

**THE SETTLEMENT BETWEEN THE U.S. GOVERN-
MENT AND NEXTWAVE TELECOM INC. TO RE-
SOLVE DISPUTED SPECTRUM LICENSES**

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND
THE INTERNET

OF THE

COMMITTEE ON ENERGY AND
COMMERCE

HOUSE OF REPRESENTATIVES

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THE SETTLEMENT BETWEEN THE U.S. GOVERNMENT AND NEXTWAVE TELECOM INC. TO RESOLVE DISPUTED SPECTRUM LICENSES

TUESDAY, DECEMBER 11, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 3 p.m., in room 2123, Rayburn House Office Building, Hon. Fred Upton (chairman) presiding.

Members present: Representatives Upton, Stearns, Shimkus, Ehrlich, Tauzin (ex officio), Markey, Gordon, Engel, Green, DeGette, Boucher, and Dingell (ex officio).

Staff present: Howard Waltzman, majority counsel; Yong Choe, legislative clerk; Andy Levin, minority counsel; and Courtney Johnson, legislative clerk.

Mr. UPTON. Good afternoon everyone. The House itself does not expect any votes until 6:30. So, a number of members are coming back from their Districts, and I would entertain a motion now to ask for unanimous consent that all members of the subcommittee have an opportunity to include their opening statement as part of the record. And without objection, so ordered.

Good afternoon. Why are we here today? In part because Congress is being asked to help clean up a judicial train wreck between bankruptcy policy and spectrum policy.

Among other things, the train wreck has resulted in very valuable and scarce spectrum going unused for over 4 years, and the taxpayers have been starved out of the proceeds which either of the options of this spectrum should have yielded them.

The D.C. Circuit Court says that bankruptcy law trumps all else, and thus the NextWave is entitled to keep its licenses while the subsequent action, Auction 35 winners, are out of luck.

The Court's decision motivated the FCC, the Department of Justice, and the Auction 35 winners, to settle this dispute with NextWave in order to get the spectrum into productive use. Congress is now being asked to facilitate the settlement before the end of the month.

Let me say at the outset that I am not happy about this, and about the way that this has all shaken out. I am not happy that NextWave gets \$6 billion out of this, and "b" as in big, when it

promised to pay \$4.5 billion in the C-block auction, and thus far has only made \$500 million in payments.

I am not happy with the way the D.C. Circuit came down on this matter either. But the alternative would be to ignore the settlement, and roll the dice, and hurry up and wait, and hope that the Supreme Court not only takes the case, but also overturns the D.C. Circuit.

So while it may not be pretty or handsome, the settlement is the best looking option that we have if we want to get the spectrum into productive use and improve our physical situation, because under the terms of the settlement the government will get \$10 billion in a lump sum.

Above all, we need to draw lessons from how we got into this morass and recognize what I once heard the distinguished ranking member of the full committee, Mr. Dingell, once say, there is no education, no value, in the second kick of a mule.

So I am planning to introduce legislation which would prevent a similar judicial train wreck between the bankruptcy laws and the spectrum policy laws from ever happening again. Spectrum is too valuable of a national resource to let it lay fallow or the lawyers argue ad nauseam in court.

And with that, that concludes my opening statement, and I will yield to my friend and colleague, the ranking member of the subcommittee, Mr. Markey. Perfect timing.

Mr. MARKEY. I thank you, Mr. Chairman, although I would say that being introduced with the words “ad nauseam” immediately preceding my name is not exactly—but I am sure that it reflects a certain percentage of attitudes about me.

I thank you, Mr. Chairman, for having this hearing, and this is an important subject for us because it basically captures the intersection of budget policy and telecommunications policy as they collide.

The chief reasons that supporters give for endorsing the settlement are as follows. Number 1, it ends the legal wrangling. Number 2, it puts the spectrum in the market. Number 3, it gives the government a financial boost of some \$10 billion.

And, Number 4, it is better than any alternative, and so let me take each of these in-turn. First, the legal wrangling. I think a quick glance at the settlement document would indicate to anyone that the lawyers have approached the job of eliminating legal claims on the licenses, and limiting corporate liability in future lawsuits with particular industriousness.

In fact, they have in all likelihood lawyered themselves out of time. If we are truly interested in ending legal wrangling, however, Congress should consider changes to the settlement.

The brokered agreement still does not address what was ostensibly the root cause of all of the litigation in the first place. Namely, the authority of the FCC to cancel licenses, and extricate them from companies in default. That question still goes unresolved.

Second, Congress should assess whether similarly situated companies should be part of the settlement, either as a matter of assuring legal finality, or as a matter of equity in public policy-making.

There are similarly situated companies out there with similar claims still waiting a resolution, perhaps by this subcommittee, on an ongoing basis, not the role in my opinion for the Congress.

Second, putting the spectrum put in the market. It is hard not to approach this argument without engaging in I told you to rhetoric. One wonders why this argument was not persuasive to the Commission in 1997, 1998, 1999, or 2000, when in that year NextWave agreed to pay everything that it owed, plus interest, along with an offer to provide special services in schools in their markets.

Suffice it to say that we have waited 5 years to get the spectrum in the market, and whether it happens now or in a few months from now, is less important in my view than how it comes into the market.

Third, is the fiscal policy argument, that the government stands to gain \$10 billion. In the alchemy of Federal budget scoring, this number is totally illusory. This is another reason why I felt it wholly inappropriate from an institutional perspective for the FCC to become a fiscal policy advocate back to Congress, and its own oversight committee.

The Commission should leave cooking the books on spectrum revenues and budget scoring to OMB. That's their job, and they are experts at it. Instead, it should root itself in fulfilling its statutory directives from Congress on these matters.

The fact is that C-Block revenue has already been accounted for in previous and in current budgets. You can't tell so-called money the roughly \$500 million NextWave deposit. That was booked and counted some years ago.

With respect to the rest of the money, OMB and CBO have been counting on all or part of it for years. As a matter of Congressional fiscal implications, the Congressional Budget Office already had an estimate for C-Block revenues this year.

The CBO reached this number by splitting the difference on the relative outcomes if the government won its case or lost its case. In other words, if the government won, it would get the \$16 billion from the bidders in Auction 35. If it lost, it would get approximately \$6 billion from NextWave in principal, plus interest, and penalty payments.

Splitting the difference, the CBO estimated C-Block revenue at \$11 billion. Now, if we take the proposed settlement, with its \$16 billion payment from the companies, and then subtract the \$9.55 billion appropriation that Congress must make for NextWave's portion, that leaves a net gain of \$6.45 billion.

And compare that with the \$11 billion that was already in Congressional budget estimates, and we arrive at a net shortfall of about \$4.5 billion. So what is the fiscal implication of this settlement? Not a \$10 billion gain at all.

The cold truth is that if a settlement were introduced as is, and brought to the House floor, the CBO would score the bill as costing the government \$4.5 billion. We can quibble about whether we believe this is an accurate representation of income and outlay, but that is the way the government counts it.

Which brings us to the final argument, which is that this settlement may be unpalatable, but the alternatives are worse. One of

the most troubling things about this settlement to me is that it represents the abandonment of any pretense of sound telecommunications policy in favor of a financial settlement, where the FCC intervenes to broker an agreement between potential licensees and where the overriding objective is seemingly about getting more money.

A more suitable alternative might be one that better meets the objectives of Congressionally developed spectrum policy as articulated in Section 309(j) of the Telecommunications Act.

Advocates for the deal have mentioned getting the spectrum into the market and recouping a portion of its value for the taxpayer. Yet, the statute also includes an equally important number of other goals, the promotion of economic opportunity and competition, the wide distribution of licenses and avoidance of excessive concentration of licenses, as well as the admonishment to avoid unjust enrichment in the methods employed to award uses of the resources.

When you consider all of the statutory telecommunications policy objectives, of which Auction revenue is but one, it becomes clear that while the corporate interest is well represented in the agreement, the public interest has not yet been fully served.

Congress would do well to further examine this settlement with more time next year. At that time, we could address issues more comprehensively, and also confront the lingering tension between communications law and bankruptcy law.

Otherwise, Congress may have to act on every failed enterprise holding spectrum licenses into the foreseeable future. Mr. Chairman, I thank you, and you have indulged me with extra time in the opening statement. I yield back.

Mr. UPTON. Thank you. Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. And I, too, look forward to this hearing. This is a mess that we are trying to work our way through. A company, who puts up in essence a minimum investment, declares bankruptcy, and gets a fairly good rate of return on that amount of the investment that they went bankrupt on.

Spectrum does have value, which we currently have a buyer willing to pay for, and there is the argument of the time value of money and the time value of resources. There is a need in our society, especially in this era, to create economic activity and job growth, and so there is another list to be added of the possible benefits.

And in this downturn of the economy, if there is a way to use spectrum more rapidly and help create jobs, that is a benefit. So we have a lot to sort out here. I look forward to—I guess we are going to have two panels, and I look forward to hearing from the first, and then the second, as we try to address this issue, and I yield back my time, Mr. Chairman.

Mr. UPTON. Thank you. The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I want to welcome our witnesses this afternoon. In my view, Mr. Chairman, the NextWave settlement is broadly in the public interest, and I urge the committee to take such steps as may be necessary to give it full force and effect.

The settlement serves the public interest in a number of ways. First, the government benefits. The U.S. Treasury will receive \$10 billion, and that is fully \$5 billion more than the government would have received based upon the initial price in the NextWave auction.

So had it not been for the NextWave bankruptcy, and succeeding events, the government would have received \$5 billion less than it receives in the settlement. I would also note that if the agreement does not go into effect, the government faces a risk of having to return to the winning bidders in the re-auction \$3.17 billion in downpayments which the government is presently holding.

Second, the settlement benefits consumers of wireless services. The spectrum, which is the subject of this settlement, is currently unused. Upon approval of the settlement, this valuable spectrum can be put to immediate use to improve existing wireless services, and to hasten the arrival of advanced wireless services for voice, video, and data.

There is presently an acute spectrum shortage, and an increased demand for wireless services. The freeing up of this new spectrum is eagerly awaited in order to benefit consumers and to satisfy this growing demand.

Third, from the standpoint of the companies which purchased the spectrum in the re-auction, the settlement resolves all of the legal issues and permits them to proceed with their business plans.

The winning bidders in the re-auction have paid for the right to use the spectrum, and have a reasonable expectation of being able to use it. These 21 companies bid a total of \$15.85 billion for the NextWave spectrum, and were required to deposit 20 percent of their winning bid amounts as downpayments at the time that their bids were accepted.

And that was a total of \$3.17 billion. That money is currently on deposit with the Federal Government, and the carriers are receiving no interest on the \$3.17 billion of their funds that the government is presently holding.

The carriers that were successful in the re-auction also reflect on their balance sheets a contingent liability for the remaining 80 percent of the auction price, which they will be committed to pay assuming that the auction is confirmed.

This financial overhang from the re-auction substantially hinders the ability of these wireless carriers to build out their networks, to improve service quality and to invest in other promising opportunities. The settlement resolves all of these concerns as well.

And, fourth, putting the spectrum into immediate use would provide an economic stimulus as carriers invest billions of dollars on the infrastructure necessary to offer wireless services.

I will be interested to learn from our witnesses this afternoon the magnitude of the anticipated expenditure that would be required for this buildout in the event that the settlement is approved.

Mr. Chairman, I think that the committee should take immediate steps to ensure that the settlement becomes effective. While some may wish that certain aspects of the NextWave bankruptcy and subsequent events would have proceeded differently, in today's circumstance the settlement represents the best opportunity to conclude this unfortunate chapter and realize for the various parties

the benefits that I mentioned earlier. Thank you, Mr. Chairman. I look forward to today's witnesses.

Mr. UPTON. I yield to the chairman of the full committee, the gentleman from Louisiana, Mr. Tauzin.

Chairman TAUZIN. Thank you, Mr. Chairman. I want to thank you for holding this hearing today, and I particularly want to thank Chairman Powell for joining us, and for assisting us through this hopefully process where we can conclude with what has been an unnecessarily contentious and drawn out issue.

For years, and as you know, Mr. Chairman, I have urged the former Chairman of the FCC to respect the fact that NextWave had a property right in this spectrum, and that having bid through the process by which these licenses were distributed, and having bid properly and then having been in bankruptcy court trying to work out their financial problems, that the FCC had no authority to relicense or to reauction these licenses.

Nevertheless, the FCC determined to proceed with Auction 35 and eventually the D.C. Court concluded as I thought they would that NextWave had a property right here. The FCC, nor any Federal Agency, could not simply cancel or take it away.

So, here we are.

We are in a situation where after all of these many, many, months, when in prior months and prior years the FCC could possibly have settled this in a way that respected the property rights of the parties, and at the same time put the spectrum to good use and perhaps collected the money that the government was owed, we are now at a point in time when we have another opportunity to do all those things in a settlement.

I agree with you that this is not the prettiest nor the cleanest necessarily way, or the easiest way to resolve all these difficult issues, but it does put them all to rest. Mr. Boucher has put his finger on it. This gets the spectrum out for the American public to enjoy.

This satisfies the government's obligation to collect its money and to plug a hole in a budget which needs to be plugged. And at the same time respects the property rights of the parties, which the D.C. Circuit Court has recognized.

I think it is a win, win, win, and it puts to rest again—and not necessarily the prettiest or easiest way—issues that should have been put to rest a long time ago. And I agree with you, Mr. Boucher, this settlement ought to be approved as rapidly as we can approve it, in whatever manner that we can approve it, and as quick as we can get it done.

And I want to commend the Chairman of the FCC for his efforts in encouraging this settlement and for what I hope will be his strong support for Congress endorsing it and putting it behind us.

The sooner we can get this spectrum working for Americans, and settle these financial issues for the government and the parties, and for their property rights, the sooner we can put this ugly saga behind us.

The bottom line is this spectrum has laid fallow for too long, and wireless carriers indeed suffer right now from a dearth of available spectrum. The American public is desperately in need of these new services frankly, and the sooner we can get it out the better.

And I think that anyone who holds this up now is playing the same kind of politics that have held it up for too doggone long. And we ought to put it to rest rapidly, and we ought to approve this settlement, Mr. Chairman, any way we can. Thank you, Mr. Chairman.

Mr. UPTON. Thank you. The gentlemen from Tennessee, Mr. Gordon.

Mr. GORDON. Thank you, Mr. Chairman. I think the issues have been well-outlined, and I am ready to hear the witnesses.

Mr. UPTON. Mr. Stearns.

Mr. STEARNS. Mr. Chairman, thank you. Joshua Hammond wrote a book called, *The Servant Culture Forces to Define Who Americans Are*, and it is sort of interesting that the first one was choice, but the second or the fifth one was ready, fire, aim.

And we as Americans go out and do things, and then we come back later and try to adjust and fix it. Now, Mr. Chairman, what we see here obviously is an awful spectrum car pile up on the telecommunications highway to say the least.

As a result valuable spectrum other wireless carriers need lay smoldering on the side of the road as this morass of litigation remains to be resolved. Now, none of us I think in this room—and I could be wrong—has actually read the ruling from the Appeals Court, which the FCC is—that said that they erred in repossessing the license.

And we probably haven't read the District Court case either that ordered the licenses returned to the FCC. But there is something very simple here. NextWave put a deposit down on a spectrum of \$500 million, which was a very small amount of the \$4.7 billion bid.

So now if I put a small amount down on an automobile, I guess I own this car, and then you go out and repossess it, and when you go to repossess it, do you have to pay me a lot more money for that car when I only put a small downpayment?

Now, what Mr. Boucher says is true, there is a lot of mitigating things here that the government ultimately is going to get more money back than if they just sit here and try to do this on a little sense, and I have made this problem very simple.

But I think we are at the point now that there is people on this side of the House, and I sort of agree with the chairman and also Mr. Boucher, that this is probably a way out of this. Mr. Chairman, I understand that you will probably have legislation next year to make sure that this smoldering pile-up on the highway doesn't occur.

And that is going to be cast net year, but there is people in the Senate who don't agree with what we are saying here, and they think that something should be done, because when you look at it from the outside as a taxpayer, there is a net here that they don't see, but ultimately the government is going to benefit.

So I just stand here as someone who—again, the members have so much on their plate that we don't have the opportunity to read the appeals decision that ruled the FCC erred in repossessing the licenses and the whole idea of this.

So we have to go with what appears to be a reasonable settlement to the best of the benefit for the government. And so, Mr.

Chairman, I think the burden now rests on the government, and particularly the FCC and the Department of Justice, to demonstrate that this settlement is in the public interest.

Because we don't have all the details, and we can work on just what we see as the outside. But we have a morass of litigation that has to be resolved, and as many members pointed out, this might be a solution that is palatable, but not fully understandable. And I yield back, Mr. Chairman.

Mr. UPTON. Thank you. I recognize the ranking member of the committee, Mr. Dingell, from the great State of Michigan.

Mr. DINGELL. It is a great State, Mr. Chairman, as you have so wisely said. Thank you, Mr. Chairman, for holding this hearing, and my thanks to the witnesses for appearing.

The matter that we are addressing today is a highly complex one. Its roots go back many years, with much work by both the Federal Communications Commission, this committee, and other agencies of government.

The FCC's past work on this matter has been significantly less than stellar. While the matter is complex, it is with the proper asking of questions reducible to I think an understandable whole, one in which we may come to intelligent judgments as to what should be done, and where it is that the public interest lies.

And as this hearing goes forward, I will be asking some questions to try and figure out whether this matter is in the public interest. I noted with interest the comments of my friend, Mr. Stearns, and I want to commend him. This is something which does need to be resolved.

But we want to make sure that this matter is resolved on terms which are acceptable to the public, and which are consistent with the public interest. We are faced now with a dilemma of how to proceed from here. I hope that we can make a rational and a deliberate judgment as to the proper course.

Again, I repeat that those things will be greatly assisted by the proper questions being asked and the proper questions being answered. The judgment must be made I would note with full possession of all the facts, taking into consideration relevant matters of telecommunications law and policy within this committee's jurisdiction.

Understandably, the parties have a desire to expedite this process, and I think I can say that I do not quarrel with their desire. To that end, I would note that Mr. Markey and I wrote the Commission late last week. We asked for some information in preparation for today's hearings, and Chairman Powell, I want to express my thanks to you and to your staff for the timely response. I know that it was no small task, and I want you to know that I appreciate your courtesy, and the completeness with which you responded.

Although the letter to Chairman Powell was responded to, and its answer was responsive to our questions, I am still concerned that the Commission may yet be lacking critical information necessary to make an informed judgment on how that agency should proceed.

And, of course, we look to the Commission to advise us so that we may make the necessary and proper judgments. And as tempting as it may be to legislate a quick fix, I would note that it may

very well be unwise to do so under the circumstances before us, and with the amount of knowledge and understanding which we now possess.

The Congress is being asked, and we have to be very clear on this, to authorize and appropriate \$6 billion to a private party, and I am satisfied that there is not a single soul in this room that wouldn't love to have Congress appropriate \$6 billion to and for them.

This is, however, I would note, an unprecedented exercise in my experience. Moreover, to legislate such a thing at lightning speed without a full and thoughtful investigation of whether the facts and circumstances warrant such remarkable treatment is indeed hasty and very truthfully ill-advised.

Do we know precisely who will be receiving this windfall? NextWave, like many companies emerging from bankruptcy, may not be the same company it was when it was first issued the licenses that are in question.

Indeed, it may be a totally different company. Its finances have been substantially restructured, and we have no assurances from the Commission that the company in fact continues to be a qualified license holder under the Commission's designated entity rules.

We are not really sure we even know who the shareholders or officers are. In fact, these questions about NextWave's qualifications have been raised before the Commission at various times by various parties.

But the agency has yet to determine whether or not those claims and those matters have merit. We are being asked now as a legislative body to disregard whether NextWave currently has a legal right to hold these licenses, and to codify a settlement that would dismiss these claims and deliver 6 billion cash U.S. dollars.

The parties are also asking us to abandon two key statutory mandates and perhaps more contained in the Commission's auction authority. One is the basic principle that expressly forbids the FCC from considering potential revenues generated from competitive bidding in making spectrum policy decisions.

Yet, that is precisely the driver of the recommendations being made here today. This committee has consistently and steadfastly objected in the past on a bipartisan basis when the Budget Committee has insisted on abandoning these core principles, which they have done not infrequently, and often to their great distress and sorrow. And add to that of others of us here, too.

We are also being asked to ignore the statutory mandate that small businesses, rural telephone companies, women-owned companies, be afforded an opportunity to compete in the broadcast PCS market along with the bigger players.

Press reports indicate that most of the NextWave licenses will be consolidated among Verizon, Cingular, a partnership of SBC and Bell South, and AT&T. Now that would appear to be clearly inconsistent with the intentions that the Congress and this committee have expressed in the legislative pronouncements we have made when the FCC's auction authority was established.

Mr. Chairman, I appreciate the hard work that has been done by the Commission, and I commend you for having these hearings. I think we have got to look at this very carefully, because if we don't,

we might find that we have made a prodigious mistake, and we will have created quite a stink. I thank you.

Mr. UPTON. Thank you. The gentleman from Maryland, Mr. Ehrlich.

Mr. EHRLICH. Thank you, Mr. Chairman. Chairman Powell, it is good to see you. I always enjoy your testimony and I do apologize in advance for having to leave in a few minutes.

So I guess it is a little bit of a fairly unusual opening statement here. This is indeed a complex issue, and I want to make some observations I guess in the form of some questions, which I am sure that you will attend to in any event.

But from my opening statement, I would like to leave some particular inquiries with you for your consideration. Mr. Chairman, let's say that Congress does not do a deal this year. What would be the effect on our goal to get spectrum in use, and get investment rolling, and get new services in place?

Are we talking about a month delay, 2 months, 5 months, whatever? There is some speculation from the press, as you know, that we don't need legislation at all. Why can't the FCC settle this litigation, or settle this without any litigation?

Third, there has been some discussion that NextWave or other companies have gained themselves to enrich themselves. In these negotiations did NextWave or the other companies in Auction 35 gain the system?

Fourth, and last, there is a quote from a news service of December 6 attributed to you. "I personally think getting \$10 billion today that I can put in the bank for that spectrum, versus the roughly \$5 billion that I might be able to get from NextWave over a 10 year installment period was fiscally better."

Mr. Chairman, is that an accurate quote? If so, would you explain the logic behind it. What would happen if the Supreme Court denied cert after the strong decision at the D.C. Circuit Court level, would NextWave keep the license, and what would the government get?

I suspect, Mr. Chairman, that your testimony will answer many of these questions in the course of it, and I appreciate your consideration, and I yield back.

Mr. UPTON. Thank you. Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. I want to thank you for holding this important hearing because of the timeliness of it, I think, and I want to begin by saying that like my colleagues, I am not comfortable with the NextWave settlement, and I am not necessarily opposed to it maybe like my colleague from Florida, Mr. Stearns.

I don't know our options, but I can't get over the feeling that the American consumer loses, no matter what we do in trying to resolve this issue, and I also can't get over the fact that NextWave may be gaming the system, and hurting our consumers.

I have never heard NextWave express their disappointment that they would not be billing their advanced third generation wireless network. Mostly, I have heard about the need for a financial settlement for the NextWave investors and a reallocation of the spectrum to the wireless industry.

And what about my constituents who don't own a cell phone, and are thus deprived of their benefit for the deal through the financial settlement. They are getting a lot less than the \$15 plus billion on Auction 35.

The \$10 billion that they will receive is no small sum, but it still is less than was promised. And what if, Mr. Chairman, this deal doesn't go through by December 31? What will happen?

In reading Chairman Powell's testimony, he certainly paints a glooming picture of our legal right to NextWave's spectrum. However, if Congress is not able to reach a deal for the industry imposed deadline, are there no other options to reclaim the American people's spectrum, and that is the bottom line. It is the American people's spectrum.

For instance, I was told that there are several petitions sitting down at the FCC seeking to challenge the designated entity status of NextWave. If this settlement falls through, is the Commission going to act on these petitions.

And in addition, I hope, Chairman Powell will expand on this during the questioning, on when did the clock start ticking for the NextWave to meet their build out requirements.

Finally, Mr. Chairman, I want to know what steps the FCC has taken to ensure that this doesn't happen again, and if necessary, if we need to change the law in Congress on tightening the auction rules as we go forward, what else can be done.

In closing, like I think all of us, particularly from Houston, I understand that we are on the Board of Directors of a corporation called The U.S. Government. And we have a judiciary relationship to the American people, who deserve the best deal possible for our stockholders, or our constituents.

And I am not fully convinced that this is the best deal, and I yield back my time.

Mr. UPTON. Thank you. Ms. DeGette.

Ms. DEGETTE. Mr. Chairman, like everyone else here, I am eager to hear the testimony, and to hear the rationale for this settlement, and so I don't want to delay the proceedings any further, and I will submit my opening statement for the record.

Mr. UPTON. Thank you. Mr. Engel.

Mr. ENGEL. Thank you, Mr. Chairman. Thank you for calling this hearing on the NextWave settlement. This is quite frankly a can-tankerous problem that was irritated more by numerous bad decisions in the past. Let me be clear that I truly believe that the FCC made a mistake when it recalled and reaucted spectrum licenses prior to a final determination of the court's regarding NextWave's legal standing under bankruptcy.

I understand the desire to put this spectrum to use, but I also am very concerned about any company or individuals rights to the legal protections of bankruptcy. As a result of the FCC's decision, numerous other parties were drawn into the mess.

Other wireless companies, such as Verizon, participated in the reauction. Now, this was a tedious business decision, and they were aware of the pending litigation, but the business opportunity to expand their wireless networks could not be ignored.

In the end, these other companies made the choice that not participating was a greater risk than participating. Some areas of the

country, such as New York City where I am from, are experiencing rapid growth in cell phone use. These licenses are vital to continued growth and good service in New York City.

Existing spectrum that is already in use is almost at maximum capacity. Thus, unused spectrum, such as that in NextWave's control, is just wasteful. That having been said, I find myself impressed with the settlement before us, and considering the numerous legal difficulties, multiple court challenges, and other things, this legal deal extricates us from one of the most complex legal quagmires I have ever witnessed in a very, very long time.

It is evident that a great deal of hard work and thought went into this. Recently, it has come to my attention that there is now an outstanding question as to whether or not NextWave is legally entitled to hold the licenses.

It has been suggested that NextWave may not qualify as its foreign ownership exceeds legal caps. However, instead of junking this whole deal, I would suggest that an escrow account be set up pending this determination.

I hope that when Congress acts that it includes all companies that bid on spectrum licenses and then went into bankruptcy. Those other companies particular situations may not have been appropriate for the negotiation table with NextWave, but I believe the FCC should be pursuing agreements with them so that Congress can enact one bill to handle all of this.

I would also like to note that the problems that we are seeking to solve today are the results of the previous FCC Chairman's decisions. Chairman Powell has worked hard on this settlement. However, in his written statement, he advises Congress to alter existing bankruptcy law to prevent future situations like this one before us.

Instead, I believe that this subcommittee should be dealing with issues under its jurisdiction. We should be determining if the FCC needs to strengthen its financial reviews of bidders, or if legislation is needed to strengthen the FCC's authority in this area.

I would hope that the Chairman is also able to discuss what the FCC has done on its own to prevent this from happening again, and I look forward to his testimony, and I think that this will be a very fascinating hearing, and I thank you.

Mr. UPTON. Thank you. That concludes opening statements. We are going to have two panels this afternoon. The first panel will be headed by the Chairman of the Federal Communications Commission, the Honorable Michael K. Powell, along with Mr. Joseph H. Hunt, Counsel to the Deputy Attorney General at the Department of Justice. Gentleman, welcome.

Your statements are made a part of the record in their entirety, and if you could take about 5 minutes to sum things up, and we will start questions after that.

Mr. Chairman, go ahead.

STATEMENTS OF HON. MICHAEL K. POWELL, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; AND JOSEPH H. HUNT, COUNSEL TO THE DEPUTY ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE

Mr. POWELL. Let me say at the outset that listening to the various opinions expressed during the opening comments, I can assure

you that over the 6 month drawn out, tortuous negotiations, I have shared every single sentiment that I have heard here at one point or the other in the process.

I am pleased and honored to have the opportunity to sit before you today and at least explain why I reached my professional opinion that on the public interest merits of the NextWave settlement, the American consumer does benefit.

As I say in my testimony, I think sometimes in the morass of details that it might be important to just keep three simple questions at the forefront of your deliberation.

First, it is important to consider what posture the government is actually in, as opposed to where one wishes we stood.

If I had to do it over again, I personally would love to be in a different posture than that held by the D.C. Circuit, but under that ruling, and the mandate that was issued, NextWave has rightful claim to its licenses, and the Commission's reauction, with its glittering bids of \$16 billion has been largely arguably nullified.

The second question, given these circumstances, regrettable though they may be, we must ask does this settlement nonetheless salvage substantial benefits for the American taxpayer.

The government concluded that it does, putting the licenses to work in recovering two-thirds of the proceeds it would have received had Auction 35 not been undermined by the court ruling.

Third, even if the settlement is bitter to swallow, as I believe it is, we have to ask ourselves is there a better alternative. The government concluded that the only other alternative posed greater risks to the public's interests than did the settlement.

And in my testimony today, I would like to elaborate on these points. I will only briefly note that Chairman Upton and Mr. Markey are correct—that this settlement does not solve the basic problem, which the Commission as always been concerned about—the clarity necessary to reconcile potentially conflicting legal regimes between bankruptcy and telecommunications policy.

No matter what one's position, we know at least now that the process of auctioning spectrum has a vulnerability associated with it, and at least we need to go forward with auctions understanding that that continues to be a risk.

I won't elaborately discuss the posture of the case, but it is important to note that after this long and tortuous history that it did arrive before the United States Court of Appeals for the D.C. Circuit.

That court held unequivocally that the Commission acted unlawfully when it tried to automatically cancel the licenses of NextWave, and issued a mandate that required that the NextWave licenses be in rightful possession of that party, and we were permitted only to conduct further proceedings not inconsistent with that ruling.

Given those circumstances, the Department of Justice and the FCC decided, and indeed at certain critical moments—to consider the financial implications, and with the White House, in the form of the OMB, explored possible settlement of the case.

The government had to find a way to recover the licenses, distribute them to many companies that had won them at reauc-

tioning, and to secure as much of the reauction proceeds as possible.

I assure you that this was no simple task. The talks went on for many months, and I was personally involved in the discussions and regularly kept my colleagues informed of the progress so that they would be prepared if Commission action was necessary to finalize any agreement.

In the very late stages of the negotiations, thorny legal issues and questions of uncertainty made it clear that it would be very difficult to effectuate any settlement without legislative action.

The parties reached mutually agreeable terms only late in November, and a proposal was almost immediately forwarded to Congress by the Attorney General for your consideration. The settlement agreement requires in its simplest form that the Auction 35 bidders pay the government nearly \$16 billion that they bid in exchange for receiving the licenses auctioned in Auction 35.

And to then the government keeps \$10 billion in net proceeds, but by December 31, 2002 will pay NextWave approximately \$5.8 billion in exchange for the complete release of its legal claims and the disputed licenses.

As you know the settlement agreement is contingent upon the passage of legislation that includes draft legislation for Congress to consider. There are several reasons why we concluded that legislation was necessary to effectuate this settlement, and Mr. Ehrlich, this might help with some of your questions.

First, the proposed legislation ensures that Congress has authorized a settlement, and the movement of funds necessary to implement it. I would note that the FCC has no checkbook from which it could pay NextWave to relinquish its licenses.

Moreover, even if the Auction 35 winners paid the government first, it was unclear legally what they would be paying for, given the status of the auction, and that the government had no clear mechanism to turn around and transfer that money to NextWave.

There simply is no authority resident in the Federal Communications Commission to draw on the Treasury in that manner. This Congressional action is required to empower the government to execute those complex terms.

Finality was a second and critical factor in reaching the agreement. Both NextWave and Auction 35 winners were unwilling to participate without confidence that after having reached an agreement and foregone other opportunities, the agreement would not be overturned in court.

The proposed legislation attempts to partially address these issues. It contains judicial review provisions patterned on other acts of Congress that provide for an expedited review limited to Constitutional claims.

Any challenge to the legislation in the settlement agreement itself, or to actions taken by the Commission, would be funneled into a single Court of Appeals for review. This provides assurance that the public will receive the benefits of the settlement with minimal 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 re-

ceipts equal to the payments to be made by NextWave by the end of next year.

Fourth, and finally, I would like to say a word about the December 31 clause in the settlement agreement. This is not, as some have maintained, an effort to jam the U.S. Congress into the agreement.

Congress, of course, remains free to consider the deal as it sees fit, and modify the terms under its prerogatives. No private contract can limit the legislative power. The date merely reflects the fragility of the coalition and its interests.

The Auction 35 winners need quick resolution in order to justify to their boards foregone alternatives in order to finance the purchase and to plan for the future. The bankruptcy proceeding continues to march forward and the parties each must maintain their positions there as well.

And as we have noted, the Supreme Court case continues to move forward. The parties felt that after December 31 they were unwilling to promise to be a party to a settlement given these other exigencies.

I merely ask that Congress keep those risks in mind as it deliberates over the legislation. We do recognize that the compressed period for analysis and recent discussions makes this task difficult for you, and for your staffs, and we appreciate the attention and care that has already been shown by Congress in considering the settlement in the legislation.

I pledge my own personal assistance and that of my agency as you work through these difficult issues. Now to the gravamen of the whole settlement. This settlement is in the public interest in my judgment.

Given the magnitude of it, in terms of money and its complexity, it is challenging to sort through the conflicting claims about its merit. But after a long and substantial examination, I believe that it is squarely in the public interest, just as the Attorney General and the White House have concluded, via OMB as well.

I am convinced because at bottom after all the verbiage, the settlement satisfies three essential government objectives. First, it removes the licenses from a bankrupt bidder, and distributes them to companies that bid in the reauction who can put them to use almost immediately.

Increasing spectrum in the market will partially help address the current spectrum shortage, improving quality of service, and providing capacity for new advanced services, such as third generation or so-called 3G.

And I believe solidly that these are benefits to the consumer. Along that route, and aside, these licenses have been used once, and only once. They were used 3 months ago today on September 11, when wireless capacity forced a 300 percent increase in New York City for wireless telephone calls, and the congestion and complications in public service activity that resulted have been heavily noted.

Ever since that tragic day the government has worked to try to provide access systems and other ways for public safety to take advantage of spectrum. The Federal Communications Commission

issued special temporary authority to companies operating in New York City to deal with the crisis.

That authority was to use these very NextWave licenses that had been encumbered for so many years. That is definitely in my opinion in the public interest. Second, it ends nearly 5 years of litigation, and it is an important point to note that this litigation likely would continue for several more years, leaving the spectrum laying fallow and the Treasury empty.

Third, it gives the taxpayers \$10 billion, double the amount of money that they stand to gain from NextWave, which would only have to pay \$4.3 in installments over a several year period.

This money flows to the U.S. Government at a time when the funds are sorely needed. And finally I think you always have to ask what really are the better alternatives to this settlement.

The main reason to settle is that a settlement is preferable to the other alternative. If the Commission continued to litigate, and the Supreme Court declines to take the case, the decision of the Circuit will stand, of course, and NextWave likely will be the licensee.

In that scenario, NextWave likely will elect to continue to pay for the spectrum over time at very advantageous interest rates pursuant to the installment program. NextWave could pay for the spectrum over 6 years at a rate of 6.5 percent for C-Block licenses, and 6.25 for F-Block licenses.

That would leave the Treasury with substantially less than \$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 may not rule in the government's favor on the merits.

In addition, and importantly, even if the Supreme Court does rule in favor of the government, it might very well remand the matter to the District of Columbia Circuit for further action on several legal issues that remain unsolved in the panel's decision.

No matter what the outcome, litigation would likely mean many years of further delay of the Commission's ability to grant spectrum licenses for much needed wireless services for American consumers.

I would note that the Commission first auctioned this spectrum in 1996 and 1997. Yet, it has never been used but that once. Even a favorable ruling from the high court might not arrive until late in 2003.

And without a settlement, the valuable spectrum will remain fallow. Moreover, even if the government ultimately prevails in all litigation, there is uncertainty about the future value that bidders would place on the spectrum given fluctuations in the market.

Several high bidders in Auction 35 have indicated that if a settlement does not go forward, and there is further litigation, they should be released from the obligations of Auction 35, and have their downpayments returned.

They would argue, for example, that they should be entitled to the full return of the \$3.2 billion that was mentioned earlier. It is uncertain at what price this spectrum would sell for at the conclusion of litigation.

In conclusion, the Commission and the other parties to the NextWave case have negotiated long and hard to resolve a matter

of critical importance to the American public. We have attempted to settle it in a way that protects the public interest, ensures that 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, and I look forward to answering your questions, any that you may have. Thank you.

[The prepared statement of Hon. Michael K. Powell follows:]

PREPARED STATEMENT OF HON. MICHAEL K. POWELL, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

I. INTRODUCTION

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

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

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

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

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

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

II. THE POSTURE OF THE CASE

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

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

Over the next three years, the Commission, the United States, NextWave, and others engaged in intensely fought litigation in numerous courts, including the U.S. Bankruptcy Court, the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the D.C. Circuit, and the Supreme Court of the United States. The Second Circuit upheld the Commission's regulatory requirement that there be full and timely payment by NextWave for the licenses. The Second Circuit also held that the Commission's decision to automatically cancel the NextWave licenses and to re-

auction the licenses was not contrary to bankruptcy law. The court did allow that any administrative claims about the FCC's actions could be raised in the D.C. Circuit. Relying on the Second Circuit decision, in January 2001, the Commission re-auctioned the spectrum previously licensed to NextWave. In that re-auction (Auction No. 35), 21 wireless carriers bid \$15.85 billion for the new licenses.

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

Given these circumstances, the Department of Justice and the FCC began to explore a possible settlement of the case. The Government had to find a way to recover the licenses, distribute them to the many companies that had won them at the re-auction, and secure as much of the re-auction proceeds as possible. This was no simple task. The talks went on for many months. I was personally involved in the discussions and regularly kept my colleagues informed of the progress, so that they would be prepared if Commission action was necessary to finalize any agreement. In the late stages of the negotiations thorny legal issues and questions of uncertainty made it clear that it would be very difficult to effectuate any settlement without legislative action. The parties reached a mutually agreeable set of terms in late November, and a proposal was almost immediately forwarded to Congress by the Attorney General for your consideration.

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

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

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

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

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

Fourth and finally, I would like to say a word about the December 31, 2001 clause in the settlement agreement. This is not, as some have maintained, an effort to jam the Congress into agreement. Congress, of course, remains free to consider the deal as it sees fit, and may modify the terms under its prerogatives. No private contract can limit the legislative power. The date merely reflects the fragility of the coalition and its interests. The Auction No. 35 winners need quick resolution in order to justify forgone alternatives, finance the purchase, and plan for the future. The bankruptcy proceeding continues to march forward and the parties each must take positions there. Also, the Supreme Court case continues to move forward. The parties felt that after December 31, 2001, they were unwilling to promise to be a party to settlement, given other exigencies. I merely ask Congress to keep those risks in mind as it deliberates over the legislation.

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

III. THE SETTLEMENT PROPOSAL IS IN THE PUBLIC INTEREST

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

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

IV. WHAT ARE THE BETTER ALTERNATIVES TO SETTLEMENT?

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

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

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

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

V. CONCLUSION

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

Mr. UPTON. Thank you.
Mr. Hunt.

STATEMENT OF JOSEPH H. HUNT

Mr. HUNT. Thank you Chairman Upton and members of the subcommittee. I appreciate the opportunity to provide a statement. The government's dispute with NextWave dates back to 1996 and 1997, when the company was the high bidder at auctions held by the Federal Communications Commission for wireless telecommunications licenses.

NextWave opted to pay its winning bids, totaling \$4.86 billion, in installments, but soon sought bankruptcy protection. After two trips to the United States Court of Appeals for the Second Circuit, which ruled for the government on bankruptcy law issues, the FCC reaucted the disputed spectrum earlier this year in FCC Auction Number 35.

Winning bids for that spectrum in Auction 35 totaled \$15.85 billion, more than three times the amount that NextWave had agreed to pay 5 years earlier. NextWave brought an action in the District of Columbia Circuit challenging the FCC's reauction of the spectrum.

That court held that Section 525 of the Bankruptcy Code precluded the FCC's automatic cancellation of NextWave's licenses. Although the government has petitioned the Supreme Court for review of that decision, there can be no assurance that continued litigation will allow the government to put the spectrum to its most productive use or to recover the \$15.8 billion bid at Auction 35. Moreover, even if the government were ultimately successful in its pursuit of this litigation, victory could only come after years of additional delay.

Extensive and complex negotiations, lasting more than 2 months, culminated in a settlement agreement signed by the government, NextWave, and Auction 35 winning bidders representing more than \$15.8 billion in bids. Under the settlement, NextWave will surrender the licenses in exchange for guarantee of payment from the United States. The FCC will then grant licenses to the Auction 35 winning bidders, who will pay the full amount of their winning bids.

As the Attorney General explained in his letter to the Congressional leadership, the Department has concluded that the settlement is strongly in the public interest. It offers two tangible benefits to the American people.

First, the settlement accomplishes by mutual agreement what lengthy and contentious litigation has been unable to achieve—the award of spectrum to telecommunications companies that are most likely to use it promptly and efficiently, thereby making possible the expansion and improvement of widely used wireless telecommunications services.

Second, it will bring substantial additional revenues to the United States Treasury. The settlement is designed to bring into the Treasury net payments in excess of \$10 billion, resulting in a net benefit to the budget of approximately \$4 billion.

The settlement is a genuine compromise that recognizes the enormous demand for this spectrum, and recovers for the public most of the value the spectrum represents to the winning bidders at Auction 35.

The Attorney General has submitted a draft bill that provides statutory authority to proceed with the settlement. The bill provides the guarantee of payment that is required before NextWave will relinquish its claims to the licenses. It also specifies that Auction 35 should be implemented, with payment terms as modified under the settlement agreement.

The bill establishes a limited and expedited structure for judicial review of challenges to the settlement, which is designed to ensure that any challenge is resolved by the courts as quickly as possible. Three kinds of challenges are permitted—litigation concerning approval of the settlement under the Bankruptcy Code, constitutional challenges to the FCC's approval of the settlement, and constitutional challenges to the implementing legislation.

To ensure that the litigation concludes quickly, thereby providing the timely access to clean licenses required by the Auction 35 bidders and timely public access to additional spectrum, parties will be held to strict guidelines for initiating judicial proceedings and courts will be called upon to expedite their review, to the extent practicable.

The settlement requires enactment of legislation before it can go forward. The Department of Justice strongly urges the committee, and the Congress as a whole, to take the steps necessary to realize these benefits. We are mindful of the difficulties that Congress faces when asked to enact proposed legislation before December 31, 2001. But the parties decision to select that date was not entered into lightly. Quick legislative action is necessary in order to conclude all related litigation and ensure the availability of the spectrum to the American consumers by the end of 2002.

The importance of the deadline for legislative action also reflects the pendency of petition for writs of certiorari before the Supreme Court.

We appreciate the care and seriousness with which this subcommittee and the Congress have undertaken to review and consider the proposed legislation. Chairman Upton, that concludes my prepared statement. I appreciate this opportunity to answer any questions that you may have.

[The prepared statement of Joseph H. Hunt follows:]

PREPARED STATEMENT OF JOSEPH H. ("JODY") HUNT, COUNSEL TO THE DEPUTY ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE

Thank you Chairman Upton, as well as the Members of the Subcommittee, for allowing me to provide a statement concerning the settlement agreement reached by the government, NextWave, and the Auction 35 participants. That agreement offers an opportunity for the government to end years of hard-fought litigation on terms that will benefit the American public by providing for prompt deployment of valuable telecommunications spectrum and adding billions of dollars to the United States Treasury.

The government's dispute with NextWave dates back to 1996 and 1997, when the company was the high bidder at auctions held by the Federal Communications Commission (FCC) for wireless telecommunications licenses. NextWave opted to pay its winning bids, totaling \$4.86 billion, in installments, but soon sought bankruptcy protection. The United States Court of Appeals for the Second Circuit agreed with the government that NextWave could not keep the licenses while paying less than the winning bid amount, and also held that the bankruptcy court could not thwart the operation of the FCC's automatic-cancellation rule, under which the licenses dissolved upon failure to make timely payments. Following the Second Circuit's rulings, the FCC re-auctioned the disputed spectrum earlier this year in FCC Auction

No. 35. Winning bids for that spectrum in Auction 35 totaled \$15.85 billion, more than three times the amount that NextWave had agreed to pay five years earlier.

NextWave brought an action in the District of Columbia Circuit challenging the FCC's automatic cancellation of the licenses and re-auction of the spectrum. That court held that section 525 of the Bankruptcy Code precluded the FCC's automatic cancellation of NextWave's licenses. The government has petitioned the Supreme Court for further review of that decision. Even if the Supreme Court grants review and rules for the government, there remain other issues to be litigated before the D.C. Circuit and the FCC on remand. Thus, there is no assurance that continued litigation would allow the government to put the spectrum to its most productive use or to recover the \$15.85 billion bid at Auction 35. If the government does not prevail before the Supreme Court or on remand, NextWave would retain the licenses, and the United States might (depending on the treatment of interest and penalties) receive only \$4.86 billion for this spectrum. Moreover, even if the government were ultimately successful in its pursuit of this litigation, success would likely come after years of additional delay in deployment of the spectrum in the face of continuing increases in consumer demand for wireless telecommunications services.

Recognizing these disadvantages of continued litigation, the government entered into settlement discussions with NextWave and the Auction 35 winning bidders. The government pursued settlement as an opportunity to provide for the prompt transfer of valuable, unused spectrum to the Auction 35 Winning Bidders, whose bids provided strong evidence of their ability to put it to the highest and best use, and to increase the amount of money flowing into the Treasury by several billion dollars over what the government might otherwise receive.

Extensive and complex negotiations, lasting more than two months, culminated in a settlement agreement signed by the government, NextWave and Auction 35 winning bidders representing more than \$15.8 billion in bids. Under the settlement, NextWave will surrender the licenses in exchange for a guarantee of payment from the United States. The FCC will then grant licenses to the Auction 35 winning bidders, who will pay the full amount of their winning bids—approximately \$15.85 billion. In exchange for NextWave's relinquishment of its claims to the licenses, and after payment of taxes and other amounts to the government required by the settlement, NextWave will receive approximately \$5.82 billion (net of corporate taxes on the transaction).

As the Attorney General explained in his letter submitting the draft bill to the Congressional leadership, the Department of Justice has concluded that "the settlement is strongly in the public interest." This is a good settlement; it offers two tangible benefits to the American people. First, it accomplishes by consensual arrangement what lengthy and contentious litigation has been unable to achieve—the award of spectrum to telecommunications companies that are most likely to use it promptly and efficiently, thereby making possible the expansion and improvement of widely used wireless telecommunications services.

Second, it will bring substantial additional revenues to the United States Treasury. The settlement is designed to bring into the Treasury net payments in excess of \$10 billion, after accounting for the payment to NextWave. The Office of Management and Budget advises that these payments will result in a net benefit to the budget (above the current baseline) of approximately \$4 billion. The public is far better off with such an agreed resolution than it would be if we continued to pursue judicial relief, especially given the uncertain prospects of success and the delay associated even with a favorable outcome to the litigation. The settlement is a compromise that recognizes the enormous demand for this spectrum and recovers for the public most of the value the spectrum represents to the winning bidders at Auction 35.

The settlement requires implementing legislation before it can go forward. The Attorney General has submitted a draft bill that provides statutory authority to proceed with the settlement. The settlement specifies that Auction 35 should be implemented, with payment terms as modified under the settlement agreement. By appropriating funds to guarantee payment, the bill enables NextWave to relinquish its claims to the licenses, which is a prerequisite to the FCC's issuance of those licenses to the winning bidders at Auction 35. The bill also establishes a limited and expedited structure for judicial review of challenges to the settlement, enabling the spectrum to be put to use expeditiously and bringing an end to this protracted litigation.

The judicial review provisions of the bill are designed to ensure that any challenge to the settlement is presented to and resolved by the courts as quickly as possible. Three kinds of challenges are permitted—litigation concerning approval of the settlement under the Bankruptcy Code, constitutional challenges to the FCC's approval of the settlement, and constitutional challenges to the implementing legislation. To ensure consistency and to promote judicial efficiency, the D.C. Circuit will have ex-

clusive jurisdiction to hear any such challenge. Although the bill requires expedited treatment, it leaves the court to set its own schedule, subject to an instruction that the court act "with a view to" deciding the case within a certain period of time "if practicable." Similar provisions seeking quick action are also provided for rehearing and certiorari review.

The bill provides ample opportunity for judicial resolution of genuine legal disputes about the settlement. As in any bankruptcy case, settlement must be approved by a bankruptcy court or district court. NextWave has filed its motion for approval with the Bankruptcy Court for the Southern District of New York, and the bankruptcy rules provide for a period of notice during which any objections may be brought before the court. If the bankruptcy court grants NextWave's motion for approval, any objecting party may appeal that decision. The D.C. Circuit, which is familiar with the case, will have exclusive jurisdiction to hear any challenge to the constitutionality of the settlement or the legislation.

The bill precludes nonconstitutional challenges to the FCC's implementation of Auction 35 pursuant to the terms of the settlement and the legislation. Congress's express approval of the settlement would eliminate potentially time-consuming litigation. Similarly, because of the importance of putting this valuable spectrum to use as quickly as possible, the bill precludes courts from entering an interlocutory order enjoining an Auction 35 licensee from using the spectrum before the expedited review process has reached finality. Legal disputes that would not affect the implementation of the settlement—such as questions about the qualifications of a winning bidder—are not subject to the provisions for expedited treatment and can proceed in the normal course. The judicial review provisions of the bill permit bankruptcy challenges that are otherwise authorized under current law.

We believe that the bill is constitutional in all its particulars, and that there are no other judicial obstacles to full implementation of the settlement. The settlement nevertheless addresses the consequences of an adverse ruling. If a final court order prevents NextWave from surrendering the licenses, the settlement will not go forward. If a final order bars the FCC from implementing Auction 35, the government will again hold valuable wireless spectrum and could offer it in a future auction as appropriate.

I want to emphasize that the Department of Justice, after careful consideration, has concluded that this settlement of the NextWave litigation offers significant benefits to the American public. Because the settlement requires enactment of legislation before it can go forward, the Department strongly urges the Committee, and the Congress as a whole, to take the steps necessary to realize these benefits. We are mindful of the difficulties Congress faces when asked to enact proposed legislation before December 31, 2001. But the December 31, 2001 date is a necessary component of this carefully negotiated settlement; the parties' decision to select that date was not entered into lightly. All parties, including the United States, need to bring an end to the wrangling over these licenses and put the spectrum to good use. Legislation is necessary by December 31, 2001, in order to conclude all related litigation and ensure the availability of the spectrum to the American consumers by December 31, 2002. The December 31, 2001 date for enactment also reflects the pendency of petitions for writs of certiorari before the Supreme Court, an important component of the time pressures that were considered.

The parties have said that they are willing to settle this case on the terms set forth in the agreement, but only if the legislation can be enacted by December 31, 2001. If the implementing legislation is not enacted, we will return to litigation in which our prospects are uncertain and the path to success a long and costly one. Only if Congress enacts the implementing legislation and keeps this settlement agreement in place are the American people certain to realize promptly both the improvements in wireless telecommunications services and the addition of several billion dollars to the Treasury. We appreciate the care and seriousness with which this subcommittee and others in Congress have undertaken to review and consider the proposed legislation. After careful analysis, we have concluded that the settlement is in the public interest. We hope that you will agree.

Chairman Upton, that concludes my prepared statement. I very much appreciate this opportunity to present the Department of Justice's views on this important issue, and I would be pleased to respond to any questions you may have.

Mr. UPTON. Thank you both. We are going to proceed with questions from members using the 5 minute rule, and I will yield first to the chairman of the full committee, Mr. Tauzin for 5 minutes.

Chairman TAUZIN. Thank you, Mr. Chairman. I think it is important to put this whole matter in a bit of perspective here. Congress,

as you know, Mr. Chairman, determined to move away from various forms of spectrum allocation including all sorts of lotteries, and other forms of distribution of licensing in favor of this auction.

And Congress had a choice. We could have passed a law that said to the FCC that when you auction off spectrum from now on, cash on the barrel head. We could have said that. That would have limited the potential of people coming to these auctions to only those folks who had the avail cash on the barrel head, and who could come forward with enough financing in advance of the auction to pay for the purchase as soon as the auction was concluded.

That is the way that a lot of auctions are conducted in this country. You can't do it on credit. We decided instead to permit auctions on credit, and to allow people to come into the auction process to bid for spectrum, and to put down a small amount as a downpayment, with the understanding that they would pay the rest of the auction bid over time.

In effect, we decided to provide for government financing, time to go out and do the financing behind the auction bids in an attempt to keep the auction processes as open as possible to as many Americans as possible.

I thought that was probably a good idea. But let's put a few other things in perspective, too. When these C-Block auctions occurred back in 1996 and 1997, and the parties like NextWave showed up and bid, and in this case \$4.86 billion for these licenses, and they did so under a credit system, they did so based upon the financing arrangements that they could reasonably assume would be available for them to pay for these licenses over the time allowed under the auction process.

But then you see that the government did something else, too, about that time. Congress tried to find money for its budget problems, and authorized more spectrum sales, and so the government was forced to provide additional spectrum auctions and additional sales.

Some would argue that the speed in which Congress and the FCC went out and auctioned additional spectrum had several deleterious effects upon the C-Block auctions. First of all, it diminished the value of those licenses as we put more spectrum out into the public domain, and therefore made each bid on spectrum less valuable.

Second, it may have severely undercut the capacity of groups like NextWave to go out and do their financing as the value of their asset, the spectrum they had bid in, made have been diminished by the government action.

I mean, what I am saying is that we may have contributed to the failure of this process because budgeteers were making the decision about spectrum auctions instead of communication policy experts.

Because budgeteers were driving the FCC to produce more and more dollars out of spectrum sales at a time when budgeteers wanted to balance the budget. There were many on this committee arguing to the Budget Committee that you are going too fast, and you are going to force auctions in which we are not going to get any money.

And guess what. There was an auction that occurred—and I forget the name of it, but we got one dollar, I think, for a successful

bid in that subsequent auction. So when we think about responsibility here, let's put a little bit on ourselves.

Congress, yielding to the demands of the Budget Committee for more and more money for spectrum auctions, may have messed up, bundled this process of credit auctions under which NextWave and other bidders on the C-Block auction went forward.

But once NextWave successfully bid in its spectrum, I believe the Circuit Court was correct. It acquired a property right in that spectrum, and now the Circuit Court has said so.

And despite all the claims of the FCC that they had a right to pull that spectrum back and sell it to anybody that they wanted to, the Court said, wait a minute, you can't just do that. You auctioned this off to NextWave, and they bid it in, and they put their money down.

And they even came back when the value of that spectrum began going up in the marketplace again, and they came back and said we will pay you ever dime that we owe you, plus. We will give you a bonus if you take your money now and settle with us.

And the government said, no, we want the spectrum back because we think we can sell it for a higher price, and that is what the government tried to do. And the Circuit Court basically said you can't do that in America. You just can't take somebody's property because you want to sell it for a higher price than you sold it to them.

And the Circuit Court said no to the government, that you can't do that. NextWave has a property rights interest. That being the case, we have got to resolve this thing now. And what we have before us, I think, Mr. Chairman, is the recognition.

And indeed as Chairman Powell has told us, that under the circumstances we now find ourselves with NextWave having a property right in this spectrum, with the spectrum being worth a lot more today than it was when NextWave bid it in initially.

But remembering that it was worth a lot less when NextWave was trying to put its finances together before it had to declare bankruptcy. Remembering that we may have contributed to that situation by rushing out too much spectrum in auctions that I think ill-considered, ill-timed, and not in all respects conducted properly.

The bottom line is that we now find ourselves with a situation where the government can now not only recoup its full \$4.86 billion, but a great deal more. And the folks who came in and bid at this auction that the government set up trying to resell this spectrum, are now prepared to put up that money and to put this spectrum to use, and NextWave will be respected in its property rights.

Now, I don't know how you can settle this thing any other way that would be fairer, and would be consistent with public policy considerations, and constitutional rights of the parties.

And at the same time get this spectrum out the way that we intended in 1996 and 1997 to the users in America who desperately want to use it. I don't know how you would do it any other way, except through protracted and extensive more litigation, all of which could have been avoided in the first place if Congress and the FCC hadn't made a bunch of bad decisions back then.

Now, I think we have some complicity in this. I think we are partially to blame for the mess that has been created. I think we all have to extricate ourselves from it the best way we can, and I think, Mr. Chairman, that you put your finger on it.

This is literally the best that we can do in the public interest to settle this mess, recognizing property rights like the D.C. Court did. And at the same time recouping for the government its money due, and more importantly getting the spectrum out to folks in America who should have been enjoying it since 1996.

Now, if I am wrong in any of that, I wish, Mr. Chairman, that you would correct me in whatever time remains. Then, Mr. Chairman, I yield back.

Mr. UPTON. The gentlemen's time has expired. The gentleman from Massachusetts, Mr. Markey.

Mr. MARKEY. I followed it completely, Mr. Chairman, and I thought you did a good job laying out all of the competing considerations that have to be factored into this decision.

You know, on spectrum policy, Congress is schizophrenic. There is no question about it. Sometimes we say to the Commission to auction it off. Other times we say give it free to the broadcasters, and other times we say forego auctions, because there is some other public interest consideration.

We make various decisions here based upon what we believe to be the best balance of policies to compete out in the marketplace, but also to serve the public interest, and that's what Section 309(j)(3) talks about, and not just insuring the maximum amount of revenue comes in, but all these other values as well.

And I know that we are all talking about money here, but we are talking about a lot of other very important things, too, that have to be put out here on the table. Now, Mr. Dingell and I gave you kind of a homework assignment on short notice.

And we very much appreciate, Mr. Chairman, your very rapid response to some very complex questions. And in the answers, you told Mr. Dingell and I that the FCC has not taken action on petitions questioning the eligibility of NextWave, the whole C-Block licenses. That is the Verizon Voice Stream petition.

You say that there is no investigation that was performed because the licensees and licenses were subject to litigation. And you stipulate that the Commission has conducted no extensive review of NextWave's ownership structure since its original 1997 license grants.

And we could go on here, but from my perspective, we have got urban communicators sitting out here. They will be on the next panel. They are kind of the remainder men of this story line, with an unresolved ending for them and for others who are similarly situated.

I don't think that Congress has a policymaker can or should allow that to happen. I think we need to quite clearly articulate what the policy is going to be, and not just for the largest bidder, but also for every other bidder, just out of a sense of fairness, equity.

Now, that is what we were structuring here, and one of the questions that I have, and I pose it to you, Mr. Chairman, as a potential alternative, is if our goal is to get the spectrum out into the market

soon, what if the FCC simply ceased litigation, and accepted that NextWave is the licensee as Mr. Tauzin just said.

And then mandate that it fully filled out its wireless infrastructure, and compete against the incumbents using the wholesale strategy that it said was going to be its marketplace strategy.

And recognizing the fact that the CBO scoring of \$10 billion is completely illusory. They are going to score this whole thing as a loss, and so that there is only a marginal difference of opinion.

At least that way we would get a competing network built out there, and would add more competition to the marketplace, and would fulfill the requirements of Section 309(j)(3), that we provide the consumer with those additional choices.

Why isn't that a better alternative since the competing bidders who slot to get into this market, the Alaska media wireless, and Salmon wireless, were told by the FCC that they were bidding on something that was very speculative.

And in fact, NextWave might wind up as the legal owner of the spectrum, and so they already know that, the new bidders, the people that sent it up to \$16 billion or whatever it was.

So why don't we just go that route, Mr. Chairman. Why isn't that a better route, and then at some point in the future if they want to see it they can sell it, but at least we will have ensured the integrity of the process; that is, in terms of the—well, of course, that is impossible completely in this situation.

But at least we will have a new competitor out in the marketplace consistent with what NextWave promised initially when they bid for this spectrum.

Mr. POWELL. Sure, I will take my best shot. It is an alternative, and certainly one that the Commission considered would be before it if this settlement was not codified. First, as to why not. It is by far not a certainty or a finality, or a conclusion.

For example, there are many, many continuing regulatory proceedings that would have to be revived in the context of NextWave's qualification as a licensee that remain pending.

The Commission would have to spend a significant amount of time considering and evaluating those petitions and considerations. If they led to disqualification, it would require another substantial period in which they would be designated for a hearing and evaluated, and arguably continue in litigation and upon appeal.

And at least one set of answers is that it would not be a final settlement of the litigation aspects, because they would go on for quite a bit longer. Another point that I would like to make is about an additional competitor.

Certainly there would be additional an competitor, but as you noted, their model was to be a carrier's carrier, which is to provide capacity to other carriers. They would not as a consequence be a retail alternative competitor for consumers.

And compare that to the fact that in Auction 35 the list of companies that stand to win licenses and put them to use are not all existing companies that are already providing competitive choices.

Many of them would be new competitive entrants in particular markets, including some small and new entrepreneurial entrants, and so many of them would be providing service that I would argue even more new competitive choice for consumers than the default

of just simply awarding to them a single company which might provide modest competitive benefits, but not retail competitive benefits.

Mr. MARKEY. I think I understand what you are saying. It is very speculative what would come in if we auctioned this spectrum again 5 years from now, or NextWave sold it 5 years from now, and what would be the benefit of NextWave's strategy in the marketplace, as opposed to some other smaller company.

Although that I think that we all pretty much have a good idea that some of the companies that are players in this auction actually want to add this spectrum to already existing services.

I think that is what Verizon and SPC are all about in this, and that is quite different than adding a new competitor. We know that as well, and I think you should stipulate that in your testimony. That's also part of this.

But what I am saying to you is that if you remove that direction, that at least NextWave then would have fulfilled its obligations. It would have built out. The option process would have had some approximation of having fulfilled what its original intent was, although it was a long and winding road.

And I think to a certain extent that is a very strong signal to send to companies that might look at this as kind of an opportunity to move in, bid for spectrum, and sit on it, and never build out, and not even have the proper financing perhaps, but they own it now, and not see the consumer with a competitive company out in the marketplace.

And all I would say is that this hearing helps to kind of frame some of the other alternatives that might be out there in looking at a way of resolving the issue. Thank you.

Mr. UPTON. Thank you. Mr. Chairman, you asked in your opening statement, you asked the question is there a better alternative, and as we all listened to the opening statements on both sides, I think we all lament that there is probably not a better alternative than what is on the table before us.

I think that a lot of us see the writing that is on the wall, and we also see the calendar and the clock ticking to December 31, and we also know that there is probably a very limited number of legislative days, perhaps until only the end of this week, before this session of Congress wraps up until next year, though there is a chance that we will be in next week.

What do you think would happen if for some reason we don't see a legislative fix or a legislative agreement before we break in the next couple of days? What is your prediction as to what will happen?

Will we wait for the courts to step in and perhaps before the Supreme Court, or do we see everybody walk away, or do we see the candle relit for another 90 days? What is your prediction as to what would happen?

Mr. POWELL. I think that it is difficult to predict, but I think a lot would have to do with whether there was a perception that a result was coming.

Mr. UPTON. I mean, I think everybody knows that we are pretty close, maybe.

Mr. POWELL. I think that each of the major sets of parties would make judgments about how likely and how soon they thought a possible resolution was coming. It is important to review what I think the window of opportunity is and why after this date there are these exigencies.

First of all, the government. We have sought certiorari, and that case continues to progress. At some point the government transitions from being a party to a settlement, and it has to put on its Supreme Court litigating fighting hat, and that is a role that it has to play.

And as the months go by, it increasingly gets closer to its obligation to serve that role. If you take the Auction 35 winners, they certainly did take spectrum at option fully aware of the risks.

But those risks have come true, and they are busy trying to justify to boards and shareholders why they continue to be under the potential government obligation for significant amounts of money, foregoing other opportunities to make network modifications and upgrades.

And they have been willing to participate in the discussions and resolution of those under the anticipation that if it really comes through in a sufficiently timely way that it will be worth it.

But when it starts dragging on in time, I think there are serious questions whether many of the Auction 35 winners would be willing to be a participant in settlement and might very much prefer to simply have it go down, and seek other alternatives for their needs.

And by the way, they do so with full knowledge that one day this spectrum, if framed by the government as a public asset will be sold again. And perhaps at better values than what it was sold at the present auction.

So I think they are a fragile part of the settlement, and you can ask Mr. Strigl and Verizon their judgment when they come up in the second panel. And then I think it is important that the other part of the window exigency was that the bankruptcy proceedings march on.

NextWave as a bankrupt party is in that proceeding, and has milestones to meet with the Court. That Court is willing to entertain possible settlements that restore creditors, but at some point that process continues to advance and mature.

So those are the factors that result in the frugality and what will happen will be an individual judgment of each of those parties. As a formal matter under the settlement, after that date, none of those parties is legally bound to terms and conditions, and each would enjoy a new individual judgment as to whether to proceed at all.

Mr. UPTON. So the bottom line would be that it would be pretty hard to put Humpty-Dumpty back together again?

Mr. POWELL. There will be a lot of pieces, yes.

Mr. UPTON. Does the full Commission need to approve the settlement, or do you have that authority as Chairman? What is your sense?

Mr. POWELL. I think that the important point is that this is the settlement of the litigation, and not an administrative or Commission act. It is one in which the Department of Justice, as the coun-

selor to the Federal Communications Commission, plays a principal role.

And indeed it is important to note that this settlement really was an opportunity for the Commission and the government to put the parties together and to try and find terms and conditions under which they could reach mutual agreement.

It was clear that that could not be done by the Commission under its own authority, such as questions about how to move the money. And so in essence it is a proposal to Congress to embrace the legislative terms.

Under Section 5(a) of the Communications Act, it firmly vests in the Chairman of the Federal Communications Commission the special right to propose legislation and to work with other government agencies in the resolution of disputes and that is the provision on which I acted.

Mr. UPTON. All right. Mr. Hunt, do you have a comment with regard to the first question that I gave to Chairman Powell? What happens if the clock runs out?

Mr. HUNT. Well, I agree with the Chairman's comments. I might only add that having sat through more than 2 months of negotiations with all of these parties, and with 40 or 50 lawyers every day and every night, I would not begin to predict the likelihood of being able to put humpty-dumpty back together again once the date passes.

But everything that the chairman stated was accurate—and reasons why we were driven to the time constraints that we were driven to with respect to this agreement.

Mr. UPTON. Thank you. Mr. Boucher.

Mr. BOUCHER. I would like to take just a moment to inquire as to the necessity of Congress acting in this matter. We have an agreement before us which has been signed by the stakeholding parties. Why can't that agreement simply be put into effect on its own? Why does Congress have to do anything?

Mr. POWELL. Let me take a stab at that, and then offer Mr. Hunt an opportunity on the part of the Administration as well. The first issue that became complicated was literally the simple mechanisms for moving money.

As I alluded to in my opening testimony, you have a company that under the ruling of the court is in rightful possession of the licenses, and basically in order to disgorge them they need to be paid.

No one at the Federal Communications Commission, as I said, has a checkbook or the kind of authority necessary to draw on the funds of the United States Treasury. And so that was one set of problems and difficulties.

Moreover, even though there is potentially money due to the U.S. Government which would cover the costs of disgorging NextWave of the licenses, it was clear to us that: one, there was a legal issue as to what it would be received for if, for example, Auction 35 is not in legal effect, which is at least questionable under the D.C. Circuit ruling.

And you just don't take money from the U.S. Government for any reason, and then even if we could find a way to do that, it was

clear that nobody had the ability to then reissue those funds to NextWave in the context of a settlement.

So first and foremost because of the merry-go-round of money that is necessary—we felt had to have the kinds of authorization of the institution empowered to make appropriations. The second set of issues, at least from my perspective, is that there is a host of thorny legal matters as a consequence of the D.C. Circuit’s decision that would raise legal risks and vulnerabilities to any settlement without the blessing of Congress. Because of the ruling of the D.C. Circuit if the licenses automatically canceled when we sold them, we in essence didn’t really have them to sell.

While we thought we had arguments that could justify our redistributing them to the Auction 35 winners, the auction winners and NextWave themselves were particularly uncomfortable with committing to these settlements if there were a host of risks and vulnerabilities that would be ultimately overturned like an apple cart because of these odd legal postures.

So since it was necessary to get appropriation authority, it was thought that the settlement of that finality would be equally meritorious. I am confident that we explored many ways that we could have done it without Congressional intervention and came to the conclusion that we didn’t feel comfortable that we could.

Mr. BOUCHER. Well, I would assume that on the first point that an appropriation meets your needs. And that potentially might be easier to obtain than taking legislation ab initio through the entire Congressional process.

I am not confident of that, but perhaps it would be. On the second point, I am a little bit perplexed about who would have standing to challenge the agreement. You have suggested that there is some legal uncertainties.

Are you saying that you are concerned that some party not a signatory to the agreement might go to court and challenge its terms, and demonstrate to the Court that it has standing even to be there in order to do that?

I have some real doubts about that. In the alternative, are you saying that you need direct statutory authority to issue these licenses now to the companies that prevailed in the second auction, or do you think that you have sufficient authority to do that?

Mr. POWELL. First of all, candidly, we have learned in this litigation that nothing is beyond the realm of possibility that could upset an otherwise valid decision.

But, yes, I think that there was some concern that there could be standing and challenges by parties who were not part of the settlement. Indeed, we have already seen some companies, and some testified before the Judiciary Subcommittee just the other day, raising questions and concerns about the settlement when they had yielded in the auction, or had otherwise complied with the rules and provisions of the auction rules.

So those were concerns, and I should say that you might ask that again in the next panel. I think the concerns were very, very serious to the private parties more than to the government.

We believe that while risky, we thought that there were some challenges and responses that we would have to such claims. But

nonetheless there were very significant commitments being made here.

And again given that there was going to be this need for the money movement, there was a desire to have that done as well, and maybe Justice has a better view on it.

Mr. BOUCHER. I will take your advice and propound that question to our next set of witnesses. Let me finally ask one other question. NextWave was obviously the largest winning bidder in your initial C-Block auction.

But there were also some other winning bidders in that first C-Block auction that like NextWave declared bankruptcy, and declared bankruptcy at a time when they had those licenses.

We are probably going to be hearing shortly from one of those other companies, a company called Urban Communications. Let me ask you if there are any other companies that are precisely similarly situated to NextWave, meaning that they declared bankruptcy, and the Commission has now received a court order requiring a reinstatement of the license to that bankrupt entity. Is there any other companies situated that way?

Mr. POWELL. There are, and I would ask Justice to add to this as well, but to my knowledge—and we need to verify this—there is only one company similarly situated to NextWave in near identity, and that is Urban Comm.

There are other companies to which there are issues associated with automatic cancellation that at some point have to be resolved as well. They are not necessarily companies whose licenses found their way back into the Auction 35 morass.

But there are companies in which the Commission has positions that they automatically canceled, and had to be reconsidered. I would also caution that because of some of the complexities of Federal Court litigation there is probably at least a host of legal issues about other Circuits considering matters in different parts of the country in which some of these companies reside.

And the government continues to be careful in the position that it takes with respect to remaining litigation.

Mr. BOUCHER. Mr. Chairman, may I have unanimous consent for 1 additional minute?

Mr. UPTON. Hearing no objections—

Mr. BOUCHER. Chairman Powell, is there anything in this settlement that prejudices the rights of Urban Communications or another company that might be similarly situated to NextWave?

I mean, they still have the full range of opportunities available to them that the law provides, even if this settlement is approved, do they not? So, I mean, do you see any way that this settlement might actually cause harm to such a company?

Mr. POWELL. I don't think it causes harm, although I am more than understanding of the concerns of that company particularly, and the fact that they are sort of similarly situated, and see the opportunity to settle their growing concerns.

Our position by the way is that we have never been opposed to that, and we have always maintained that we are relatively open to settlement discussions with Urban Comm as well. Indeed our only position has been that we wanted to first resolve the

NextWave litigation, which had different exigencies associated with it, and different financial obligations associated with it.

We needed some understanding of what parameters we would really be able to operate in, in continued settlement discussions, but that is what we tried to convey both to that company and in our own deliberations.

And I think we have already in fact began to consider some options with respect to that particular party, and I think that there still is a realistic possibility that it could be settled with the government as well.

Mr. BOUCHER. Thank you, Mr. Chairman.

Mr. UPTON. Okay. The Chair will recognize Mr. Dingell for 5 minutes.

Mr. DINGELL. Mr. Chairman, thank you. First, Mr. Powell, thank you for your assistance to Mr. Markey and me. Second of all, I would note that the Bureau ordered NextWave to come into compliance with the foreign ownership rules within a set time. But that the full Commission neither ruled nor evaluated whether NextWave later complied with the order; is that correct?

Mr. POWELL. That is largely correct, yes.

Mr. DINGELL. Okay. Now, Mr. Chairman, I would note that the Commission has made no final determination with regard to whether the claims have any merit, referring to the matters with regard to NextWave's qualifications; is that correct?

Mr. POWELL. That's correct.

Mr. DINGELL. Mr. Chairman, has the Commission undertaken any formal investigation with regard to the claims?

Mr. POWELL. Those claims, the recent ones filed in July, are pending, and there have been no formal actions taken yet.

Mr. DINGELL. Are the questions of the validity of those claims important or unimportant?

Mr. POWELL. They are important, but they are potentially mooted if NextWave is never a licensee.

Mr. DINGELL. But they are important in determining whether or not there is compliance with the law, and with the public interest; is that right?

Mr. POWELL. Yes. But it is important to note that the qualifications are requirements of a license holder, and in many ways what has complicated those issues is that if NextWave gives up licenses and does not stand as a holder of licenses, there aren't qualifications for it to meet.

Mr. DINGELL. But what you are really saying is it only becomes irrelevant if we bless the settlement; is that right?

Mr. POWELL. That's absolutely correct.

Mr. DINGELL. So if we do not, those questions remain then to be important; is that right?

Mr. POWELL. That's right.

Mr. DINGELL. Now, Mr. Chairman, is it fair to say that there is some reasonable basis to believe that NextWave may not be entitled to the reinstatement of its licenses?

Mr. POWELL. We don't have any reasonable basis to make that opinion one way or the other at this point, no.

Mr. DINGELL. So you can't tell us yes and you can't tell us no?

Mr. POWELL. That's correct.

Mr. DINGELL. Thank you, Mr. Chairman. Now what would happen to these outstanding claims if the settlement is approved by the Congress? They are mooted are they not?

Mr. POWELL. Yes, sir, they would be mooted.

Mr. DINGELL. I note that NextWave filed a second plan of reorganization with the bankruptcy court in August of this year, and that the Commission, through its lawyers at the Department of Justice, objected to that plan. Can you tell us what was the basis for the Commission's objections?

Mr. POWELL. I will ask the Department of Justice to comment on that as well. My recollection is that we reserved the right to continue to consider the qualifications of the licensees under the second reorganization plan, rather than endorse it as proposed.

Mr. DINGELL. That tends to comport with my understanding, and the way that I understand it is this, and tell me if I am incorrect. Among other things, there is an outstanding claim against NextWave's qualifications; is that right?

Mr. POWELL. I'm sorry, Mr. Dingell?

Mr. DINGELL. Amongst other things, there are outstanding claims against NextWave's qualifications; is that right?

Mr. POWELL. That's correct.

Mr. DINGELL. And that the Commission has reserved the right to reevaluate NextWave's status as a licensee in the light of the proposed reorganization plan and its effect on the company's financial structure?

Mr. POWELL. Yes, it would be obligated to do so.

Mr. DINGELL. I think that is generally what you said. Now, the second point that we are discussing, the need for the Commission to evaluate NextWave's status as a licensee, has that been completed?

Mr. POWELL. No it would have to be revived if NextWave ultimately became the licensee.

Mr. DINGELL. All right. Is it fair to say that NextWave's current financial structure is substantially different than when the licenses were originally issued?

Mr. POWELL. I am not certain. It is my understanding that it is, but maybe those who participated in bankruptcy court might more fully know.

Mr. DINGELL. Maybe with all respect I could say, Mr. Chairman, that I think that the FCC does not know; is that correct?

Mr. POWELL. The FCC, as you have noted, has not taken a comprehensive auditing or investigation of the structure that would allow it to conclude one way or the other.

Mr. DINGELL. And that was the next point that I was going to make. The Commission has not evaluated NextWave's qualifications since 1997, and there is also evidence of a tremendous amount of investment pouring in to NextWave at this time, is there not?

Mr. POWELL. Clearly, if public press reports are to be believed on what we know from the bankruptcy, they have secured additional financing.

Mr. DINGELL. And it would appear that that should be considered on a fully diluted basis according to the rules of the FCC which require that kind of consideration; is that right?

Mr. POWELL. I believe so, but I would have to check on that.

Mr. DINGELL. If you want to add to that, Mr. Chairman, I would ask that the record remain open for that particular point. And I would note that this would then reduce the control group's authority and potentially violate designated entity rules if that occurs; is that correct?

Mr. POWELL. We do have rules, and as you have noted, they would have to be examined carefully to determine whether the structure complied with our rules, yes.

Mr. DINGELL. Now, I would note, Mr. Chairman, that all of these questions are being begged by the consideration of these proposals before the committee. Now, Mr. Chairman, just a couple of more questions.

When designated entities' licenses are transferred or assigned, the Commission would normally evaluate how the financial proceeds would be distributed to the investors; isn't that correct?

Mr. POWELL. Yes, the FCC would have to assure itself that the party was making a transfer that complied with our rules, yes.

Mr. DINGELL. And again, Mr. Chairman, that has not yet been done?

Mr. POWELL. No, it has not been done, and under the terms of the settlement it would not constitute a transfer from one company to the other, and that would not trigger it.

Mr. DINGELL. But that would only be under the terms of the settlement as approved, and would in fact constitute a significant change in the rules of the Commission?

Mr. POWELL. If NextWave ever had perfected an interest in the licenses and made an effort to transfer or sell them to other parties, it would trigger the consideration of those rules.

Mr. DINGELL. Now, Mr. Chairman, I would note that the Commission, I think, has not evaluated how the \$6 billion distribution of this case would be distributed as between NextWave's control group, and the non-control group of investors, because the FCC indicates that this is not necessary because NextWave is technically relinquishing its licenses under the settlement, and there is therefore—and I quote—no transfer or assignment; is that correct?

Mr. POWELL. Yes, sir.

Mr. DINGELL. So from a policy standpoint, let's address this question. Should the fact that there is no technical transfer or assignment in this case, and that the government is paying NextWave instead of a private party cutting the check, changed the underlying importance of ensuring that the distribution is proper from a designated entity's standpoint?

And I believe that the answer to that question is probably no; is that correct?

Mr. POWELL. The policies are still important, but the technicalities are more than technicalities. They are important as to whether they are threshold obligations that trigger the rule.

Mr. DINGELL. Thank you, Mr. Chairman. Mr. Chairman, you have been very gracious. Thank you.

Mr. UPTON. Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman, and Chairman Powell. Again, two quick points. I know that as much as we have the de-

bate about the current issue we are looking at public policy on how to correct this so that we do not fall back into this trap again.

And I know that many government agencies at a lot of different levels do not always accept the highest bid, because in the contractual arrangements there are criteria by which companies are to meet, and so the one that meets the best criteria with another determination on the price sometimes are allowed to win the bid.

And to me this is where I think this was probably a failure of more specific legal language. And that is just an opening premise. You mentioned in your testimony that it is important for Congress to make clear how spectrum auctions are to be treated under the U.S. Bankruptcy Code so that these cases never happen again.

What would be your recommendations, Chairman Powell, in this regard? How would you like us to assist, and maybe legislatively, or what changes do you see in the rulemaking process to fix this?

Mr. POWELL. I believe that to a large degree the Commission has taken whatever additional options that are available to it without additional consideration by the legislature.

There is tension between the specific provision that the D.C. Circuit cited for its decision and the expectations that we have about auctions. These are two important legal regimes, and I think that they are intense if what we hope is that future auctions would proceed with certainly without the risk that the public spectrum could be pulled out of the marketplace and essentially warehoused through a long and lengthy bankruptcy proceeding.

The Commission for the last several years has indeed warned of this concern, and it has nonetheless come to fruition and has a number of times offered its expert advice in proposing legislation, prospective legislation, and particularly that would help with that tension in this situation.

And I think we would be more than willing and a partner in efforts by this committee or other appropriate committees in considering those issues.

Mr. SHIMKUS. And if I can be so bold to talk to the chairman, I think that is probably what we will be looking at doing sometime in the spring of next year. That's all the questions that I have, Mr. Chairman, and I yield back.

Mr. UPTON. Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. Mr. Chairman, what would be the impacts if the wireless carriers did not get this section of the spectrum?

Mr. POWELL. Well, it is difficult to say given that there are many, many markets being served, and the impact would likely vary fairly significantly across markets. But needless to say, we have all read the articles and have an understanding and appreciation about what a premium is being placed on spectrum these days and whether there are debates about third generation wireless spectrum, the importance of 911, and any 911 services. By the way there is a growing body of consumers who are deeply frustrated with the quality of service and call completion.

Many of those issues are capacity issues; constraint about the spectrum that will ensure quality. I would submit that those are as important as competition, but I think that this is a significant

amount of spectrum as evidenced by the value that was placed on it at reauction.

And if it continued to not be available, and to be used in the market, I think that the impact would be significant, and I think it would grow. I think that each year it would become even more pronounced in a way that consumers would see.

Mr. GREEN. Well, again, you would see a deterioration of service, but there wouldn't be any problem with the current delivery of it. You are just talking about the increase in growth that we need and for the industry to continue—

Mr. POWELL. I don't have the statistics at hand, but wireless subscription and minutes of use continue to grow at an extraordinary rate. One might argue in certain markets already capacity constraints, tower site issues, are preventing the service reaching the level of quality that some consumers want, expect, and demand.

And that is even before you start discussing many of the new and exciting services that we hope to see deployed by carriers that will require variations in their spectrum. Now, that said, it is a little difficult to over-generalize from carrier to carrier, from market to market.

But in general those are the circumstances that we see in the wireless market.

Mr. GREEN. If Congress doesn't act on the settlement and the Supreme Court rules in favor of NextWave, will NextWave's designated entity status then come under review by the FCC?

Mr. POWELL. It is my belief that we would have to resolve pending petitions on those issues, yes.

Mr. GREEN. And in the buildout requirements, for NextWave required to meet the condition of attaining their licenses, what were the buildout requirements for them? Do you recall?

Mr. POWELL. Yes, I believe the build-out requirements were that major milestones would have been basically a month from now, but given as you understand the sort of mess and complexity of this particular issue, if NextWave were awarded licenses, we fully expect that they would file and demand relief in terms of the buildout requirement given the incumbrance of the spectrum during the period in which we litigated.

I can't speak to what the outcome would be, but it would be a Commission decision. That is a month away, and nobody has any expectation that if the Supreme Court ruled for the licensee were tomorrow that they would be built out to their requirements by January.

Mr. GREEN. Mr. Chairman, on an unrelated action, I noticed that the First Circuit Court recently ruled that Echo Star and Direct TV, which we had a hearing on last week, must comply with carry one-carry all requirements achievement. Can you say that they might be able to comply with this by January 1, 2002?

Mr. POWELL. Congressman, candidly, I just don't know. I have only just recently seen the decision and have not read it fully, and don't fully understand yet what the requirements that the Court held are. So I would be happy to talk with you about it further later when I have a better understanding.

Mr. GREEN. Okay. I appreciate that. Thank you, Mr. Chairman. Oh, I would be glad to yield to the ranking member.

Mr. MARKEY. And it would only be to ask for unanimous consent, Mr. Chairman, that the questions and the answers to the document which Mr. Dingell and I sent to the Chairman last week be put in the record.

Mr. UPTON. Without objection.
[The information referred to follows:]

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE CHAIRMAN
December 10, 2001

The Honorable EDWARD J. MARKEY
Ranking Member
Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
United States House of Representatives
2108 Rayburn House Office Building
Washington, D.C. 20515

DEAR CONGRESSMAN MARKEY: Thank you for your letter of December 6, 2001, regarding the NextWave settlement and companion legislation. Enclosed are my responses to each of the questions that you posed.

I trust this is responsive to your request, and I look forward to discussing this important matter with you at the December 11th hearing.

Sincerely,

MICHAEL K. POWELL
Chairman

enclosure

RESPONSES TO NEXTWAVE SETTLEMENT QUESTIONS

Question 1. How much money will NextWave receive as a result of the proposed settlement, before and after Federal income taxes? Does NextWave now or has it ever provided a commercial mobile service using the licenses obtained in Auction 5? Please explain applicable Commission rules relating to: a) the required holding period for licenses assigned to a designated entity; b) the build-out requirements for such licenses; c) avoidance of unjust enrichment associated with early transfer or assignment of such licenses; and d) to whom such early transfer or assignment normally would be permitted.

Response: The settlement provides that, in exchange for NextWave's relinquishment of the licenses, the government will net \$10.031 billion from the sale of licenses in Auction No. 35 covering the same spectrum previously licensed to NextWave, and NextWave will receive an initial cash payment of \$6.498 billion; however, NextWave's net payment from the government, after adjustments for amounts held by the government and other payments by NextWave, is \$5.819 billion. The transaction is explained in greater detail in the attached schedule at Tab 1, which explains how the overall appropriation of \$9.55 billion reduces to the net payment. NextWave has never provided commercial mobile services to the public using the licenses obtained in Auction Nos. 5, 10, and 11.

(a) Required Holding Period

Original C and F block licensees that won licenses at Auction Nos. 5, 10, and 11, generally are not permitted during the first five years from the date of their initial license grant to assign or transfer control of their licenses won in closed bidding to entities other than those that satisfy the entrepreneur block eligibility rules. 47 C.F.R. § 24.839(a)(1). However, under an exception, entrepreneur block licensees are permitted to assign or transfer control of C and F block licenses won in closed bidding to any entity during the first five years following the date of initial license grant, provided that the five-year construction build-out requirement has been satisfied. 47 C.F.R. § 24.839(a)(6).

(b) Build-Out Requirements

The PCS rules require that a licensee of a 30 Mhz block must serve the area covered by its license with a signal level sufficient to provide adequate service to at least one-third of the population in that area within five years of being licensed and least two-thirds of the population in the area within 10 years of being licensed. 47 C.F.R. § 24.203 (a). A licensee of a 10 MHz or a 15 MHz block must serve the area covered by its license with a signal level sufficient to provide adequate service to at least one-quarter of the population in that area within five years of being li-

censed, or make a showing of substantial service in their licensed area within five years of being licensed. 47 C.F.R. § 24.203(b).

(c) Unjust Enrichment

Ordinarily, if a C or F block licensee that used a bidding credit assigns or transfers its license within the first five years after the initial license grant date to an entity that does not qualify for a bidding credit, or as favorable a bidding credit, the licensee is subject to an unjust enrichment payment. Specifically, under the Commission's rules, a licensee that utilizes a bidding credit and that, during the initial term, seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. government for the amount of the bidding credit plus interest. 47 C.F.R. § 1.2111(d). A licensee that utilizes a bidding credit, and that, during the initial term, seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, will be required to reimburse the U.S. government for the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest. 47 C.F.R. § 1.2111(d).

Similarly, a licensee that utilizes installment payment financing and seeks to assign or transfer control of its license to an entity that does not qualify for installment payments will be required to make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer. 47 C.F.R. § 1.2111(c). A licensee that utilizes installment payment financing and seeks to assign or transfer control of its license to an entity that qualifies for a less favorable installment payment plan will be required to adjust its payment plan to the reflect the new eligibility status. 47 C.F.R. § 1.2111(c).

For licenses won in Auction No. 5 or 10, where virtually all bidders were given the same bidding credit, no bidding credit unjust enrichment payment is required upon transfer of a license to an entrepreneur that is not a small business within the first five years after the date of the initial license grant, even if the transferor or assignor has not yet satisfied its initial construction benchmark requirement. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Red 16266, 16291 at n.156 (2000).

(d) Eligible Licensees Or Transferees

For permissible transfers and assignments, the transferor or assignor would not be required to make unjust enrichment payments upon early transfer or assignment to the following entities: a transferee/assignee that qualifies for the same or greater level of bidding credits; a transferee/assignee that meets the eligibility standards for the same or more favorable installment payments; and a transferee/assignee of a license from Auction No. 5 or 10 that is an entrepreneur and not a small business. See 47 C.F.R. § 1.2111(c), (d); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Red 16266, 16291 at n.156 (2000).

Question 2. Please state which rules, if any, described in your answers to questions 1 (a), (b), (c), and (d) would need to be waived by the Commission to effectuate the settlement agreement proposed by the parties. What statutory provisions, if any, would need to be amended by Congress?

Response: None of the rules described above would need to be waived by the Commission to effectuate the Settlement Agreement because NextWave, pursuant to the settlement, is not transferring its licenses. Rather, it is agreeing to relinquish any claims to the licenses.

There are several reasons why this legislation is necessary to effectuate 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 minimum additional litigation delay. Third, the legislation provides the guarantee necessary for NextWave. to relinquish its claims on the licenses. In return,

NextWave will be paid once the government receives Auction No. 35 receipts equal to the payments to be made to NextWave no later than December 31, 2002.

Question 3. For each Auction 35 winner participating in the settlement, please state whether such winner qualifies for designated entity status under current Commission rules. Has the Commission conducted any pre- or post-auction audits to validate these qualifications? Under the settlement, what can the Commission do if it subsequently finds, or is made aware of, information that parties to the settlement are in violation of the designated entity rules or other Commission rules with respect to qualifying for such licenses?

Response: To date, the FCC's Wireless Telecommunications Bureau has qualified all Auction No. 35 winning bidders claiming designated entity status under the Commission's rules, with the exception of four applicants. The Bureau engaged in post-auction review of long-form applications submitted by the winning bidders and, in some cases, has consulted with winning bidders to review additional documentation clarifying representations made in the long-form applications. Two of the remaining bidders (Alaska Native Wireless, L.L.C. and DCC PCS, Inc.) seeking to qualify as designated entities had their applications contested on the grounds that they do not qualify. These applications are restricted under the Commission's *ex parte* rules. 47 C.F.R. § 1.1208; *see also* Petition to Deny filed against DCC PCS by Raymond J. Quianzon, Jennifer Dine Wagner of Fletcher, Heald, & Hildreth, P.L.C., counsel for TPS Utilicom (March 9, 2001); Petition to Deny filed against Alaska Native Wireless, L.L.C. by Raymond J. Quianzon, Jennifer Dine Wagner of Fletcher, Heald, & Hildreth, P.L.C., counsel for TPS Utilicom (March 9, 2001).

The Bureau is carefully reviewing the applications of the four remaining bidders—Alaska Native Wireless, L.L.C.; DCC PCS, Inc.; 3DL Wireless, LLC; and SVC BidCo, L.P.—to determine whether they qualify as designated entities. Should the FCC later determine, after licenses are granted, that a licensee either misrepresented or altered its designated entity status in a manner inconsistent with the Commission's rules that licensee would be subject to enforcement action, which could potentially include revocation of its licenses.

Question 4. The settlement agreement permits certain participating Auction 35 winners, at their discretion, to withdraw all their bids for Auction 35 licenses without penalty and receive a refund of all monies paid to the Government. In the past, has the Commission ever allowed winning auction bidders to cancel their bids and, if so, under what circumstances? Were these bidders permitted a full refund of monies paid? If not, what is the policy justification for this disparate treatment?

Response: As a general matter, a winning bidder that cancels its bids is subject to default penalties under the Commission's Rules. Under the proposed legislation, and because of the unique circumstances of Auction No. 35, refunds are available to a small group of auction winners who bid less than \$10 million so long as they surrender their rights to the C and F block licenses in question. This is because of the length of time between the auction and the award of the licenses, which creates a particular hardship, on these small bidders who are having increasing difficulty in accessing the financial markets. The Wireless Telecommunications Bureau did notify bidders in a Public Notice in advance of Auction No. 35 that their participation was subject to the outcome of the litigation, and that monies would be returned at the conclusion of the litigation if the government lost. The settlement effectively gives a choice to smaller bidders: sign up for the settlement and, pledge to pay the amount owed from Auction No. 35 at a future date in exchange for license grant, or walk away from the transaction now in exchange for return of all deposits.

It should be noted that as part of the C block restructuring process, the Commission permitted licensees that had acquired licenses in Auction Nos. 5 and 10 to return their licenses, or portions of their licenses, in exchange for debt relief. Under four restructuring options, licensees were permitted to return their licenses or portions of their licenses (*i.e.*, disaggregated licenses) while money on deposit was either forfeited or a portion applied toward the purchase of other licenses in Auction No. 22 (the C block re-auction that followed restructuring). *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, NW Docket No. 97-82, *Second Report and Order and Further Notice of proposed Rule Making*, 12 FCC Red 16436 (1997); *see also* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Red 8345 (1998).

Question 5. What action, if any, has the Commission taken on the Alaska Native Wireless-Verizon-Voicestream petition filed July 19, 2001, to initiate an investigation and audit regarding the eligibility of NextWave to hold C- and F-Block licenses?

Response: The Wireless Telecommunications Bureau has taken no action on the Alaska Native Wireless-Verizon-VoiceStream petition pending the outcome of the NextWave litigation and the proposed settlement.

Question 6. If the Commission has conducted an investigation or audit of the matters raised in the above petition, what specific findings has it made? If no investigation or audit has been performed, please explain why not.

Response: To date, the Wireless Telecommunications Bureau has not conducted an investigation or entered specific findings with respect to the issues raised in the Alaska Native Wireless-Verizon-VoiceStream petition. No investigation has been performed because the rights to the licenses claimed by NextWave have been—and, until certain conditions of the Settlement Agreement are satisfied, will continue to be—the subject of pending litigation.

Question 7. Is the Commission satisfied that NextWave is currently a qualified licensee under the agency's (a) designated entity, and (b) foreign ownership rules? Please explain the basis for each conclusion. Have any pre- or post-auction audits been performed to validate such conclusions?

Response: At the close of the original C block auction in 1996, NextWave's applications were contested on the basis that the company did not qualify as a designated entity and that it violated foreign ownership limitations under the Communications Act. The FCC's Wireless Telecommunications Bureau undertook an extensive review of NextWave's business structure for purposes of determining whether they were qualified to hold C and F block licenses. The Bureau found that NextWave qualified as an entrepreneur. However, it also found that the company exceeded permissible foreign ownership thresholds. The Bureau later granted NextWave its licenses on the condition that it restructure to comply with foreign ownership requirements consistent with the Communications Act and the Commission's rules.

The Wireless Telecommunications Bureau based its original license grant on an extensive examination of NextWave's ownership structure. The original license grant was appealed with a proposed settlement later filed. This is the Antigone-Devco challenge referred to in Question 12 below. These matters have remained pending due to the dispute with the government concerning the claim to NextWave's licenses. (See answer to Question 12 below.) The Commission has conducted no extensive review of NextWave's ownership structure since its original 1997 license grants.

Question 8. Has the Commission evaluated NextWave's proposed financial structure contained in its Second Plan of Reorganization dated August 6, 2001, to determine whether the company would qualify as a designated entity under the agency's rules if such plan were adopted? If so, what conclusions has the Commission drawn? If no evaluation has been performed, or no conclusions were drawn from such an evaluation, please explain why not.

Response: The Department of Justice, on behalf of the Commission, filed objections to NextWave's Second Plan of Reorganization in which, *inter alia*, the government reserved to the Commission the jurisdiction to evaluate NextWave's status as a licensee in light of that Plan, noting the pending requests before the Commission seeking review of NextWave's qualifications. (See answers to Questions 5-6, 11-12.) Because the settlement process has to date superseded pursuit of the Second Amended Plan, the Commission has not evaluated whether and to what extent NextWave qualifies as a designated entity under the Second Plan.

Question 9. Has the Commission evaluated how the proceeds of the settlement payable to NextWave would be distributed between its control group and non-control group investors? Would such a distribution comply with Commission rules and precedents relating to licenses issued pursuant to Section 309(j) of the Communications Act and subsequently transferred or assigned? Would such a financial distribution comply with special Commission rules, if any, relating to licenses transferred or assigned by designated entities?

Response: The Commission will have no occasion to evaluate how proceeds of the Settlement will be distributed to NextWave. The Settlement Agreement requires that NextWave relinquish its claim on the licenses; therefore, there is no transfer or assignment by NextWave of the licenses. If there were such a transfer or assignment, the Commission would apply its rules regarding such transfers by a designated entity.

Question 10. Does the Commission believe that the instructions of the D.C. Circuit remand "for proceedings not inconsistent with this opinion" preclude the agency from further consideration of whether NextWave is a qualified licensee under other applicable Commission rules? If not, has the Commission undertaken any further proceedings for this purpose?

Response: No. On August 31, 2001, the FCC's Wireless Telecommunications Bureau released a Public Notice announcing that it would update its licensing records in order to comply with the D.C. Circuit's mandate. The Public Notice emphasized that the United States and the FCC intended to appeal the D.C. Circuit's decision to the Supreme Court, and that the status of ongoing regulatory proceedings concerning the licenses in question was not affected by the mandate. The Public Notice specifically explained that the pending regulatory proceedings could affect the status of the subject licenses. Those proceedings remain before the Commission pending implementation of the settlement.

Question 11. Does the Commission have any reasonable basis to believe that NextWave may not be entitled to reinstatement of its licenses (other than the arguments forming the basis for its petition for writ of certiorari to the U.S. Supreme Court)? If so, please explain.

Response: Though the Wireless Telecommunications Bureau has reviewed challenges to NextWave's eligibility (*see* Question 7 *supra*), the full Commission has never ruled on the merits of any of the objections to NextWave's original license grants. Also, more recently, petitions have been filed with the Commission challenging NextWave's eligibility to hold C and F block licenses.¹ The Petitions allege that NextWave is in violation of the agency's designated entity and foreign ownership rules. The proceeding initiated by the petitions has been deemed restricted under the Commissions *ex parte* rules. Accordingly, the agency is prohibited from commenting on the merits of the proceeding. As stated previously, these matters would be withdrawn in conjunction with the settlement.

Question 12. Why has the Commission failed to rule upon the merits of the Antigone-Devco petition originally filed on March 17, 1997, or upon the subsequent request of the parties to withdraw it on June 1, 1998?

Response: Not too long after the Commission received the Antigone-Devco petition (and the subsequent request for settlement) the government was engaged in complex bankruptcy litigation with NextWave raising substantial issues regarding the impact of the bankruptcy proceedings on the licenses that had been granted to NextWave. The Commission acknowledged the pending Antigone-Devco challenge and settlement when it explained its basis for canceling NextWave's licenses in its 2000 Order, and determined the matters were moot without reaching their merits. *See* Public Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses, NextWave Personal Communications, Inc. and NextWave Power Partners Inc., Petition for Reconsideration; In re Settlement. Request Pursuant to DA 99-745 For Various Broadband PCS C Block Licenses, File Nos. 00341CWL96, et. al., *Order on Reconsideration*, 15 FCC Red 17500 (2000). In light of the D.C. Circuit ruling, the status of these pleadings is in question, but in any event, these matters would be resolved by implementation the settlement.

Question 13. One of the recipients of frequencies to be relinquished under the proposed settlement is Voicestream Wireless, which is effectively owned by Deutsche Telekom. What is the current level of German government ownership of Deutsche Telekom?

Response: Based on FCC records, the German government currently owns approximately 43 percent of Deutsche Telekom, which has indirect ownership of Voicestream Wireless. *See* Form 602, filed by Powertel, Inc. November 30, 2001.

Question 14. In its 5th Report and Order (1994), the Commission adopted rules to fulfill Congress's mandate to ensure that small businesses, rural telephone companies, and businesses owned by minorities and women were given the opportunity to participate in the provision of broadband PCS. Please explain whether, and specifically, how, the settlement proposed by the parties meets this objective.

Response: The Settlement Agreement affirms the results of Auction No. 35, which was conducted under the Commission's rules as modified in August of 2000. Thus, licenses will be assigned to the parties who would have received them had Auction No. 35 never been challenged. Of the 35 winning bidders in Auction No. 35, 32 were entrepreneurs. 83 percent of the winning bidders were small or very small businesses, 9 percent of the winning bidders claimed to be minority-owned businesses and 3 percent of the winning bidders claimed to be women-owned businesses. (Some of these entities fall into more than one category.)

¹*See* Petition to Initiate an Investigation and Audit Regarding the Eligibility of NextWave Personal Communications, Inc. and NextWave Power Partners Inc. to Hold C and F Block licenses, filed by Alaska Native Wireless, L.L.C., Verizon Wireless, Voicestream Wireless Corporation, dated July 19, 2001; Petition for Reconsideration, filed by Alaska Native Wireless, L.L.C. and Voicestream Wireless Corporation, dated October 12, 2001; Petition to Deny Reinstatement of Licenses filed by Alaska Native Wireless, L.L.C., and Voicestream Wireless Corporation, dated August, 30, 2001.

Section 309(j) of the Communications Act directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minorities and women. Rules originally adopted in 1994 to fulfill Congress' mandate to encourage auction participation by small entities have been modified over the years to comply with the Supreme Court's decision in *Adarand Constructors v. Peña* through the Commission's normal rulemaking procedures. Most recently, in August 2000, the Commission released the *C/F Block Sixth Report and Order*, in which it changed its C and F block eligibility rules. Specifically, with respect to Auction No. 35, the Commission determined it would be appropriate to continue to set aside certain C block licenses for entrepreneurs. These licenses were made available through "closed" bidding. In addition, the Commission permitted other licenses to be acquired by both entrepreneurs and non-entrepreneurs through "open" bidding. The Commission also retained bidding credits to enhance auction participation by small businesses seeking to acquire "open" licenses. See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000). Section 309(j) of the Communications Act accords the Commission wide latitude in determining how to achieve the stated objectives. Section 309(j) does not mandate the use of set-asides, or any other particular method, to promote the participation of small businesses in spectrum auctions. With the exception of C and F block spectrum, the Commission has conducted all of its auctions without set-asides. Currently, the Commission decides for each service whether to offer bidding credits to enhance small business auction participation.

Question 15. The settlement agreement reflects a decision by the Commission to limit its negotiations to NextWave and participating Auction 35 winners. Specifically, and as to each of them, please describe what legal claims of Verizon Wireless or any other party to the settlement (a) were pending at the time the Commission began negotiations with them, and (b) are pending now. Please give all relevant details for each party, including date of filing, stated basis for the claim, and status on the day negotiations began and status today.

Response: Schedules C1 and C2 of the Settlement Agreement provide the requested information, and are attached for your review at Tab 2. Schedule C1 is a list of pending matters relating to the Antigone-Devco petition. Schedule C2 is a list of regulatory filings relating to the Alaska Native Wireless-Verizon-Voicestream petitions. These matters were pending during the negotiations; however, no member of the FCC's Office of General Counsel and Department of Justice negotiation team directly oversees these matters, which are handled in the Wireless Telecommunications Bureau.

Question 16. Did the Auction 35 rules contain any provisions to protect the Government from potential claims by Auction 35 winners? If so, please state these provisions. If not, why not?

Response: Yes. In a Public Notice released prior to Auction No. 35, the FCC's Wireless Telecommunications Bureau notified potential bidders that they were responsible for performing their own due diligence with respect to licenses available in the auction. Specifically, the Bureau made the following unequivocal statement defining a bidder's obligation to keep abreast of matters affecting any licenses:

Potential bidders and interested parties should be aware that various proceedings that may relate to the licenses available in Auction No. 35 may be pending or subject to further administrative review before the Commission, including, for example, waiver requests, petitions for reconsideration, and applications for review. In addition, certain judicial proceedings that may relate to the licenses available in Auction No. 35 are pending or may be subject to further review. Resolution of these matters could have an effect on the availability of spectrum included in Auction No. 35 and the auction is subject to such matters. Some of these matters (whether before the Commission or the courts) may not be resolved by the time of the auction. The Commission will continue to act on matters before it, but it makes no representations as to the resolution of judicial proceedings. Potential bidders are solely responsible for identifying associated risks, and investigating and evaluating the degree to which such matters may affect their ability to bid on or otherwise acquire licenses in Auction No. 35.

The Bureau's Public Notice also clarified that the Commission would "return the payments made by winning bidders of licenses in Auction No. 35 in the event that such bidders are subsequently required to surrender licenses won to prior applicants or license holders as a result of final determinations reached in pending proceedings." The Public Notice stated that the Commission would not pay interest on the returned payments, as it lacked legal authority to do so. Finally, the Public Notice made clear that winning bidders of licenses subject to pending proceedings were

still required to meet the normal payment and construction schedules established by the Commission.

Question 17. You have described the settlement as “a resolution that maximizes the public interest.” We, too, support a public interest resolution of this matter and are curious as to what public interest conditions the Commission sought to obtain in the settlement agreement with the parties. Does the settlement agreement include any conditions on the companies that will receive relinquished frequencies that such companies will expedite their deployment of E-911 safety technology, commit to the rapid deployment of digital capability to geographic areas within their licensed markets, currently still predominantly utilizing analog technology, commit to grant free or discounted service to educational institutions, or commit to anything else that could be characterized as activity that “maximizes the public interest”?

Response: All licensees are expected to comply with the Commission’s rules and any public interest obligations that flow from our regulations. Auction No. 35 winners are treated no differently in this regard. The overriding public interest benefit of the settlement, however, is that it enables the disputed NextWave spectrum to be put to use after years of hard-fought, legal wrangling, Section 309(j) of the Communications Act asks the Commission to balance such considerations when it calls for the rapid deployment of spectrum, and when it recognizes that the American public should receive a fair portion of the value of spectrum. 47 U.S.C. § 309(j)(3). The time has come to put the NextWave spectrum to productive use for the American consumer, or run the risk that these licenses will further uncertainty while the litigation continues. These licenses include some of the largest markets in the United States, where spectrum is in high demand for new and innovative uses such as Third Generation (3G) wireless. The settlement paves the way for the spectrum to be put into the hands of Auction No. 35 participants, who clearly value the licenses the most, consistent with 309(j). In addition, the U.S. taxpayer will benefit by receiving approximately \$10 billion for the disputed spectrum, nearly twice the original 1996 bids for the licenses. Also, contrary to the way licenses were granted to NextWave, monies will be paid in full by the Auction No. 35 winners, without installment payments, which significantly reduces the risk of default to the U.S. government.

Question 18. Did the Commission request any such public interest commitments from parties receiving the NextWave frequencies?

Response: The Commission did not impose any additional public interest obligations, other than those that are expected from all licensees, as a condition of settlement.

Chairman TAUZIN. Reserving the right to object, I simply want to indicate for the record that Mr. Dingell and Mr. Markey discussed with me the process by which this letter was sent to Mr. Powell.

And I encouraged them to send it, and encouraged obviously that we get all these answers on the record so that we might have a full record on this matter as we go forward, and I want to thank Mr. Markey and Mr. Dingell for their efforts here.

Mr. MARKEY. Thank you, Mr. Chairman.

Chairman TAUZIN. And I do not object, Mr. Chairman.

Mr. GREEN. I yield back my time, Mr. Chairman.

Mr. UPTON. The gentleman’s time has expired. Ms. DeGette.

Ms. DEGETTE. Thank you, Mr. Chairman. Following up on Congressman Boucher’s question, Mr. Hunt. He asked you the question if you will recall why do you need Congressional approval of this agreement, and you talked about several things.

Unfortunately, since this has happened quickly, I have not had time to personally review the proposed settlement agreement, and I would like to know if one of the reasons that you feel that you need Congressional approval is because of the provisions regarding filing lawsuits, and other types of legal action that you referred to in your opening statement. And if so, if you could expand on that a little bit.

Mr. HUNT. Certainly. Yes, that is one of the reasons that we believe that this legislation is necessary, not only for the appropriation. And I might just add parenthetically that I didn't have an opportunity to mention that the Judgment Fund, which is ordinarily used in settling litigation, would not be available in this case to guarantee the payment to NextWave. And that is why the appropriation aspect is necessary.

Ms. DEGETTE. Okay. If you could answer my question because I only get 5 minutes.

Mr. HUNT. Certainly. Yes, we think the expedited judicial review provisions are a necessary component here, because one of the goals that we have is to get the spectrum into public use as expeditiously as possible.

Ms. DEGETTE. And who would those expedited court deadlines apply to, Mr. Hunt?

Mr. HUNT. Those expedited court deadlines have several components. One is expedited provisions for courts themselves in making determinations on any litigation that is filed with respect to this settlement. There is no mandatory deadline where Congress is saying to a court—

Ms. DEGETTE. I was going to say that I don't think that would go over too well with the Court.

Mr. HUNT. Well, it has actually happened in a number of Congressional enactments where there have been such circumstances. And, in fact, as recently as last year the Supreme Court upheld a determination in *Miller v. French* that said that any challenges brought to prison conditions pursuant to the Prison Litigation Reform Act—

Ms. DEGETTE. Okay. You know what? Let me ask the Chairman a couple of questions.

Mr. HUNT. Sure.

Ms. DEGETTE. Mr. Chairman, you talked a little bit about the requirements for buildout, and I am wondering what the specific effect of the bankruptcy filing by NextWave would have on any requirements.

You talked a little bit about the timetable earlier in response to Mr. Green's question. I am wondering if the bankruptcy filing would have any bearing on that?

Mr. POWELL. I think the short answer is that it would, because it would at least give the company an argument that as a consequence of the bankruptcy proceeding and the uncertainty and overhang associated with those positions being resolved in bankruptcy, it has not been able to fully comply as a growing concern with its buildout obligations. And NextWave would arguably argue that it should have relief on the buildout requirements.

Ms. DEGETTE. And what would the effect of recent increases in capital to the company that we have been seeing about in press accounts have on their argument, vis-a-vis the bankruptcy?

Mr. POWELL. It is hard for me to judge. I don't appreciate the full range of additional capital that you are referring to. Money alone won't get a network built, and to meet the aggressive buildout requirements as I mentioned before, including milestones that are just a month away, I think it couldn't realistically be obtained no matter how much money there was available.

Ms. DEGETTE. Thank you. Now, Mr. Chairman, you had talked previously about the need to release this spectrum for use by the public, and I am wondering if you can talk to me more specifically about how Congress and Congressional approval by December 31 of this year would help expedite that? What would be the practical effect of releasing that spectrum?

Mr. POWELL. The practical effect is that in the auction that we held earlier, Auction 35, there are a number of companies who are prepared to take the spectrum they won and put it into use in their networks, in essence, right away.

And so by settling the case, and terminating the litigation, shifting the licenses to those companies, they would be deployed in networks and available to consumers relatively soon, probably beginning in the next few months, and over the next 6 months we would begin to see the benefits of that spectrum.

Ms. DEGETTE. And what would happen if Congress didn't approve this settlement agreement by the end of the year, in terms of the release of that spectrum to others?

Mr. POWELL. I think at a minimum it would not find its way to public use for a significantly longer period of time, largely because I think there would be any number of continuing litigation and regulatory issues that would hold up the perfection of any licenses for a much more serious period of time.

Ms. DEGETTE. Thank you, and thank you, Mr. Chairman.

Mr. UPTON. Mr. Engel.

Mr. ENGEL. Thank you, Mr. Chairman. Chairman Powell, can you help me understand when—and first of all, greetings. And can you help me understand when evaluating a bid does the FCC consider the ability of a company to actually pay for the license?

Mr. POWELL. We don't have an extensive examination of financial wherewithal. We have a requirement for a substantial amount of up-front payments when a bidder prevails in order to demonstrate financial viability to proceed with the perfection of the license.

Mr. ENGEL. So does the FCC consult with investment managers at all who might provide an indication that a bid may be far more than what a license is worth, and therefore, logically the necessary capital to build out would be difficult to obtain?

Mr. POWELL. No, we don't do that. It would be very difficult, given that the licenses are auctioned through a pretty elaborate dynamic and gaming system, and the way that we try to protect against lack of viability is in the context of the rules that govern the auctions.

If a company ultimately bids and wins a bid, and then subsequently has difficulty with the service and obligations, then that is treated as a potential default and enforcement remediation—as opposed to an unending examination of financial resources, which I think we have concluded would be extraordinarily difficult to examine given the resources that we have.

Mr. ENGEL. In view of what has happened, do you think that policy might change? I mean, what can we do as a committee to help you with this?

Mr. POWELL. Well, I think that we cured the thing that I think was most responsible for that, which is installment payments. Regrettably, I think that installment payments were initiated for good

purposes, which was the desire to have smaller companies, companies with more difficult financial situations, to be able to pay over time to the U.S. Government so that they didn't have the shock of up front and immediate payments.

Regrettably what that did is lead to some overbidding and the possibility of default, and regrettably it is part of what had the Courts perceive us as a creditor, as opposed to a government regulator.

We since have stopped using installment payments, in the context of auctions, and while there is no requirement of demonstrated financial wherewithal before even entering the auction, you are required to pay fairly quickly—I think even within 10 days of the closure of the auction—substantial amounts of money in furtherance of your obligation.

Mr. ENGEL. If you could rebid the spectrum when it is not used would that be helpful at all?

Mr. POWELL. It is helpful and we can in many ways, and that is what we were endeavoring to do here, which is to reclaim the right to do just that. And normally we have been able to do that. We have done that pretty consistently when spectrum isn't used or benchmarks are failed.

This situation is quite complicated and similarly unique because what we did is have a bidder run to the bankruptcy court for protections that were held to bar us from being able to do it.

Mr. ENGEL. I know that in your testimony that you mentioned amending the bankruptcy law. That is obviously something that this committee—that is not within this committee's jurisdiction.

What specifically could we do that is in our jurisdiction to ensure or to make it a little easier for you, and ensure that this kind of thing does not really happen again?

Mr. POWELL. Well, Congressman, as I had mentioned earlier, on a number of occasions the Commission has tried to advise what the possibilities of prospective legislation might look like, and I would be happy to provide you examples of that.

In many ways I would reserve an answer, because I think we would love to consider and work with what the possibilities of that are. We have taken what we think are the prudent steps within our authority to protect against it.

We have yet to see whether that is sufficient protection, but I do believe that we do have this continuing risk. It could be addressed either through—potentially either through Communications Act changes, or bankruptcy code interpretations.

In many ways I yield to Congress' wisdom as to what the best way to maximize its interests as to those two things are.

Mr. ENGEL. Well, thank you, Mr. Chairman. Thank you.

Mr. UPTON. Mr. Chairman, thank you very much.

Mr. POWELL. And thank you.

Mr. UPTON. That was very good testimony, and I look forward to working with you obviously in the future and we appreciate your time this afternoon.

Mr. POWELL. Thank you, sir.

Mr. UPTON. We will get prepared for Panel Number 2; Mr. Denny Strigl, CEO of Verizon Wireless; Mr. Frank Cassou, Executive VP and General Counsel of NextWave Telecom; and Mr. Jim Winston,

Corporate Secretary of Urban Communicators. If you would take your place at the table.

Your testimony has been made part of the record in its entirety, and we will continue to proceed as we did with the first panel. If you would take no more than 5 minutes for your opening statements, that would be terrific.

And, Mr. Strigl, we will start with you. Thank you.

STATEMENTS OF DENNIS STRIGL, CHIEF EXECUTIVE OFFICER, VERIZON WIRELESS; FRANK A. CASSOU, EXECUTIVE VICE-PRESIDENT AND GENERAL COUNSEL, NEXTWAVE TELECOM, INC.; AND JAMES L. WINSTON, CORPORATE SECRETARY, URBAN COMMUNICATORS

Mr. STRIGL. Thank you very much, Mr. Chairman. And members of the committee, thank you very much for holding this hearing today. I am concerned that much of the recent discussion of the NextWave settlement has focused on lobbyists, on lawyers, and investors.

And the big picture for the wireless industry and our economy I think has been somewhat missing from the dialog. I am not a lobbyist, and I am not a lawyer, or a self-interested investor.

I am a wireless network operator who has come before this subcommittee for actually the third time in 18 months to talk about the critical need for more radio spectrum. Radio spectrum, of course, being the life blood of the growing wireless communications business.

In many ways, I am here today, Mr. Chairman, and committee members, to deliver the same message. I believe that the legislation proposed by the Administration is strongly in the public interest.

Why? First, the proposed legislation ends 5 years of legal controversies that have prevented this spectrum from being put into use. Continuing the legal fight in my opinion is not at all productive.

Even assuming that the FCC could win every legal battle going forward, renewed litigation in the Supreme Court and the D.C. Circuit Court would take at least as you have heard 2 or 3 more years.

Second, the proposed legislation will benefit customers and this is because the additional spectrum is needed by carriers to introduce new wireless services in new markets and to fortify existing systems that are currently approaching capacity limits in the major markets across the United States.

And we would also use this spectrum to roll out high speed wireless data services. Third, the proposed legislation will stimulate investment and it will create jobs. Verizon Wireless will invest billions of dollars over the next 5 to 7 years for infrastructure and for additional network capacity to use the NextWave spectrum.

Assuming other auction winners make proportionate similar investments, the settlement will yield a substantial stimulus to the economy. The wireless carriers, equipment manufacturers, and others involved in building out infrastructure will create thousands of good paying jobs across this country.

And then the proposed legislation produces net receipts of \$10 billion for the U.S. Treasury in fiscal year 2002. Without the settle-

ment and the authorizing legislation, the licenses would create few receipts this year under NextWave's installment payments.

And U.S. taxpayers would lose the benefit of the much higher prices that prevailed earlier in the year when the auctions were concluded. The effect for fiscal year 2002 would actually be a negative outflow of funds if we do not have the legislation, because without the settlement the Treasury would have to immediately refund more than \$3 billion of deposits to the Auction 35 winners.

There has been a suggestion that Congress should not act on the proposed legislation because there may be bankruptcy related or other problems affecting past or future auctions. I urge the subcommittee to take advantage of the solution at hand.

This settlement, and the authorizing legislation, can avoid several more years of legal limbo for these licenses and the licenses of course could be put into effect immediately for the use of the American public.

Putting to use almost \$16 billion worth of spectrum across 40 States now rather than later, I would say is a pretty good days work. And on a separate track with respect to the problem presented by bankruptcies in the future and spectrum auctions, Verizon Wireless will happily work with Congress in crafting a solution.

The legal context for this settlement in the authorizing legislation are detailed in the attachment to the testimony that I am submitting today, but more than 5 years have now elapsed since the FCC's original auctions awarding the NextWave licenses.

And absent a settlement the litigation could continue for another 2 or 3 years, or even longer, because it is now doubtful that the Supreme Court could hear the case at all in this term.

Facing that prospect, the FCC, the Department of Justice, NextWave, and winners of the Auction 35 licenses, are anxious to bring certainty, and the uncertainty of prolonged litigation actually is a major problem for businesses and for consumers alike.

The settlement agreement is the product of lengthy and intensive negotiations among many public and private parties whose interests it affects. The parties attempted to negotiate a settlement that did not require authorizing legislation.

But in the end the only structure to which the parties could find common ground does require the legislation that you now find before you. To achieve its objectives in a timely way, the proposed legislation includes specific instructions to the courts to dispose promptly of any judicial challenges to the settlements, or to the legislation itself.

Those instructions are warranted to put behind us 5 years in which this spectrum has laid fallow. Those provisions are fully respectful of the independence of the judiciary, and have ample precedent in prior legislation.

In summary, I urge the subcommittee to do everything it can to move this legislation through Congress before the end of the year. It is the best result for the industry, and we believe for the economy.

To that end, I appreciate the subcommittee's promptly holding hearings, and again I thank the subcommittee for the opportunity to appear before you today.

[The prepared statement of Dennis Strigl follows:]

PREPARED STATEMENT OF DENNIS STRIGL, CHIEF EXECUTIVE OFFICER, VERIZON WIRELESS

Mr. Chairman, and members of the Committee, thank you for holding this hearing today. I am concerned that much of the recent discussion of the NextWave settlement has focused on the lobbyists, lawyers, and investors. The big picture for the wireless industry and our economy has been missing from the dialogue. I'm not a lobbyist, lawyer, or self-interested investor. I'm a wireless network operator that has come before this Subcommittee for the third time in 18 months to talk about the need for more radio spectrum—the lifeblood of the growing wireless communications business. In many ways, I'm here today to deliver the same message.

I believe the legislation proposed by the Administration is strongly in the public interest:

- *The proposed legislation ends five years of legal controversies that have prevented this spectrum from being put to use.* Continuing the legal fight is not productive. Even assuming that the FCC would win every legal battle going forward, renewed litigation in the Supreme Court and the D.C. Circuit would take at least two or three more years.
- *The proposed legislation will benefit consumers.* This is because the additional spectrum is needed by carriers to introduce wireless service to new markets, to fortify existing systems that are approaching capacity limits in major markets, and to roll out high-speed wireless data services.
- *The proposed legislation will stimulate investment and create jobs.* Verizon Wireless will invest billions of dollars over the next 5 to 7 years for infrastructure and additional network capacity to use the NextWave spectrum. Assuming other auction winners make proportionately similar investments, the settlement will yield a substantial stimulus to the economy. The wireless carriers, equipment manufacturers, and others involved in building out the infrastructure will create thousands of good-paying jobs across the country.
- *The proposed legislation produces net receipts of \$10 billion for the U.S. Treasury in fiscal year 2002.* Without the settlement and the authorizing legislation, the licenses would generate few receipts this year under NextWave's installment payments, and U.S. taxpayers would lose the benefit of the much higher prices that prevailed in the reauction of the licenses. The effect in fiscal year 2002 would actually be a negative outflow of funds, because without the settlement the Treasury would have to immediately refund more than \$3 billion of deposits to the Auction 35 bidders.

There has been a suggestion that Congress should not act on the proposed legislation because there may be bankruptcy-related or other problems affecting past or future auctions. I urge the Subcommittee to take advantage of the solution at hand. This settlement and the authorizing legislation can avoid several more years of legal limbo for these licenses that can be working for the American people. Putting to use almost \$16 billion worth of spectrum across 40 States now—rather than later—is a pretty good day's work. And on a separate track, with respect to the problem presented by bankruptcies in future spectrum auctions, Verizon Wireless will be happy to work with Congress in crafting a solution.

The legal context for this settlement and the authorizing legislation are detailed in the attachment to this testimony. More than five years now have elapsed since the FCC's original auctions awarding the licenses to NextWave. Absent a settlement, the litigation could continue for another two or three years or even longer, because it is now doubtful that the Supreme Court could hear the case this term. Facing that prospect, the FCC, the Department of Justice, NextWave, and winning bidders from the FCC's January 2001 reauction have negotiated a settlement agreement that is intended to avoid the uncertainty of prolonged litigation and ensure that the spectrum covered by NextWave's licenses will finally be put to use.

The settlement agreement is the product of lengthy and intensive negotiations among many public and private parties whose interests it affects. The parties attempted to negotiate a settlement that did not require authorizing legislation but in the end the only structure on which the parties could find common ground does require the legislation that you now find before you.

To achieve its objectives in a timely way, the proposed legislation includes specific instructions to the courts to dispose promptly of any judicial challenges to the settlement or to the legislation itself. Those instructions are warranted to put behind us five years in which this spectrum has lain fallow. Those provisions are fully respectful of the independence of the judiciary and have ample precedent in prior legislation.

In summary, I urge the Subcommittee to do everything it can to move this legislation through Congress before the end of the year. It is the best result for the industry and the economy. To that end, I appreciate the Subcommittee's promptly holding this hearing and again, I thank the Subcommittee for the opportunity to appear before you today.

ATTACHMENT

LEGAL CONTEXT OF THE SETTLEMENT

More than six decades ago, Congress determined that the public airwaves are a valuable and scarce resource that must be allocated by the Government for the temporary, exclusive use of particular persons. Since that time, it has vested in the FCC exclusive authority to make spectrum allocations. From the beginning, the guiding statutory standard for issuance of licenses has been, as it remains, "public convenience, interest, or necessity." 47 U.S.C. § 307(a).

The FCC has used different means for allocating spectrum to serve the public interest, including comparative hearings and lotteries. In 1993, Congress added Section 309(j) to the Communications Act to authorize the use of auctions. Congress found that a competitive bidding system would (1) ensure that spectrum is used more productively and efficiently than if handed out for free; (2) speed delivery of services; (3) promote efficient and intensive use of spectrum; (4) prevent unjust enrichment (to a lottery winner, for example); and (5) produce revenues for the American people. H.R. Rep. No. 103-111, at 246-253 (1993).

Section 309(j) makes clear, however, that revenue raising must take a back seat to the FCC's continuing duty to select the best user of the spectrum. Thus, Congress required the FCC to adopt safeguards to protect the public interest and to promote, among other goals, the dissemination of licenses to a "wide variety" of owners, including small businesses. 47 U.S.C. § 309(j)(3). Congress required the FCC to consider installment-payment methods to implement this goal, and Congress restricted the FCC's ability to consider the "expectation of Federal revenues" in designing authorized auctions. 47 U.S.C. §§ 309(j)(7)(B), 309(j)(4)(A). In addition, Congress provided that the FCC's new auction authority does not otherwise affect any provisions of the Communications Act and that the FCC's licensing decisions are to be governed by the public interest, convenience, and necessity. In particular, Congress specified that the auction-related provisions of the Act do not diminish the Commission's authority to regulate or reclaim spectrum licenses, and do not convey any rights, including any expectation of renewal of a license, that differ from the rights of other licenses within the same service that were not issued via auctions. 47 U.S.C. § 309(j)(6).

In implementing its new auction authority, the FCC concluded that designing auctions to award licenses to the parties that value them most highly (as evidenced by their commitment to pay the most) will best achieve the congressional goals noted above. The FCC also adopted installment-payment programs to implement the express congressional directive to promote dissemination of licenses among a wide variety of owners, including small businesses, as one facet of identifying who would be the best users of the public spectrum overall.

When the FCC conducted a series of auctions from 1995 through 1997 for the right to use certain broadband PCS spectrum, NextWave (that is, NextWave Personal Communications Inc. and its affiliates) was the winning bidder for spectrum in 63 markets by submitting high bids totaling \$4.74 billion, which NextWave, as a small business, would pay over a ten-year period under the FCC's installment payment program. The FCC issued the 63 licenses to NextWave in early 1997, subsequent to the express condition that failure to make a scheduled payment would result in automatic cancellation. Almost immediately, however, NextWave and winning bidders for other licenses, finding it hard to obtain financing, asked the FCC for relief from their obligations. The FCC suspended installment payments while it considered the matter, but ultimately gave licensees only a limited set of "restructuring" options, stressing the importance of avoiding changes that would impair the integrity of the auctions process and would be unfair to losing bidders in the auctions. The FCC's adoption of the restructuring options was upheld by the D.C. Circuit.

The NextWave Litigation

On June 8, 1998, the day that PCS licensees were required to elect among these "restructuring" options, NextWave, rather than make an election, filed a petition for reorganization in bankruptcy. NextWave's next installment payment was due at the end of October 1998, but it failed to make that payment, thus triggering the express automatic cancellation condition on its licenses. NextWave, however, began liti-

gating in the bankruptcy court to keep its licenses while avoiding its obligations to make full and timely payment, by asserting a claim of “fraudulent conveyance” under Section 544 of the Bankruptcy Code, 11 U.S.C. § 544, based largely on an asserted decline in the value of the licenses since the auctions.

NextWave’s bankruptcy filing has spawned years of litigation, which has focused on the FCC’s right to reclaim spectrum from bankrupt licensees who are unable to meet the payment conditions imposed on their licenses. From the outset, the bankruptcy court framed the issue as whether the FCC’s challenge to NextWave’s plan of reorganization sought to adjudicate the FCC’s rights as a *creditor* under the Bankruptcy Code (in which case the bankruptcy court could adjudicate the matter), or the FCC’s rights as a *regulator* (in which case it could not). The bankruptcy court concluded that only creditor interests were at issue and ruled in NextWave’s favor; the district court affirmed, allowing NextWave to retain the licenses while reducing NextWave’s payment obligation from \$4.74 billion to \$1.02 billion.

The Second Circuit reversed that decision. It rejected the bankruptcy court’s view that the FCC’s rights to enforce the license conditions against a bankrupt licensee were limited to those of a traditional creditor. Instead, the Second Circuit described the congressional commitment *to the FCC* (not any court) of exclusive authority over spectrum and the noncreditor regulatory interests behind auctions as spectrum allocation tools. Accordingly, the Second Circuit held that the bankruptcy court lacked authority to order remedies that abrogate the FCC’s licensing authority. The Second Circuit further held that NextWave became obliged at the close of the auction, when what it was buying was worth what it bid, thus defeating NextWave’s efforts to reduce the debt.

When the case returned to the bankruptcy court, market conditions had changed, bringing a substantial increase in the value of the NextWave licenses and NextWave was therefore able to propose a reorganization plan providing for full payment of its obligations to the FCC. The FCC, however, announced that NextWave’s licenses had automatically cancelled when the October 1998 payment was missed, and proposed to re-auction the spectrum. The bankruptcy court issued an order declaring the FCC’s reauction notice null and void, citing the automatic stay and other provisions of the bankruptcy code, 11 U.S.C. §§ 362, 1123, 1124. The Second Circuit again reversed. The Supreme Court denied NextWave’s petitions for certiorari from both Second Circuit decisions.

In January 2001, the FCC completed its reauction of NextWave’s licenses. In the reauction—dubbed Auction 35—21 companies seeking access to spectrum that has grown increasingly scarce bid a total of approximately \$15.8 billion—more than three times what NextWave had originally bid for the spectrum.

The D.C. Circuit’s Decision

NextWave next appealed the FCC’s public notice announcing the reauction of its licenses to the D.C. Circuit. Like the bankruptcy court and the Second Circuit, the D.C. Circuit was asked to consider whether the FCC’s license cancellation was prohibited by Section 525 of the Bankruptcy Code, which forbids any governmental unit to “deny, revoke, suspend, or refuse to renew a license” to a person that “is or has been a debtor” under Chapter 11 of the Bankruptcy Code solely because such debtor was insolvent before the bankruptcy case was filed or has not paid a debt that is dischargeable in bankruptcy. 11 U.S.C. § 525(a). The D.C. Circuit held that, because the FCC’s license cancellation was triggered by NextWave’s failure to make the required payments, the cancellation fell within these automatic stay provisions of the Bankruptcy Code. The D.C. Circuit invalidated the cancellation, returning the spectrum to NextWave.

The FCC, Verizon, and certain other wireless carriers have petitioned the Supreme Court asking that they review the D.C. Circuit’s decision. That petition is pending.

The Settlement Agreement

More than five years now have elapsed since the FCC’s original auctions awarding the licenses to NextWave. Absent a settlement, the litigation could continue for another two or three years or even longer, because it is now doubtful that the Supreme Court if it grants certiorari could hear the case this term and because there are other issues raised by NextWave that would be heard on remand from the Supreme Court even if the Court reversed the D.C. Circuit concerning Section 525. Facing that prospect, in the aftermath of the D.C. Circuit’s decision, the FCC, the United States Department of Justice, NextWave, and winning bidders from the FCC’s January 2001 reauction have negotiated a settlement agreement that is intended to avoid the uncertainty of prolonged litigation and ensure that the spectrum covered by NextWave’s licenses will finally be put to use.

The settlement agreement is the product of weeks of intensive negotiations among many public and private parties whose interests it affects. The parties attempted to negotiate a settlement that did not require authorizing legislation but in the end the only structure on which the parties could find common ground does require the legislation that you now find before you.

To achieve its objectives in a timely way, the proposed legislation includes specific instructions to the courts to dispose promptly of any judicial challenges to the settlement or to the legislation itself. Those instructions are warranted by the need to put behind us the five years in which this spectrum has lain fallow. Those provisions also are fully respectful of the independence of the judiciary and have ample precedents in prior legislation.

Mr. UPTON. Thank you.

Mr. Cassou.

STATEMENT OF FRANK CASSOU

Mr. CASSOU. Thank you, Mr. Chairman, and members of the committee. I would like to begin by thanking this committee for the oversight it has devoted to C-Block issues. The committee as a whole and many of its members have spent considerable time to give NextWave and other C-Block companies an opportunity to tell our side of the story.

You have held hearings, and advocated legislative solutions, and exerted strong leadership on C-Block policy matters. NextWave has been treated very fairly here, and we are sincerely grateful.

As the committee has heard this afternoon, there is a proposed settlement of a controversy that has clouded NextWave's bankruptcy reorganization. Mr. Chairman, to appreciate the fairness of this settlement, it is important to understand what has happened to NextWave over the past 6 years.

NextWave has been attempting to enter the wireless market as a new competitor since 1995. The company was formed then by a group of experienced telecommunications executives, with an innovative plan to provide wireless services on a wholesale basis.

NextWave was granted spectrum licenses by the FCC in 1997, after a thorough investigation of our qualifications. At that time, the FCC's wireless bureau certified unequivocally that NextWave was in compliance with all designated entity requirements.

We have remained in compliance ever since. Moreover, NextWave's foreign ownership has fallen to a modest level well below the 25 percent threshold established in the Communications Act.

In 1997, and in 1998, NextWave made great progress in raising hundreds of millions of dollars to finance its \$500 million payment to the FCC in the initial buildout of its network.

The company hired over 600 employees and contractors, opened 22 offices, and secured more than \$2 billion in financing commitments from major vendors. The company cleared microwave lengths, and acquired cell sites.

We had test systems operating in four major markets. Indeed, the first call made on our network was placed to the FCC by the distinguished former chairman of this committee, Thomas Bliley.

Unfortunately, spectrum values declined dramatically during 1997 for reasons that were unforeseeable. As a result, financing sources dried up, and the company's financial position deteriorated, but the company did not run to the bankruptcy court.

It fought off insolvency for more than a year, but it was forced to lay off more than 500 employees and contractors and had accumulated more than \$400 million in debt to creditors.

To preserve the assets for the benefit of creditors and to sustain the company as an ongoing venture, NextWave was finally forced to seek bankruptcy protection in June 1998. Indeed, it had a legal duty to do so.

The committee is familiar with the litigation that has followed, but what it may not be familiar with is NextWave's repeated efforts, continuing to the present, to settle the litigation and to operate as a wireless carrier.

In January of 2000, NextWave proposed a plan of reorganization that would have paid the FCC and other creditors in full, and enabled NextWave to emerge from bankruptcy with sufficient capital to build out its network.

The FCC blocked the plan and despite repeated assurances to NextWave that its licenses would not cancel if it deferred payment while reorganizing, the FCC announced in January of 2000 that it was canceling the licenses.

In August of this year, following the D.C. Circuit decision giving NextWave back its licenses, NextWave submitted a new plan of reorganization that included approximately \$5 billion in financing commitments, enough again to pay all creditors in full, and enable NextWave to build out its network.

NextWave employees are currently working with contractors building out the markets, the network in 95 markets. Even with this settlement, NextWave intends to operate its remaining licenses in markets such as Detroit and Madison, Wisconsin.

All that brings us to where we are today, to the settlement. The settlement is a fair compromise, and the benefits are clear, but that this is not a windfall for anyone. Each party is giving up something.

It is important to understand what NextWave is giving up; loss of past opportunity. As I mentioned, in January of 2000, NextWave proposed to plan a reorganization that would have allowed it to emerge from bankruptcy and would have paid the FCC in full for NextWave's license obligations.

Had the FCC not blocked that plan, NextWave would be fully operational today, providing service across the country. By way of comparison, another wireless carrier, Voice Stream, which has a national footprint comparable to that of NextWave, was sold for \$29 billion after a little over 2 years of operation.

That opportunity has already been taken from NextWave loss to the present value of this spectrum, and as a result of the D.C. Circuit's ruling in June of this year, NextWave's licenses were reinstated for use by the company.

The FCC's reaction of those licenses established their market value at \$15.85 billion. NextWave's present obligation to the FCC for those licenses is approximately \$1 billion in 2002, plus another \$4 billion payable over the next several years.

Loss of future opportunity. Under the settlement, NextWave is being asked to forego the opportunity to proceed with its current plan of reorganization. Based on the value that the market has

placed on the spectrum alone, it is likely that NextWave would become a company of significant value in the near future.

NextWave's payment is significant, but it is not a windfall. The settlement enables much larger additional payments to taxpayers, in excess of \$10 billion, twice the amount that NextWave originally bid on the licenses, and more than 10 times the amount that would otherwise be received from NextWave in 2002.

The settlement also avoids further delays in the use of the spectrum. I hope that this testimony has been helpful and I urge the committee to approve the settlement agreement.

[The prepared statement of Frank Cassou follows:]

PREPARED STATEMENT OF FRANK CASSOU, EXECUTIVE VICE PRESIDENT & GENERAL COUNSEL, NEXTWAVE TELECOM INC.

INTRODUCTION

Thank you, Mr. Chairman; Members of the Committee. My name is Frank Cassou. I am the Executive Vice President and General Counsel of NextWave Telecom Inc. I joined NextWave in February 1996, and have played an active role since then in the Company's attempts to acquire, pay for, and build out broadband PCS licenses.

I would like to begin by thanking this Committee for the oversight it has devoted to C block issues. The Committee as a whole, and many of its Members individually, have spent considerable time and energy in recent years to provide NextWave and other C block companies an opportunity to voice our concerns and tell our side of the story. You have held hearings, advocated legislative solutions, and exerted strong leadership on C block policy matters with your colleagues and with the FCC. NextWave has been treated very fairly here, and we are sincerely grateful.

I come before you today to report that after years of conflict, there is a proposed consensual resolution of the primary legal controversy that has clouded NextWave's bankruptcy reorganization. The proposed settlement will end long-running litigation, generate \$10 billion in payments to taxpayers, allow consumers to access radio spectrum that has been tied up in the litigation, and provide the foundation from which the NextWave can complete its bankruptcy proceedings and emerge reorganized and able to proceed with its remaining business.

BACKGROUND

NextWave was formed in 1995 by a group of experienced telecommunications executives, including the former President of the wireless business at QUALCOMM, Inc., to participate as a designated entity in the auctions and implement an innovative business plan as a nationwide "carrier's carrier," providing wireless services on a wholesale basis at far lower rates than anything available at that time. At the conclusion of the C Block auctions in May and July 1996, NextWave was designated the high bidder for 63 licenses and timely made its \$474 million down payment on such C Block licenses. NextWave then executed promissory notes for the remaining amounts due to purchase its C Block licenses.¹

NextWave was granted spectrum licenses by the FCC in 1997, after a thorough investigation of our qualifications. At that time, the FCC's Wireless Telecommunications Bureau certified unequivocally that NextWave was in compliance with all of the Commission's "Designated Entity" requirements. The Company has remained in compliance ever since. By virtue of our Chapter 11 filing in 1998, NextWave's fundamental corporate structure and ownership have been in a state of suspended animation. Nothing has occurred since the original license grant that would cause us to fall out of compliance. Moreover, NextWave's current foreign ownership is de minimus; well below the 25 percent threshold established in the Communications Act.

NextWave moved quickly to implement its business plan and raised more than \$600 million to finance its down payments to the FCC and the initial build-out of its network. By early 1997, NextWave had hired over 600 employees and contractors, and had opened 22 offices across the country. NextWave also secured more than \$2 billion in financing commitments from major vendors for deployment of net-

¹In subsequent auctions, NextWave was the high bidder for 27 F Block licenses and made timely down payments on those licenses of approximately \$25 million.

work equipment. Within months, NextWave had ninety percent of the microwave links needed to launch service, had acquired seven switch sites, designed more than 1300 cell sites, signed more than 300 site leases, and negotiated an additional 900 leases. NextWave expected to begin commercial service in four markets by late 1997, and had completed network engineering designs for 22 of its major markets, including New York, Los Angeles, Chicago, and Boston. NextWave had also obtained airtime purchase commitments for in excess of 35 billion minutes of use.

Unfortunately, spectrum markets declined dramatically during 1997, primarily due to the availability of additional spectrum that was made available through auction, at the very time NextWave was attempting to raise capital and launch service.

Despite its efforts to remain solvent, NextWave was forced to curtail its operations, laying off more than 500 employees and contractors. By this time, NextWave owed (in addition to its FCC obligations) more than \$400 million to creditors, and faced attachment proceedings and other litigation across the country. To preserve assets for the benefit of creditors, to sustain the company as an ongoing venture and to fulfill our fiduciary duties, NextWave was forced to seek bankruptcy protection. We did so only after exploring every alternative. The decision to initiate Chapter 11 proceedings was approved by our Board of Directors, including our outside directors, Allan E. Puckett, the former Chairman and CEO of Hughes Aircraft Company, and William H. Webster, the former Director of the CIA and FBI.

On June 8, 1998, NextWave filed for relief under Chapter 11 of the Bankruptcy Code. Pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code, the NextWave have operated their businesses and managed their properties as debtors-in-possession.

Litigation Between NextWave and the FCC

Following extended litigation in the Bankruptcy Court and the Second Circuit, NextWave prepared to emerge from bankruptcy and. Aided by improved market conditions, and with the aid of the breathing space the Bankruptcy Code provides, NextWave submitted a plan of reorganization in December 1999. That plan would have cured all alleged defaults in installment payments to the FCC, permitted NextWave to meet all FCC obligations going forward, and paid all creditors *in full*, including interest and late fees. Indeed, NextWave went further and offered to make an immediate cash payment to the FCC of \$4.3 billion—thereby paying for the licenses seven years earlier than required. 244 B.R. at 262. The plan was set for confirmation on January 21, 2000. Had that plan been confirmed, NextWave would have been a bankruptcy success story, having paid its creditors in full while retaining sufficient capital to realize its goal of building out its nationwide network.

As a result of FCC actions, however, that plan was never confirmed. On January 12, 2000, the FCC issued a Public Notice declaring that the NextWave' C and F Block licenses were cancelled retroactively to January 1999 due to a failure to make postpetition installment payments while NextWave reorganized its business. In response to the Public Notice, NextWave pursued two parallel courses with respect to the Public Notice: (i) in the Bankruptcy Court and, on appeal, in the Second Circuit; and (ii) in the Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit").

In response to an Order to Show Cause filed by the NextWave seeking to void the Public Notice, the Bankruptcy Court found that the attempted cancellation of the C and F Block licenses was ineffective due to, *inter alia*, certain provisions of the Bankruptcy Code and it termed the FCC's purported cancellation "shocking" and "offensive to due process." Subsequently, however, in response to a petition for writ of mandamus filed by the FCC, the Second Circuit found that bankruptcy courts lack jurisdiction to review regulatory actions such as the Public Notice. Specifically, the Second Circuit opined that "[e]ven if the bankruptcy court is right on the merits of its arguments against revocation," that court simply "lacked jurisdiction to declare the Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped." *In re FCC*, 217 F.3d 125, 139 (2nd Cir. 2000). The Second Circuit emphasized that "NextWave remains free to pursue its challenge to the FCC's regulatory acts" in the D.C. Circuit, *id.* at 140, and refrained from commenting "on the prospects" of any such appeal. *Id.* at 129.

On February 11, 2000, NextWave filed a petition for reconsideration of the Public Notice with the FCC. On September 6, 2000, the Commission denied the reconsideration petition, and, shortly thereafter, scheduled NextWave's licenses for reauction on December 12, 2000 (such reauction referred to hereinafter as "Auction 35"). NextWave vigorously opposed the FCC's actions seeking unsuccessfully to stay the reauction until after the D.C. Circuit had ruled on the merits of its claims.

Following the D.C. Circuit's denial of the stay, NextWave pursued an appeal of the FCC's cancellation in the D.C. Circuit. In that appeal, the NextWave asserted, as it had before the Bankruptcy Court, that cancellation of the C and F Block licenses violated several provisions of the Bankruptcy Code, including §§ 362, 525, 1123 and 1124, as well as established principles of due process and fair notice.

On June 22, 2001, the D.C. Circuit issued a ruling on the NextWave' appeal, reversing the FCC's purported cancellation and holding that cancellation of NextWave's C and F Block licenses violated Section 525(a) of the Bankruptcy Code (the "D.C. Circuit Opinion"). Section 525(a) provides, in relevant part, that a "governmental unit may not... revoke... a license... to... a bankrupt... solely because such bankrupt... has not paid a debt that is dischargeable... under this title." The D.C. Circuit reversed the Commission's purported cancellation concluding that the FCC had violated the Bankruptcy Code when it revoked NextWave's licenses solely because NextWave had not paid a dischargeable debt. The Court stated: "Applying the fundamental principle that federal agencies must obey all federal laws, not just those they administer, we conclude that the Commission violated the provision of the Bankruptcy Code that prohibits governmental entities from revoking debtors' licenses solely for failure to pay debts dischargeable in bankruptcy." The D.C. Circuit made clear that the FCC had effectively sought a "regulatory purpose" exception to that prohibition, but that Congress had not created such an exception. 254 F.3d at 151.

On August 6, 2001, the FCC filed a motion asking the D.C. Circuit to stay the issuance of the mandate pending the Commission's filing a petition for a writ of certiorari in the United States Supreme Court. On August 23, 2001, the D.C. Circuit denied the Stay Motion, noting that "the FCC has not demonstrated that the petition would present a substantial question" warranting Supreme Court review.

On August 30, 2001, the D.C. Circuit issued its mandate, thereby formally concluding the proceedings before it. On August 31, 2001, the FCC issued a Public Notice announcing that it had returned the NextWave' licenses to active status.

Shortly after the D.C. Circuit opinion, NextWave filed a second plan of reorganization. As did the first plan, this second plan provided for payment in full of all creditors, including the FCC. The plan contained financing commitment of approximately \$5 billion to fund the build-out and commercial launch of a nationwide wireless 3G network.

On October 19, 2001, the FCC filed a petition for writ of certiorari with the United States Supreme Court requesting review of the D.C. Circuit Opinion. Certain of the high bidders in Auction 35 also filed certiorari petitions with the Supreme Court. Given the proposed settlement agreement, NextWave requested and received a sixty day extension of the time within which to respond to such petitions. It is contemplated under the settlement agreement that the petitions for certiorari will be withdrawn at the time the FCC receives the C Block and F Block licenses.

Auction 35 and Intervention by Wireless Carriers

As indicated above, following the issuance of the Public Notice, the FCC scheduled and held Auction 35 which, while it included certain other licenses, was primarily a reauction of NextWave's C and F Block licenses. The 30 MgHz C Block licenses held by NextWave were divided into three 10 MgHz licenses and bidders for certain of those 10 MgHz licenses were not limited to designated entities. Further, Auction 35 was specifically held subject to resolution of the litigation with NextWave over the C Block and F Block licenses. Even taking into account these factors, however, the results of Auction 35 indicated that the market value of spectrum had significantly increased during 1999-2001. The aggregate bids for NextWave's licenses were \$15.85 billion. Alaska Native Wireless ("ANW"), Verizon Wireless ("Verizon"), Salmon PCS ("Salmon"), and VoiceStream Wireless ("VoiceStream") were responsible for over \$13.72 billion of such bids.

NEXTWAVE'S COMMITMENT TO BUILDING OUT ITS NETWORK

NextWave's goal has always been to be a nationwide provider of wholesale wireless telecommunication services. After being declared the high bidder in the C Block auctions, raised \$600 million and secured more than \$2 billion in financing commitments in an effort to create a nationwide wireless network. Throughout the bankruptcy cases, NextWave has continued to work toward this goal and on several occasions has sought to confirm a plan of reorganization providing significant present and/or future value to its creditors and equity interest holders—many of whom invested money or services in NextWave in 1996 or 1997. In December 1999, NextWave proposed a plan that would fully cure and reinstate the FCC's claims and pay other creditors amounts owed as of the bankruptcy filing, while permitting NextWave to complete, the build-out of a nationwide wireless network within 12 to

18 months. That Plan was, however, subsequently abandoned when the FCC announced the cancellation of NextWave's licenses. Notwithstanding the disruptions to the reorganization process throughout the course of the bankruptcy proceedings, NextWave has proceeded to the extent possible with the build-out of the network. For example, network architecture and preliminary radio frequency designs are completed for the top 40 markets. In June 2001, NextWave obtained court approval for debtor-in-possession financing sufficient to achieve initial build-out of all of its markets with a full commercial build in the D and E markets. This build-out has continued with the signing of vendor contracts and the purchase and installation of base stations and switches in certain markets.

Following the DC Circuit Opinion, NextWave filed a new plan of reorganization, this time backed by financing commitments of approximately \$5 billion, to pay in full all creditors, including the FCC, to fund the build-out and commercial launch of a nationwide wireless 3G network.

SUMMARY OF THE SETTLEMENT AGREEMENT

Despite these efforts and the commitment to its original business plan, the Company concluded that its obligations to its shareholders and creditors required it to enter into the Agreement that is currently before this Committee and Congress as a whole. The Settlement Agreement contemplates, in sum, that the litigation and the regulatory disputes between the FCC and NextWave will be fully and finally resolved. As a result, NextWave's C Block and F Block licenses, which have been subject to the cloud of litigation, and NextWave's D Block and E Block licenses, which have been caught up in the delays caused by the dispute with the FCC would be put immediately to productive use. The following is a brief overview of the transactions and procedures encompassed in the Settlement Agreement.

Even if the settlement agreement is approved by Congress, NextWave will continue its efforts to create a wireless company, albeit on a reduced scale. NextWave remains on schedule to launch commercial service in the markets covered by its D Block and E Block licenses—which were paid for in full and are not the subject of this litigation—during 2002 and plans to continue operations with these licenses even if the C and F Block licenses are referred to the government.

(a) The Parties will seek legislation authorizing the FCC and Department of Justice (the "DOJ") to settle with NextWave as set forth in the Settlement Agreement.² The proposed legislation further appropriates the funds required to implement the settlement between the FCC and NextWave and provides for an expedited appellate review process for challenges to the Settlement Agreement or transactions contemplated thereunder.

(b) Pursuant to § 363(b) and (f) of the Bankruptcy Code, NextWave's C Block and F Block licenses will be returned to the FCC.

(c) Upon fulfillment of the conditions set forth in the Settlement Agreement including (i) enactment of the Legislation; (ii) occurrence of the Final Bankruptcy Settlement Approval Date; and (iii) transfer of NextWave's C Block and F block licenses to the FCC, NextWave will become entitled to receive \$9.55 billion (the "NextWave Payment"). The NextWave Payment will be provided for in the legislation and owed once the applicable conditions are satisfied. The NextWave Payment is comprised of \$3.052 billion as a nonrefundable advance tax payment (the "Advance Tax Payment") and \$6.498 billion in cash (the "Cash Payment").

(d) The FCC will retain \$499 million of the deposits NextWave made on its C and F Block licenses. In addition, NextWave is required to make certain other payments to the FCC such that, when added to the Advance Tax Payment and the retention of its deposits, NextWave will have paid the United States \$3.731 billion.

(e) It is contemplated under the Settlement Agreement that counting the Advance Tax Payment and certain other payments by NextWave and the payments by Auction 35 Participants for the C Block and F Block licenses, the United States and the Commission will receive at least \$10 billion.

(f) Verizon and ANW are required to post letters of credit to secure the payments they owe for their Auction 35 licenses. Conditioned upon the posting of such letters of credit, once NextWave receives the Cash Payment, it is required to pay Verizon and ANW \$118.1 million and \$25 million respectively.

(g) If Verizon does not post a letter of credit in the amount of \$7,692,113,700 in January 2002, the FCC has the right to terminate the Settlement Agreement. The NextWave Payment is also conditioned on the issuance of an FCC Order approving

²Capitalized terms utilized herein without definition are intended to be defined as set forth in the Settlement Agreement.

the Settlement prior to January 10, 2002 and final resolution of any litigation relating to bankruptcy approval of the Settlement.

(h) In accordance with its normal regulatory proceedings and authority, the FCC will act upon the applications to issue the Auction 35 licenses to Participating Auction 35 Winning Bidders.

ANALYSIS OF THE SETTLEMENT AGREEMENT³

These benefits are particularly appealing to the Government and the Auction 35 participants in light of the alternatives. As a result of the D.C. Circuit proceeding, NextWave currently holds the C Block and F Block licenses and the likelihood that the Supreme Court will act to reverse the D.C. Circuit decision is small. Even in the unlikely event of the grant of certiorari by the Supreme Court and a subsequent ruling against NextWave, the litigation would not be ended. The proceedings would then return to the D.C. Circuit for consideration and review of NextWave's remaining claims, including due process and fair notice claims. Even if the Government and the Auction 35 participants were ultimately successful, the spectrum would be tied up until at least the end of 2003, if not later.

This is a rare case in which the resolution, while not the outcome any party would unilaterally select, is one that benefits all parties. The FCC and the government will receive at least \$10 billion, more than twice the amount NextWave bid on the licenses at the original auction. In contrast, as matters now stand, NextWave's obligation to the FCC in the upcoming year will be to pay approximately \$850 million, and its *total* obligation to the FCC for the licenses will amount to only approximately \$5 billion. The settlement thus provides the United States with \$10 billion in 2002—ten times what it would otherwise receive in that year from NextWave. The Auction 35 Participants will receive the C Block and F Block licenses and will put them to immediate use. This will enable these carriers, some of whom are currently or might in the future suffer from spectrum capacity constraints, to provide critical wireless services to consumers and may expedite the provision of third generation wireless technology.

The settlement also benefits NextWave. While NextWave will be foregoing the opportunity to fulfill the vision for which it has struggled so long—that of becoming the first nationwide carriers' carrier providing third generation services on a wholesale basis—its creditors will receive payment in full and its shareholders will realize a return on their equity investments. In addition, NextWave will be able to complete the commercial launch of service in the markets covered by the D Block and E Block licenses (primarily Detroit, Michigan and Madison, Wisconsin). In addition, NextWave will be spared the expense and delay that could result from further court and regulatory litigation.

It is critical to realize, however, that these benefits come at a substantial loss. Although the Company will be able to move forward and build out a network in the five markets where it will continue to hold licenses, the scale of its immediate future operations will be much smaller than would have been possible had NextWave retained all the licenses it currently holds. Moreover, the decision to settle has imposed real and substantial lost opportunities for the Company.

Loss of past opportunity. In January 2000, NextWave proposed a plan of reorganization that would have allowed it to emerge from bankruptcy and would have paid the FCC in full for NextWave's license obligations. The FCC, however, rejected NextWave's proposal and tried to cancel NextWave's licenses. The D.C. Circuit ruled in June 2001 that the FCC's actions were unlawful. Had the FCC's unlawful action not been prevented from executing its plan in January 2000, NextWave would be a fully operational wireless carrier by now, providing service across the country. By way of comparison, another wireless carrier, VoiceStream, which has a national footprint comparable to that of NextWave, was sold for \$29 billion after a little over two years of operation. That is an opportunity that has already been taken from NextWave.

Loss of the present value of the spectrum. As a result of the D.C. Circuit's ruling in June 2001, and its subsequent decision denying the FCC a stay, the spectrum licenses that are the subject of this settlement have been returned to NextWave, and NextWave is in full possession of them and able to use them. The FCC's reacquisition of those licenses established their market value at \$15.85 billion. NextWave's present obligation to the FCC for those licenses is approximately \$5 billion payable over the next several years.

Loss of future opportunity. After the D.C. Circuit ruled in June 2001 that NextWave rightfully holds the licenses, the Company again assembled a new plan

³See *NextWave Personal Comm. Inc. v. Federal Comm. Comm'n*, 254 F.3d 130 (D.C. 2001).

of reorganization, and arranged for financing, that would allow it to emerge from bankruptcy, build out its nationwide wireless network, and become operational. Based on the value the market has placed on the spectrum alone, it is likely that NextWave would become a company of significant value in the very near future.

This Settlement Agreement is the result of arm's length bargaining. The parties have been involved in an ongoing legal battle for years with which the Committee is familiar. Over the past several years, the parties have attempted on various occasions to discuss settlement alternatives. The Settlement Agreement itself has taken months to negotiate given the complexity of the issues involved. The negotiations were arms length and have resulted in an Agreement where each party benefits, but also has had to abandon achieving its particular view of the appropriate outcome of litigation—the true description of a compromise. We thus respectfully ask Congress to approve this Settlement Agreement and enact the necessary implementing legislation.

Mr. SHIMKUS [presiding]. Thank you.

And the last panelist, Mr. Jim Winston, Corporate Secretary of Urban Communications. You have 5 minutes, and your full statement is in the record, and welcome.

STATEMENT OF JAMES L. WINSTON

Mr. WINSTON. Good afternoon. My statement says Chair Upton—

Mr. SHIMKUS. I will take that as a compliment.

Mr. WINSTON. Members of the subcommittee, my name is James Winston, Corporate Secretary and General Counsel of Urban Communicators, P.C., a limited partnership, known as Urban Comm.

Thank you for the invitation to appear before you today to discuss the proposed settlement among NextWave Telecom, the Federal Communications Commission, the Department of Justice, and the Auction 35 participants.

I wish to make two points concerning this settlement. First, it is indeed a fair and reasonable result for the parties and the American public that the FCC would finally recognize that they should move this process forward and settle the NextWave litigation.

My second point is that it is also fair and reasonable that Congress should direct the FCC and DOJ to negotiate a similar settlement with Urban Comm. I am pleased to appear before the subcommittee today on behalf of Urban Comm.

I have had the honor of appearing before the subcommittee in the past in my capacity as Executive Director of the National Association of Black-Owned Broadcasters. In many ways, my appearance today is an extension of my role with NABOB because Urban Comm was formed by a group of NABOB members.

In the spring of 1993, at a NABOB conference, Sydney Small, Chairman of Urban Comm, and a member of the NABOB Board of Directors, suggested that Urban Comm—okay. In 1996, Urban Comm, like NextWave, obtained PCS licenses in the C-Block auction.

Urban Comm obtained 10 licenses for an aggregate bid price of \$74.6 million, and paid a downpayment of \$7.46 million for those licenses. Urban Comm, unlike NextWave, made its first quarterly interest payment to the FCC on its license debt.

However, Urban Comm was not able to make its second interest payment. On October 28, 1998, Urban Comm filed for Chapter 11 reorganization under the bankruptcy code. When the FCC announced that it would reactivate Urban Comm's licenses, Urban

Comm filed a petition for reconsideration and a petition to stay the reauction.

Those petitions were filed October 6, 2000, over 14 months ago, and over 2 months before the reauction began. The FCC has never acted on either petition. Last month, on November 9, Urban Comm filed in the D.C. Court of Appeals a petition seeking a writ of mandamus, which would order the FCC to act on Urban Comm's petition for reconsideration.

A grant of the writ of mandamus will require the FCC to act on our petition for reconsideration. If the FCC denies our petition for reconsideration, Urban Comm will have the right to appeal to the D.C. Court of Appeals.

At that point, Urban Comm will be in the same court which issued the NextWave decision, and we will be arguing virtually the same case. Thus, we expect a decision similar to the NextWave decision at some time next year.

Like NextWave, Urban Comm believes that settlement of this litigation is preferable to continued litigation. Throughout the course of its Chapter 11 proceedings, Urban Comm has sought to negotiate a settlement of this adversary proceeding with the FCC.

However, every effort to negotiate a settlement with the FCC has been rebuffed with the same netru. We can't settle with you until we settle with NextWave. Therefore, Urban Comm is here today to ask Congress to end the long tortured trail on the C-Block and F-Block licensees.

The settlement of the NextWave litigation has been presented to Congress as a reasonable and appropriate means of resolving this ongoing saga. The C-Block and F-Block auctions were a failed experiment by the FCC.

The FCC experiment was a number of auction ideas in that subject auction that were subsequently abandoned, such as setting itself up as the auction winners' senior creditor and holding this position for a 10 year period.

The parties in the NextWave settlement have provided a reasonable justification for approving the NextWave settlement. Those reasons are equally applicable to the Urban Comm case. A settlement with Urban Comm along the lines of the settlement with NextWave will provide concrete benefits to the American public, and therefore, would be in the public interest.

Urban Comm's concern with the Federal legislation therefore is not with its terms, but with its limited scope. The bankruptcy court has determined that the issues to be resolved in the Urban Comm case are so similar to those to be resolved in the NextWave case that the Urban Comm case has essentially be held in abeyance awaiting the resolution of the NextWave case.

Therefore, as a legal matter, the settlement of both cases at this time is appropriate. Urban Comm's debt to the FCC of approximately \$75 million is only 1.6 percent of NextWave's debt.

Consequently, a settlement with Urban Comm raises none of the Congressional budgetary issues that the NextWave settlement raises. Therefore, Urban Comm requests that Congress take action considering the NextWave settlement to assure that the FCC and DOJ immediately initiate settlement discussions with Urban Comm.

Urban Comm submits that such assurances can best be achieved by, one, including language in the pending settlement legislation directing the FCC and DOJ to immediately commence settlement discussions with Urban Comm.

And, two, providing authority in this legislation to permit a settlement similar to a settlement negotiated with NextWave. Thank you for the opportunity to present Urban Comm's views on this important subject. I look forward to answering any questions that you may have.

[The prepared statement of James L. Winston follows:]

PREPARED STATEMENT OF JAMES L. WINSTON, SECRETARY AND GENERAL COUNSEL,
URBAN COMMUNICATORS PCS, L.P.

Good afternoon Chairman Upton and members of the Subcommittee, my name is James Winston, and I am Secretary and General Counsel of Urban Communicators PCS Limited Partnership ("Urban Comm").

Thank you for the invitation to appear before you today to discuss the proposed settlement between NextWave Telecom, Inc., the Federal Communications Commission, the Department of Justice, and the Auction 35 participants. I wish to make two points concerning the settlement. It is a fair and reasonable result for the parties and the American public, and Congress should direct the FCC and DOJ to negotiate a similar settlement with Urban Comm.

I. BACKGROUND

I am pleased to appear before the Subcommittee today on behalf of Urban Comm. I have had the honor of appearing before the Subcommittee in the past in my capacity as Executive Director of the National Association of Black Owned Broadcasters ("NABOB"). In many ways, my appearance today is an extension of my role with NABOB, because Urban Comm was formed by a group of NABOB members. In the spring of 1993, at a NABOB conference, Sydney Small, Chairman of Urban Comm and a member of the NABOB Board of Directors, suggested that NABOB members form a company to participate in the PCS auctions.

In the spring of 1994, Urban Comm was formed and funded by NABOB members. Urban Comm immediately began to participate in the FCC's rule making proceedings in which the Commission established the rules for auctioning PCS licenses. Unfortunately, as I will describe in detail below, over the strenuous objections of Urban Comm, the FCC adopted a number of auction rules which had the ultimate effect of undermining the ability of the C-block and F-block PCS licensees to obtain financing to pay their license debt to the FCC and to construct and operate their PCS systems.

In 1996 Urban Comm, like NextWave, obtained PCS licenses in the C-block auction. Urban Comm obtained ten licenses for an aggregate bid price of \$74.6 million and paid a down payment of \$7.46 million for those licenses. Unfortunately, immediately after the C block auction was concluded, the FCC announced another PCS auction for the D, E, and F frequency blocks. The D and E-block licenses had no small business incentive rules. The F-block licenses had bidding credit rules and ten year payment terms similar to those applied to the C-Block.

The market for financing of wireless companies promptly experienced a downturn as financial institutions feared a PCS spectrum glut from the D, E and F-block auctions, which were announced before the C block bidders even received their licenses. The financial market downturn precluded Urban Comm from obtaining financing to construct its system. Urban Comm, unlike NextWave, made its first quarterly interest payment to the FCC on its license debt. However, Urban Comm was not able to make its second interest payment. On October 28, 1998, Urban Comm filed for Chapter 11 reorganization under the Bankruptcy Code.

Shortly after its Chapter 11 filing, Urban Comm became involved in an adversary proceeding with the FCC in the Bankruptcy Court. The Bankruptcy Court has reserved deciding a motion filed by the FCC to dismiss the Urban Comm adversary proceeding. The Bankruptcy Court's position is that it would be a waste of judicial resources to litigate the same issues in the same forum as NextWave's Chapter 11 case, as the Chapter 11 cases of NextWave and Urban Comm are so similar that a decision involving one would equally apply to the other.

II. THE FCC C-BLOCK AND F-BLOCK AUCTIONS WERE A FAILED EXPERIMENT

The FCC's C-block and F-block auctions were conducted shortly after Congress gave the FCC auction authority. The auction legislation imposed an obligation on the FCC to adopt auction rules which would promote opportunities for small businesses and businesses owned by minorities and women. Urban Comm participated actively in the FCC's rule-making proceedings to develop rules and procedures which would promote ownership among small businesses and businesses owned by minorities and women. Unfortunately, the FCC did not adopt rules as proposed by Urban Comm. Instead, the FCC adopted auction rules and procedures which ultimately worked to prevent the C-block and F-block licensees from successfully financing and building their businesses. The FCC has since abandoned many of its C and F-block auction rules, thus treating the C and F-block as a failed experiment.

Among the rules and procedures adopted by the FCC which hampered and eventually undermined the C-block bidders were the following:

1. In the first broadband PCS auction, the FCC divided the PCS spectrum into three frequency blocks: A, B, and C.

2. The FCC determined that small businesses and businesses owned by minorities and women would be given bidding credits of up to 25%, and would be allowed to pay for their licenses over a period of ten years.

3. However, the FCC ruled that bidding credits and payment terms could not be used in the A and B-block auctions.

4. Then, the FCC ruled that the A and B-block auctions would be conducted before the C-block auction.

5. These two critical decisions, (1) not allowing the use of bidding credits and payment terms in the A and B-block auction and (2) conducting the A and B-block auctions first, were major blows to the ultimate success of minorities, women and small businesses in the PCS business. Because of these decisions, the dire fate of the C-block auction may have been sealed long before the C-block auction ever commenced.

6. By permitting the A and B-block auction to go forward before the C-block auction, the FCC allowed the large cellular telephone companies to acquire the first licenses for the PCS service—a service which was heralded by the FCC as an opportunity for new entrants to compete with the existing cellular companies. Instead, the existing carriers, who already had every advantage (huge existing cellular telephone businesses, built-out networks and cell sites, fully staffed companies, financial leverage, and operating experience) were also given the advantage of receiving their PCS licenses first. Thus, the existing cellular companies received their licenses and began building their networks in March 1995—a year and a half before Urban Comm and other C-block auction winners would receive their licenses in September 1996.

7. The C-block auction was delayed by court cases, and did not begin until December 1995. By that time, because of the Supreme Court decision in the *Adarand* case, the FCC had abandoned its bidding credits for minorities and women, and provided only a small business bidding credit in the C-block auction.

8. When the C-block auction began in December 1995, virtually all bidders qualified for the same bidding credit and ten year payment terms. Thus, the bidding credits and ten year payment terms, which may have been useful to small businesses bidding against the large companies in the A and B-block auctions, were totally incapable of achieving their intended purpose in the C-block auction, because the large cellular companies did not bid in the C-block auction. Those companies had obtained all of the spectrum they needed in the A and B-block auction.

9. Thus, the C-block auction pitted all of the small businesses against each other in a PCS "ghetto." Because all of the bidders had the same bidding credits, the bidding credits were nullified and were of no value.

10. Similarly, because the small companies were not bidding against the existing cellular companies, the ten year payment term did not provide them with the ability to bid against the large companies. Instead, the ten year payment term merely plunged the FCC into the role of creditor, a role for which it was woefully unprepared, and as we now see, helped lead to the ultimate demise of the C-block.

11. The correctness of this analysis is borne out by the FCC's refusal to provide any payment terms in any of the auctions it has conducted in recent years, including the Auction 35 re-auction of C-Block licenses.

12. After conclusion of the C-block auction, the FCC further undermined financing opportunities for the C-block auction winners by announcing on June 26, 1996, just seven weeks after the conclusion of the C-block auction, that the FCC would auction D, E, and F-block PCS licenses, beginning August 26, 1996. As a result of a feared

spectrum glut, bid prices in the D, E, and F-block auction were only a fraction of the prices bid in the C-block auction.

13. In September 1996, well the after the close of the C-block auction, the FCC sent to C-block auction winners a series of promissory notes and security agreements, and required all auction winners to sign these documents without negotiation or revision. The notes and security agreements established the FCC as the senior secured lender for the C-block licensees. The notes and security agreements added an additional unexpected difficulty for C-block auction winners seeking to obtain financing to construct and operate their systems. The FCC gave bidders no warning prior to the auction that they would be required to sign such notes and security agreements. These notes and security agreements proved to be the final nail in the coffins of most C-block licensees.

Urban Comm does not provide this long list of counterproductive FCC actions to place blame on the FCC. Rather, it is Urban Comm's intent to put the current settlement in its proper historical context.

III. URBAN COMM HAS BEEN TRYING UNSUCCESSFULLY FOR MOST OF THE PAST THREE YEARS TO SETTLE ITS CHAPTER 11 RELATED LITIGATION WITH THE FCC

Throughout the course of its Chapter 11 proceeding, Urban Comm has sought to negotiate a settlement of its adversary proceeding with the FCC. However every effort to negotiate a settlement with the FCC has been rebuffed with the same mantra, "We can't settle with you until we settle with NextWave." In October of this year, after several press reports of an imminent settlement between NextWave and the FCC, officers of Urban Comm traveled to the FCC to meet with FCC and DOJ officials to discuss the inclusion of Urban Comm in any potential settlement with NextWave. Again we were told that a settlement with NextWave would have to be concluded before the FCC would commence settlement discussions with Urban Comm.

Even now, after the NextWave settlement discussions have been concluded, we continue to be rebuffed in our efforts to initiate settlement discussions. We met with FCC officials again last week and were told that, even though the FCC has completed its negotiations with NextWave, no settlement discussions would be commenced with Urban Comm until the NextWave settlement is approved. We were also told that, if the NextWave settlement is not approved, no settlement discussions will be held with Urban Comm, and the FCC will continue its litigation against Urban Comm.

IV. THE PUBLIC INTEREST WILL BE SERVED BY ADOPTION OF LEGISLATION WHICH SETTLES BOTH THE NEXTWAVE AND URBAN COMM PROCEEDINGS

Therefore, Urban Comm is here today to ask Congress to end the long, tortured trail of the C-block and F-block PCS licensees. The settlement of the NextWave litigation which has been presented to Congress is a reasonable and appropriate means of resolving this ongoing saga. The C-block and F-block PCS auctions were a failed experiment by the FCC. The FCC experimented with a number of auction ideas in that auction which it has subsequently abandoned—such as setting itself up as the auction winner's senior creditor and holding this position for a ten year period.

The parties to the NextWave settlement have provided a reasoned justification for approving the NextWave settlement. Those reasons are equally applicable to the Urban Comm case. A settlement with Urban Comm along the lines of the settlement with NextWave will provide concrete benefits to the American people and therefore would be in the public interest.

A settlement with Urban Comm will prevent years of additional litigation. As the parties to the NextWave settlement have advised Congress, absent a settlement, the litigation in the NextWave and Urban Comm cases could continue for years. Even if the FCC is successful in its request to the Supreme Court for review of the D.C. Court of Appeal's NextWave decision, the litigation could continue for years even after a favorable decision by the Supreme Court. The licenses would continue to go unused during such litigation, and the American public would be deprived of much needed improvements in PCS service which the spectrum could permit.

And in a settlement, Urban Comm will not be made whole. A settlement cannot restore Urban Comm's lost past business opportunities. Urban Comm has approached the FCC many times over the past three years in an effort to settle the pending litigation. Urban Comm has offered to pay all of its license debt immediately along with all interest and penalties. Had the FCC settled with Urban Comm previously, Urban Comm could have emerged from its Chapter 11 proceeding, constructed its network and become a viable PCS business and competitor to the existing companies.

Similarly, a settlement will foreclose future PCS business opportunities for Urban Comm. In a settlement Urban Comm will lose the opportunity to become a PCS provider. Unlike NextWave, Urban Comm has no PCS licenses other than those involved in the Chapter 11 proceeding. A settlement in which Urban Comm returns to the FCC all of its PCS licenses involved in the Chapter 11 proceeding will leave Urban Comm no licenses with which to begin constructing a PCS business. Thus, Urban Comm will have foregone its chance to build a PCS business.

In spite of the opportunities which Urban Comm must forego in a settlement, Urban Comm recognizes that the terms described in the NextWave settlement are a reasonable compromise of the competing interests being addressed. Urban Comm, therefore, is prepared to enter into a settlement similar to that negotiated between the FCC, DOJ, NextWave and the Auction 35 parties.

Urban Comm's concern with the settlement legislation therefore is not with its terms but with its limited scope. The Bankruptcy Court has determined that the issues to be resolved in the Urban Comm case are so similar to those to be resolved in the NextWave case that the Urban Comm case has essentially been held in abeyance awaiting a resolution of the NextWave case. Therefore, as a legal matter, settlement of both cases at this time is appropriate. Urban Comm's debt to the FCC of approximately \$75 million is only 1.6% of NextWave's debt. Consequently, a settlement with Urban Comm raises none of the Congressional budgetary issues that the NextWave settlement raises.

Therefore, Urban Comm requests that Congress take action in considering the NextWave settlement to assure that the FCC and DOJ immediately initiate settlement discussions with Urban Comm. Urban Comm submits that such assurances can best be achieved by: (1) including language in the pending settlement legislation directing the FCC and DOJ to immediately commence settlement discussions with Urban Comm, and (2) providing authority in this legislation to permit a settlement similar to the settlement negotiated with NextWave.

Thank you for the opportunity to present Urban Comm's views on this important subject. I look forward to answering any questions you may have.

Mr. SHIMKUS [presiding]. Thank you. And just for the record, as you see, we have a small group of members left, but we are pleased to see that the full committee chairman has been diligent in listening, and is now prepared to open a first round of questions, and he is recognized for 5 minutes.

Chairman TAUZIN. Thank you, Mr. Chairman. Mr. Winston, let me first thank you for your analysis in your testimony on page two, in which you do a much better job than I tried to do in outlining the failure of the C-Block auctions, and many of the reasons why they failed.

And particularly I had not remembered this, the fact that A and B-Block auctions occurred 1½ years prior to C-Block, and therefore the largest cellular companies already had their spectrum and were already deploying it by the time that smaller companies, like yours and others, were invited to a C-Block auction.

And the other point that you raised that the bidding credits were essentially nullified in the process, which made it even more difficult for smaller bidders to meet their financial obligations in the bids.

All of that contributed as you pointed out to what should have been a predictable failure of that process, correct?

Mr. WINSTON. Yes. Needless to say, we had high hopes in 1993 when Congress passed the Auction Authority Legislation, and specifically provided in the legislation for opportunities to be made available for small businesses, and businesses owned by minorities and women.

From 1993 until the auction began in December 1995, we saw one mistake after another that eviscerated everything Congress tried to do with Section 309(j) of the Communications Act.

By giving the existing carriers a 1½ year headstart on us, they had all the pluses going for them to begin with, and then giving them a 1½ year headstart, I guess we should not be too surprised at where we are now, but it is frustrating.

Chairman TAUZIN. Well, the point is that the failure to get the finances to deploy those licenses, and the fact that bankruptcy followed was not terribly unpredictable when you consider all the facts that led up to the NextWave and the Urban Comm situation.

I mean, we are literally in this position largely because of the failure of the early efforts at auctioning licenses, and complicated as I pointed out by the fact that the budgeteers in this body pushed an awful lot of spectrum out I think too soon, and complicated the value of that spectrum in the marketplace.

Mr. Strigl, there is a little provision in the Fifth Amendment of the Constitution. The Fifth Amendment is one that politicians remember because they often have to take it before courts.

But there is a provision at the end of it that I think is often forgotten, and it reads as follows. "That private property shall not be taken for public purposes without just compensation."

Now, essentially, isn't that where we find ourselves? The D.C. Circuit Court has said that whether we like the process or not the government sold some property to NextWave, and that whether you would like to buy it from the government again, the court said that you can't do that because NextWave owns it and the fact that they are in bankruptcy with their property does not in any way take away their ownership of property rights. Isn't that essentially what the D.C. Court said?

Mr. STRIGL. Mr. Chairman, I think that is exactly what the D.C. Court said.

Chairman TAUZIN. And in effect you were invited to bid on some government property that the government no longer owned. It had not been paid for yet, but it no longer owned it; is that right?

Mr. STRIGL. Yes, sir. We did so with our eyes open.

Chairman TAUZIN. And you knew that it was a risk coming in, and so what we have is a situation where all these enormous bids that were put up at this auction for property that the government no longer owned are literally invalid if the D.C. Court is correct, and if it were upheld, and if we went through all kinds of litigation to the Supreme Court; is that correct?

Mr. STRIGL. Yes, sir, that's correct.

Chairman TAUZIN. So that while this is a nice pot of money that the government would like to pick up, the government has no right to literally if the D.C. Court is correct, has no right to sell somebody else's property; and that you have literally no legal rights to take that property in that sale until the ownership was settled; is that correct?

Mr. STRIGL. Mr. Chairman, we never took the property. However, I might point out that we are still committed for the \$8.8 billion that we bid.

Chairman TAUZIN. And in effect the settlement says that yo guys are going to go ahead and all of you bid in this auction for property that the government didn't own. And you are still going to put up that money, and the government is going to get not just the \$4.86

billion that it was promised for in the C-Block auction by NextWave, but it is going to get a substantial amount more.

And NextWave is going to be paid something closer to the current value of its property in the settlement. Is that essentially what we are talking about?

Mr. STRIGL. Yes, sir, I believe that is essentially what we are talking about here, and I think it is very important that we get certainty to this.

Chairman TAUZIN. And if we don't, and we have said this a number of times at this hearing, but if we don't accept this settlement, whether we like the numbers in it, or we like the position that we are in, or who was right or who was wrong in this awful 5 year process, if we don't accept the settlement and put it behind us, where are you?

I mean, you have bid for property that the government said or the court said that you couldn't buy, and you put up a lot of your resources to buy this property, and to I suspect forego other business opportunities, and other things that you might have done with this commitment of financial resources. Where are you?

Mr. STRIGL. First, I think, sir, that the settlement is very fragile, and if December 31 comes and goes without the enacting legislation, there is no certainty that this deal can be put back together.

Speaking for my company, we have had what I would call a dark cloud over our head since January, and that is the commitment to pay the government \$8.8 billion. There are plenty of other things as one would imagine that a business can do with \$8.8 billion.

And we stand ready to explore some of those opportunities, but not as long as this obligation hangs over our head.

Chairman TAUZIN. And you chose instead to take a risk and to put this money up to get this spectrum, and you must have some awful big needs for that spectrum out there?

Mr. STRIGL. We have great need for the spectrum, not only to meet our capacity needs in major cities across the United States, but also to roll out 3-G spectrum, and one of the things that I have said to this subcommittee before is that I believe that we are falling behind our foreign competitors.

Chairman TAUZIN. I know that my time has expired, and I am going to end, Mr. Chairman. We don't have a lot of members here, but I want to end on this note, because Mr. Strigl has made an excellent point here.

We are talking about spectrum that is apparently going to be used for third generation wireless, and I don't know if Americans fully understand the implications of third generation wireless yet, or the fact that most European countries are already way ahead of us in licensing out third generation spectrum.

And companies in Europe and other parts of the world are busy building the software and hardware that is going to manage these systems, and provide incredible new services for people.

But we are talking about incredible new wireless devices that are going to allow us to communicate much more readily and reliably in not only good times, but in tough times, like September 11 incidents.

And it will give us a chance to literally stay connected in this country in a new highly dense sort of communications wireless sys-

tem called Third Generation. Without this spectrum out there, and companies like yours investing in it, we are not only behind Europe and other parts of the world, we are desperately behind them; is that not correct?

Mr. STRIGL. I think that is accurate, yes, sir.

Chairman TAUZIN. Thank you, Mr. Chairman.

Mr. SHIMKUS [presiding]. Thank you, Mr. Chairman, and now I will yield 5 minutes to the gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman. Mr. Strigl, welcome. Let me pick up where Chairman Tauzin left off, in terms of talking about the next generation of wireless services and the extent to which you—and to the extent that you know this—and other wireless companies may be planning to devote this NextWave spectrum to the roll out of Third Generation services.

Is that really your intent, or do you anticipate using part of this spectrum for the enhancement of your existing generation of voice-based services?

Mr. STRIGL. Congressman Boucher, it is difficult to say exactly any amount of spectrum that will be devoted to 3-G services, as opposed to voice services. Our intention is to meet our capacity demands, and at the same time roll out 3-G spectrum over the—the 3-G services over the entirety of our spectrum.

Here is what I know for certain. That without this spectrum that we cannot devote any of the spectrum we have to anything other than voice and short messaging service. Data, particularly high speed data, is not a possibility in our major cities with the limited spectrum that we have today.

Mr. BOUCHER. And so in the event that Congress does not approve this settlement, and for various reasons the companies that successfully bid for this spectrum in the reaction decide to take their investment dollars elsewhere because of the complexities that would lie ahead of them in the absence of Congressional approval, you would see an effect then on the ability of the United States to have the near-term deployment of Third Generation services; is that correct?

Mr. STRIGL. Yes, sir, and we are experiencing it now. I think we would continue to experience it. This is essential for carriers to have.

Mr. BOUCHER. And you would say that this spectrum is essential for carriers to have to deploy Third Generation services?

Mr. STRIGL. Yes, sir.

Mr. BOUCHER. Let me ask you this also. When the Chairman of the Federal Communications Commission was here a few moments ago, we asked him about why it is necessary for Congress to approve this settlement for it to become effective.

He mentioned two basic things. He said, first of all, that there has to be an appropriation because the dollar flow simply doesn't work if Congress doesn't have this appropriation made and available at the time that all the other pieces are put in place.

And potentially that could be handled by having an appropriation approved without taking the other steps that Congress is being asked to take in the settlement. So those other steps I think are something that you perhaps appropriately could address.

What else Congress is being asked to do is to provide an expedited and specifically targeted process for handling any challenges that are made of a legal nature to the settlement itself.

And my question to you is why is that necessary? How insistent are Verizon's lawyers that Congress has got to clear this path, if you will, for this settlement to be something that you can take confidence in.

And why would it be reasonable to think that parties who are external to this settlement would actually have standing to challenge it? We can assume that the parties to it are not going to challenge it and so it has to be someone outside.

And so how could they have standing to do that? I realize in-part that this is a legal question, but I am going to give you an opportunity to convince us that we really have to do this.

Mr. STRIGL. Congressman, you have asked a multiple part question, and let me attempt to answer at least some of these. The fragile nature of this agreement, of putting the Auction 35 winners with the government, with NextWave, has been very difficult for all parties concerned.

I think the issue from Verizon's point of view—and I believe that Chairman Powell said it quite well—I have a board of directors, and I have shareholders who are very concerned about the opportunity costs of what my company has committed to.

We have been under this cloud for some arguably 11 or 12 months, without any certainty, and the legislation brings certainly, as Chairman Powell spoke of, from the point of view of ending the litigation. From the point of view of putting the spectrum into use.

And from my point of view of what I call putting clear spectrum into use, and without any onerous legal challenges that obviously are very troublesome to someone willing to make an investment about the size of what we paid for the spectrum.

I think it is important to say here that we stand ready not only to pay for the spectrum, but also to put investment in place of approximately some \$7 to \$8 billion to use that spectrum.

So in order to devote that \$7 billion, plus another \$8 billion, we have to know that we are through this onerous litigation process. That is the driver, sir, why we are insistent that we get some certainty to this once and for all.

Mr. BOUCHER. Thank you, Mr. Strigl. You make an excellent case. Thank you, Mr. Chairman.

Mr. SHIMKUS. Thank you, and I will now recognize myself for just one question. Mr. Cassou, many people have been able to answer this for your company, and so I am going to give you an opportunity to address this.

And as many people mentioned in their opening statements, it is a \$500,000 investment, and a \$6.5 billion return—a pretty good return—minus legal fees, and I know that legal fees can be pretty high, but I don't think it would consume the whole return.

How do we justify this then to our constituents as they are trying to sort out whether we can justify and look at getting spectrum available. There is a lot of things. But that is the hurdle that a lot of us are going to have to overcome. Can you kind of talk us through how we might be able to manage that?

Mr. CASSOU. Yes. I tried to address that in my opening statements that while the payment is a large payment, the company, as a result of the D.C. Circuit decision this year, has had the licenses reinstated to it, and those licenses have through Auction 35 been valued at roughly \$16 billion.

So as a result of this settlement, the company is agreeing to forego the opportunity now to proceed forward with its plan of reorganization and build out those licenses, and accepting one-third of the value of the licenses, and the other two-thirds, of course, going to the government and the taxpayers.

And NextWave throughout the process has complied with the law. We made our initial downpayment as required by the FCC's rules in a timely manner, and then after seeking protection through bankruptcy in June 1998, also complied with the rules as we operated under the bankruptcy laws as well.

So while it is not a result that we sought, we think it is a fair settlement, and one that is beneficial to the taxpayers and provides a fair return to the NextWave creditors and investors that have been patient through this process.

Mr. SHIMKUS. Thank you. And, Mr. Winston, I would just make a statement that your testimony is very compelling. It would make the case for us of fair and equal treatment in consideration of what you are attempting to do, and I think that the committee will probably follow up on some of your requests.

Mr. WINSTON. Thank you, sir.

Mr. SHIMKUS. With that, I would like to yield back my time and recognize Mr. Markey for 5 minutes.

Mr. MARKEY. Thank you, Mr. Chairman, very much. Mr. Strigl, first congratulations. Chairman Powell has lifted the spectrum caps, and you really do have a bright future. Why wouldn't it make sense for you to just walk away from this deal, take the billions which you have invested in the auction, and just purchase the additional spectrum which you need out in the open marketplace, avoiding this entire mess? Doesn't that make sense?

Mr. STRIGL. Congressman, I have asked myself numerous times over the last 11 months why we haven't, and why I haven't said to my board, and to my shareholders, let's walk from this deal.

Mr. MARKEY. And the answer was?

Mr. STRIGL. The answer is that I think I can get this spectrum faster through the Auction 35 process, and that is what I thought every month that has gone by, than to go out and to try to acquire new spectrum.

Mr. MARKEY. But you didn't know that the spectrum cap was going to be lifted at that point in time?

Mr. STRIGL. Of course, Congressman, I didn't know that until quite recently.

Mr. MARKEY. Right. But from this point on doesn't it make sense for you to just go out and to purchase this additional spectrum which you need?

Mr. STRIGL. Congressman Markey, first of all, we have put a lot of blood and sweat into this deal, and my feeling is that the settlement that we have put together is fair and it is the quickest way of putting spectrum to use.

If we were to do another deal, as you very well know, sir, it would be months of a process to go through, and not only of negotiating, but of license transfer approvals. I think that this is the quickest way to use the spectrum.

Mr. MARKEY. Well, let me move to Mr. Cassou. Mr. Cassou, is it?

Mr. CASSOU. Yes.

Mr. MARKEY. Mr. Cassou, congratulations to you. You have won the case, and you have great expectations that you would win at the Supreme Court no doubt, and so the question that I have for you is why don't you just build out the plan, or some assemblance of the plan, which you as a company had always intended to build out, instead of using this C-Block auction as an exit strategy? Why don't you stay in the market? Why don't you compete?

Mr. CASSOU. Well, it actually isn't an exit strategy. We have—as you know this has been a long and complex, and drawn out litigation with the Commission. And throughout this process we have been trying to vindicate our ability to build out the licenses just as you say.

After the D.C. Circuit decision this summer, we filed a plan of reorganization to do just exactly as you described, and to proceed forward. We raised \$5 billion toward that effort.

However, at the time that the Commission and the Auction 35 participants approached us at the end of August, we had a fiduciary duty to our creditors and to our shareholders to look at this and evaluate it, and to provide them with a path, and to provide certainty, and also avoid further delays in the investments that they have made in this process.

After balancing those considerations and talking with those constituencies, it was the conclusion that it was time to stop fighting with our regulator, and that this was a fair settlement, and a good resolution of these issues.

Mr. MARKEY. Well, let me ask you this. The creditors or the investors, they knew what the goal was, was to build out. And now that you are on the cusp of victory, with a clear cut Circuit Court decision, you could have gone to the Supreme Court and got a knockout punch, and begun the process.

Why do you say that the fiduciary duty is to now just take the money and exit the wireless business? Why is that a fiduciary responsibility? Isn't there a longer term return on investment that you would get that was always the promise that you were giving to your investors?

Isn't this now the time to capitalize upon it as Mr. Strigl and others are trying to gain more spectrum, and almost at any cost? Isn't this the ideal time to build out your own plan and to capture that over the next 20 and 30 years?

Mr. CASSOU. Yes, we balanced those considerations against the risks of further delay and litigation, even in the scenario where we are successful with the Supreme Court, which we expect that we would be.

There are as you have heard continuing regulatory petitions that are on file with the Commission, and the carriers from the industry have indicated in filings with the government back in July that

they would continue to pursue those regulatory proceedings. So again we are looking to put an end to a process.

Mr. MARKEY. Are you concerned that the FCC will never end its proceedings surrounding your existence? Is that a concern which you have? That Chairman Powell and the FCC will continue to bring actions against you?

Mr. CASSOU. They have been very fair to us in this current settlement process and as I mentioned, we have additional licenses that we will go forward and build out with, covering roughly \$6.5 billion POPs in five markets, and so the company will be a licensee.

Mr. MARKEY. Well, I appreciate that, but what I am trying to find is what is the source of your concern. Are you saying that the FCC is just such a threat to you that you can't afford not to basically sell out and never build out your dream of having this network?

Mr. CASSOU. Well, the history of our experience over the past 5 years is that we have not been able to.

Mr. MARKEY. I appreciate that, but I am talking about the FCC right now. Do you think they are an impediment to you building out right now? If you went that course, legally you know that you are on very strong ground.

Mr. CASSOU. Yes, we have concerns though that we might be further delayed through the regulatory proceedings and through proceedings in which we have to justify extensions to the build out requirements that are coming up.

Mr. MARKEY. I appreciate that, but you are long term investors, and you are not in it just for the quick kill.

Mr. CASSOU. That's correct, and we will be.

Mr. MARKEY. And so what I am saying is that over the next 20 or 30 years that you would definitely get a good return on your investment over the long term.

Mr. CASSOU. People like myself who have been with the company for 6 years, and will continue to be with the company to build out in the future, will continue that vision. The creditors and investors that made their investments back in 1996 are looking for a solution that ultimately provides certainty. If we had certainty to go forward and build out, we would do that.

Mr. MARKEY. But you are so close with the Supreme Court decision in the offering, and you could have just taken it there. That's hard to understand why you would not have just finished it off in other words.

Mr. CASSOU. There was additional—certainly there is additional risk at the Supreme Court level, although we believe that we have the better arguments here, and then there is further regulatory delays that we were expecting.

Mr. MARKEY. Mr. Winston, I wish I could say congratulations to you.

Mr. WINSTON. I wish you could, too, sir.

Mr. MARKEY. How much would you settle for, Mr. Winston? What would you accept?

Mr. WINSTON. Can you invite anybody else into a room together and give up a number?

Mr. MARKEY. What do you think it is worth, Mr. Winston, honestly?

Mr. WINSTON. We have not discussed numbers. Obviously we have not had any settlement discussions with anyone to discuss numbers about. But I would assume that a formula, similar to the formula that was applied in the NextWave settlement, would be a reasonable way of approaching a settlement with us.

Mr. MARKEY. Just one final question. Do you think that we should end this process without resolving this issue of bankruptcy law versus telecommunications law? Do you think that should be a part of any legislative proposal that ultimately is attached to any moving piece of legislation?

Mr. WINSTON. I think those issues are probably much larger than the limited settlement that we are discussing here.

Mr. MARKEY. But because of the lack of resolution of that larger issue, we have this settlement before us. Do you think we should add predictability to that process henceforth as we deal with this as the illuminating event that has drawn everyone to the Commerce Committee here today?

Mr. WINSTON. I would hope that the committee would address the settlement before with respect to NextWave, and hopefully Urban Comm because of the issues that they have raised about timing, et cetera.

And that the larger issue, I think, requires much more time and attention than the specific matter before the committee now.

Mr. MARKEY. Thank you, Mr. Winston, and Mr. Strigl, and Mr. Cassou.

Mr. SHIMKUS. And thank you. Whitey Herzog may be coming to the Sox, and so I may have to be rooting for them. You know that.

Mr. MARKEY. Are you rooting for the Red Sox?

Mr. SHIMKUS. Well, with Whitey Herzog, you could.

Mr. MARKEY. What is his nickname?

Mr. SHIMKUS. The Rat.

Mr. MARKEY. The Rat.

Mr. SHIMKUS. Fitting for Boston. I will now recognize Mr. Engel for 5 minutes.

Mr. ENGEL. Well, I don't know about you guys, but I am delighted that the Mets just got Roberto Alomar today. So, I have to say. Mr. Strigl, the deadline of December 31 of this year, some people have said that it is a power play by the Department of Justice and the FCC, but I don't think it is.

I think it is a simple admission that the reauction bidders are holding letters of credit for these projects and that by tying up so much capital for too long is obviously very detrimental to Verizon. I would like you to expand on that.

Mr. STRIGL. Yes. Congressman Engel, first of all, the letters of credit will be posted as soon as this settlement is finalized by legislation. But we do have what I would call a very sizable \$1.8 billion deposit that has been sitting with the government and not collecting interest for many months.

And our fear is that that would stay in place without interest going forward without this settlement. We think that on December 31 that it may very well be in our best interests to walk from this deal, and to use the \$8.8 billion for other opportunities.

There are plenty of opportunities in the marketplace today, and we think that those are worth investigating. However, at the same

time, if we can conclude this and bring certainty to this process, that is certainly in our best interests.

Mr. ENGEL. Well, I would think it would be in everybody's best interests. I think that is in line with the question that Mr. Markey was asking as well. I think there is a limit to how long this can drag on.

Mr. STRIGL. Yes, sir.

Mr. ENGEL. How long after Verizon takes control of these licenses will your company begin using them and deploying telecommunications equipment that utilizes this spectrum?

Mr. STRIGL. Immediately. Our intention is the end of June, July 1, to take possession of this spectrum, and to begin building out certainly in the year 2002 as rapidly as we can, particularly in our major cities.

Mr. ENGEL. So again that would be an incentive to wrap this up as quickly as possible, or at least from my vantage point it seems very simple to me.

Mr. STRIGL. We can put it to use, sir, in places like New York, Chicago, Washington, DC, Boston, and other major cities almost immediately.

Mr. ENGEL. Okay. Thank you very much. Thank you, Mr. Chairman.

Mr. SHIMKUS. Thank you. Mr. Markey, do you have anything to add? Seeing no other members, I will call this hearing adjourned.

[Whereupon, at 5:47 p.m., the subcommittee was adjourned.]