FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

December 10, 2001

VIA HAND DELIVERY

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

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.

RESPONSES: 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 licensed, 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 Rcd 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 Rcd 16266, 16291 at n.156 (2000).

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.

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 of 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

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.

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, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 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 Rcd 8345 (1998).

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.

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.

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.

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 superceded 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.

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.

10. Does the Commission believe that the instructions of the DC. 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.

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 Commission's *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.

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 Rcd 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.

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[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.

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.

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.)

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. Pena* 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.

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.

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.

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.

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.