

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

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In the Matter of)
)
Service Rules for the 746-764 and) WT Docket No. 99-168
776-794 MHz Bands, and Revisions)
to Part 27 of the Commission's Rules)
)
)

To: The Commission

Petition For Reconsideration

Nelson Repeater Services, Inc. ("Nelson"), by its undersigned counsel and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby files its Petition For Reconsideration of the Commission's *First Report and Order* in the above-captioned proceeding.¹ Nelson is a provider of SMR services in the 800 MHz band located in the Phoenix, Arizona area, and is a "Very Small Business" within the terms and conditions of Part 1 of the Commission's rules, in that Nelson has earned less than \$15 Million in annual gross revenues for the three preceding years.

Nelson petitions the Commission to reconsider its Order in this proceeding for the reason that, in view of the structure of the planned 700 MHz auction, there is no realistic opportunity for small businesses to compete for licenses in the planned auction. Congress has expressed a clear

¹ In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, First Report and Order in WT Docket No. 99-168, FCC 00-5 (released January 7, 2000) ("First Report and Order"); 65 Fed. Reg. 3139 (January 20, 2000).

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intent that the Commission must, in auctioning spectrum, establish mechanisms to ensure that small businesses have the opportunity to participate. Specifically, Congress provided:

the Commission shall seek to promote the ... following objectives: ... promoting economic opportunity and competition ... by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.²

This clear directive from Congress is being ignored by the Commission under its 700MHz auction Rules.

The Commission recently announced the minimum bids under the auction, with the lowest being \$40,000,000.³ Even with the maximum 25% bidding credit available under the Commission's rules for Very Small Businesses, the likely auction prices of the very large service territories drawn in this proceeding, and the very large bandwidths available for license makes it highly improbable that a small business can participate. This result of *de facto* exclusion of small businesses from the licensing process is contrary to the Congressional mandate underlying the Commission's bidding rules.

As the Commission is well aware, the 700 MHz UHF frequencies fall in an exceedingly valuable portion of the spectrum due to their outstanding propagation characteristics. In addition, the very large 20 MHz and 10 MHz license bands, and the Part 27 flexibility as to eligibility and use assure that these frequencies will command top dollar, even in small geographic service areas. These factors, combined with the enormous service territories proposed by the Commission in its Order, promise that competition for licenses will be limited to the very largest competitors and groups of competitors.

² Section 309(j)(3)(B) of the Communications Act of 1934, as amended, 47 USC §309(j)(3)(B).

³ DA 00-292, Attachment A (February 18, 2000).

A 25% discount seems relatively sizeable until it is realized that the likely prices for the auctioned licenses may be in the hundreds of millions of dollars. If, for example, EAG 5 (which extends from the Gulf of Mexico all the way to Canada, and cuts a very large swath through the map of the U.S.) sells for \$200 Million, a 25% discount only brings the price down to \$150 Million. This is a substantial percentage discount, but it is still *ten times* the annual revenue cap for a “Very Small Business”. And \$200 Million may be a naively low example in these circumstances.

The Commission’s use of bidding credits as a means to promote opportunity for small businesses was challenged as a “token gesture” in connection with the 800 MHz auction.⁴ In that case, the Court upheld the Commission’s action on the grounds that the use of bidding credits to facilitate success of small businesses in the auction was not a violation of the Communications Act because the Commission’s decision to fulfill by this means the Congressional mandate under §309(j)(3)(B) was not unreasonable *ex ante*.⁵ But as the Court stated, “it is true, as Fresno emphasizes, that the method chosen did not turn out to be successful at allocation licenses ‘among a wide variety of applicants.’”⁶ Thus, with the experience of that earlier auction now available as a guidepost, it is predictable that the same method will also be entirely unsuccessful in the 700 MHz auction. In fact, because of the expected cost of each available block in each

⁴ *Fresno v. FCC*, 165 F.3d 965 (D.C. Cir. 1999).

⁵ *Id.*, at 971.

⁶ *Id.*

EAG, and the extremely large minimum bids, this method will be even more unsuccessful, and the Commission's use of it in this auction is "unreasonable *ex ante*."⁷

Although the Rules provide for a consortium of small businesses or a consortium of very small businesses to receive the same 15% or 25% bidding credits available to single small and very small businesses, this will not alleviate the problem. Forming such a consortium involves sizeable transaction costs and risks. For example, for a consortium of 10 very small businesses to raise \$150 million, each would have to contribute \$15 million. Assuming each of them could even come up with the required capital, there would still be the problem of establishing the arrangement, sorting out the rights and privileges of each member, securing adequate contractual remedies and protections for each, etc. Assuming *arguendo* that all of these problems could be overcome, there still remains the problem that many of the potential candidate businesses to join the consortium are fiercely independent and competitive in nature, and joining a consortium of this type would be anathema in any case. Indeed, such businesses should not be forced by the Commission to join a coop-type arrangement in order to compete for spectrum against the few very large companies with billions of dollars at their disposal.

Nor will the hope that a small business might be able to buy or otherwise obtain a slice of spectrum from one of the auction winners satisfy the requirements of §309(j)(3)(B). The Congressional mandate is to make spectrum available to small businesses in the *auctioning* of spectrum, not just in theoretically possible post-auction transactions which are not fostered nor controlled under the Commission's rules.

Nelson submits that the Commission's Order has the ultimate effect of precluding small business participation in this auction, expressly contrary to Congressional intent. There are two

⁷*Id.*

possible remedies: redrawing of the service territories to cover less geographic area, for example, by reverting to a system of 52 MEAs or 176 EAs instead of the six very large EAGs. This would lower the cost of licenses, and might bring them in range for small businesses or consortia of small businesses. As an alternative, the Commission could set aside a portion of the spectrum for the exclusive use of small and very small businesses. A third possibility is to make the licensed frequency bands narrower.

Without implementation of one of these options, the result will be that only the very largest companies and groupings of companies will be able to compete for licenses, and the small businesses will be shut out of the frequencies altogether. This is not in the interest of the public, because it simply encourages large, oligopolistic operators, and concentrates market power in this very valuable spectrum in the hands of a few.

RELIEF SOUGHT

Nelson respectfully requests that the Commission reconsider its consolidation of Economic Areas to make large geographic groupings, effectively putting the auction price of the service territories out of reach for small businesses, even with substantial percentage credits. Nelson requests that the Commission redraw its service territories (either as MEAs or EAs) to make them less expensive, encouraging broader participation in the auctions. In the alternative, the Commission could consider setting aside a portion of the spectrum exclusively for smaller businesses, redraw the service territories and / or reduce the spectrum Block size.

CONCLUSION

For the reasons set forth above, Nelson respectfully requests that the Commission reconsider its Order as set forth above.

Respectfully submitted,

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