA.<sup>204</sup> On May 6, 1996, the Commission concluded the broadband PCS C block auction. The broadband PCS D, E, and F block auction closed on Jan. 14, 1997. Ninety bidders (including the C block reauction winners, prior to any defaults by winning bidders) won 493 C block licenses and 88 bidders won 491 F block licenses. Small businesses placing high bids in the C and F block auctions were eligible for bidding credits and installment payment plans. For purposes of our evaluations and conclusion in this FRFA, we assume that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees potentially affected by this order, are small entities.

D. Description of the projected reporting, recordkeeping, and other compliance requirements

A licensee electing one of the options set forth in the Order must file a written notice of such election (the "Election Notice") with the Wireless Telecommunications Bureau, Auctions and Industry Analysis Division no later than the Election Date. The "Election Date" is January 15, 1998. Those licensees electing either (1) to continue making payments under their original C block Notes; (2) the disaggregation option; or (3) the amnesty option but elect to take advantage of the build-out exception and retain certain of their licenses, will be required to execute and submit a modification of their Notes, Security Agreements, Uniform Commercial Code ("UCC") Financing Statements and any other related documents securing their Notes within the time frame established by the Bureau.

Continuation under Existing Note(s). Any licensee that wishes to continue making installment payments in accordance with the terms of its original C block Note, must elect to do so by submitting the Election Notice.

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<sup>201</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

<sup>202</sup> 15 U.S.C. § 632.

<sup>203</sup> See 47 C.F.R. § 24.720(b)(1).

<sup>204</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 (1995); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5581-5584 (1995); 47 C.F.R. §§ 24.320(b) and 24.720(b).

Disaggregation. For licensees electing the disaggregation option, the Election Notice must include the following: (1) a list of all licenses being disaggregated; (2) the original of all licenses being disaggregated; and (3) all originals of the Notes and Security Agreements for those licenses being disaggregated for cancellation by the Commission.

Amnesty. For licensees electing the amnesty option, the Election Notice must include the following: (1) a list of all licenses being surrendered; (2) if applicable, a statement indicating that the licensee intends to avail itself of the build-out exception together with a list of those BTA licenses it intends to retain and pertinent information concerning build-out; (3) the original of all licenses being surrendered; and (4) originals of the Notes and Security Agreements for those licenses being surrendered for cancellation by the Commission.

Prepayment. For licensees electing the prepayment option, the Election Notice must include the following: (1) a list of all licenses being prepaid; (2) a payment in the amount of any additional "new money" as a licensee desires to apply to the prepayment of its licenses; (3) the original of all licenses not being prepaid in accordance with this option; and (4) all originals of the Notes and Security Agreements for those licenses not being prepaid for cancellation by the Commission.

- E. Steps taken to minimize significant economic impact on small entities, and significant alternatives considered

The Commission believes that it is in the public interest to adopt these provisions to facilitate use of C block licenses without further regulatory or marketplace delay. The menu approach adopted in this Order is intended to provide options to facilitate the rapid introduction of service to the public, while recognizing that ultimately the decisions concerning competition and services appropriately are marketplace decisions and should not be determined by government intervention. This decision is intended to be fair to current C block licensees (including small entities), to bidders who were not successful in their attempts to obtain licenses in this spectrum, and to the public desiring new and innovative competitive services. These options minimize the potential significant economic impact on small entities because they meet the unique circumstances facing the C block licensees and permit these small entities to choose one of three alternative solutions to reduce their debt to the Commission. All of the entities affected by this Order are small entities, and the intent of this Order is to alleviate, to some extent, the financial difficulties faced by these small entities. These options are relatively straightforward, achieve a degree of fairness to all parties, including losing bidders in the C block auction, continue to promote competition and participation by smaller businesses in providing broadband PCS service, and avoid solutions that merely prolong uncertainty.

The Commission received numerous comments and *ex parte* comments that addressed these issues at great length. The majority of commenters favor some type of relief, including debt restructuring, spectrum disaggregation, or a penalty-free license surrender (*i.e.*, amnesty) followed by a reauction. Other commenters express disapproval of any relief, and urge the

Commission to strictly enforce its rules.<sup>205</sup> Several commenters contend that the Commission should enforce the applicable installment payment plan terms and not modify its current designated entity rules.<sup>206</sup> These commenters generally argue that the Commission should act immediately to enforce the current installment payment rules, as any continued delay causes unnecessary confusion for both licensees and others.<sup>207</sup> The Commission declines to adopt this alternative due to the financial difficulties reported to be facing many C block licensees. The Commission believes that there may be a need for some measure of relief for these small entities in addition to the suspension of payments previously granted.

Several commenters urge the Commission to restructure the C block debt because doing so is in the public interest. Some commenters recommend deferral of the C block debt.<sup>208</sup> Representatives Tauzin and Markey support specific prepayment options.<sup>209</sup> The Commission declines to adopt these proposals. The Commission does not wish to adopt temporary solutions that might only postpone the difficulties faced by the C block licensees, including small entities, and further prolong uncertainty. Under such an approach there is no certainty that the long term financial outlook facing many licensees would be improved. The Commission believes that the options adopted in this Order are relatively straightforward and achieve a degree of fairness to all parties, including small entities. Finally, the Commission rejects any proposal of a deferral of payments on the grounds that such proposal would be

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<sup>205</sup> See, e.g., Airadigm Comments at 2-3; ALLTEL Comments at 2; CIRI Comments at 2-3.

<sup>206</sup> See Airadigm Comments at 2-3; ALLTEL Comments at 2; Bay Springs Comments at 1; BellSouth Comments at 1-2; Comcast Comments at 3, 5; CSCI Comments at 1; Conestoga Comments at 1; CIRI Comments at 2-3; Nextel Comments at 2; Northcoast Comments at 1-2; Omnipoint Comments at 3; Pioneer Comments at 1; Point Enterprises Comments at 1; SpectrumWatch Comments at 1; Sprint Corp Comments at 1; Sprint Spectrum L.P. Comments at 1-2; PCS Wisconsin Reply Comments at 1; Radiofone Reply Comments at 1; Antigone/Devco Reply Comments at 1-2; U.S. Airwaves Reply Comments at 1; PrimeCo Reply Comments at 1-2; GTE Reply Comments at 1-2.

<sup>207</sup> See, e.g., Nextel Comments at 22; Airadigm Comments at 4; Bay Springs Comments at 4; AirGate Wireless *ex parte* letter, July 31, 1997.

<sup>208</sup> Suggestions in the record addressing "deferral/restructuring" propose that the Commission provide for some period (ranging from 2-20 years) during which installment payments would be deferred. Some of these plans explicitly reduce the "net present value" of the debt (e.g., the total amount of debt discounted to reflect the time value of money), while others leave it unchanged, assuming the government interest rate as the discount rate. See, e.g., BMU Comments at 2; ClearComm Comments at 3 & Reply Comments at 3; Chase Comments at 3; Alpine Comments at 9 & Reply Comments at 11; Horizon Comments at 13; SBC Comments at 9; R&S Comments at 21; Indus Comments at 3; MFRI Comments at 3; Magnacom Comments at 1-2; NABOB Comments at 3-4; RFW Comments at 2; KPCS Comments at 2; Urban Comm Comments at 9; PCS Plus Comments at 2; Holland Comments at 3; Eldorado Comments at 1-2; MCI Comments at 2; Bear Stearns Comments at 2-3; Fortunet Comments at 4 & Reply Comments at 8; RTFC Reply Comments at 2; NextWave Reply Comments at 20; TRA Reply Comments at 5; Urban Comm Reply Comments at 4; Congressman Tom Davis *ex parte* letter, July 30, 1997; Congressman Rick Boucher *ex parte* letter, July 25, 1997.

<sup>209</sup> See Congressmen Billy Tauzin and Edward Markey *ex parte* letter, September 16, 1997.

unfair to unsuccessful bidders who may have withdrawn from the C block when prices became too high.

Among other goals, Section 309(j) directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses and other designated entities.<sup>210</sup> At the same time, Section 309(j) requires that the Commission ensure the development and rapid deployment of new technologies, products and services for the benefit of the public, and recover for the public a portion of the value of the public spectrum resource made available for commercial use.<sup>211</sup> In assessing the public interest, the Commission must try to ensure that all the objectives of Section 309(j) are considered. The Commission believes that those goals are best met by promoting efficient competition while maintaining fairness and efficiencies of process in the Commission's rules.

#### F. Report to Congress

The Commission shall send a copy of the Order, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. § 801(a)(1)(A). A copy of the Order and this FRFA (or summary thereof) will be published in the Federal Register. *See* 5 U.C.C. § 604(b). A copy of the Order and this FRFA will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

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<sup>210</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>211</sup> 47 U.S.C. §§ 309(j)(3)(A), (C).

**APPENDIX D****Initial Regulatory Flexibility Analysis  
(Further Notice of Proposed Rulemaking)**

As required by the Regulatory Flexibility Act (RFA),<sup>212</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the rules proposed in the Further Notice of Proposed Rulemaking (Notice) in WT Docket No. 97-82. Written public comments are requested on the IRFA. Comments on the IRFA must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines for comments on the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.

**A. Need for, and objectives of, the proposed rules**

This Notice is being initiated to secure comment on proposed changes to auction rules to govern the reauction of returned broadband PCS spectrum in the C block. Among other goals, Section 309(j) of the Communications Act of 1934, as amended, directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses and other designated entities.<sup>213</sup> Section 309(j) also requires that the Commission ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public, and recover for the public a portion of the value of the public spectrum resource made available for commercial use.<sup>214</sup> The Commission is seeking comment on proposed changes to auction rules to govern the reauction of returned broadband PCS spectrum in the C block.

**B. Legal basis**

This action is taken pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309 (j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), 303(r), and 309(j).

**C. Description and estimate of the number of small entities to which the proposed rules will apply**

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<sup>212</sup> 5 U.S.C. § 603.

<sup>213</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>214</sup> 47 U.S.C. §§ 309(j)(3)(A), (C).

The Commission is required to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.<sup>215</sup> The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.<sup>216</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>217</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.<sup>218</sup> Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).<sup>219</sup>

The rule changes proposed in the Notice will affect all small businesses which avail themselves of these rule changes, including small businesses currently holding C block and F block broadband PCS licenses who choose to participate and other small businesses who may acquire licenses through reauction. The Commission, with respect to broadband PCS, defines small entities to mean those having gross revenues of not more than \$40 million in each of the preceding three calendar years.<sup>220</sup> This definition has been approved by the SBA.<sup>221</sup> On May 6, 1996, the Commission concluded the broadband PCS C block auction. The broadband PCS D, E, and F block auction closed on Jan. 14, 1997. Ninety bidders (including the C block reauction winners, prior to any defaults by winning bidders) won 493 C block licenses and 88 bidders won 491 F block licenses. Small businesses placing high bids in the C and F block auctions were eligible for bidding credits and installment payment plans. For purposes of our evaluations and conclusion in this IRFA, we assume that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees potentially affected by this order, are small entities. In addition to the 178 current small business licensees who may participate at the reauction of C block licenses, a number of additional small business entities may seek to acquire licenses through reauction, and thus be affected by these rules.

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<sup>215</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>216</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>217</sup> 5 U.S.C. § 601(6).

<sup>218</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

<sup>219</sup> 15 U.S.C. § 632.

<sup>220</sup> See 47 C.F.R. § 24.720(b)(1).

<sup>221</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 (1995); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5581-5584 (1994); 47 C.F.R. §§ 24.320(b) and 24.720(b).

In addition, the Commission proposes to provide small business bidders in the C block reauction with bidding credits, and to that end proposes a two tiered bidding credit which will provide a greater discount to "very small businesses."<sup>222</sup> The Commission proposes to define the second tier of very small business as entities that, together with their affiliates and persons or entities that hold interest in such entities and their affiliates, have average gross revenues of not more that \$15 million for the preceding three years. Creation of this subcategory of small business will enable the Commission to tailor a bidding credit to meet the needs of entities that may be interested in bidding on spectrum returned by C block licensees. Thus, the Commission proposes a 35 percent bidding credit for very small businesses and a 25 percent bidding credit for small businesses.

To assist the Commission analyzing the total number of affected small entities, commenters are requested to provide information regarding how many total broadband PCS small business entities would be affected by the rules proposed in this Notice. In particular, the Commission seeks estimates of how many broadband PCS entities, existing and potential, will be considered small businesses or very small businesses.

D. Description of reporting, recordkeeping, and other compliance requirements

There are no additional reporting, recordkeeping, or other compliance requirements as a result of the Notice.

E. Steps taken to minimize significant economic impact on small entities, and significant alternatives considered

The Commission proposes to apply the same rules that were used in the C block auction to the reauction of C block licenses, with some modifications designed to encourage participation by small businesses while at the same time helping to ensure the best use of the spectrum through the competitive bidding process.

The Commission proposes to conduct the C block reauction in three stages. Having three stages, with bidders required to be more active in each stage, serves to provide bidders with the flexibility to pursue backup strategies as the auction progresses. The Commission proposes to use high activity requirements in the reauction. In addition, the Commission proposes to use similar activity levels in the C block reauction and, to further expedite the auction, require the Wireless Telecommunications Bureau to use its delegated authority to aggressively schedule bidding rounds, quickly transition into the next stage of the auction when bidding activity falls, and use higher minimum bid increments for very active licenses.

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<sup>222</sup> In the C block auction, a winning bidder that qualified as a small business or a consortium of small businesses was able to use a bidding credit equal to 25 percent of its winning bid. For the reauction, the Commission proposes tiered bidding credits, as were offered for F block and, more recently, Local Multipoint Distribution Service (LMDS) small business bidders.

The Commission proposes to establish a minimum opening bid for the reauction. A minimum opening bid is the minimum bid price set at the beginning of the auction below which no bids are accepted. A minimum opening bid in the C block reauction will help ensure that the public is fairly compensated for licenses returned to the Commission, expedite the auction and give the Commission the flexibility to make adjustments based on the competitiveness of the auction. The Commission proposes minimum opening bids for each market equal to ten percent of the corresponding high bid for the market in the original C block auction. Such an approach will scale the minimum opening bids in a way that reflects the relative value of the licenses.

The Commission proposes to require electronic filing of all short-form applications for the reauction. Electronic filing of applications would serve the best interests of auction participants as well as the members of the public monitoring the reauction. The Commission believes that an electronic filing requirement will help ensure that the reauction will be completed within the time frame contemplated by this Notice.

The Commission proposes to set the amount of the upfront payment for the reauction at \$.06 per megahertz per population ("MHz per pop").

The Commission proposes that parties have fifteen (15) days to file a petition to deny following public notice that an application was accepted for filing. If, pursuant to Section 309(d) of the Communications Act, the petitions to deny are dismissed or denied, the Commission would announce by public notice that it is prepared to award the license, and the winning bidder would then have ten (10) business days to submit the balance of its winning bid. If the bidder does so, the license would be granted. If the bidder fails to submit the required down payment or the balance of the winning bid or the license is otherwise denied, a default payment would be assessed.

Section 309(j) of the Communications Act of 1934, as amended, directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses and other designated entities.<sup>223</sup> Section 309(j) also requires that the Commission ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public, and recover for the public a portion of the value of the public spectrum resource made available for commercial use.<sup>224</sup> The Commission believes these provisions in the Notice help meet those goals and promote efficient competition while maintaining fairness and efficiencies of process in the Commission's rules.

F. Federal rules which overlap, duplicate, or conflict with these rules

None.

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<sup>223</sup> 47 U.S.C. § 309(j)(3)(B).

<sup>224</sup> 47 U.S.C. §§ 309(j)(3)(A), (C).

**Affirming and Dissenting Separate Statement  
of  
Chairman Reed E. Hundt**

**Re: C Block Financing Issues**

The C block is the long-desired fifth wireless license: the third so-called PCS license to be added to the two outstanding cellular licenses. A half-dozen holders of the C block licenses for about two-thirds of the country by population are in financial distress and apparently unable to pay monies promised to the government by these licensees in a fair auction of the C block licenses. The question presented today is what should the FCC do as a creditor and a policymaker in this situation. For ten months I have been stating that the key policy goal in wireless is competition, not debt collection. However, it is also true that this Commission, as a creditor, ought to behave in a commercially reasonable manner. In America debtors who cannot pay are not thrown into prison, nor ought they be consigned to a Serbonian bog of Commission deliberation in which armies of lawyers and lobbyists and Commission staff are sunk. Yet for almost a year my colleagues on this Commission have been unwilling to make a commercially reasonable restructuring proposal of any kind to any of the financially troubled C block licensees. Nor have they been willing to promote competition by expediting some solution to the need to restructure and finance the C block.

Having this fifth license used in the marketplace is a longstanding goal of policy in this country; allowing it to be unfinanceable due to moralistic arguments against commercially reasonable structuring of debtridden licensees faced with unsolvable financial problems is inconsistent with all the wireless competition policies of this Commission and the repeated public statements by all commissioners for many years. Today the Commission, after ten months of inaction in response to my repeated urgings, finally decides to take some significant steps consistent with the reasonable commercial practices of any debt holder and consistent with our oft-stated commitment to competition.

The Commission has a history dating back to 1993 of seeking to promote small business entrepreneurial activity in wireless with these C block licenses. This history included the current Commissioners' decision in 1994 to reallocate the PCS spectrum so as to make sure the C block licenses were of equal viability to the two other 30 MHz PCS licenses auctioned in 1994. Subsequently, the Commission designated the C block as an entrepreneur's block expressly to promote participation by small businesses and businesses owned by minorities and women. After the Supreme Court's Adarand decision, that plan had to be revised to eliminate provisions for minorities and women but the Commission retained its primary objective of providing entrepreneurial opportunities for small businesses. All current Commissioners supported this objective.

After the FCC successfully persuaded the Supreme Court to lift an appellate court stay, the C block auction began in 1995. To the dismay of many, some of the winners bid at levels far beyond apparently prudent ranges. Most did not; dozens of financially prudent bidders won at reasonable prices. But a handful of bidders submitted bids that cannot be explained other than by assuming they made their decisions according to erroneous market predictions, bad financial advice or a triumph of hope over thought. Regrettably, these bidders -- irrationally exuberant in hindsight and, according to many, even at the time of bidding -- won nearly three quarters of the United States market measured by population.

Some of these bidders have subsequently criticized the FCC's auction process and other FCC actions. None of this criticism has the slightest basis in fact. All amount to unworthy attempts to shift blame from the bidders to the auction conductor. Nothing about this history discredits auctions as a means of distributing licenses. Moreover, the installment payment and bidding credit plan that facilitated entrepreneurial entry into the C block in fact worked very well with respect to the majority of the licensees. More small business participation in wireless resulted from prudent bids in the C block than in virtually all other FCC license distributions in this decade.

However, the current situation, and indeed the situation for almost a year, has been that a handful of large C block licensees have been unable to attract sufficient financing to create viable businesses. These are at least Nextwave, Pocket, GWI, ChaseTel and ClearComm.

Unfortunately, all other C block bidders have their business futures occluded by the financial troubles of these large, financially troubled bidders. That is because Wall Street financiers are interested in seeing the build out of the entire block with the attendant possibilities for roaming that would be realized by complete buildout. In other words, the financial difficulties of the largest troubled bidders are in fact visited on otherwise financeable C block bidders.

Furthermore, the country's wise policy of encouraging wireless competition is hampered by the financial troubles of the C block. The sooner this block of licenses can be financed, the quicker we will see long overdue robust price and quality competition in wireless.

In addition, our decision not to adopt a single standard, and to permit competition among CDMA, TDMA and GSM, is also undercut by a failure to put the C block on reasonable financial footing. It is simply necessary to have at least three PCS firms operating in major markets to permit each of these technologies a fair chance to gain adherents.

I was aware last December that the market was unlikely to finance many of the largest bidders. That is why, in my year end statement entitled, "The Hard Road Ahead," I stated that "commercial lenders often reassess the terms of loans to address changes in the marketplace" and that C block licenses "perhaps ... should be able to request renegotiation of their financing where it is necessary and appropriate to do so."

I made this suggestion because it is necessary for creditors, such as the United States in this situation, to act in a commercially reasonable manner. And it is necessary for the Commission to focus persistently on major policy goals and not to make the blunder of thinking that Congress has tasked us to attempt to maximize revenue from the C block auction. Here the goals are, as a matter of statute, not to maximize revenue from the C block, nor to punish debtors for their unwise bids, but rather we are commanded by Congress to promote competition, deployment of service and small business entry.

For the greater part of the last ten months my colleagues and I have disagreed over these objectives. They have focussed instead on questioning whether the largest licensees were really financially troubled, or they have evinced disinterest in the significance to consumers of these licensees' business prospects, or they have dwelled on the disappointment of other C block bidders who dropped out of the bidding in markets where price levels reached the heights now universally seen as imprudent and unsustainable. Finally, they have expressed indifference to the risk of bankruptcy filings by the subject licensees, rather than negotiating restructuring of their debt according to market-based principles.

With perfect hindsight, had Congress written the law to state with inexorable clarity that the auctioning of wireless licenses does not suddenly make them property subject to bankruptcy jurisdiction, this latter point would be moot. Indeed, if tying up licenses in bankruptcy litigation were foreclosed as an option for a troubled C block licensee, then the Commission could simply retrieve licenses from defaulters, and reauction them to other small businesses. This is why I asked Congress this summer to amend the law to make clear that such action could be taken. No other commissioners joined me at that time. Powerful lobbying forces defeated my efforts. I am glad that, at least in recent days, all commissioners have joined this effort. However, responsible leaders in Congress have assured us that no such legislation is likely this year.

Pocket Communications, one of the largest C block licensees, is already in Chapter 11. An objective of the Commission therefore ought to be to compromise the Pocket litigation, as we have been advised by Sidley & Austin, Gordian Group, and many other experts. I had hoped that today's decision would offer a market-based compromise Pocket would accept. I have doubts that the decision today will accomplish that result.

Another objective ought to be to reach market-based compromises with the other troubled C block licensees that would at least roughly approximate results that could be obtained in bankruptcy settlements -- because that strategy would save the time and money expended trying to retrieve unused licenses in bankruptcy.

I might be the only FCC commissioner in history who has actually litigated as an attorney for creditors in bankruptcy court. Normally this would be of small relevance to my job. However, from personal experience, as well as from the advice of our experts, I am quite confident that bankruptcy litigation can cause substantial delay even when the creditor's legal position is impregnable. That is the case here. Some debtor's attorneys have suggested that such issues as perfection of UCC-1's are a legal problem for the Commission. This is a frivolous assertion, that underscores the desperate ingenuity of a bankrupt firm's counsel but

plays no role in our thinking or actions. Highly skilled outside counsel, Department of Justice lawyers, our own General Counsel's office, and my own personal experience all convince me beyond any doubt that we will prevail in bankruptcy court. But the process of bankruptcy litigation takes time and money. Meanwhile, the assets in question are, based on all advice, declining in value while lawyers talk and commissioners deliberate and lobbyists advocate. The reason is the lead time granted to the other licensees. If we truly want small business entrepreneurs to make use of the C block spectrum, we simply have to permit them to restructure their government debt or obtain the debtor's voluntary agreement to return the licenses quickly for prompt reauction. This is why it is so important for the Commission to make proposals that might obtain such agreement at least from some of the C block licensees. This action is overdue, and although the Commission may not have made a perfect decision today, some decision was better than none.

The test of any work-out plan for the financially-troubled C block licensees appears to be this: Does the plan avoid protracted bankruptcy, with the attendant costs of debtor and creditor litigation, while also generally treating fairly the competing interests of the taxpayers, consumers, non-government creditors, equity holders and other interested parties?

Today we adopt at least one plan that is highly likely to obtain a voluntary and fair restructuring settlement agreement from several of the troubled bidders. I refer to the disaggregation plan, which allows licensees to return 15 Mhz of spectrum in return for a proportionate reduction in the amount of their outstanding debt. This will help small or rural area licensees who may not need the full 30 Mhz of spectrum to serve their markets. If long delayed, at least we are at last adopting this change in our rules.

The so called "amnesty" option we adopt today is also a good idea and I would have been happy to extend it to any licensee at any time. The problem of course is that it does not provide any incentives to the licensees' non-government creditors to consent to a return of licenses and therefore is not a workable solution. Congressman Dingell has told us that in his view "Giving licensees a choice between walking away from investments already made and facilities already constructed, or taking a chance in bankruptcy court, is tantamount to giving them no choice whatsoever." Nonetheless, I don't object to our decision to offer this as an option.

Another plan we considered including in our Order today had real promise for practical use -- the so-called "full price buy out plan." This plan, proposed originally by the bipartisan leadership coalition of Congressmen Markey and Tauzin, would have permitted a licensee to retain as many of its licenses as it could pay for in cash today (at net present value) using the full amount of funds on deposit plus any additional sums it could immediately raise. Licenses that could not be paid for in this manner would be returned and reauctioned in exchange for discharge of the debt obligations associated with these licenses.

Unfortunately, the prepayment plan included in today's Order fails by a number of key measures to be consistent with the Markey/Tauzin suggestion and with good policy. I register my strong dissent as to this part of the Order.

First, it is questionable why a majority of Commissioners departs from the bipartisan consensus in Congress on this issue. Just two weeks ago, Senator Domenici wrote the Commission urging that we adopt a "comprehensive solution ... [that would] put into productive use the spectrum." He also advised against pursuing "options that forestall the commercial application of Block C spectrum because of time-consuming and costly litigation resulting ... from extended bankruptcy proceedings." This sentiment is also reflected in letters from Senator McCain received over the past six weeks. Likewise, Senators Inhofe, Nickles and Burns expressed their view in early August that "debt restructuring of the PCS licensees may be necessary to address the concerns that have been raised by the interested parties." Congressmen Markey, Tauzin and Dingell have each supported the full price buy out plan described above.

This correspondence makes plain Congress' direction that we adopt a workable, comprehensive plan for the C block. That is consistent with the statute. The Congressional mandate has not been adequately met by the Order we adopt today.

The Order requires licensees to forfeit 30% of their deposits if they elect the "buy-out" option, even though this money has already been paid and would be used to purchase licenses at the price bid in the original C Block auction. That penalty is more than 50 times higher than any previous penalty in FCC history. The bipartisan view from Congress is that no such forfeiture should be imposed -- a difference which potentially represents hundreds of millions of dollars lost by incumbent licensees for reasons that bear no relation to the policy goals included in Section 309(j) of the Communications Act which granted the Commission's original auction authority. Today's Order also ignores the bipartisan conclusion of Congress that prepayment prices should be set based on "the net present value of the ... prices for such licenses". Instead, the prepayment alternative ignores the time value of money and extracts an additional penalty from licensees on the order of several hundred million more dollars.

Second, the prepayment option we adopt today stands fundamentally at odds with basic principles of commercial reasonableness. By requiring licensees that elect the option to prepay their licenses at the "nominal" bid price, the plan ignores the time value of money and inflates the effective price paid by the licensees that it purportedly seeks to assist. Put simply, the value of a bid paid out over ten years is significantly less --around 40% less -- than that same bid paid in cash. The consequence of this oversight is a massive penalty for any licensee that might otherwise elect this alternative. The prepayment option layers on an additional penalty by requiring licensees to forfeit 30% of their deposit. Note that this forfeiture of deposited monies is ordered even though the licensees would use their deposits to prepay licenses at effective prices higher than the amount that they bid. At base, the plan ignores fundamental principles of finance and, as a result, cannot reasonably be expected to appeal to licensees or their creditors.

Third, the prepayment plan adopted today has too much risk of not being helpful to the financing of the licenses held by the very large bidders that constitute the vast majority of the C block licensed POPs in the United States. The acid test of any work out plan is whether the deal is accepted by the debtor; if not, the plan is not a work-out but rather only works us deeper into the toils of a drawn out bankruptcy litigation. In this case, the prepayment plan

extracts the two extraordinary penalties described above and offers little in the way of incentives for licensees to accept it. According to the Congressional Budget Office Report, bankruptcies could cost consumers in excess of \$5.5 in lost benefits. Taxpayers lose because the re-auction of licenses is conducted in a piecemeal fashion at the end of lengthy bankruptcy litigations, ensuring smaller proceeds as the value of the licenses deteriorates from delay. Such are the costs of the Commission majority's sanctimonious rigidity.

The majority's unwillingness to adopt a comprehensive plan for addressing the financial situation of the C block is inexcusable and inexplicable. The legacy of that decision is a substantial risk of bankruptcies that Congress and any commercially reasonable enterprise would have us eliminate. By focussing on punishment and ignoring the need to make the work-out "workable", the majority sacrifices consumer and taxpayer interests. This approach is fundamentally misdirected and contrary to our statutory directives. In short, today's decision will delay more competition for most Americans. Competition delayed is competition denied.

Finally, it is not clear to me that the parameters of our Order today and the accompanying Notice treat fairly those C block companies -- such as Omnipoint, Cook Inlet and Airadigm -- that have accepted our challenge to bring service to market and who, as result, have invested heavily in build out. These licensees have operating businesses that are tied to specific C block licenses. Consequently, they do not have the same flexibility as other licensees to disaggregate or participate in a "full price buy out", which would require a dramatic reduction in the size of their existing service footprints. This concern with fairness is more than a metaphysics. These licensees must compete for capital in the public markets with other C block licensees, including winners of the subsequent re-auction. To the extent that such a re-auction of spectrum returned under any of the options in our Order today "resets" the market price for spectrum, it could impair access to capital for those licenses that are significantly built out but which carry artificially higher prices per pop.

The concerns I have identified do not subtract from the following facts:

1. After many months of discussion the Commission has finally recognized the need to restructure certain debt in the C block.
2. Today's decision will permit us to obtain some licenses for reauction and will permit some licensees to get financing, based on all available information.
3. And we have, at the very least, not simply extended the payment dates on the existing notes by the many years sought by some licensees. This proposal was unfair to the taxpayer and an unnecessary windfall to most C block licensees.

Therefore, I affirm in part and dissent with respect to the so-called "full price buy-out" plan.

**Separate Statement  
of  
Commissioner Susan Ness**

*Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82*

A little over a year ago, we conducted an auction for the "C-block" PCS licenses. Like our other auctions, this auction was carefully conceived to operate on market-based principles, allowing licenses to be obtained by those who valued them most at prices to be set by free market mechanisms. It was also crafted to fulfill a Congressional mandate to bring "designated entities" -- especially small businesses, often owned by women and minorities -- into the marketplace. And it did.

I supported our commitment to market-driven auctions and to designated entities. I reaffirm that commitment today.

Our auction was conducted properly, our rules were clear, and numerous licensees stand ready to meet their payment obligations fully and on time. And while it is truly unfortunate that a handful of bidders overbid and/or overleveraged, it is clearly *not* our responsibility to prevent them from failing in the marketplace, or from going into bankruptcy. It *is* our responsibility to manage the spectrum, including the auction process, with *fairness* and *integrity*.

Although I sincerely regret that some licensees now find themselves unable to meet their commitments, I remain unpersuaded that the FCC should alter the outcome of the auction by providing bidders vastly more favorable terms than those to which they previously agreed. To grant overly generous accommodations to certain C-block licensees, after the auction, would be to forsake the marketplace and return to the government picking winners and losers. I do not think that this should be our spectrum policy for the future.

Such a result also would be unfair to those C-block licensees that counted on us to enforce our rules; unfair to disappointed C-block bidders who dropped out of the auction when the licenses they desired became too expensive; unfair to licensees in other spectrum blocks who are offering competing services; and unfair to the U.S. taxpayer.

I do support, however, modest options that would facilitate the return of spectrum and reauction in a timely and fair manner. The menu of options we offer to all C-block licensees today provides an appropriate balance.

## **Clear Rules; A Fair Auction**

Everyone participating in the C-block auction was subject to the same rules. The auction was run fairly. Even now there are no serious complaints about our conduct of the auction or the clarity of our rules.

Our rules were designed, as Congress intended, to create opportunities for small businesses. Eligibility to bid was limited, and favorable payment terms were available. While we offered licensees the opportunity to pay for the licenses in installments, we were not a lender in the traditional sense: the payment terms were available to all small businesses without regard to their credit-worthiness or soundness of their business plans. First and foremost, we acted as a licensing agency and, as our rules clearly specified, the licenses were granted conditionally.

Each license was conditioned upon timely payments according to a predetermined payment schedule, with the caveat that the license would automatically cancel if the payments were not made. The conditional interest granted is clearly noted on the face of the license itself, and in the relevant Commission rules and orders. (Indeed, the conditional nature of the license and the attendant penalties and loss of downpayment are duly acknowledged in at least one large bidder's public filings with the Securities and Exchange Commission.)

## **The Problem**

The C-block auction resulted in licenses being won by a handful of large players -- each with license bids in excess of a billion dollars -- and a multitude of smaller players. Several of the largest winners paid well in excess of prices comparable to those paid by the A and B block licensees. Compounding the problem, some of these same large players have highly leveraged capital structures with debt/equity ratios as high as 10 - 1, tying their future to conducting a successful public offering. In contrast to the larger players, the majority of the C-block winners have smaller holdings, paid considerably less per pop for their licenses and/or had more prudent capitalization. For the most part, the smaller licensees do not appear to be in financial trouble.

Last spring, a handful of the largest winners requested relief from their obligations -- essentially to keep their licenses on more favorable terms than those they voluntarily agreed to just sixteen months ago. They were outnumbered by many smaller licensees who have not sought relief and who are ready to build out their markets.

Nonetheless, as the campaign for significant modifications won some support at the Commission, other licensees echoed the call, reflecting a natural desire to pay less should the Commission be willing to rewrite the terms of the agreement. That chorus transcended the C-block and has now spilled over into other radio services. Interest payments were temporarily suspended as of March 31, 1997, pending Commission consideration of what, if any, measures should be taken to assist financially troubled licensees.

Other interested parties include many small companies -- some of which failed to win any licenses and dissolved -- who feel the prices were unreasonably driven up by certain bidders during the auction. Many of the investors in these companies and in those C-block licensees currently meeting their obligations believe fairness dictates that defaulting parties forego their licenses, that the licenses be re-auctioned, and that everyone have a fair chance to acquire the licenses in a subsequent auction.

### **Marketplace Disruption**

We must, however, consider certain countervailing factors. The financial markets became unsettled subsequent to our suspension of C-block installment payments. Licensees with sound business plans have been enveloped by the cloud of marketplace uncertainty, and the flow of capital needed for continued build-out has been impeded. C-block licensees, to varying degrees, have plans on hold, as the financial community awaits the outcome of this proceeding.

The Commission must take action now to get the C-block of licensees back to business. While there has been a wide range of proposals offered and considered, the one thing that almost all parties have agreed upon is that final resolution is needed immediately to enable rapid build-out and foster competition.

### **A Menu of Options**

We adopt a menu of options that is likely to help many of the troubled licensees, without jeopardizing the principles of fairness and integrity that are essential to market-driven auctions. In developing these options, the majority of Commissioners have discarded proposals that would have fundamentally changed auction outcomes or created incentives for licensees to alter otherwise achievable business plans. In addition, we have avoided giving anyone a "thumb on the scales" in a subsequent auction.

Specifically, we are continuing the deferral of installment payments until March 31, 1998, making the total suspension period a full year. This resumption date ensures that all C-block licensees and prospective financial backers will have sufficient time to complete their deals. Some will also benefit from the access to foreign equity that is permitted, beginning January 1, 1998, under the recent WTO Agreement. (This is all the relief that was initially sought by one bidder that is now urging us to adopt a very substantial restructuring.)

All C-block licensees who do not choose one of the three following options will be expected to resume payments under their existing agreements. I hope and anticipate that the vast majority of successful bidders will proceed in this fashion.

The three options are:

*First*, under the amnesty option, licensees may forfeit *all* of their licenses and their downpayments. In return, the Commission will (in coordination with the Department of Justice) approve forgiveness of their outstanding debt and cancellation of the additional penalties, including a deficiency payment (representing the difference between the net bid price and the price obtained in a subsequent auction), that otherwise would be due. The licenses will then be re-auctioned.

*Second*, under the disaggregation option, licensees may return half of their spectrum in a given market or markets in exchange for a corresponding reduction of debt. This is consistent with our existing disaggregation rules, facilitates new spectrum-based competition in the marketplace, and better enables the cash flows of the licensees to service the significantly reduced debt. We will re-auction licenses for the 15-megahertz spectrum blocks that are returned under the same designated entity terms as apply to all other C-block licenses. Several of the largest licensees have endorsed this option.

*Third*, under the prepayment option, licensees may apply 70 percent of their downpayments from licenses they now choose to abandon and 100 percent of their downpayments for licenses they now choose to keep to pay for as many licenses at the original auction price as they can afford. This is a buy-out, not a bail-out. Again, returned spectrum will be re-auctioned under the same terms as apply to all other C-block licenses.

### **Rejected Options**

We carefully considered and discarded other options. For example, our dissenting colleague would have offered vastly more generous buy-out options. His actions suggest that the prospect of a large licensee filing for bankruptcy must be avoided at all costs. I cannot agree.

*Substantial Discounts:* Under the approach advocated by the Chairman, the debt owed by the licensees would be drastically discounted -- a 40% haircut to the American taxpayer -- well below the prices that other, subsequently disappointed, bidders were clearly willing to pay. This would be replacing a market-based outcome with an FCC-directed outcome. I agree with the Chairman's prior statements that the market -- not the FCC -- should pick the winners and losers.

In my view, the price bid is the price bid. Bidders were not offered a cash versus credit price. The notes do not provide for prepayment discounts. If the FCC wanted to induce licensees to prepay, we would have included a prepayment schedule in our notes and rules. To the contrary, the favorable financing terms offered -- at an interest rate reflecting the cost of capital to the U.S. government -- were designed, in part, to induce designated entities to hold their licenses for a full ten years. This was consistent with Congress's stated goals to bring small business, including women and minorities, into the market -- on a sustained basis. Therefore a licensee would be unjustly enriched if it received the full ten year benefit of attractive financing without the burden of holding the license for the full term.

*Use of All Downpayments:* I also disagree with the Chairman that the C-block licensees should be permitted to "spend" 100 percent of their deposits from licenses they no longer want, to pay for licenses they *do* want. These funds have been paid to the U.S. Treasury and are not the licensees' to redeploy as they wish. That policy was clearly stated in our rules and documentation. Indeed, the Chairman reiterated that view in an April 30, 1997, speech to the Federal Communications Bar Association:

Some say that the C-block licensees will not pay the total of their commitments to installment payments. If that is true, they will not hold the licenses any longer. But still the taxpayers will have received all the installment payments to that date, and we will reactuate the licenses. . .

A buyer of an option to purchase a piece of property is not entitled to apply the price of that option to the purchase price of another property. If licensees were able to use 100 percent of their deposits to cherry-pick which licenses they want to keep and which they want to return, they would recoup in full what they paid and there would be no deterrent in future auctions against bidding excessively. Such a result surely would poison a market-based auction.

Moreover, we have repeatedly refused to allow defaulting licensees to recoup their downpayment -- not just in the C-block auction, but in other auctions. Again, the purpose is to ensure the integrity of the auction.

Nonetheless, to accommodate some of the troubled licensees, the majority has agreed to allow them to apply up to 70 percent of the downpayments on licenses returned and 100 percent of the downpayment on licenses kept toward payment for selected licenses. The remaining 30 percent of the downpayment on returned licenses equates to the 3% of bid price default penalty specified in our rules.

The Wireless Telecommunications Bureau has routinely assessed such penalties, including loss of downpayment, on defaulting bidders.<sup>1</sup> It also have assessed similar penalties against defaulting auction winners in other spectrum bands. While the amount at stake for the largest C-block licensees is not insignificant, surely it cannot be the policy of the FCC that we grant generous breaks to the largest bidders while we strictly apply our rules -- including the penalty provisions -- to the smaller bidders.

*Transferable Bidding Credit:* Finally, the Chairman would have allowed licensees to return all licenses and then apply 100% of their downpayments as a transferable bidding credit in a subsequent auction. This option, too, was carefully considered and discarded as being grossly unfair to losing C-block bidders, and to those bidders who already have built out their systems and cannot risk returning their licenses. It would have put a "thumb on the scales" in the subsequent

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<sup>1</sup>For example, in May, one C-block bidder, BDPCS, Inc., was assessed a \$67.7 million penalty, which totals 7% of the face amount of its bids of approximately \$873 million. See BDPCS, Inc., Order, 12 FCC Rcd 6606 (WTB, 1997). Another C-block bidder, C.H. PCS, was assessed an initial penalty for over \$6.4 million. C.H. PCS Inc., Order, 11 FCC Rcd 22430 (WTB, 1996).

auction in favor of the defaulting bidders. Those who bid up the original auction would now be rewarded by receiving full use of their downpayments toward the same licenses, at presumably significantly lower prices with "use it or lose it" dollars, or to cash out through another bidder. No wonder this concept found few policy adherents.

### **Other Misconceptions**

*Declining value of the licenses:* Clearly, it would be better if C-block licensees did not file for bankruptcy. As a former communications lender, I am painfully aware of the problems and timeframes associated with bankruptcy proceedings. Nonetheless, I do not share the view that the C-block spectrum is a declining value asset, or that if the licenses were tied up in protracted litigation, they would ultimately yield a small fraction of today's worth. Our PCS service rules are extremely flexible, allowing licensees to provide both fixed and mobile services. With changing technology constantly creating new services, there is every likelihood that demand for this spectrum will be there whenever the licenses are reauctioned.

*Forestalled Competition:* Nor do I believe that C-block licensees must build their systems now or consumers will suffer from lack of competition in mobile communications. Even if buildout of a substantial portion of the C-block licenses were delayed, consumers still have the benefit of competition from the A and B blocks, wide area SMR, and the PCS D, E, and F blocks, in addition to the two cellular licenses in each market. Consumers in many markets already enjoy a substantial reduction in rates as a result of PCS competition.<sup>2</sup> Moreover, licensees are obligated to have built their systems only by the fifth year. Thus even if bankruptcy were avoided, there is no guarantee that service would commence immediately.

I reject the argument that if we do not provide extraordinary relief to the largest C-block licensees, other C-block licensees will be stymied by lack of roaming opportunities for their customers. The marketplace recognizes the problem, and has been working on a solution. Equipment manufacturers are helping to forge agreements that will enable the PCS equipment to roam nationwide, and new handsets operate on both cellular and PCS frequencies. I am confident that wireless telephone competition will not come to a grinding halt if there were a delay in the buildout of some of these licenses.

### **Conclusion**

The FCC's primary responsibilities are to write fair rules, run fair auctions, and issue licenses to successful bidders. We have an obligation of fairness and impartiality to those who bid but chose not to overbid or overleverage. And we owe it to the C-block licensees who seek no special treatment but just want to get about their business to avoid changing the rules in any fundamental way that is detrimental to their business plans.

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<sup>2</sup>The Yankee Group identifies over 40 markets that now have three wireless competitors and 10 markets with four competitors. It observes that pricing in competitive markets with at least one new PCS operator averages 18% lower than in markets with no PCS competitors. *Yankee Watch Mobile Flash -- Competition Begins to Have an Impact on Wireless Pricing (April 18, 1997).*

I believe the approach we adopt today fairly balances the competing interests. Restoring regulatory certainty to the marketplace promotes investment, competition, and service to the American public. Even though the approach we adopt today is the product of negotiation and compromise, and does not reflect the first-choice preferences of any individual Commissioner, I am satisfied that under present circumstances adoption of this order is the course of action that best serves the public interest.

**SEPARATE STATEMENT OF**  
**COMMISSIONER RACHELLE B. CHONG**

*Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, WT Docket No. 97-82, Second Report and Order and Further Notice of Proposed Rulemaking*

*Introduction*

Three years ago, we set up a series of new rules for the conduct of a historic auction, the first U.S. auction of spectrum for the purpose of providing Personal Communications Service (PCS). Our previous assignment methods of lotteries and comparative hearings were time-consuming, resource-intensive, and encouraged losing applicants to tie up the licenses in years of litigation. We believed that auctions would speed the development and deployment of new services to the public; encourage the efficient use of spectrum; and generally award licenses to those parties who value them most highly and who are thus most likely to introduce service rapidly to the public. Finally, auctions recovered for the public a portion of the value of the spectrum.<sup>1</sup> Thus, we firmly believed that the public interest would be served by having market forces, rather than regulators, decide who should be assigned licenses for the PCS spectrum. We also put our trust in market forces to determine which licensees would succeed and which would fail.

Consistent with our statutory mandate under section 309(j),<sup>2</sup> however, we incorporated in our auction rules some special assistance to "designated entities," including small businesses, minorities, women, and rural telephone companies. After some unexpected delay caused by the release of the Supreme Court's *Adarand* decision,<sup>3</sup> this assistance was narrowed to apply only to small businesses. Because the main problem small business faced was access to capital,<sup>4</sup> we gave them a number of regulatory advantages to address this problem and to give them opportunities to succeed. These tools included a smaller down payment, installment payments and their own block (C Block) so they would not have to bid against larger, "deep pocket" companies.

Despite these advantages, some C Block licensees have found themselves in financial trouble. These licensees allege that the higher per pop<sup>5</sup> values they paid for their C Block licenses

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<sup>1</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd. 2348, 2349-50 (1994).

<sup>2</sup> 47 U.S.C. § 309(j).

<sup>3</sup> *Adarand v. Peña*, 515 U.S. 200 (1995).

<sup>4</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd. 5532 (1994).

<sup>5</sup> "Pop" is defined as prices per MHz per population.

as compared to their counterparts in the A and B Blocks, together with alleged recent downturns in the wireless financial markets, have made it difficult for them to obtain financing. A number of C Block licensees have petitioned this Commission asking for relief. They have made impassioned pleas for very dramatic restructuring of their installment payment plans. Some have gone so far as to claim that if we do not restructure their debt, they will go into bankruptcy, pointing to one large C Block licensee who has already gone into bankruptcy.

Since the beginning of this debate, my initial reaction to these requests for relief was to turn them down. No one disputes that our rules at the time of the auction were clear. Every applicant knew exactly what would happen if a licensee failed to pay in a timely manner. In our rules and in the notes signed by the C block licensees, the Commission could not have been clearer that we granted these licenses subject to conditions. If a licensee failed to meet a condition, including making a timely installment payment, it would be in default; in such an event, the license would be returned to the Commission.<sup>6</sup>

### *Major Restructuring Requests*

Regardless of these clear rules and executed financial agreements, some C Block licensees have asked us for dramatic restructuring, including up to a 70-80% reduction of their debt or deferrals of all payments for a number of years. I believe it would be unwise for the Commission to agree to any such major restructuring. First, I believe that a major restructuring -- or any other dramatic after-the-fact rule change designed to bail out every financially-troubled C Block licensee -- harms beyond repair the integrity and credibility of our auction rules. Such a major restructuring would make a mockery of our entire auction process.<sup>7</sup> In addition, I believe major restructuring would encourage speculation in any future auctions, because bidders may rely upon anticipated regulatory relief in making bids that are higher than prudence would warrant. Further, any major restructuring might also deter future investment because of the uncertainty caused by our regulatory actions. It is not just the integrity of our auctions rules that is at stake; if we were to permit major restructuring, we would head down a very slippery slope which could have dire consequences for the agency and all of its rules.

Second, I opposed any major restructuring because I felt that it would be inherently unfair to other bidders and licensees, including the following: (1) losing C Block bidders who made prudent bids in accordance with our rules but were outbid by those now in financial trouble; (2) rule-abiding C Block licensees who are promptly making their payments and building out their systems just the way Congress and the Commission wanted them to; and (3) other broadband and narrowband PCS licenses who are competing with the C Block licensees for financial support in the

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<sup>6</sup> I believe that our licensees reasonably should have expected the Commission to deny requests for relief. Even our dissenting colleague, who thinks that the relief we provide C Block licensees does not go far enough, has publicly stated that if defaults occurred, he would not hesitate to take back the licenses. *See* speech by Chairman Reed Hundt, "To Loop or Not to Loop: Is that the Question?" before the Cellular Telecommunications Industry Association (March 26, 1996) ("But I have heard that some bidders believe that the FCC will forgive the down payment due when the auction is over and even may forgive the principal payments which begin six years later. In the event that anyone knows anyone who thinks such thoughts, I have some advice you can pass on to them: Forget about it.")

<sup>7</sup> My dissenting colleague states that we have a "sanctimonious" attitude. Far from passing any moral judgments, my decisionmaking is based on the facts, the law, and notions of sound public policy.

marketplace. These other bidders and licensees have expressed tremendous frustration and downright anger that the Commission would even consider breaching its duty to the American taxpayers and to our other licensees by changing our rules after the fact to give unwarranted relief to financially troubled C block licensees. These licensees are right -- every notion of fair play is violated by a bailout. If we go too far to help the financially troubled C Block licensees, we end up skewing the marketplace and rendering more serious harm to others who played by our rules.

### *The Menu Approach*

It has been my consistent position that the wisest thing for us to have done was to decide quickly to enforce our rules. Having said that, some of my colleagues wished to go much farther. In the spirit of compromise and because I felt strongly that we needed to resolve the C Block question as quickly as possible,<sup>8</sup> I initiated the idea of a menu approach and agreed to compromise on the ultimate menu that we adopt today in order provide some modest and limited relief for troubled C Block licensees.

### *The Prepayment Option*

Although I support the majority decision, I remain concerned that we may have gone too far, particularly with the prepayment option. I would have preferred not to include this option at all, or if so, to allow the parties to use only 50% of their deposits. Again, due to the need to get the proceeding concluded, and because I felt that the 70% figure was consistent with our rules,<sup>9</sup> I ultimately agreed to the majority's proposal. This proposal was, however, as far as I thought we could prudently go, without endangering the integrity and credibility of our rules.

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<sup>8</sup> My dissenting colleague has characterized the majority of the Commissioners as being unwilling to act, or the cause of a ten month delay in reaching a resolution of the C Block issue. I wish to set the record straight. The first C Block request for relief was filed in March 1997, and the draft Public Notice putting out those requests for comment was not presented to the other Commissioners' offices until late May. Reply comments on the petition were due in July 1997, after which time the Staff drafted an item. Thus, given the pleading cycle, no action could have resulted before August. The notion that the Commissioners in the majority are somehow responsible for a ten month delay is ridiculous. Since August, the three Commissioners and our staffs have been deeply engaged in this issue, meeting with dozens of parties, talking with financial analysts and Congress members, reading dozens of *ex parte* filings, and consulting with bankruptcy counsel and the FCC Task Force. In truth, the only delay in this decision was caused by the Chairman, who, for about eight weeks, was wedded to an approach not favored by a single other Commissioner, and who refused to concede defeat. It was he who erected a number of procedural roadblocks in the way of a more timely item. Notably, when a majority of the Commissioners directed the staff in writing to prepare a draft item disfavored by the Chairman, he directed the staff to disregard our instructions, claiming that under Section 5(a) of the Communications Act, he is the "CEO" of the Commission and as such, is the sole person who may "coordinate and organize the work" of the Commission's staff. While Section 5(a) states that the Chairman may coordinate and organize the work of the Commission, he may do so only "in such a manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission." Clearly, the prompt and efficient disposition of the C block matter was not served by a Chairman who refused to allow the staff to draft a decision supported by a majority of the Commissioners. Having studied the legislative history of Section 5(a), I know that Congress did not intend for Section 5(a) to be a tool of the Chairman to defeat the basic structure of the Commission as a multi-member body, with majority rule and equal votes granted to each Commissioner.

<sup>9</sup> See 47 CFR Section 1.2104(g)(2).

My dissenting colleague makes clear that he would have preferred to allow the licensees to use 100% of the downpayment and to allow a discount on the net bid price to the net present value. I believe his proposal would have been bad public policy for a variety of reasons. First, I believe that it would have been unfair and commercially unreasonable for us to have discounted the face value of the notes to their net present value. It is clearly fair to other bidders and to the integrity and credibility of our rules for the prepayment to be in the amount of the note, *i.e.* to make the licensees pay what they bid. If we offered an arbitrary discount to net present value, then every C Block licensee -- even those who can pay what they bid -- would demand the same discount. Clearly, the loser would be the American taxpayer, and the culprit the agency that cannot abide by its own rules. Further, to offer deep discounts off the net amount of the debt is outside normal commercial practices. By allowing C Block licensees to pay off their debt in advance of the maturity date, we are allowing them to reap the benefit of not incurring additional interest due on the principal amount owed. To discount the amount of principal owed by C Block licensees would unfairly permit a windfall.

Second, I object to my dissenting colleague's characterization of our decision to allow licensees to use only 70% of their deposits (as opposed to 100%) as an unreasonable imposition of a "penalty." This is no penalty! The prepayment option is simply that -- an option. If a licensee wishes to continue to make installment payments under the terms of its agreement with the Commission, it may do so and all of the monies on deposit with the Commission will go to pay for the purchase of those licenses. Allowing parties to take deposits that were targeted for a specific market's license, aggregate those deposits and use them to buy other licenses for other markets is an enormous benefit that our rule abiding C Block licensees can't enjoy. Under our rules, no such aggregation is allowed; those monies on deposit would have been forfeited to the Commission if the installment payments were not made on each license. Thus, allowing a licensee to use any percentage of deposits for any license they return to the Commission is an enormous benefit; allowing licensees to use 70% of those deposits is downright generous.

Nor do I believe that our failure to adopt the Chairman's prepayment plan makes our C Block approach unworkable. As an initial matter, I do not agree that, as my dissenting colleague asserts, the acid test of our decision is how many licensees avail themselves of the options we set forth here today.<sup>10</sup> At the time we put in place our C Block auction rules, I expected there to be winners and losers. There will be some who may not have prudently bid or who are overcome by subsequent market events; I do not believe it to be the Commission's job to bail out every licensee who finds itself in financial trouble. This notion is inherently inconsistent with an auction and market forces process.

Further, I believe that the more modest relief we have adopted herein does provide some reasonable alternatives for financially troubled C Block licensees. I am optimistic that our menu of options will be attractive to a wide range of licensees. Several of the options we presented have been specifically advocated by and supported by commenters.<sup>11</sup> We also have taken steps to make

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<sup>10</sup> Indeed, if all parties took an option, it may be evidence that the proposal was too generous.

<sup>11</sup> Clearcomm, L.P., Americall International, L.L.C., and Chase Telecommunications, L.P. *ex parte* letter, September 17, 1997.

our option attractive to those who have built out their systems.<sup>12</sup> In addition, it appears from recent press reports, that our options may even be attractive to those licensees who are in bankruptcy.<sup>13</sup> A third party has petitioned the bankruptcy court in the *Pocket* bankruptcy matter, seeking to purchase Pocket's assets and resume its installment payments.<sup>14</sup> This development generally confirms the wisdom of my initial position that the best thing to do was to simply enforce the rules, and let the market work. In any event, this development supports the majority's belief that the options we have adopted are sufficiently attractive to encourage parties to invest in even the most troubled of C Block licensees.

### *Bankruptcy Concerns*

It may well be, however, that our menu approach does not appeal to every licensee and that some C Block licensees will reject all the options and go into bankruptcy. This is neither a surprise to me nor a development that causes me any serious alarm. In fact, this is a risk I am willing to take. My dissenting colleague's statements to the contrary notwithstanding, it is not the Commission's job to bail out every C Block licensee. Some bidders simply made imprudent business decisions, and despite our desire to assist small businesses in starting wireless businesses, the Commission's C Block auction process only offered *opportunities*, not *guarantees* of success. Our job here is to make sure that the public interest is served. The decision we make today strikes the right balance between our responsibility to preserve the integrity and credibility of our rules and our obligation to be fair to all licensees -- including those who are successful and those who find themselves in trouble.

Although I am not indifferent to the sad plight of the financially troubled licensees, or to the delays in service and costs to the Commission associated with a bankruptcy proceeding, I disagree with my dissenting colleague that we should make the threat of bankruptcy the key driver of our decision today. There are three main reasons for my view. First, bankruptcies are a normal activity of our commercial world and, in our role as lender, should be expected. In fact, since, as Commissioner Ness astutely noted, the Commission did not even check applicants' financial status as a traditional lender would have, it truly would have been extraordinary had there been no C Block bankruptcies. The Commission has litigated many a bankruptcy before, and I have full faith in our counsel to obtain the best result possible given our strong case.

Second, despite assertions by my dissenting colleague to the contrary, I do not think the presence of a C Block licensee as the "fifth competitor" in the market is the key to competition in the wireless industry. Even without a C Block licensee in all of the markets, competition in the

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<sup>12</sup> Under each of the options, those who have built out have an opportunity to keep the licenses in those markets where they have built out -- subject to certain restrictions designed to prevent "cherry picking."

<sup>13</sup> Although, in general, I am loathe to comment on a pending litigation matter, because this matter was reported in the press and my dissenting colleague raises it in his dissent, I feel I may briefly discuss it here. I am, however, deeply disappointed that my colleague, an experienced litigator, would see fit to include in his separate statement the advice of our bankruptcy counsel as to our conduct of pending litigation. Moreover, any implication that our counsel's advice supports only the Chairman's position is simply incorrect.

<sup>14</sup> "National Telecom Makes Unsolicited \$1.5 Billion Bid For Pocket," Communications Daily, October 3, 1997.

wireless market will continue to flourish.<sup>15</sup> The combination of four PCS and cellular players, each with more than 25 MHz of spectrum, together with the D, E and F Block licensees, each with 10 MHz, and an enhanced SMR provider makes for a vibrant competitive mix. Nor do I believe that the whole C Block will fail if the largest competitors do not build out their systems immediately. When we declined to adopt a single technology standard for PCS, we left open the possibility that there would be situations where parties would have to roam on PCS blocks other than their own. Although a delay in the roll out of service by a third PCS competitor may make roaming agreements a bit more difficult to negotiate, with the recent advancements of dual mode phones, carriers will soon have four wireless systems on which to roam.

Finally, I disagree with my dissenting colleague's characterization of the C Block as "a wasting asset." If there is one thing that I have learned in my years in the dynamic wireless industry, it is foolish to try and predict the future. Spectrum and services once thought to have little value have often proven to be extremely valuable. For example, C Block spectrum -- which some knowledgeable parties thought would sell for significantly less than A and B block spectrum -- far outstripped those values. Although time to market is certainly one factor in determine the value of spectrum, I think the value of the C Block licenses in the future will depend on many factors, including developments in technology and the amount and type of other spectrum available for similar uses.

### *Conclusion*

In sum, I support the majority's decision today with full confidence that we have made a wise and fair decision. I hope that the regulatory certainty that will flow from our menu approach will finally allow the C Block licensees to get back to the business of building out their systems.<sup>16</sup>

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<sup>15</sup> It is worth noting that our rules do not require PCS licensees to build out their systems in less than 5 years in any case. 47 CFR § 21.930.

<sup>16</sup> It does seem fitting somehow that this Commission, who cut its first teeth on the PCS auction and service rules back in the summer of 1994, finish its term with yet another major PCS decision.