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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment of the Commission's)
Rules Regarding Installment Payment)
Financing for Personal Communications)
Services (PCS) Licenses)
_____)

WT Docket No. 97-82

To: The Commission

REPLY COMMENTS

On October 16, 1997, the Commission adopted its *Second Report and Order and Further Notice of Proposed Rulemaking* ("FNPRM" or "Second R&O")¹ seeking comment on the Commission's proposed rules governing the reauction of spectrum returned under the various restructuring options made available to C block licensees. DigiPH PCS, Inc. ("DigiPH"),² by its attorneys, submitted comments in response to the FNPRM, and hereby submits its reply comments. Specifically, DigiPH responds to those commentors who support the Commission's proposal to reauction C block spectrum without installment payments and/or advocate the elimination of the entrepreneurs' block set aside. DigiPH urges that the Commission adopt reauction procedures which do not prejudice the rights of C block licensees who have abided by the Commission's original rules and commenced, or completed, the build out of their networks.

I. REAUCTION WITHOUT INSTALLMENT PAYMENTS

Those commentors who support the Commission's proposed reauction without installment payments blame the allowance of installments in the original C block auction for the

¹ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 97-82 (released October 16, 1997).

² DigiPH participated in the C block auction under the name Mobile Tri-States L.P. 130, and holds C block licenses for eight (8) BTAs in Mississippi, Alabama and Florida.

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overbidding which resulted in the current C block problems.³ For example, Conestoga Wireless Company (“Conestoga”) asserts that reauction of spectrum without installments is “[t]he only way to ensure that bidders behave rationally [] by requiring them to test their business plan in the marketplace and obtain financing on their own.” Conestoga further notes that this will “encourage bidders to place rational limits on their bidding.”⁴

DigiPH argued at length in its initial comments to the Commission that reauction of returned spectrum or licenses without installments will result in lower bids and reduced prices for the reaucted licenses. Without repeating those arguments, DigiPH notes in summary, that such a reauction would be terribly unfair to those entities which bid responsibly, obtained the requisite financing, commenced build out of their BTAs and are now approaching commercial launch of their networks. DigiPH and similar licensees are simply not in a position to take advantage of any of the menu options because they have already invested significant capital, time and effort to bring wireless service to their BTAs. Thus, the proposed reauction without installments creates a severe competitive disadvantage for DigiPH and similar licensees by forcing them to pay more for their licenses than their competitors who obtain their spectrum at reduced prices on reauction.

Thus, Conestoga’s argument for reauction without installments misses one very important point. Those licensees who bid responsibly in the initial auction, obtained financing and proceeded to build out their networks did so in justifiable reliance on the Commission’s rules as originally promulgated. To change the rules now creates a serious disadvantage for those

³ See Comments of Conestoga Wireless Company, at 2-3 (“Conestoga”).

⁴ Conestoga at 3.

entities that bid responsibly, are building their networks and ultimately, played by the rules as originally established by the Commission.

As demonstrated by DigiPH's initial comments, a reauction without installment payments will lead to disparate treatment of licensees in the same service. Such inequitable treatment destroys the integrity of the auction process. While the Commission may determine that installment payments encourage irresponsible bidding and therefore should not be offered, this determination should apply to *future* spectrum auctions, not the reauction of previously awarded spectrum. To change the rule midstream is highly unfair to the entities which operated according to the Commission's plan for the entrepreneurs' block and proceeded to build their networks. Such a radical shift in policy should not be allowed. To do so creates competitive disadvantages for those who, because of the progress of their build out, cannot avail themselves of the Commission's "menu" of options. The only fair solution is to retain installment payments for the reauction such that licensees in the same service are not subjected to artificial competitive inequities.

II. REMOVAL OF THE C BLOCK SET ASIDE

Some commenters have suggested that the Commission open the reauction to all entities rather than limiting bidders to those entities which qualify as small businesses.⁵ Nextel Communications, Inc. ("Nextel") argues that to continue the set aside of spectrum for small businesses and entrepreneurs is at odds with the Commission's goal of providing licenses to those who place the greatest value on the spectrum and "skews" the market for C block spectrum.⁶ DigiPH did not address this issue in its initial comments because it was not part of

⁵ See Comments of Nextel Communications, Inc. ("Nextel").

⁶ Nextel at 7.

the Commission's proposal, nor did the Commission seek comment on this issue. However, for the same reason that the Commission should not eliminate installment payments for reauctoned spectrum, the Commission must not eliminate the C block set aside. As with the proposed elimination of installments, to change the rules at this late date seriously harms those entities which abided by the Commission's original regulatory scheme. Elimination of the set aside would force DigiPH and similar entities to compete with larger, better-financed companies who obtain C block spectrum at discount prices on reauction. The disruption of the competitive balance at this late stage would be overwhelming. Without the set aside, smaller entities which created viable business plans, bid responsibly and are building their networks would be forced to compete with telecommunications giants who can obtain cheaper spectrum on reauction.

Further, the Commission's decision to limit the C block to designated entities was determined to be the best way to implement the congressional mandate of ensuring the wide dissemination of licenses among diverse entities.⁷ Despite the possibility that a set aside block of spectrum may "skew" the market, the Commission determined that the need to encourage participation by designated entities outweighs any potential harm. In fact, the Commission specifically considered, and rejected, similar arguments to eliminate the set aside of spectrum blocks for designated entities.

We do not accept [the] argument that we should do away with the entrepreneurs' blocks and instead offer bidding credits as well as other special provisions across all broadband PCS frequency blocks. As we already explained in the *Fifth Report and Order*, in

⁷ See, e.g., Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) ¶¶ 121-22. "We agree that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies [Reserving blocks for bidding by designated entities] would be the most direct mechanism for preserving opportunities for small companies in an auction environment."

our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provision with a limitation on the size of the entities designated entities will bid against. Without the insulation of the entrepreneurs' block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS.⁸

III. CONCLUSION

The Commission's proposal to reauction returned spectrum without installment payments is detrimental to those C block licensees who bid responsibly in the C block auction, operated pursuant to sound business plans, and have proceeded to finance and build out their networks. The Commission's proposal is simply unfair to DigiPH and similarly situated C block licensees in that the reauction on the scale envisioned under the Second R&O, coupled with the elimination of installments, will result in severe devaluation of spectrum.

Arguably, the availability of installment payments may have encouraged some C block licensees to bid irresponsibly. However, many other licensees participated in the auction and have proceeded to build out their networks in reliance on the availability of installment payments. Adopting such a radical change in direction after so many licensees detrimentally relied on the Commission's initial rules would simply be unfair. If the Commission is unsuited of its role as banker, it should eliminate installment programs from its future auctions, provided that in doing so, it establishes a well-reasoned alternative methodology to ensure continued participation in emerging technologies by small businesses, rural telephone companies, and other

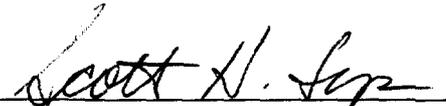
⁸ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, PP Docket No. 93-253, 10 FCC Rcd 403 (1994) ¶ 16.

designated entities. To eliminate installment payments from this reauction is unthinkable in light of the adverse impact on licensees who simply played by the rules.

Similarly, elimination of the set aside at this late date threatens the integrity of the auction process. To change the rules such that entities which have proceeded to build out under the current rules are forced to compete with deep-pocketed telecommunications giants who subsequently obtain devalued spectrum on reauction would be the epitome of unfairness. In addition, the Commission has already determined that set aside spectrum is essential to ensuring the viable participation of designated entities in the auction process. While the Commission may decide that for future auctions, installment payments and set asides should be eliminated, the fact remains that for the C block, installment payments and set asides were an integral aspect of participants' bidding strategy. To change now will result in significant harm to the licensees who continually played by the rules.

Respectfully submitted,

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