

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

April 15, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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)
)
Amendment of the Commission's)
Cellular PCS Cross-Ownership Rule)
)

WT Docket No. 96-59

DOCKET FILE COPY ORIGINAL

GN Docket No. 90-314

COMMENTS OF KMTel, L.L.C.

KMTel, L.L.C. ("KMTel") submits its comments in response to the Commission's Notice of Proposed Rule Making ("Notice") in the above captioned proceeding. In support thereof, the following is respectfully set forth.

I. INTRODUCTION

KMTel is a small, minority owned business that has participated in the Commission's C-Block Auction for Broadband PCS licenses. After nearly one year of

preparing for the auction, and over four months of bidding activity in the ongoing auction, KMTel has learned a tremendous amount regarding the Commission's auction process, the rules and regulations governing it, and the problems which many small businesses and entrepreneurs have encountered.

In principle, KMTel believes that the Commission's intentions in the C-Block auction were good. The idea of setting aside a block of licenses on which large corporations would not be eligible to bid for, and providing enhanced economic benefits for "small businesses" in the form of bid credits was entirely valid. As the auction indicate, the Commission's intentions and the "spirit" of the C-Block auction did not come to fruition, but in fact "backfired" as many true small businesses, including KMTel, became confronted with serious financial distress after spending significant resources and personal wealth preparing for, and bidding in, an auction where most true small businesses could not financially compete.

Ironically, it was the cash-rich mega corporations that did not participate in the A and B Block auctions that "made out" by finding a way to legally structure their organizations and investment capital in a manner that apparently complies with the current rules. In essence, the reportedly "small businesses" that were financially supported by these multi-billion dollar companies squeezed the true small businesses and entrepreneurs right out of all large, medium, and even most of the small markets offered in the auction. The total dollars bid for C-Block licenses now exceed by more than 300% what the A and B Blocks went for individually!

Of the 254 original bidders making an upfront deposit in the C Block auction only about 100 remained at the close of round 91, with the top five bidders (by total dollars on high bids) holding high bids totaling \$10.5 billion or 81% of the total and covering 65% of the population. The top nineteen bidders held high bids totaling \$12.0 billion or 92% of the total and covering 82% of the population. The remaining 47 million people or 18% of the population (small cities and rural areas) may, depending upon late round auction

results, be served by approximately 81 or fewer small businesses. The results of the C-Block auction clearly demonstrate that the rules and regulations that were intended to “spread the wealth” and bring in a multitude of new participants and competition into the industry was not successful

II. RE-DEFINING “SMALL BUSINESS” FOR FUTURE AUCTIONS

a. Comments on whether the current definition of small business continues to be appropriate.

KMTel submits that the definition of “Small Business” has not been appropriate for the C-Block auction and will not be appropriate for the future auctions. In the C-Block auction, most, if not all applicants structured their organisation in a manner that allowed them to receive the maximum bid credits and the most attractive financing terms that the Commission had allotted for the most “disadvantaged” participants. Prior to the commencement of the C-Block auction, it was in KMTel’s interest neither to steer away from the “spirit” of the Commission’s rules and find a legal structure that would allow the company to bring in enormous amounts of capital from the giants in the industry, nor to spend the legal resources to look deeply into the rules in order to forewarn the Commission of the inevitable problems that would be created if companies did find the means to do so. Unfortunately, these problems did, in fact, surface during the C-Block auction and many entrepreneurs like KMTel suffered the consequences.

Based on the levels of capital put on deposit by a handful of the largest applicants (providing eligibility that covered the entire U.S. population nearly six times over), and based on the tremendous level of bidding and high prices that the C-Block auction has experienced, it is not reasonable to believe that the majority of the dollars bid in the current auction come from “small businesses”. While KMTel does not intend to confirm that the top bidders in the C-Block auction complied with the Commission’s existing rules

for “small businesses,” a problem obviously exists where moneys from billion-dollar “large businesses” were used to squeeze many of the true small businesses out of contention to play a major part in the PCS industry.

b. Proposed changes to rules and regulations for future auctions where “small businesses” are encouraged to participate.

Unless it can be demonstrated over a relatively short period of time that minorities and women are faced with greater disadvantages than small businesses of similar financial size, KMTel does not support any rule modifications to change the revenue and asset levels set for eligible applicants, upfront deposits and corresponding bid-unit eligibility, the downpayment provisions, or the license financing terms.

While it is practically inconceivable that “small businesses” could obtain billions in financial backing without giving up control of the venture, KMTel submits that the simplest form of eliminating the problem encountered in the C-Block auction is to put limits on the amount of capital allowed to be used during the auction process by any one individual company. These limits should be based on what is reasonably achievable by true small businesses and entrepreneurs in accordance with what they claim in their applications.

KMTel proposes that for applicant’s to receive the economic benefits granted by the Commission to “small businesses” that the following requirements and bid limitations be added to the current regulations:

- Up-front deposits cannot exceed the highest of the last three years gross revenues as presented on the FCC Short-Form 175 Application
- Total net dollars bid (after 25% discount) during the auction process cannot exceed ten (10) times the amount placed on deposit, and

- No individual bidder can bid on more than twenty-five (25) BTA licenses or on more than forty (40) million pops in any one round of bidding.

By incorporating the above restrictions, the Commission can, in essence, eliminate the need to go through a lengthy and costly study of the current auction rules to find and eliminate all of the potential legal structures that can be devised to overcome the “spirit” of the auction. These restrictions will help the commission achieve its original goal: to allow small businesses and entrepreneurs to provide competition in the next generation of wireless communication services.

III. PROVIDING SMALL BUSINESSES THE ABILITY TO COMPETE IN THE UPCOMING D, E AND F BLOCK AUCTIONS

KMTel proposes that the bidding credits and financing terms provided to C-Block participants be granted to small businesses in each of the D, E and F Blocks if they qualify under the definitions and abide by the proposed bidding restrictions as set forth in Section II b above. Each Block would be bid simultaneously at the BTA level where all companies would be qualified to participate (while maintaining consideration of the maximum MHz of spectrum allowed to be bought by one company and the current restrictions on cellular license holders), yet the playing field will be truly “levelized” by providing the economic benefits only to those applicants complying with proposed restrictions outlined above.

IV. COMMENTS ON RULES REGARDING THE TRANSFER OF C-BLOCK PCS LICENSES AND ACQUIRING LICENSES RETURNED TO THE COMMISSION UNDER EVENTS OF DEFAULT

KMTel proposes that the Commission eliminate the provision that if C-Block licenses are sold to non-designated entities, the twenty five per cent (25%) discount would have to be paid to the Commission at the time of the sale. Since all C-Block license winners will apparently be granted the discount, and since it is obvious that the discount offered to small businesses by the Commission were “bid away” by the large cash-rich bidders, the bid credits are no longer included within the financial community when determining the market value of the PCS license. In essence then, requiring the credits to be paid back to the FCC if the license is sold to a non-designated entity acts as a 25% tax on the sale. This will make it very difficult for C-Block license holders to ever exit the market or raise additional moneys.

Furthermore, KMTel proposes to modify the rule to include provisions for rebidding licenses that are returned to the Commission under events of default. When and if C Block licenses are returned to the Commission by reason of default, the first right and opportunity (through an auction process) to acquire that license should be granted to the original applicants of the C-Block auction where the proposed bidding limitations as outlined in Section II are put into effect

V. POST AUCTION SUPPORT BY THE COMMISSION TO SMALL BUSINESSES

KMTel proposes that interest proceeds from the installment payment provisions of the C, D, E and F Block auctions be used to fund the creation of regional consolidated service centers, marketing and customer care infrastructure for qualified small businesses after the auction period for a period not to exceed ten years. The intention here is for the small businesses to have the opportunity to buy support services and infrastructure support from the regional centers at cost based rates with additional credit granted equal to the cumulative amount of interest paid to the Commission to date.

Such a plan will allow truly small businesses to stay above water during the initial years where operating losses will be plentiful and capital costs of the required infrastructure to provide PCS services is very significant. The public interest would be served more effectively with greater competition and lower rates. Otherwise, it will be very difficult for true small businesses to remain "in business" in such a capital intense industry in which market penetration will continue to be dominated by the current mega-corporations of the wireless industry.

VI. CELLULAR/PCS CROSS-OWNERSHIP RULES AND THE CINCINNATI BELL REMAND

KMTel would support a proposal that prevents any and all cellular license holders from acquiring any A, B, C, D, E or F Block licenses where there is any overlap with the geographic areas covered by the cellular carrier's existing cellular license for a period of seven years from the close of the combined D, E and F Block auctions. Cellular carriers should be permitted to compete for and to acquire licenses only where there is no overlapping service area.

The dilemma with the Cincinnati Bell Remand is that the Commission said cellular carriers could have a little but not too much additional spectrum via acquiring PCS licenses. The problem that exists is determining how much is a little and how much is too much. KMTel would propose that the rules be modified to restrict all cellular license holders from acquiring any PCS license where there is spectrum overlap with their existing licenses for a period of seven years or until it can be demonstrated that PCS license holders have had sufficient opportunity to establish themselves in the market place.

Cellular carriers initially had an extended time period to establish their market presence and today have a dominate market position related to mobile communications services and any overlapping PCS license acquired by a cellular carrier now will only further enhance their dominance and reduce effective competition. If it is later determined

that the market can not support up to the current nine or more possible local service and wireless providers, provisions should only then be established where cellular companies could acquire the PCS license from new license holder to augment their networks and service offerings.

VII. AUCTION SCHEDULE FOR D, E AND F BLOCKS

KMTel proposes that the D, E and F Block auction be scheduled to begin within sixty days or as soon as practicable after the close of the C Block auction.

VIII. SUMMARY OF KMTTEL COMMENTS

- There were preferences granted to designated entities in the C-Block auction that were simply “bid away” by a handful of cash-rich participants whose capital came from giant corporations that do not warrant receiving the preferences set aside for small businesses to effectively compete and to enter the market. This artificially drove up the prices of C Block licenses and forced many of the truly small businesses out of the auction or, at least, out of the running for the top markets;

The rules for participating and receiving the maximum bid credits and financing terms in the C Block auction did not conform with the “spirit” of the auction that the Commission portrayed and presented to small businesses.

- True small businesses were financially distraught after spending many resources and personal capital to prepare for, and then attempt to participate and compete in the auction that was originally intended for them.

- Changes in the rules and regulations in upcoming auctions should include limitations on the dollar amount that applicants can put on deposit and bid.
- Small businesses should be eligible to participate at a “level playing field” with others in the D, E and F Block auctions.

Respectfully, submitted,

KMTel, L.L.C.

By: _____

Michael H. Kappas

Chairman and Chief Executive Officer

A handwritten signature in black ink, appearing to read "M. Kappas", is written over a horizontal line. The signature is stylized and cursive.