

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Commission's Rules)	WT Docket No. 97-82
Regarding Installment Payment financing)	
For Personal Communications Services)	
(PCS) Licensees)	

COMMENTS OF POWERTEL

Powertel, Inc. (Powertel) hereby submits these comments in response to the Commission's notice of proposed rulemaking in WT Docket No. 97-82. The Commission issued this Notice in response to several petitions for rulemaking seeking changes in eligibility rules for upcoming Personal Communications Service (PCS) spectrum auctions. Powertel strongly opposes efforts to eliminate the reservation of C and F Block licenses and to dismantle the carefully crafted program for entities that qualify under the Federal Communications Commission's (FCC or Commission) rules as "designated entities."

Powertel, Inc. is one of the leading wireless Personal Communications Service providers serving the southeastern United States. The Company is licensed to provide wireless PCS services in 12 states to a population of more than 24 million people in major cities including Atlanta, Augusta, Columbus, Birmingham, Chattanooga, Jackson, Jacksonville, Knoxville, Lexington, Louisville, Macon, Memphis, Nashville and Savannah. With PCS service in 24 cities and along major connecting highway corridors spanning seven states, Powertel has the largest contiguous PCS network in the southeastern United States. The company utilizes GSM, the leading technology for digital wireless communications deployed in 110 countries with more than 70 million subscribers. Powertel offers consumers and businesses a variety of compact

handsets featuring a secure portable phone, voice mail, short messaging and paging services and a range of affordable pricing plans without contracts.

Powertel is a mid-sized carrier that does not qualify as a DE. However, Powertel's past participation in the FCC's PCS auctions and its spectrum use and acquisition strategy has been predicated in part on the DE rules as they currently exist. Therefore, Powertel opposes efforts to now "change the rules of the game" by dismantling the Commission's carefully crafted band plan and rules designed to ensure meaningful participation in auctions by DEs.

The Commission's rules, which resulted from extensive rulemaking over nearly five years, contemplate that larger carriers can participate in the restricted auctions by partnering with DEs. Powertel has done just that. Powertel has just recently committed to make a significant investment in a DE, and is considering further such investments. Instead of filing overly broad waiver petitions and seeking to overturn extensively considered rules designed to follow the Congressional mandate of small business participation in auctions, Powertel has partnered with DEs as provided for in the Commission's rules.

The Notice Overstates The Amount of Change That Has Occurred In The PCS Marketplace

The Commission states that circumstances have changed since 1994 when the Commission adopted the original rules for the C and F block spectrum.¹ Powertel disagrees with the Commission's conclusion. Approximately three years ago, a few entrepreneur's block auction participants with overly ambitious business plans filed for bankruptcy. Those large players locked up most of the licenses covering the largest amount of POPs, thus depriving other

¹ Notice at ¶ 25.

entrepreneurs with more realistic plans from trying their hand at putting the spectrum to productive use.

Moreover, the Commission continued to refine its rules concerning DE eligibility since 1994.² The current rules are the result of five years of extensive rulemaking activity by this and prior Commissions. In fact, very little has changed since the last two times that the Commission considered, and rejected, arguments by large entities that the entrepreneur's block auctions should be opened to all.³ As pointed out by PCIA and others in their comments opposing SBC's and Nextel's waiver petitions, any action by the Commission to change course now after six years of extensive rulemaking, and less than two years after re-affirming that the C and F blocks would remain "entrepreneurs only," would be arbitrary and capricious.⁴

About the only thing that truly has changed since 1994 is that consolidation within the industry has greatly increased. This consolidation has resulted in the creation of a handful of megacarriers whose extensive resources dwarf the majority of carriers with whom they would compete in an auction for licenses. The Commission recognized the dangers posed by consolidation in its decision to retain the spectrum cap,⁵ and the Commission tentatively concludes in this Notice that it will continue to retain the spectrum cap.⁶ The Commission's

² See Notice at ¶ 9 ("Since adoption of the *Competitive Bidding Fifth Report and Order*, the rules for auctions of C and F block licenses have steadily evolved")

³ The current attempt by non-DEs to rescind the set-aside represents the third effort in less than two years to open the auction to non-entrepreneurs. See Opposition Comments of Personal Communications Industry Association to Petitions of SBC and Nextel, filed in DA 00-191 ("PCIA comments") at 11-12.

⁴ See *id.*

⁵ *1998 Biennial Report Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket No. 98-205, Report and Order, FCC 99-244, at ¶¶ 25, 27 (rel. September 22, 1999) ("*Spectrum Cap order*").

⁶ Notice at ¶ 25.

decision to retain the spectrum cap to lessen this concentration cannot be squared with its decision to rescind the entrepreneur set-aside here.

Set Asides Remain Necessary to Prevent Undue Concentration in the Industry

Powertel is as aggressive a competitor as any in the PCS marketplace today. That is how Powertel went from a small rural wireless carrier to a leading PCS carrier in the Southeast region. Competition, even from megacarriers like AT&T, SBC, and Bell Atlantic-GTE, does not intimidate Powertel. But competition must occur on a playing field that is level. The Commission's arbitrary and capricious abandonment of its prior rules will harm carriers like Powertel that based their strategy on the continued existence of those rules. Marketplace participants that followed the Commission's rules should be rewarded. The Commission must not arbitrarily change the rules in the middle of the game to these carriers' detriment and to the advantage of carriers with already substantial advantages in size, scale, and scope.

As large carriers continue to merge with each other, the communications industry becomes increasingly concentrated. The remaining set-asides in the upcoming auctions represent the best chance to reverse this concentration, to the benefit of consumers. Carriers without overly grandiose business plans that won licenses in prior DE-only auctions have begun to provide innovative services. As the Commission has recognized, the circumstances that led to the high profile DE failures are unlikely to recur.⁷ The Commission must resist efforts to turn the wireless industry into a "largest carriers only" game at the expense of the small- and medium-sized carriers, and ultimately at the expense of the consumers.

⁷ *Amendment to the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8377 (1998).

Other Methods of Acquiring Spectrum Continue to Exist for Large Carriers

As PCIA and others noted, opening the C and F block auctions to large companies is not the only alternative for those companies to acquire additional spectrum.⁸ For instance, non-DEs can participate in the upcoming 700 MHz auctions. Non-DEs can also seek to buy PCS and other wireless spectrum from existing carriers or swap markets through "buy-sell" agreements. Large companies can seek partitioning, disaggregation, or roaming arrangements in markets where they have no spectrum. In addition, as PCIA, VoiceStream Wireless Corporation and Council Tree Communications all observed (and as Powertel has done), companies that do not qualify as designated entities can participate in the auctions indirectly through non-controlling investments in companies that do qualify as designated entities.⁹

Of all the options for accumulating additional spectrum mentioned above, the most important may be partnering with DEs. Such partnering arrangements help both the small carrier and the larger carrier and encourage diversity in accord with Congress's mandate. The carriers that result from these alliances have the potential to become viable competitors offering innovative products and services in competition with the megacarriers. The carriers that followed the rules and entered partnering and investment arrangements should be rewarded by allowing the auction to proceed with the set-asides intact as the Commission initially envisioned. If the Commission does decide to open the auction to all participants, Powertel agrees with the

⁸ *See, e.g.*, PCIA comments at 29-30.

⁹ *See, e.g.*, Comments of VoiceStream Wireless Corporation at 3 (stating that it has partnered with qualified designated entities in the past and illustrating that partnership arrangements are a viable option if the Commission does not open the auction to all interested persons); Comments of Council Tree Communications LLC at 9-10 (stating that the stated goals of petitioners could be obtained by using opportunities for management and investment already permitted in the Commission's rules); PCIA Reply Comments at 3, all filed in DA 00-191.

Commission's suggestion that, at a minimum, the amount of bidding credits available to DEs should be raised.¹⁰

Rule Changes Resulting From This Rulemaking Will Lead Only To Additional Delay

The Commission states in the Notice that speeding the development of new services to the public is one of several goals that it must balance in distributing the Nation's spectrum resources.¹¹ It is possible, and perhaps likely, that one or more DEs will file a legal challenge and seek a stay of the auction. Protracted legal proceedings, including the possibility of a successful appeal, could cloud title to the licenses for years to come.

At a minimum, this would create a chilling effect on the auction because of the risk and cost involved in participating in an auction. If the Commission insisted on moving forward with an expedited rule change, the winners could end up losing the licenses after a successful court challenge. Preparing for auctions is extremely expensive, as is the cost of paying for spectrum won at auction. The cost to the industry of participating in an auction under a cloud could be substantial, thus diverting investment that could be put to more productive use. At the same time, large entities would not be precluded from providing the services they seek to offer if the set-aside is preserved, because other options, such as partnering with DEs and participating in unrestricted auctions, exist for accumulating spectrum. For the public, the worst result that can occur is that productive use of the spectrum will be delayed. In addition to harming U.S. consumers, such delay will hurt American workers. Litigation-related delays could place U.S. manufacturers at a disadvantage in the competition to develop 3G products.

¹⁰ See Notice at ¶ 41.

¹¹ Notice at ¶ 24.

The Commission Should Not Change the Band Plan By Breaking Licenses Into 10MHz Blocks

Powertel opposes the Commission's plan to break the remaining licenses into three 10 MHz blocks.¹² The Commission should respect the expectation of carriers and their investors that eligibility in these auctions would be limited to DEs. At a minimum, DEs should have the first opportunity to bid on these licenses. Any licenses that are not purchased by DEs could then be distributed in an open auction. Should the Commission decide that some participation by non-DEs is warranted, it should limit that participation by reserving at least 20 MHz of licenses for DEs. If the Commission does decide to open the auction to all participants, again, Powertel agrees with the Commission that the amount of bidding credits available to DEs must be raised.¹³

The Commission Must Preserve the Spectrum Cap

Powertel agrees with the Commission that the current spectrum cap must remain in force. As recognized in the *Spectrum Cap* order and re-iterated in the Notice,¹⁴ preservation of the spectrum cap remains necessary to combat excessive concentration that would be deleterious to consumer interests. The Commission's tentative conclusion correctly recognizes that none of the pleadings submitted in support of waiver or forbearance from the spectrum cap meet the waiver standard set forth in the *Spectrum Cap* order.¹⁵

¹² See Notice at ¶ 16.

¹³ See Notice at ¶ 41.

¹⁴ *Spectrum Cap* order at ¶¶ 25, 27; Notice at ¶ 49.

¹⁵ Notice at ¶ 50 (citing *Spectrum Cap* order at ¶ 26.)

CONCLUSION

For the foregoing reasons, Powertel urges the Commission to retain the DE set
aside.

Respectfully submitted,

POWERTEL, INC.

By: _____
Jill Dorsey
POWERTEL, INC.
1233 O. G. Skinner Drive
West Point, GA 31833

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