

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Broadband PCS Spectrum Auction)	
Scheduled For January 12, 2005)	DA 04-1639
)	
Comment Sought on Reserve Prices Or)	Report No. AUC-03-58-A (Auction No. 58)
Minimum Opening Bids And Other)	
Auction Procedures)	

COMMENTS OF COUNCIL TREE COMMUNICATIONS, INC.

Steve C. Hillard
George T. Laub
Jonathan B. Glass
Council Tree Communications, Inc.
110 North Rubey Drive
Suite 201
Golden, Colorado 80403-2453
303-678-1844

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	2
I. THE HIGHLY SUCCESSFUL AUCTION NO. 35 DEMONSTRATES THE OVERALL VIABILITY OF THE DE RULES	4
II. THE COMMISSION SHOULD ESTABLISH A PERSONAL NET WORTH LIMITATION FOR COMPETITIVE BIDDING SMALL BUSINESS PREFERENCE ELIGIBILITY PRIOR TO COMMENCING AUCTION NO. 58	5
III. THE COMMISSION MUST REMEDY THE DIMINISHED PROPORTION OF “CLOSED” LICENSES AVAILABLE IN AUCTION NO. 58	8
IV. THE SUBSTANTIALLY HIGHER MINIMUM OPENING BID PRICES REFLECT A REDUCED ENTRY OPPORTUNITY FOR DE PARTICIPANTS.....	11
V. CONCLUSION	12

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Council Tree Communications, Inc. (“Council Tree”), by counsel and pursuant to the request of the Wireless Telecommunications Bureau, 1/ hereby submits its comments regarding the broadband PCS spectrum auction scheduled for January 12, 2005, known as Auction No. 58. Council Tree is pleased that, in implementing Auction No. 58, the Commission has preserved the overall integrity of the designated entity (“DE”) program, including both the bidding credits and, most importantly, the maintenance of Closed license bidding. At the same time, Council Tree is very troubled that the Commission has not implemented a personal net worth limitation for competitive bidding small business preference eligibility. Council Tree is also deeply concerned by the severely diminished availability of Closed licenses, chiefly because Closed licenses are central to the DEs’ ability to participate competitively in an auction and, ultimately, in entering the wireless marketplace.

1/ Broadband PCS Spectrum Auction Scheduled for January 12, 2005, Comment Sought On Reserve Prices Or Minimum Opening Bids And Other Auction Procedures, *Public Notice*, ___ FCC Rcd ___, DA 04-1639 (rel. June 18, 2004) (“*Public Notice*”).

Finally, the markedly higher minimum opening bid prices in this auction serve quite simply as an unnecessary barrier to DE participation.

Therefore, Council Tree urges the Commission to establish a personal net worth limitation for competitive bidding small business preference eligibility, as set forth in Council Tree's pending Petition for Rulemaking, 2/ prior to the start of Auction No. 58. In addition, Council Tree urges the Commission to re-designate a substantially higher number of licenses as Closed than the number of Closed licenses set forth in the *Public Notice*, in order to more closely replicate the Closed license offerings available to DEs in Auction No. 35. Finally, Council Tree asks that the Commission reduce the minimum opening bid prices in this auction to a level consistent with those set forth in Auction No. 35.

I. INTRODUCTION AND SUMMARY

Council Tree is an investment company organized to identify and develop telecommunications industry investment opportunities for the benefit of businesses owned by members of minority groups and women, recognizing that the prospects for business success can be predicated on the meaningful diversification of telecommunications facilities ownership. In particular, Council Tree has long been an

2/ Council Tree Communications, Inc. Petition for Amendment of Part of the Commission's Rules to Include a Personal Net Worth Limitation for Competitive Bidding Small Business Preference Eligibility (filed Mar. 8, 2004) ("Petition for Rulemaking"). The Consumer & Governmental Affairs Bureau announced the filing of the Petition for Rulemaking on April 2, 2004, and assigned RM No. 10956. *See* Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed, Report No. 3654 (rel. Apr. 2, 2004). Council Tree respectfully requests that the Commission incorporate the Petition for Rulemaking by reference.

active supporter of responsibly managed government efforts to encourage the participation of businesses owned by Alaska Native corporations and Indian tribes in the communications industry. As part of this work, Council Tree President Steve C. Hillard is a member of the Commission's Federal Advisory Committee on Diversity in the Digital Age, and he serves as Chairman of the Committee's Transactional Transparency & Related Outreach Subcommittee.

As the Commission finalizes the rules and procedures for Auction No. 58, Council Tree urges it to remain true to the special measures that promote DE auction participation by small businesses. This participation has significantly contributed to the success of wireless mobile services in the United States, and therefore must be protected. Council Tree submits that the DE rules will be significantly strengthened with the addition of a personal net worth test. The personal net worth test will ensure that the DE program encompasses only those who legitimately need a lower barrier in order to enter the wireless marketplace. The test will therefore preserve the DE program as a means to most effectively promote and enhance both small businesses participation as well as diversity of ownership in wireless communications, just as Congress intended.

Similarly, the Commission must move forward mindful of its obligation to make as many Closed licenses available as possible. By doing so, the Commission would compensate for the former Closed licenses retained by NextWave or assigned to Cingular, which has caused the Closed licenses opportunity, as proposed in Auction No. 58, to decrease by 39 percent, as measured by MHz POPs, in comparison with Auction

No. 35. The re-designation of certain Open licenses to Closed licenses in the auction spectrum pool will address this problem. Finally, the Commission must ensure that the substantially higher minimum opening bid prices do not reduce the entry opportunities for DE participants, and the Commission should therefore reduce these minimums to levels consistent with Auction No. 35.

I. THE HIGHLY SUCCESSFUL AUCTION NO. 35 DEMONSTRATES THE OVERALL VIABILITY OF THE DE RULES

The current PCS C block auction structure was adopted by the full Commission pursuant to a notice and comment period, ^{3/} almost four years ago, ^{4/} and greatly diminished DE opportunities in Auction No. 35 compared with previous C block auctions. Auction No. 58 now represents the first real opportunity for DEs to obtain PCS spectrum in almost ten years, given the return of all the NextWave licenses that Auction No. 35 bidders were never able to acquire. The results of Auction No. 35, the first PCS auction completed under these DE rules, demonstrate that both large carriers and small entrepreneurial firms have an equal chance to succeed in an FCC auction, and Auction No. 58 will be the first means to effectuate this opportunity.

In Auction No. 35, national carrier Verizon Wireless bid \$8.8 billion for wireless spectrum. At the same time, DE participant Alaska Native Wireless was the

^{3/} See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Sixth Report & Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000) ("*Sixth Report & Order*").

^{4/} *Sixth Report & Order*, 15 FCC Rcd 16267 ¶ 1 ("The [rule] modifications also will apply to any subsequent auctions of C or F block licenses, including any spectrum made available or reclaimed from bankruptcy proceedings in the future.").

second highest winning bidder – bidding \$2.9 billion. Even more impressive, analysis reveals that the 32 DE high bidders in Auction No. 35 won 45 percent of all licenses by value, thereby demonstrating that DE participants contributed to the overall strong showing of all auction participants. Indeed, these auction results plainly demonstrate – in real terms – that the current rules provide an equitable opportunity for all types of bidders, whether large or small.

Indeed, when the Commission developed the current DE rules, it struck a reasonable balance between the various goals of Section 309(j). ^{5/} The DE rules as written satisfy Congress’s directive that the Commission establish a meaningful program to enhance diversity and promote small business presence in the wireless communications marketplace. ^{6/} In addition, the current rules serve the Treasury’s interest of optimizing returns by providing the regulatory certainty necessary for small players in particular to obtain the necessary financing. ^{7/}

II. THE COMMISSION SHOULD ESTABLISH A PERSONAL NET WORTH LIMITATION FOR COMPETITIVE BIDDING SMALL BUSINESS PREFERENCE ELIGIBILITY PRIOR TO COMMENCING AUCTION NO. 58

The Commission’s DE program was designed to secure opportunities to participate in the provision of spectrum-based services for smaller businesses and businesses owned by members of minority groups and women, consistent with the

^{5/} *Sixth Report & Order*, 15 FCC Rcd 16278-79 ¶ 23.

^{6/} *Id.*; see also 47 U.S.C. § 309(j)(3)(B).

^{7/} *Sixth Report & Order*, 15 FCC Rcd 16279 ¶ 23; see also 47 U.S.C. § 309(j)(3)(C).

intent of Congress to promote economic opportunity where it might not otherwise exist. When it enacted Section 309(j) to give the Commission auction authority, Congress was concerned that a system of competitive bidding would tend to favor only those with deep pockets. To address this concern, the Commission has undertaken to see that the provisions relating to DEs are reserved for those that legitimately need lower entry barriers to join the wireless marketplace.

Ten years later, however, high net worth individuals have recognized that the Commission does not count personal wealth in assessing the size of a business that applies for auction-related bidding credits or set-asides. If a high net worth individual does not have his or her wealth tied to ownership of other businesses – or if such other businesses have few or no gross revenues – the Commission’s approach leaves the door open for that individual to benefit from government incentives meant for much smaller enterprises. This flaw threatens the very availability of competitive bidding preferences for true DEs.

To address this problem, Council Tree urges the Commission to look to the Small Business Administration’s small disadvantaged business program, where a concern is not eligible to participate if any attributable investor in the applicant has personal net worth above certain levels. ^{8/} Specifically, in addition to applying such other limitations as it uses to establish small business preference eligibility (*e.g.*, gross

^{8/} Council Tree recommends that, in implementing new personal net worth rules, the Commission establish this value at approximately \$3 million (which excludes the value of the investor’s ownership in the applicant and the value of the investor’s equity in his primary personal residence) for certain auctions – such as this highly-valued broadband PCS spectrum.

revenue tests), the Commission should provide that no competitive bidding preference made available based on business size shall be awarded to an applicant if the personal net worth of any attributable individual investor exceeds a minimum cap. This limitation should be applied by the Commission only to an individual with both a controlling interest in the applicant under the Commission's rules *and* an appreciable equity interest in the applicant. The limitation also should be applied to affiliates of a controlling interest holder with an appreciable equity stake.

Under this approach, officers and directors with no meaningful equity stake in an applicant will not be affected. Similarly, wealthy individuals without a controlling interest in an applicant will still be free to invest. It will be wealthy individuals masquerading as DEs who will – and should – be denied access to the DE program. Establishing and enforcing this rule will help to ensure that the incentives offered in the competitive bidding process will be reserved for those that need them to participate in the provision of spectrum-based services. It will also help to preserve the DE program by adhering strictly to the intent of Congress, not promoting the interests of deep pockets.

Accordingly, Council Tree urges the Commission to amend Part 1 of its rules to include a personal net worth limitation for competitive bidding small business preference eligibility prior to commencing Auction No. 58. The Commission must ensure that its DE program is administered in a manner consistent with the goals of Congress.

III. THE COMMISSION MUST REMEDY THE DIMINISHED PROPORTION OF “CLOSED” LICENSES AVAILABLE IN AUCTION NO. 58

As the ability to bid on Closed licenses is crucial to a DE’s success, and the availability of Closed licenses in Auction No. 58 has been severely diminished when compared with Auction No. 35, Council Tree urges the Commission to include for auction a higher number of Closed licenses than those set forth in the *Public Notice*.

Even a cursory review of the *Public Notice* highlights the dramatically reduced number of Closed licenses available for bidding by DE participants in Auction No. 58. Specifically, Council Tree’s analysis demonstrates that the amount of Closed spectrum in Auction No. 58 has declined by 39 percent when compared with the Auction No. 35 offering – from 1.71 billion MHz POPs available in Auction No. 35 to 1.04 billion MHz POPs available in Auction No. 58, a total decline of 690 million MHz POPs. This decline relates in part to NextWave retaining licenses in entire markets, keeping both Open and Closed alike as it did in New York City with 30 MHz, for example. However, a significant amount of the decline in Closed licenses – 329 million MHz POPs, or 49 percent of the decline – is explained in other split markets (markets where spectrum was divided among the FCC, NextWave and/or Cingular) simply by choices made relating to *which* licenses in a split market were returned to the FCC for auction, as described below, and which licenses within that same market were retained by NextWave or assigned to Cingular.

For example, Exhibit A illustrates a 17 market subset of Auction No. 58 markets which previously, in Auction No. 35, had offered a total of 51 C block licenses for sale at that time. Of those 51 licenses offered in Auction No. 35, just 30 are now

offered for sale in Auction No. 58. The remaining 21 licenses were either retained by NextWave (4 licenses) or previously assigned by NextWave to Cingular (17 licenses). Tellingly, of those 21 licenses retained by NextWave or assigned to Cingular, the vast majority were Closed (18 licenses) and just 3 were Open licenses.

The choice of selecting Open versus Closed licenses was subjective in nature. The net result of those choices to either retain or assign Closed licenses in lieu of Open licenses, as illustrated in Column C of Exhibit A, was to dramatically reduce the pool of Closed licenses for DEs in the subsequent Auction No. 58. In fact, the number of available Closed licenses in this 17 market subset of Auction No. 58 markets has declined by 60%, from 30 licenses in Auction No. 35 to just 12 licenses in Auction No. 58. Even more dramatic is the decline in Closed MHz POPs in this 17 market subset from 435 million MHz POPs in Auction No. 35 to just 106 million MHz POPs in Auction No. 58, a decline in Closed licenses of 329 million MHz POPs, or 76 percent. This 329 million MHz POP decline in turn accounts for 49 percent of the overall decline in Closed licenses from Auction No. 35 to Auction No. 58.

As a result of these factors, there are far fewer Closed licenses (and associated MHz POPs) available for DE bidders in Auction No. 58. The Commission's DE program objectives were not served in the selection of POPs retained by NextWave or assigned to Cingular. Neither Cingular, nor the assignee of any of the Closed licenses currently held by NextWave for sale to third parties, will be bound by the Commission's rules applicable to Closed licenses. These circumstances amount to a

direct loss for the DE program, and have contributed heavily to the severely diminished number of Closed licenses available for Auction No. 58.

The optimal solution, and one that would be most consistent with the overall goals of the DE program, would be an undertaking by the Commission to precisely recreate the 1.71 billion MHz POPs offered in Closed bidding in Auction No. 35 by re-designating Open licenses to Closed licenses in sufficient amount to achieve that objective. Barring this, however, Council Tree urges the Commission at a minimum to re-designate licenses in the 17 market subset of Auction No. 58, as depicted in Column D of Exhibit A. This latter undertaking would remedy the fact that NextWave assigned Closed rather than Open licenses to Cingular in these markets, and that NextWave itself retained Closed versus Open licenses, and in doing so returned far fewer Closed licenses to the Commission to the detriment of the DE program, as discussed above. 9/

9/ We also note that the Commission's original rationale in establishing specific frequency bands for the C block Closed licenses is even less compelling now. At that time, the Commission reasoned that "the [specifically identified] closed band or bands will be adjacent to the F block spectrum. Because the bands will be contiguous, entrepreneurs that wish to aggregate newly acquired closed 10 MHz C block licenses with F block licenses may enjoy reduced base station facilities costs and simplified maintenance requirements." *Sixth Report & Order*, 15 FCC Rcd 16277 ¶ 20, n.58. Yet, also in the *Sixth Report & Order*, the Commission determined that F block licenses would be available for Open, rather than continued Closed, bidding. *Id.* 16279-81 ¶¶ 24-26. Thus, this alleged benefit applied only to incumbent F block PCS licensees, and would not have benefited new DE participants in Auction No. 35. Obviously, this benefit will not assist new DE bidders in the forthcoming Auction No. 58.

IV. THE SUBSTANTIALLY HIGHER MINIMUM OPENING BID PRICES REFLECT A REDUCED ENTRY OPPORTUNITY FOR DE PARTICIPANTS

Finally, Council Tree is concerned that the minimum opening bid prices in Auction No. 58 are now over four times higher on a weighted average per MHz POP basis than in Auction No. 35. This, in turn, may not only hamper entry opportunities, but may also suggest a greater focus on financial results in contravention of Section 309(j)(7)(B). In contrast, the upfront payments have remained essentially the same when compared with those set for Auction No. 35.

Particularly notable examples of this sharp increase in minimum opening bid prices include the Kansas City, Cincinnati, San Diego and Charlotte markets, where the minimums increased on a per MHz POP basis by 9.7x, 9.0x, 6.3x, and 6.2x, respectively, for Auction No. 58 compared with Auction No. 35. This situation raises the possibility that potential DE participants will have greater difficulty raising necessary capital or, at the least, will face higher capital costs. Thus, the higher minimum opening bid prices – and related difficulties they create – would stymie a DE's ability to participate in Auction No. 58, and thus serve as a barrier to entering the wireless marketplace.

Finally, Section 309(j)(7)(B) prevents the Commission from prescribing auction regulations "solely or predominantly" on the expectation of auction revenues. ^{10/} Rather, the Commission is obligated to ensure that its competitive bidding rules allow spectrum to be acquired by those who value it most highly, and

^{10/} 47 U.S.C. § 309(j)(7)(B).

increase the likelihood that innovative, competitive services will be offered to consumers. As noted earlier, the results of Auction No. 35 evidence the significant value that DE participants place on PCS spectrum. Moreover, the DE rules were designed to provide greater market access for new technologies and services, which are, very often, the province of entrepreneurs and small businesses. 11/

V. CONCLUSION

As the Commission moves forward to implement Auction No. 58, Council Tree urges the Commission to establish a personal net worth limitation for competitive bidding small business preference eligibility prior to the start of the auction. Council Tree also asks the Commission to replicate as closely as possible the proportion of Closed license offerings available in Auction No. 35. And finally, the substantially higher minimum opening bid prices reflect a reduced entry opportunity for DE participants and, as such, should be reduced to levels more consistent with Auction No. 35.

Respectfully submitted,

/s/ Steve C. Hillard

Steve C. Hillard

George T. Laub

Jonathan B. Glass

Council Tree Communications, Inc.

110 North Rubey Drive Suite 201

Golden, Colorado 80403-2453

303-678-1844

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11/ See, e.g., Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration*, 16 FCC Rcd 1343, 1346 ¶ 7 (2001).

Exhibit A: Analysis of Auction No. 58 Markets in which NextWave Retained Licenses or Assigned Licenses to Cingular

Market Name	POPs	Tier	A. Auction #35 Bands Auctioned			B. Retained by NextWave or Assigned to Cingular			C. Auction #58 Proposed Bands (as set forth in Public Notice)			D. Council Tree Proposal for Revised Auction #58		
			C3	C4	C5	C3	C4	C5	C3	C4	C5	C3	C4	C5
El Paso, TX	0.7	2	10	10	10		10	10	10			10		
Los Angeles, CA	16.4	1	10	10	10	10	10				10			10
Portland, OR	2.1	2	10	10	10	10	10							10
Sarasota, FL	0.6	2	10	10	10	10	10							10
Allentown, PA	0.7	2	10	10	10	10			10				10	10
Denver, CO	2.7	1	10	10	10	10			10				10	10
Gainesville, FL	0.3	2	10	10	10	10			10				10	10
Hagerstown, MD	0.4	2	10	10	10	10			10				10	10
Houston, TX	5.0	1	10	10	10				10	10		10	10	10
Joplin, MO	0.2	2	10	10	10	10			10				10	10
Lakeland, FL	0.5	2	10	10	10	10			10				10	10
Manchester, NH	0.6	2	10	10	10	10			10				10	10
Portland, ME	0.5	2	10	10	10	10			10				10	10
Poughkeepsie, NY	0.5	2	10	10	10	10			10				10	10
San Diego, CA	2.8	1	10	10	10	10			10				10	10
Springfield, MO	0.7	2	10	10	10	10			10				10	10
Temple, TX	0.4	2	10	10	10	10			10				10	10
Total	35.2													

Bold = License retained by NextWave
 Non-Bold = Assigned to Cingular

MHz POPs (in millions)

	A. Auction #35	B. Retained by NextWave or Assigned to Cingular	% change from Auction 35		% change from Auction 35	
Closed	435	329	106	-76%	400	-8%
Open	622	222	400	-36%	106	-83%
Total	1,057	551	506	-52%	506	-52%

Number of Licenses

	A. Auction #35	B. Retained by NextWave or Assigned to Cingular	% change from Auction 35		% change from Auction 35	
Closed	30	18	12	-60%	27	-10%
Open	21	3	18	-14%	3	-86%
Total	51	21	30	-41%	30	-41%

Key:

 = Closed
 = Open