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Before the
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| In the Matter of | ) | |
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| Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding | ) | WT Docket No. 97-82 |
| | ) | |
| Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use | ) | ET Docket No. 94-32 |
| | ) | |
| 4660-4685 MHz | ) | |

COMMENTS OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") submits these comments in response to the Second Further Notice of Proposed Rulemaking ("FNPRM"), in the above proceeding, FCC 97-82, released December 31, 1997.

NTCA is a national association of approximately 500 local exchange carriers ("LECs"). These LECs provide telecommunications services to end users and interexchange carriers throughout rural and small-town America. NTCA members are typically small carriers that serve no more than 50,000 access lines. All of NTCA's members are included in the definition of a "rural telephone company," as defined by the Telecommunications Act of 1996.[1]

In its Third Report and Order, which precedes the FNPRM, the Commission adopts rules that discard its "service-specific" auction rules in favor of "general" competitive bidding rules

[1] Telecommunications Act of 1996, Pub. L. No. 104-1-4, 110 Stat. 56 to be codified at 47 U.S.C. §§ 151 *et. seq.*



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that apply to all auctionable services.[2] As part of this move towards "general" rules, the Commission adopts a uniform set of rules to govern the participation of designated entities. The new rules allow the Commission to select among different, pre-established levels of average annual gross revenue to determine which entities will be eligible for increased bidding credits and installment payment plans, if and when installment payments apply.[3] As written, these rules require that all designated entities, including rural telephone companies, be treated as "small businesses," as that term is variably defined by the Commission.

In the FNPRM, the Commission refers to its recent report to Congress on the spectrum auctions where it stated its belief that auctions have generally provided rural telephone companies with favorable opportunities.[4] The Commission proceeds by stating that in that report, "[w]e observed that, to date, rural telephone companies have won about 44 percent of the 123 rural Basic Trading Areas licenses and we noted some examples of rural telephone companies' successes in offering broadband PCS."[5] Despite these *supposed* successes, the Commission seeks comment on whether there are mechanisms that might further opportunities

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[2] In the Matter of Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rulemaking ("FNPRM")*, Released Dec. 31, 1997.

[3] The new rules eliminate the use of installment payments for the 800 MHz Lower 80 and General Category channels services, and suspend the use of installment payments for other services to be auctioned in the immediate future. The Commission also indicates that it intends to eliminate installment payments for the paging and 220 MHz services. Order, ¶¶ 34-43.

[4] FNPRM, ¶ 179.

[5] Id.

for rural telephone companies to provide spectrum based services.[6] NTCA takes exception to the Commission's self-congratulatory "Report to Congress"[7] and, in response to the FNPRM, would like to point out the deficiencies in the Commission's past and present treatment of rural telephone companies in the hopes that one day it will give full effect to Congress' 309(j) mandate.

## I. CONTRARY TO THE FCC'S REPORT TO CONGRESS ON SPECTRUM AUCTIONS, RURAL TELEPHONE COMPANIES HAVE NOT HAD VIABLE OPPORTUNITIES TO PROVIDE SPECTRUM-BASED SERVICES

NTCA previously presented evidence that contradicts the FCC's stubborn assertion that rural telephone companies have had adequate opportunities to participate in spectrum auctions and to provide spectrum based services to rural American consumers.[8]

For example, in comments submitted in response to the FCC's *Inquiry on Competitive Bidding Process for Report to Congress*, NTCA indicated that data previously filed with the Commission shows that few of its rural telco members were able to compete in the PCS C-block auctions, and only a very small number actually won a license or hold investments in any of the winning consortiums.[9] NTCA stated that this "limited participation" was particularly troubling

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[6] Id.

[7] See *The FCC Report to Congress on Spectrum Auctions*, WT Docket 97-150, at 25-27 (rel. Oct. 9, 1997).

[8] NTCA Comments in response to *FCC Inquiry on Competitive Bidding Process Report to Congress*, WT Docket No. 97-150, filed August 1, 1997.

[9] Id. at 3. See also, NTCA Comments at Appendix A, GN Docket No. 96-113, which provides the percentage of NTCA members who participated in the C-block auction by state, their average percentage equity in a bidding entity, and the total number of licenses won by bidding entities partially or wholly owned by NTCA members (by state).

because the C-block was a block set aside as an entrepreneur block and originally designed as an incentive to enhance small business participation in the competitive bidding process.[10]

NTCA presented further evidence that the Commission's designated entity rules have failed to stimulate rural telco participation in spectrum auctions with data obtained from a member survey. Out of a total of 91 responding members, less than half participated in any FCC auction within the last 4 years.[11] Thirty percent of those companies that did not participate stated that their lack of participation was directly due to difficulty in obtaining financing.[12] Further, many of those that did bid for one or more license were forced to drop out as the bidding reached extremely high prices-per-POP.

NTCA urged the Commission to address these issues in its report to Congress. Unfortunately, the Report ultimately submitted to Congress glossed over the shortcomings of the competitive bidding rules and, in particular, failed to even acknowledge NTCA's concerns about the designated entity rules.[13]

With this repeated failure to address rural concerns as a backdrop, the Commission, in its FNPRM, asks for comments on whether there are mechanisms that might *"further"* opportunities

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[10] Id.

[11] According to the company responses, only 43.96 percent participated as a bidding entity in any one of the following spectrum auctions during the last four years: broadband PCS, narrowband PCS, Multipoint Distribution Service, or Wireless Communications Service.

[12] Non-participating respondents listed other reasons for abstaining as well: 41 percent of all non-participating entities indicated that the auctions rules were too confusing; 61 percent stated that they did not participate because of the size of the in-region license area; 31 percent pointed to the build-out requirements as the deterring factor.

[13] See supra, n.7.

for rural telephone companies to provide spectrum based services.

## II. THE COMMISSION MUST GIVE FULL EFFECT TO CONGRESS' 309(j) MANDATE IF IT HOPES TO PROVIDE OPPORTUNITIES FOR RURAL TELEPHONE COMPANIES TO PROVIDE SPECTRUM BASED SERVICES

In response to this most recent inquiry, NTCA asks that the "new" Commission halt the former's practice of disregarding Congress' 309(j) mandate. Section 309(j) requires the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum based services."

The first step towards fulfilling Congress' mandate is to discontinue the practice of lumping rural telcos together with small businesses and start addressing the needs of rural telephone companies with provisions that distinctly enhance the ability of rural telcos to participate in the provision of spectrum based services. If, however, the Commission insists on treating rural telephone companies as small businesses in their designated entity rules, then "like entities" should be treated the same in all auctionable services. For example, although the FCC has repeatedly applied analogous auction rules to small businesses and rural telcos, *i.e.*, identical bidding credits, installment payment plans and eligibility rules, it strayed from this pattern with respect to its rules governing the Local Multipoint Distribution Service ("LMDS").[14] In that singular instance, the FCC concluded that rural telcos were not merely "small businesses," but

[14] See Rulemaking to Amend Parts 1,2,21, and 25 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, FCC 97-82 (March 13, 1997).

rather established an eligibility restriction that prohibits rural telephone companies from bidding on in-region 1150 MHz LMDS licenses for three years. There is no corresponding eligibility restriction on other "small businesses." The Commission must address this inconsistency.

The second step the Commission should take is to start giving serious consideration to Congress' interest in affording rural telephone companies opportunities to participate in spectrum auctions so that rural areas would receive prompt service. Sections 309(j)(3)(A), (3)(B), and (4)(B) demonstrate Congress' clear and unambiguous intent that consumers residing in rural areas not be denied timely access to cutting-edge wireless technologies, products and services. To this end those portions of the statute requires the FCC to design auctions and auction rules that:

(1) promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas . . ." 47 U.S.C. § 309(j)(3)(A);

(2) promote economic opportunity and competition "by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including . . . rural telephone companies. . ." 47 U.S.C. § 309(j)(3)(B); and

(3) include performance requirements "to ensure the prompt delivery of service to rural areas . . ." 47 U.S.C. § 309(j)(4)(B).

A third step the "new" Commission should take is to adequately and thoroughly respond to rural commenters that respond to repeated inquiries regarding designated entity provisions. NTCA has pointed out that over the past few years, in several dockets involving competitive bidding and spectrum auctions, the Commission has "utterly ignore[d] Congress' many directives that the FCC specifically consider rural areas and rural telcos."[15] The Commission's Report to Congress typifies this deficiency as it failed to even mention issues raised in NTCA's comments.

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[15] See supra, n.8.

## CONCLUSION

Small, rural telephone companies continue to have difficulty participating in the spectrum auctions. A primary reason for this difficulty is the Commission's repeated failure to live up to all of its 309(j) mandates. For the above reasons, NTCA urges the Commission to reevaluate its treatment of rural telephone companies in the designated entity provisions of its "general" competitive bidding rules, in light of 309(j)'s mandates.

Respectfully submitted,

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February 6, 1998

## CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in WT Docket No. 97-82/ ET 94-32 was served on this 6th day of February 1998, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

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