RECEIVED
APR 25 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the Matter of	)	
	)	
Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	**WT Docket No. 96-59**
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	**GN Docket No. 90-314**

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF RADIOFONE, INC.

Ashton R. Hardy
Michael Lamers
Hardy and Carey, L.L.P.
111 Veterans Boulevard - Suite 255
Metairie, LA 70005
(504) 830-4646

April 25, 1996

TABLE OF CONTENTS

Page

SUMMARY iii

I. The FCC Should Eliminate the PCS/Cellular Cross-Ownership Rule and the 45 MHz Spectrum Cap 2

A. The PCS/Cellular Cross-Ownership Rule Should Be Eliminated Along with the 45 MHz Spectrum Cap 2

B. The Record Contains No Justification for Retaining the PCS/Cellular Cross-Ownership Rule or the 45 MHz Spectrum Cap 5

C. The Elimination of These Rules Should Apply to the A, B and C Block Frequencies in the MTAs and BTAs in Which Radiofone and Its Affiliates Currently Provide Cellular Service 10

II. The D, E and F Block Auctions Should Be Separate and Non-Simultaneous 14

A. Separate Auctions Would Provide an Opportunity for Entities to Obtain 10 MHz Licenses 14

B. No Justification Is Given for Holding a Simultaneous Auction for the D, E and F Blocks 16

III. The 49% Equity Exception Should Not Be Allowed in the D, E or F Block Auctions 17

A. The Record Shows That the 49% Equity Exception Will Lead to "Back Door Control" of All Remaining Licenses By Non-Entrepreneurs 18

B. The 49% Equity Exception Violates the FCC's Statutory Obligation to Provide Opportunities for Small Businesses . . . 19

IV. The Record Supports Extending Small Business Benefits to D and E Blocks and Limiting Bidding on 10 MHz Licenses to "True" Entrepreneurs 20

V. The Record Supports Retaining C Block Definition of "Small Business" and Current Affiliation Rules, and Counting C Block Licenses as Assets 21

CONCLUSION 24

SUMMARY

Radiofone, Inc. (Radiofone) submits its reply comments in response to the comments filed concerning the FCC's Notice of Proposed Rule Making (Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap), WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-119, released Mar. 20, 1996. Many commenters support the Commission's proposal to eliminate the PCS/cellular cross-ownership rule. The reasons underlying their comments also compel the elimination of the related 45 MHz spectrum cap. These rule changes should apply to the A, B, C, D, E and F Block licenses in Radiofone's cellular service areas, at a minimum.

Additionally, Radiofone submits that the D, E and F Block PCS auctions should be held separately and non-simultaneously, in order to give cellular carriers and other parties who are interested in obtaining 10 MHz of spectrum a fair opportunity to do so. Commenters requesting a combined D, E and F Blocks auction have provided no justification for doing so.

Furthermore, Radiofone agrees with the commenters who state that the C Block auction was a failure for small businesses, and requests that the 49% equity exception not be extended to the D, E and F Block auctions. Radiofone also agrees with those commenters supporting the extension of small business benefits to the D and E Blocks while retaining the current definition of "small business" and the corresponding affiliation rules.

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

In the Matter of	)	
	)	
Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	**WT Docket No. 96-59**
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	**GN Docket No. 90-314**

REPLY COMMENTS OF RADIOFONE, INC.

Radiofone, Inc. (Radiofone), by its attorney, hereby submits its reply comments in response to the comments filed concerning the Commission's Notice of Proposed Rule Making (Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap), WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-119, released Mar. 20, 1996 [hereinafter NPRM].

Additionally, Radiofone submits that the D, E and F Block PCS auctions should be held separately and non-simultaneously, in order to give cellular carriers and other parties who are interested in obtaining 10 MHz of spectrum a fair opportunity to do so. Commenters requesting a combined D, E and F Blocks auction have provided no justification for doing so.

Furthermore, Radiofone agrees with the commenters who state that the C Block auction was a failure for small businesses, and requests that the 49% equity exception not be extended to the D, E and F Block auctions. Radiofone also agrees

with those commenters supporting the extension of small business benefits to the D and E Blocks while retaining the current definition of "small business" and the corresponding affiliation rules.

I. The FCC Should Eliminate the PCS/Cellular Cross-Ownership Rule and the 45 MHz Spectrum Cap

In its Comments, at 1-5, Radiofone requested the FCC to eliminate the PCS/cellular cross-ownership rule and the 45 MHz spectrum cap. None of the commenters provided a basis for retaining either rule; to the contrary, many of the commenters addressing the issue supported eliminating the PCS/cellular cross-ownership rule and in doing so, supported elimination of the 45 MHz spectrum cap.

A. The PCS/Cellular Cross-Ownership Rule Should Be Eliminated Along with the 45 MHz Spectrum Cap

Many commenters support the elimination of the PCS/cellular cross-ownership rule.[1] They offer many reasons. For example, Vanguard Cellular states that "the evolving competitive marketplace, with any number of PCS, ESMR and other competitive services, makes it increasingly unlikely that cellular providers could successfully engage in anticompetitive practices or exert undue market power."[2] Vanguard references the success of the Sprint Spectrum PCS system in the

---

[1] Virginia PCS Alliance Comments at 8; Vanguard Cellular Systems, Inc. (Vanguard Cellular) Comments at 5; AT&T Wireless Comments at 9; GTE Service Corporation (GTE) Comments at 6; BellSouth Corporation Comments at 1; Cellular Telecommunications Industry Association (CTIA) Comments at 3-11; ALLTEL Corporation Comments at 8-9; Western Wireless Comments at 12; Ad Hoc Rural PCS Coalition Comments at 15; Cellular Communications of Puerto Rico, Inc. Comments at 2.

[2] Vanguard Cellular Comments at 5.

Washington-Baltimore area as proof of this.[3] The Ad Hoc Rural PCS Coalition similarly states that with PCS, cellular, SMR and other mobile radio operations available to consumers, "there is little risk that a cellular licensee will exert undue market power if allowed to acquire 20 MHz of broadband PCS spectrum."[4] Additionally, Roseville Telephone Company states that "there is no evidence that the PCS/cellular cross-ownership rule prevents anti-competitive behavior."[5] Furthermore, CTIA states that "arbitrary limits on cellular-PCS eligibility due to concerns about the undue exercise of market power should not amount to a needlessly strict 'numbers game,' ruling out an entire class of possible cellular-PCS combinations because an artificial boundary has been crossed."[6] Radiofone agrees with these reasons, most of which were advanced in Radiofone's Petition for Partial Reconsideration, GEN Docket No. 90-314, filed Dec. 8, 1993.

All of these reasons also compel the elimination of the 45 MHz spectrum cap.[7]

---

[3] Id.

[4] Ad Hoc Rural PCS Coalition Comments at 15; see also AT&T Wireless Services, Inc. Comments at 9 (noting the number of CMRS licensees, including PCS and SMR); Cellular Communications of Puerto Rico, Inc. Comments at 2.

[5] Roseville Telephone Company Comments at 8.

[6] CTIA Comments at 9.

[7] Radiofone therefore cannot support with Roseville Telephone Company's (Roseville's) proposal to place a limit of 40 MHz on the non-SMR spectrum that an entity may hold. Roseville Comments at 8-9. Roseville contends that 40 MHz of broadband PCS spectrum is comparable to 25 MHz of cellular spectrum plus 15 MHz of broadband PCS spectrum. Id. at 9 n.13. However, the latter presents engineering and customer equipment difficulties that would not be experienced with 40 MHz of broadband PCS spectrum.

As these commenters have demonstrated that there is no justification for limiting cellular carriers to 10 MHz (under the PCS/cellular cross-ownership rule), there also is no justification for limiting them to 20 MHz (under the 45 MHz spectrum cap). As GTE stated, "any cross-ownership restriction or spectrum cap chosen by the Commission will be arbitrary and . . . the Commission should eliminate these rules altogether."[8] GTE also states that "spectrum caps unduly restrain the legitimate business activities of licensees and . . . there is no evidence to support a finding that aggregation limits are necessary" or "that cellular carriers will behave in an anticompetitive manner if allowed to acquire PCS spectrum on an unrestricted basis."[9]

Western Wireless states that the FCC should reconsider spectrum cap features that were rejected in the context of the PCS/cellular cross-ownership rule.[10] Radiofone agrees. As stated in Radiofone's Comments at 2-5, the Commission should eliminate the 45 MHz spectrum cap for the same reasons that the Sixth Circuit rejected the PCS/cellular cross-ownership rule. In fact, the FCC has historically made parallel changes to the PCS/cellular cross-ownership rule and the spectrum cap rule.[11] Such parallel treatment is appropriate because these rules are

---

[8] GTE Comments at 8.

[9] Id.

[10] Western Wireless Comments at 8.

[11] See, e.g., Sixth Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 11 FCC Rcd. 136, 161-64 (1995).

based on the same justifications.[12]

In sum, the 45 MHz spectrum cap should be eliminated for the same reasons that the Commission should eliminate the PCS/cellular cross-ownership rule.

B. The Record Contains No Justification for Retaining the PCS/Cellular Cross-Ownership Rule or the 45 MHz Spectrum Cap

None of the commenters supporting the retention of the PCS/cellular cross-ownership rule provided any documentary support for fears that cellular carriers could detrimentally affect the PCS market, despite the Commission's indication that such evidence was needed. NPRM, para. 66. Indeed, one commenter asserts that the FCC has a "voluminous record" and "ample support" for retaining the PCS/cellular cross-ownership rule, but provides no evidence to support this assertion.[13] Two other commenters suggested that cellular carriers should not be permitted to have any broadband PCS licenses for several years.[14] Two other commenters assert that cellular carriers, if allowed to obtain more than 10 MHz, would warehouse the spectrum.[15] This is pure speculation. These commenters do

---

[12] See Radiofone Comments at 5.

[13] Telephone and Data Systems, Inc. (TDS) Comments at 3.

[14] KMTel, L.L.C. Comments at 7; Gulfstream Communications, Inc. (Gulfstream) Comments at 12.

[15] PersonalConnect Comments at 4; Gulfstream Comments at 9. In any event, the Commission's strict build-out requirements would prevent warehousing of spectrum. See GTE Comments at 8 (agreeing that "the cost of acquiring licenses and constructing facilities will adequately deter cellular companies from acquiring such licenses for the purpose of preventing competitive entry into their markets"). There is no need to strengthen these requirements, as requested by one of the commenters. Gulfstream Comments at 9-10 (not explaining how warehousing could be accomplished and not providing evidence that PCS

not and cannot cite to any evidence that would support their assertions. The Sixth Circuit held that no such evidence exists,[16] and stated:

> Before the FCC may foreclose such businesses as Radiofone from obtaining a thirty MHz Personal Communications Service license within their geographic region, it must provide something in the way of documentary support for its asserted fears that Cellular providers will detrimentally affect the market if allowed to become Personal Communications Service licensees.[17]

Thus, because there is no documentary support for any concerns about the potential for anticompetitive behavior, the FCC may not preclude Radiofone and other small cellular carriers from obtaining up to and including 30 MHz of broadband PCS spectrum in-market.

The other reasons commenters proffered for the retention of the PCS/cellular cross-ownership rule similarly have no merit. For example, one commenter states that "cellular companies will quickly be able to offer additional services and obtain . . . subscribers, leaving PCS licensees with little to offer."[18] In other words, this commenter appears to be concerned that cellular carriers will promote competition. Thus, its request to retain the PCS/cellular cross-ownership rule should be denied.

The same commenter also asserts that "cellular companies will be more likely to expand on their existing technologies rather than experimenting with new services

---

providers would warehouse).

[16] Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 762-63 (6th Cir. 1995).

[17] Id. at 764 (emphasis added).

[18] DCR Communications, Inc. (DCR) Comments at 13.

and technologies."[19] However, Radiofone (through its affiliate) obtained experimental broadband and narrowband PCS licenses, and used these licenses to experiment with and develop new services and technologies. Radiofone is seeking an opportunity to offer such services to citizens of Southeastern Louisiana and other markets where it has cellular presence.

One commenter asserts that the PCS/cellular cross-ownership rule should be retained because a few cellular carriers obtained A, B and C Block licenses.[20] However, those licenses presumably were not in-market where the PCS/cellular cross-ownership rule is applicable.

One commenter asserts that if the PCS/cellular cross-ownership rule were eliminated, large companies will become larger and make it difficult for small companies to compete.[21] However, Radiofone is not a large company. Radiofone qualifies as an entrepreneur, and in the C Block PCS auction, Radiofone's affiliates applied as small businesses. Thus, at most, this commenter's statements would justify retaining the rule only for large cellular companies, not companies like Radiofone. Indeed, Rendall and Associates and Cook Inlet Region, Inc. want small

---

[19] Id.

[20] North Coast Mobile Communications, Inc. (North Coast Mobile) Comments at 16.

[21] Columbia Cellular Comments at 2; see also North Coast Mobile Comments at 15-16 (asserting that a "few huge telecommunications companies" will hold the PCS licenses).

companies to be able to participate in PCS.[22] Allowing Radiofone to fully participate would be consistent with these commenters' requests.

Several commenters erroneously predict that if the PCS/cellular cross-ownership rule were eliminated, all of the PCS spectrum would be held by the two cellular companies in each area.[23] However, if the PCS/cellular cross-ownership rule and the 45 MHz spectrum cap were eliminated, and the 40 MHz cap on PCS spectrum were retained, each cellular carrier would be able to obtain at most 40 MHz of PCS spectrum, leaving 40 MHz for other entities. These commenters support the idea of having two cellular carriers and one non-cellular carrier providing PCS.[24] Thus, the elimination of the PCS/cellular cross-ownership rule is consistent, not inconsistent, with these commenters' views.

The same commenters erroneously describe the wireless market as being comprised of PCS and cellular.[25] However, this is contrary to the Commission's findings that the wireless market consists of PCS, cellular, SMR, 220 MHz, interconnected Business Radio Service, conventional dispatch, and paging.[26]

Two commenters state that the rule should not be changed because parties have

---

[22] Rendall and Associates Comments at 12; Cook Inlet Region, Inc. Comments at 11-12; see also DCR Comments at 13.

[23] Telephone Electronics Corporation (TEC) Comments at 13; Mountain Solutions at 10.

[24] TEC Comments at 13; Mountain Solutions at 10.

[25] TEC Comments at 14; Mountain Solutions at 11.

[26] See Radiofone Comments at 4.

as early as July 1994, five months before the A and B Block auction began and 17 months before the C Block auction. PCS applicants cannot have "relied" on a rule that was on review. Additionally, in the C Block Supplemental Bidder Package, dated December 11, 1995, at 23, the FCC informed potential applicants about the pendency of Cincinnati Bell, noting that it was required to notify applicants "who may be affected, should the petitioners prevail." And the petitioners did prevail. Furthermore, to prevent this quagmire, Cincinnati Bell filed a Request for Stay of the A and B Block auction, and Radiofone filed a Request for Stay of the C Block auction. The Commission ignored the former, and denied the latter, Order (Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules), DA 95-2496, 1995 FCC LEXIS 8089, released Dec. 20, 1995 (Wireless Telecommunications Bur.). If these commenters truly were concerned about "reliance interests," they too should have requested a stay of the PCS auctions.

One commenter asserts that "the burden of proving the current rules are overly restrictive is on those who wish to relax them."[28] However, in the current situation the burden is on the Commission to support its rules.[29]

In sum, none of the commenters who favor the retention of the PCS/cellular cross-ownership rule have provided any justification for their position.

---

[28] Rendall and Associates Comments at 12.

[29] Cincinnati Bell, 69 F.3d at 764.

C. The Elimination of These Rules Should Apply to the A, B and C Block Frequencies in the MTAs and BTAs in Which Radiofone and Its Affiliates Currently Provide Cellular Service

Radiofone requests the Commission to eliminate the PCS/cellular cross-ownership rule and the 45 MHz spectrum cap, and to have those rule changes apply to all of the broadband PCS licenses -- that is, the A, B, C, D, E and F Block licenses (including the ones already awarded) -- in the MTAs and BTAs where Radiofone and its affiliates provide cellular service.

Such a result is mandated by Justice Stevens' memorandum vacating the stay of the C Block auction, wherein he stated:

> I am persuaded, however, that allowing the national auction to go forward will not defeat the power of the Court of Appeals to grant appropriate relief in the event that the respondent overcomes the presumption of validity that supports the FCC regulations and prevails on the merits.[30]

Radiofone did in fact overcome the presumption of validity supporting the regulations and did in fact prevail on the merits. Now is the time for the Commission to fashion the "appropriate relief" that Justice Stevens contemplated when he lifted the stay and permitted the C Block auction to go forward. The only appropriate relief would be to place Radiofone in the position it would have occupied had the arbitrary PCS/cellular cross-ownership rule and the 45 MHz spectrum cap not been in place at the time the auctions were conducted. Such an approach would provide Radiofone with a fair opportunity to compete in the provision of advanced

---

[30] FCC v. Radiofone, Inc., No. A-368 (U.S. Oct. 25, 1995) (memorandum of Justice Stevens).

technologies in the areas where it currently provides cellular service. Radiofone submits that the Commission need not disrupt the A, B or C Block licenses on a national level in order to provide the relief that is appropriate in this case; the Commission need only address the PCS licenses in areas where Radiofone and its affiliates provide cellular service.

Radiofone is entitled to this relief notwithstanding the fact that the Commission has awarded licenses in the A and B Blocks and is completing the C Block auction. Radiofone's petition before the Sixth Circuit specifically requested that the court remand to the Commission with instructions to permit Radiofone to apply for the 30 MHz PCS licenses in its cellular service areas nunc pro tunc. The relief sought by Radiofone in the Sixth Circuit, as well as the arguments made by Radiofone entitling it to relief, have at all times been fully applicable to each of the six PCS frequency blocks.

Moreover, the participants in the C Block auction were fully apprised of the pendency of the challenges by Radiofone and others to the auction rules. Indeed, as discussed above, the Sixth Circuit required the FCC to formally notify C Block bidders that the auction rules had been challenged and would be subject to change in the event that Radiofone or other petitioners prevailed. Additionally, all of the A, B and C Block bidders had every opportunity to participate in the Cincinnati Bell proceedings in which the PCS rules were reviewed. In fact, NYNEX and U S WEST, which are two of the owners of PCS PrimeCo (winner of the B Block

PCS license in the New Orleans MTA), were intervenors in Cincinnati Bell.[31] Thus, they were fully aware of the pendency of that case. The A, B and C Block bidders cannot now be heard to complain that, by bidding in the auction and taking steps to start up their PCS operations, they have reasonably relied on the Commission's action in conducting the auctions or awarding licenses, because any reliance by such auction participants was wholly unreasonable. These participants were fully aware that they proceeded at their own peril. "By choosing to rely on a rule that was under reconsideration, they risked the possibility that the rule could change, and any harm that they may suffer as a result was foreseeable."[32] Those entities that have been awarded licenses in Radiofone's cellular service area, along with those that are high bidders in the C block licenses in those areas, participated in the auctions and made related business decisions with full knowledge of the risk and uncertainty caused by the Commission's decision to hold the auctions despite the pendency of litigation that could affect the ultimate outcome of the licenses awarded.

Contrary to suggestions by commenters in this proceeding,[33] the Commission need not participate in retroactive application of the auction rules in order to provide Radiofone with the relief to which it is entitled under Cincinnati Bell. The Sixth Circuit has declared that the PCS/cellular cross-ownership rule the Commission used for the A, B and C Blocks auctions was arbitrary and capricious, in a decision that

---

[31] Cincinnati Bell, 69 F.3d at 752-55.

[32] Memorandum Opinion and Order (McElroy Electronics Corp.), 10 FCC Rcd. 6762, 6771 (1995).

[33] GTE Comments at 9-10; see also TDS Comments at 4.

necessarily entails review of the 45 MHz spectrum cap as well, as discussed above. Therefore, all three auctions conducted under those rules and any licenses that were issued pursuant to the rules were invalid ab initio. The Sixth Circuit mandate requires that the Commission correct the errors that resulted from the invalid rules. The corrected auction rules would not apply retroactively, but prospectively to new procedures for assigning licenses in the affected markets. Radiofone merely requests that the Commission vacate actions that have occurred under invalid rules, go forward with new rules and issue licenses in the affected markets accordingly. Such action by the Commission in no way constitutes retroactive rulemaking. Radiofone expresses no opinion on how the licenses for the remainder of the country are handled, and the Commission must determine for itself whether its license grants can be supported. However, the decisions of the Sixth Circuit and Justice Stevens dictate that the license grants which overlap Radiofone's cellular markets must be rescinded.

Since all of the affected parties, including the Commission, were fully aware that their conduct had been challenged as arbitrary and capricious, no inequity will result from fashioning appropriate relief for Radiofone. Parties that participated in the auctions in the affected markets will have every opportunity to participate in any process adopted by the Commission in order to implement the Sixth Circuit's mandate.

Radiofone, a small family-owned business, should not be forced to return to court in order to seek enforcement of the Sixth Circuit's mandate.

II. The D, E and F Block Auctions Should Be Separate and Non-Simultaneous

Radiofone has requested the FCC to hold separate, non-simultaneous auctions for the D, E and F Blocks. Several commenters support separation of the auctions, and no commenter supporting simultaneous auctions provides any valid justification for doing so.

A. Separate Auctions Would Provide an Opportunity for Entities to Obtain 10 MHz Licenses

Those commenters supporting separation of the auctions include Mid-Plains Telephone, which suggested holding the D, E and F Block auctions sequentially.[34] Mid-Plains states:

> Certainty of a winning bid in a given market in a given block of spectrum is needed in order for small businesses to adequately assess the financial resources which should be committed in a subsequent auction of a block of the spectrum. Trying to [assess] bid strategy simultaneously in three markets will be unduly burdensome on small businesses and will place them at a competitive disadvantage.[35]

Mid-Plains' suggestion therefore would support the Commission's goals in designing licenses of "varying sizes."[36] Mid-Plains' suggestion also would enable cellular carriers to obtain a 10 MHz license, as apparently desired by those commenters supporting the retention of the PCS/cellular cross-ownership rule,[37] and as cited by

---

[34] Mid-Plains Telephone Comments at 6.

[35] Id.

[36] Memorandum Opinion and Order (Deferral of Licensing of MTA Commercial Broadband PCS), FCC 96-139, para. 10, released Apr. 1, 1996.

[37] E.g., Cook Inlet Region, Inc. Comments at 11; DCR Comments at 14.

the Commission as a reason why it created the 10 MHz blocks.[38]

Other commenters support a D and E Block auction that is separate from the F Block auction. WPCS, Inc., Columbia Cellular, and Rendall and Associates request the F Block auction to be held first, and New Dakota Enterprises and Sprint request the F Block auction to be held last.[39] Either way, these scenarios would help ensure that at least one 10 MHz Block would be auctioned separately and thereby help to provide opportunities for entities to obtain 10 MHz PCS licenses, as supported by General Wireless, Inc.[40] It also would provide opportunities for cellular carriers to obtain 20 MHz licenses, as apparently desired by those commenters supporting the elimination of the PCS/cellular cross-ownership rule and the retention of the 45 MHz spectrum cap.[41] Although the Congressional mandate to accommodate designated entities would best be accomplished by having the D, E and F Block auctions to be held separately and non-simultaneously, these proposals would at least provide a minimal opportunity to obtain 10 MHz licenses.

---

[38] Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services), 9 FCC Rcd. 4957, 4981 (1994).

[39] Columbia Cellular Comments at 2; WPCS, Inc. Comments at 8; Rendall and Associates Comments at 12; New Dakota Investment Trust Comments at 3-5; Sprint Comments at 8-9. New Dakota Investment Trust wants the F Block auction to be held separately in order to give entities an opportunity to obtain 10 MHz licenses and to prevent the aggregation of 30 MHz of spectrum. New Dakota Investment Trust Comments at 3-5. New Dakota Investment Trust's concerns would be further alleviated by the Commission's holding three separate, non-simultaneous auctions.

[40] General Wireless, Inc. Comments at 5-6.

[41] E.g., Vanguard Cellular Comments at 5; Virginia PCS Alliance, L.C. Comments at 8; ALLTEL Corporation Comments at 9.

B. No Justification Is Given for Holding a Simultaneous Auction for the D, E and F Blocks

Those commenters supporting the simultaneous auctioning of all three Blocks fail to justify this procedure, for many reasons. First, several commenters are concerned about the headstart advantage that one licensee may have over another if the licenses are not auctioned together.[42] However, the Commission previously rejected such headstart arguments.[43] Second, one commenter asserted that if the F Block auction is held separately, the prices for F Block licenses could be higher than those for D and E Block licenses.[44] But there is no evidence of pent-up demand for F Block licenses as there was for C Block licenses, and that pent-up demand apparently contributed to the high prices for the C Block licenses.[45] Third, other commenters assert that a simultaneous auction will result in higher auction revenues.[46] However, Congress has prohibited the Commission from considering

---

[42] Spectrum Resources Comments at 1-2; PersonalConnect Comments at 2.

[43] Report and Order (Inquiry into the Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems), 86 FCC 2d 469, 491 n.57 (1981) (headstart of wireline telephone companies over non-wireline cellular providers); Fourth Memorandum Opinion and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 9 FCC Rcd. 6858, 6864 (1994) (headstart of A and B Block licensees over C Block licensees); see MCI Cellular Tel. Co. v. FCC, 738 F.2d 1322, 1323 (D.C. Cir. 1984).

[44] Iowa L.P. 136 Comments at 7.

[45] Second FCC PCS Auction at Twice Bidding Pace of First Round Year Ago, Communications Daily, at 3, Dec. 26, 1995 ("There is a lot of pent-up demand for these licenses," said Kathleen Ham . . . .").

[46] E.g., Auction Strategy, Inc. Comments at 5.

auction revenues in developing regulations for PCS auctions.[47] Fourth, some commenters want the auctions to be held concurrently so that licenses will be awarded quickly.[48] However, the Commission has at its disposal alternatives for speeding up auctions other than holding them simultaneously, such as by moving more quickly from Stage I to Stage II.[49]

The real issue here is that the Commission designed the frequency blocks in order to provide PCS licenses of varying sizes. A simultaneous auction would defeat that goal by allowing bidders to aggregate 30 MHz of spectrum, as suggested by several commenters.[50] The question is whether the Commission wants to provide realistic opportunities for cellular carriers and other parties to obtain 10 MHz licenses. Radiofone submits that separate, non-simultaneous auctions for the D, E and F Blocks will provide such opportunity.

III. The 49% Equity Exception Should Not Be Allowed in the D, E or F Block Auctions

Radiofone has asked that the Commission not allow bidders in the D, E or F Block auctions to employ the 49% equity exception, as it did in the C Block auction, because this will foreclose the remaining opportunities for small businesses and entrepreneurs to participate in broadband PCS.

---

[47] 47 U.S.C. § 309(j)(7).

[48] E.g., Spectrum Resources, Inc. Comments at 1-2.

[49] C.f. Devon Mobile Communications, Inc. Comments at 16 (suggesting that the auction could be accelerated by beginning at Stage II).

[50] E.g., North Coast Mobile Comments at 19; see Auction Strategy, Inc. Comments at 5.

A. The Record Shows That the 49% Equity Exception Will Lead to "Back Door Control" of All Remaining Licenses By Non-Entrepreneurs

Radiofone agrees with the National Telephone Cooperative Association (NTCA) that "liberal equity options," including the 49% equity exception, caused the C Block auction "to be dominated by bidders with huge investments from entities that are not designated entities."[51] As a result, entrepreneurs and small businesses viewed the C Block auction as a "disaster for legitimate small business."[52] Other commenters state that these larger C Block applicants have obtained substantial financial backing "in exchange for agreements or tacit understandings that the winning licensees will become affiliated with these incumbents.[53]

Extension of the 49% equity exception to the F Block, as well as to the other 10 MHz Blocks (if the Commission's proposal is adopted) will be the death knell for true entrepreneurs and small businesses that wish to become licensees of a BTA broadband PCS system. A number of commenters believe the opposite is true, claiming that small businesses will be denied access to much needed capital if this exception is not adopted[54] or that a change at this time will add unnecessary complexity to the Commission's rules.[55] Commenters that were too large to meet the entrepreneurs' block financial caps either provided no justification for supporting

---

[51] NTCA Comments at 4.

[52] Point Enterprises, Inc. Comments at 2.

[53] Ad Hoc Rural PCS Coalition Comments at 7.

[54] E.g. Devon Mobile Communications, L.P. Comments at 6.

[55] North Coast Mobile Comments at 6.

this exception[56] or argued for its extension to promote an expedient auction.[57]

In reality, removing this particular exception from the F Block rules should not prejudice minority- or women-owned businesses or small businesses, which will have ample time to utilize other generous financing options that are available to them.[58] Moreover, any harm arising from a minor delay of the D, E or F Block auctions will be significantly outweighed by the benefits of an auction (or auctions) which provide enhanced opportunities for entrepreneurs and small businesses. Most importantly, it will go a long way to ensure that a single large business does not exercise "back door control" over any of the remaining PCS licenses through its substantial equity ownership position in a D, E or F Block applicant.

B. The 49% Equity Exception Violates the FCC's Statutory Obligation to Provide Opportunities for Small Businesses

A vast number of commenters also agreed with Radiofone that although the C Block auction was a rousing success for a few well-heeled bidders and the U.S. Treasury, it was a failure as far as promoting opportunities for small businesses and other designated entities.[59] This widespread discontent with what will soon be the

---

[56] Sprint Comments at 3.

[57] Vanguard Cellular Comments at 3.

[58] These options include the 25% Equity Exception / Control Group Minimum 25% Equity Requirement found at 47 C.F.R. §§ 24.709(b)(3), (5).

[59] Ad Hoc Rural PCS Coalition Comments at 4 ("designated entities . . . have been overwhelmingly denied licenses in the previous broadband PCS auctions"); Allied Communications Group Comments at 3 ("the Commission has succeeded only in (i) auctioning off 75% of the broadband licenses . . . and (ii) increasing the overall concentration of licenses and market power of dominant players in the wireless telephony industry"); Integrated VoiceSys Comments at 1 ("the current C

results of the C Block auction should signal to the Commission that significant changes need to be made in its eligibility rules, or else the Commission will fail to meet its statutory obligation to provide opportunities for small business. As one commenter aptly noted, "Congress did not intend that DEs should be relegated to trophy positions in new business ventures that are financed by large companies."[60] Therefore, the Commission should eliminate the 49% equity exception from its F Block auction rules.

IV. The Record Supports Extending Small Business Benefits to D and E Blocks and Limiting Bidding on 10 MHz Licenses to "True" Entrepreneurs

Almost all of the commenters believe the Commission should adopt its proposal to extend small business benefits to the D and E Blocks, as well as the F Block, in order to promote opportunity for small businesses and other "true"

Block auctions do not fairly represent small business in the true sense of the word"); Iowa L.P. 136 Comments at 1 ("the only small businesses that achieved success in the C Block auction are those with substantial backing from large entities that would be otherwise ineligible to participate in the entrepreneurs' auction"); KMTel, L.L.C. Comments at 2 ("cash-rich mega corporations . . . 'made out' by finding a way to legally structure their organizations and investment capital in a manner that apparently complies with the current rules"); Rendall and Associates Comments at 3 ("large moneyed interests can take advantage of existing rules to exploit any opportunity to dominate the PCS business"); Spectrum Resources, Inc. Comments at 2 ("the resulting PCS industry is tending to resemble a large oligopoly, rather than the fully competitive environment that was intended by Congress and the Commission"); TEC Comments at 3 ("legitimate small businesses are being effectively excluded from the C Block bidding"); Vanguard Cellular Comments at 5 ("the results of the PCS auctions are likely to leave the bulk of the licenses in the hands of large telecommunications conglomerates/carriers or entities financed by companies of similar size").

[60] New York Rural Telephone Companies Comments at 3.

entrepreneurs.[61] Radiofone strongly supports this proposal. However, Radiofone and a number of other commenters[62] have suggested that the Commission could benefit these entities even further by setting aside the D and E Blocks for small businesses only. By adopting this reasonable proposal, as well as restricting the availability of the 49% equity exception, the Commission will enhance opportunities available to small businesses and ensure that the remaining broadband PCS licenses are distributed among a wide variety of applicants for a reasonable price.

V. The Record Supports Retaining C Block Definition of "Small Business" and Current Affiliation Rules, and Counting C Block Licenses as Assets

Numerous commenters expressing an opinion on the issue agreed with Radiofone that the Commission's current definition of a "small business" in the broadband PCS rules ($40 million in gross revenues and $500 million in total assets) remains an appropriate threshold for the F Block auction.[63] As PCS Development

---

[61] Ad Hoc Rural PCS Coalition Comments at 10; Airlink, L.L.C. Comments at 11; Auction Strategy, Inc. Comments at 3; Cook Inlet Region, Inc. Comments at 3; Devon Mobile Communications, Inc. Comments at 12; Gulfstream Comments at 3; Integrated Communications Group Comments at 1; Iowa L.P. 136 Comments at 2; KMTel Comments at 4; Mid-Plains Telephone Comments at 4; Mountain Solutions Comments at 7; National Telecom PCS, Inc. Comments at 5; North Coast Mobile Comments at 12; Omnipoint Corporation Comments at 3; Opportunities Now Enterprises, Inc. Comments at 1; PCS Development Corporation Comments at 8; Phoenix L.L.C. Comments at 3; PersonalConnect Communications Comments at 2; Rendall and Associates Comments at 11; Spectrum Resources, Inc. Comments at 3; TEC Comments at 12; U.S. Intelco Wireless Comments at 3; Virginia PCS Alliance Comments at 6.

[62] E.g., Iowa L.P. 136 Comments at 2; Mountain Solutions Comments at 4; TEC Comments at 4.

[63] E.g., Airlink Comments at 15; Auction Strategy Comments at 2; Devon Mobile Communications Comments at 10; Iowa L.P. 136 Comments at 6; Mid-Plains Telephone Comments at 3; PCS Development Corp. Comments at 8.