

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

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OFFICE OF THE SECRETARY

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

WT Docket No. 97-82 /

REPLY COMMENTS

CAROLINA PCS I LIMITED PARTNERSHIP

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June 30, 2000

No. of Copies rec'd 0+4
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SUMMARY

Carolina PCS I Limited Partnership (“Carolina”), while feeling strongly that the DE spectrum allocation should not be disaggregated to support growth of non-DEs at the expense of true DEs, Carolina supports the Commission’s proposal to allow large incumbent carriers’ to bid for C-Block spectrum which was formerly limited to designated entities (“DEs”) with the amount of spectrum available for such open bidding based upon whether a market has a population above the 2 to 2.5 million level. While commentators on each side of the issue have urged the Commission to further skew the DE/non-DE allocation in their favor, Carolina believes that the Commission’s initial proposal of preserving not less than 20 MHz of spectrum for DEs below the 2-2.5 million population level is the minimum which the Commission could allow without totally abdicating its Congressional mandate to ensure meaningful participation in broadband PCS by DEs. Carolina stands as proof that a true DE can and is able to construct and operate in markets with combined populations well in excess of 3 million “pops.”

While Carolina understands the need for additional spectrum for all carriers, it is significant to note that no case has been made that DEs can effectively compete without the spectrum which the open auction would take out of the exclusive purview of the DEs. It is therefore essential that the Commission take steps to ensure that DEs are not precluded from accumulating sufficient spectrum for their competitive service offerings. These steps include retaining the DE restrictions on F Block spectrum, increasing bidding credits and allowing DEs to merge while retaining their grandfathered DE eligibility. Carolina also supports DEs having the right to transfer licenses to non-DEs once the first construction benchmark is reached or once the DE is offering substantial service throughout its market. Carolina urges that the Commission provide clear guidelines as to what would satisfy the

requirement of “substantial service.”

Finally, Carolina urges that the Commission beware of allowing non-DEs to accumulate additional spectrum while allowing portions of their original spectrum to continue to lie fallow. Accordingly, Carolina supports the proposal to recapture A and B Block spectrum where the spectrum has not been utilized by instituting an unserved area re-licensing of that spectrum. Carolina submits that willingness to relinquish such unserved area within their A and B Block licenses be the *quid pro quo* for allowing a non-DE to bid for spectrum which was formerly reserved exclusively for true DEs.

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REPLY COMMENTS

Carolina PCS I Limited Partnership ("Carolina"),^{1/} by its attorneys and in response to the Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding,^{2/} hereby files its reply to comments on the Commission's proposed revisions to the rules governing C and F Block auctions and services.

I. INTRODUCTION

We agree that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business.^{3/}

^{1/}Carolina's subsidiaries are the C Block PCS licensees for all BTAs in the State of South Carolina.

^{2/}Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications (PCS) Licenses, WT Docket No. 97-82, FCC 00-197, *Further Notice of Proposed Rulemaking*, rel. June 7, 2000 ("FNPRM").

^{3/}Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5585 (1994).

With those words the Commission, in furtherance of its Congressional mandate to provide for meaningful participation by designated entities (“DEs”) in the emerging PCS technology, proceeded to establish the C and F Blocks which were, by rule, only opened to DEs. The 30 MHz C Block allocation was intended to “satisf[y] the concerns of those parties who believe they must have this amount of bandwidth to compete effectively.”^{4/} Nothing has changed nor has there been anything introduced into the record by *any* commentor that in any way establishes a diminished need for spectrum by DEs. To the contrary, the basis upon which the large carriers have sought to justify their access to the DE spectrum is the assertion that existing 25 and 30 MHz non-DE allocations are too small. The Commission should tread softly on any road which leads to effectively precluding meaningful *competitive* participation in PCS by true DEs, and in resolving the irreconcilable demands for spectrum it should err on the side of leaving as much spectrum for true DEs as possible.

II. DISCUSSION

A. The Commission’s Proposed Tiered Approach Represents a Reasonable Compromise

While there is more than ample support in the record for not stripping any of the DE spectrum, to the extent that a decision is made to make a portion of the DE spectrum available to non-DEs, the Commission proposal to maintain not less than 20 MHz of spectrum for DEs in market below 2 to 2.5 million “pops” is reasonable. A number of large player commentors point to alternatives of either leaving only one 10 MHz license in each market for DEs or reducing the threshold dividing Tier 1 and Tier 2 markets from 2.5 million to 1 million population.^{5/} Given the

^{4/}*Id.* at 5587.

^{5/}*See e.g.*, AT&T Wireless Services, Inc. Comments at 6-8, Nextel Communications, Inc. Comments at 12, SBC Communications Inc. Comments at 3-8, US West Wireless, LLC Comments (continued...)

history of and mandate for these entrepreneurial blocks of spectrum, the 2 to 2.5 million population threshold proposed in the FNPRM is the absolute minimum cut-off the Commission should consider. The United States Small Business Administration (“SBA”) suggests that a higher cut-off level might well be appropriate.^{6/}

Nextel Communications, Inc. (“Nextel”) submits affidavits purporting to “project” the costs of constructing markets which vary in size from Los Angeles to San Diego and Norfolk. The “prohibitive” costs alluded to by Nextel’s expert, which, interestingly enough, were based upon the costs of the non-DE United Kingdom auction results, serve more to highlight the fact that allowing non-DE participation in the auction will, as the Commission recognized in 1994, act to preclude true DEs from winning those licenses. With respect to the estimated costs, while the Nextel projections are an interesting, Carolina’s actual experience in constructing markets with a combined population well in excess of 1.6 million “pops,” demonstrates otherwise. Carolina’s combined BTAs exceed 3 million pops and its *actual* costs are substantially below the Nextel projections. Carolina has already instituted service in portions of four BTAs (Greenville-Spartanburg, Greenwood, Anderson and Columbia, South Carolina BTAs) with a combined population in excess of the 1.6 million “pops” of the Norfolk BTA used in Nextel’s example. Although its service was just launched in these markets this year, Carolina has already satisfied its 10-year build-out requirements in the Greenville-Spartanburg and Greenwood BTAs,^{7/} seven years ahead of the Commission’s deadline.

^{5/}(...continued)

at 5, Verizon Wireless Comments at 3, and VoiceStream Wireless Corporation at 4-5.

^{6/}See SBA Comments at 5-6.

^{7/}See Carolina Phone - Greenville LLC, dba, Carolina Phone, FCC Form 601, Schedule K, filed Feb. 18, 2000; and Carolina Phone - Greenwood LLC, dba, Carolina Phone, FCC Form 601, (continued...)

Further, Carolina has more than satisfied its 5-year build-out requirements in the Anderson BTA, falling only 8% short of satisfying its full 10-year build out requirement for this BTA.^{8/} Site acquisition and construction are presently underway in all remaining BTAs, which will be brought on line well in advance of the mandated construction time frame under which Carolina took its licenses. Carolina's level of build-out for the remaining BTAs is comparable in breadth to the Carolina coverage already deployed. Carolina's own record demonstrates conclusively that, contrary to Nextel's expert's assertions, in point of fact a true DE *can* succeed in a market the size of Norfolk.

Limiting DE eligibility requirements to markets with populations below 1 million or attempting to lump all certain-sized markets together from a potential construction standpoint ignores reality. For example, the Charlotte, NC BTA has a population of approximately 1.6 million. However, less than 600,000 of that population is in the greater Charlotte area. The balance of the BTA population is dispersed throughout the BTA. Indeed, the physical size of the Charlotte BTA (as well as the population of the Charlotte BTA) is comparable to the three Carolina markets where Carolina has already exceeded its first or second construction milestones. Accordingly, Carolina urges that to the extent that the DE eligibility requirements are to be based on market size, the appropriate cut off should not be below the 2 to 2.5 million population level proposed by the Commission.

Carolina urges the Commission to retain the set-aside in full for all F Block spectrum in addition to the tiered C Block spectrum. Doing so would ensure DE licenses for a minimum of 20

^{7/}(...continued)
Schedule K, filed Feb. 18, 2000.

^{8/}See Carolina Phone - Anderson LLC, dba, Carolina Phone, FCC Form 601, Schedule K, filed Feb. 18, 2000. Carolina is currently constructing a few more sites in the Anderson BTA, which when completed, will satisfy the 10-year construction requirements for that BTA as well.

MHz in the large markets and a full 30 MHz in the markets below 2.5 million. Where a DE has returned 15 MHz of its spectrum but continues to hold the other 15 MHz, Carolina would concede that the remaining C Block spectrum could be licensed in an opened auction, provided that the 10 MHz of F Block spectrum remained restricted to true DEs. This would ensure, at a minimum that a full 25 MHz of spectrum would be held by DEs, in those markets, even if they had populations in excess of 2.5 million.

B. The Record Supports Increasing Bidding Credits to Ensure Meaningful Protections for Designated Entities

As the Commission has known from the start, and as Carolina and others have shown in the record of this proceeding, (as well as in comments on petitions leading to the above-captioned FNPRM), the Commission must institute a meaningful bidding credit system - one which takes into consideration the vast disparity among bidders and allows a true DE to make a competitive bid with a company the size of a Nextel or SBC. Under such a system, the level of credits must reflect the relative financial strengths of all entities eligible to bid in the reauction. Otherwise, as the Commission recognized more than six years ago, there is no basis to believe that any DE would be able to obtain any license desired by a non-DE.⁹⁷ Carolina supports the proposed increases in bidding

⁹⁷Twenty First Wireless, Inc. ("Twenty First") proposes a host of special advantages for Native American entrepreneurs, such as no down payments; unrestricted transferability; bidding credits which are twenty-five percent higher than that accorded other very small entrepreneurs. First, special treatment for Native American-owned entities is already afforded under current rules. Under Section 24.720 (47 C.F.R. § 24.720) assets held by Native Americans are not attributable for purposes of determining eligibility as a small or very small business. Therefore, entities, like Twenty First can qualify as a DE even if their assets exceed the threshold. Case-in-point, Cook Inlet Region, Inc. is a licensee with assets which greatly exceed the threshold for DE status under the rules. However, because much of the assets are held by Native Americans, a minority group under Section 24.720 definitions, it qualifies to hold C and F Block licenses as a DE. Further, the original C Block
(continued...)

credits, and further supports Burst Wireless, Inc. in its proposal to establish a third category of eligibility “made up of businesses that (together with affiliates and persons or entities that hold interests in such entity and their affiliates) had average annual gross revenues that were not more than \$3 million for the preceding three years that would be allotted a bidding credit of at least 50%.”^{10/}

These new levels of bidding credit must be available both in the DE-limited allocation as well as in any open allocations to ensure that the end result of the re-auction is meaningful participation by *true* DEs. The need for substantial credits outside of the DE allocation has already been recognized. The need for the increased, and tiered bidding credits within the DE allocation is illustrated by the vast disparity among DEs. For example, Leap Wireless, which characterizes itself as a DE,^{11/} has reported assets in excess of \$1 billion in its latest Securities and Exchange Commission (“SEC”) filing^{12/} while still claiming bidding credits as a “very small business.” Clearly, a company the size of Leap is in a dramatically different financial position than a true DE

^{9/}(...continued)

auction was delayed, in part, over the issue surrounding the legality of affording special consideration to minorities and women-controlled entities; a practice which the Commission was forced to abandon. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed.2d. 158 (1995). Commission should not tie-up any new rules with legal issues which have already been litigated and can only serve to further delay the re-auction.

^{10/}Burst Comments at 5-7.

^{11/}As the Commission is aware, Leap’s status as a DE has not been finally determined and Carolina has challenged the Bureau’s finding of Leap as a DE. In re Application of AirGate Wireless, L.L.C. and Cricket Holding, Inc. and Application of Leap Wireless International, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 11827 (Wireless Telecommunications Bureau 1999), *application for review pending*.

^{12/}*See* Leap Wireless International, Inc. SEC Form 10-Q, filed Apr. 14, 2000.

with assets of less than \$3 million. Not only would such a true DE be unable to out-bid a \$1 billion dollar enterprise, but affording bidding credits of any level to entity with \$1 billion in assets is not in furtherance of the Congressional mandate. Accordingly, while the bidding credits should be expanded for true DEs, the Commission should take a hard look at the current status of a DE-qualified applicant before awarding bidding credits. The intent of the bidding credits is to level the playing field, not stack the deck in favor of a large enterprise seeking to claim DE status. Carolina suggests that the Commission adopt a policy wherein even if an entity was grandfathered for purposes of participation as a DE in the re-auction, that unless that entity would still qualify as a DE at time of filing its FCC Form 175, it should not be entitled to any bidding credits. The intent of the DE set-aside is not to benefit a \$1 billion corporation and the Commission must be careful to ensure that what remains of the DE set-aside does not become a closed auction for the benefit of a single entity with assets more than double the limits for a DE.

C. Carolina Supports the Grandfather Exception, as Clarified in the FNPRM

As indicated in its comments, Carolina supports the Commission's tentative conclusion that upon the merger of two entities, each of which is eligible for the "grandfather" exception, the exception extends to the resulting entity, but that, upon the merger of two entities, only one of which is eligible for the "grandfather" exception, the merged entity is ineligible for the exception.^{13/} Carolina supports this proposal and highlights the fact that if the Commission proceeds, as indicated, to disaggregate the C Block spectrum into distinct 10 MHz licenses, the only way for some DEs to amass spectrum in excess of 10 MHz might well prove to be the merger of two DEs which each hold

^{13/}*Id.* at ¶ 38.

a 10 MHz license. Carolina would urge that, in this limited context, the allowance of not only the grandfathering of the DE eligibility, but also the retention of any bidding credits held by each entity prior to the merger.^{14/}

D. Carolina Supports the Lifting of License Transfer Restrictions Upon Satisfaction of the First Construction Benchmark

Carolina fully supports the Commission proposal to allow for the free transfer of DE licenses once the five year construction benchmark has been satisfied. The Commission has also sought comment on whether to allow a degree of further flexibility for incumbent DE licensees that may not have fully satisfied construction requirements for each individual licenses but where the carrier can demonstrate “substantial service” throughout its system.^{15/} While Carolina agrees that a DE should be able to transfer its license(s) freely where it is offering “substantial service” throughout its entire system, it urges the Commission to provide a guideline as to what would constitute “substantial service.” The benefit of doing so is clear in that it would relieve the Commission from having to utilize scarce resources to evaluate each and every proposal where the licensee claims it is offering “substantial service.” Carolina suggests that for purposes of this analysis, contiguous BTAs be treated as “mini-MTAs” in performing the benchmark calculation. This would allow a carrier to compare the composite population for all of a carrier’s contiguous licenses with the composite “pops covered” to see if, from a system-wide basis the 5-year benchmark has been met. In application, this would afford DEs the same construction flexibility afforded to non-DE MTA licensees. Under

^{14/}Alaska DigiTel, LLC proposes a waiver process for transfer of licenses, set-aside for DEs, to a non-DE. This proposal would allow for transfers to non-DEs on a case-by-case basis but should not be adopted in lieu of the proposal set forth in the FNPRM as modified above.

^{15/}FNPRM at ¶ 45.

current rules, MTA licensees have always been able to aggregate the population of all of the BTAs which comprise their MTA for purposes of performing the benchmark calculations. This proposal would act to put the BTA licensees on the same footing. Carolina does not suggest that this be the only means of demonstrating substantial service and urges the Commission to still allow for case-by-case showings of other means of satisfying this requirement. Instead, Carolina is merely urging that this one means be adopted as satisfying the “substantial service” requirement without the need for any further analysis to determine whether the construction benchmark has been met.

E. Carolina Supports The Rural Cellular Associations’s (“RCA”) Proposal to Open Unserved and Underserved A & B Block to Designated Entities

The alleged thrust behind seeking to open the DE spectrum to non-DEs is the claim that this spectrum has laid fallow since the close of the C and F Block auctions. Significantly, those auctions closed less than four years ago. With the passage of the five-year benchmark for the MTA constructions, there remain numerous BTAs, subsumed within those MTA licenses, where the A or B Block carrier has yet to initiate service.^{16/} However, those very carriers are arguing the need for more spectrum in “parts” of those markets while they may already be holding 30 MHz of fallow spectrum in other parts of their own markets. That being the case, the Commission must protect against a non-DE acquiring additional spectrum through participation in Auction No. 35 where its previously authorized spectrum remains unused in areas. Accordingly, Carolina supports RCA’s proposal that geographic areas unserved by A and B Block licensees should be opened to “fill-in”

^{16/}See Wireless Telecommunications Bureau Reminds Broadband Personal Communications Services (PCS) Licensees of Five-Year Construction Benchmark, *Public Notice*, DA 00-1276 (rel. June 12, 2000). See also 47 C.F.R. § 24.203.

applications^{17/} but suggests that this be the “entry price” for a non-DE’s participation in the re-auction. While A and B Block carriers have, admittedly, paid for their licenses at auction, there would be nothing improper in requiring, as a condition to a non-DE carrier’s entry into a re-auction of former DE spectrum (for which a non-DE carrier was not previously eligible to bid), that a non-DE relinquish its claim to any areas within its MTA which remain unserved after its initial five year construction period has lapsed.^{18/} Moreover, a non-DE should be expressly precluded from bidding for *any* former DE spectrum in any BTA wherein it has not satisfied its 5-year construction requirement (viewed on the basis of the sub-BTA alone and not as a part of the whole MTA), even though it might have satisfied this benchmark when viewing the MTA as a whole.^{19/} Carolina urges that the Commission give this proposal serious consideration as it could prove to be a vital component to meeting the Commission’s statutory mandate to avoid letting spectrum lie fallow.^{20/}

^{17/}RCA Comments at 2; and Attachment to RCA Comments at 13-15.

^{18/}The Rules do not allow the Commission to take back and re-auction unserved areas of licenses previously granted. However, here, the return of unserved area to the Commission by A and B Block licensees would be completely voluntary based upon their decision to participate. In making business decisions as to whether to participate in the upcoming C and F Block auction, these entities would need to consider whether C and F Block spectrum available in Auction No. 35 is more valuable to them than the un- or under served portions of the spectrum they already hold.

^{19/}This position is not inconsistent with Carolina’s proposal above that the “substantial service” test be made analogous to the MTA construction requirements exclusively for the purpose of allowing early transfer of DE licenses. Significantly, that transfer would take place *prior* to the end of the actual five year construction period. Carolina has not proposed that the “substantial service” test, used for purposes of allowing early transfer, obviate the need to actually satisfy the BTA-by-BTA 5-year construction requirements prior to the expiration of that period.

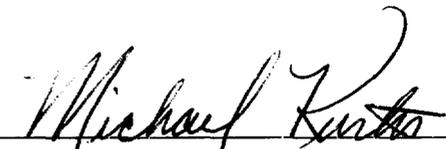
^{20/}Procedurally, the Commission may accomplish this task in the short-form application process. Specifically, non-DEs who participate in the upcoming auction of C and F Block licenses should be required to provide certification in their short-form applications of their A and B Block license holdings and identify the market areas served, as well as identify and certify any unserved area(s) within their MTAs. This requirement is similar to the certification of local exchange carrier (LEC) and cable television holdings which was required for entities to participate in the LMDS
(continued...)

III. CONCLUSION

Carolina requests that the Commission proceed with the upcoming C and F Block PCS auction, (Auction No. 35), as originally envisioned under the existing Commission rules. While Carolina submits that the preservation of the DE set-aside as originally established continues to be in the public interest, if the Commission is inclined to reconfigure the C Block spectrum size in order to open the auction to non-DEs and also modify the auction procedures, Carolina urges the Commission to make such modifications in accord with Carolina's proposals as set forth above.

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^{20/}(...continued)

auction. 47 C.F.R. §§ 101.1001 and 101.1003. This certification would clearly not only identify unused spectrum but also ensure that the public interest is served and the Congressional mandates in 309(j) are met. Recapture and re-allocating unused A and B spectrum would further promote the rapid deployment of new technologies for the benefit of the public residing in rural areas while disseminating licenses among a wide variety of applicants (including small businesses and rural telephone companies). 47 U.S.C. § 309(j)(3)(A).

CERTIFICATE OF SERVICE

I, Jennifer L. Clapp, a secretary with the law firm of Kurtis & Associates, P.C., do hereby certify that I have this 30th day of June 2000, had copies of the foregoing "REPLY COMMENTS" sent via First Class United States Mail, postage prepaid to the following:

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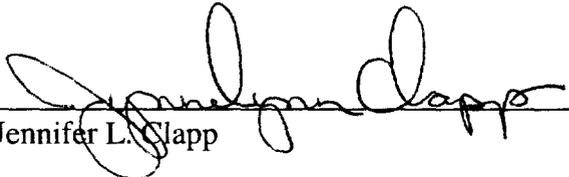
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