

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

RECEIVED
APR 17 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of the Commission's Rules) WT Docket No. 97-82
Regarding Installment Payment)
Financing for Personal Communications)
Services (PCS) Licenses)
Order on Reconsideration of the Fourth)
Report and Order)

DOCKET FILE COPY ORIGINAL

PETITION FOR CLARIFICATION OR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, Verizon Wireless¹ hereby petitions the Commission for clarification or further reconsideration of the rules concerning designated entities ("DEs"), including rules that were addressed in the *Order on Reconsideration of the Fourth Report and Order*.² A "Petition for Reconsideration" of that order, recently filed by US West Wireless and Sprint

¹ On April 3, 2000, pursuant to Commission approval (*Vodafone AirTouch, Plc, and Bell Atlantic Corporation*, DA 00-721, rel. Mar. 30, 2000), the domestic cellular, paging and PCS businesses of Bell Atlantic Mobile (BAM) and Vodafone AirTouch were combined, forming a new nationwide competitor that offers wireless products and services coast-to-coast using the name of Verizon Wireless.

² *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Fourth Report and Order*, FCC 00-54 (Feb. 29, 2000) ("*Order on Reconsideration*"), summarized, 65 Fed. Reg. 14213 (Mar. 16, 2000).

No. of Copies rec'd 0111
List ABCDE

Spectrum, as well as other petitions for rulemaking and waiver, led the Commission to announce that it will reexamine, in this rulemaking docket, the bidder eligibility policies and other procedures that will apply in Auction No. 35, the upcoming reauction of C and F block licenses. Because these policies and procedures are already under full review, the Commission should also take this opportunity to eliminate ambiguity concerning which companies will be able to participate in the reauction as DEs.

SUMMARY

Verizon Wireless asks that the Commission clarify or reconsider – in advance of the reauction – the operation of its two-year C-block "grandfather" rule, Section 24.709(b)(9)(i), with respect to entities that have undergone significant growth or ownership changes. In the *Order on Reconsideration*, the Commission suggested that this rule may allow companies that did not participate in C block restructuring to obtain grandfathered DE status, solely because they had participated in the original C block auction, years ago. However, some of these companies may no longer be DEs because they exceed the revenue limits that were intended to ensure that only smaller businesses are entitled to DE status. Extending DE status to all original C block participants may result in classifying as DEs companies that have grown financially, or have been acquired by, or merged with, large corporations. This would unjustifiably confer a windfall on large businesses, to the detriment of the DEs that the rule was intended to benefit — those who turned in licenses under

the C block restructuring program due to financial difficulties, in exchange for the right to bid in a future auction as DEs.

Verizon submits that resolution of these issues in advance of the auction will provide needed certainty, thereby avoiding the need to address eligibility issues on a case-by-case basis in response to petitions to deny and waiver requests, which will place a cloud on the auction and delay the issuance of licenses.

DISCUSSION

In the *Order on Reconsideration*, the Commission declined to extend the DE grandfather period beyond two years. However, in considering the issue at the time, the Commission could not take into account its current review of the eligibility rules for Auction No. 35.³ Broadly read, Section 24.709(b)(9)(i) gives grandfathered DE status to all who participated in the original C block auction or the C block reauction as eligible DEs. Under this broad interpretation, large companies may be given special benefits intended only for small companies who turned in C block licenses after encountering financial difficulties. Verizon Wireless respectfully requests that the Commission limit the scope of its rule or, alternatively, grant

³ Some parties have recommended that the Commission open some or all of the licenses in Auction No. 35 to all interested bidders, without regard to DE status. If the Commission modifies the eligibility rules, Verizon Wireless would be eligible to participate in a C and F block auction and compete for licenses, although some licenses may be set aside for DEs. As a result, the company has a strong interest in the issue of eligibility to bid as a DE.

reconsideration to modify the rule so that it is consistent with, instead of contrary to, the Commission's DE program.

Section 24.709(b)(9)(i) was originally adopted in the *Second Report and Order* in this docket,⁴ as part of a special package of rule provisions dealing with the future eligibility of licensees turning in some or all of their C block licenses, as indicated by its title: "Special rule for licensees disaggregating or returning certain spectrum in frequency block C." The *Second Report and Order* barred DEs from participating in the reauction for the spectrum that they had disaggregated or returned if they had retained any of the benefits – namely, if they had disaggregated and turned in only half of the spectrum (the "disaggregation" option) or if they turned in all of the spectrum but chose to apply a portion of their initial payments to other licenses (the "prepayment" option).⁵ Licensees turning in entire C block PCS licenses without seeking credit (the "amnesty" option) were not restricted: "Licensees electing the amnesty option will be eligible to bid for any and

⁴ *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 16436 (1997).

⁵ The Commission stated that "licensees . . . will be prohibited from bidding in the subsequent reauction for spectrum the incumbent licensee has disaggregated . . . [and] will also be barred from reacquiring the spectrum they have surrendered to the Commission through a secondary market transaction for a period of two years from the start of a reauction." 12 FCC Rcd at 16457, ¶ 42. Also, "for a period of two years from the start date of the reauction, licensees . . . will be prohibited from reacquiring the licenses surrendered pursuant to this [prepayment] option either through a reauction or any other secondary market transaction." 12 FCC Rcd at 16470, ¶ 69. These prohibitions were codified in Section 24.709(b)(9)(ii).

all licenses at the reauction.”⁶ The rule codifying these licensees’ right to bid in reauctions is Section 24.709(b)(9)(i). Section 24.709(b)(9)(i) had to cover more than just amnesty, however, because the Commission also intended to allow licensees who elected disaggregation or prepayment to bid at reauction for *other* licenses.

The rule thus states:

(9) *Special rule for licensees disaggregating or returning certain spectrum in frequency block C.*

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the auction for frequency block C, which began on December 18, 1995, or the reauction for frequency block C, which began on July 3, 1996, will be eligible to bid in any reauction of block C spectrum that begins within two years of the start date of the first reauction of C block spectrum following the effective date of this rule.⁷

This broad language arguably renders eligible "any entity that was eligible for and participated in" the original C block auction. However, the policy reasons for grandfathering into future reauctions C block licensees who restructured do not support maintaining a broad eligibility rule that includes parties that would not now qualify as DEs.

⁶ 12 FCC Rcd at 16462, ¶ 54.

⁷ 47 C.F.R. § 24.709(b)(9)(i). The current rule, quoted here, includes minor changes to aspects of the original rule not relevant here (*i.e.*, adjustment of the starting date for the two year period to include those who participated in the July 3, 1996 reauction of defaulted licenses).

The *Fourth Report and Order*⁸ made no substantive changes to the rule. In the *Order on Reconsideration*, however, the Commission interpreted Section 24.709(b)(9)(i) broadly, by applying the two-year grandfather provision arguably to *all* initial C block eligible applicants, not just licensees who returned spectrum. *Id.* at ¶ 6. Under this interpretation of the rule, *all* entities who participated in the original C block auction (or the initial reauction) would be grandfathered, even if they are no longer eligible as small businesses based on revenues and assets.

Despite this sweeping language, the *Order on Reconsideration* also acknowledges the context within which the grandfather rule was adopted, stating that the "two year 'grandfather' exception to the entrepreneur eligibility requirement was *part of a package of financial restructuring options offered by the Commission to C block licensees experiencing financial difficulties* in the wake of the first two C block auctions," and that the rules were intended to "provide '*limited relief*'" to the distressed entities — relief that was "*limited in . . . scope.*"⁹ It is difficult to reconcile the Commission's recognition that the rule was intended to have a narrow scope, addressing C block licensees who returned spectrum, with its interpretation that this grandfather rule should extend to additional companies — even ones that are now very large.

⁸ *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order*, 13 FCC Rcd 15743 (1998).

⁹ FCC 00-54, at ¶ 8 (emphasis added).

This conflict is obvious when considered in light of other rules applicable to C block licensees. All C block licensees are required to maintain their DE status for five years under Section 24.709(a)(3), except that they will not be disqualified if financially successful ("increased gross revenues or increased total assets due to nonattributable equity investments . . . , debt financing, revenue from operations or other investments, business development or expanded service" are not taken into account). Companies who do *not* hold C block licenses, however, are not subject to Section 24.709(a)(3) and are thus under no obligation to maintain their basic qualifications as DEs. Nevertheless, the *Order on Reconsideration* appears to interpret the grandfather rule as covering all companies that participated in the original C block auction, apparently including companies that are not subject to the obligations of Section 24.709(a)(3). As a result, this interpretation may confer unwarranted benefits on companies that were DEs in the original C block auction but are no longer DEs. Given that the heading of the grandfather rule states that its benefits are intended for C block *licensees*, it would be illogical to confer those benefits on companies who are not subject to the obligation of C block licensees to maintain their DE status.

The Commission's treatment of the closely-related issue of bidding credits is also instructive. Both the DE eligibility limitation and the provision of bidding credits were intended to achieve the same statutory objective, and look to the same factors to determine the whether a company is entitled to their benefits. In the *Fourth Report and Order* and the *Order on Reconsideration*, the Commission *denied*

requests to grant bidding credits to former small businesses merely because they had participated in the original C block auction.¹⁰ It explained this decision as follows:

*We concluded that it would not be in the best interests of the public and, in particular, of competing small businesses and licensees to provide a discount to applicants that no longer meet the small business size standards. . . . The purpose of such credits is to allow small entities with limited access to capital to compete effectively against larger businesses in auctions. Were we to allow large businesses to qualify for bidding credits, by virtue of their past participation as small businesses in earlier C block auctions, we would undermine the effectiveness of such credits in aiding entities that currently qualify as small businesses. We cannot justify such a result, nor can we envision a convincing public policy rationale*¹¹

The same concerns apply with equal force to the qualifications to participate in an auction as a DE. Companies participating in the reaction as DEs should be required to be in fact DEs. If the Commission believes that all or part of the C and F block reaction should be closed to non-designated entities, there is no justification for allowing companies that no longer qualify to participate in those closed auctions – with the sole exception being those companies that turned in licenses in reliance on being grandfathered, in accordance with the rule.

Just as granting bidding credits to non-DEs would harm qualified DEs, the interpretation of the grandfathering rule in the *Order on Reconsideration* would

¹⁰ See 13 FCC Rcd at 15752 n.57; FCC 00-54, at ¶¶ 9-10.

¹¹ FCC 00-54, at ¶¶ 9-10 (footnotes omitted) (emphasis added).

have adverse consequences for the companies the rule was intended to benefit. Legitimate DEs would be classed together with companies that may have been small businesses five years ago but are now major, established wireless companies which enjoy full access to the capital markets. Some former "small businesses" who previously held C block licenses have merged with or been acquired by other wireless operators. Such former DEs have had to explicitly renounce their DE status and have either transferred their DE licenses to eligible DEs or have paid the unjust enrichment penalties. No public interest objective is served by continuing to grant DE status to companies that are manifestly no longer DEs. The statutory objective of providing opportunities for companies outside the mainstream of telecommunications because of lack of access to capital¹² would not justify granting large companies DE status, and the grandfather rule should not be interpreted to provide otherwise. Otherwise, a grandfather provision that was adopted to provide limited relief to certain financially distressed C block licensees who turned in spectrum would become a potentially gaping exception to the DE eligibility requirements.

Verizon Wireless asks that the Commission eliminate any ambiguity by clarifying that the grandfather provision in Section 24.709(b)(9)(i) is available only to DE licensees who turned in spectrum as a *quid pro quo* in accordance with the C block restructuring program and who remain qualified as DEs. Moreover, the

¹² See 47 U.S.C. § 309(j)(3)(B).

entity claiming grandfathered DE status must be the same company – substantially the same ownership and control – that acquired DE status. There is no convincing public policy justification for allowing a former C block licensee to participate as a grandfathered DE in the reauction after its ownership has changed or after it has exceeded the revenue tests that were adopted for the 1996 PCS auctions.

CONCLUSION

For the foregoing reasons, Verizon Wireless requests that the Commission clarify application of the two-year grandfather rule in Section 24.709(b)(9)(i) as set forth herein.

Respectfully submitted,

VERIZON WIRELESS



John T. Scott, III
William D. Wallace
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595

(202) 624-2500

Its Attorneys

Date: April 17, 2000

CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 17th day of April, 2000, caused to be served true and correct copies of the foregoing "Petition for Clarification or Reconsideration" upon the following parties via hand delivery:

The Honorable William Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W., Room 8-B201H
Washington, D.C. 20554

The Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th Street, S.W., Room 8-A302C
Washington, D.C. 20554

The Honorable Susan Ness
Commissioner
Federal Communications Commission
445 12th Street, S.W., Room 8-B115H
Washington, D.C. 20554

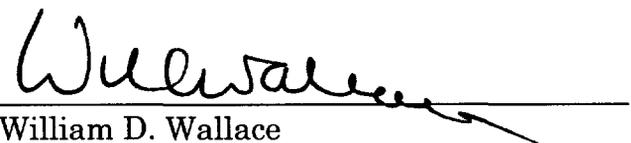
The Honorable Michael Powell
Commissioner
Federal Communications Commission
445 12th Street, S.W., Room 8-A204C
Washington, D.C. 20554

The Honorable Gloria Tristani
Commissioner
Federal Communications Commission
445 12th Street, S.W., Room 8-C302C
Washington, D.C. 20554

Thomas Sugrue
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C252
Washington, D.C. 20554

James D. Schlichting
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C254
Washington, D.C. 20554

Kathleen O'Brien Ham
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C255
Washington, D.C. 20554


William D. Wallace