

Statement of

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CHAIRMAN
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Before the

**SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE**

On the

NEXTWAVE SETTLEMENT LEGISLATION

**Tuesday, December 11, 2001
3:00 p.m.
2123 Rayburn House Office Building**

I. Introduction

Good afternoon, Mr. Chairman and Members of the Subcommittee. I am pleased to appear before you and offer my professional opinion on the public interest merits of the NextWave settlement, and the necessity of legislation to secure those benefits for the American consumer.

As you consider this important matter, and its myriad provisions, I would respectfully suggest keeping three central points at the forefront of your deliberations:

First, consider what posture the Government actually is in, as opposed to where we all wish it stood. Under the court ruling, NextWave has a rightful claim to the licenses, and the Commission's re-auction -- with its glittering bids totaling \$16 billion -- has been nullified.

Second, given these circumstances (regrettable though they may be), we must ask if this settlement nonetheless salvages substantial value for the American taxpayer. The Government concluded that it does, putting the licenses to work and recovering two-thirds of the proceeds it would have gotten, had Auction No. 35 not been undermined by the court ruling.

Third, even if the settlement is slightly bitter to swallow, we must ask if there is a better alternative. The Government concluded that the only other alternative posed greater risks to the public's interest than did the settlement. In my testimony today, I will elaborate on these conclusions.

And, finally, I respectfully request this Subcommittee and the Congress consider an important issue related to this case-- settling with NextWave still leaves a gaping loop hole for anyone seeking to participate in an auction and then avoid the resulting government debt by declaring bankruptcy. Spectrum belongs to the public, and I believe that, even if we never provide for installment payments, it is important for Congress to make clear how spectrum auctions are to be treated under the U.S. Bankruptcy Code so that these cases never happen again. Although prospective protection for our auction program is not in the settlement legislation, now would be a good time to consider enacting language of this nature in order to provide certainty to all auction bidders, as well as to protect the auction process.

II. The Posture of the Case

In 1993, Congress authorized the FCC to award licenses for spectrum through a system of "competitive bidding," or auction. In 1996 and 1997, the Commission held initial auctions for C-Block and F-Block Personal Communications Services (PCS)

licenses. At those auctions, NextWave submitted the winning bid on 63 C-Block licenses and 27 F-Block licenses for a total of \$4.8 billion. NextWave deposited a \$500 million down-payment with the U.S. Government and agreed to pay the balance (\$4.3 billion) over ten years at a favorable interest rate.

Each license granted to NextWave by the Commission was conditioned on NextWave's full and timely payment of all its installments, and the licenses made clear that failure to make such payment caused their automatic cancellation. NextWave failed to pay its bid commitments, instead filing for bankruptcy protection in 1998. NextWave filed to reduce the value of its bids and later fought against license cancellation during the course of its reorganization under Chapter 11 of the Bankruptcy Code.

Over the next three years, the Commission, the United States, NextWave, and others engaged in intensely fought litigation in numerous courts, including the U.S. Bankruptcy Court, the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the D.C. Circuit, and the Supreme Court of the United States. The Second Circuit upheld the Commission's regulatory requirement that there be full and timely payment by NextWave for the licenses. The Second Circuit also held that the Commission's decision to automatically cancel the NextWave licenses and to re-auction the licenses was not contrary to bankruptcy law. The court did allow that any administrative claims about the FCC's actions could be raised in the D.C. Circuit. Relying on the Second Circuit decision, in January 2001, the Commission re-auctioned the spectrum previously licensed to NextWave. In that re-auction (Auction No. 35), 21 wireless carriers bid \$15.85 billion for the new licenses.

Unwilling to yield, NextWave petitioned the D.C. Circuit for review of the Commission's decision to cancel NextWave's licenses for failure to pay. On June 22, 2001, the D.C. Circuit ruled that the automatic cancellation of NextWave's licenses violated Section 525 of the Bankruptcy Code, concluding that the Second Circuit opinion did not squarely consider this provision. The gravamen of the D.C. Circuit's decision was that NextWave was still in possession of the licenses, raising questions about our having re-auctioned the licenses in Auction No. 35. The Government has since sought review of this decision in the Supreme Court. This matter is still pending.

Given these circumstances, the Department of Justice and the FCC began to explore a possible settlement of the case. The Government had to find a way to recover the licenses, distribute them to the many companies that had won them at the re-auction, and secure as much of the re-auction proceeds as possible. This was no simple task. The talks went on for many months. I was personally involved in the discussions and regularly kept my colleagues informed of the progress, so that

they would be prepared if Commission action was necessary to finalize any agreement. In the late stages of the negotiations thorny legal issues and questions of uncertainty made it clear that it would be very difficult to effectuate any settlement without legislative action. The parties reached a mutually agreeable set of terms in late November, and a proposal was almost immediately forwarded to Congress by the Attorney General for your consideration.

The settlement agreement requires that Auction No. 35 bidders pay the Government the \$15.8 billion that they bid in exchange for receiving the licenses auctioned in Auction No. 35. The Government will then keep \$10 billion in net proceeds and will guarantee by December 31, 2002 to pay \$5.8 billion net to NextWave in exchange for its complete release of all claims to the disputed licenses.

The settlement agreement is contingent upon the passage of legislation, and it includes draft legislation for Congress to consider. There are several reasons why this legislation is necessary to effectuate the settlement.

First, the proposed legislation ensures that Congress has authorized the settlement and the movement of funds necessary to implement it. The FCC has no checkbook from which it could pay NextWave to relinquish its licenses. Moreover, even if the Auction No. 35 winners paid the Government first, it is unclear legally what they would be paying for (given the status of the auction) and, the Government had no mechanism to turn around and transfer that money to NextWave. This congressional action is required to empower the Government to execute the settlement.

Finality was a second and critical factor in reaching agreement. Both NextWave and the Auction No. 35 winners were unwilling to participate without confidence that after having reached agreement and forgone other opportunities, the agreement would not be overturned in court. The proposed legislation attempts to address these issues. It contains a judicial review provision, patterned on other Acts of Congress, that provides for expedited review, limited to constitutional claims. Any challenge to the legislation, the settlement agreement itself, or to actions taken by the Commission would be funneled into one court of appeals (the D.C. Circuit) and would be on a fast track for review. This provides assurance that the American public will receive the benefits of the settlement with minimum additional litigation delay.

Third, the legislation provides the guarantee necessary for NextWave to relinquish its claims on the licenses. In return, NextWave will be paid once the Government receives Auction No. 35 receipts equal to the payments to be made to NextWave but no later than December 31, 2002.

Fourth and finally, I would like to say a word about the December 31st clause in the settlement agreement. This is not, as some have maintained, an effort to jam the Congress into agreement. Congress, of course, remains free to consider the deal as it sees fit, and may modify the terms under its prerogatives. No private contract can limit the legislative power. The date merely reflects the fragility of the coalition and its interests. The Auction No. 35 winners need quick resolution in order to justify forgone alternatives, finance the purchase, and plan for the future. The bankruptcy proceeding continues to march forward and the parties each must take positions there. Also, the Supreme Court case continues to move forward. The parties felt that after December 31st, they were unwilling to promise to be a party to settlement, given other exigencies. I merely ask Congress to keep those risks in mind as it deliberates over the legislation.

We recognize that the compressed period for analysis and reasoned discussion makes this task difficult for you and your staff, and we appreciate the attention and care that has already been shown by Congress in considering this settlement and legislation.

III. The Settlement Proposal is in the Public Interest

Given the magnitude of this settlement in terms of money and its complexity, it is challenging to sort through conflicting claims about its merits. I have concluded after long and substantial examination that this settlement is squarely in the public interest, as has the Attorney General and the White House. I am convinced because, at bottom, the settlement satisfies three essential Government objectives:

- First, it removes the licenses from a bankrupt bidder, and distributes them to companies that bid in the re-auction, who can put them to use almost immediately. Increasing spectrum in the market will partially help address the current spectrum shortage—improving quality of service and providing capacity for new advanced services, such as Third Generation or so-called 3G.
- Second, it ends nearly five years of litigation that would likely continue for several more years, leaving the spectrum fallow and the treasury empty.
- Third, it gives the taxpayers \$10 billion dollars, *double* the amount of money they stand to gain from NextWave (\$4.3 billion, paid in installments over 6 years). This money flows to the U.S. Government at a time that the funds are sorely needed.

IV. What are the Better Alternatives to Settlement?

The main reason to settle is that settlement is preferable to the alternatives. If the Commission continues to litigate and the Supreme Court declines to take the case, the decision of the D.C. Circuit will stand and NextWave will be the licensee. In that scenario, NextWave likely would elect to continue to pay for the spectrum over time at advantageous interest rates. Pursuant to the installment payment program, NextWave could pay for the spectrum over six years at a rate of 6.5 percent for C-Block licenses and 6.25 percent for the F-Block licenses. That would leave the Treasury with substantially less than the \$10 billion in revenues that would be generated by the settlement.

Even if the Supreme Court grants the Government's petition for certiorari, the Court might not rule in the Government's favor on the merits. In addition, even if the Supreme Court rules in favor of the Government, it might remand the matter to the D.C. Circuit for further action on several legal issues left unresolved in the panel's initial decision— any of which could result in NextWave remaining the licensee.

No matter what the outcome, litigation would likely mean years of further delay of the Commission's ability to grant spectrum licenses for much-needed wireless services for American consumers. The Commission first auctioned this spectrum in 1996 and 1997, yet the spectrum has never been used. Even a favorable ruling from the High Court might not arrive until late in 2003. Without a settlement, valuable spectrum may well remain fallow at a time when our economy and the consumer need it most.

Moreover, even if the Government ultimately prevailed in all litigation, there is uncertainty about the future value bidders would place on the spectrum given fluctuations in the marketplace. Several high bidders in Auction No. 35 have indicated that if the settlement does not go forward and there is further litigation, they should be released from the obligations of Auction No. 35. They would argue, for example, that they should be entitled to the return of the \$3.2 billion in deposits held in non-interest-bearing accounts by the Government. It is uncertain at what price this spectrum would sell for at the conclusion of the litigation.

V. Conclusion

The Commission and the other parties to the NextWave case have negotiated long and hard to resolve a matter of critical importance to the American public. We have attempted to settle this matter in a way that protects the public interest, ensures that the spectrum is put to prompt use, and guarantees that the

American people receive fair value for the spectrum. I would like to thank the Subcommittee for this opportunity to provide information on the NextWave settlement. I look forward to answering any questions you may have.