

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)
)
Broadband PCS Spectrum Auction) PN Rpt. AUC-03-58-A
Scheduled for January 12, 2005) (Auction No. 58)
) DA 04-1639
)

To: The Wireless Telecommunications Bureau

REPLY COMMENTS OF THE DESIGNATED ENTITY PROGRAM SUPPORTERS

The Designated Entity Program Supporters (“DE Supporters”) 1/ respectfully submit these Reply Comments in response to comments received by the Commission regarding the above-referenced Public Notice (“Auction 58 PN”). The DE Supporters reiterate their support for the use of designated entity (“DE”) bidding credits and set-asides in Auction 58. 2/

1. Commenters Expressed Overwhelming Support for DE Rules

The vast majority of the comments – nearly 80% of those filed – support the preservation of the Commission’s DE rules. Many entities submitting comments are themselves DEs that made it clear that they would not be able to participate in Auction No. 58 without the aid of the DE rules. 3/ Commenters, including entities that invest in DEs, emphasized that small businesses would not be able to raise the necessary capital in order to effectively participate in

1/ The DE Supporters include the Minority Media and Telecommunications Council, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Association of Black Telecommunications Professionals, National Coalition of Hispanic Organizations, Hispanic Americans for Fairness in Media, Hispanics in Information Technology and Telecommunications, Lawyers Committee for Civil Rights Under the Law, National Association for the Advancement of Colored People, National Associations of Black Owned Broadcasters and the National Urban League. These Reply Comments reflect the institutional views of each of the DE Supporters and is not intended to reflect the views of any of their individual members, directors or advisors.

2/ See 47 C.F.R §24.709(a).

3/ See e.g., Highland Cellular Comments at 1; McBride and Reiter Comments at 1; Coloma Spectrum, LLC Comments at 1.

the auction without the DE set-asides. ^{4/} As Doyon, Limited stated, “lack of access to capital is the dominant barrier to entry in the capital-intensive wireless industry” and the consistency of the DE rules helps small businesses acquire financing. ^{5/} Moreover, the Commission itself has often acknowledged the severe disadvantage DEs generally have accessing the capital markets. ^{6/} In the face of increasing consolidation within the wireless industry, commenters explained that such rules are necessary to level the field among the different bidders and ensure that those who historically have been shut out of the communications sector grab a foothold in the market. ^{7/} Given the strong support in the record, the Commission should proceed with its plan to enforce the existing DE rules, including the DE set-asides. Echoing the sentiments of many commenters, Coloma Spectrum, LLC stated in their comments, “ Auction No. 58 rules provide a true opportunity for DE’s to acquire spectrum.” ^{8/}

2. The DE Rules Enable the Commission to Fulfill Its Mandate to Promote Diversity of Ownership

The DE rules are needed to achieve the Commission’s mandate to promote diversity in license ownership and to reduce the barriers, such as lending discrimination and other barriers to accessing capital, that prevent small and minority and women-owned businesses from entering the spectrum market. Congress has mandated that the Commission identify and eliminate obstacles to market entry for small and minority and women-owned businesses that wish to enter the telecommunications industry. ^{9/} Moreover, §309 of the Communications Act directs the Commission to ensure that small businesses, women-owned and minority-owned businesses, as

^{4/} See e.g., Doyon Limited Comments at 1; Catalyst Investors Comments at 1, Arctic Slope Regional Corp. Comments at 1; Madison Dearborn Partners, LLC Comments at 1-2; Media Venture Partners Comments at 1; Maxicom PCS, LLC Comments at 2.

^{5/} Doyon, Limited Comments at 2.

^{6/} See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report & Order in PP Docket No 93-253, *reprinted at* 59 Fed. Reg. 37566 (July 22, 1994) at ¶¶ 93-107 (noting societal barriers to access to capital, as well as Congressional findings that minorities and women often face discrimination in the private lending market).

^{7/} Alta Comments at 1.

^{8/} Coloma Spectrum Comments at 1.

^{9/} 47 U.S.C. §257(a); see also 47 U.S.C. §257 (b) (stating that the Commission must develop policies that promote diversity in media voices and that further the public interest).

well as businesses that operate in rural areas are given the opportunity to participate in auctions for spectrum-based services. ^{10/}

In 2000, the Commission released a series of studies regarding barriers to participation by women- and minority-owned businesses in the communications sector. One study indicated that minority- and women-owned businesses were less likely to obtain debt financing in order to participate in auctions, and when they were able to obtain loans, the interest rate was higher than rates paid by non-minority applicants. ^{11/} Another study showed that when such businesses participated in an auction, they were less likely to win a license than were non-minority applicants. ^{12/} Notably, this study also found that the difference in auction success rates between minority and women applicants were generally less pronounced among small companies than among large companies. ^{13/} The conclusions of these studies remain valid today. Thus, by assisting DEs in acquiring spectrum through a continuation of the DE set-asides, the Commission is likewise helping to promote diversity of ownership, as the Communications Act requires. ^{14/} Increasing diversity is even a more compelling goal today, given that minorities are becoming ever more underrepresented in the industry at the same time their representation among the country's population as a whole is increasing..

3. Preservation of the DE Rules is Needed to Combat the Negative Effects of Wireless Industry Consolidation

The DE rules are needed now, more than ever, to combat the recent trend toward consolidation in the wireless sector and to ensure that small and minority and women-owned businesses are not shut out of the wireless industry. The recently announced merger between

^{10/} 47 U.S.C. § 309(j)(4)(D) (requiring that the Commission consider the use of bidding preferences or tax certificates in order to assist these businesses in participating in auctions).

^{11/} William Bradford, *Discrimination in Capital Markets, Broadcast Wireless Spectrum Service Providers and Auction Outcomes* at 15-16, Dec. 5, 2000, available at http://www.fcc.gov/opportunity/meb_study.

^{12/} See Ernst & Young LLP, *FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions*, at 4, available at http://www.fcc.gov/opportunity/meb_study.

^{13/} *Id.* at 15.

^{14/} None the commenters argue – nor could they – that the DE rules are ineffective in promoting diversity of ownership.

Cingular and AT&T Wireless, which, if approved, would combine the second and the third largest wireless carriers, has serious implications for competition in the provision of wireless services, particularly in rural areas, where consumers already have fewer choices. ^{15/} It is in these same rural areas that DEs most commonly operate. In view of the trend toward wireless industry consolidation, it is now more important than ever for the Commission to take concrete steps to ensure that DEs obtain the licenses needed to provide wireless services

Industry consolidation makes open bidding a far more hostile paradigm for DEs, and investors will shy away from committing funds to these bidders if they must compete in an open bidding environment. As the large carriers continue to aggressively acquire spectrum – including purchasing portions of Nextwave’s spectrum that was not returned to the Commission ^{16/} – smaller carriers are being squeezed out of the market. For consumers, the loss of these smaller carriers will mean a loss of the advantages they often provide, such as innovative service offerings, a focus on meeting local needs, emphasis on customer service, and a nimble and less-bureaucratic ability to respond to changing market conditions. The DE rules

^{15/} After the merger, rural consumers may have as few as two or three options in wireless providers. In the most rural markets, there are already on average roughly only three mobile providers from which to choose. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Service, *Eighth Report*, 18 FCC Rcd 14783 (2003) (“*8th CMRS Report*”) at ¶ 116. A drop from three competitors down to two leaves consumers vulnerable to anticompetitive behavior, such as tacit collusion among carriers that will slow or stop the trend of declining mobile rates. Indeed, the Commission has recognized that “CMRS markets do meet many of the criteria that make tacit collusion sustainable” and that “tacit collusion becomes more likely as the number of competitors is reduced.” 2000 Biennial Regulatory Review – Spectrum Aggregation Limits for Commercial Mobile Radio Services, 16 FCC Rcd 22668 (2001) at ¶ 45 (“*Spectrum Cap Order*”).

^{16/} See “Quick NextWave Auction Nets Only Minimum Bids,” *RCR Wireless News* at 3 (July 12, 2004) (reporting on sale by NextWave to Verizon Wireless of 10 MHz of spectrum in New York City); *Applications for Consent to the Assignment of Licenses from Nextwave Personal Communications, Inc., Debtor-in-Possession, and Nextwave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC*, Memorandum Opinion and Order, 19 FCC Rcd 2570 (2004) (approving assignment of 34 NextWave licenses to Cingular); see also “Verizon Picks Up Qwest Assets,” *RCR Wireless News* at 1 (July 5, 2004) (reporting on agreement of Verizon Wireless to acquire all the wireless assets of Qwest Communications International, including PCS licenses in 62 markets).

are crucial to the ability of small and minority and women-owned carriers to establish a viable presence in the wireless marketplace and provide a competitive alternative to the major carriers.

4. The Wireless Bureau's Public Notice Is An Inappropriate Vehicle for Proposing Changes to the Commission's DE Rules

The DE Supporters would like to respond to those commenters who urge the Commission to eliminate the DE rules. Changes in rules established by the Commission cannot be effected by the Wireless Telecommunications Bureau, based on comments received in response to its Auction 58 PN. In fact, Verizon Wireless acknowledged that a rulemaking proceeding would have to be commenced in order to change existing eligibility rules. ^{17/} Similarly, CTIA filed a petition for rulemaking, a filing it could have made much earlier. ^{18/} A lengthy rule-making process at this point would inevitably delay Auction No. 58 and further delay the deployment of spectrum that has been lying fallow for far too long already. ^{19/}

^{17/} Verizon's Comment at 4 (arguing that the Commission can expedite the rulemaking process and finish in time for the January 12, 2005 auction date).

^{18/} Accordingly any "need for expedition" urged by CTIA is of its own making.

^{19/} See "FCC Chairman Praises NextWave Settlement," *FCC News* (Apr. 20, 2004) (stating that the settlement will "finally" place the spectrum in the hands of consumers).

Conclusion

For the foregoing reasons, the DE Supporters urge the Commission to preserve the existing DE rules in order to fulfill Congress's intent that it promote diversity of ownership in the telecommunications industry.

Respectfully submitted,

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