

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

To: The Commission

**REPLY COMMENTS OF
NORTHCOAST COMMUNICATIONS, LLC**

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SUMMARY

Northcoast Communications, L.L.C. files these Reply Comments to continue to oppose the proposed changes to the FCC's existing entrepreneur block eligibility and bidding rules as unnecessary, inequitable, and *most importantly*, unsupported by the record. A review of the record compiled thus far in this proceeding does not justify a change in the existing FCC eligibility rules for the C and F blocks. To implement such a change would run afoul of the Administrative Procedure Act and U.S. Supreme Court precedent. In particular, in these Reply Comments Northcoast categorically refutes claims that eligibility rules changes are warranted because large carriers need more spectrum, and that small business PCS providers are unable to construct and compete in large markets. Specifically, Northcoast establishes that if large carriers were to use their existing spectrum more efficiently, they would not experience such spectrum scarcity. Further, as a DE that is in the process of building out a network in the largest U.S. wireless market, Northcoast proves arguments alleging DEs are unable to compete are equally baseless.

If compelled to compromise, Northcoast urges the Commission to open up only 10 MHz of spectrum in any single market to bidding by large carriers, or risk possible reaction delays resulting from legal challenges, that clearly would not be in the public interest. Finally, Northcoast dispenses with the claim that bidding credits could ever be a meaningful substitute for a spectrum set aside.

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Northcoast Communications, L.L.C., ("Northcoast") hereby submits Reply Comments in the captioned proceeding.¹ Northcoast filed Comments in this proceeding on June 22, 2000, in which it continued to oppose all proposed changes to the FCC's existing entrepreneur block eligibility and bidding rules as unnecessary, inequitable, and most importantly, unsupported by the record. Despite the fact that almost 40 parties weighed in during the Comment cycle in response to the Commission's *FNPRM*, the Commission is no further along in establishing a record that would support the drastic policy and rule changes proposed.

I. Summary of Comments

As mentioned above, the Commission received almost forty sets of Comments responding to the proposals raised in the *FNPRM*. To be precise, of the 35 comments filed that directly address the basic issue of whether the entrepreneur block eligibility requirements should be retained, 26 commenters *strongly oppose* the eligibility rule changes proposed by the Commission, and nine commenters not only support the proposed changes, but urge complete

¹ *Further Notice of Proposed Rulemaking in WT Docket No. 97-82*, FCC 00-197, released June 7, 2000 ("*FNPRM*").

elimination of the eligibility requirement. Not surprisingly, virtually all of these nine commenters are the large incumbent wireless licensees that initiated this re-examination of the rules.² In other words, approximately 75 percent of the commenters oppose the Commission's proposals, and it is this same majority of commenters who provided the Commission with the only real substantive analysis of its proposals. That analysis overwhelmingly establishes that the present record does not support the drastic changes in spectrum policy proposed in the *FNPRM*. The majority's analysis also conclusively demonstrates that adoption of the proposed changes would be tremendously bad public policy.

II. The Proposed Policy and Rule Changes are Not Justified by the Present Record

After reviewing *all* of the Comments filed in this proceeding, one point becomes patently clear - the Commission needs to cut through all of the conclusory statements and "truisms" being indiscriminately tossed about, and get back to policy and rule making basics. Basic concepts of administrative law dictate that before an administrative agency such as the Commission can revise an existing rule, an adequate record must be developed to justify that change in rule and/or policy³, and an agency must "cogently explain why it has exercised its discretion in a given manner".⁴ The record developed thus far clearly does not provide the Commission with the necessary support to enable it to explain and adopt the tentative conclusions proposed in the *FNPRM*. In this instance, the issue presented is more than just a single rule revision. Rather, the

² It is noteworthy, however, that Powertel, Inc. which no longer qualifies as a designated entity, "strongly opposes" the FCC's proposals to eliminate the eligibility requirement. Powertel's opposition is based on the premise that large carriers in fact already have the opportunity to participate in the upcoming reauction by partnering with designated entities, as Powertel has done. *See* Comments of Powertel at p. 2.

³ 5 U.S.C §706(2)(A).

⁴ *See Motor Vehicle Mfrs. Assn. of the of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 48 (1983)(finding the agency's reversal of the rules on seatbelts was not supported by reasoned decision-making)(hereinafter "*MVMA. v. State Farm*").

issue involves the elimination of a key component of the FCC's broadband PCS spectrum allocation and auction strategy. As so accurately stated by Leap Wireless International, Inc., the fundamental question that needs to be answered in this rule making proceeding is:

What changes in the wireless marketplace have occurred since the Commission's most recent affirmations of the Entrepreneur's Block eligibility and spectrum cap rules (that is, August 1998 and August 1999, respectively) that should cause the Commission to sacrifice the current and potential benefits to carriers and consumers of the Entrepreneur's Block regime?⁵

The answer is that the most significant change in the wireless marketplace over the past two years is the continued global consolidation of wireless service providers. Clearly, this significant market development does not justify elimination of the entrepreneur block regime.

Amazingly, despite the fact that most of the large carriers advocate *complete elimination* of the entrepreneur block set-aside, they apparently also believe that nothing more than gratuitous assertions of changes in circumstances and need for spectrum are necessary to support the elimination of the carefully crafted and balanced "Designated Entity" ("DE") rules.

Governing law does not sustain this approach. Significant rule changes cannot be justified by conclusory statements about changed circumstances. Instead, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'." ⁶ An agency's rule reversal is arbitrary and capricious and in violation of the law if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the

⁵ Comments of Leap Wireless International, Inc. at p.6.

⁶ *MVMA v. State Farm*, 463 U.S. at 43, citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁷ Northcoast also recognizes that that an “agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis” for that change.⁸ Northcoast submits that even after the Comments have been filed, the record in this proceeding does not provide the Commission with the requisite data and facts necessary for it to be able to cogently articulate its reasoned analysis supporting the extensive changes proposed.

To the extent that the large carriers attempted to provide a basis in their Comments as to why the entrepreneur block set-aside should be eliminated (as opposed to simply treating the rule change as a *fait accompli* that needs no justification), they basically rely on two conclusions made by the Commission in the *FNPRM*: first, that spectrum “shortages” justify the change;⁹ and second, that small businesses have been slow to build out major markets, and that they necessarily are unable to compete in those markets.¹⁰ As explained below, all of these assertions are unfounded, unsupported by the record, and consequently any conclusions based upon them would be fatally flawed.

A. Spectrum Scarcity Claims Should Be Documented and Spectral Efficiency Mandated Before Handing Over Entrepreneur Block Spectrum

In the Commission’s and large carriers’ haste to come up with reasons that might support the hasty dismantling of the entrepreneur block program, the fact that large carriers are

⁷ *MVMA v. State Farm*, 463 U.S. 29, 43; *see also Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. 1995) (“It is .. elementary that an agency must conform to its prior decision or explain the reason for its departure from such precedent.”).

⁸ *Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841 (D.C.Cir.)(1970).

⁹ *See, e.g.*, Comments of US West Wireless, LLC at p.4; Comments of Verizon Wireless at p.6.

¹⁰ *See, e.g.*, Comments of Nextel Communications, Inc. at pp. 7-11 (“Nextel”).

inefficient users of valuable spectrum is a matter of public policy that largely has been overlooked. Before the large wireless incumbents are given any opportunity to acquire spectrum reserved for DEs pursuant to a Congressional directive, they should first be required to prove to that they have taken all technologically feasible steps to efficiently utilize the spectrum that already has been allocated to them. As Northcoast noted in its Comment, large cellular providers continue to operate extensive, inefficient analog networks side by side with digital networks. More worrisome, however, is the fact that they continue to sell analog phones to new subscribers.¹¹ This practice creates the illusion of spectral scarcity on the one hand, while extracting a high return from mostly depreciated plant on the other.¹² As long as large companies are given the opportunity to weigh the cost of acquiring additional spectrum against the cost of upgrading their networks more rapidly, they will always attempt to acquire the spectrum and then continue to plead spectral poverty to the outside world.

If the Commission unquestioningly capitulates to these requests for additional spectrum, obviously these carriers will never have any incentive to implement spectrum efficient measures or equipment. Further, Northcoast also questions the wisdom of “rescuing” certain carriers from their own bad business decisions. Not only is there another upcoming auction of very desirable 700 MHz spectrum, but several of the large carriers could have participated in earlier PCS

¹¹ See, e.g., www.point.com, an online service that allows consumers to search for analog cellular service offerings by zip code.

¹² In most major markets, including New York, cellular providers have implemented no more than three digital CDMA carriers, or the equivalent in TDMA/GSM. As a practical matter, this means that out of a 25 MHz spectrum allocation, at most only 10 MHz is being used for digital service. Consequently, 15 MHz effectively is lying fallow and available for providing additional digital services, such as 3G services.

spectrum auctions, and chose not to. Designated entities should not now be forced to pay the price for other carriers' seemingly erroneous business decisions.

B. The Costs of Deploying Third Generation Networks in Major Markets By Small Businesses Have Been Greatly Exaggerated

Northcoast also vigorously contests the notion that small businesses cannot afford to build out or compete in larger markets.¹³ Once again, in order to advance their own (as opposed to the public's) interests, the large incumbents make sweeping, unsubstantiated generalizations¹⁴, and misrepresent the state of the record¹⁵ on this critical point. To support the contention that small business cannot afford to build out large markets, Nextel submits a series of capital expenditure projections for new entrants "contemplating the construction and operation of a wireless system to compete with incumbent cellular, PCS and SMR providers in major metropolitan areas."¹⁶ The figures submitted indeed are significant and likely would be quite daunting to most, if not all, DEs. However, these projections bear absolutely no relation to Northcoast's experience or business plan, and are premised on faulty and unrealistic

¹³ See, e.g., *FNPRM* at ¶¶26, 30; Comments of Nextel at pp. 7-11, Exhibit 1; Comments of SBC Communications Inc. at pp. 4-7.

¹⁴ See, e.g., Comments of SBC at 7 ("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.").

¹⁵ Specifically, Nextel's statement that the "record irrefutably establishes that licenses in major metropolitan areas, as well as even medium size areas, are ill-suited to successful development by small businesses" is completely baseless. Comments of Nextel at p. 8.

¹⁶ Comments of Nextel at Exhibit 1. In assessing these projections, the Commission should always remain cognizant of the fact that they were prepared by a Nextel employee, which is the same company that has made herculean attempts over the past two years, both publicly and privately, to obtain access to this spectrum. Consequently, while Nextel's exhibit basically constitutes the only real "evidence" that has been submitted into the record by a large carrier seeking to bolster its position, it hardly constitutes independent data upon which the Commission can rely.

assumptions. Consequently, the Commission cannot reasonably rely on this “data” as support for a potential finding that DEs are incapable of serving large markets.

Northcoast is at a loss to explain Nextel’s greatly exaggerated estimates for the cost of deploying a 3G wireless network. This is especially mystifying in light of Nextel’s current capital cost structure. A recent wireless industry report released by Bear Stearns & Co.¹⁷ estimates Nextel’s current capital expenditures to be \$27 per pop. However, Nextel’s Comments claim that the cost to construct and operate a 3G network in the Norfolk, VA BTA, to the point of reaching positive cash flows, would be “approximately \$550 Million”.¹⁸ Since the Norfolk market has a current population of approximately 1.6 million, this translates into a per pop capital requirement of \$343,¹⁹ exponentially higher than Nextel’s estimated average current capital expenditure per pop.

As a DE with a roll out schedule that includes four “Tier 1” markets over the next 18 months, Northcoast has received numerous construction cost proposals from major vendors, in addition to build out financing offers. In fact, Northcoast presently has commenced its build out of the New York market, having recently finalized its construction schedule and budget.²⁰ While Northcoast is not in a position to divulge the specifics of its plans due to certain non-disclosure

¹⁷ See “Wireless Trading Multiples”, for the week ending June 16, 2000.

¹⁸ Comments of Nextel at Exhibit 1.

¹⁹ Although Northcoast obviously does not believe that this figure is accurate, if we suspend disbelief and assume for the moment that it will cost Nextel \$550 Million to build and operate a wireless network that could serve the needs of 195,000 subscribers over 8 years, Northcoast estimates that Nextel would not be able to recover its investment for a period of at least 8 years. If this is in fact Nextel’s business model, we do not believe the Commission should encourage it in any way.

²⁰ Northcoast takes this opportunity to reiterate that it will launch service in New York and other *major markets in advance* of the five year construction benchmark that is generally applicable to the PCS industry.

agreements, it can say unequivocally that based on its experience, both Nextel's cost and construction projections are *drastically* inflated.²¹

Another reason why Nextel's projections should be discounted is that Nextel's overall business model is radically different than Northcoast's intended business plan. What might be "reasonable" for Nextel is ridiculous for a DE such as Northcoast. Northcoast firmly believes that it would be folly for it to attempt to compete head-to-head with any of the nationwide, bucket of minutes-no roaming fee service offerings by the AT&Ts, Verizons and Nextels. Northcoast does not believe it needs to copy such a service approach in order to be successful. In fact, Northcoast's business plan is not to compete as the sixth or seventh national "one rate" provider with another "me too" product. Rather, Northcoast will position itself as the second local phone company in the markets it serves, offering innovative new services in furtherance of the goals of Section 309(j) of the Communications Act. Northcoast will compete for local loop revenues with a bundled offering of products, including Local Area Mobility Service ("LAMS"), Wireless Local Loop ("WiLLs"), and fixed or mobile high speed data. This business plan has been met with great enthusiasm by both equipment vendors and financial backers.

Furthermore, Northcoast questions the universally accepted conventional wisdom of the large carriers that presumes their national one-rate plans to be the only viable business plans for effective use of this spectrum, and therefore the only plans that would serve the public interest. This simply is not true. Since when is absolute conformity a prerequisite to a public interest

²¹ Along these lines, Northcoast encourages the Commission to carefully consider NextWave's analysis of the respective costs associated with building out both Tier 1 and Tier 2 markets *vis a vis* the potential revenue upside presented by large markets. *See* Comments of NextWave at p. 6. Specifically, NextWave observes that while both Tier 1 and Tier 2 markets require high fixed-cost investments, Tier 1 markets would generate greater revenue streams to offset those costs, and likely result in more favorable business models. In addition, Northcoast notes that the average capital expenditure per pop for building out "urban" markets is significantly less than the average expenditure for smaller, more suburban or rural markets, which leads to greater cost efficiencies in larger markets.

determination? Experience already has shown that targeted, innovative niche service offerings, such as Leap's flat rate "local" service plan, can be successful in the CMRS market, as evidenced by Leap's high percentage of first time wireless users.²² Once again then, the record does not support the Commission's tentative conclusion that small businesses cannot succeed in large markets. Therefore, the Commission's proposal to remove the eligibility restrictions for all but 10 MHz of spectrum in Tier 1 markets cannot be justified and therefore should not be adopted.

III. Adopting the Proposed Changes Will Lead to Further Delay of the Reauction

One point that all parties (except NextWave) agree upon is the desire to proceed as expeditiously as possible with the reauction of C and F block spectrum, and to avoid any further delays in putting the subject licenses to productive use.²³ Retaining only 10 MHz of entrepreneur block spectrum for qualified DEs is not acceptable, fair or justified.²⁴ Northcoast believes that the record establishes that an absolute minimum of 20 MHz of spectrum is required to roll out 3G services. Several small business commenters state that their business plans require a 30 MHz set-aside. It is critical that the Commission craft a compromise that is broadly acceptable to all, and supported by the record. Clearly, given the paucity of the record established thus far, the draconian rule changes proposed could not be supported, and inevitably meritorious legal challenges will follow.²⁵ These will not be the baseless appeals and stay

²² See Comments of Leap Wireless at pp. 11-12.

²³ As an ancillary matter, Northcoast urges the Commission to release an updated and complete inventory of licenses to be included in the C and F block reauction. It is very difficult to simultaneously "defend" the entrepreneur block eligibility rules and develop a solid auction strategy, when it is not clear whether certain C and F block licenses will be included in the reauction.

²⁴ Northcoast also reiterates its position that eliminating the eligibility requirements for available 10 MHz F block and 15 MHz C block spectrum is unsupportable. See Comments of Northcoast at pp. 7-10; Comments of Leap at pp. 4-5; Comments of PCIA at pp. 20-21.

²⁵ See, e.g., Comments of the Personal Communications Industry Association at pp. 11-12;

requests that the Commission often has to deal with in other auction scenarios. Rather, the Commission would face a difficult challenge in justifying such sweeping changes, and significant reauction delays likely ensue.

IV. Bidding Credits Are No Substitute for a Set-Aside

Predictably, the large carriers' Comments universally advocate that all eligibility restrictions should be completely eliminated for the C and F block reauction, and that retaining the existing 15 and 25 percent bidding credits would ensure that DEs would have a "meaningful" opportunity to compete against Nextel (a company that has already offered \$8 billion for the reclaimed NextWave spectrum), Verizon (a company that recently budgeted \$350 million to market its name change) and other global wireless service providers in an open auction. To be quite blunt -this contention is absurd. As numerous commenters observed, in the broadband PCS context, the Commission repeatedly has rejected the premise that bidding credits alone would enable DEs to effectively compete against companies with multi-billion dollar market capitalizations,²⁶ and thereby meet Congress' statutory directive of avoiding excessive concentrations of licenses. For bidding credits actually to be "meaningful" and provide DEs with even a remote chance of competing for licenses, they would have to be so huge that it would defeat the purpose of the credit.²⁷ Furthermore, the Commission clearly would not even consider adopting such sizable credits. Consequently, bidding credits as a substitute for a set-aside are indefensible.

Comments of Twenty First Wireless, Inc. at pp. 13-14.

²⁶ See, e.g., *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fifth report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532, 5589 (¶131).

²⁷ In this context, it is worth repeating PCIA's observation that due to the FCC's sliding size scale for DEs, some entrepreneur block bidders (those that do not meet the small and very small business caps) would not be entitled to any bidding credits, and if they even bothered to sign up for the auction, would

V. Conclusion

For the reasons stated above, Northcoast urges the Commission to retain its existing entrepreneur block program, including the eligibility and bidding rules. The record in this proceeding clearly does not support the drastic changes proposed, and such spectrum policy changes should not be based on such an insufficient record.

Respectfully submitted,
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have to compete head-to-head against the RBOCs, Nextel and AT&T.