

Statement of

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Before the

**SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE HOUSE COMMITTEE ON JUDICIARY**

On the

NEXTWAVE SETTLEMENT LEGISLATION

**Thursday December 6, 2001
10:00 a.m.
2141 Rayburn House Office Building**

I.

Introduction

Good morning Mr. Chairman and Members of the Subcommittee. My name is John Rogovin, and I am Deputy General Counsel of the Federal Communications Commission.

I appreciate this opportunity to appear before you today to report on the details of the Commission's efforts to reach a settlement in the *NextWave* matter. Last summer, Chairman Powell asked me to explore settlement of the *NextWave* case. After months of hard-fought, around-the-clock negotiations, I am pleased to report that the parties have reached an agreement that will conclude their long-running dispute.

The agreement will bring substantial benefits to the American public. Of principal concern to the Commission is that the settlement will allow the immediate deployment of critical spectrum resources that have remain unused during five years of delay and litigation. Consumers throughout the United States will benefit from that outcome. In addition, the settlement will generate \$10 billion for the Treasury, nearly twice the amount that NextWave would pay if it keeps the licenses.

The settlement, however, cannot be implemented without legislation. This legislation is needed to permit the Commission to make payments to NextWave and to take other actions to effect the settlement. Because the settlement would bring the *NextWave* litigation to an end while ensuring substantial benefits for the public, we

respectfully urge the Congress to approve the settlement by enacting the proposed legislation before Congress adjourns this year.

II. Background

In 1993, Congress authorized the FCC to award licenses for spectrum through a system of "competitive bidding," or auction. In 1996 and 1997, the Commission held initial auctions for C-Block and F-Block personal communications services (PCS) licenses. At those auctions, NextWave submitted the winning bid on 63 C-Block licenses and 27 F-Block licenses, for a total of \$4.8 billion. NextWave deposited a \$500 million downpayment with the U.S. Government and agreed to pay the balance (\$4.3 billion) over ten years at a favorable interest rate.

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

Over the next three years, the Commission, the United States, NextWave, and others engaged in intensely fought litigation in numerous courts, including the U.S. Bankruptcy Court, the U.S. Court of Appeals for the Second Circuit, the U.S. Court of

Appeals for the D.C. Circuit, and the Supreme Court of the United States. The Second Circuit upheld the Commission's regulatory requirement that there be full and timely payment by NextWave for the licenses. The Second Circuit also held that the Commission's decision to automatically cancel the NextWave licenses and to re-auction them was not contrary to bankruptcy law. In January 2001, the Commission re-auctioned the spectrum previously licensed to NextWave. In that re-auction (Auction No. 35), 21 wireless carriers bid \$15.85 billion for the new licenses.

Meanwhile, NextWave had petitioned the D.C. Circuit for review of the Commission's decision to cancel NextWave's licenses for failure to pay. On June 22, 2001, the D.C. Circuit ruled that the automatic cancellation of NextWave's licenses violated Section 525 of the Bankruptcy Code. The Government has sought review of the D.C. Circuit's decision in the Supreme Court. This matter is still pending.

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I recognize that many of you have a long-standing interest in this matter, and some of you even joined an Amicus Brief in support of NextWave during the D.C. Circuit stage of this litigation. While we may disagree on the legal merits of the bankruptcy law question that was before the D.C. Circuit, I believe we can agree that a speedy resolution to this protracted litigation would benefit all of the parties involved, as well as the general public interest.

It is this attempt at a resolution that brings me here before you today. All of the parties to this matter, including NextWave, the Commission, the United States, and the majority of the winning bidders in Auction 35 are seeking your assistance in finally putting this matter to a just end. Specifically, we respectfully request that Congress pass legislation approving and authorizing the settlement agreement. Let me briefly describe below the settlement and why it is in the public interest. I will then address the need for the proposed legislation.

III.

The Settlement Agreement and Legislative Proposal

The settlement agreement requires that Auction 35 bidders pay the government \$15.8 billion that they bid in exchange for receiving the licenses auctioned in Auction 35. The government will then keep \$10 billion in net proceeds and will guarantee by December 31, 2002 to pay \$5.8 billion net to NextWave in exchange for its complete release of all claims to the disputed licenses.

The principal benefit of the settlement is that it allows the Commission to grant licenses to companies that will rapidly use them to provide wireless telecommunications services. This fulfills the congressional mandate in the Communications Act to deploy spectrum as expeditiously as possible, without undue regulatory or judicial delay. Moreover, it allows the Commission to grant licenses to the very bidders who place the highest value on those licenses. In the absence of a settlement, there is considerable

uncertainty about when the spectrum will be put to productive use in the service of the American public.

Congress also has charged the Commission with obtaining value for public use of the spectrum through the auction program. This settlement will do just that. The settlement will provide payments to the United States of more than \$10 billion – approximately twice what the Treasury would have received had NextWave retained the licenses and more than the government is likely to collect.

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

First, the proposed legislation ensures that Congress has approved and authorized the settlement in all respects. This congressional action is required to ensure that the Commission is acting fully within its authority. It provides, for example, necessary budgetary and appropriations authority to the Commission to make payments to NextWave.

Second, the proposed legislation contains a judicial review provision, patterned on other Acts of Congress, that provides for expedited review, limited to constitutional claims. Any challenge to the legislation, the settlement agreement itself, or to actions taken by the Commission would be funneled into one court of appeals (the D.C. Circuit)

and would be on a fast track for review. This provides assurance that the American public will receive the benefits of the settlement with a minimum of additional litigation delay.

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

Finally, we are mindful that we have asked much of Congress -- to pass legislation codifying the settlement by the end of the year. We recognize that the compressed period for analysis and reasoned discussion makes this task difficult for you and your staffs, and we appreciate the attention and care that has already been shown by Congress in considering the settlement and legislation. As you may know, the final settlement agreement was completed and signed by the Government only on November 26, 2001, after a lengthy and complex negotiation period.

V.

Alternatives to Settlement

The main reason to settle is that settlement is preferable to the alternatives. If the Commission continues to litigate and the Supreme Court declines to take the case, the decision of the D.C. Circuit will stand and NextWave will be the licensee. In that

scenario, NextWave likely would elect to continue to pay for the spectrum over time at advantageous interest rates. Pursuant to the installment payment program, NextWave could pay for the spectrum over six years at a rate of 6.5 % for C-Block licenses and 6.25 % for the F-Block licenses. That would leave the Treasury with substantially less than the \$10 billion in revenues that would be generated by the settlement.

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

No matter what the outcome, litigation would likely mean years of further delay in the ability of the Commission to grant spectrum licenses for much-needed wireless services for American consumers. The Commission first auctioned this spectrum in 1996 and 1997, yet the spectrum has never been used. Without a settlement, valuable spectrum may well remain fallow at a time when our economy and the consumer need it most.

Moreover, even if the Government ultimately prevailed in all litigation, there is uncertainty about the future value bidders would place on the spectrum given fluctuations in the marketplace. Several high bidders in Auction 35 have indicated that if the settlement does not go forward and there is further litigation, they should be released

from the obligations of Auction 35. They would argue, for example, that they should be entitled to the return of the \$3.2 billion in deposits held in non-interest-bearing accounts by the Government. It is uncertain at what price the spectrum would sell for at the conclusion of that litigation.

V.

Conclusion

The Commission and the other parties to the *NextWave* case have worked long and hard at the negotiating table to resolve a matter of critical importance to the American public. We have attempted to settle this matter in a way that protects the public interest, ensures that the spectrum is put to prompt use, and guarantees that the American people receive fair value for the spectrum. I would like to thank the Subcommittee for this opportunity to provide information on the NextWave settlement. I look forward to answering any questions you may have.