

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

In the Matter of)	
)	
Broadband PCS Spectrum Auction Scheduled for January 12, 2005)	Report No. AUC-03-58-A (Auction No. 58)
)	
Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures)	

To: Chief, Wireless Telecommunications Bureau

**COMMENTS OF DOBSON COMMUNICATIONS CORPORATION
AND REQUEST FOR WAIVER**

Dobson Communications Corporation (“Dobson”) hereby responds to the Wireless Telecommunications Bureau’s (the “Bureau’s”) *Public Notice* seeking comment on procedures with respect to the upcoming auction of broadband PCS licenses (Auction 58).¹ Dobson urges the Bureau to recognize the inequities that exist by reason of the sunset provision contained in Section 24.709(a)(5)(i) of the Commission’s rules² and to use its delegated authority over the conduct of these auctions to allow entities that were eligible to bid, and in fact participated in bidding, on licenses offered in “closed” bidding in Auction 35 to bid in the closed auction on certain of the licenses being offered in Auction 58.³

¹ *Broadband PCS Auction Scheduled for January 12, 2005*, Report No. AUC-03-58-A, *Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures*, DA 04-1639 (rel. June 18, 2004) (“*Public Notice*”). Pursuant to the *Public Notice*, Dobson is filing these comments electronically by email to auction58@fcc.gov.

² 47 C.F.R. § 24.709(a)(5)(i).

³ See *Public Notice* at 2 (“Some licenses are available to all bidders in ‘open’ bidding, while other licenses are available only to entrepreneurs in ‘closed’ bidding.”), *citing* 47 C.F.R. § 24.709(a)(4).

I. Introduction and Background

As the *Public Notice* acknowledges, the spectrum being put up for bid in Auction 58 was offered in previous auctions but has been returned to the Commission because of license cancellation or termination.⁴ The majority of the Auction 58 licenses authorize the use of spectrum recently returned to the Commission by NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. (collectively “NextWave”) under a settlement between NextWave and the government in NextWave’s bankruptcy proceeding.⁵ In addition, a number of licenses included in Auction 58 authorize the use of spectrum that is being re-auctioned for the first time since the original C block auctions. As outlined in the *Public Notice* the Bureau intends that many of the Auction 58 licenses will be available for bidding only by entities that qualify on the application date as “entrepreneurs” under Section 24.709 of the Commission’s rules.⁶

Section 24.709(a)(5)(i) recognized a special qualification for “entrepreneur” status in any re-auction commencing within two years of March 23, 1999 (the commencement date of Auction 22) for entities who were eligible for and participated in the auction for frequency block C which began on December 18, 1995 (Auction 5), or the C block re-auction which began on July 3, 1996 (Auction 10) but who no longer meet the financial qualifications.⁷ Through its wholly-owned subsidiary DCC PCS, Inc. (“DCC PCS”), Dobson was eligible for

⁴ *Id.* at 1.

⁵ See *In re NextWave Personal Communications, Inc., et al.*, Case No. 98 B 21529 (ASH) (B. Ct. S.D.N.Y.), *Order Granting Motion Pursuant to Section 363 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002, 6004 and 9019 Approving Settlement and Releases*, signed May 25, 2004.

⁶ *Public Notice* at 1-2 and Attachment A – Part 1. Of the 234 licenses being put up for bid in Auction 58, 119 will be available only to entrepreneurs.

⁷ 47 C.F.R. § 24.709(a)(5)(i).

and participated as a small business in Auction 5.⁸ Thus, even though it had grown beyond the financial caps that normally determine “designated entity” status, Dobson was eligible for grandfathered status under Section 24.709(a)(5)(i) on all auctions initiated prior to March 23, 2001, including Auction 35, which commenced on December 12, 2000. All of the NextWave C block spectrum was offered by the Commission in Auction 35, and in that auction some of the licenses were restricted to bidding by entrepreneurs under the Commission’s rules. DCC PCS was the winning bidder for fourteen C block licenses in Auction 35, eleven of which encompassed spectrum that had been reclaimed from NextWave.⁹

However, after the U.S. Court of Appeals for the District of Columbia Circuit declared the Commission’s cancellation of NextWave’s licenses (which served as the predicate for Auction 35) to be unlawful and the U.S. Supreme Court subsequently affirmed the appellate court’s ruling, Dobson’s winning applications for those licenses were dismissed. In effect, therefore, with respect to these licenses, the Commission was prevented from providing through Section 24.709(a)(5)(i) the relief it intended to provide for entities such as Dobson.

Under the terms of its settlement of the government’s claims in the bankruptcy court, NextWave has returned much of its spectrum to the government, and the FCC is now again

⁸ See *Qualified Bidders and Bidding Instructions for December 18, 1995 Broadband PCS Auction*, Public Notice, Report No. AUC-95-05 (rel. Dec. 18, 1995); see also <http://www.fcc.gov/wtb/auctions> for Auction No. 5 round results indicating that DCC PCS placed bids.

⁹ In Auction 35, DCC PCS won C block licenses encompassing spectrum reclaimed from NextWave in the following markets: BTA010 (Allentown, PA), BTA029 (Baltimore, MD), BTA056 (Brownsville, TX), BTA059 (Bryan, TX), BTA226 (Kansas City, MO), BTA268 (McAllen, TX), BTA350 (Pittsburgh, PA), BTA401 (San Antonio, TX), BTA402 (San Diego, CA), BTA441 (Temple, TX), and BTA461 (Washington, DC). As noted above, NextWave’s successful challenge to the FCC’s cancellation of its licenses precluded the Commission from awarding these licenses to DCC PCS. DCC PCS did acquire three other C block licenses won in Auction 35: BTA136 (Fairbanks, AK), BTA221 (Juneau, AK), and BTA438 (Syracuse, NY). Dobson joined with other Auction 35 winning bidders, NextWave and the government in an agreement that would have confirmed the Auction 35 results. However, as the Commission is well aware, that agreement could not be effectuated because Congress did not enact required implementing legislation.

putting it up for bid. Using the same rules as were used for Auction 35, the Bureau proposed to auction much of the same spectrum for which DCC PCS was eligible to bid in Auction 35 – making Auction 58 essentially a “do-over” of Auction 35 as to the NextWave spectrum. Principles of equity and fairness, as well as the dictates of sound policy, should lead the Commission to ensure that entities who met the requirements for grandfathered status for Auction 35 retain this status for Auction 58 at a minimum with respect to the former NextWave spectrum that was offered in Auction 35 and is now again being offered in Auction 58. A strict application of the sunset provision of Section 24.709(a)(5)(i) would, however, preclude this result. Accordingly, Dobson respectfully requests that the Bureau grant a blanket waiver of Section 24.709(a)(5)(i) in order to allow Dobson (as well as other similarly situated parties) to retain grandfathered status and be eligible to bid on “closed” C block spectrum in Auction 58 that was previously put up for bid in Auction 35.

II. Under the Applicable Standard, Waiver of the Grandfathering Rule for Auction 58 Is Justified.

The Commission may grant a request for waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁰ As shown below, the waiver requested here meets both prongs of the waiver standard.

¹⁰ 47 C.F.R. § 1.925(b)(3).

A. The Underlying Purpose of the Grandfather Rule Would Not Be Served by Its Strict Application Here and Grant of the Waiver Would Serve the Public Interest.

The Commission adopted Section 24.709(a)(5)(i) during its restructuring of the C block, in response to pleas from financially troubled C block PCS licensees. The purpose of the grandfather rule was to recognize the rights of auction participants in the original C block auction to participate in any re-auction of the spectrum being returned to the agency as a result of those troubled licensees' financial difficulties. This right was extended to those original C block auction participants whose success would otherwise render them ineligible for future re-auctions of C block spectrum (beginning with Auction 22). The grandfathering rule would allow successful entrepreneurs – who had overcome the various problems that other C Block licensees had not – to have a “second bite at the apple.” The Commission considered this the “appropriate” course due to the “complex issues” involved in the original C block auction.¹¹ Deeming that such relief should not be available forever, the Commission created a sunset of two years for this relief.

Of course, when it adopted the grandfather rule, the Commission obviously could not have anticipated how complex the issues surrounding NextWave's bankruptcy would become, how much time would pass before those issues were finally resolved, or that a substantial amount of this original C block spectrum initially made available in Auctions 5 and 10 would first be made effectively available for re-auction only now. Auction 35 began within the two-year timeframe specified in the Section 24.709(a)(5)(i), and so DCC PCS had grandfathered status to bid on closed licenses in that auction. As the Commission is well-

¹¹ *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd 15743, 15752, 15768 (1998).

aware, however, it is only because of an unprecedented series of events, including a Supreme Court reversal and a failure of Congressional action, that the results of Auction 35 with respect to former NextWave spectrum could not be effectuated. Put simply, the “second bite” the Commission intended to provide by the grandfather rule for Auction 35 has been deferred until now. The purposes of Section 24.709(a)(5)(i) therefore would not be served by enforcing its time limitation for Auction 58.

Grant of the requested limited waiver of the grandfather rule would serve the same public interests that led the Commission to adopt the rule in the first place. DCC PCS competed for licenses in the original C block auctions, but withdrew from the auction when prices rose above levels it considered supportable. Dobson pursued an alternative growth strategy, under which it has successfully grown beyond the financial caps normally applied to determine entrepreneur status. The history of the C block vindicated Dobson’s bidding strategy in the original auctions, and the grandfather rule appropriately enabled entities like Dobson to bid on closed licenses in Auctions 22 and 35. After being unable to effectuate the results of Auction 35 with respect to the NextWave spectrum, the Commission is now again auctioning some of these same licenses. Granting the requested waiver and extending grandfather rights to formerly eligible participants would thus advance the same public interest considerations that led the Commission to adopt the grandfather rule in the first place – ensuring fair and impartial treatment for all auction participants, preserving the integrity of the auction process, and maintaining public confidence in the stability of the Commission’s auction rules.¹²

¹² See *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, 8348 (1998).

B. Under the Unique Circumstances Presented Here, Barring Dobson From Eligibility to Bid On the Former NextWave Spectrum Would Be Inequitable and Contrary to the Public Interest.

In granting an unprecedented waiver of its unjust enrichment rules in connection with a proposed sale of NextWave licenses to Cingular Wireless LLC, the Commission recently expressed its view that:

the unique facts and circumstances of the history of the NextWave litigation render a strict application of the installment payment unjust enrichment rules to [the proposed sale] contrary to the public interest.¹³

The Commission found that the circumstances involved in the NextWave litigation “differ significantly from *any other context*” in which it had considered the application of its rules.¹⁴

The requested limited waiver of the two-year restriction in the grandfather rule should be similarly viewed in the context of these same unique circumstances. Under the grandfather rule, DCC PCS was able to bid on and win closed licenses encompassing former NextWave spectrum in Auction 35, and it is only because of the unique twists and turns of the NextWave litigation that Auction 35’s results could not be effectuated. DCC PCS would be the current licensee of the NextWave spectrum it won in Auction 35 had had it not been for two extraordinary events that were beyond its control: the reversal of the FCC’s cancellation of NextWave’s licenses; and Congress’s failure to enact legislation to implement the post-Auction 35 settlement agreement.¹⁵ Now that the government and NextWave have

¹³ *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC*, WT Docket No. 03-217, *Memorandum Opinion and Order*, 31 CR 1099, para. 44 (rel. Feb. 12, 2004).

¹⁴ *Id.* at para. 43 (emphasis added).

¹⁵ DCC PCS was fully prepared to follow through on all of its Auction 35 bids. DCC PCS was an active participant in the negotiations that led to the ill-fated settlement among Auction 35 winning bidders, NextWave and the government, and stood ready to pay for the eleven former NextWave licenses on which it was the

settled their claims, some of the very same spectrum that was offered in Auction 35 is again being offered by the FCC in Auction 58. Applying the time restriction set forth in Section 24.709(a)(5)(i) in these unique circumstances would be highly inequitable to Dobson and to all other similarly situated entities.

The equities weigh heavily in favor of waiving of the grandfather rule's sunset provision to allow original C block auction participants a renewed opportunity to bid on spectrum being lost to them by result of the NextWave litigation and/or lack of Congressional approval for an arranged settlement. The Commission can grant this relief without undermining the public interest, as it has previously found that all participants will have a meaningful opportunity to bid on the closed licenses notwithstanding an extension of the grandfathering provisions.

Nor would grant of the requested waiver compromise any other public interest considerations; to the contrary, the Commission has previously found that small and very small business can compete effectively with grandfathered auction participants. Specifically, in rejecting the use of bidding credits in closed auctions, the Commission stated that it was "not persuaded that small and very small businesses will be unable to effectively compete against 'grandfathered' entities," and that it did "not want to undermine the 'grandfather' exception."¹⁶ The Commission added that "[w]e continue to believe that small

winning bidder if that settlement had been consummated. In any event, DCC PCS made full payment for the three licenses won in Auction 35 which did not involve former NextWave spectrum.

¹⁶ *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Order on Reconsideration*, 16 FCC Rcd 1343, 1354 (2001).

and very small businesses will have a meaningful opportunity to compete in Auction No. 35 and in future spectrum auctions.”¹⁷

III. Conclusion.

As demonstrated above, both of the waiver standards set forth in Section 1.925 of the Commission’s rules are met by the instant request. The Bureau therefore should waive the two-year time restriction set forth in Section 24.709(a)(5)(i) to enable entities who had grandfathered eligibility to bid on closed licenses in Auction 35 to have that eligibility preserved with respect to closed licenses being offered in Auction 58. At a minimum, the waiver should allow Auction 35 grandfathered entities to again bid on closed licenses in Auction 58 that cover the exact same spectrum as the licenses auctioned in, but not awarded through, Auction 35.

Respectfully submitted,

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¹⁷ *Id.*