Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications for Consent to Assign Licenses from	)	WT Docket No. 03-217
	)	DA No. 03-3031
	)	
NextWave Personal Communications, Inc. and NextWave Power Partners Inc., Assignors,	)	File Nos. 0001461949, 0001462008, 0001462060, 0001462065, 0001462358, 0001462360, 0001462372, 0001462378, 0001462417, 0001462499, 0001462500, 0001462559, and 0001462570
To	)	
Subsidiaries of Cingular Wireless LLC, Assignees	)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Pursuant to Section 309(d) of the Communications Act of 1934, as amended ("Communications Act"),[1] and Section 1.939 of the Commission's rules,[2] Nextel Communications, Inc. ("Nextel") hereby comments on the above-captioned applications to assign C and F Block Personal Communications Service ("PCS") licenses ("Designated Licenses") from NextWave Personal Communications, Inc. and NextWave Power Partners Inc. (collectively, "NextWave") to various subsidiaries of Cingular Wireless LLC ("Cingular").[3] Nextel provides commercial mobile radio service

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1 47 U.S.C. § 309(d).

2 47 C.F.R. § 1.939.

3 *Cingular Wireless and NextWave Seek FCC Consent for the Full and Partial Assignment of Thirty-Four Broadband Personal Communications Services Licenses,* Public Notice, DA 03-3031, WT Docket No. 03-217 (released Oct. 6, 2003) ("Public Notice").

("CMRS") in numerous markets currently served by NextWave and Cingular, and therefore is a party in interest under Section 1.939.[4]

I. INTRODUCTION AND SUMMARY

Under the Commission's unjust enrichment rules, Cingular may not be assigned the Designated Licenses unless the Commission is paid the full amount – including the remaining unpaid principal and all unpaid, accrued interest – owed to the Commission on the Licenses. This would appear to be at least $884 million – $687 million in outstanding principal and a conservatively estimated $197 million in unpaid accrued interest. Cingular, however, seeks a waiver of this requirement, proposing that the Commission only be paid $714 million – over $170 million less than the amount due under the rules.

The Commission should deny this waiver request. It directly contradicts well-established Commission precedent and policy. The waiver request also flies in the face of statements by Cingular's owners – SBC and BellSouth – that strenuously opposed proposals in a 1997 Commission proceeding that would have reduced the debt owed on C Block licenses. Cingular has failed to demonstrate good cause for the Commission to grant a waiver of the unjust enrichment rules. Granting Cingular – the second largest wireless carrier and clearly *not* a small business – a waiver of these rules would do great harm to the integrity of the FCC's auction process. The Commission should deny the waiver request, and any Commission consent to the proposed transaction should be conditioned on full payment by Cingular of the amounts due under these unjust enrichment provisions.

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[4] *See* Exhibit 1 to Cingular's FCC Form 603, File No. 0001461949, Exhibit 1, "Description of Transaction, Public Interest Statement and Waiver Request" ("Application"), at Attachment 1, Table 2 (listing Nextel as competitor in markets in which Cingular is seeking assignment of NextWave licenses).

The Commission should also investigate whether Cingular has the requisite character qualifications to hold the Designated Licenses. As the Commission staff has recognized, in 2001 Cingular failed to cooperate in remediating serious interference caused by its operations to a public safety system. This egregious failure to address potentially life-threatening interference raises serious issues that warrant further Commission investigation.

Because of the important matters the proposed transaction raises, and because Cingular's waiver request raises fundamental issues regarding the integrity of the Commission's auction process, the Commission rather than its staff should review the proposed license assignments. The Commission should also apply "permit-but-disclose" *ex parte* rules to ensure full public participation and a complete record in this proceeding.

II. CINGULAR HAS FAILED TO JUSTIFY ITS REQUEST FOR A $170+ MILLION WAIVER OF THE UNJUST ENRICHMENT RULES

In reviewing proposed license assignments, the Commission considers whether the transaction would violate the Communications Act or the Commission's rules.[5] Cingular bears "the burden of demonstrating that the transaction will not violate or interfere with the objectives of the Act or Commission rules, and that the predominant effect of the transaction will be to advance the public interest."[6]

Cingular fails to meet this burden. Its proposed transaction violates Section 1.2111(c)(1) of the Commission's rules, which states:

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[5] *Applications of Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer Control,* Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶¶ 48 (1999) ("*Ameritech-SBC Order*").

[6] *Applications of TeleCorp PCS, Inc., et al.,* Memorandum Opinion and Order, 16 FCC Rcd 3716, ¶ 12 (WTB 2000).

> If 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.[7]

As a small business, NextWave took advantage of the Commission's installment payment program when it acquired the Designated Licenses in the Commission's C and F Block auctions in 1996 and 1997. Cingular, however, clearly does not meet the eligibility standards for this program. Far from being a small business, Cingular earned $14.7 billion in revenue last year[8] – well over *100 times* the $125 million dollar limit on gross revenues set forth in the Commission's small business eligibility criteria for C and F Block licenses.[9]

Pursuant to Section 1.2111, therefore, before the Commission can assign these licenses to Cingular, the Commission must be paid the remaining unpaid principal *plus* all unpaid accrued interest for the Designated Licenses. This figure includes $687 million which, according to Cingular, is the unpaid principal remaining under the promissory notes covering the Designated Licenses. It also includes the unpaid interest accrued under the notes through the date of the proposed assignment. Although Cingular does not disclose the amount of interest that is due, even conservative estimates result in a substantial amount. Interest rates ranging from 6.25 to 6.5 percent applied to NextWave's installment payments for the C and F Block licenses it acquired in 1996 and

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7 47 C.F.R. § 1.2111(c)(1).

8 Cingular Wireless LLC, SEC Form 10-K for Fiscal Year Ended Dec. 31, 2002, at 29.

9 47 C.F.R. § 24.709(a).

1997.[10] Interest payments made up the entire portion of small business installment payments during the first six years after the C Block licenses were granted, and the entire portion of these payments during the first two years after the F Block licenses were granted.[11] NextWave has failed to make many of these interest payments, apparently having ceased making payments ever since the Commission temporarily suspended such payments in 1997.[12] It consequently appears that, as of today, the Commission is owed at least $197 million in unpaid accrued interest on the Designated Licenses.[13] Adding this

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[10] *See* Statement of Michael K. Powell, Chairman, FCC, Before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, on the NextWave Settlement Legislation, at 6 (Dec. 11, 2001), *available at*: <http://www.fcc.gov/Speeches/Powell/Statements/2001/stmkp143.pdf>.

[11] *See* 47 C.F.R. § 24.711(c); 47 C.F.R. § 24.716(c).

[12] *Installment Payments for PCS Licenses*, Order, 12 FCC Rcd 17325, ¶ 2 (WTB 1997). Although the Commission temporarily suspended the interest payments in 1997, it made clear that such interest continued to accrue. *Id.* ¶ 3; *see also FCC Announces Grant of Broadband Personal Communications Services D, E and F Block BTA Licenses*, Public Notice, 13 FCC Rcd 1286 at 1287 (WTB 1997). In a later 1997 decision, the Commission afforded C Block licensees several options to restructure their obligations under the installment payment program, and subsequently lifted its suspension of interest payments. *Amendment of the Commission"s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436, ¶ 6 (1997) ("*Installment Payment Financing Second Report and Order*") (offering options of original terms, disaggregation, amnesty, and prepayment); Order on Reconsideration of the Second Report and Order, 13 FCC Rcd 8345 (1998) ("*Installment Payment Financing Order on Recon of Second R&O*") (modifying restructuring options to provide additional flexibility); Order, 13 FCC Rcd 6956, ¶¶ 2-3 (1998) (postponing the election date and payment resumption date); *Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees; Payments for C and F Block Licensees Resume July 31, 1998*, Public Notice, 13 FCC Rcd 7413 (WTB 1998). NextWave elected none of the Commission's restructuring options, choosing instead to file for bankruptcy on June 8, 1998.

[13] This estimate makes the following conservative assumptions: (1) the lower interest rate of 6.25% applies to all of the Designated Licenses, even though a significant number of these licenses (the C Block licenses) are subject to an interest rate of 6.5%; (2) the period of nonpayment for all the licenses began April 28, 1997 (the date F-Block payments were suspended), even though nonpayment for the C Block licenses appears to

amount to the $687 million in outstanding principal, Cingular is required to pay the U.S. Treasury at least $884 million under the Commission's unjust enrichment rules, plus the interest accruing from today to the date it would consummate its proposed transaction.

Cingular, however, proposes to pay the Commission only $714 million – *over $170 million less than the amount due under the Commission's unjust enrichment rules.* Recognizing that this proposal does not comply with the Commission's unjust enrichment rules, Cingular seeks a waiver of these rules, claiming that its request presents "unique circumstances" arising from NextWave's bankruptcy and would not undermine the rules' purpose.[14]

The Commission should deny Cingular's waiver request. Cingular attempts to justify this $170+ million waiver by, in effect, treating the Commission as if it were merely a creditor seeking to cut the best deal it can on a debt owed by a bankrupt company. In fact, there is far more at stake here. NextWave's protracted bankruptcy proceedings do not alter the Commission's duty to carry out its regulatory mandate under

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have begun March 31, 1997 (the date C Block payments were suspended), if not earlier; (3) no interest accrued during the 703 days during which NextWave's licenses were considered canceled by the Commission; and (4) no interest is charged on the accrued, unpaid interest. Based on these conservative assumptions, NextWave was required to pay $117,636.99/day in interest for the Designated Licenses, and, as of today, it is 1,677 days behind in interest payments. Therefore, as of today, the Commission is owed a minimum of $197,277,232.23 (117,636.99 x 1,677) in accrued, unpaid interest for the Designated Licenses.

[14] Application, Section V. As an alternative to a waiver, Cingular requests that the Commission issue a "statement" that its proposed payment constitutes the full payment required under the unjust enrichment rules. Application at 14. But Section 1.2111(c)(1) plainly states that "*full* payment" of the unpaid principle and interest, not some lesser amount, must be made. 47 C.F.R. 1.2111(c)(1) (emphasis added). Cingular proposes to pay a lesser amount, and the Public Notice recognizes that it is offering less than required by the rules. Public Notice at 2 (proposed payment constitutes only "a *portion* of the total amount owed for the licenses") (emphasis added). Cingular consequently requires a waiver of the rule.

the Communications Act. An important part of this mandate entails protecting the integrity of its auction process and enforcing the unjust enrichment provisions of Section 309(j) of the Act[15] in a non-discriminatory manner. As explained in more detail below, these vital objectives would be thwarted by granting Cingular a waiver. Such a waiver would flout Commission precedent and policies.

A. Granting the Waiver Request Would Be Contrary to Section 309(j) of the Act and Undermine the Integrity of the Auction Process

Pursuant to Section 309(j)(4)(D) of the Act,[16] the Commission has adopted various measures – including installment payment financing – to ensure that small business and other designated entities have the opportunity to participate in spectrum auctions and become "strong, long-term *bona fide* competitors" in the provision of spectrum-based services.[17] At the same time, Congress recognized the potential for abuse of small business preferences, mandating that the Commission "require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."[18]

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15 47 U.S.C. § 309(j).

16 *Id.* § 309(j)(4)(D).

17 *Implementation of Section 309(j) of the Communications Act – Competitive Bidding,* Fifth Report and Order, 9 FCC Rcd 5532, ¶ 112 (1994) ("*Section 309(j) Fifth Report and Order*").

18 47 U.S.C. § 309(j)(4)(E). *See also id.* at § 309(j)(3)(C) (in designing a system of competitive bidding, FCC must include safeguards for "avoidance of unjust enrichment"). The legislative history of Section 309(j) states in part: "To the extent that the Commission is attempting to achieve a justifiable social policy goal – such as the reservation of appropriate licenses for small business applicants – licensees should not be permitted to frustrate that goal by selling their license in the aftermarket. In these instances, antitrafficking restrictions are necessary and appropriate." H.R. Rep. No. 103-

To implement this statutory mandate, the Commission adopted

> unjust enrichment rules applicable specifically to designated entities to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our preferences to obtain a license at a lower cost than they otherwise would have to pay and later to sell it at the market price.[19]

These unjust enrichment rules include Section 1.2111(c), which the Commission adopted "[t]o ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms."[20]

The waiver requested by Cingular would directly undermine the objectives underlying the Commission's statutory duty to prevent unjust enrichment. NextWave was able to acquire the Designated Licenses through an installment payment program limited to small businesses and other designated entities. Cingular concedes that NextWave has not used the licenses "to deliver widespread commercial wireless communications to the public."[21] Nor has NextWave become a "strong, long-term *bona fide* competitor" in the wireless industry, as the Commission contemplated when it established its small business preferences. Yet Cingular now seeks to acquire these licenses, *without* being required to pay the full amount due to the Commission under the unjust enrichment rules. The public interest would not be served by granting Cingular a waiver of these rules. Cingular, a joint venture of SBC and BellSouth, both Fortune 100

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111 at 257, cited in *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348 at n.158 (1994) ("*Section 309(j) Second Report and Order*").

19 *Section 309(j) Second Report and Order*, ¶ 259.

20 *Section 309(j) Fifth Report and Order*, ¶ 141.

21 Application at 1.

companies, clearly was not intended to be a beneficiary of the Commission's small business preferences and Cingular has demonstrated no justification for this waiver.

Granting Cingular's waiver request would be patently unfair to other licensees that have played by the rules, by either building out their licenses to provide service to customers or transferring their licenses to other operators after complying with the unjust enrichment rules. Moreover, granting this waiver would encourage other parties to speculate in FCC licenses and "game" the FCC's auction and licensing processes rather than putting scarce spectrum resources to their most valuable use by providing service to customers. This would undermine the integrity of the Commission's spectrum auctions.

The Commission has faced a number of challenges in administering the C and F Block installment payment program over the past several years, yet throughout this time, it has made clear that "[m]aintaining the integrity of our rules and auction processes is an essential goal. As Senator John McCain observed . . ., 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.'"[22]

SBC and BellSouth – the Bell Operating Companies that own Cingular in a joint venture – have themselves emphasized this very point in previous filings with the Commission. Both companies aggressively opposed proposals in 1997 to provide C and F Block licensees relief from their installment payment obligations. SBC stated flatly that the "FCC should hold the Licensees to their original bids and not reduce the principal

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[22] *Installment Payment Financing Second Report and Order*, ¶ 3 (quoting *Ex Parte* Letter from the Chairman of the Senate Commerce Committee, Senator John McCain, to FCC Chairman Reed Hundt, WT Docket No. 97-82 (Sept. 18, 1997).

or accumulated interest due."[23] BellSouth decried waiver requests that would have postponed or reduced interest and principal payments owed by C and F Block licensees:

> Such "waivers" would undermine the integrity of the auction process by directly changing the economic bargains that resulted from the auctions. After-the-fact waivers of this kind are discriminatory *per se*. Deviations from evenhandedness relating to the economic terms of the auction have the effect of subsidizing one competitor over another and would directly penalize those who relied upon the rules as they stood prior to and at the time of the PCS auctions.[24]

Cingular's owners are now singing a different tune. Now they have no concern that the Commission would be unjustifiably rewarding a company that qualifies as anything but a "small" business. This cynical change in position, of course, has everything to do with corporate self-interest and nothing to do with the public interest. The waiver Cingular seeks is in fact even more egregious than the 1997 proposals to provide debt relief to C and F Block licensees (proposals SBC and BellSouth so vigilantly opposed), in that it would benefit the industry's second largest carrier – hardly the intended beneficiary of the Commission's efforts to promote small business entry in the wireless industry.

Although Cingular makes much of the bankruptcy of NextWave, what is truly bankrupt is its argument for a waiver of the unjust enrichment rules. The mere fact that NextWave did not succeed in the wireless industry does not correlate to a justification for Cingular to receive discounted spectrum. For the reasons that SBC and BellSouth stated in 1997, granting this waiver would do great harm to the integrity of FCC auctions and

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[23] SBC *Ex Parte* Presentation at 6, attached to Letter from Gina Harrison, SBC, to William F. Caton, FCC, WT Docket No. 97-82 (Sept. 17, 1997).

[24] Comments of BellSouth, WT Docket No. 97-82, at i-ii (June 23, 1997).

would "have the effect of subsidizing one competitor over another."[25] In this case, the Commission would be subsidizing the second-largest competitor in the industry – at the expense of numerous others trying to compete with Cingular. As Chairman Powell has eloquently stated,

> When the referee (in this case, the Commission) starts tinkering with the rules during the game, or worse after the buzzer has sounded, it does two very unfortunate things: First, it undermines the fairness of the contest. . . . Second, and most importantly in my mind, is that by telegraphing to the world that the game is subject to unpredictable changes in the rules based on the subjective decisions of the tournament organizers, you discourage people from playing the game at all.[26]

B. Cingular's Waiver Request Is Inconsistent with Commission Precedent and Policies

Cingular's request for a substantial reduction of the interest payments due under the unjust enrichment rules is contrary to a number of prior Commission decisions. For example, in 1994, in its proceeding adopting rules for the C and F Block auctions, the Commission rejected proposals to eliminate or reduce interest on installment payments, finding that this could "encourage speculation instead of legitimate applicants who can attract capital."[27] In 1997, in its proceeding restructuring certain aspects of the installment payment program, the Commission made clear that it did "not wish to adopt proposals that result in a dramatic forgiveness of the debt owed. ... [W]e believe that [it] would be very unfair to other bidders, and would gravely undermine the credibility and

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25 *Id.* at ii.

26 *Installment Payment Financing Order on Recon of Second R&O*, Separate Statement of Commissioner Michael Powell, 13 FCC Rcd 8345 at 8395-96.

27 *Implementation of Section 309(j) of the Communications Act – Competitive Bidding,* Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, ¶ 104 (1994).

integrity of our rules."[28] In 1999, the Commission even rejected a waiver request that would have reduced the interest rate on certain C Block installment payments from 7 to 6.5%.[29]

Consistent with these Commission decisions, the Wireless Telecommunications Bureau staff has denied a request to waive the Commission's unjust enrichment rules in circumstances very similar to those presented by Cingular.[30] This 2002 case involved LMDS licenses that Winstar acquired in a 1998 FCC auction with the help of bidding credits reserved for small businesses. In 2001, Winstar filed for bankruptcy and entered into an agreement to assign the licenses to an entity that did not qualify as a small business. The bankruptcy court approved the agreement, subject to FCC approval. Because the assignee was not a small business and did not qualify for bidding credits, the Commission's unjust enrichment rules required Winstar to reimburse the government for the amount of the bidding credits Winstar had used in the 1998 auction, plus interest; the total amount came to $8.5 million. Winstar asked the Commission to waive this payment, claiming that (1) it was in bankruptcy, (2) it would not profit from the assignment, (3) it did not have the money to make the unjust enrichment payments, and

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28 *Installment Payment Financing Second Report and Order* ¶ 19.

29 *Requests for Waiver of Section 24.711(b)(3) of the Commission's Rules Establishing the Interest Rate on Installment Payments for C Block PCS Licensees*, Memorandum Opinion and Order, 14 FCC Rcd 9298, ¶ 1 (1999).

30 *Winstar LMDS, LLC (Chapter 7 Debtor) Request for Waiver of 1.2111(d) and 101.1107(e) of the Commission's Rules Regarding Unjust Enrichment Payment for Fifteen LMDS Licenses Purchased in Auction No. 17*, Order, 17 FCC Rcd 7084 (Auctions Div. 2002) ("*Winstar Waiver Request Order*").

(4) the waiver would help the assignee to build and operate a network to provide wireless service to customers.[31]

The Bureau staff stated that these "arguments lack merit" and denied Winstar's waiver request.[32] It noted that "Congress has specifically directed the Commission to take measures to prevent unjust enrichment as a result of the methods employed to issue licenses,"[33] and found that granting the waiver request would undermine the purpose of the Commission's statutorily mandated unjust enrichment rules.[34] Although Winstar was not prohibited from assigning its licensees, it had to make the necessary payments to the Commission under the unjust enrichment rules before doing so. Presumably this meant Winstar's creditors would receive less money from the sale of the licenses and/or the assignee would need to increase the money it had previously agreed to pay for the licenses.

The Commission staff denied yet another similar waiver request in 1999.[35] The licensees involved in this case requested a waiver of a number of the Commission's rules, including the unjust enrichment rules, in the context of a series of proposed license assignments and corporate restructurings involving licenses that had been acquired with small business bidding credits. The Commission staff noted "that the Commission adopted its unjust enrichment rules at the direction of Congress, *see* 47 U.S.C.

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31 *Id.* ¶¶ 3, 5-6.

32 *Id.* ¶¶ 11, 16.

33 *Id.* ¶ 11.

34 *Id.* ¶ 13.

35 *D&E Communications, Inc., Request for Waiver of Sections 24.712, 24.720(b)(1), 1.2111(d), and 24.839(a) of the Commission's Rules Regarding Eligibility to Acquire License as a Small Business*, Order, 15 FCC Rcd 61 (Auctions Div. 1999).

§ 309(j)(3)(C), (4)(E), denominating them 'strict repayment penalties.'"[36] The staff found that the parties had failed to make the required showing for a waiver. The decision specifically rejected an argument that the parties' financial distress justified the waiver, stating that "even when the financial distress of a licensee is so severe that the Commission chooses to allow the transfer of the licensee's entrepreneurs' block license to a non-designated entity, the Commission will require the payment of any applicable unjust enrichment obligation."[37]

The Commission has emphasized the importance of protecting the integrity of its rules and auction process, and denied other C and F Block licensees the very sort of relief now sought by Cingular. Consistent with this clear Commission policy, the staff has denied requests to waive the unjust enrichment rules in cases that cannot be materially distinguished from the circumstances presented by Cingular. The Commission must consequently deny its waiver request as well.

C. The NextWave Bankruptcy Proceedings Provide No Basis For Granting Cingular's Waiver Request

Cingular points to NextWave's protracted bankruptcy proceedings in seeking to justify its waiver request. It claims that these proceedings, and NextWave's delay in using its spectrum to provide service to customers, establish "unique circumstances" warranting a waiver of the Commission's unjust enrichment rules. It also points to a term sheet, signed by the government and approved by the Bankruptcy Court, regarding the government's financial claims relating to the Designated Licenses. Cingular argues that

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[36] *Id.* at n.40 (quoting *Section 309(j) Fifth Report and Order,* 9 FCC Rcd at 5591, ¶ 134).

[37] *Id.* at ¶ 15. Notably, Cingular is hardly in "financial distress" vis-à-vis other wireless competitors and thus Cingular does not even attempt to justify its waiver request on this basis.

the "Term Sheet makes possible the crucial first step toward resolving NextWave's complicated bankruptcy proceedings and the government's claims regarding NextWave's licenses."[38]

The Commission should reject these arguments. As a procedural matter, both the Bankruptcy Court's approval and the term sheet make clear that the assignment of the Designated Licenses remains contingent on the Commission's review of the proposed transaction. More fundamentally, such arguments effectively treat the Commission as merely an ordinary creditor seeking to strike a deal with a bankrupt debtor. The government, of course, must represent its interests in NextWave's bankruptcy proceeding. But the Commission's interests as a creditor clearly do not preempt its mandate under the Communications Act. In holding that Section 525 of the Bankruptcy Code barred the Commission from canceling NextWave's licenses for failure to make timely installment payments, the Supreme Court made clear that its "interpretation of § 525 does not create any conflict with the Communications Act."[39] And the Communications Act obviously makes the Commission more than simply a creditor. Under Section 310(d), it must review proposed license assignments to determine whether they will serve the public interest, and under Sections 309(j)(3)(C) and 309(j)(4)(E), it must adopt and enforce safeguards to prevent unjust enrichment. Although Cingular may wish to treat the Commission's approval of the proposed assignment as a *fait accompli* thanks to the legal wrangling in the bankruptcy proceeding, the Commission must be faithful to its statutory mandate to protect the integrity of its auction process and enforce its unjust enrichment rules in a principled, non-discriminatory manner.

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38 Application at 15.

39 *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 304 (2003).

In carrying out this mandate, the Commission has made clear that it will not modify or waive its rules simply because a licensee is in bankruptcy or has demonstrated a willingness to engage in protracted litigation. In its proceeding restructuring its installment payment rules, the Commission refused to modify its rules "because some licensees indicate that they may consider filing for bankruptcy."[40] The Commission reasoned that "[t]o do so would harm the integrity of the auctions process and encourage licensees to threaten litigation in the future."[41] Consistent with this decision, in the case described above regarding Winstar, the Commission staff rejected an argument that the assignor's bankruptcy justified a waiver of the unjust enrichment rules: "In view of the explicit Congressional mandate in the Communications Act regarding the imposition of unjust enrichment payments, we conclude that the parties have not shown that the public interest, including consideration of the general policies of the Bankruptcy Code, will be served by granting the requested waiver."[42]

In light of this precedent, and the Commission's statutory mandate to protect the integrity of its auctions process, the Commission should deny Cingular's request for a waiver of the unjust enrichment rules. Any Commission consent to the proposed assignment should be conditioned on full payment of the amount owed to it under Section 1.2111 of the Rules.

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40 *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees,* Second Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 6571, ¶ 16 (1999).

41 *Id.*

42 *Winstar Waiver Request Order* ¶ 14.

III. CINGULAR'S CONDUCT RAISES CONCERNS ABOUT ITS CHARACTER QUALIFICATIONS

In determining whether a proposed assignment will serve the public interest under Section 310(d) of the Act,[43] the Commission must consider whether the applicant has the requisite "character qualifications" to acquire the licenses that are the subject of the application.[44] The primary focus of a character inquiry is whether the applicant's past conduct indicates a proclivity for "truthfulness and reliability" in its dealings with the Commission.[45] In assessing this factor, the Commission may weigh relevant evidence of FCC- and non-FCC related conduct, including whether the applicant has committed "any violation of any provision of the Act, or of the Commission's rules or policies."[46] The Commission also "take[s] seriously allegations of unreasonable or anticompetitive conduct" in evaluating a licensee's character.[47]

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43 47 U.S.C. § 310(d) (providing that no station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience, and necessity will be served thereby.").

44 *See, e.g., Ameritech-SBC Order* ¶ 568; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and ATUT Corp., Transferors, to AT&T Comcast Corp., Transferee,* Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 207 (2002) ("*AT&T-Comcast Order*").

45 *See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 F.C.C.2d 1179, ¶ 23 (1986) ("*Character Qualifications*"), *modified*, 5 FCC Rcd 3252 (1990) ("*Character Qualifications Modification*"), *recon. granted in part*, 6 FCC Rcd 3448 (1991) ("*Character Qualifications Recon*"), *modified in part*, 7 FCC Rcd 6564 (1992) ("*Further Character Qualification Modification*"); *AT&T-Comcast Order* ¶ 207 (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context and other license transfer proceedings, and emphasizing the importance of an "applicant's future truthfulness and reliability.").

46 *See, e.g., AT&T-Comcast Order* ¶ 207.

47 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp., Transferor, to SBC Communications, Inc., Transferee,* Memorandum Opinion and Order, 13 FCC Rcd 21292, ¶ 30 (1998); *see also Ameritech-SBC Order* ¶ 568, n.1098.

Cingular's character is placed in doubt by its egregious failure to cooperate with Anne Arundel County (the "County") in resolving interference problems with the County's public safety communications network. In 1989, the County began operating a public safety communications system in the 800 MHz band, which is used by the police department, sheriff's department, and fire department.[48] In 1997, this system began experiencing radio frequency interference from certain wireless telecommunications networks.[49] This interference persisted, and in 1999, the County decided to remedy the problem by acquiring a new public safety communications system.[50] Subsequent testing revealed as many as 61 "dead spots" in the County's existing public safety communications system.[51] According to the County, this interference "represents a crisis for the County's public safety system, and the health and welfare of the County's citizens, as well as its public safety employees, is at stake."[52]

Since these "dead spots" were centered around tower sites of Nextel and Cingular, the County approached both carriers in order to remedy the problem and to gain input necessary to configure the County's new system.[53] Although Nextel promptly cooperated

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48 *See 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 13126, ¶ 3 (2003) ("*Anne Arundel Order*").

49 *Anne Arundel Order* ¶ 3.

50 *Id.* ¶¶ 3-4.

51 *Id.* ¶ 4.

52 "Fact Sheet Submitted by Anne Arundel County, Maryland" at 1, attached to letter from James Hobson, Counsel for Anne Arundel County, to Marlene Dortch, FCC Secretary, WT Docket No. 02-100 (Sept. 11, 2002) ("County Fact Sheet").

53 *Anne Arundel Order* ¶¶ 4-5.

with the County in this effort,[54] Cingular did so only belatedly and reluctantly[55] – even though "[t]esting revealed that Cingular was a major source of interference with and degradation of the County's system."[56] In fact, "for quite some time, Cingular was not cooperative. From July to mid-November of 2001, Cingular would neither provide information needed to assess the situation nor cooperate with testing."[57] Cingular then exacerbated its failure to cooperate by activating a system that increased the risk of interference:

> With knowledge of the County's ongoing interference problem, Cingular activated in November 2001 a system of switching its frequencies and power level on a constant basis. Whatever the operational benefits for Cingular, this practice results in a greater risk of interference and has affected the County's ability to design and engineer its new radio system.[58]

Cingular's actions prompted the FCC's staff to observe that "Cingular in the past has not always cooperated fully in the County's efforts to resolve interference problems with its public safety communications network."[59] Particularly in light of the nation's heightened homeland security concerns, the Commission should consider Cingular's callous failure to cooperate in addressing potentially life-threatening interference to public safety systems in determining whether Cingular has the requisite character qualifications to acquire FCC licenses.

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54 *Id.* ¶ 5.

55 County Fact Sheet at 2.

56 *Id.*

57 *Id.*

58 *Id.*

59 *Anne Arundel Order* ¶ 26.

IV. THE PROPOSED TRANSACTION SHOULD BE REVIEWED BY THE COMMISSION AND BE SUBJECT TO "PERMIT-BUT-DISCLOSE" EX PARTE RULES

Although license assignment applications are typically reviewed by the Wireless Telecommunications Bureau under delegated authority, Cingular's proposed transaction hardly qualifies as typical. It seeks a waiver that raises fundamental issues regarding the unjust enrichment rules and the integrity of the Commission's auction process. As described above, there are also significant questions raised regarding Cingular's character qualifications to hold the licenses. Under these circumstances, the Commission, rather than FCC staff, should review the proposed transaction. Indeed, Commission review is required under Section 0.331(a)(2) of the rules, which states that the "Chief, Wireless Telecommunications Bureau shall not have authority to act on any ... petitions or requests, whether or not accompanied by an application, when such ... petitions or requests present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedent and guidelines."[60]

For similar reasons, the Commission should announce that this proceeding will be governed by "permit-but-disclose" *ex parte* procedures that are applied to non-restricted proceedings under Section 1.1206 of the Rules.[61] This would permit full public participation in the proceeding and provide the Commission with a more complete record on the important issues raised by the proposed assignment. The Commission has adopted such an approach in numerous other license assignment proceedings.[62]

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[60] 47 C.F.R. § 0.331(a)(2).

[61] *Id.* at § 1.1206. This proceeding is currently treated as a restricted proceeding pursuant to 47 C.F.R. § 1.1208. *See* Public Notice at 3.

[62] *See, e.g., Commission Seeks Comment on Applications to Assign Wireless Licenses from WorldCom, Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition*

V. CONCLUSION

The Commission should deny Cingular's request for a waiver of the unjust enrichment rules, and condition any consent to the proposed license assignments on the full payment due under these rules. The Commission should also investigate whether Cingular possesses the requisite character qualifications to hold the Designated Licenses given its failure to cooperate in addressing interference to public safety systems in Anne Arundel County.

Respectfully submitted,

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November 5, 2003

Corp., Public Notice, DA 03-2948, WT Docket No. 03-203, at 4 (Sept. 25, 2003); *AT&T Corp. and Comcast Corp. Seek FCC Consent for a Proposed Transfer of Control,* Public Notice, 17 FCC Rcd 5907 at 5908 (2002).

Certificate of Service

I, Ruth E. Holder, hereby certify that on this 5th day of November, 2003, I caused true and correct copies of the foregoing Comments of Nextel Communications, Inc. to be mailed, by e-mail or first-class U.S. Postal Service mail, to:

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