

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In The Matter Of)	
)	
Broadband PCS Spectrum Auction Scheduled)	DA 04-1639
for January 12, 2005)	
Comment Sought on Reserve Prices or Minimum)	Report No. AUC-03-58-A
Opening Bids and Other Auction Procedures)	
_____)	

REPLY COMMENTS OF QUALCOMM INCORPORATED

QUALCOMM Incorporated (“QUALCOMM”) submits this reply to urge the FCC to adopt open bidding rules for Auction 58 to permit all bidders to bid for all of the licenses to be auctioned, instead of applying the Auction 35 rules, which would preclude non-designated entity (“DE”) bidders from bidding on more than half of the PCS licenses to be auctioned.

I. Introduction

As set forth more fully herein, the Commission has a legal duty to reexamine its auction rules in light of changed circumstances that have taken place after their adoption. It is undeniable that the wireless industry has changed dramatically since the Commission adopted the rules for Auction 35 in 2000. Since then, a total of nine carriers in the United States have deployed 3G wireless technology, offering a wide variety of advanced wireless services, and additional deployments are under way. Two carriers, Verizon Wireless and Sprint PCS, are in the midst of deploying high speed wireless broadband service, known as 1xEV-DO, on a nationwide basis. Other carriers, including Cingular Wireless and AT&T Wireless, are in the process of deploying 3G technology known as WCDMA or UMTS. The total number of wireless subscribers in the United States has grown quite rapidly—from approximately 97

million people in 2000 to over 166 million today. Subscribers have come to insist that their carriers' footprints extend wherever they go. Despite the inherent spectral efficiency of CDMA technologies, when faced with this burgeoning demand and use, wireless carriers, even those deploying some flavor of CDMA, need additional spectrum to expand their footprints to keep up with the demand.

Going forward with the auction under the old Auction 35 rules, as set forth in the Bureau's Public Notice, would ignore these marketplace realities, and on this basis alone, the Commission should reconsider the Public Notice and open up the bidding on all of the licenses to all bidders. Furthermore, it is especially important that the Commission do so because the spectrum at issue has not been used to serve anyone for many years now, and setting aside the majority of the spectrum for DEs, many of whom will likely be start-ups, is bound to cause even further delays in the use of some of this spectrum. The Commission's own experience with setting aside broadband PCS spectrum for DEs, a history replete with litigation and delay after delay that frustrated the initiation of service, is more than ample justification for the Commission not to hold Auction 58 with a set-aside of spectrum for DEs. No commenter in this proceeding has supplied, or could supply, a sufficient justification for the Commission to hold Auction 58 with more than half of the licenses set aside for DEs in light of the current realities in the wireless marketplace and the past history with such set asides in broadband PCS auctions.

The public interest lies in seeing that this long fallow PCS spectrum is finally and quickly put to use. Excluding most of the nation's wireless carriers from bidding for more than half of the PCS licenses at stake, and failing even to consider changes to the rules, would be contrary to the public interest.

For all of these reasons, QUALCOMM urges the Commission to reconsider the Public Notice and to start a rulemaking to consider changing the rules to govern Auction 58 so that all bidders can bid on all of the licenses.

II. The Commission Should Reconsider the Public Notice and Start a Rulemaking to Change the Rules to Govern Auction 58 so That All Bidders Can Bid on All of the Licenses to Be Auctioned

As Verizon Wireless pointed out in its Comments, courts have long held that the Commission cannot continue to apply rules or policies when the circumstances that gave rise to the rules or policies when they were adopted no longer apply. *See, e.g., Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), quoting *WWHT v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) (“it is settled law that an agency may be forced to reexamine its approach ‘if a significant factual predicate of a prior decision . . . has been removed.’”); *Meredith Corp. v. FCC*, 809 F. 2d 863, 874 (D.C. Cir. 1987), quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943) (“If time and changing circumstances reveal that the ‘public interest’ is not served by the application of the regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.”); *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (“Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. It can hardly be supposed that the vitality of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continued operation.”).

Accordingly, there should be an examination of the current wireless marketplace and whether the Commission needs to change its rules before Auction 58 proceeds under the same rules as governed Auction 35, as would occur under the Public Notice. Even parties seeking DE status, such as Council Tree Communications (“Council Tree”) and Dobson Communications

(“Dobson”), concede that the Commission needs to consider changes to the rules. See Council Tree Comments at Pages 5-10; Dobson Comments at Pages 1-9.

Some Comments filed by the parties who support use of the Auction 35 rules in Auction 58 all paid little or no attention to facts regarding the current marketplace, instead simply saying that Auction 35 raised a great deal of money, a non sequitur, and that the wireless industry is consolidating. See, e.g., Comments of Alta Communications at 1-2; Comments of Doyton, Limited at 1-2; Colonna Spectrum at 1-2. The wireless industry is consolidating because carriers are trying to deploy 3G services as quickly as possible, and they need a bigger footprint, with more spectrum, to keep up with consumer demand. The public interest will not be furthered by keeping more than half of the spectrum at stake in Auction 58 out of the hands of the carriers who need it most.

In 2000, when the Commission last reviewed its auction rules, no carrier had yet deployed 3G technology. Today, the U.S. wireless market is very different. As already noted, today, a total of nine carriers in the United States have deployed various 3G technologies.¹ Two carriers, Verizon Wireless and Sprint PCS, are in the midst of deploying high speed wireless broadband service, known as 1xEV-DO, on a nationwide basis. Other carriers, including Cingular Wireless and AT&T Wireless, are in the process of deploying 3G technology known as WCDMA or UMTS. The total number of wireless subscribers in the United States has grown quite rapidly—from approximately 97 million people in 2000 to over 166 million today.

Total minutes of wireless use are up over 400% from 2000 through the present. There are now more minutes of use of wireless than wireline service. By any indicator, ranging from

¹ These carriers are: Verizon Wireless, Sprint PCS, ALLTEL, US Cellular, Western Wireless, Cellular South, NTELOS, Kiwi PCS, and Leap Wireless. Additional information about 3G technology and deployments is available at www.3gtoday.com.

minutes of use for wireless voice to numbers of data downloads or bandwidth of data downloaded to overall average revenue per user, the demand for wireless services in the United States is at record levels. Despite the inherent spectral efficiency of CDMA technologies, when faced with this burgeoning demand and use, wireless carriers, even those deploying some flavor of CDMA, need additional spectrum to expand their footprints to keep up with the demand.

Thus, it is against this backdrop of fundamentally changed circumstances that the Public Notice was released, which makes no change in the Commission's auction rules to take account of these changes. Based on the changed circumstances, the Commission should reconsider the Public Notice and permit all bidders to bid on all licenses.

Over and above the changed circumstances, there are other reasons why the Commission should change the rules to govern Auction 58. The Commission should not ignore history. Despite the best of intentions, the DE concept has not lead to a proliferation of new small business deploying innovative services on PCS spectrum, as originally envisioned. Instead, for a whole variety of reasons, the Commission has been mired in litigation on top of litigation, and the C and F Block PCS spectrum set aside for DEs in Auction 58 under the Public Notice has not been used to deliver commercial service to anyone. At the same time, the Commission has effectively abandoned the concept of spectrum set-asides for DEs in all other services and auctions as the Commission has conducted countless spectrum auctions using bidding credits, not set asides, to encourage the participation of small businesses.

The public interest in the conduct of Auction 58, particularly in light of the historic problems with setting aside the particular spectrum at issue for DEs, lies in the FCC ensuring that the spectrum is finally used to deliver service to the public as quickly as possible. That objective will be thwarted if the FCC precludes the nation's non-DE wireless carriers, who are so

well positioned to put this spectrum to use as quickly as possible to yield immediate and important benefits for the public, from bidding on more than half of the licenses to be auctioned.

At the end of the day, in all likelihood, whether through post-auction transactions, joint ventures, management agreements, or non-controlling investments in various DEs, the nation's non-DE wireless carriers will ultimately gain access to much if not all of the spectrum set aside to DEs under the Public Notice. The set aside will only make the process more time consuming and more expensive and permit financial players to reap windfall profits as a result of the financial opportunity borne in the FCC rules, rather than as the result of any true innovation. The FCC should not force the use of these financial vehicles and instead should let the non-DE wireless carriers bid in their own names for all the licenses so they can deliver the innovative services that the public wants as quickly and as inexpensively as possible.

III. Conclusion

Wherefore, QUALCOMM respectfully requests that the Commission reconsider the Public Notice and start a rulemaking to change its rules to permit all bidders to bid for all the licenses at issue in Auction 58.

Respectfully submitted,

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