

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

In the matter of
Applications for Consent to the Assignment of
Licenses Pursuant to Section 310(d) of the
Communications Act from NextWave Personal
Communications, Inc., Debtor-in-Possession, and
NextWave Power Partners, Inc., Debtor-in-
Possession, to subsidiaries of Cingular Wireless
LLC
WT Docket 03-217
File No. 0001461949, et. al.

MEMORANDUM OPINION & ORDER

Adopted: February 11, 2004

Released: February 12, 2004

By the Commission:

I. INTRODUCTION

1. We have before us thirteen related and simultaneously filed applications dated September 26, 2003, from NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. (together with NextWave Telecom, Inc. collectively referred to as "NextWave") and subsidiaries of Cingular Wireless LLC, ("Cingular" and, together with NextWave, the "Applicants") seeking approval for the assignment from NextWave to Cingular of certain C and F Block Personal Communications Services ("PCS") licenses (the "Applications").

1 ULS File Nos. 0001461949, 0001462008, 0001462060, 0001462065, 0001462358, 0001462360, 0001462372, 0001462378, 0001462417, 0001462499, 0001462500, 0001462559, and 0001462570 filed September 26, 2003. ULS File No. 0001461949 was designated the Lead Application.

As explained in the Public Notice that accepted these Applications for filing, the Applications are being treated as involving assignments of authorizations from NextWave Personal Communications, Inc., Debtor-in Possession, and NextWave Power Partners, Inc. Debtor-in-Possession, respectively. See Cingular Wireless and NextWave Seek FCC Consent for the Full and Partial Assignment of Thirty-Four Broadband Personal Communications Services Licenses, Public Notice, WT Docket 03-217, DA 03-3031 (rel. Oct. 6, 2003) ("Public Notice").

2 47 C.F.R. §§ 1.2111, 24.714.

3 The request for waiver ("Request for Waiver") is attached as Exhibit 1 to the Lead Application for this transaction. The Applications, with the exception of the Lead Application, incorporate the Request for Waiver by reference.

interest, convenience, and necessity.⁴ In addition, we grant a limited waiver of the payment provisions of sections 24.714 and 1.2111 of the Commission's rules to NextWave, as described herein,⁵ as well as a waiver of the timing requirements of section 24.714 in order to allow the Applicants to consummate the transaction.⁶ We therefore deny the Petition to Deny filed by Eldorado Communications, LLC and NY Telecom, LLC.⁷

II. BACKGROUND

A. Assignors

2. NextWave was the high bidder on 95 licenses in the broadband PCS C, D, E and F Block auctions that concluded in 1996 and 1997.⁸ NextWave initiated Chapter 11 bankruptcy proceedings in the Southern District of New York on June 8, 1998.⁹ After significant litigation with the Commission, in January of 2003, the U.S. Supreme Court affirmed the D.C. Circuit's decision that because NextWave was under protection of Chapter 11 of the United States Bankruptcy Code its licenses did not automatically cancel for nonpayment while it was in bankruptcy.¹⁰ On March 3, 2003, the Wireless Telecommunications Bureau (the "Bureau") released an Order granting NextWave's request to toll the license construction deadlines for 90 C and F Block PCS licenses for 703 days from the original five-year construction deadlines.¹¹ According to the instant Applications, NextWave states that "the relevant five year construction requirements of section 24.203 of the Commission's rules have been satisfied with respect to" each of the subject licenses.¹² NextWave further maintains that grant of the assignment of the subject licenses "will not affect [its] continued operation of its wireless networks in markets where it retains licenses, and will facilitate its plans to expand its operations in those markets."¹³

B. Assignees

3. The assignees, which are all direct or indirect wholly-owned subsidiaries of Cingular, include: BellSouth Mobility LLC; BellSouth Personal Communications, LLC; Corpus Christi SMSA

⁴ See 47 U.S.C. § 310(d).

⁵ See *infra* paras. 34-37.

⁶ 47 C.F.R. §§ 1.2111, 24.714.

⁷ Petition to Deny filed by Eldorado Communications, LLC and NY Telecom, LLC, WT Docket No. 03-217 (Nov. 5, 2003) ("Petition").

⁸ See *Entrepreneurs' C Block Auction Closes – FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas*, *Public Notice*, DA 96-716 (rel. May 8, 1996); *Entrepreneurs' C Block Reauction Closes – FCC Announces Winning Bidders in the Reauction of 18 Licenses to Provide Broadband PCS in Basic Trading Areas*, *Public Notice*, DA 96-1153, 11 FCC Rcd 8183 (1996); *D, E and F Block Auction Closes – Winning Bidders in the Auction of 1,479 Licenses to Provide Broadband PCS in Basic Trading Areas*, *Public Notice*, DA 97-81 (rel. Jan. 15, 1997).

⁹ *In re NextWave Personal Communications, Inc. et. al.*, 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998).

¹⁰ *FCC v. NextWave*, 537 U.S. 293 (2003), *aff'g* 254 F.3d 130 (D.C. Cir. 2001) ("*NextWave Decision*").

¹¹ *In re NextWave Personal Communications Inc. and NextWave Power Partners Inc. Petition for Declaration of Compliance With, and Clarification of, Broadband PCS Construction Deadline; or in the Alternative, for Waiver and Extension of First Construction Deadline*, *Order*, 18 FCC Rcd. 3235 (WTB 2003) (Application for Review pending).

¹² Request for Waiver at 6.

¹³ *Id.* at 9.

Limited Partnership; Florida Cellular Service, LLC; Houston Cellular Telephone Company, L.P.; Pacific Bell Wireless Northwest, LLC; Pacific Telesis Mobile Services, LLC; SBC Wireless LLC; Southwestern Bell Mobile Systems, LLC; and Southwestern Bell Wireless, LLC.¹⁴ Cingular, in turn, is jointly owned by SBC Communications, Inc. and BellSouth Corporation.¹⁵ According to the Applications, Cingular will not hold more than 45 MHz of spectrum in any of the subject markets after consummation of the proposed transaction.¹⁶

C. Proposed Transaction

4. In the instant matter, NextWave and Cingular have entered into a Purchase Agreement dated August 4, 2003 (the "Purchase Agreement").¹⁷ According to the Applications, at the same time the Purchase Agreement was executed, NextWave, the United States Government (on behalf of the Federal Communications Commission),¹⁸ BFD Communications Partners, LP (NextWave's "debtor-in-possession" lender) and the Official Committee of Unsecured Creditors appointed in the NextWave bankruptcy proceedings entered into a "Term Sheet for Agreement Regarding the §363 Sale of Rights and Interests in Certain Licenses" (the "Term Sheet"), which includes mutual releases and other terms affecting the proposed transaction.¹⁹ Furthermore, because NextWave is in the process of reorganizing under the protection of bankruptcy laws, the U.S. Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") has reviewed and approved both the Purchase Agreement and the Term Sheet, and has entered an order approving the sale of NextWave's rights and interests in the licenses to Cingular.²⁰ As stated in the Term Sheet and the Purchase Agreement, the transaction is subject to the Commission's regulatory approval and review pursuant to Section 310(d) of the Communications Act.²¹

5. The proposed transaction involves the sale and assignment by NextWave of all of its rights and interests in 10 and 20 MHz blocks of spectrum to be disaggregated from twenty 30 MHz C Block PCS licenses and in fourteen 10 MHz F Block PCS licenses to certain subsidiaries of Cingular (the "Designated Licenses").²² Under the Applicants' proposal, Cingular will pay the sum of \$1.4 billion (the "Purchase Price")²³ in exchange for receiving NextWave's rights and interests in the Designated Licenses free and clear of all encumbrances.²⁴ Both the Purchase Agreement and the Term Sheet indicate that

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ *Id.* at 3.

¹⁷ Applications at Exhibit 2; Purchase Agreement at 1.

¹⁸ The Department of Justice represents the Federal Communications Commission and the United States Government as a signatory to the Term Sheet. *See* Applications at Exhibit 3.

¹⁹ Request for Waiver at 1.

²⁰ *Id.*

²¹ *See* Applications at Exhibits 2, 3.

²² Request for Waiver at 3. The term "Designated Licenses" therefore does not include the spectrum being retained by NextWave for twenty of the C Block PCS licenses, and the Commission's decision herein does not extend to those licenses. Moreover, pursuant to the Commission's rules, NextWave will be required to sign a note modification for the installment payment loans associated with the C Block PCS licenses it retains.

²³ *Id.* at 6-7.

²⁴ According to the Request for Waiver, the term "Encumbrance" is defined in the Purchase Agreement as: "any lien (including, without limitation, any tax lien), claim, interest, charge, security interest, lease, mortgage, pledge, easement, right of use, first offer or first refusal, conditional sale or other title retention agreement, defect in title, covenant or other restriction of any kind, other than those conditions imposed upon licenses and licensees generally

(continued...)

upon consummation of the proposed transaction and subject to a “Final Order” of the Commission’s regulatory approval of the Applications,²⁵ Cingular will pay a portion of the \$1.4 billion, specifically \$714 million, for the benefit of the Commission in full satisfaction for all claims related to the Designated Licenses (the “FCC Direct Payment”).²⁶ As explained in the Request for Waiver, the Term Sheet and the Purchase Agreement, the Applicants have requested that the Commission find that “delivery of the FCC Direct Payment as contemplated in [the] Agreement (including the timing for such FCC Direct Payment) will constitute full payment and satisfies all conditions required under 47 C.F.R. § 1.2111 and § 24.714.”²⁷ However, the FCC Direct Payment will not be made until the time of closing, which, according to the Purchase Agreement, shall occur following a final order of the Commission and on a date which “will not be more than ten (10) business days after the fulfillment or waiver of the parties’ respective conditions [for] closing.”²⁸ Chief among the conditions precedent for closing are the requirements that the Commission’s consent has become a Final Order; that the Commission’s consent has not modified the FCC Direct Payment; and, that the Commission has either waived “the full payment requirements and all other conditions under 47 C.F.R. §1.2111 and § 24.714, subject to delivery of the FCC Direct Payment as contemplated in this Agreement (including the timing for such FCC Direct payment)” or that the Commission has stated that the “delivery of the FCC Direct Payment as contemplated in this Agreement (including the timing for such FCC Direct Payment) constitutes full payment, and satisfies all conditions, required under 47 C.F.R. §1.2111 and § 24.714.”²⁹ Furthermore, in accordance with the Term Sheet, concurrently with the FCC Direct Payment, NextWave and the United States Government will grant to each other mutual general releases from any and all claims relating to the Designated Licenses.³⁰

6. The Applicants argue that the Commission’s approval of the proposed transaction is in the public interest and creates no competitive harm.³¹ However, as acknowledged by the Applicants, “in

(...continued from previous page)

by the Communications Act and the FCC’s rules, regulations and policies promulgated thereunder. For the avoidance of doubt, any and all amounts owed to any Governmental Body payable under or in connection with applicable law, including, but not limited to, all payments payable under or in connection with 47 C.F.R. §§ 1.2111 and 24.714, to the extent not satisfied in full at or prior to Closing, shall constitute an ‘Encumbrance.’” *See* Request for Waiver at 7, n. 8. Neither this definition of “Encumbrance” nor the releases contemplated by the transaction restrict the Commission’s ability to entertain regulatory claims and take any action “pursuant to its regulatory authority over NextWave as an FCC licensee, including without limitation its authority under the Communications Act and the FCC rules, regulations, policies, and decisions. . . .” *See* Term Sheet at 3(b).

²⁵ “Final Order” as defined in the Purchase Agreement dictates, among other finality requirements, that “the action or order is not then under judicial review, there is no notice of appeal or other application for judicial review pending, and the deadline for filing such notice of appeal or other application for judicial review has passed, including any extensions thereof. . . .” *See* Purchase Agreement at 11.3.

²⁶ *See* Applications at Exhibits 2, 3. Consistent with this Order, and the Commission’s rules, upon consummation this payment must be made to the Commission for the benefit of the U.S. Treasury. To ensure that the FCC Direct Payment is credited to the correct account, the Applicants must ensure that the FCC Direct Payment is, consistent with our instructions for all unjust enrichment payments for a payoff of an installment loan, sent to LOCK BOX number 358440.

²⁷ *See* Purchase Agreement at 5.8(b), Term Sheet at 2(a), Request for Waiver at 6-7, n.8.

²⁸ *See* Purchase Agreement at 2.1 & 7.3.

²⁹ *Id.* at 7.3.

³⁰ Request for Waiver at 7; *but see supra* n. 24 (noting that the FCC will continue to exercise its authority to entertain regulatory claims and otherwise discharge its regulatory responsibilities with respect to the licenses).

³¹ Request for Waiver at 8-12.

agreeing to accept the FCC Direct Payment (as determined in the Term Sheet) in resolution and full satisfaction of all claims regarding the Designated Licenses, the government is agreeing to receive an amount that may vary from the amount that might otherwise be determined to be payable under sections 1.2111 and 24.714 in less unique circumstances.”³² The Applicants therefore urge the Commission, as part of its approval of the Applications, to either grant waivers of sections 1.2111 and 24.714 of its rules or explicitly state that delivery of the FCC Direct Payment (including the timing of such payment) “constitutes full payment, and satisfies all conditions, required under sections 1.2111 and 24.714.”³³

7. In support of the Request for Waiver, the Applicants maintain that the Commission’s standard for granting a waiver has been satisfied because, based on the unique factual circumstances presented by the NextWave litigation and bankruptcy, rigid application of the unjust enrichment rules would be contrary to the public interest.³⁴ The Applicants further argue that the proposed FCC Direct Payment was expressly negotiated between NextWave and the Commission (as a creditor of NextWave), was determined by the Department of Justice to be in the public interest, and was found to be “fair and equitable” by the Bankruptcy Court.³⁵ Absent a grant of the waiver, the Applicants state that the transaction will not proceed and the spectrum will continue to be subject to litigation and uncertainty for a significantly longer period of time.³⁶

D. The Public Record

8. On October 6, 2003, the Bureau accepted the Applications for filing and released the *Public Notice* establishing the time period for interested parties to file petitions to deny.³⁷ Subsequently, on November 5, 2003, Eldorado Communications, LLC, together with NY Telecom, LLC (together the “Petitioners”), filed a petition to deny,³⁸ and Nextel Communications, Inc. (“Nextel”) filed comments opposing grant of the Applications.³⁹ On November 12, 2003, pursuant to Section 308(b) of the Communications Act, the staff of the Bureau sent a letter to the Applicants seeking further information regarding certain aspects of the Applications’ Request for Waiver (“308(b) Letter”).⁴⁰ On November 17, 2003, Cingular and NextWave each filed Oppositions to Petitions to Deny.⁴¹ On November 24, 2003, Eldorado and NY Telecom filed a Reply to the Oppositions to Petitions to Deny.⁴² Nextel did not file any

³² *Id.* at 14.

³³ *Id.* at 12- 13.

³⁴ Request for Waiver at 15.

³⁵ *Id.* at 20.

³⁶ *Id.* at 18- 19. Notably, if the Commission does not grant the requested relief, or attempts to modify the FCC Direct Payment, then the Purchase Agreement deems that the Commission’s consent contains an adverse condition and the transaction may terminate. *See* Purchase Agreement at 7.3.

³⁷ *Public Notice* at 3.

³⁸ Petition at 1.

³⁹ Comments of Nextel Communications, Inc., WT Docket 03-217 (Nov. 5, 2003) (“Comments”).

⁴⁰ Letter from Katherine M. Harris, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Michael R. Wack and David G. Richards (Nov. 12, 2003) (“308(b) Letter”).

⁴¹ Opposition to Petitions to Deny, filed by Cingular Wireless LLC, WT Docket 03-217 (Nov. 17, 2003) (“Cingular Opposition”); Opposition to Petition to Deny Filed by NY Telecom, LLC and Eldorado Communications, LLC, filed by NextWave Telecom, Inc., WT Docket 03-217 (Nov. 17, 2003) (“NextWave Opposition”).

⁴² Reply to Oppositions to Petition to Deny, filed by Eldorado Communications, LLC and NY Telecom, LLC, WT Docket No. 03-217 (Nov. 24, 2003) (“Reply”).

subsequent responsive comments. On November 26, 2003, NextWave and Cingular each filed responses to the staff's 308(b) Letter.⁴³

9. In opposition to the Applications, Petitioners maintain that they have standing to file the Petition because NY Telecom has an interest in bidding on the subject licenses in a future Commission re-auction.⁴⁴ Further, NY Telecom claims that it has standing because it currently has a pending Application for Review on file with the Commission that challenges a Bureau-level decision to toll the construction requirements for the licenses held by NextWave, and seeks the revocation and re-auction of those licenses.⁴⁵ Eldorado also argues an independent ground for standing. As an Auction No. 5 participant, Eldorado maintains that it bid against NextWave for certain of the Designated Licenses.⁴⁶ Eldorado therefore argues that it has standing to challenge the Applications because grant of the proposed transaction would allow "NextWave to pocket \$700 million from the assignment of Auction No. 5 licenses" while other winning bidders that did not go into bankruptcy, such as itself, were forced to return their licenses and forfeit their down payments.⁴⁷

10. In support of their Petition, Eldorado and NY Telecom argue that the grant of the proposed transaction does not serve the public interest, convenience, and necessity⁴⁸ because it would allow NextWave to both profit from its acquisition of spectrum in Auction No. 5 and avoid its obligations with respect to that spectrum.⁴⁹ Further, the Petitioners argue that granting the Request for Waiver would deprive the public of funds owed by NextWave and would allow Cingular to unfairly benefit from the Commission's designated entity policies.⁵⁰ The Petitioners also contend that the Applicants have not satisfied the standard for a waiver because the underlying purpose of the rules would not be served by a grant of the Applications. Moreover, the Petitioners argue that a grant of the proposed transaction would undermine the Commission's designated entity policies because, instead of preserving the spectrum for small businesses, a grant of the proposed transaction would allow significant amounts of spectrum to be transferred to one of the largest wireless providers in the country.⁵¹ According to Petitioners, this is exactly the consequence the Commission's unjust enrichment rules are intended to guard against.⁵² Additionally, Petitioners maintain that NextWave's alleged unique circumstances are nothing more than the natural consequences of NextWave's decision to avoid its financial obligations to the Commission,

⁴³ Letter from David G. Richards to Katherine M. Harris, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission (Nov. 26, 2003) ("Cingular 308(b) Response"); Letter from Michael R. Wack to Katherine M. Harris, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission (Nov. 26, 2003) ("NextWave 308(b) Response").

⁴⁴ Petition at 2.

⁴⁵ *Id.* at 3. At a minimum, Petitioners argue that a grant of the Applications should be specifically subject to reversal if NY Telecom is ultimately successful in reversing the tolling decision. *Id.* at 4. Nothing in the instant *Order* resolves the pending Application for Review filed by NY Telecom and that matter will be determined in a separate decision consistent with the Commission's authority to entertain regulatory claims and otherwise discharge its regulatory responsibilities with respect to the Designated Licenses. *See* Term Sheet at 3(b).

⁴⁶ Petition at 5.

⁴⁷ *Id.* at 5-6.

⁴⁸ *Id.* at 1-2.

⁴⁹ *Id.* at 6.

⁵⁰ *Id.* at 7.

⁵¹ *Id.*

⁵² *Id.* at 7-8.

and such circumstances do not warrant a departure from the Commission's precedent enforcing its unjust enrichment rules.⁵³

11. Similarly, Nextel points out that under the Commission's unjust enrichment rules, designated licenses may not be assigned unless the Commission is paid in full, including the remaining unpaid principal and all unpaid, accrued interest.⁵⁴ In this regard, Nextel argues that the Applicants' Request for Waiver directly contradicts well-established Commission precedent. Nextel further notes that granting Cingular, which is not a small business, such a waiver would do great harm to the integrity of the Commission's auction process.⁵⁵ Nextel therefore argues that the Commission should deny the request and consent to the proposed transaction conditioned upon full payment of the amounts owed under the rules.⁵⁶

12. Specifically, Nextel focuses upon the fact that grant of the proposed waiver would result in the Commission receiving significantly less money than what it is due under the Commission's unjust enrichment rules.⁵⁷ Moreover, Nextel asserts that a grant of the waiver would undermine the objectives underlying the Commission's statutory duty to prevent unjust enrichment and is inconsistent with Commission precedent.⁵⁸ Nextel points out that in resolving issues of restructuring the installment payment program the Commission has been historically opposed to dramatically forgiving debt because doing so undermines the credibility of and integrity of its auction rules.⁵⁹ Furthermore, Nextel notes that in the context of the *Winstar* bankruptcy, the Bureau refused to grant a waiver of the bidding credit unjust enrichment payments, and instead held that although Winstar was not prohibited from transferring licenses, it had to make the necessary payments to the Commission before doing so.⁶⁰

13. In addition to its arguments regarding unjust enrichment, Nextel also claims that the Commission should evaluate whether Cingular has the requisite character qualifications to acquire the subject licenses in light of "its egregious failure to cooperate with Anne Arundel County (the "County") in resolving interference problems with the County's public safety communications network."⁶¹ Specifically, Nextel alleges that Cingular did not cooperate promptly in addressing potentially life-threatening interference to public safety systems, did not provide the information needed to assess the situation, and did not cooperate with testing.⁶² Finally, in regard to the issue of reviewing the transaction,

⁵³ *Id.* at 8-9.

⁵⁴ Comments at 2.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Nextel states that if the Commission grants the waiver, the Commission will receive approximately \$170 million dollars less than it would under the rules. As explained in its Comments, Nextel applied certain assumptions regarding the application of the Commission's rules and it believes that this figure represents a conservative estimate of what the Commission stands to lose if it accepts the FCC Direct Payment. *See id.* at 4-7.

⁵⁸ *Id.* at 8-11.

⁵⁹ *Id.* at 11-12.

⁶⁰ *Id.* at 12-13; *citing* In Re Winstar LMDS, LLC (Chapter 7 Debtor) Request for Waiver of Sections 1.2111(d) and 101.1107(e) of the Commission's Rules Regarding Unjust Enrichment Payment for Fifteen Licenses Purchased in Auction No. 17, *Order*, 17 FCC Rcd. 7,084 (AIAD 2002) ("*Winstar Order*").

⁶¹ *Id.* at 18.

⁶² *Id.* at 19.

both Nextel and the Petitioners contend that the proceeding should be governed by the “permit-but-disclose” *ex parte* rules.⁶³

14. The Applicants counter that the Petitioners lack standing to challenge the Applications, that both the Petition to Deny and the Comments lack merit, and that the Commission should not seek comment generally on the proposed transaction as the Petitioners and Nextel urge.⁶⁴ The Applicants’ Oppositions stress that the public interest will be served by a grant of the proposed transaction and Request for Waiver, and that the filings in opposition fail to prove otherwise.⁶⁵

15. Specifically, Cingular responds that Nextel’s challenge is frivolous and made for the sole purpose of delaying the proposed transaction.⁶⁶ In this regard, Cingular argues that the Bureau already has reviewed Cingular’s conduct in the matter referred to by Nextel and found that there was no instance of bad faith or misconduct by Cingular.⁶⁷ Furthermore, Cingular claims that Nextel fails to establish that the grant of the applications would be *prima facie* inconsistent with the public interest, convenience, and necessity,⁶⁸ pursuant to Section 309(d)(1) of the Communications Act.⁶⁹ Cingular alleges that Nextel’s challenge does not discuss any misrepresentation or lack of candor with intent to mislead the Commission, or a pattern of willful violation of the Communications Act or the Commission’s rules.⁷⁰

16. Cingular also argues that the Commission should reject the Petitioners’ challenge to the Applicants’ Request for Waiver of the unjust enrichment rules. In essence, Cingular contends that Petitioners’ arguments are grounded in an “absolutist position” and suggest that the Commission’s unjust enrichment rules are “unwaiveable rules.”⁷¹ Furthermore, Cingular stresses that if the Request for Waiver were to be denied, the transaction will “disintegrate,” leaving the licenses in the bankruptcy estate and the government with little to no opportunity to be paid.⁷² Cingular seeks to distinguish the proposed transaction from the facts in the *Winstar* case by arguing that in *Winstar* the Bureau rejected a request for waiver of the entire amount due under the unjust enrichment rules for bidding credit recapture, while in the instant matter the Commission is a party to the bankruptcy proceeding and, acting as a creditor, it has

⁶³ *Id.* at 20; While Petitioners do not use specific language concerning a “permit but disclose” *ex parte* classification, the Petition requests that “prior to making a decision on the merits of the Applications, the Bureau should expand the scope of this proceeding to allow for public comment, as it has with similarly complex license assignment proceedings in the past.” Petition at 2. Nextel also argues that because the Request for Waiver presents issues that are not typical to assignment applications that are normally reviewed by the Bureau, it must be resolved by the Commission. Comments at 20. In light of the unique circumstances of this matter, as well as our interest in seeing this transaction become final, we agree with Nextel that the decision is best resolved at the Commission level.

⁶⁴ See Cingular Opposition at 1-16, 24-25; NextWave Opposition at 1-3,9,17.

⁶⁵ Cingular Opposition at 14-24; NextWave Opposition at 9-12.

⁶⁶ See Cingular Opposition at 9.

⁶⁷ See *id.* at 8, 10-13; see also Petition of Cingular Wireless L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission, *Memorandum Opinion and Order*, 18 FCC Rcd. 13,126 (WTB 2003).

⁶⁸ See Cingular Opposition at 9.

⁶⁹ 47 U.S.C. § 309(d)(1).

⁷⁰ See Cingular Opposition at 9.

⁷¹ *Id.* at 14.

⁷² *Id.* at 19.

approved a settlement in full satisfaction of the debt owed by NextWave, with knowledge that it would preclude recovery of the full amount of interest.⁷³

17. Similarly, NextWave argues that contrary to the arguments of the Petitioners, grant of the Applications serves the public interest.⁷⁴ In contesting the Petitioners' standing, NextWave states that neither Eldorado nor NY Telecom can explain any legally cognizable harm that will result from NextWave entering into a transaction designed to repay its creditors, including the United States government, and the Petitioners' arguments regarding the financial consequences of granting the Applications cannot support standing.⁷⁵ Further, NextWave suggests that the Petitioners' filing amounts to "a thinly disguised attempt at greenmail."⁷⁶ NextWave also argues that the Commission should reject the Petitioners' request to seek additional public comment on this transaction.⁷⁷

18. Nextel did not file a reply to the Applicants' Oppositions. The Petitioners, however, filed a response defending their arguments as well as their standing to challenge the proposed transaction.⁷⁸ Among the standing arguments proffered by Petitioners, they allege that they have an interest in the "fair and evenhanded application of the Commission's designated entity preference programs."⁷⁹ Additionally, Petitioners reiterate that the grant of the Request for Waiver is not warranted because the Applicants will receive a discount that benefits each company to the detriment of the public.⁸⁰

19. The 308(b) Letter to the Applicants sought further information regarding certain aspects of the Applicants' Request for Waiver.⁸¹ Specifically, the Bureau asked the Applicants to: (1) explain how the proposed "FCC Direct Payment" should be apportioned among the Designated Licenses; (2) provide evidence for representations in the Request for Waiver that the Department of Justice has approved the Term Sheet in accordance with its authority under the Debt Collections Improvement Act of 1996; and (3) describe specifically how any exercise of the Department of Justice of its authority under the Debt Collections Improvement Act of 1996 impacts the Commission's resolution of the Request for Waiver of sections 1.2111 and 24.714 of the Commission's rules.⁸²

20. In response to the Bureau's question regarding how the "FCC Direct Payment" should be apportioned among the designated licenses, NextWave submits that the Term Sheet was not intended to reflect an apportionment of funds among particular claims held by individual signatories but rather represented a unified reduction and settlement of numerous different claims.⁸³ In a separate response, Cingular suggests that the \$714 million covers the approximately \$687.5 million owed in principal, and leaves approximately \$26.5 million that could be applied to the interest owed by apportioning it among

⁷³ *Id.* at 22-23.

⁷⁴ NextWave Opposition at 1-3, 9.

⁷⁵ *Id.* at 8-9.

⁷⁶ *Id.* at 3.

⁷⁷ *Id.* at 17.

⁷⁸ Reply at 3-11.

⁷⁹ *Id.* at 6.

⁸⁰ *Id.* at 11.

⁸¹ *See supra* n. 40.

⁸² 308(b) Letter at 2.

⁸³ NextWave 308(b) Response at 1-2.

the licenses according to the size of the principal amount due.⁸⁴ With respect to answering the Bureau's second question, both Applicants attached the Bankruptcy Court transcript to evidence oral representations made by the Department of Justice during Bankruptcy Court hearings that demonstrated that it approved the Term Sheet in accordance with its authority under the Debt Collections Improvement Act.⁸⁵ Likewise, in responding to the Bureau's third question, both Applicants argue that DOJ's approval of the debt compromise lends additional support for the grant of the requested relief.⁸⁶ Further, while both Applicants maintain that the Department of Justice's approval of the Term Sheet is relevant to the Commission's ultimate determination of the public interest, the Applicants nonetheless acknowledge that the Commission has the independent regulatory authority to review the Applications and Request for Waiver.⁸⁷

III. DISCUSSION

A. Standing

21. To establish standing to file a petition to deny challenging these particular assignment applications, Eldorado and NY Telecom are required by Section 309(d)(1) of the Communications Act⁸⁸ to demonstrate that each is a "party in interest."⁸⁹ Eldorado and NY Telecom must make specific allegations of fact sufficient to demonstrate that grant of the challenged assignment applications would cause the petitioner to suffer a direct injury.⁹⁰ Eldorado and NY Telecom also must establish a causal link between the claimed injury and the grant of these assignment applications by demonstrating that the injury can be traced to the grant of these assignment applications.⁹¹ In addition, Eldorado and NY Telecom must establish that it is likely, as opposed to merely speculative, that the alleged injury would be prevented or redressed if these assignment applications are denied.⁹²

22. The Applicants contest the Petitioners' standing, claiming that the Petitioners have identified no legally cognizable harm to them that will result from the Commission granting the Applications. The Petitioners assert several bases for standing, arguing that Eldorado was a bidder against NextWave in the original auctions and that Eldorado was harmed by NextWave's exorbitant bids; that Eldorado was forced to surrender its PCS licenses under the FCC's restructuring processes and that it would be unfair to allow NextWave to sell its licenses merely because it declared bankruptcy; that NY Telecom has standing by certain partners' interests in Eldorado; and that NY Telecom intends to bid for the spectrum if it is re-auctioned. The Applicants respond that denial of the transaction would leave the licenses in NextWave's hands and would not necessarily make the spectrum available for re-auction, and that denial of the transaction would not restore the licenses Eldorado surrendered in the restructuring process.

⁸⁴ Cingular 308(b) Response at 1-2.

⁸⁵ NextWave 308(b) Response at 2; Cingular 308(b) Response at 2-3.

⁸⁶ NextWave 308(b) Response at 2-3; Cingular 308(b) Response at 3-6.

⁸⁷ NextWave 308(b) Response at 3; Cingular 308(b) Response at 3.

⁸⁸ 47 U.S.C. § 309(d)(1).

⁸⁹ *Alaska Native Wireless Order*, 18 FCC Rcd. 11,640, 11,644 ¶ 10 (2003).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

23. For the reasons discussed by the Applicants, we have serious doubts that Petitioners have standing as “part[ies] in interest,” with a Section 309(d)(1) right to challenge the Applications.⁹³ Nevertheless, in light of the significance of the issues raised in this proceeding, we have fully considered Petitioners’ arguments and have determined, as set forth below, that they are without merit.

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

24. Pursuant to Section 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the proposed assignment of licenses will serve the public interest, convenience, and necessity.⁹⁴ The public interest standard involves the balancing of potential public interest harms of the proposed transaction against the potential public interest benefits.⁹⁵ The Applicants bear the burden of proving by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.⁹⁶ In applying our public interest test, we must assess whether the proposed transaction complies with the specific provisions of the Communications Act, the Commission’s rules, and federal communications policy.⁹⁷ That policy is shaped by Congress and deeply rooted in a preference for competitive processes and outcomes.⁹⁸ Our public interest analysis considers the likely competitive effects of the proposed transaction and whether such assignments raise significant anti-

⁹³ See 47 U.S.C. § 309(d)(1) (stating that “[a]ny party in interest may file with the Commission a petition to deny any application . . . to which subsection (b) of this section applies”). Thus, we do not discern what direct injuries granting the Applications would cause Petitioners, or what non-speculative injury would be prevented or redressed if the Applications were denied. Alaska Native Wireless Order, 18 FCC Rcd. at 11,644 ¶ 10 (2003).

⁹⁴ 47 U.S.C. § 310(d).

⁹⁵ See, e.g., General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, *Memorandum Opinion and Order*, FCC 03-330, at ¶ 15 (rel. Jan. 14, 2004) (“*GM-News Corp. Order*”); WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee, *Memorandum Opinion and Order*, FCC 03-319, at ¶ 12 (rel. Dec. 19, 2003) (“*WorldCom Order*”); Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, *Memorandum Opinion and Order*, 17 FCC Rcd. 23,246, 23,255 ¶ (2002) (“*Comcast-AT&T Order*”); Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee), *Hearing Designation Order*, 17 FCC Rcd. 20,559, 20,574 ¶ 25 (2002) (“*EchoStar-DirecTV HDO*”); VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779, 9789 ¶ 17 (2001) (“*Deutsche Telekom-VoiceStream Order*”); Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, *Memorandum Opinion and Order*, 15 FCC Rcd. 14,032, 14,046 ¶ 22 (2000) (“*Bell Atlantic-GTE Order*”); Global Crossing LTD. (Debtor-in-Possession), Transferor, and GC Acquisition Limited, Transferee, *Order and Authorization*, DA 03-3121, at ¶ 17 (IB, WTB, WCB rel. Oct. 8, 2003) (“*Global Crossing Order*”).

⁹⁶ See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 15; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,574 ¶ 25; *Comcast-AT&T Order*, 17 FCC Rcd. at 23,255 ¶ 26.

⁹⁷ See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 16; *EchoStar-DirecTV HDO*, 17 FCC Rcd., at 20,574 ¶ 25; Applications of TeleCorp, Inc., Tritel, Inc., and Indus, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd. 3716, 3721-22 ¶ 12 (2000) (“*TeleCorp-Tritel Order*”).

⁹⁸ See, e.g., *GM-News Corp. Order* at ¶ 16; Application of MCI Telecommunications Corporation, Assignor, and EchoStar 110 Corporation, Assignee, *Order and Authorization*, 16 FCC Rcd. 21,608, 21,613 ¶ 7 (1999) (quoting *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd. 3,160, 3168-69 ¶ 14 (1999) (“*AT&T-TCI Order*”).

competitive concerns.⁹⁹ In addition, we consider the efficiencies and other public interest benefits that are likely to result from the proposed assignments of the licenses.¹⁰⁰

25. As a threshold matter, the Commission must determine whether the parties meet the requisite qualifications to hold and assign licenses under Section 310(d) of the Act and the Commission's rules.¹⁰¹ In making this determination, the Commission, as a general rule, does not re-evaluate the qualifications of assignors and transferors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.¹⁰² In this proceeding, no issues have been raised with respect to the basic qualifications of NextWave as assignor. Conversely, as a required part of our public interest analysis, Section 310(d) requires the Commission to consider whether the proposed assignee or transferee is qualified to hold Commission licenses.¹⁰³

26. As noted above, Nextel argues that the Commission should evaluate whether Cingular has the requisite character qualifications to acquire the subject licenses in light of "its egregious failure to cooperate with Anne Arundel County (the "County") in resolving interference problems with the County's public safety communications network."¹⁰⁴ Cingular responds that the Bureau already has reviewed Cingular's conduct in the County and found that there was no instance of bad faith or misconduct by Cingular.¹⁰⁵ Furthermore, Cingular claims that Nextel's challenge does not discuss any misrepresentation or lack of candor with intent to mislead the Commission, or a pattern of willful violation of the Communications Act or the Commission's rules and fails to establish that the grant of the Applications would be *prima facie* inconsistent with the public interest, convenience, and necessity.¹⁰⁶

⁹⁹ See, e.g., *WorldCom Order*, FCC 03-319, at ¶ 12; *Global Crossing Order*, DA 03-3121, at ¶ 17.

¹⁰⁰ See, e.g., *WorldCom Order*, FCC 03-319, at ¶ 12; *Global Crossing Order*, DA 03-3121, at ¶ 17.

¹⁰¹ See 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; see, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 15; *WorldCom Order*, FCC 03-319, at ¶ 13; *Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd. at 9790 ¶ 19; *Global Crossing Order*, DA 03-3121, at ¶ 18; Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless, *Memorandum Opinion and Order*, 18 FCC Rcd. 6490, 6492 ¶ 5 (CWD 2003) ("*Verizon-Northcoast Order*").

¹⁰² See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 18; *WorldCom Order*, FCC 03-319, at ¶ 13; *Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd. at 9790 ¶ 19; Applications of SBC Communications Inc. and BellSouth Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd. 25,459, 25,465 ¶ 14 (2000) ("*SBC-BellSouth Order*"); Applications of Vodafone AirTouch, PLC and Bell Atlantic Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd. 16,507, 16,513 ¶ 14 (2000) ("*Bell Atlantic-Vodafone AirTouch Order*"); *Global Crossing Order*, DA 03-3121, at ¶ 18; *Verizon-Northcoast Order*, 18 FCC Rcd. at 6492 ¶ 5; *TeleCorp-Tritel Order*, 18 FCC Rcd. at 6492 ¶ 5. See also Stephen F. Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 Fed. Comm. L.J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee's basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. *Id.*

¹⁰³ See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 23; *WorldCom Order*, FCC 03-319, at ¶ 13; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,574, 20,576 ¶¶ 25, 28; *SBC-BellSouth Order*, 15 FCC Rcd. at 25,465 ¶ 14; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,227 ¶ 429; *Bell Atlantic-Vodafone AirTouch Order*, 15 FCC Rcd. at 16,513 ¶ 14.

¹⁰⁴ Nextel Comments at 18. See also *supra* para. 13.

¹⁰⁵ See Cingular Opposition at 8, 10-13; see also Petition of Cingular Wireless L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission, *Memorandum Opinion and Order*, 18 FCC Rcd. 13,126 (WTB 2003).

¹⁰⁶ See Cingular Opposition at 9.

27. When determining whether an assignee has the requisite character qualifications to be a Commission licensee, the Commission will review allegations of misconduct directly before it, as well as conduct that takes place outside the Commission.¹⁰⁷ The Commission has long held that the character qualifications of an applicant or licensee are relevant to the Commission's public interest analysis and that an applicant's or licensee's willingness to violate other laws, and in particular to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies.¹⁰⁸ To this end, the Commission has determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC-related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition.¹⁰⁹ With respect to FCC-related conduct, the Commission has stated that violations of provisions of the Act, or of the Commission's rules or policies, are predictive of an applicant's future truthfulness and reliability and, thus, have a bearing on an applicant's character qualifications.¹¹⁰

28. We find that Cingular has the requisite character qualifications to acquire the Designated Licenses. First, the Commission has already reviewed Cingular's conduct regarding interference in the County, and found no problem warranting the denial of applications or the revocation of licenses.¹¹¹ Second, the Bureau has found Cingular to be qualified to acquire licenses numerous times prior and subsequent to the initiation and resolution of the inquiry into interference issues in the County.¹¹² Third, Nextel provides no evidence that Cingular has made any misrepresentations or acted with a lack of candor

¹⁰⁷ See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 23; *WorldCom Order*, FCC 03-319, at ¶ 13; *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20,576 ¶ 28; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,227-28 ¶ 429.

¹⁰⁸ See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 23.

¹⁰⁹ See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 23; *WorldCom Order*, FCC 03-319, at n.57; *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20,576 ¶ 28; *Bell Atlantic/GTE Order*, 15 FCC Rcd. at 14,227 ¶ 429. The Commission has also stated that it will consider non-FCC related misconduct of the licensee's or applicant's parent or related subsidiary where there is a sufficient nexus between the licensee or applicant and the parent corporation or a related subsidiary. See *GM-News Corp. Order*, FCC 03-330, at ¶ 23.

¹¹⁰ See, e.g., *WorldCom Order*, FCC 03-319, at n.56; *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20,576 ¶ 28; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,227, ¶ 429. The Commission has used its character policy in the broadcast area as guidance in resolving similar questions in transfer of common carrier authorizations and other license transfer proceedings. See, e.g.; *GM-News Corp. Order*, FCC 03-330, at ¶ 23.

¹¹¹ See generally *Petition of Cingular Wireless L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission*, *Memorandum Opinion and Order*, 18 FCC Rcd. 13,126 (2003).

¹¹² See, e.g., *Transfer of Control Application from Dobson Cellular Systems, Inc. to Cingular Wireless LLC*, ULS File No. 0001505653, filed Nov. 6, 2003 (consented to Dec. 29, 2003); *Assignment Application from Unwired Telecom Corp. to BellSouth Mobility LLC*, ULS File No. 0001470839, filed Oct. 10, 2003 (consented to Dec. 10, 2003); *Assignment Application from Sunshine PCS Corporation to BellSouth Mobility LLC*, ULS File No. 0001449402, filed Sept. 15, 2003 (consented to Nov. 10, 2003); *Assignment Application from Devon Mobile Communications, L.P., as Debtor-in-Possession to Southwestern Bell Mobile Systems, LLC*, ULS File No. 0001340256, filed June 10, 2003 (consented to Aug. 27, 2003); *Transfer of Control Application from T-Mobile USA, Inc. f/k/a VoiceStream Wireless Corporation to Cingular Wireless LLC*, ULS File No. 0001270639, filed April 24, 2003 (consented to June 20, 2003); *Wireless Telecommunications Bureau Grants Consent for the Assignment of Licenses to AT&T Wireless Services, Inc., Cingular Wireless LLC, Meriwether Communications LLC, and Skagit Wireless, LLC*, WT Docket No. 03-46, *Public Notice*, 18 FCC Rcd. 9975 (rel. May 14, 2003) (consenting to the assignment of licenses to BellSouth Mobility LLC).

in any of its proceedings before the Commission, or has a pattern of willful violations of the Communications Act or the Commission's rules.¹¹³

29. When evaluating the likely competitive effects and public interest benefits of a proposed transaction, the Commission performs case-by-case review of transactions in order to fulfill the Commission's statutory mandate to promote competition, ensure diversity of license holdings, and manage the spectrum in the public interest.¹¹⁴ In this case, we analyze the effects of the transaction on the mobile telephony product market. We define the mobile telephony product market as consisting of all commercially available two-way, mobile voice and data services providing access to the public switched telephone network via terrestrial systems.¹¹⁵ These services are currently provided by cellular, broadband PCS, and Specialized Mobile Radio licensees.¹¹⁶

30. In this transaction, Cingular proposes to acquire 10 MHz and 20 MHz spectrum blocks in thirty-four Basic Trading Areas ("BTAs").¹¹⁷ NextWave will disaggregate 10 MHz of spectrum from eighteen 30 MHz C block PCS licenses and 20 MHz of spectrum from two 30 MHz C Block PCS licenses.¹¹⁸ Additionally, NextWave will assign fourteen 10 MHz F Block PCS licenses to Cingular.¹¹⁹ Cingular's acquisition of the NextWave spectrum will result in it entering the Portland, Maine and Salisbury, Maryland BTAs,¹²⁰ along with twenty counties in other BTAs,¹²¹ and acquiring additional spectrum in thirty-two BTAs where it already holds and operates spectrum.¹²² Post-transaction, Cingular will hold 20 MHz to 45 MHz of spectrum in the counties comprising the thirty-two BTAs. Cingular claims that it will control less than thirty percent of the spectrum available to support mobile telephony in each applicable market.¹²³

31. Although Cingular is acquiring additional spectrum in certain areas where it already operates, the transaction will not, as recognized by the Applicants, "affect the number of currently active competitors in any of the markets involved given the fact that NextWave currently has limited operations and trial (non-paying) customers in these markets."¹²⁴ Moreover, in the twenty BTAs where NextWave is

¹¹³ See Nextel Comments at 17-19; see also Cingular Opposition at 8-13.

¹¹⁴ See 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd. 22,668, 22,696 ¶ 55 (2001) (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)).

¹¹⁵ See CenturyTel Wireless, Inc. and CenturyTel, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd. 1,260, 1,263 ¶ 10 (2003) ("*CenturyTel Order*"); Applications of Chadmoore Wireless Group, Inc. and Various Subsidiaries of Nextel Communications, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd. 21,105, 21,110 ¶ 14 (2001) ("*Chadmoore Order*"); Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Seventh Report*, 17 FCC Rcd. 12,985, 12,993 (2002) ("*Seventh Annual CMRS Competition Report*").

¹¹⁶ See *Seventh Annual CMRS Competition Report*, 17 FCC Rcd. at 12,993; *CenturyTel Order*, 18 FCC Rcd. at 1,263 ¶ 10; *Chadmoore Order*, 16 FCC Rcd. at 21,110 ¶ 14.

¹¹⁷ See Application, Exhibit 1, at 10.

¹¹⁸ See *id.* at 3, Amended Attachment 1.

¹¹⁹ See *id.* at 10.

¹²⁰ Cingular states that it will also enter the Portland, Oregon BTA, but it has included the spectrum held by Salmon PCS in its overlap analysis because Cingular holds a greater-than-ten-percent ownership interest in Salmon PCS. See *id.* at 11.

¹²¹ See *id.*

¹²² See *id.* at 10-11, Amended Attachment 1.

¹²³ See *id.*

¹²⁴ See *id.* at 11-12.

disaggregating spectrum to Cingular, NextWave will continue to hold spectrum and thus will remain a potential competitor. In the fourteen BTAs where NextWave is assigning 10 MHz F Block licenses in full, the potential competition that NextWave represented will be eliminated. However, we have received no comments indicating that this constitutes a competitive harm, and, based on our own investigation and given the level of actual competition prevailing in these markets today, we do not believe any adverse impact on mobile telephony rates or service will result.

32. The Applicants state that this transaction is in the public interest, because it will allow spectrum that has been sitting idle for more than five years as a result of litigation to be put into use for the benefit of wireless consumers.¹²⁵ Furthermore, this transaction will allow Cingular to expand its national footprint and will add a competitor in those markets in which Cingular currently holds no spectrum, providing consumers increased choice among wireless competitors and access to Cingular's voice and data products and services.¹²⁶ In those markets where Cingular already offers service, the proposed transaction will allow Cingular to expand its network capacity and services to meet the needs of new and existing subscribers.¹²⁷

33. In conclusion, we find that Cingular is qualified to hold these licenses and that the transaction will not result in undue anticompetitive harm.¹²⁸ We find that the proposed transaction integrating the Designated Licenses into Cingular's nationwide network is in the public interest, as Cingular will be able to expand into new markets, and expand its network capacity and services in markets in which it currently provides service.

C. Request for Waiver

34. We next turn to our determination regarding the Applicants' Request for Waiver. For the reasons articulated below, we find that the Applicants have satisfied the Commission's standard for waiver.¹²⁹ We therefore grant NextWave a limited waiver of the payment provisions of sections 24.714 and 1.2111 of the Commission's rules and we grant the Applicants a waiver of the timing provisions of section 24.714 so that they may consummate the proposed transaction as set forth in the Purchase Agreement and Term Sheet.

35. We begin by examining the unjust enrichment rules that apply to transactions involving licenses subject to installment payments and we then explain how we apply those rules for the purposes of this transaction. At the outset, we note that the rules that the Commission has adopted to ensure that it prevents installment payment unjust enrichment, sections 1.2111(c) and 24.714(c), while consistent in intent, nonetheless operate in a slightly different manner. In short, these unjust enrichment rules impose on different parties to the transaction – the assignor or the disaggregatee – the responsibility to pay the Commission for the outstanding payment obligation. As discussed in detail below, this distinction is relevant to our ultimate decision resolving the Applicants' Request for Waiver as well as our determination that NextWave requires only a limited waiver of the payment provisions of sections 24.714 and 1.2111 and the Applicants require a waiver of the timing provision of section 24.714 in order to consummate the proposed transaction.

¹²⁵ See *id.* at 9.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ This transaction was not challenged by Nextel or Eldorado/NY Telecom on the grounds that it would cause competitive harm.

¹²⁹ 47 C.F.R. § 1.925.

36. For transfers of spectrum licenses, section 1.2111 places the obligation on the assignor to ensure that the Commission receives full payment. Specifically, section 1.2111(c)(1) states, “[i]f a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.”¹³⁰ In the context of the proposed transaction, our rules therefore place the responsibility of payment for the transfer of the fourteen F Block PCS licenses on NextWave, and to the extent that the FCC Direct Payment does not satisfy NextWave’s obligation, it would need a waiver of the rule in order to consummate the transaction described in the Term Sheet and Purchase Agreement.

37. The payment responsibility for disaggregation of broadband PCS spectrum, however, operates in a different manner. Under section 24.714(c), the outstanding balance owed by the licensee (including accrued and unpaid interest) is apportioned between the licensee and the disaggregatee, with each party being responsible for its proportionate share. Additionally, section 24.714(c)(2)(ii) requires that the disaggregatee render its entire pro rata payment within thirty days of a conditional grant by the Commission. Thus, for the twenty C Block PCS licenses being disaggregated from NextWave to Cingular in the proposed transaction, the rules place the responsibility of payment of its proportionate share of the balance owed on Cingular, and to the extent that the FCC Direct Payment does not satisfy Cingular’s obligation, it would need a waiver of the rule in order to consummate the transaction described in the Term Sheet and Purchase Agreement. To the extent the rule requires this payment to be made within thirty days of a conditional grant, the Applicants also need a waiver of this timing requirement in order to permit the timing of the FCC Direct Payment as described in the Term Sheet and Purchase Agreement.

38. In examining this proposed transaction and the Applicants’ Request for Waiver, we recognize that section 24.714, applied literally, requires that the outstanding balance, which, here, includes all of the original principal obligation as well as the interest and any late fees that have accrued for the Designated Licenses for over five years, be apportioned between NextWave and Cingular on a pro rata basis. Yet, because of the automatic cancellation rule of section 1.2110,¹³¹ we are also conscious of the fact that section 24.714 did not contemplate that interest and late fees could accrue and go unpaid for longer than two quarters without the license automatically canceling for failure to pay. We therefore find that section 24.714 does not anticipate that when a license is being disaggregated, the disaggregatee can be responsible for more than its pro rata portion of the unpaid principal and two quarters of interest and late fees. Thus, because we believe it is consistent with the meaning of section 24.714, in the instant transaction, we apportion to Cingular its proportionate share of two quarters of accrued and unpaid interest and any late fees as well as its proportionate share of the entire outstanding principal obligation owed. All interest and any late fees owed for the disaggregated C Block PCS Designated Licenses above this amount remain the obligation of NextWave, and, as discussed in detail below, are included in the limited waiver we grant to NextWave of section 24.714. Accordingly, applying section 24.714 as set forth above to the instant transaction, Cingular’s payment obligation for the disaggregated C Block PCS

¹³⁰ 47 C.F.R. § 1.2111(c)(1). The Commission has previously clarified that the approval of an assignment or transfer that results in installment payment unjust enrichment is conditioned upon the full payment of the required unjust enrichment payment on or before the consummation date. Therefore, there is no need to waive the timing of section 1.2111(c) in order to permit the Applicants to consummate the transaction as described in the Term Sheet and Purchase Agreement. See *In Matter of Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 15,239, 15,314 at ¶ 37 (2000).

¹³¹ 47 C.F.R. § 1.2110(g)(4)(iv).

Designated Licenses is at most \$641 million.¹³² Thus, applying the FCC Direct Payment (which is \$714 million) to this obligation fully satisfies Cingular's responsibilities, and Cingular therefore does not require a waiver of the full payment provisions of section 24.714.

39. We now turn to the application of our rules to NextWave's payment obligations under section 1.2111. We note that after subtracting the maximum amount that Cingular could owe for the disaggregated C Block PCS Designated Licenses from the FCC Direct Payment, the remainder of the FCC Direct Payment is sufficient to fully satisfy NextWave's outstanding principal obligation under section 1.2111 for the transfer of the F Block PCS Designated Licenses to Cingular.¹³³ However, what then remains of the FCC Direct Payment (*i.e.*, after subtracting both the maximum amount Cingular could owe for the disaggregated C Block PCS Designated Licenses as well as the principal obligation NextWave owes for the transfer of the F Block PCS Designated Licenses) is insufficient to fully pay the accrued interest and any late fees NextWave owes under section 1.2111. Thus if we are to approve the transfer of the F Block PCS Designated Licenses as described in the Term Sheet and Purchase Agreement, we must grant NextWave a limited waiver of payment provisions of section 1.2111 with respect to a portion of the accrued interest and any late fees.

40. The Applicants acknowledge that sections 1.2111 and 24.714 of the Commission's rules require that licensees participating in the Commission's installment payment program must satisfy their auction-related debt obligations in order to assign or disaggregate a license that is subject to installment payments to an entity that is not eligible to participate in the installment payment program.¹³⁴ The Applicants also recognize that the rules for assignment and disaggregation require that the Commission receive full payment of the amounts owed to the government.¹³⁵ In this regard, and as noted above, the Applicants concede that "in agreeing to accept the FCC Direct Payment (as determined in the Term Sheet) in resolution and satisfaction of all claims regarding the Designated Licenses, the government is agreeing to receive an amount that may vary from the amount that might otherwise be determined to be payable under sections 1.2111 and 24.714 in less unique circumstances."¹³⁶ The Applicants nonetheless argue that the Commission is not bound by any particular mechanism or formula for calculating the amount of such full payment and that the Commission is free either to accept the proposed FCC Direct Payment in full satisfaction of what is owed for the Designated Licenses, or to determine that a grant of a waiver is appropriate under the unique factual circumstances of this proceeding.¹³⁷

41. In contrast, the Petitioners argue that the Commission's unjust enrichment rules are intended to guard against the type of transaction proposed by the Applicants. Specifically, Petitioners maintain that "[t]he requested waiver will result in a payment to the Commission of less than the amount to which it would otherwise be entitled, lead to an assignment of designated entity spectrum to one of the

¹³² This calculation is rounded to the nearest million and includes two quarterly payments of interest based on the original principal obligation and late fees based on those payment amounts. As stated below, see *infra* para. 47, we are not in this decision reaching any determination or waiving any of our rules regarding how long or how much interest or late fees have accrued for the Designated Licenses under sections 24.714 and 1.2111 of the Commission's rules.

¹³³ 47 C.F.R. § 1.2111. Notably, the Petitioners and Nextel do not dispute that the FCC Direct Payment is sufficient to satisfy the principal owed on the Designated Licenses under both sections 1.2111 and 24.714. See Petition to Deny at 7 n.22; Nextel Comments at 4-6.

¹³⁴ See Request for Waiver at 13-14; see also NextWave 308(b) Response at 2.

¹³⁵ Request for Waiver at 13-14.

¹³⁶ *Id.* at 14.

¹³⁷ NextWave 308(b) Response at 2.

largest wireless providers in the country, and enable NextWave to receive nearly \$700 million for its interests in the assigned licenses.”¹³⁸ Likewise, Nextel advocates that a very important part of the Commission’s mandate under the Communications Act is to protect the integrity of the auctions process and to enforce the unjust enrichment provisions of the Act in a non-discriminatory manner.¹³⁹

42. We agree with the Petitioners and Nextel that the Commission has a statutory mandate to prevent unjust enrichment. Congress specifically included the concept of unjust enrichment in two subsections of Section 309(j) of the Communications Act.¹⁴⁰ First, as one of the objectives of the Act, Congress instructed the Commission to avoid unjust enrichment through the methods it employed to award use of the spectrum.¹⁴¹ Second, Congress specifically directed that, in prescribing regulations pursuant to Section 309(j) of the Communications Act, the Commission shall “require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses”¹⁴² Pursuant to this mandate, when the Commission adopted small business preferences to facilitate the participation of designated entities in auctions, the Commission also adopted unjust enrichment provisions. The purpose of such provisions is “to prevent designated entities from profiting by the rapid sale of licenses acquired through the benefit of preference policies.”¹⁴³ Accordingly, among other requirements, the unjust enrichment rules require the full payment of the remaining unpaid principal balance and any unpaid accrued interest where a licensee utilizing the Commission’s installment payment program seeks approval for a transfer of control or assignment of a license to an entity not eligible for installment payments.¹⁴⁴

43. We also agree with the Petitioners and Nextel that approval of the proposed transaction requires waiver of the Commission’s unjust enrichment rules. We disagree, however, that either our prior precedent or our statutory mandate requires us to deny the Applicants’ Request for Waiver. First, neither of the cases cited by the Petitioners or Nextel concern the resolution of Commission litigation. In contrast, this Request for Waiver affects the settlement of a complex lawsuit that has spanned several years and has left significant amounts of spectrum lying fallow without benefit to the public. Second, these prior cases are not determinative with respect to the type of unjust enrichment at issue in this transaction. Unlike the Applicants’ Request for Waiver, both the *Winstar* and *D&E* decisions were requests to waive the payment of bidding credit unjust enrichment.¹⁴⁵ In each of those cases, the parties argued that the Commission should forgo any payment of bidding credit unjust enrichment.¹⁴⁶ Here, however, we are confronted with a request to determine whether the proffer of a significant payment, which fully satisfies the Applicants’ obligations to pay the principal amount owed, although not all of the interest and any late fees owed, warrants a departure from the strict application of the Commission’s installment payment unjust enrichment rules. Moreover, we are asked to do so in the context where the proffered payment was determined to be an acceptable settlement by the United States Government in a negotiated agreement with a licensee whose debt under the installment payment program will be forgiven

¹³⁸ Petition at 7.

¹³⁹ Nextel Comments at 7.

¹⁴⁰ 47 U.S.C. § 309(j).

¹⁴¹ 47 U.S.C. § 309(j)(3)(C).

¹⁴² 47 U.S.C. § 309(j)(4)(E).

¹⁴³ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-235, 9 FCC Rcd. 2348, 2394, ¶ 258 (1994) (*Competitive Bidding Second R&O*).

¹⁴⁴ 47 C.F.R. §§ 1.2111, 24.714.

¹⁴⁵ *Winstar Order*, 17 FCC Rcd. 7,084; In re *D&E Communications, Inc., Order*, 15 FCC Rcd. 61 (AIAD 1999).

¹⁴⁶ *Id.*

to the extent that debt exceeds the FCC Direct Payment.¹⁴⁷ For these reasons, we find that the present circumstances differ significantly from any other context in which we have considered the application of our unjust enrichment rules. Moreover, we believe that it is entirely within our discretion, and consistent with our obligations to balance various competing public interest considerations under the Communications Act, to consider doing so here.

44. In fact, it is with the weight of our statutory public interest obligations in mind that we find that the Applicants have met the Commission's standard for grant of a waiver. As a general matter, a party must show either that (i) the underlying purpose of the applicable rule would not be served, or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.¹⁴⁸ We agree with the Applicants that the unique facts and circumstances of the history of the NextWave litigation render a strict application of the installment payment unjust enrichment rules to the transfer of the Designated Licenses contrary to the public interest. Without a waiver of the unjust enrichment rules, we recognize that the proposed transaction will fail, and the Designated Licenses will remain subject to the continued uncertainties inherent in the bankruptcy process. On the other hand, approval of the proposed transaction and grant of a limited waiver, as described herein, serves the public interest. Specifically, approval of the Applications and grant of a limited waiver will allow this spectrum to be put into immediate use for the benefit of consumers. In the markets in which Cingular does not currently hold spectrum, the transaction will add a new competitor. In markets where Cingular is already a provider, grant of the transaction will allow it to expand its capacity and wireless services.

45. Moreover, we believe that granting a limited waiver of sections 24.714 and 1.2111 to NextWave is consistent with our statutory obligations under Section 309(j) of the Communications Act. As the Applicants argue, the proposed transaction will promote the efficient use of spectrum and the rapid deployment of services for the benefit of the public.¹⁴⁹ Such an outcome is consistent with our statutory obligation in Section 309(j)(3)(A)-(B) to promote competition and to speed the deployment of services for the benefit of the public.¹⁵⁰ We are also mindful that the recovery of \$714 million dollars to the benefit of the U.S. Treasury is consistent with the intent of Section 309(j)(3)(C) of the Act, "to recover for the public a portion of the value of the public spectrum resource."¹⁵¹ Continued litigation will only hinder the immediacy of our ability to recover such value.¹⁵² In fact, it is currently unclear how long it will take to

¹⁴⁷ As described in the Term Sheet and Purchase Agreement, provided the Commission exercises its regulatory authority to approve the Applications and any rule waivers it deems necessary to effectuate the transaction, the FCC Direct Payment will be deemed sufficient to satisfy the Applicants' payment obligations for the Designated Licenses and the Department of Justice, as a signatory to the Term Sheet, will exercise debt forgiveness under the Debt Collections and Improvement Act for any remaining payment obligations associated with the Designated Licenses subject to certain exemptions not applicable here. See Term Sheet at 3(a)-(b); Term Sheet at 8; see also Cingular 308(b) Response at 2-3 and Enclosures 1 and 2 respectively (citing statements of U.S. Attorney before U.S. Bankruptcy Court for the Southern District of New York); NextWave 308(b) Response at 2 (citing statements of U.S. Attorney before U.S. Bankruptcy Court for the Southern District of New York).

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

¹⁴⁹ See NextWave Opposition at 14; Cingular Opposition at 20.

¹⁵⁰ 47 U.S.C. § 309(j)(3)(A)-(B).

¹⁵¹ See 47 U.S.C. § 309(j)(3)(C).

¹⁵² See NextWave Opposition at 1,14; Cingular Opposition at 20.

achieve the recovery of a portion of the value of the public spectrum resource through the bankruptcy process. Moreover, there is no guarantee that the value recovered through the bankruptcy process will ultimately be any greater than that which has been negotiated through the settlement reached in the Term Sheet, and it is entirely possible that it could be less and will take far longer to obtain. We therefore believe that under these unique circumstances, granting a waiver is entirely consistent with our statutory obligations in Section 309(j)(3)(C) of the Communications Act.

46. Additionally, we do not believe approval of the proposed transaction and grant of a limited waiver results in unjust enrichment as contemplated by the Commission's rules. The approval of the proposed transaction is not the type of "rapid sale of licenses acquired through the benefit of preference policies" that Commission's anti-trafficking rules were designed to prevent.¹⁵³ Here, Cingular's Purchase Price of \$1.4 billion was reached through an auction supervised under the processes of the Bankruptcy Court rather than as the result of capitalizing upon preferences reserved for designated entities.¹⁵⁴ Moreover, it would be difficult for the Commission to characterize the sale of these licenses as "rapid." While we recognize that the acceptance of the FCC Direct Payment results in less than full payment under our rules and would be otherwise impermissible under less unique circumstances, on balance, we find that the grant of a limited waiver serves the public interest for all of the reasons described above.

47. In granting this limited waiver, we stress that we are not reaching any determination or waiving any of our rules regarding how long or how much interest or late fees have accrued for the Designated Licenses under sections 24.714 and 1.2111. Instead, because the Department of Justice executed the Term Sheet, on the Commission's behalf, and has exercised its discretion under the Debt Collections and Improvement Act to grant debt forgiveness for any monies owed above the FCC Direct Payment (subject to the Commission's necessary regulatory approvals that we have provided herein), we find that we need not define the specific amount of the interest and late fees owed for the Designated Licenses in order to determine that the public interest will be served by a grant of a limited waiver of the full payment provisions of sections 24.714 and 1.2111 regarding those obligations. The monies remaining of the FCC Direct Payment (after fully satisfying Cingular's obligation under section 24.714, and NextWave's obligation for principal under section 1.2111) satisfy at least a portion of the interest and any late fees owed by NextWave under sections 24.714 and 1.2111, and, as explained above, all other payment obligations for the Designated Licenses have been satisfied or forgiven. Our limited waiver of NextWave's obligation to render the full payment owed under sections 24.714 and 1.2111 allows the transaction described in the Term Sheet and the Purchase Agreement to be consummated as the Applicants and the United States Government intended. This in turn allows for resolution of longstanding litigation with respect to the Designated Licenses, which we anticipate will have significant benefits to the public. Further, because we believe that it serves the public interest to have finality in this transaction, we grant the Applicants a waiver of the thirty-day requirement in section 24.714, so that the timing provisions described in the Term Sheet and Purchase Agreement may apply to this transaction.

IV. CONCLUSION

48. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 309(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j), 310(d), the Applications, dated September 26, 2003, seeking approval for the assignment of certain C and F Block Personal Communications Services licenses from NextWave to Cingular are GRANTED.

¹⁵³ See *supra* para. 42 & n. 143.

¹⁵⁴ See Cingular Opposition at 18-19.

49. Additionally, to the extent discussed herein, we GRANT a limited waiver of the payment provisions of sections 24.714 and 1.2111 of the Commission's rules, 47 C.F.R. §§ 24.714, 1.2111, to NextWave as well as a waiver of the timing requirements of section 24.714, 47 C.F.R. § 24.714, to the Applicants in order to allow the Applicants to consummate the transaction.

50. Furthermore, we DENY the Petition to Deny filed by Eldorado Communications, LLC and NY Telecom, LLC.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary