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

In The Matter of)
)
Amendment of the Commission's Rules)
Regarding Installment Payment Financing for)
Personal Communications Services (PCS))
Licenses)

WT Docket No. 97-82

To: The Commission

COMMENTS OF SBC COMMUNICATIONS INC.
ON FURTHER NOTICE OF PROPOSED RULEMAKING

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DATED: June 22, 2000

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SUMMARY

As set forth in its previous filings regarding the C and F block spectrum to be re-auctioned, the Commission should open up the eligibility requirements for the auction so that companies with the resources to build facilities and commence service quickly can acquire this spectrum and finally put it to use in order to meet the burgeoning demand for wireless services. Accordingly, SBC supports the Commission's decision to change the eligibility rules to allow Companies who do not qualify as "entrepreneurs" to bid for this spectrum.

The Commission's proposals, however, do not go far enough. First, establishing a "Tier 1" of BTAs of markets with a population over 2.5 million will set aside too much spectrum for small companies in major markets where they will be unable to compete effectively. Thus, if the Commission decides to adopt a tiered approach, the top tier should include all markets with a population greater than one million.

Second, if the Commission decides to split the 30 MHz C block licenses into three 10 MHz licenses, it should allow new entrants to purchase all three licenses. The Commission's tentative decision limiting the rights of new entrants who are not entrepreneurs could result in the loss of a significant new competitor, or in the addition of a competitor without enough spectrum to compete effectively with incumbent providers.

SBC supports the tentative decision to allow open bidding on the 15 MHz licenses, and strongly urges the Commission to allow open bidding for the 10 MHz F block licenses as well. SBC also urges the Commission to lift entirely the remaining restrictions on transferring C and F block licenses won by entrepreneurs. Finally, the Commission should make clear, in view of the ongoing litigation over the status of the

defaulted C and F block licenses, that successful bidders will not have to pay for any licenses for which the Commission cannot ultimately deliver clear title.

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SBC Communications Inc. ("SBC") files these comments in response to the Further Notice of Proposed Rulemaking (the "FNPRM") released on June 7, 2000 regarding the eligibility rules for participating in the re-auction of C and F block PCS authorizations.

INTRODUCTION

SBC applauds the Commission's decision to change the eligibility rules for acquiring C and F block spectrum so that companies that would not otherwise qualify as "entrepreneurs" can participate in the upcoming auction. As set forth in SBC's petition for a waiver of those rules and in its subsequent filings on this issue, the public interest requires the Commission to put this long-dormant spectrum to use as quickly as possible in order to satisfy the rapidly escalating demand for wireless services. The best way to

do that is to allow companies that have the resources to build facilities and commence service quickly to bid for this spectrum.

The proposed changes, however, do not go far enough. First, the Commission's tentative decision to allow "open" bidding primarily in a "Tier 1" of BTAs consisting only of markets with a population exceeding 2.5 million is far too restrictive because there will be many large markets where much of the available spectrum will be reserved for small companies. Retaining such substantial set-asides for small companies ignores the past inability of smaller companies to construct systems in such large markets, as well as the strong and well-recognized market realities that will prevent those companies from competing effectively with the large national and regional carriers. This unnecessary reservation may lead once again to long delays in putting this valuable spectrum to use in the public interest. Accordingly, if the Commission does decide to implement a "tiered" approach to eligibility, the cut-off for the top tier should be set no higher than one million pops.

Second, if the Commission ultimately decides to split the 30 MHz C block licenses into three 10 MHz licenses, it should allow new entrants to purchase all three licenses. Failure to allow new entrants to do so could result in the loss of a significant new competitor in many markets, or in the addition only of a spectrum-constrained entrant that will be unable to compete as effectively with the incumbents. If the Commission decides to retain 30 MHz licenses, it should allow open bidding for them.

SBC strongly supports the Commission's tentative decision to allow open bidding for all 15 MHz C block licenses and urges the Commission to do the same for all F block licenses. SBC also supports the Commission's tentative decision to change the transfer

restrictions on C and F block licenses won by entrepreneurs by allowing sales to non-entrepreneurs in some circumstances, although here again the proposal does not go far enough. Rather, those restrictions should be lifted in their entirety so that this spectrum will be freely transferable. Finally, on a matter that has been previously raised by SBC but was not covered by the NPRM, the Commission should make clear that, in view of the ongoing litigation over the status of the defaulted C and F block licenses, successful bidders will not have to pay for any licenses for which the Commission cannot ultimately deliver clear title.

DISCUSSION

I. “TIER 1” BTAs SHOULD HAVE ONE MILLION POPS

The most significant proposal in the FNPRM is the Commission’s tentative decision to split the 30 MHz licenses into three separate 10 MHz licenses and to adopt a “tiered” approach to eligibility, under which two of those licenses would be subject to “open” bidding in markets with a population exceeding 2.5 million, while only one license would be available to non-entrepreneurs in other markets. While SBC continues to believe that the public interest would best be served by open bidding for all licenses in all markets, it is not opposed to a compromise involving tiers of markets; indeed, SBC previously suggested a compromise under which non-entrepreneurs would be allowed to bid in markets with more than 700,000 pops. The Commission’s tentative conclusion that the first tier should be limited to the very small number of markets that are more than 3 ½ times that size, however, will make available far too little spectrum in large markets for companies that have the financial and technical resources to ensure that this spectrum is quickly put to use by a strong competitor.

As SBC discussed at length in its earlier filings, the track record of the initial C and F block auction winners in large markets is dismal. For example, the initial C block licensees for 9 of the top 10 markets declared bankruptcy, and only one out of twenty C and F block licenses in those markets was operational by the beginning of this year.¹ Furthermore, the situation has not improved in any significant way since SBC filed its petition in January. According to the Commission's data, as of last month only 5 C and F block licenses covering the markets with 700,000 or more pops, and only 28 out of 1208 C and F block licenses – representing approximately 2.3% of those licenses – were operational.² By any standard, this demonstrates that these companies simply are not capable of entering large markets and competing in any significant way.

Indeed, the entrepreneurs who have benefited from set-asides have acknowledged that they are best suited to providing service in small and medium size markets. Even the larger players among the C and F licensees made this point in their responses to SBC's waiver petition: Omnipoint agreed that entrepreneurs were more likely to succeed in "markets [that] are not highly valued by bidders backed by larger, national players"; VoiceStream noted "a growing trend towards small-market PCS launches"; and Leap Wireless International, Inc. ("Leap") has tried to distinguish itself by offering flat-rate, local service (with no roaming) to lower income customers in "small- to mid-sized

¹ See Petition of SBC Communications Inc. for a Waiver of Section 24.709 and for Expedited Action at 8-9.

² See Buildout Schedule and Technology chosen by C Block Licensees {http://www.fcc.gov/wtb/pcs/TECH_C.XLS} (updated 5/10/00), Buildout Schedule and Technology chosen by D, E, and F Block Licenses {http://www.fcc.gov/wtb/pcs/TECH_DEF.XLS} (updated 5/10/00).

metropolitan areas that are regarded within the industry as ‘secondary markets’ with less potential for wireless growth.”³

Given the unmistakable market trends in the wireless industry – trends that the Commission has repeatedly acknowledged – it is inevitable that small carriers will continue in this role and will not be able to compete effectively with the large regional and national carriers in major markets. In those larger markets a new entrant will face four or more well-established competitors with facilities in place, name brand recognition and established customer bases. Thus, unlike the situation the Commission faced years ago in establishing the original eligibility rules for the C and F blocks, when only the two cellular carriers had a significant headstart, a new entrant obtaining a license in the upcoming auction will have to fight an uphill battle against many entrenched competitors.

Moreover, such new entrants will be at a distinct disadvantage in larger markets where they will have to compete for customers who are demanding nationwide rate plans and consistency of services and features across markets. The Commission has repeatedly recognized that consumer demands for such rate plans and services are the driving force behind the consolidations that have created large regional and national CMRS carriers and that the creation of such carriers serves the public interest.⁴ If carriers like AT&T,

³ See Reply Comments of SBC Communications Inc. (filed March 1, 2000) at 14-15. As SBC demonstrated, a number of other entrepreneurs made the same point. For example, Carolina PCS I L.P. (“Carolina”) conceded that only one of its markets is “somewhat metropolitan,” that the others are “largely rural” and that “[t]he majority of C and F Block carriers ... are seeking to provide regional, niche-market PCS services to their customer.”

⁴ See In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Servs., Fourth Report, 14 FCC Rcd. 10,145, 10,159-60

[Footnote continued on next page]

Sprint, SBC/BellSouth, Bell Atlantic/GTE/Vodafone and VoiceStream/Omnipoint/Aerial are being compelled to create larger footprints to meet these market forces, how can a small entrepreneur hope to compete effectively in a large market on a stand-alone basis? Even assuming that it could pay for its license and find the financing to build out a large system, it will never be able to offer potential customers a facilities-based, roaming charge-free footprint that is even remotely comparable to the major carriers, and thus will be severely hampered in its ability to offer the increasingly popular "single" rate plans and to offer customers consistent features in other markets. For example, AT&T has reported that it added one million new subscribers to its single rate plan in 1999, resulting in substantially increased roaming expenses. As a result, AT&T has been forced "to seek to decrease roaming expenses through capital spending for network expansion, acquisitions and affiliate launches."⁵ Small entrepreneurs will not be able to decrease high roaming rates in this way, leaving them at a severe competitive disadvantage.⁶

[Footnote continued from previous page]

(1999) ("1998 CMRS Annual Report"); In re Applications of Vanguard Cellular Systems, Inc. and Winston, Inc., DA 99-481, Memorandum Opinion and Order, 14 FCC Rcd. 3844, ¶ 24 (WTB Mar. 11, 1999).

⁵ See AT&T Corp., SEC Form S-3, Amendment 1 at 39,40 (filed Mar. 28, 2000). See also "The Rate Race: The Complexities of Simplified Pricing," Wireless Review, available at <http://www.wirelessreview.com/issues/1999/90201/feat28.htm> (stating that Bell Atlantic Mobile reported a 100% jump in digital sales since it launched SingleRate pricing plans and that "these plans are driving business and revenues")

⁶ The Commission has also acknowledged that high roaming rates are an impediment to implementing the kind of single rate plans for wireless service that are so popular with consumers, and the creation of large regional and national facilities-based carriers is in the public interest because it can facilitate the offering of such plans. See 1998 CMRS Annual Report at 10,159-60. Similarly, commentators have also noted the significant cost burden that roaming charges place on a carrier seeking to offer a single rate plan. See United States Cellular Corp., June 30 1999 Quarterly Report (SEC Form 10-Q) (reporting a 59% increase in net outbound roaming expense due to an expanded "local"

[Footnote continued on next page]

In view of both the past failures of smaller firms and the undeniable market forces that are resulting in the creation of national facilities-based carriers, the Commission's concession in the FNPRM that "the record provides some indication that designated entities have had greater success in markets with smaller populations"⁷ is a remarkable understatement. The plain fact is that there is no basis for believing that smaller firms can hope to compete effectively in large markets and that the Commission can expect additional failures unless it conforms its eligibility rules to this marketplace reality.

In particular, the Commission's proposal to divide the C block licenses into three 10 MHz licenses and to allow open bidding for only one of those three licenses in markets with populations up to 2.5 million is an invitation to continued problems of the kind that have been plaguing the Commission for years. This proposal would greatly limit open bidding for all but the very largest markets, severely restricting the ability of large carriers to expand into such major markets as San Diego, Baltimore, Tampa, Denver, Cincinnati, Kansas City, Portland (Oregon), Charlotte, Norfolk and San Antonio. While dropping the threshold to 2 million or 1.5 million, as the FNPRM also suggests,

[Footnote continued from previous page]

area, and noting that the roaming rate US Cellular absorbs usually exceeds the "local rate" US Cellular charges its customers); "AT&T Sets Up a Venture with Dobson to Broaden its Cellular-Phone Network" Wall St. J. B16, Oct. 7, 1999 (available at 1999 WL-WSJ 24916787) (reporting that a nationwide network is important to AT&T's cost-effective delivery of its flat fee calling plan); "Carriers Still Battle for Users with Price" RCR Radio Comms Rep. Sept. 14, 1998 (available at 1998 WL 21947903) (noting carriers' initial reluctance to offer one-rate plans was primarily due to the expense involved in the elimination of roaming charges). A small carrier attempting to operate in a single (or a few) major market(s) would either have to forego offering such rates or would suffer from a severe cost disadvantage in offering them since it would have no choice but to incur such high roaming charges on a broad scale.

⁷ FNPRM, ¶ 30.

would improve matters somewhat, the line for Tier 1 BTAs should be drawn no higher than 1 million, which would ensure that markets, such as Columbus, Louisville, Indianapolis, Orlando, Greensboro, Jacksonville, Richmond and Albany, would be covered. It does not serve the public interest to restrict the ability of consumers in these markets to obtain service from some of the country's largest and most efficient wireless service providers.

SBC continues to believe that the public interest would best be served by opening up the bidding for all of the licenses to be re-auctioned, without establishing any tiers. Indeed, the FNPRM states that the Commission might decide not to adopt a tiered approach at all,⁸ and SBC urges it to do just that. In the event that the Commission does ultimately decide to create different tiers of eligibility, however, SBC strongly urges it to not to create rules that will run headlong into clear market forces by greatly restricting open bidding in all but a handful of the very largest markets.⁹

II. THE COMMISSION SHOULD ALLOW NEW ENTRANTS TO OBTAIN MORE SPECTRUM THAN INCUMBENTS

The FNPRM tentatively concluded that the Commission should allow open bidding in Tier 1 markets for only two of the three 10 MHz licenses to be created from the current 30 MHz licenses, and that it should allow open bidding for only one of those three licenses in markets below the first tier, although it also seeks comments on an alternative proposal that would allow open bidding on all three licenses in Tier 1 and two

⁸ See FNPRM, ¶ 30.

⁹ The Commission's proposed cut-off of 2.5 million pops would restrict the top tier to only 9 out of 103 markets in the auction, while SBC's proposal to draw the line at one million pops would place 30 out of 103 markets in Tier 1.

of the three in all other markets.¹⁰ With the caveat discussed below, SBC strongly supports allowing open bidding to the greatest extent possible.

The only restriction to open bidding that SBC supports is that the Commission should distinguish between new entrants and incumbent providers. As SBC has argued before – and as the Commission has stated in the past¹¹ – 30 MHz of PCS spectrum is needed to offer a full complement of both voice and data wireless services. Indeed, while the FNPRM tentatively concluded that a wireless system could function with less spectrum, it is carefully worded to state only that “a 10 MHz C block license is a viable minimum size for voice and some data services.”¹² The public interest, however, is not served by creating new competitors that are restricted to the “minimum” amount of spectrum needed to be “viable” for voice service, with only “some” capability to provide data services. In particular, there is no reason to place such restrictions on large carriers seeking to fill in the gaps in their service areas and to become new competitors against other major incumbent carriers who have far more than 10 MHz of spectrum. Accordingly, new entrants should be allowed to bid on and obtain all three 10 MHz

¹⁰ See FNPRM, ¶¶ 28-30.

¹¹ See In re Amendment of the Commission’s Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, 9 FCC Rcd. 4957, ¶ 56 (1994) (“We also believe that limiting one licensee to 20 MHz could be a disadvantage for future competition. The ability to provided a complete package of mobile voice and data services could become a significant competitive advantage in the future. Such a package of wireless services, however, may require more than 20 MHz of spectrum.”)

¹² FNPRM, ¶ 16 (emphasis added).

licenses to ensure that they can compete on a level playing field with incumbents who already have 25, 30 or more MHz.¹³

III. THE COMMISSION SHOULD ALLOW OPEN BIDDING FOR ALL OTHER LICENSES

SBC strongly urges the Commission to allow open bidding on both the 15 MHz C block licenses that were not sold in Auction No. 22 and the 10 MHz F block licenses. Given its tentative conclusion to allow at least one of the new 10 MHz C block licenses to be the subject of open bidding in all markets, there is no good policy reason not to allow open bidding for the single 10 MHz F block license in each market. Indeed, as the FNPRM notes, there is already a 30 MHz C block license held by an entrepreneur in almost every market where an F block license is up for re-auction, so closed bidding is not necessary to ensure that at least one smaller company will be able to enter the market.¹⁴ In addition, since the F block licenses that have already been awarded have been built out more slowly than the Commission had hoped,¹⁵ maintaining closed bidding for these remaining licenses would likely result in further delays in putting this spectrum into use. Moreover, many of the available F block licenses cover major markets, such as Chicago, San Francisco, Philadelphia, Dallas, Atlanta and St. Louis, which, as discussed earlier, small entrepreneurs are not likely to be able to serve effectively. Finally, it is quite likely that this spectrum can best be put to use by existing wireless carriers to provide data and

¹³ SBC does agree with the Commission, however, that any attempt to implement a package, or “combinatorial,” bidding structure would be too complex due to the large number of licenses involved. See FNPRM, ¶ 17.

¹⁴ See FNPRM, ¶ 31.

¹⁵ See FNPRM, ¶ 31.

other advanced 3G services. This is particularly true in these large markets, where a single 10 MHz license is almost certainly not enough to support a viable voice and data business.

Similarly, SBC supports the Commission's tentative decision to allow open bidding for all of the 15 MHz licenses. As the Commission noted, all of these licenses remain unsold after being offered on a closed bidding basis in Auction No. 22.¹⁶ Since they found no takers under the old eligibility rules, there is every reason to make them freely available now.

IV. SBC SUPPORTS THE REMOVAL OF THE TRANSFER REQUIREMENTS FOR C AND F BLOCK LICENSES

The FNPRM tentatively concluded that the current restrictions on transferring C and F block licenses, which severely restrict the ability of incumbent providers to transfer them to entities that were not eligible to bid for them at auction, should be loosened by eliminating restrictions on licenses obtained in open bidding and by allowing the transfer of licenses obtained through closed bidding upon the completion of the first construction benchmark, even if that occurs before the end of the five year holding period mandated by the current rules.¹⁷

SBC supports the Commission's conclusion that these rules need to be changed, but the proposed change does not go far enough. Specifically, these restrictions should be lifted in their entirety so that C and F block licenses can be transferred to a qualified party at any time. This result is particularly appropriate here because if this spectrum had

¹⁶ See FNPRM, ¶ 32.

¹⁷ See FNPRM, ¶¶ 43-44.

been put into use as scheduled several years ago, the time when such transfers would be allowed, even under the old rules, would be rapidly approaching.

As Chairman Kennard has stated, it should be a top priority of the Commission to create a vibrant secondary market for CMRS spectrum:

“We can create a secondary market for spectrum.... We can find ways to allow potential ‘buyers and sellers’ to come together. I want to have rules and policies that allow a secondary market for spectrum so that it flows as freely in the marketplace as any commodity.”¹⁸

These principles should govern here. Given the need for carriers to acquire more spectrum, the public interest in the creation of an effective secondary market, and the long delay that has already occurred in making this spectrum available, these licenses should be freely transferable.

V. THE COMMISSION MUST TAKE ACCOUNT OF THE PENDING LITIGATION OVER THE DEFAULTED LICENSES IN THE RE-AUCTION

Finally, although the FNPRM does not discuss this issue, the Commission should make clear that bidders will not be at risk of losing any of their money solely because the Commission is ultimately unable to deliver any of the re-auctioned licenses as a result of pending litigation regarding the status of defaulted licenses. While the recent decision of the Court of Appeals for the Second Circuit is certainly helpful in this regard, that litigation is not over and another challenge is pending in the DC Circuit. Accordingly, the Commission should expressly provide that a successful bidder will not have to pay for

¹⁸ Chairman William E. Kennard, "Wire Less is More," Address to the Cellular Telcomm. Indus. (Feb. 28, 2000), available in <http://www.fcc.gov/commissioners/kennard/speeches.html>.

any license that the Commission is ultimately unable to deliver and/or that the Commission will refund any money paid (with appropriate interest) if it is subsequently determined that the Commission did not have the authority to deliver a license.

CONCLUSION

For the reasons and in the manner set forth above, the Commission should modify its rules to allow SBC and other qualified applicants to bid on licenses in the upcoming re-auction of C and F block spectrum.



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DATED: June 22, 2000

CERTIFICATE OF SERVICE

I, Philip W. Horton, hereby certify that a copy of the foregoing Comments of SBC Communications Inc. on Further Notice of Proposed Rulemaking was served by hand this 22nd day of June, 2000, on the following persons:

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