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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

AirGate Wireless Reply Comments on Further Notice of Proposed Rulemaking

AirGate Wireless, L.L.C. ("AirGate"), by its undersigned counsel, hereby submits these reply comments on the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding ("Further Notice").[1] AirGate reaffirms its position that the Commission should reserve at least one 10 MHz C-block and the F-block frequencies exclusively for designated entities in each market. AirGate agrees with the initial comments that the record in this proceeding does not support the Commission's other proposed changes to the designated entity rules. Thus, adoption of rule modifications that further undermine opportunities for designated entities would be arbitrary and capricious. At the very minimum, the Commission should retain F-block license eligibility restrictions in order to meet its statutory mandate to grant licenses to a diverse range of applicants, including small businesses, and to promote competition.

I. The Proposed Modifications Eliminating Designated Entity Provisions are not supported on the Record and would be Arbitrary and Capricious.

The FCC's designated entity provisions fulfill the Commission's statutory mandates under Section 309(j) to promote economic opportunity and competition and

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[1] Further Notice of Proposed Rulemaking, WT Docket No. 97-82, FCC 00-197 (rel. June 7, 2000).

disseminate licenses among a wide variety of applicants including small businesses.[2] AirGate believes closed bidding on at least one C-block license and all F-block licenses is essential for the Commission to fulfill its obligation to promote economic opportunity for small businesses and competition and to widely disseminate licenses. Some of the Commission's proposed changes, such as its decision that bidding credits are sufficient assistance to promote small business participation in PCS, have not been explained and are not justified on the record. Eliminating all designated entity set-asides would be arbitrary and capricious.

The Commission has authority to change its substantive rules in a rulemaking, as long as it provides a reasoned explanation.[3] Numerous commenting parties properly believe that the Commission has not met its burden on the issue of reserved spectrum.[4] The Rural Cellular Association ("RCA") notes that the large carriers requesting waiver or change of the designated entity rules have not shown that their proposals are consistent with Section 309(j).[5] RCA also notes that the C-block auction failure does not warrant "wholesale disregard of the Congressionally mandated policy."[6] Neither the FCC, nor

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[2] 47 U.S.C. § 309(j). ASCENT notes in its comments that the Commission has separate statutory obligations to eliminate market entry barriers for small businesses under Section 257 of the Act.
[3] Cellular Mobile Communications Corp. v. FCC, 28 F3d 191, 196-197 (D.C. Cir 1994).
[4] See, e.g., Comments of Personal Communications Industry Association ("PCIA Comments") at 11 ("the rulemaking record in this proceeding in no way supports the 180 degree change from existing precedent") Comments of Office of Advocacy, U.S. Small Business Administration ("SBA Comments") at 5; Comments of Twenty First Wireless, Inc. at 3 ("The Administrative Procedure Act requires the Commission to implement the non-revenue maximizing section 309(j) objectives pursuant to rules based on substantial evidence"); Comments of Northcoast Communications, LLC ("Northcoast Comments") at 3 ("Northcoast questions the Commission's perfunctory conclusion that industry circumstances suddenly have changed . . . the Commission's FNPRM fails to explain how the entrepreneur block set-aside, which it repeatedly and recently stated was necessary to fulfill Congress' objections[sic], suddenly is no longer needed").
[5] Comments of Rural Cellular Association ("RCA Comments") at 9.
[6] Id. at 5.

parties advocating wholesale changes in policy "has demonstrated the necessity of such a change."[7]

The Commission relies in part on "changed circumstances" as support for its rule changes. AirGate agrees with commenters who note that little has changed in the market since the Commission last reviewed entrepreneur's block eligibility and confirmed that C and F block would remain open only to entrepreneurs.[8] The one significant change, consolidation of the wireless market,[9] supports safeguarding existing designated entity rules in order to enhance competition and promote continued small business participation in PCS. In contrast, only a handful of the country's largest wireless carriers – many of which are themselves recently consolidated entities -- support wholesale elimination of designated entity provisions.[10] Participation by these large entities will lead to further consolidation of the wireless industry. Indeed, AirGate agrees with Powertel's statement that "the remaining set-asides in the upcoming auctions represent the best chance to reverse this concentration, to the benefit of consumers."[11]

A large number of small businesses filed comments in this proceeding seeking to preserve current designated entity rules. Any rule modifications that further reduce opportunities for small business will likely face a legal challenge because this proceeding's record does not support the proposed rule changes. A legal challenge could result in delay of the auction. Even if the auction is not stayed, at a minimum, such litigation which would create uncertainty and lead to hesitation regarding participation in

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[7] SBA Comments at 5.
[8] PCIA Comments at 5; Comments of Powertel, Inc. ("Powertel Comments") at 3, Northcoast Comments at 4; Comments of Telecorp PCS, Inc. and Tritel Communications, Inc. ("Telecorp/Tritel Comments") at 6.
[9] See, e.g., PCIA comments at 7.
[10] See Comments of AT&T Wireless Services, Inc.; SBC Communications Inc.; BellSouth Corporation; Nextel Communications, Inc.; U S WEST Wireless, LLC; Voicestream Wireless Corporation; and Verizon Wireless.

the auction.[12] Legal action could also affect the valuation of the licenses. Powertel also notes that any delay in use of the spectrum could affect U.S. manufacturers' ability to develop 3G products.[13]

II. F-Block License Eligibility Must Be Retained Even If the Rules are Changed.

Along with the majority of parties filing comments in this proceeding, AirGate supports preservation of existing F-block license eligibility rules.[14] Even carriers that favor limited "open" bidding support retention of the F-block set-aside.[15] The record provides ample justification for preserving the F-block spectrum for entrepreneurs. Many entrepreneurs based their business plans on the continuation of eligibility restrictions.[16] Prospective bidders will have difficulty revising their plans and raising capital in time for the November auction, especially since the capital markets are all but closed to new issues.[17]

Another reason to retain F-block eligibility restrictions is one that the FCC itself acknowledges: F-block PCS licensees have not had the same degree of difficulty financing and constructing their systems as C-block licensees. AirGate supports the comments to the effect that the relative success of F-block licensees favors retaining,

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[11] Powertel Comments at 4.
[12] See, e.g., Powertel Comments at 6.
[13] Id.
[14] See, e.g., Comments of Carolina PCS I Limited Partnership ("Carolina PCS Comments") at 2 ("F block spectrum should remain the exclusive preserve of DEs to insure that at least two DE licensees collectively control 25 MHz of PCS spectrum per BTA . . .), Comments of Leap Wireless International Inc. ("Leap Comments") at 17 ("[I]t is important and procompetitive for these Entrepreneur's Block spectrum allocations to be preserved").
[15] See, e.g., Comments of America Connect, Inc. at 3.
[16] See, e.g., Comments of U.S. Airwaves at 4-5 ("These business plans are premised on the legitimate expectation that C and F block licenses will be reserved for entrepreneurs . . . it will create an enormous disincentive for new entrepreneurs considering entering the auction, as well as undermine the ability of existing entrepreneur licensees to finance new growth opportunities."); Powertel Comments at 4; TeleCorp/Tritel Comments at 10; Comments of Alaska DigiTel, LLC, *et al* at 3; Comments of OPM Auction Co. ("OPM Comments") at 2; Comments of Polycell Communications, Inc.

rather than eliminating, eligibility for the remaining F-block spectrum.[18] The FCC has apparently found a mechanism that promotes successful small business spectrum licensees, in accordance with its Section 309(j) statutory mandate. This relative success, however, in the licensing of the F-block should not be confused with the ability of small businesses to compete with the largest wireless carriers in the country in auction bidding. Such success should not be penalized. AirGate also agrees that even increased bidding credits will not be sufficient for small business to bid directly against the largest wireless carriers in the country.[19]

The Commission's reliance on the status of current F-block construction as a basis to eliminate eligibility restrictions is unfair, contrary to the Commission's rules, and based on erroneous information. The Commission's rules clearly state a five year construction requirement. F-block licensees had no notice that failure to construct well before the deadline would lead to elimination of designated entity provisions. Since the five year construction deadline is a number of years away, and licensees had no notice of

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[17] See, e.g., "IPO Market is Left in Limbo After a Series of Tepid Debuts," Wall Street Journal Interactive Edition, June 19, 2000.

[18] See e.g., Leap Comments at 18 ("The 'equity considerations' cited by the Commission are most compelling with respect to preserving the F-Block for Entrepreneurs, not eliminating it."); PCIA Comments at 21 ("If anything, the fact that F block licensees avoided financial difficulties makes the equity considerations for continuance of the set-aside stronger, not weaker"); Comments of Burst Wireless, Inc. at 3 ("Given that the Commission's proposal to open a portion of the C block spectrum appears to be driven in part by the financial difficulties of some C block licensees, it is illogical and inconsistent to conclude that the relative lack of financial problems of F block licensees offers any support for denying DEs access to the remaining F block licenses"); Northcoast Comments at 6 ("the logical conclusion is that the equities support maintaining, rather than eliminating, the F block set-aside").

[19] Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532, 5675 (1994) (citing the need for bidding credits 60% or more for designated entities in open bidding); OPM Comments at 4, n.11 ("in the instant case, bidding credits would be insufficient"); PCIA Comments at 21 ("the Commission has already unequivocally rejected the premise that bidding credits in the absence of a set-aside for broadband PCS is sufficient"); Leap Comments at 19 ("the implementation of bidding credits is useful but insufficient from the standpoint of preserving the opportunities for small businesses and entrepreneurial companies to participate in and grow spectrum-based services); Comments of National Telephone Cooperative Association ("NCTA") at 7 ("designated entities must have exclusive access to the C and F blocks, if they are to have any opportunity to compete to provide PCS"); SBA Comments at 4; Comments of Rural Telecommunications Group and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("RTG/OPASTCO Comments") at 6.

any standard other than five year standard, it is unfair and contrary to the Commission's rules to judge their progress at this time.[20] As AirGate noted in its initial comments, F-block licensees had difficulty financing their systems because they were tainted with the high-profile C-block bankruptcy proceedings. That does not mean F-block licensees will not complete construction by the original deadline. Moreover, the Commission's conclusion is factually incorrect. PCIA cited in its comments a number of C- and F-block licensees that have initiated service well ahead of the Commission-imposed schedule.[21] AirGate agrees with the Rural Telephone Group and OPASTCO that basing policy on the 'fact' that F-block licensees are not constructing their systems is premature.[22]

III. Conclusion

AirGate encourages the Commission to honor the statutory requirements of Section 309(j) and Section 257 by maintaining closed bidding for a portion of the C block spectrum and for the F block licenses. The majority of commenters support this position, and no large carrier has provided sound reasons to abandon these rules. Modification of the rules would threaten the viability of existing small businesses PCS licensees, and undermine future small business participation in spectrum based services. Given the

[20] See, e.g., RTG/OPASTCO Comments at 6.
[21] PCIA Comments at 9.
[22] RTG/OPASTCO Comments at 5.

record in this proceeding, eliminating entrepreneur eligibility is arbitrary and capricious, and may jeopardize the success of future auctions.

Respectfully Submitted,

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