

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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)

**COMMENTS OF VERIZON WIRELESS**

In the above captioned Public Notice, the Wireless Telecommunications Bureau announces that it has scheduled an auction of 234 broadband Personal Communications Service (“PCS”) licenses to commence on January 12, 2005 (Auction No. 58), and, in a business as usual manner, requests comment on “reserve prices or minimum opening bids and other auction procedures.”<sup>1</sup> Verizon Wireless has specific concerns as to one of the proposed procedures (see Section III of these Comments). The more fundamental flaw in the Public Notice, however, is the Bureau’s failure to seek comment on its plan to bar many interested parties from bidding on much of the spectrum to be auctioned. Instead, it proposes to use the Auction No. 35 rules, which set aside spectrum and reserve it for a restricted class of bidders. Without considering the legal or public interest ramifications of this prohibition, the Bureau would exclude many carriers from bidding on more than half the licenses included in Auction No. 58.

If, as the Commission has repeatedly said, the goal of the spectrum auction process is to ensure that parties that value licenses the highest will win them and will put them to prompt use,

---

<sup>1</sup> *Broadband PCS Spectrum Auction Scheduled for January 12, 2005, Comment Sought on Reserve Prices or Minimum Opening Bids and other Auction Procedures*, Public Notice, DA 04-1639, Report No. AUC-03-58-A (Auction No. 58) (rel. June 18, 2004) (“*Public Notice*”).

allowing all entities who value these licenses to bid is essential to achieving that goal. An open auction will allow market forces, not regulation, to ensure that those parties that most highly value the spectrum (and can thus be expected to put it to prompt use) are free to compete. Open eligibility is the course the Commission has followed in auctions for almost all other services, and it has held nearly 30 auctions to date using that mechanism.

While simply adhering to the rules for Auction No. 35 may be easier than changing them, administrative convenience is no excuse, and no lawful basis, for the Bureau or the Commission to shirk its statutory duty to adopt auction rules that serve the public interest and the goals of Section 309(j) of the Communications Act. This is particularly true where, as here, the Bureau provides no rationale for why it has deviated from the practice in most other auctions to allow open bidding. The second paragraph of the Public Notice indicates that more than half the licenses in Auction No. 58 will be closed to entities that do not qualify as “entrepreneurs” or “designated entities” (“DEs”) under the Commission’s rules, but provides no explanation. The Commission cannot and should not move forward under old auction rules that history and experience have proved a failure. It must reconsider the action in the Public Notice and take actions to permit the widest possible participation in Auction No. 58.<sup>2</sup>

**I. THE COMMISSION SHOULD ALLOW OPEN BIDDING FOR ALL LICENSES IN AUCTION NO. 58.**

Four years have passed since the Commission last looked at the issue of whether it should retain the set-aside of PCS licenses for “entrepreneurs” based on an assessment of the market at that time. Even four years ago, the Commission decided to make considerable changes to its

---

<sup>2</sup> The Cellular Telecommunications & Internet Association (“CTIA”) will be filing a petition today requesting an immediate rulemaking to provide for open auctions.

Entrepreneurs' Block policies in light of the changing marketplace, noting that that the PCS industry had changed dramatically since the implementation of its rules in 1994: "The introduction of wireless Internet, advanced data, and 3G services, and global competition within these services, has created a shortage of suitable available spectrum."<sup>3</sup> To the extent that the Commission was concerned then about a lack of suitable spectrum for commercial mobile radio service ("CMRS") expansion then, it should be even more concerned now. The number of wireless subscribers has increased exponentially, as have the number of minutes each subscriber uses. Furthermore, there has been an increase in data applications including mobile Internet access, text messaging and camera phones that portend an even greater reliance on wireless devices in the future. Since 2000, many carriers have completed the deployment of the first generation of mobile data with technologies permitting mobile access at 56-130 kbps, and are now introducing true mobile broadband services.<sup>4</sup> The change in the wireless landscape in the past four years leads inexorably to the need for more spectrum for existing carriers. The PCS spectrum that the Commission intends to auction in Auction No. 58 is perfectly suited to meet these needs.

Open eligibility for Auction No. 58 is particularly warranted because PCS spectrum is the only candidate for near term deployment of advanced services in the United States. The only

---

<sup>3</sup> See *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*; Sixth Report and Order and Order on Reconsideration ("Sixth Report and Order"), WT Docket No. 97-82, FCC 00-313, (rel. Aug. 29, 2000) at ¶ 23.

<sup>4</sup> Verizon Wireless was the first carrier to launch what will become a nationwide high-speed wireless data network, and its entry has already prompted competitive responses from other carriers who plan to offer their own broadband wireless services. Verizon Wireless first offered its EV-DO service in San Diego and Washington, D.C. in October 2003, and has committed to invest \$1 billion over the next two years to deploy the service nationwide. EV-DO as well as other broadband services require additional spectrum. It makes no sense, and clearly disserves the public interest, to restrict the very carriers who will put new PCS spectrum to broadband and other uses to respond to growing public demand from bidding for such spectrum.

other expansion band is the Advanced Wireless Service (AWS) spectrum, which will take a number of years to clear of government users and make available for CMRS use. These facts make it even more essential that all carriers have an opportunity to compete in any auction of the remaining PCS spectrum.<sup>5</sup>

It is unclear what is compelling the Bureau to schedule Auction No. 58 without first considering how changed circumstances should affect the rules for this auction. Perhaps the Commission believes that going directly to auction without reconsidering its Entrepreneurs' Block rules would be the speedier course. This might be true if the goal were to ensure the shortest time to the start of the auction rather than the "rapid deployment of new technologies, products, and services for the benefit of the public."<sup>6</sup> The Bureau must adhere to auction rules that achieve the goals of Section 309(j), not simply default to past rules out of administrative convenience. Moreover, as the Commission knows from past experience, the process of reviewing DE arrangements post-auction is time-consuming and generally delays licensing, and thus service to the public. The Commission spent many months in exhaustive analysis over the qualifications of certain DE bidders in Auction No. 35, with the result that issuance of the licenses was considerably delayed.

In any event, a public interest analysis of whether all licenses in Auction No. 58 should be open to all bidders would not necessarily delay any auction. The Commission can expedite the rulemaking process and complete it well before the January 2005 planned start for that

---

<sup>5</sup> On March 31, 2004, Verizon Wireless filed a Petition with the Commission to auction the 1910-1915 and 1990-1995 bands (the "PCS G-Block"). More than three months later, the Commission has still not acted on this petition. Failure to designate those bands for auction underscores the need for open eligibility for Auction No. 58.

<sup>6</sup> See 47 U.S.C. §309(j)(3)(A).

auction (a date that itself appears arbitrary). In the prior auction of these licenses, Auction No. 35, the Commission moved from rulemaking to auction in only about six months.<sup>7</sup> It took even less time to move from rulemaking to the first Entrepreneurs' Block auction, Auction 5, when the Commission had to change the fundamental eligibility for participation after the Supreme Court's *Adarand* decision in 1995. The Commission started that auction less than six months after it issued the notice of proposed rulemaking, even though that auction was stayed in the interim.<sup>8</sup> There is no reason why a rulemaking needs to delay Auction No. 58.

Not only is there sufficient reason for the Commission to re-open the question of auction eligibility, there is also sufficient evidence for the Commission to lift all restrictions on eligibility to bid on C block licenses. An open regulatory regime for C block PCS licenses would best promote the overall goals of Section 309(j) by maximizing participation in Auction No. 58 and ensuring that this spectrum is put to use expeditiously by those that value it most.

Open bidding is also fully justified by the history of the PCS licenses scheduled for Auction No. 58. After several auctions and reauctions, there has now been an eight-year delay in putting this same spectrum to use. During this time there has been a five-fold increase in the number of wireless subscribers, from 33 million to more than 160 million.<sup>9</sup> As the Commission acknowledged four years ago, the business plans of many wireless carriers, small and large,

---

<sup>7</sup> See *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Further Notice of Proposed Rulemaking; WT Docket No. 97-82 (rel. June 7, 2000) ("*Auction No. 35 Further Notice*"); see also <http://wireless.fcc.gov/auctions/35/>.

<sup>8</sup> See *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Further Notice of Proposed Rulemaking; PP Docket 93-253 (rel. June 23, 1995); see also <http://wireless.fcc.gov/auctions/05/>.

<sup>9</sup> See CTIA's *Semi-Annual Wireless Industry Survey*; [http://www.ctia.org/public\\_policy/statistics/index.cfm/AID/10030](http://www.ctia.org/public_policy/statistics/index.cfm/AID/10030)

depend in part on obtaining additional spectrum to meet this demand for wireless service.<sup>10</sup> That fact is even more evident today. Carriers need additional spectrum to provide high-speed, wide-bandwidth technologies, multimedia Internet access, imaging and other advanced wireless services. Making additional PCS spectrum available will enable CMRS carriers to respond to the demand for existing services and these new spectrum-intensive services.

In contrast, nowhere in the evidence of phenomenal growth of demand for these services is there any evidence that the distribution of Entrepreneur Block licenses to designated entities has produced service to the public that would justify a continuing set aside for one class of carriers. But even if such facts may exist, the Commission must first seek them, examine them and make an active decision to retain, rather than simply default to, restrictive bidding rules.

The Bureau's cursory discussion in the Public Notice is in contrast to the Commission's and Bureau's actions in the months leading up to Auction No. 35, where the Commission asked whether it should continue the set aside, and after reviewing the record, concluded that it should remain in some form but that bidding for many licenses should not be restricted.<sup>11</sup> Here the Bureau makes no attempt to justify continued reliance on the unsuccessful DE set aside rules. Nor does the Bureau attempt to address the fundamental public interest questions raised by restricting access to spectrum, or with the plain fact that the Commission did not achieve its goals or meet its expectations from the set aside rules.

The right approach to achieve the Commission's public interest goals and auction obligations is also the simplest. The Commission should permit any interested party to apply for

---

<sup>10</sup> *Sixth Report and Order*, ¶¶ 16-29.

<sup>11</sup> *See gen. Sixth Report and Order*.

and bid on any and all of C block licenses available for reauction. By eliminating up-front barriers to eligibility, the Commission will draw the broadest possible range of bidders, including small businesses that value the licenses because they are ready to put this spectrum into service and have the financial wherewithal to do so.

Preserving an Entrepreneurs' Block set aside mistakenly places regulatory convenience as a higher priority than rapid deployment of service to the public. Ten years ago, when PCS was a new service and the Commission had 120 MHz to distribute, there were only two mobile service competitors in each market, and demand for mobile service was much less than it is now. At that time, a spectrum set aside may have been appropriate. However, now the Commission can see that the result in most markets has been fallow spectrum and delays in service to the American public. Even with strict implementation milestones, the auction and reauction cycle has precluded efficient and effective use of this spectrum. Indeed, Auction No. 58 is the fourth "reauction" of C or F block spectrum, while there has been very limited reauction of A, B, D or E block PCS licenses.<sup>12</sup> Given the rapid increase in demand for spectrum, the growth in the number of CMRS competitors in both large and small markets across the nation, and the failure of the set aside program to lead to the deployment of much of the spectrum it covered, retaining the set aside for a restricted group of bidders is clearly unjustified on both policy and legal grounds.<sup>13</sup>

---

<sup>12</sup> Six E block licenses were involved in Auction No. 22 in 1999 and 14 E block, 9 D block and 2 A block licenses are offered for auction in Auction No. 58. No A, B, D or E block spectrum was included in the other PCS reauctions.

<sup>13</sup> Courts have held that the Commission cannot continue to adhere to rules when the original assumptions for those rules are no longer valid or have been overtaken by new facts. *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979) (reversing Commission for maintaining cable rules after the premise for the rules had changed); *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987) (reversing Commission where subsequent developments undermined the predictions that led to the rule); *Bechtel v. FCC*, 957 F. 2d 873

Moreover, the Commission has found a spectrum set aside unnecessary to put licenses into the hands of small businesses. An open bidding process does not preclude entrepreneurs from participating in and winning licenses at auction or from acquiring licenses in the secondary market. Elsewhere the Commission has provided statistics demonstrating that open bidding, with bidding credits for small businesses, has been successful in putting licenses into the hands of small businesses.<sup>14</sup> As the Commission states, “bidding credits without a set aside enable small businesses to compete effectively in open auctions, even auctions of broadband PCS licenses.”<sup>15</sup>

No auction since the C and F block auctions and the subsequent reauctions (Auctions 10, 22 and 35) have included a set aside for entrepreneurs. Instead the Commission grants small businesses “bidding credits,” with which to bid against larger concerns. In fact, in recent years the Commission has declined several times to set aside spectrum for the exclusive use of “small business.”<sup>16</sup> In both the AWS and 700 MHz proceedings, the Commission chose not to set aside

---

(D.C. Cir. 1992) (reversing Commission order; “it is settled law that an agency may be forced to reexamine its approach is a significant factual predicate of a prior decision has been removed”).

<sup>14</sup> See *Auction No. 35 Further Notice* at ¶ 40; see also *Sixth Report and Order* at ¶ 44.

<sup>15</sup> *Id.* License set-asides benefit a handful of small businesses, while not achieving the objectives of Congress in Section 309(j)(3) of the Communications Act to have services deployed quickly and to recover for the public the full value of the spectrum. On the other hand, where Verizon Wireless and others have deployed service, thousands of small businesses have benefited. These businesses, and many thousands more, are likely to continue to benefit greatly from the continuing development of voice and data services. In auctioning this spectrum, the Commission should seek to promote these services. Doing so will in turn be most likely to promote growth of small businesses everywhere. This can best be done through an open, unrestricted bidding process.

<sup>16</sup> It makes no sense whatsoever to include bidding credits for open spectrum in an auction where a significant portion of the spectrum is open only to designated entities. The Commission declined to adopt any special provisions for DEs bidding on D and E blocks in Auction 11, where the closed F block was auctioned alongside the open D and E blocks, and it should decline to do so here. See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, WT Docket No. 96-59, FCC 96-278 (rel. June 24, 1996) at ¶¶ 68-72.

spectrum for designated entities or other restrictive categories of bidders.<sup>17</sup> Most recently, in the AWS proceeding it stated that a set aside was unnecessary and that "opening these bands to as wide a range of applicants as possible would encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure efficient use of this spectrum."<sup>18</sup> Moreover, the Commission noted that its disaggregation and newly-adopted leasing rules would help small businesses to negotiate after-auction access to spectrum.<sup>19</sup> To proceed with restrictions that have proven not to serve the public interest, in the face of other Commission decisions finding that the goals of Section 309(j) are fully achieved by open auctions, would be arbitrary and unlawful.

## **II. THERE IS NO RATIONALE FOR SETTING ASIDE ANY FORMER NEXTWAVE LICENSES SOLELY FOR ENTREPRENEUR BIDDING.**

Even if the Commission were to decide to keep the Entrepreneur's Block rules for some of the licenses, there is absolutely no rationale to apply those rules to the former NextWave spectrum. As part of a settlement with the Government, NextWave returned many of its PCS licenses to the FCC, which the Bureau then disaggregated for auction into 150 licenses. The Public Notice for Auction No. 58 would close 91 of those licenses to non-DEs, even though they are licenses that NextWave previously built out<sup>20</sup> and could have sold, free of DE restrictions, to any other carrier earlier this year. These licenses could just as easily have been part of the

---

<sup>17</sup> See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, WT Docket No. 02-353, FCC 03-251 (rel. Nov. 25, 2003) ("AWS Order") at ¶68; see *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, 17 FCC Rcd 1022 at ¶ 85.

<sup>18</sup> *AWS Order* at ¶68. "We do not see a need to supplement the incentives for small business participation provided elsewhere in this order by foreclosing any of the licenses to other bidders." *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *NextWave Personal Communications Inc. and NextWave Power Partners Inc. Petition for Declaration of Compliance With, and Clarification of, Broadband PCS Construction Deadline; or in the Alternative, for Waiver and Extension of First Construction Deadline*, Order, File Nos. 0000855872, *et al* (rel. Mar. 3, 2003).

package of licenses that NextWave is auctioning privately – again, without any restrictions.<sup>21</sup>

Having agreed to lift the restrictions on the spectrum that it allowed NextWave to sell, the Commission would be acting inconsistently to impose those restrictions on the spectrum that was returned by NextWave for reauction by the Commission. It makes no sense that these same licenses would now be closed to the bidders that can use them the most.

In fact, the Commission has already made the policy decision that non DEs can hold these licenses, when it earlier this year consented to the sale of NextWave licenses to Cingular.<sup>22</sup> And, as part of its settlement with NextWave, the Commission placed no restrictions on to whom NextWave can sell its remaining licenses today or in the future. Given its actions with regard to spectrum retained and sold by NextWave, it would be inconsistent and arbitrary for the Commission to retain its restrictive set aside rules for its own auction of the same spectrum.

### **III. THE BUREAU SHOULD RETAIN STAGE 3 ELIGIBILITY AT 98 PERCENT.**

Regardless of whether the Commission ultimately chooses to retain the Auction No. 35 rules, there are certain aspects of the Bureau's procedures that Verizon Wireless believes will hinder progress in the auction. For no apparent reason, the Bureau has eliminated Stage 3 of the auction in which participants must maintain 98 percent eligibility. Instead of three stages, with a final eligibility requirement of 98 percent, the Bureau has proposed two stages, with a final eligibility level of 95 percent. Verizon Wireless believes that it is necessary to have high final stage eligibility levels in order to speed the auction to its conclusion.

---

<sup>21</sup> See *NextWave Reorganization Accelerates, Company Announces Reauction of Six PCS Licenses*, NextWave Telecom Inc. News Release, June 7, 2004.

<sup>22</sup> See *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*, Memorandum Opinion and Order, WT Docket 03-217, File No. 0001461949, *et. al.*, (rel. Feb. 12, 2004).

Pushing Stage 3 eligibility to 98 percent has been one of the Commission's tools to keep an auction running at a reasonable pace. In the original C block auction, bidding dragged on for many bidding rounds as a single small license toggled back and forth between two bidders, delaying the close of the auction. As a result of what it learned in that auction, the Commission raised the Stage 3 eligibility in the D, E, and F block auction to 98%, where it has stayed, as one of its tools to speed the close of the auction. For example, of the approximately 20 simultaneous multiple round auction that the Commission has either held or scheduled since Auction No. 35, all but two have had final stage eligibility levels of 98 or 100 percent. Only two auctions have had a similar activity rule structure to the one proposed for Auction No. 58, and those auctions have not yet occurred. The Bureau provided no rationale for decreasing the eligibility requirements in those two instances, instead using the stock phrase that it adopted these activity procedures "[b]ecause the procedures have proven successful in maintaining the pace of previous auctions."<sup>23</sup> Yet this is no explanation for changing those procedures. The Bureau repeats that same terse conclusion here, again without any explanation. The Bureau should restore the 98 percent eligibility requirement for Auction No. 58.

#### **IV. CONCLUSION**

Much has changed since 2000 in the wireless telecommunications landscape. In addition to the phenomenal growth of the industry, increasing competition, and increasing demand for spectrum, the Commission has deliberately changed its approach to DE participation in auctions, relying on bidding credits and not set asides to encourage participation of small business entities.

---

<sup>23</sup> See *Auction of 24 GHz Service Licenses Scheduled for July 28, 2003*, Public Notice, DA 4-633, Report No. AUC-04-56-B (Auction No. 56) (rel. Mar. 12, 2004) at 21; see also *Automated Maritime Telecommunications System Spectrum Auction Scheduled for September 15, 2004*, Public Notice, DA 04-1513, Report No. AUC-04-57-B (Auction No. 57) (rel. May 26, 2005) at 26.

In addition, the Commission has adopted new rules that permit spectrum leasing, thus opening new avenues for small businesses to gain access to spectrum in the secondary market. DE set asides are a discredited relic. The Commission should adopt open bidding rules for Auction No. 58.

Respectfully submitted,

**VERIZON WIRELESS**

By:           /s/ John T. Scott, III          

John T. Scott, III  
Vice President and Deputy  
General Counsel – Regulatory Law

Charla M. Rath  
Director – Spectrum & Public Policy

Verizon Wireless  
1300 I Street, N.W.  
Suite 400 West  
Washington, D.C. 20005  
(202) 589-3740

Date: July 8, 2004