

Holland & Knight

Tel 202-955-3000
Fax 202-955-5564
www.hklaw.com

Holland & Knight LLP
800 17th Street, N.W., Ste. 1100
Washington, DC 20006

June 3, 2015

Leighton T. Brown
(202) 457-7161
Leighton.Brown@hklaw.com

Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Ex Parte Presentation
WT Docket No. 14-170, GN Docket No. 12-268, RM-11395 and
WT Docket No. 05-211

Dear Ms. Dortch:

On June 1, 2015, Grant B. Spellmeyer, Vice President, Federal Affairs and Public Policy, United States Cellular Corporation (“U.S. Cellular”), and the undersigned met with Louis Peraertz, Senior Legal Adviser to Commissioner Mignon L. Clyburn, to discuss certain issues now before the Commission pursuant to the Notice of Proposed Rule Making (“NPRM”) and supplemental Public Notice in the above-captioned proceedings.¹

During the meeting, we again urged the Commission to generally maintain the current Designated Entity (“DE”) program, while also ensuring, through adoption of the proposals set forth in the NPRM, that small businesses continue to have an opportunity to participate in the provision of spectrum-based services.² We therefore stressed that the Commission must not adopt rules that would undermine, and possibly even destroy, the DE program due to concerns regarding Auction 97 that are unrelated to the DE program itself. For instance, we again expressed our opposition to restrictions on the percentage of equity ownership held by DE investors, minimum equity requirements for the controlling interest(s) in a DE, extended unjust enrichment periods, and discriminatory build-out requirements.

In particular, we strongly urged the Commission not to “cap” the amount of bidding credits a DE may claim for a given auction. We emphasized that for twenty years the Commission has consistently acknowledged that bidding credits are essential “to encourage large

¹ See *Updating Part 1 Competitive Bidding Rules*, Notice of Proposed Rulemaking, 29 FCC Rcd 12426 (2014); *Request for Further Comment on Issues Related to Competitive Bidding Proceeding; Updating Part 1 Competitive Bidding Rules*, Public Notice, 30 FCC Rcd 4153 (2015).

² See NPRM, 29 FCC Rcd at 12430 (“Collectively, these proposals seek to update our rules to reflect that small businesses need greater opportunities to gain access to capital so that they may have an opportunity to participate in the provision of spectrum-based services in today’s communications marketplace.”).

companies to invest in designated entities and to assist designated entities without large investors to overcome the additional hurdle presented by auctions...³ We also noted that, in recognition of their importance, the Commission has never imposed a monetary cap on bidding credits.⁴

In addition, as a demonstration of the importance of bidding credits, we provided the attached maps, which depict respectively the market areas actually won by U.S. Cellular's DE partners King Street Wireless in Auction 73 and Advantage Spectrum, L.P. in Auction 97, as well as the areas these applicants would have won on a *pro forma* basis without bidding credits, but assuming the same total outlay. In applying this constraint and thus reducing the number of licenses won, we assumed that King Street and Advantage Wireless would have bid for and won the markets with the highest population density, a reasonable assumption given the economics of deploying networks in low-density areas. The difference in the numbers of markets won with and without bidding credits, with all other factors kept constant, is stark. In the case of King Street, the reduction in the number of markets won without bidding credits would have resulted in curtailing the aggressive LTE deployment that it has been able to achieve. Moreover, the impact in rural markets would have been most severe.

We also noted the strong arguments made in these proceedings opposing bidding credit caps. For instance, the Multicultural Media, Telecom and Internet Council stressed that any "cap would only serve to impede the ability of DEs to compete in a highly competitive marketplace now and in the future."⁵ Similarly, the Auction Reform Coalition ("ARC") noted how "[a]ny artificial limit on a DE's ability to utilize bidding credits would [] restrict its ability to acquire spectrum licenses and participate in spectrum-based businesses."⁶ Consequently, the proposed caps would violate the statutory mandate that the Commission ensure that its competitive bidding rules adequately promote "economic opportunity and competition."⁷

In addition to being far lower in dollar amounts than the Auction 97 bidding credits alleged to be abusive,⁸ the unreasonably low caps proposed by some commenters would

³ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5539 (1994); see NPRM, 29 FCC Rcd at 12445 ("By making the acquisition of spectrum licenses more affordable for new and existing small businesses, bidding credits facilitate their access to needed capital.").

⁴ See Response to the FCC's Request for Further Notice of the Multicultural Media, Telecom and Internet Council, WT Docket 14-170, *et al.*, p. 17 (May 15, 2015) ("To date, the Commission has not imposed a cap on spectrum bidding credits; and in the strongest terms we urge the Commission not to do so now.").

⁵ *Id.* at 16.

⁶ Reply Comments of the Auction Reform Coalition, WT Docket 14-170, p. 7 (Mar. 6, 2015) ("ARC NPRM Reply Comments").

⁷ 47 U.S.C. §309(j)(3)(B).

⁸ See Comments of AT&T, WT Docket 14-170, *et al.*, p. 12 (May 14, 2015) (alleging that its proposed cap is needed to prevent DEs from "claiming *billions of dollars* in 'small business credits') (emphasis added); Comments of the Rural-26 DE Coalition, WT Docket 14-170, *et al.*, pp. 4-5 (May 14, 2015) (alleging that its proposed cap is needed to "deter large entities backed with Wall Street capital from gaming the rules and denying U.S. taxpayers *billions in revenue*") (emphasis added).

effectively prevent DEs from competing for spectrum in heavily-populated markets.⁹ Notably, in Auction 97, 179 licenses individually sold for more than \$40 million,¹⁰ which would be the maximum amount a DE could bid with the assistance of bidding credits if the Commission were to adopt the \$10 million cap proposed by AT&T and the Rural-26 DE Coalition. Further, such a purchase was, in a number of cases, for only a single 10 MHz license of mid-band spectrum. Prices for the more valuable 600 MHz spectrum will likely be higher. As King Street recognized, while this type of unreasonably low bidding cap “makes absolute sense to large nationwide carriers seeking protection from DE bidding competition, it does nothing to advance the statutory mandate at issue here.”¹¹

Moreover, even if a DE is not focused on the largest markets, the proposed caps would significantly restrict the number of licenses it could acquire. For instance, in Auction 97, 247 licenses sold for more than \$20 million, and 350 licenses sold for more than \$10 million.¹² Consequently, the proposed caps would prevent a DE from operating with sufficient scale to sustain itself in the industry, let alone become a viable competitive threat to the currently dominant carriers. In other words, as King Street explained, the “scale economies of the industry makes the consequences of capping bid credits far greater.”¹³

Further, a bidding credit cap very well could prevent DEs from even being able to acquire a limited number of small-market licenses because such a cap would make it very difficult to obtain even that level of financing, a consequence noted by several investment firms. For instance, as Council Tree Investors, Inc. explained, “[i]f DEs’ bidding credits are to be capped at low levels, large investors would have no incentive to ally with them, and would instead choose

⁹ See Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, *et al.*, p. 3 (May 18, 2015) (“As a single license in a major market may cost billions of dollars, a cap such as AT&T has proposed would make the new entrant credit essentially useless.”). In fact, prices for spectrum in New York City during auction 97 exceeded \$2.7 billion – 67 times the \$40 million ceiling implied by AT&T’s proposed \$10 million dollar cap on bidding credits.

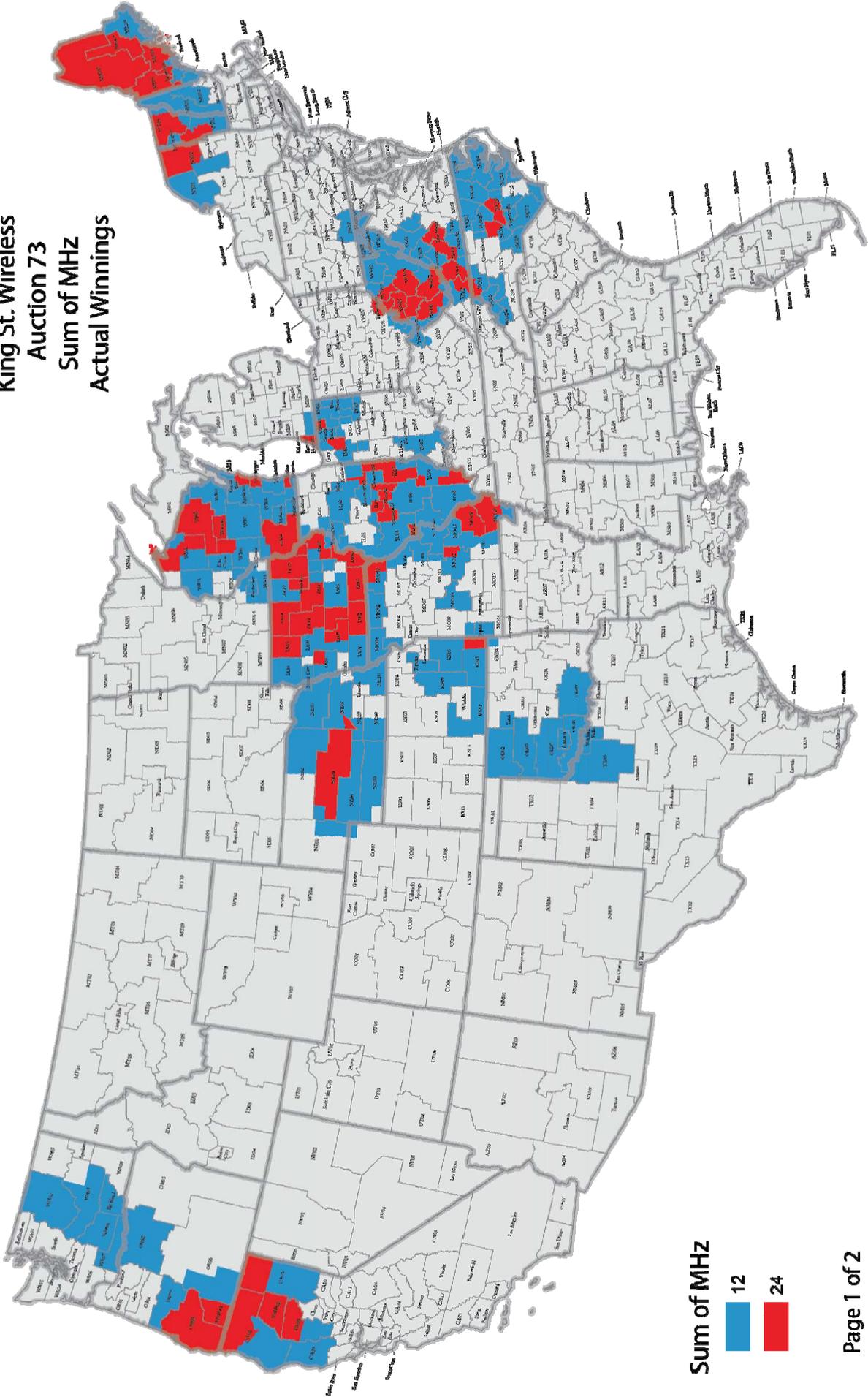
¹⁰ See *Auction 97 Full Information Round Results Files* (available at http://wireless.fcc.gov/auctions/auction_results_files.htm?id=97&type=full&setSize=0).

¹¹ Comments of King Street Wireless, L.P., WT Docket 14-170, *et al.*, p. 12 (May 14, 2015); see Reply Comments of Competitive Carriers Association, WT Docket 14-170, *et al.*, p. 10 (May 21, 2015) (“Through these proposals, AT&T transparently attempts to gerrymander the eligibility for bidding credits to exclude a significant portion of carriers and entities, thereby limiting the number of competitors that could conceivably compete with AT&T on a level playing field in a spectrum auction.”); ARC NPRM Reply Comments at 7 (“AT&T’s proposal would benefit only AT&T and other bidders having greater access to capital markets than do DEs.”).

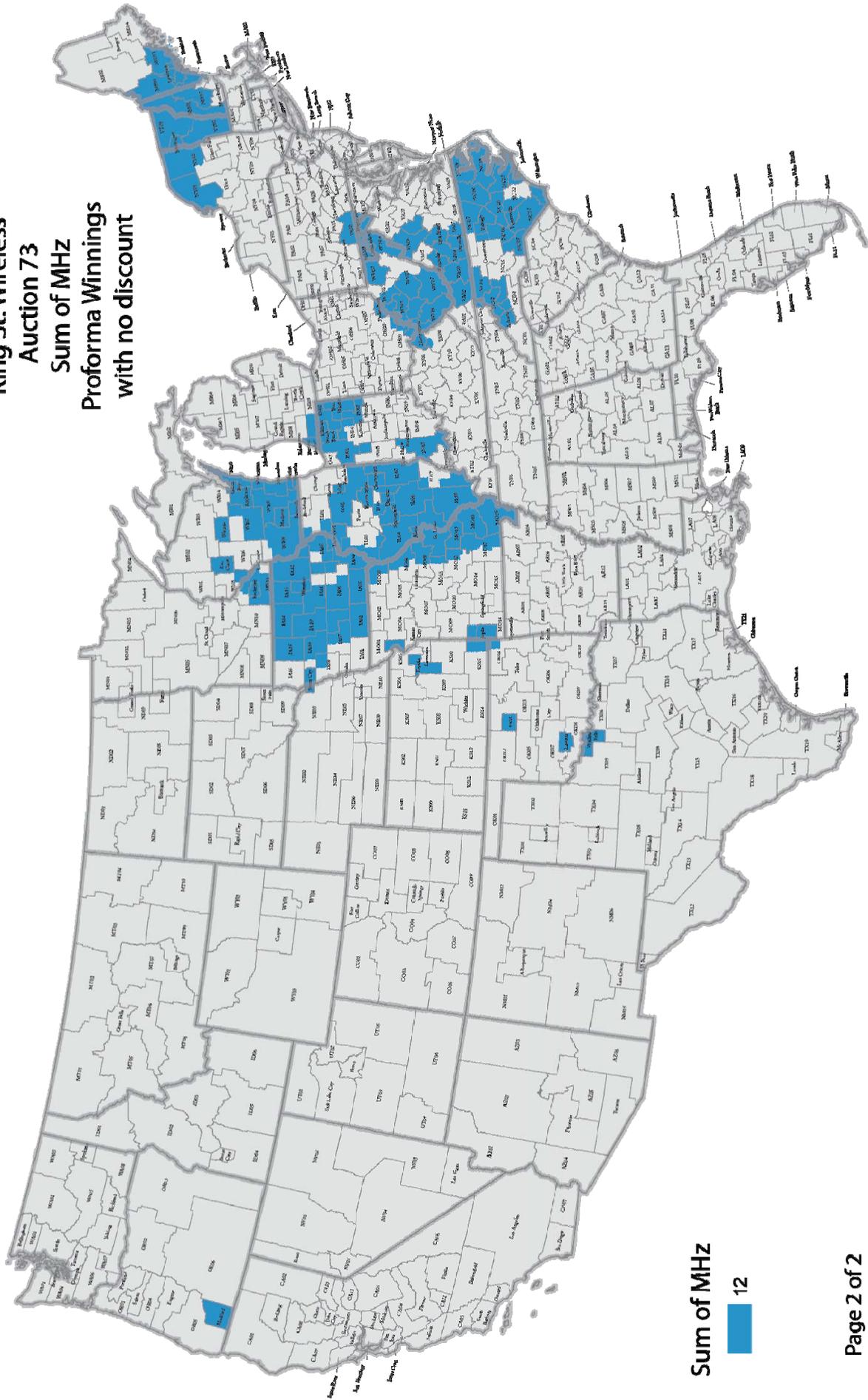
¹² See *Auction 97 Full Information Round Results Files*, *supra* n. 10.

¹³ Reply Comments of King Street Wireless, L.P., WT Docket 14-170, *et al.*, p. 4 (May 21, 2015); see Letter from E. Ashton Johnston, Telecommunications Law Professionals PLLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 14-170, *et al.*, p. 2 (June 1, 2015) (“Columbia Capital Ex Parte”) (“[S]cale has become ever-more important as spectrum scarcity demands greater efficiency of use across all bands.”); Comments of Competitive Carriers Association, WT Docket 14-170, *et al.*, p. 16 (May 14, 2015) (“Proposals to set the DE discount cap at \$32.5 million or less is far too limiting and fails to recognize that competition in the wireless industry is based in part on achieving sufficient scope and scale within a market to be [an] effective competitor against the nation’s two largest carriers.”).

King St. Wireless Auction 73 Sum of MHz Actual Winnings



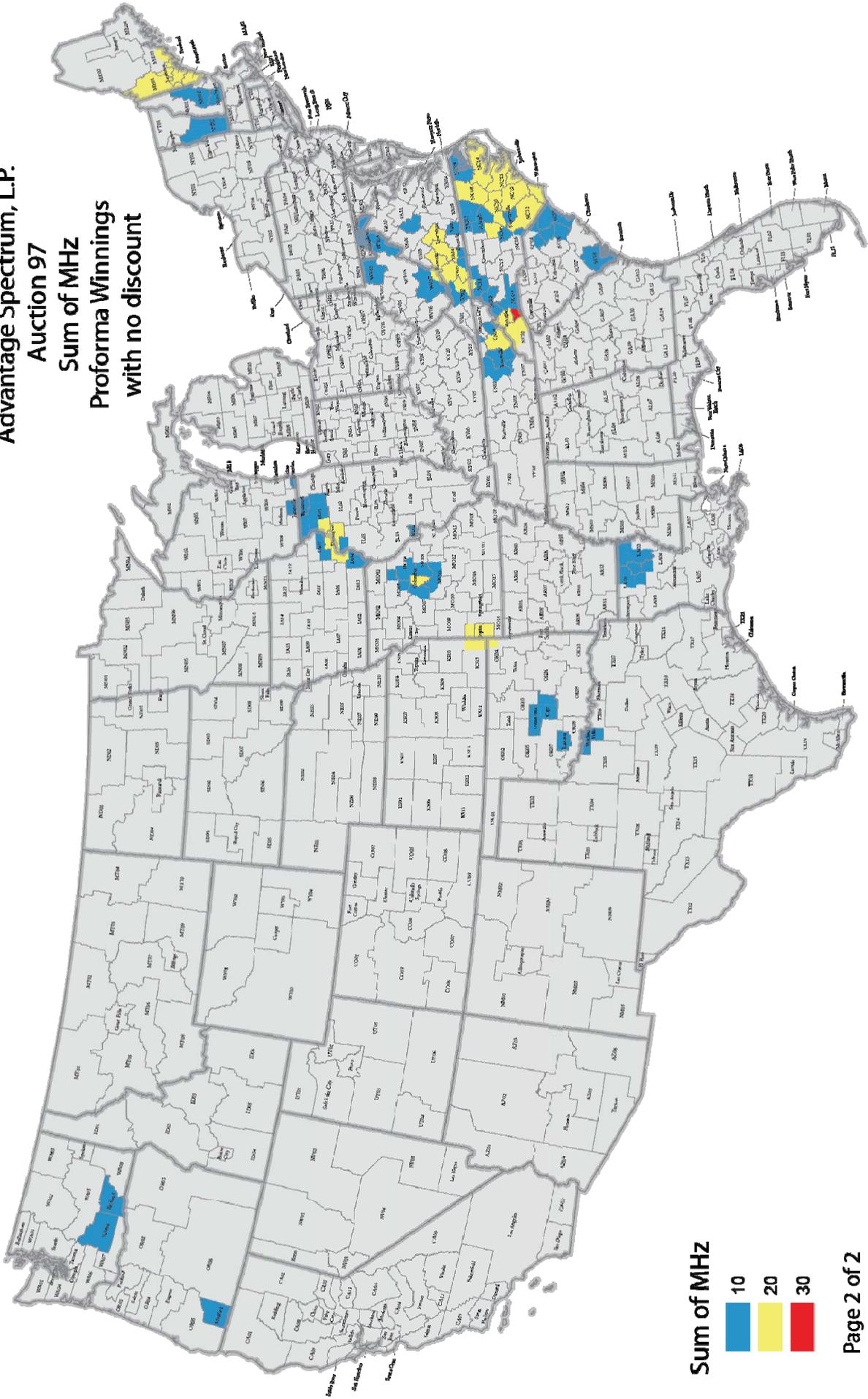
**King St. Wireless
Auction 73
Sum of MHz
Proforma Winnings
with no discount**



Sum of MHz

12

**Advantage Spectrum, L.P.
Auction 97
Sum of MHz
Proforma Winnings
with no discount**



Sum of MHz
10
20
30