

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

In the Matter of	)	
	)	
Broadband PCS Spectrum Auction Scheduled for January 12, 2005	)	DA 04-1639
	)	
Comment Sought on Reserve Prices or Minimum Opening Bids and other Auction Procedures	)	Report No. AUC-03-58-A (Auction No. 58)
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**REPLY COMMENTS OF T-MOBILE USA, INC.**

T-Mobile USA, Inc. (“T-Mobile”) hereby respectfully submits this reply to the comments made in response to the Wireless Telecommunications Bureau’s (“Bureau”) Public Notice<sup>1</sup> regarding procedures for Auction No. 58.<sup>2</sup> The vast majority of comments filed in this proceeding, however, address not the auction procedures the Bureau proposes but the Commission’s establishment of restricted eligibility for the majority of licenses available for auction.<sup>3</sup> Based upon Administrative Procedure Act (“APA”) notice and comment rulemaking

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<sup>1</sup> Public Notice, *Broadband PCS Spectrum Auction Scheduled for January 12, 2005, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures*, DA 04-1639, Report No. AUC-03-58-A (Auction No. 58) (June 18, 2004) (“Public Notice”). All citations to initial comments filed in response to this Public Notice will be short cited herein.

<sup>2</sup> Through these Reply Comments, T-Mobile indicates its full support for the initial comments filed by Verizon Wireless and CTIA.

<sup>3</sup> In 1995, the Commission established that 30 MHz “C” block and 10 MHz “F” block PCS licenses would be set aside for small businesses and women and minority owned businesses (designated entities (“DEs”)). *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, ¶ 115 (1994). More recently, in 2000, the Commission liberalized the restricted nature of these licenses and allowed non-DEs to bid for a portion of this spectrum. *See Amendment of the Commission’s Rules*

requirements, any decision resulting from the Bureau’s Public Notice cannot substantively address this issue. Nevertheless, in proceeding with Auction No. 58, the Commission should recognize that the wireless environment has dramatically changed since its original decision—nearly a decade ago—to limit the availability of these licenses to particular classes of eligible parties. Because bidding eligibility is clearly an issue of the utmost importance to all of the commenters in this proceeding, T-Mobile believes the Commission should expeditiously initiate a proceeding (whether a rulemaking or waiver process) to fully consider whether the use of restricted bidding continues to be the most efficient and effective mechanism for deploying these licenses in a manner consistent with the public interest.

**I. THE RECORD BEFORE THE AGENCY DEMONSTRATES THE NEED TO PROCEED EXPEDITIOUSLY TO A RULEMAKING OR WAIVER PROCESS ON ELIGIBILITY ISSUES FOR AUCTION NO. 58.**

In its Public Notice, the Bureau did not—and could not under the APA—address changes to the rule that limits bidding on the majority of licenses to entrepreneurs and small businesses.<sup>4</sup> Nonetheless, this was the primary issue raised by the comments filed in response to the Public Notice. The variety of comments filed by large<sup>5</sup> and small wireless providers,<sup>6</sup> private

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*Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Sixth Report and Order and Order on Reconsideration, 15 FCC Rcd 16266, ¶ 2 (2000) (“*C/F Block Sixth R&O*”). Specifically, the Commission restricted bidding for 10 MHz of “C” Block spectrum to DEs in Basic Trading Areas (“BTAs”) with populations equal to or greater than 2.5 million and for 20 MHz of C Block spectrum to DEs in all other BTAs. *See id.* According to the Public Notice, only 115 licenses will be available to all bidders while 119 licenses will be restricted to DEs. Public Notice at Attachment A – Part 1.

<sup>4</sup> See Public Notice at 2 (merely stating which licenses will be subject to open and closed bidding).

<sup>5</sup> See Verizon Wireless Comments.

<sup>6</sup> See 3G PCS Comments; Arctic Slope Regional Corporation Comments; Coloma Spectrum Comments; Dobson Communications Comments; Doyon Comments; Highland

investment companies,<sup>7</sup> and a number of organizations representing different interests<sup>8</sup> indicates that the eligibility issues associated with Auction No. 58 are of critical importance to the industry. CTIA – The Wireless Association (“CTIA”) has also separately and independently filed a petition for rulemaking and/or waiver request to address eligibility issues arising from Auction No. 58.<sup>9</sup>

The procedural posture of this record, which has been developed in response to a Bureau-level Public Notice, will not permit the Commission to substantively address the core record issues under the notice and comment rulemaking provisions of the APA. Therefore, T-Mobile believes the Commission should promptly take administrative notice of the record before it, as well as CTIA’s request for a rulemaking and/or waiver, and initiate proceedings that would provide the agency with the procedural structure necessary to address the issues raised by the industry as a whole. In this regard, T-Mobile applauds the Commission for placing the CTIA

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Cellular Comments; Vincent D. McBride and Scott D. Reiter Comments.

<sup>7</sup> See Alta Communications Comments; Catalyst Investors Comments; Council Tree Communications Comments; Madison Dearborn Partners Comments; Maxicom PCS Comments.

<sup>8</sup> See CTIA Comments (representing the mobile industry); American Women in Radio and Television Comments (representing professional women and men who work in radio, television, cable, broadcast, advertising, and other communications related fields); Designated Entity Program Supporters Comments (representing groups such as the Minority Media and Telecommunications Council, Hispanic Americans for Fairness in the Media, and the NAACP); Rural Telecommunications Group Comments (trade association dedicated to promoting wireless opportunities for rural telecommunications companies).

<sup>9</sup> CTIA – The Wireless Association, *Petition for Expedited Rulemaking or, Alternatively, a Waiver of the Closed Bidding Rules for C Block Licenses in the Broadband Personal Communications Services*, RM-11019 (filed July 8, 2004) (“CTIA Petition”).

Petition on Public Notice and encourages the Commission to diligently and expeditiously review the comments received in response.<sup>10</sup>

As such, the initiation of a narrowly tailored rulemaking to address eligibility concerns need not in the near term unduly delay the auctioning of this spectrum and will actually expedite the deployment and efficient use of the spectrum in the long term. The Commission has in the past successfully completed expedited rulemakings addressing issues surrounding an auction. For example, in 2000, in reviewing the rules to be used for Auction No. 35, the Commission initiated and completed a rulemaking addressing and ultimately revising the eligibility rules within 3 months.<sup>11</sup> On the other hand, experience has shown that designated entity (“DE”) relationships result in significant delay due to the work associated with reviewing DE financing and business relationships post-auction and can often lead to appeals to the full Commission and litigation.<sup>12</sup> Historically, as well, DEs have struggled to deploy PCS, which is a service that requires significant capital investment and economies of scale and scope to succeed. The many bankruptcies and subsequent acquisitions of DEs well document the difficulty most DEs have

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<sup>10</sup> Public Notice, *Petition for Rulemaking Filed, Petition for Expedited Rulemaking or, Alternatively, a Waiver of the Closed Bidding Rules for C Block Licenses in the Broadband Personal Communications Services*, Report No. 2663 (July 15, 2004).

<sup>11</sup> See *Amendment of Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Further Notice of Proposed Rulemaking, 15 FCC Rcd 9773 (June 7, 2000) (seeking comment on bidder eligibility for Auction No. 35 and announcing comments were due June 22, 2000, reply comments were due June 30, 2000, and ex parte presentations were allowed only until July 12, 2000); *C/F Block Sixth R&O* (Aug. 29, 2000) (modifying the eligibility rules for the C and F blocks). Auction No. 35 subsequently began on December 12, 2000.

<sup>12</sup> See e.g., *Applications of Alaska Native Wireless, LLC, Auction No. 35 – C & F Block Broadband PCS*, Order, 17 FCC Rcd 4231 (2002). In this instance, the review of the DE status of Alaska Native took approximately 15 months to resolve post-auction.

had providing viable service to date.<sup>13</sup> The FCC must take note of these failings and ensure that the public interest is served in how it deploys the remaining PCS spectrum.

**II. ALL LICENSES IN AUCTION NO. 58 SHOULD BE OPEN TO BIDDING BY ALL INTERESTED COMPETITORS.**

As the Commission itself has recently recognized, the wireless industry is an extremely competitive market, offering ever-expanding services to consumers.<sup>14</sup> T-Mobile, as well as the other wireless service providers, are striving to improve service quality and meet the rapidly growing demand by consumers for existing voice and data as well as advanced wireless services.<sup>15</sup> However, the provision of such services is necessarily limited by providers' access to additional spectrum suitable to provide them. Since Auction No. 35, which was largely set aside when the Supreme Court ruled in NextWave's favor on its bankruptcy claims, the Commission has not auctioned any unencumbered spectrum that can be directly utilized by the wireless industry to provide current and future mobile services. As such, the licenses available in Auction No. 58 should be widely disseminated to all interested parties who have a need for such spectrum to support current and future advanced services. T-Mobile, as an incumbent PCS provider with nearly 15 million subscribers nationwide, continues to have ongoing requirements for improved service quality for its voice and data services. Denying our company direct access to such spectrum in an arbitrary manner not only hurts consumers but undermines competition in the

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<sup>13</sup> See, e.g., *In re NextWave Personal Communications, Inc. et. al.*, 235 B.R. 263 (Bankr. S.D.N.Y. 1998); *In re Urban Communicators PCS limited Partnership*, Case Nos. 98-B-47996, 98-B-47997, 98-B-10086 (Bankr. S.D.N.Y. 1998) (Jointly Administered).

<sup>14</sup> 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 Services*, Eighth Report, 18 FCC Rcd 14783, ¶ 12 (2003) (concluding that "there is effective competition in the CMRS marketplace").

<sup>15</sup> See *id.* at ¶ 17 (noting the increasing demand for wireless voice and data services).

existing marketplace. While companies such as ours might partner with DEs to gain access to this important spectrum, such an approach greatly adds to transaction costs, imposes operational inefficiencies and business burdens, and inhibits the spectrum from going to those that value it most in the marketplace and are most likely to provide service – a result clearly not in the public interest. To compound the problem even further, additional spectrum will likely not be available for PCS use by non-DEs for a number of more years, unless the Commission alters its current structure for Auction No. 58.

Unrestricted bidding will allow this spectrum to be deployed expeditiously for its most highly valued use while also promoting competition in the national and regional wireless markets. As the fifth largest wireless provider in the U.S., T-Mobile is seriously evaluating all opportunities to obtain additional spectrum, including Auction No. 58, as it strives to compete more effectively on a national scale in the wireless market. The Commission's arbitrary decision to limit bidding on over half of the licenses available in Auction No. 58, however, limits competition for these frequencies, thereby curbing the ability of all national and regional providers, including T-Mobile, to effectively grow and provide improved service and competition. A decision on the eligibility for these licenses is too important to simply allow the status quo dictate the allocation of these scarce resources. Rather than perpetuate what the Commission has since recognized as a failed and abandoned policy of restricted licensing, the Commission must strive to seriously evaluate the effects of artificially constraining the availability of these licenses through public comment and rulemaking procedures.

As the Commission itself has recognized, Section 309(j)'s requirements for DEs are more effectively met by the use of bidding credits. Neither Section 309(j), nor any other section

of the Communications Act, requires a spectrum “set aside” for small businesses.<sup>16</sup> Instead, the Communications Act requires the Commission to disseminate licenses among a variety of applicants and promote economic opportunity and competition through its bidding procedures.<sup>17</sup> Several commenters use this mandate as support for a “set aside” in Auction No. 58.<sup>18</sup> Such a stringent and grossly inefficient restriction on bidding that ultimately thwarts competition and harms customers, however, is completely unwarranted given that the goals of this section can be achieved by less drastic means.

With the exception of this spectrum, the Commission today has moved to an auction structure that exclusively uses bidding credits to ensure that small business can effectively compete against larger companies. The use of bidding credits has proven effective time and again. Nearly 80 percent of all the winning bidders in all the open auctions that utilized bidding credits were small businesses.<sup>19</sup> Furthermore, even in Auction No. 35, small businesses acquired almost half of the licenses available in open bidding through the use of bidding credits. These statistics clearly demonstrate the effectiveness of bidding credits in ensuring the dissemination of licenses among a variety of applicants. As such, the arbitrary decision to restrict bidding in Auction No. 58 and the resultant anti-competitive effects indicated above are clearly not justified in light of the fact that bidding credits are more effective at fulfilling the goals and mandates of Section 309(j).

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<sup>16</sup> *C/F Block Sixth R&O* at ¶ 22.

<sup>17</sup> 47 U.S.C. § 309(j)(3).

<sup>18</sup> *See, e.g., American Women in Radio and Television Comments* at 3.

<sup>19</sup> *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 18 FCC Rcd 25162, ¶ 148 (2003); *C/F Block Sixth R&O* at ¶ 22 n. 67.

**III. AT A MINIMUM, THE LICENSES RETURNED BY NEXTWAVE SHOULD BE SUBJECT TO OPEN BIDDING.**

Regardless of whether the Commission ultimately decides to retain closed bidding rules for some of the licenses being auctioned in Auction No. 58, the Commission must remove these limitations for licenses that were previously held by NextWave. Pursuant to Section 24.839 of the Commission's rules, DE restrictions on a license are removed after the licensee has fulfilled its five-year buildout requirements.<sup>20</sup> In April, 2003, NextWave fulfilled these obligations.<sup>21</sup> Thus, the restriction on non-DEs holding these licenses is no longer applicable. Indeed, had NextWave retained these licenses, it could have sold them, free of DE restrictions, to any wireless provider, as it did when it sold \$1.4 billion of licenses to Cingular last year or when it chose to conduct a private auction for a number of licenses earlier this month. Indeed, the Commission specifically consented to these licenses being acquired by non-DEs when it authorized NextWave to enter into the Cingular transaction and approved the resulting transfer of control applications.<sup>22</sup> Given the status of the NextWave licenses when the Commission re-acquired them—*i.e.* eligibility restrictions lifted, licenses freely transferable to non-DEs—it makes no sense for the Commission now to re-impose these restrictions, which have the effect of walling off these licenses from entities serving well over 90 percent of CMRS customers today.

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<sup>20</sup> 47 C.F.R. § 24.839(a)(1).

<sup>21</sup> *See, e.g.*, Application of NextWave Personal Communications Inc., File No. 0000837054 (filed Apr. 4, 2002) (granted Apr. 21, 2003) (acknowledging compliance with construction requirements for NextWave's Albany, NY license, KNLF669).

<sup>22</sup> *See, e.g.*, Application for Consent to the Assignment of License 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 Pacific Telesis Mobile Services, LLC, subsidiary of Cingular Wireless LLC, File No. 0001462360, Exhibit 1 at 4 (filed Sept. 26, 2003) (assigning C3 Block license for San Diego, CA, KNLF651).

Rather, good policy, good economics, and fairness and consistency dictate that the Commission not arbitrarily restrict bidding on these licenses to DEs.

**IV. CONCLUSION**

For the foregoing reasons, T-Mobile applauds the Commission for placing the CTIA's Petition on public notice with a shortened comment cycle and urges it to initiate a proceeding expeditiously so that it can promptly address the eligibility issues raised by commenters in response to the Public Notice.

Respectfully submitted,

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