Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Cingular Wireless and NextWave	)	
Seek FCC Consent for the Full and	)	WT Docket No. 03-217
Partial Assignment of Thirty-Four	)	
Broadband Personal Communications	)	
Services Licenses	)	

To: The Wireless Telecommunications Bureau

PETITION TO DENY

Eldorado Communications, LLC ("Eldorado") and NY Telecom, LLC ("NY Telecom")[1] (collectively, "Petitioners"), by their attorneys and pursuant to Section 309(d) of the Communications Act and Section 1.939 of the Commission's rules, hereby petition to deny NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively, "NextWave"), and Cingular Wireless LLC's ("Cingular," and collectively with NextWave, "Applicants") joint applications (the "Applications") to assign thirty-four Broadband Personal Communications Services Licenses. As demonstrated below, granting the Applications would not serve the public

[1] Eldorado and NY Telecom have previously participated in related proceedings. *See, e.g,* NY Telecom Application for Review, File Nos. 000855872, *et al.* (filed April 2, 2003) [hereinafter NY Telecom Application for Review]; NY Telecom Request for Public Proceeding Regarding NextWave's Construction Obligations and Revocation of Licenses that are not Timely Constructed, File Nos. 0000855872, *et al.* (filed May 16, 2002); NY Telecom Reply to NextWave, File Nos. 0000855872, *et al.* (filed June 6, 2002); Eldorado Petition for Emergency Relief (filed Nov. 7, 2001); Eldorado Opposition to Joint Request for Immediate Refund of Auction No. 35 Down Payments for NextWave Licenses, File Nos. 0000365151, *et. al.* (filed Jan. 17, 2002); Eldorado Petition for Reconsideration, File Nos. 0000365151, *et. al.* (filed April 26, 2002); Eldorado Comments, WT Docket No. 02-276 (filed Oct. 11, 2002); Eldorado Reply Comments, WT Docket No. 02-276 (filed Oct. 21, 2002).

interest, convenience, and necessity, and, therefore, the Applications should be denied.

In any event, 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.[2] The failure to date to invite public comment on the Applications continues an unfortunate pattern of the shutting the public out of proceedings involving resolution of the Commission's NextWave "problem."[3]

I. Petitioners Have Standing.

NY Telecom previously has called for the surrender and re-auctioning of the licenses at issue in this proceeding and that NY Telecom has an interest in bidding for those licenses.[4] Consequently, NY Telecom has standing to challenge the assignment of NextWave's licenses to Cingular. As the D.C. Circuit has made clear, in the PCS auction context, "[a] bidder in a government auction has a 'right to a legally valid procurement process'; a party allegedly deprived of this right asserts a cognizable injury" for standing purposes.[5] In

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[2] *See, e.g., Telecorp PCS, Inc., Tritel, Inc., and Indus, Inc. Seek FCC Consent to Transfer Control of, or Assign, Broadband PCS and LMDS Licenses,* Public Notice, DA 00-1589, WT Docket No. 00-130 (rel. July 17, 2000) (inviting interested parties to file comments or petitions); *Jacksonville Wireless, L.P., and Airgate Wireless, L.L.C. Seek Consent to Assign PCS Licenses to Cricket Holdings, Inc.,* Public Notice, DA-2319 (rel. Nov. 13, 1998) (inviting petitions to deny, formal petitions for other forms of relief, or other comments).

[3] *See* NY Telecom Application for Review at 5-7.

[4] *See* Declaration of Stephen Roberts (attached as Exhibit 1); NY Telecom Application for Review at 2.

[5] *U.S. Airwaves, Inc. v. FCC,* 232 F.3d 227, 232 (D.C. Cir. 2000), citing *DIRCTV, Inc. v. FCC,* 110 F.3d 816, 829 (D.C. Cir. 1997); *see also DIRECTV v. FCC,* 110 F.3d 816, 829-830 (D.C. Cir. 1997) (petitioner that did not participate in FCC auction has standing to challenge rules that denied it "an opportunity to compete upon valid terms [and] on an equal basis"; loss of such an opportunity constitutes a cognizable injury for purposes of standing); *High Plains Wireless, L.P. v. FCC,* 276 F.3d 599, 605 (D.C. Cir. 2002) ("A disappointed bidder need not show that it would be successful if the license were auctioned anew, but only that it was able and ready to bid and that the decision of the Commission prevented it from doing so on an equal basis.").

order to show that such injury may be redressed, the bidder need not demonstrate that it will participate in a re-auction of the spectrum, just that it is "ready, willing, and able" to do so.[6]

To establish standing to challenge the manner in which the Commission treats licensees of auctioned services after the auction is completed, it is sufficient that the losing bidder "intends" to bid in a future reaction of the spectrum and that it is able to raise the capital needed to do so.[7] Impermissible "retroactive changes to the initial auction rules," in effect much like the rule waivers NextWave now seeks, "affect the validity of a government auction" and give other auction participants, or potential participants, standing to challenge the relief sought.[8] Because NY Telecom is ready, willing and able to bid in a future re-auction of the spectrum at issue here,[9] it has standing to challenge the Applications.

NY Telecom also has standing by virtue of its currently pending Application for Review of the Wireless Telecommunications Bureau's decision to toll the construction deadlines for 90 C and F block licenses held by NextWave.[10] In that Application for Review, NY Telecom pointed out that there was no basis for "tolling" NextWave's construction deadlines, and argued that NextWave's licenses must therefore be revoked and re-auctioned. Because granting the Applications at issue and allowing assignment of NextWave's licenses to Cingular would call into question the Bureau's ability to grant NY Telecom its requested relief, NY Telecom is entitled to challenge the Applications. At minimum, if it grants the Applications, the Bureau should explain that any grant is subject to reversal if NY Telecom is ultimately

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[6] *U.S. Airwaves, Inc., 232 F.3d at 232.*
[7] *Id.*
[8] *Id.*
[9] *See* Declaration of Stephen Roberts (attached as Exhibit 1).
[10] *See Applications of AirGate Wireless, L.L.C. and Cricket Holdings, Inc.,* 14 FCC Rcd 11827, 11844 (WTB 1999) (leaving open question of whether pendency of related proceeding confers standing under Section 309(d)(1) of the Communications Act).

successful in reversing the tolling decision either at the Commission or in the courts.

For its part, Eldorado, as an auction participant who bid against NextWave for three of the licenses at issue in this proceeding,[11] and who was eligible to bid in virtually all markets won by NextWave,[12] likewise has standing to challenge NextWave's Applications to assign its licenses.[13] Standing is present as well because, but for NextWave's actions and the Commission's disparate treatment of NextWave, Petitioners would be competitors of Applicants.

Certain of the licenses at issue in this proceeding were awarded originally in 1996, as part of the auction of C block licenses.[14] In Auction No. 5, NextWave bid up the value of the licenses by bidding nearly three times what winning bidders in the prior A and B block auctions had paid. As a result of NextWave's exorbitant bids, the scale of its acquisitions, and its subsequent bankruptcy, C block winners, including Eldorado, were unable to obtain necessary financing to construct their networks.

Recognizing the failure of Auction No. 5, the Commission offered winning bidders the Hobson's choice of forfeiting their down payments and returning their licenses, forfeiting half of their down payments and returning

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[11] Eldorado bid against NextWave in Auction No. 5 for the C block licenses in the Poughkeepsie, NY, San Diego, CA, and Sarasota, FL BTAs.

[12] Eldorado was eligible to bid on all of the PCS licenses in Auctions 5 and 10, and 1467 of the 1479 licenses in Auction 11, some of which NextWave now seeks to assign.

[13] *See Application of Baker Creek Communications, L.P., for Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas,* 13 FCC Rcd 18709, n.1 (WTB 1998); *Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses,* 12 FCC Rcd 2030, 2034 (WTB 1997).

[14] *See Wireless Telecommunications Bureau Announces Conditional Grant Of Broadband Personal Communications Services Entrepreneurs' C block Licenses To NextWave Personal Communications, Inc. – Final Down Payment Due By January 10, 1997,* Public Notice, DA 97-12 (rel. Jan. 3, 1997); *In re Applications of NextWave Personal Communications Inc. for Various C-block Broadband PCS Licenses,* Memorandum Opinion and Order, 12 FCC Rcd 2030, 2034 (1997).

half of their licenses, or paying full price and keeping their licenses.[15] In light of changed economic conditions, Eldorado and many other small businesses had no choice but to return their licenses and forfeit their down payments. They lost millions of dollars in down payments. Worse, Eldorado and other small bidders were denied the business opportunities that Congress and the Commission intended for small business entrepreneurs. If the Applications are granted, NextWave, already spared these consequences, will walk away with more than $700 million as a result of assigning licenses originally set aside for small entities like Eldorado to one of the largest wireless carriers in the country.

In short, while NextWave avoided paying for its licenses by choosing bankruptcy and then receiving extraordinary relief from its construction deadlines, similarly situated licensees were forced to surrender their licenses. [16] Now NextWave seeks sell the licenses it retained through these measures at a profit. In contrast, Eldorado made every effort to comply with the Commission's rules and requirements and, as a result, was effectively precluded from competing with NextWave.

Grant of the Applications would perpetuate this inequitable treatment and compound the injury to Eldorado by allowing NextWave to pocket $700

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[15] *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees,* Second Report and Order, 12 FCC Rcd 16436 (1997); *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses,* Order on Reconsideration of the Second Report and Order, 13 FCC Rcd 8345 (1998); *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 (1999).

[16] *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, DA 03-617 (rel. Mar. 3, 2003). By contrast, rather than waiving or extending Eldorado's construction requirements for one if its PCS licenses, and although Eldorado had satisfied all payment obligations with respect to that license, the Commission terminated Eldorado's license. *Eldorado Communications, L.L.C. Request for a Waiver and Extension of the Broadband PCS Construction Requirements,* 17 FCC Rcd 24613 (WTB 2002).

million from the assignment of Auction No. 5 licenses that Eldorado and similarly situated bidders were not permitted to retain. Eldorado would be further harmed by the assignment to Cingular of licenses that, absent the Commission's extraordinary tolling of NextWave's construction deadlines, would be available to other designated entities.[17]

II. Grant Of The Applications Is Not In The Public Interest.

The effect of granting the Applications would be to stifle competition by perpetuating the disparate treatment of similarly situated Auction No. 5 winners, and, therefore, a grant would not serve the public interest. The Commission's public interest mandate with respect to licensing spectrum-based services includes "promoting competition to the extent feasible and taking appropriate regulatory steps to ensure that the competition is fair."[18]

A grant of the Applications would, contrary to this mandate, allow NextWave both to profit from its acquisition of spectrum in Auction No. 5 and to avoid its obligations with respect to that spectrum under the Commission's rules. Even in a vacuum, this result would be inconsistent with fair competition and the public interest. When compared to the options available to those financially distressed Auction No. 5 winners that did not enter bankruptcy, this outcome improperly favors one party before the Commission over many others.

This conclusion is confirmed by the Commission's earlier decision to "reject[] proposals that would have significantly altered the amounts paid for individual licenses" by Auction No. 5 winners "out of fairness" and "to maintain the integrity of the auction process." [19] For the same reasons that only limited relief was appropriate for other Auction No. 5 winners, it is not in the

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[17] NY Telecom also has standing through Eldorado by virtue of certain NY Telecom partners' interests in Eldorado.
[18] *Review of the Pioneer's Preference Rules,* 10 FCC Rcd 4523, 4527 (1995).
[19] *Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees,* 13 FCC Rcd 8345, 8349 (1998).

public interest to allow NextWave to profit from the sale of licenses it acquired through designated entity preferences.

Moreover, granting the Applications would deprive the public of funds owed by NextWave and would allow Cingular, one of the nation's largest wireless carriers, to benefit from the Commission's designated entity preference policies. As explained in greater detail below, each of these consequences would undermine the purposes of the Commission's rules and would otherwise be contrary to the public interest.

III. The Standard For Waiver Has Not Been Met.

The Commission's rules allow waivers only in certain limited circumstances in which good cause is shown.[20] As the D.C. Circuit has stated, "an applicant for waiver faces a high hurdle even at the starting gate," and must establish that the requested waiver would serve the public interest.[21] Applicants have not met this standard.

The requested waiver will result in a payment to the Commission of less than the amount to which it would otherwise be entitled,[22] lead to an assignment of designated entity spectrum to one of the largest wireless providers in the country, and enable NextWave to receive nearly $700 million for its interests in the assigned licenses.

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[20] 47 C.F.R. § 1.925.

[21] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[22] The Application does not make the size of the shortfall clear, providing only that the unpaid principle due is "approximately $687 million" and acknowledging that if the Applications are granted the government would receive "an amount that may vary from the amount that might otherwise be determined to be payable under Sections 1.2111 and 24.714." Applications, Exhibit 1 at 14. Telecommunications industry analysts suggest that the shortfall is at least $36 million, and possibly much more. *Next-Wave Cingular Deal: Near-Term Upside Potential for NextWave* (Legg Mason Aug. 6, 2003).

These are exactly the harms against which the unjust enrichment rules are meant to guard. The purpose of these rules is "ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms"[23] and "prevent designated entities from profiting by the rapid sale of licenses acquired through the benefit of . . . preference policies."[24] Instead of preserving designated entity benefits for small businesses, the Applications would transfer spectrum to one of the largest wireless providers in the nation. At the same time, NextWave, the designated entity that originally qualified for the set-aside spectrum, would receive a substantial profit. Because the underlying purpose of the rules at issue would not be served by the requested assignment, Applicants cannot satisfy the standard for waiver set forth in Section 1.925(b)(3)(i).

Similarly, Applicants have not satisfied the standard for waiver set forth in Section 1.925(b)(3)(ii), which permits waiver where, in view of unique factual circumstances, application of the rules would be inequitable, unduly burdensome, or contrary to the public interest. Applicants attempt to satisfy this standard by claiming that the circumstances surrounding the proposed transaction are unique, and that granting the requested waiver would serve the public interest.

The circumstances presented here do not warrant departure from the Commission's unjust enrichment rules. Applicants claim that NextWave's bankruptcy and the lengthy history of litigation over the subject spectrum justify waiver. These allegedly unique circumstances amount to nothing more than natural consequences of NextWave's deliberate decision to avoid its financial obligations to the Commission and its similarly deliberate decision to contest the Commission's subsequent treatment of the affected licenses. Such

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[23] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 9 FCC Rcd 5532, 5594 (1994).

[24] *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 2348, 2394 (1994); *see also* 47 U.S.C. § 309(j).

financial distress, the Commission has previously determined, does not amount to a unique or unusual circumstance sufficient to justify waiver of the unjust enrichment rules.[25]

Moreover, NextWave's difficulty is not unique. Eldorado and many other similarly situated Auction No. 5 "winners" also were unable to make their payments to the Commission. The features that distinguish these Auction No. 5 winners from NextWave – *i.e.*, that NextWave chose bankruptcy and contested the Commission's actions, while Eldorado and others complied with the Commission's rulings – weigh against, not for, waiver.

In any event, even if the circumstances presented by the Applications were unique, waiver is not in the public interest. Depriving the Commission of payments due, assigning small-business set-aside spectrum to a large wireless carrier, and allowing NextWave to profit at the expense of the public are contrary to the purposes of the Commission's rules and not in the public interest.

The public interest benefits on which the Applicants rely also fail to justify waiver. Applicants cite the public's interest in putting spectrum to use, the public's interest in recovering value on its spectrum resource and achieving certainty, and the public's interest in effectuating the purposes of the bankruptcy code. None of these cited public benefits outweighs the public's interest in receiving full payment (including interest) for public goods, ensuring that small business and entrepreneur benefits inure to the benefit of small businesses and entrepreneurs, and effectuating the purposes of the Communications Act and the Commission's unjust enrichment rules.

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[25] *Winstar LMDS, LLC Request for Waiver of 1.211(d) and 101.1107(e) of the Commission's Rules Regarding Unjust Enrichment Payment for Fifteen LMDS Licenses Purchased in Auction No. 17,* 17 FCC Rcd 7084, 7090 (WTB 2002).

IV. Conclusion

The Bureau should not grant the Applications, which would perpetuate the injuries suffered by Petitioners and continue the pattern of extraordinarily favorable treatment for NextWave. Such disparate treatment of parties before the Commission discourages competition and disserves the public interest. Denial is also warranted because the public interest would not be served by allowing NextWave to profit from sale of its licenses at the expense of the public and allowing Cingular to purchase spectrum originally designated for small businesses. Accordingly, the Applications should be denied.

Respectfully submitted,

ELDORADO COMMUNICATIONS, LLC
and NY TELECOM, LLC

By: Henry Goldberg
Jonathan L. Wiener
Brita Dagmar Strandberg

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, NW
Washington, DC 20036
(202) 429-4900
Its Attorneys

November 5, 2003

EXHIBIT 1

DECLARATION OF STEPHEN ROBERTS

1. My name is Stephen Roberts, and I am Managing Director of NY Telecom, LLC ("NY Telecom").

2. As stated in Eldorado Communications, LLC and NY Telecom's Petition to Deny, NY Telecom stands ready, willing, and able to participate in any re-auction of the spectrum NextWave seeks to assign to Cingular.

I hereby declare under penalty of perjury that foregoing is true and correct to the best of my knowledge.

Date: 11/5/03

Stephen Roberts

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition to Deny of Eldorado Communications, LLC and NY Telecom, LLC was sent by first-class mail, postage prepaid, this 5th day of November 2003, to each of the following:

Michael R. Wack
NextWave Personal Communications, Inc.
601 13th Street, N.W.
North Tower, Suite 320
Washington, DC 20005

David G. Richards
Cingular Wireless LLC
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342

Brita Dagmar Strandberg