

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

97-821

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File No. FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
AT&T Wireless Services, Inc.)
)
Petition for Waiver of the CMRS Spectrum Cap)
Requirements of 47 C.F.R. § 20.6)
For the PCS Frequency Blocks C and F)
Auction to Begin on July 26, 2000)

PETITION FOR WAIVER AND EXPEDITED ACTION

AT&T Wireless Services, Inc. ("AT&T"), pursuant to section 1.3 of the Commission's rules, hereby petitions for a waiver of the CMRS spectrum cap^{1/} to permit AT&T to participate in the C and F block reauction scheduled for July 26, 2000, without regard to the spectrum cap. As demonstrated herein, there is good cause to waive the spectrum cap restriction in the C and F block reauction and a waiver would clearly serve the public interest.^{2/}

The Commission may waive any provision of its rules or orders upon a showing of good cause.^{3/} A petitioner must demonstrate that special circumstances, on an individual basis,

^{1/} 47 C.F.R. § 20.6.

^{2/} AT&T's ability to participate in this reauction assumes that the grant of pending waiver requests for the designated entity rules will be extended to all carriers. If not, this petition should also be deemed a request for waiver of those rules with respect to AT&T. See 47 C.F.R. § 24.709.

^{3/} 47 C.F.R. § 1.3. AT&T is requesting a waiver under section 1.3 rather than under 47 C.F.R. § 1.925 because section 1.925 addresses waivers requested contemporaneously with the filing of applications. By contrast, the waiver requested herein is being filed in advance of the application date so that AT&T will know whether it is eligible for the reauction of C and F block

warrant deviation from the rules and that a waiver would serve the public interest better than application of the general rule.^{4/} AT&T clearly satisfies this standard. The demand for its services has exploded in recent years, fueled in part by its innovative “Digital One Rate” plan. The existing spectrum that it is not currently using to satisfy that demand has been reserved to meet projected subscriber growth and to deploy fixed wireless services. Without additional PCS spectrum, AT&T will face considerable difficulty in rolling out Third Generation (“3G”) wireless applications and advanced broadband services.^{5/} However, the spectrum cap would preclude AT&T from adding C or F block licenses to its holdings in many of these markets.

Grant of AT&T’s petition will serve the public interest by enabling AT&T to obtain the spectrum that it needs to offer 3G and other advanced services, and to ensure that it can continue to meet the demand for its existing services. The Commission contemplated such waivers when it decided to retain the spectrum cap as a general matter last year.^{6/} If the Commission grants the requested waiver, AT&T will bid for C and F block licenses in markets where it would otherwise lack sufficient spectrum to provide such services. Given the number of facilities-based CMRS providers today, the waiver will not diminish competition in the wireless marketplace.^{7/}

spectrum. The material provisions of both sections are virtually identical. See BellSouth Corp. v. FCC, 162 F.3d 1215, 1225, n. 10 (D.C. Cir. 1999).

^{4/} Northwest Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

^{5/} See Declaration of Douglas I. Brandon, Vice President - External Affairs, AT&T Wireless Services, Inc. (“Brandon Declaration”), attached hereto.

^{6/} 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers; Cellular Telecommunications Industry Association’s Petition for Forbearance from the 45 MHz CMRS Spectrum Cap, Report and Order, WT Docket 98-205, WT Docket No. 96-59, GN Docket No. 93-252, FCC 99-244, ¶ 82 (rel. Sept. 22, 1999) (“1999 Spectrum Cap Order”).

^{7/} Cf. KLZK, Inc. and Ramar Communications II, Ltd., for Assignment of License Station KLZK (FM), Brownfield, Texas, FCC 99-61, ¶ 15 (rel. Mar. 26, 1999) (finding that waiver of

Because the Commission's decision on this matter could in part determine whether AT&T can bid in the reauction, the upcoming UHF Channel 60-69 auction, or both, AT&T respectfully requests that the Commission address this request prior to the deadline for the short form applications in the UHF auction. Prompt action by the Commission is essential so that AT&T can develop informed business plans and bidding strategies for these auctions. Specifically, AT&T suggests that the comments on this petition be due contemporaneously with reply comments on the pending Nextel and SBC petitions.^{8/} This would enable the Commission to address the issues raised herein simultaneously with the related questions of eligibility for the reauction raised by those petitioners. Initial comments on those petitions will also likely address the appropriateness of applying the spectrum cap to the reauction, moreover, so that no reply comments on the instant petition would be necessary.

I. IMPOSITION OF THE SPECTRUM CAP IN THE C AND F BLOCK REAUCTION WOULD IMPEDE THE ABILITY OF AT&T TO OFFER ADVANCED SERVICES

The establishment of a "national footprint" is just one use for the reauctioned C and F block PCS spectrum.^{9/} There are other equally compelling uses for this spectrum -- many of which were not even considered during the initial C and F block auctions -- that could effectively be precluded if the Commission applies the spectrum cap to AT&T in the reauction. For example, AT&T will soon need substantial additional spectrum to provide "next generation" or

one-to-a-market rule is "consistent with the public interest" and "not likely to unduly diminish diversity and competition").

^{8/} Reply comments are due March 1, 2000. See Public Notice, Extension of Filing Deadline for Comments to the Petitions Filed by SBC Communications Inc. and Nextel Communications, Inc. Regarding PCS C and F Block Rules, DA 00-271 (Feb. 11, 2000).

^{9/} Petition of Nextel Communications, Inc. for Expedited Rulemaking or, in the Alternative, Waiver of the Commission's Rules 5 (Jan. 31, 2000) ("today's carriers must have either effectively national or regional footprints or arrangements that replicate the economics of a nationwide footprint" in order to meet consumer demand for national wireless services).

“3G” advanced services, including broadband data services.^{10/} The Commission has consistently recognized the need to ensure adequate spectrum for the development of these services.^{11/} Given the exploding consumer demand for wireless services, however, many CMRS carriers are likely to be “spectrum constrained” in the near future.^{12/}

In the UHF Order, the Commission decided to impose no eligibility restrictions on the Channel 60-69 auction. It noted that “use of this spectrum will offer incumbent providers of both wireline and wireless services an opportunity to augment their existing services and systems, rather than to act in an anticompetitive manner, for example, by warehousing the spectrum acquired.”^{13/} The Commission also noted that refraining from applying the spectrum cap to the UHF frequencies will facilitate the use of these bands for next generation applications.^{14/}

As AT&T pointed out in its comments on the UHF auction rules, the UHF and C and F block spectrum is, in many respects, fungible.^{15/} Because there are so few UHF licenses to be made available (12 regional licenses, with many potential bidders expressing interest in

^{10/} Brandon Declaration ¶ 4.

^{11/} See, e.g., Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, First Report and Order, WT Docket No. 99-168, FCC 00-5, 3, 17, ¶¶ 2, 38 (rel. Jan. 7, 2000) (“UHF Order”); Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement, FCC 99-354, ¶¶ 2-3 (Nov. 22, 1999); Remarks by William E Kennard, Chairman, Federal Communications Commission, to Personal Communications Industry Association of America, Orlando, Florida (Sept. 23, 1998), available at <http://www.fcc.gov/Speeches/Kennard/spwek828.html>.

^{12/} See, e.g., 1999 Spectrum Cap Order ¶ 61 (citing numerous carriers’ comments); 1999 Spectrum Cap Order, Separate Statement of Commissioner Michael Powell (recognizing that carriers are “spectrum constrained”).

^{13/} UHF Order ¶ 50.

^{14/} UHF Order ¶ 52.

^{15/} Comments of AT&T Corp., Auction of Licenses in the 747-762 and 777-792 MHz Band Scheduled for May 10, 2000, Comments Sought on Reserve Prices or Minimum Opening Bids and other Auction Procedural Issues, WT Docket No. 99-168, DA 00-43, 2 (Feb. 2, 2000).

aggregating to one nationwide license), and because incumbent relocation issues may delay the efficacy of UHF for 3G services, AT&T will not be able to fill its needs for next generation spectrum, or even spectrum required to meet the current demand for mobile and data services, in that auction. The C and F block reauction offers an opportunity to fill these demands. It should not be placed off limits by an inflexible application of the spectrum cap.

II. INCREASED COMPETITION IN THE WIRELESS MARKET PRECLUDES THE NEED FOR THE SPECTRUM CAP IN THIS REAUCION

Waiving the application of the spectrum cap to AT&T in the reauction will not diminish competition in the wireless marketplace. Rather, it will ensure that the C and F block spectrum that has gone undeveloped for six years will most quickly and efficiently be awarded to the entities that will put it to its highest and best use.

As the Commission has recognized, the wireless market has changed considerably since the C and F block spectrum was first auctioned. Nearly three-quarters of consumers already have a choice of at least five mobile telephone operators.^{16/} The average monthly wireless telephone bill has continued to decline, reflecting increasing penetration in market sectors with lower than average usage.^{17/} In 1995, the Commission adopted the spectrum cap to prevent the concentration of control over spectrum in too few hands.^{18/} With competition in the provision of

^{16/} 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 Services, Fourth Report, 14 FCC Rcd 10145, 10164 (1999) (“CMRS Fourth Report”).

^{17/} CMRS Fourth Report, 14 FCC Rcd at 10165-10167.

^{18/} Cf. Implementation of Sections 3(n) and 332 of Communications Act, Regulatory Treatment of Mobile Services, Amendment to Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Amendment of Parts 2 and 90 of the Commission’s Rules to Provide for the Use of Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, Third Report and Order, 9 FCC Rcd 7988, 8100 (1994) (spectrum cap was imposed to “to promote diversity and competition in mobile services” and to prevent licensees from “exert[ing] undue market power or inhibit[ing] market entry by other service providers”).

wireless services now a reality, rigid structural regulation is no longer necessary to ensure a robust wireless marketplace. Moreover, application of the spectrum cap in this reauction would artificially limit the pool of eligible bidders and possibly prevent the spectrum from being distributed to the carrier or carriers who will make the most efficient and productive use of it.

Indeed, retaining the spectrum cap for the C and F block reauction would introduce substantial market inefficiencies that would impede the growth and development of wireless services called for in the Communications Act. By preventing carriers from obtaining sufficient spectrum to realize economies of scale and scope, the spectrum cap may actually raise the costs of offering wireless services and prevent carriers from effectively meeting consumer demand. Elsewhere, the Commission has recognized that the acquisition of spectrum may allow efficiencies that would otherwise not be available.^{19/} For these reasons, the Commission should waive the spectrum cap in the reauction as well.

^{19/} Amendment of Parts 20 and 24 of the Commission's Rules, Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, 11 FCC Rcd 7824, 7869 ¶ 95 (1996).

CONCLUSION

Good cause having been shown, AT&T respectfully requests that the Commission expeditiously waive the CMRS spectrum cap, 47 C.F.R. § 20.6, in the C and F block reauction.

Respectfully submitted,

AT&T WIRELESS SERVICES, INC.

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Of Counsel

February 15, 2000

CERTIFICATE OF SERVICE

I, Michelle M. Mundt, hereby certify that on this 15th day of February 2000, I caused copies of the attached "Petition for Waiver and Expedited Action" to be served via hand delivery upon the following:

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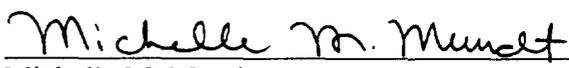
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DECLARATION OF DOUGLAS I. BRANDON

I, Douglas I. Brandon, do hereby declare as follows:

1. I am Vice President – External Affairs of AT&T Wireless Services, Inc. (“AT&T”). In this capacity, I am responsible for the development and implementation of AT&T’s federal regulatory policy, including with respect to spectrum auctions. I am also familiar with AT&T’s operations and the effect that the FCC’s spectrum cap has had on ensuring that AT&T has adequate spectrum to deploy Third Generation wireless applications and advanced services.

2. I am submitting this Declaration in support of AT&T’s Petition for Waiver and Expedited Action, which requests a waiver of the CMRS spectrum cap for the C and F block reauction scheduled to begin on July 26, 2000. The purpose of this declaration is to explain why AT&T will participate in the reauction if the Commission grants the necessary waiver of the spectrum cap.

3. AT&T is a leading provider of wireless communications services. It serves over 12 million wireless customers in numerous cellular metropolitan and rural service areas and PCS major/basic trading areas throughout the United States. With its innovative “Digital One Rate” plan, AT&T pioneered wireless “all distance” service. Digital One Rate has been an unqualified success that has generated substantial consumer demand. AT&T’s digital network also offers subscribers real-time news and weather updates and Internet access.

4. AT&T has made substantial investments to build out and upgrade its network to provide state-of-the-art wireless service in all of its licensed markets. However, as the result of

improved technology, innovative services, and rate plans such as Digital One Rate, consumer demand for wireless service has exploded. AT&T must keep some spectrum in reserve to accommodate increases in demand, and it has also set aside spectrum in many markets to develop fixed wireless services. As a result, AT&T will lack sufficient spectrum in many markets to deploy additional services, including 3G and broadband Internet access.

5. To obtain the spectrum it needs to deploy these services, AT&T wishes to participate in the upcoming reauction of C and F block PCS licenses. However, the spectrum cap would preclude AT&T from bidding on these licenses in most markets. Waiver of the spectrum cap would enable AT&T to bid on the spectrum it needs to hasten the deployment of 3G wireless technology and advanced services, while ensuring that it has adequate spectrum to meet demand for existing and planned services.

6. I have reviewed AT&T's Petition and hereby certify under penalty of perjury that the facts contained therein, and the facts contained in this declaration, other than those of which official notice may be taken, are true and correct to the best of my knowledge, information and belief.

Executed on this 15th day of February, 2000.



Douglas I. Brandon