

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

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

**PETITION FOR RECONSIDERATION OF THE
THE RURAL TELECOMMUNICATIONS GROUP AND THE ORGANIZATION
FOR THE PROMOTION AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES**

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SUMMARY

The Rural Telecommunications Group (RTG) and the Organization for the Promotion and Advancement of Small Telephone Companies (OPASTCO) urge the Commission to reconsider its decision to all but eliminate the set aside of PCS spectrum for the designated entities identified by Congress. The Commission's decision is a 180-degree reversal from its 1994 implementation of Congress's guidance, but the change is neither based on documented changed factual circumstances or changes to the statute. The Commission cannot make this fundamental change without a clear showing of either a failure of the designated entity program or a catastrophic shortage of PCS spectrum for current voice or imminent 3G services. The record does not support either finding.

The Commission's take back of spectrum reserved for rural telephone companies will further delay the implementation of service to rural and sparsely populated areas of this country. Congress recognized that rural telephone companies were uniquely positioned to offer wireless in their communities, but did not have the financial resources to compete head-to-head with national wireless operators. Now the largest operators will simply expand their practice of serving the core areas of communities while ignoring outlying areas.

The Commission should take the following actions to re-dress the balance between meeting the spectrum needs of the largest carriers and meeting the public interest in serving rural areas; placing licenses in the hands of new providers such as designated entities; avoiding market concentration and promoting new and innovative uses of the PCS bands:

- The Commission should reserve at least 20 MHz of the remaining 30 MHz C Block licenses for designated entities in all markets;
- The Commission should not divide the remaining C Block licenses into three 10 MHz licenses without creating a means for designated entities to use some form of combinatorial bidding;
- The Commission should maintain the remaining 10 MHz F Block licenses for designated entities, particularly if it refuses to reconsider its action on the 30 MHz C Block licenses;
- The Commission should retain the set aside for all C and/or F Block licenses included in Auction #35 and ensure that designated entities have one opportunity to bid on future licenses under the set aside; and
- The Commission should increase bidding credits for any “open” licenses previously reserved for designated entities. It should also retain bidding credits in closed auctions, particularly those in which large companies participate only because of the Commission’s grandfathering policy.

A rethinking of the Commission’s action is particularly necessary here because the record is so sparse as to the need to change the PCS band plan. While the Commission lists factors that seemingly justify its action, it provides no specifics. Nor do the commenters who would benefit from this significant shrinking of the set aside program. The Commission also ignores less drastic alternatives that can place spectrum into the hands of carriers who require it now or in the near future. Finally, the

Commission fails to explain how the uncontroverted success of the designated entity program to date justifies a significant diminution of the program.

In 1994 the Commission recognized that spectrum set asides for designated entities were necessary to meet congressional goals due to the unique nature of broadband PCS. Today, the Commission decides that designated entities must rely on unchanged bidding credits because credits have worked in other less valuable bands. The Commission also back peddles from earlier findings that Congress meant for the Commission to create procedures that allowed designated entities to win licenses, not merely to have a fair opportunity to compete in spectrum auctions. The Commission also claims that it is responsible for balancing “competing” congressional goals as to competitive bidding procedures; but it ignores the fact that its 1994 decision was itself a compromise that significantly limited opportunities for designated entities.

The Commission should not now attempt to reinterpret its previous view of Section 309(j)’s requirements as a means of justifying its current actions. The Commission made the correct “cut” in 1994 and there are no changed circumstances that would allow it to abandon Congress’s commitment to designated entities.

The Commission should reconsider its *Sixth Report* to the extent necessary to provide rural telephone companies and other designated entities with a legitimate opportunity to participate in PCS auctions and obtain PCS licenses in markets of any size.

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The Rural Telecommunications Group (“RTG”) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”), hereby respectfully petition for reconsideration of the Federal Communication Commission Sixth Report and Order and Order and Order on Reconsideration in the above-captioned proceeding.¹

RTG and OPASTCO respectfully submit that the Commission’s decision will leave rural and other sparsely populated areas of the country even less likely to be served by digital PCS services. In addition, the Commission’s decision will further exacerbate a trend reported to it on several occasions by RTG: the unwillingness of the largest carriers to either serve beyond the most-populated centers of their licensed areas or partition or

¹ *In the Matter of Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Service (PCS) Licensees*, Sixth Report and Order and Order on Reconsideration in WT Docket No. 97-82, FCC 00-313 (rel. August 29, 2000), 65 F.R. 53624 (September 5, 2000) (“Sixth Report”); *Further Notice of Proposed Rulemaking* in WT Docket No. 97-82, FCC 00-197 (rel. June 7, 2000) 65 F.R. 37092 (June 13, 2000) (“*Further NPRM*”).

disaggregate their licenses to entities willing to do so. The ever-increasing size of license areas and the structure of the Commission's PCS buildout rules exacerbate this trend.²

RTG and OPASTCO members are uniquely qualified to provide wireless services in these unserved areas but cannot compete in open auctions for license areas coveted by the country's largest carriers. As both small businesses and rural providers under Section 309(j)(4) of the Communications Act, these companies were singled out for protection from the open auction bidding that is guaranteed to place more and more PCS licenses into fewer and fewer hands. The Commission previously rejected calls to provide rural carriers with specific tools to prevail in auctions, and now it removes the general designated entity set aside that also applies to rural carriers. Congress also sought to prevent the very consolidation of licenses that the Commission promotes with this decision. This action upsets the carefully crafted balance between "open" spectrum and spectrum reserved for congressionally defined designated entities adopted by a previous Commission. RTG and OPASTCO submit that this Commission has acted on the flimsiest of purported "changed circumstances" to re-slice the PCS pie even more in favor of the largest carriers.

RTG and OPASTCO urge the Commission to reconsider its decision by:

- Preserving at least 20 MHz of the 30 MHz C block licenses for designated entities in all markets;

² Of course, the partitioning and disaggregation rules do not mandate that a licensee partially assign its licenses to willing parties. However, since a licensee need not share its license in any way, this results in many instances where large swaths of a licensee's covered population and geographic area can remain unserved during the entire license term. This is due to the Commission's construction rule that typically requires only "substantial service" at the end of a license term. For broadband PCS, a 30 MHz licensee need only provide adequate service to one-third of its population within five years of licensing and two-thirds of its population within ten years of licensing. 47 C.F.R. § 24.203. This rule conceivably leaves one-third of a population and large geographic areas permanently unserved by a licensee who is otherwise in full compliance with the rules.

- Reversing its decision to divide 30 MHz licenses into three separate 10 MHz licenses, or in the alternative, providing a means for entities to combine their bids for these licenses;
- Maintaining the 10 MHz F Block licenses for designated entities;
- Maintaining unpurchased 15 MHz C Block licenses and all other licenses reserved for designated entities at least through Auction No. 35 and providing designated entities with one opportunity to bid in “closed” auctions for licenses that may be auctioned in the future;
- Increasing bidding credits in any “open” auctions;
- Maintaining bidding credits for “closed” auctions.

With these changes, RTG and OPASTCO believe that the Commission can continue to meet all of the congressionally established Section 309(j) criteria that ensure that competitive bidding operates in the public interest—not in the interest of the country’s largest wireless carriers.

I. STATEMENT OF INTEREST

RTG and OPASTCO are both interested parties whose members will be significantly impacted by the outcome of this proceeding. The organizations participated extensively in the rule making and other proceedings leading up to the *Sixth Report*.³

RTG is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient, and innovative telecommunications technologies

³ See, e.g., Joint Comments of RTG and OPASTCO in WT Docket No. 97-82 (June 22, 2000); Reply Comments (June 30, 2000); Ex Parte Presentation (July 10, 2000).

to the populations of remote and underserved sections of the country. All of RTG's members, either directly or through affiliates, provide local exchange telephone service in rural areas, and are either contemplating expansion into new types of wireless services, or have already diversified their service offerings to provide such wireless services. Many of RTG's members have participated in and won licenses in previous FCC spectrum auctions, including the previous C and F Block PCS auctions, and are contemplating participation in the upcoming C and F Block reaction. The experience of RTG members as winners of previously auctioned PCS C and F Block licenses, and as operators of systems using this spectrum, gives RTG particular insight into this proceeding.

OPASTCO is a trade association of over 500 independently owned and operated incumbent local exchange carriers serving rural areas of the United States. A third of OPASTCO members provide wireless service to consumers in rural areas. Many have or are considering expanding their service offerings to include advanced services, including wireless services, to the rural regions they are committed to serve. OPASTCO members have participated in, and won licenses in previous spectrum auctions, and are planning to participate in the upcoming PCS C and F block reaction.

II. NOTHING IN THE RECORD JUSTIFIES THE COMMISSION'S ABANDONING OF THE CONGRESSIONAL MANDATE TO PLACE PCS LICENSES IN THE HANDS OF A WIDE DIVERSITY OF ENTITIES

The Commission's decision to open previously reserved licenses to bidding by entities other than "designated entities"⁴ dilutes the Commission's mandate, under Section 309(j) of the Act, to promote the development and rapid deployment of new technologies, products, and services for the benefit of the public, *including those residing*

⁴ In this and related proceedings, the listed entities in Section 309(j) have been collectively referred to as "designated entities." *See generally, In re* Implementation of Section 309(j) of the Communications Act –

in rural areas, and to avoid concentration in license holdings and ensure a meaningful opportunity for designated entities to hold PCS licenses. The Commission has significantly undermined the last chance for rural telephone companies and other designated entities to bid on PCS licenses “without competition from the large telephone companies and other deep-pocketed bidders.”⁵ This fundamental change in direction is not supported by changed facts.

A. The Commission Does Not Present Record Evidence Justifying a Change in its Set Aside Program

The Commission states that its re-ordering of the PCS spectrum blocks is mandated by “dramatically” changed circumstances in the PCS industry.⁶ It cites the wireless Internet, advanced data, 3G services, global competition, carrier’s claims for more spectrum to offer these services or meet existing needs, and a need for certain carriers to “fill out” regional or national service areas.⁷ Not surprisingly, the Commission provides no discrete supporting evidence as to how much spectrum is needed, where it is needed, when it is needed and why other alternatives to this massive re-design of the PCS bandplan are not viable. The Commission can rely only upon the self-serving claims of the large carriers who provided only the vaguest of record evidence to support their needs for immediate spectrum infusions. In fact, elsewhere in the *Sixth Report* the Commission discounts the claims of most of these carriers: “In requesting waiver or forbearance, AT&T, Bell Atlantic, Bell South, and GTE only supplied very general assertions that,

Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348 (1994) (“*Second Report*”).

⁵ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, ¶ 153, (1994) (“*Fifth Report and Order*” or “*Fifth Report*”).

⁶ *Sixth Report* at ¶ 23.

⁷ *Id.*

absent lifting the [spectrum] cap, they would face considerable difficulty rolling out 3G and other advanced broadband services.”⁸ If these companies do not meet the less strict standard for demonstrating the need for a waiver, the Commission can hardly rely upon their general assertions for a major rule change.

After the close of the ex parte period, another leading proponent of changing the PCS bandplan, Nextel, announced that it had all the spectrum necessary to serve its customers and that 3G services were 3 to 4 years away.⁹ Sprint PCS now also states that it has enough spectrum for years to come. Sprint PCS also believes that other carriers do not require additional spectrum. “either they are not using their current spectrum efficiently or their technology doesn’t enable them to do the kinds of things that our technology enables us to do.”¹⁰ Even a cursory review of the periodic literature confirms that the large carriers’ claims to the immediacy of spectrum shortages and wireless advanced services rollouts are vastly overstated.¹¹

Although many people are predicting that 3G services will be deployed beginning in Japan by 2001, in Europe by 2003, and in the United States by 2004, others in the telecommunications industry feel this prediction is optimistic, if not unrealistic. While wireless companies are spending lots of money and energy developing standards for 3G services, the telecommunications service carriers are not wasting their time or money.¹² Currently, there are no phone manufacturers publicly supporting 3G and they would have to update their data processors to accommodate color and broader bandwidth. The cost to upgrade could leave service carriers behind for a couple of years, at least. Even when 3G

⁸ *Id.* at ¶ 59.

⁹ *Nextel’s Lost Narrow, Subscriber List Grows*, Washington Post, July 19, 2000 at E1-E2.

¹⁰ “No Spectrum Worries for Sprint,” *Wireless Review*, page 9, September 15, 2000.

¹¹ *3G Is Not 2 Be, 4 Now, Anyway* (visited Sept. 28, 2000) <<http://www.wired.com/news/technology>>.

is deployed in the US, consumers and industry participants will experience growing pains due to competing standards.¹³

Even if the Commission were to accept the claims of the largest carriers as to spot spectrum shortages, the Commission fails to explain why these carriers cannot take advantage of the secondary market mechanisms established or condoned by the Commission that include affiliations, management agreements, swaps, partitioning, disaggregation, roaming arrangements, traditional assignments, and corporate mergers. Nor does the Commission explain why it is insufficient for these carriers to participate in the various upcoming spectrum auctions that will bring hundreds of MHz of mobile spectrum to market. The Commission should not make such a drastic change in its carefully crafted spectrum plan without first taking advantage of these alternatives.

Perhaps underlying the Commission's concern is the incidence of a few well-publicized PCS bankruptcies that seem to call into question the ability of designated entities to fund PCS operations in large and mid-size markets.¹⁴ Yet despite these few bankruptcies, the record indicates that the success rate of PCS C and F block entrepreneurs is astounding. The uncontroverted record reflects that 95 percent of designated entities are either in commercial operation today or in compliance with FCC construction timeframes. The record also indicates that the rate of PCS C and F block system rollout is consistent with that of the other blocks, despite the one to four year headstart of the A and B Block license holders. The record also indicates that this success is not limited to smaller markets, with designated entities or their successor

¹² *3G Phones Divide and Conquer* (visited Sept. 28, 2000) <<http://www.wired.com/news/technology>>.

¹³ Sylvia Dennis, *WAP Is A Dirty Word, Says Forrester* (visited Sept. 28, 2000) <<http://www.computeruser.com>>.

¹⁴ *Sixth Report* at ¶ 7; Further NPRM at ¶¶ 2, 10, 20, 30.

companies operating in the nation's largest markets.¹⁵ The Commission seems to ignore this information and fails to explain why it changes a designated entity program that has been overwhelmingly successful.¹⁶

While the Commission may change course and reverse a policy, a rule or decision based on changed circumstances, it must demonstrate that these changes are real and truly justify a new direction. The courts are clear that the Commission must do more than recite the existence of changed circumstances. We are not challenging the FCC's right to modify an established rule. Rather, we question whether the Commission has provided a reasoned opinion or analysis based upon actual changed circumstances.¹⁷ RTG and OPASTCO respectfully submit that the Commission has provided only the sketchiest of changed circumstances to justify a fundamental re-ordering of its PCS band plan.

B. The Commission Does Not Justify Its Move From Set Asides to Bidding Credits as a Means of Meeting the Congressional Goals of Section 309(j)

The Commission originally determined that it could meet the mandates of Section 309(j) only by reserving broadband PCS spectrum for designated entities. This Commission removes the set asides for the majority of remaining PCS licenses and now claims that bidding credits alone are enough to meet the congressional mandate. The Commission does not adequately justify this change of course.

¹⁵ See, July 17, 2000 PCIA Letter to Commissioner Susan Ness, submitted as an Ex Parte presentation in WT Docket No, 97-82.

¹⁶ The Commission seems to have a great concern with the incidence of partial restructurings and license returns among C and F Block licensees. However, it fails to acknowledge that this phenomenon was a result of the first auctions run with installment payments in place and that since then purchasers of these rebid licenses have paid 100 percent on the dollar. Not surprisingly, these later auctions have not resulted in bankruptcies and restructuring.

¹⁷ See e.g., *Orion Communications Limited v. FCC*, 10 CR 515 (1997); *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (1987); *Columbia Broadcasting System Inc. v. FCC*, 454 F.2d 1018 (1971).

The Commission rightly recognizes that Congress directed it to implement several objectives to ensure that spectrum licenses were not solely awarded to the nation's largest companies. Congress directed the Commission to, *inter alia*, ensure the rapid deployment of new services in rural areas; to promote economic opportunity and competition by avoiding excessive concentration of licenses and by disseminating licenses to small businesses, rural telephone companies and businesses owned by women and minorities ("designated entities"). Congress further directed the Commission to fashion auction procedures that ensure prompt delivery of services to rural areas; and to prescribe area designations and bandwidth assignments that promote economic opportunity for designated entities. Finally, Congress directed the Commission to ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services through the use of bidding credits and other procedures.¹⁸

When the Commission first implemented these directives for broadband PCS, it expressly recognized that bidding credits, installment payments and other incentives would not be sufficient to fulfill these congressional mandates. In 1994, the Commission first noted that the primary obstacle for designated entities was access to capital and that auctions threatened to raise the cost of entry for designated entities into spectrum-based services.¹⁹ Despite its adoption of bidding credits and other measures to aid designated entities in other spectrum auctions, the first measure the Commission adopted specifically to fulfill Congress's mandate to ensure designated entities the opportunity to participate in **providing broadband PCS** was to reserve 30 MHz licenses in Block C and 10 MHz

¹⁸ 47 U.S.C. §§309(j)(3) and (4) as cited in the *Sixth Report* at ¶¶ 3-4; *Further NPRM* at ¶¶ 5-6.

¹⁹ *Fifth Report* at ¶¶ 10-11, 96-111.

licenses in Block F for designated entities.²⁰ The Commission explained then why it was necessary to go beyond bidding credits and other measures to ensure that designated entities had an opportunity to participate in broadband PCS.

[B]ecause broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high, it is necessary to do more [than bidding credits, tax certificates, alternative payment plans, and relaxed attribution rules] to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in other, less costly spectrum-based services.²¹

After extensively recounting the findings of Congress and the Executive Branch as to the difficulty of designated entities to access capital and the additional barrier to entry that an auction would represent, the Commission explained further why bidding credits were insufficient for PCS.

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....[W]e believe this proposal will encourage smaller entities to enter the auctions for broadband PCS auctions and will ensure that “entrepreneurial” businesses are granted nearly half of all the broadband PCS licenses being auctioned.²²

In its *Sixth Report*, the Commission inexplicitly strays from these findings yet offers no justification for rethinking its implementation of the congressional mandate for

²⁰ *Id.* at ¶ 12.

²¹ *Fifth Report* at ¶ 96. (*emphasis added*). The Commission went on to state that the measures it was adopting “are required to fulfill Congress’s mandate that designated entities have the opportunity to participate in the provision of PCS.” *Id.*

²² *Fifth Report* at ¶ 121.

auctioning broadband PCS. Today, the Commission states that Section 309(j)(4) does not mandate the use of set-asides for PCS;²³ in 1994 it determined that set-asides were necessary to fulfill the congressional mandate.²⁴ Today, the Commission states that use of bidding credits in other services has been a success;²⁵ in 1994 the Commission recognized that other radio services were not comparable to the unique interest in and capital requirements for broadband PCS.²⁶ Today, the Commission claims that other objectives can not be ignored at the expense of small business access to PCS bands;²⁷ in 1994, the Commission recognized that its plan was already a compromise that would reserve only one-third of the PCS spectrum and less than half of the licenses for designated entities.²⁸ Today, the Commission claims that the statute does not require that the Commission ensure that “licenses are actually granted to small businesses,” only that they have the *opportunity* to participate in spectrum-based businesses;²⁹ in 1994, the Commission stated that the goal of the statute was to have licenses granted to designated entities.³⁰ The Commission cannot now re-interpret the same statute to justify its otherwise inexplicable change in policy direction.

III. THE COMMISSION SHOULD RE-CONSTITUTE ITS DESIGNATED ENTITY PROGRAM CONSISTENT WITH CONGRESSIONAL GUIDANCE

The Commission repeatedly characterizes its decision as a compromise that will split the remaining C and F licenses almost equally between “open” and “closed”

²³ *Sixth Report* at ¶ 22.

²⁴ *Fifth Report* at ¶ 96.

²⁵ *Sixth Report* at ¶ 44.

²⁶ *Fifth Report* at ¶ 96, 121.

²⁷ *Sixth Report* at ¶ 22.

²⁸ *Fifth Report* at ¶ 127.

²⁹ *Sixth Report* at ¶ 22.

bidding.³¹ This is not the case. This conclusion ignores the reality that the Commission has significantly reduced the spectrum available to designated entities both in terms of bandwidth and licenses.

In 1994, the Commission reserved one third of the PCS spectrum--40 MHz of 120 MHz—for auctioning to designated entities in all Basic Trading Areas (BTAs). The *Sixth Report* reduces this percentage to as low as 8 percent (10 MHz out of 120 MHz) in some Tier 1 BTAs and 16 percent (20 MHz out of 120 MHz) in some Tier 2 BTAs. The balance is even more skewed when viewed in terms of licenses. The Commission originally reserved 48 percent (986 out of 2,074) of all broadband PCS licenses for designated entities. Today, the Commission takes back all of the 154 licenses reserved for designated entities in Auction #35 creates 422 reconfigured licenses, and removes 58 percent (248 out of 422)³² of these reconfigured licenses from reservation to designated entities. With this change designated entity licenses drop from 48 percent to only 30 percent (706 out 2,342) of all PCS licenses reserved for designated entities.³³

The Commission should reconsider its decision to re-balance the division of spectrum and licenses between designated entities and large companies by adopting some or all of the following modifications to its *Sixth Report*:

³⁰ *Fifth Report* at ¶¶ 96, 110, 111.

³¹ *See, e.g.* *Sixth Report* at ¶ 19.

³² This calculation is based upon licenses listed for reauction in Public Notice DA 00-2038, revised Attachment A (rel. September 6, 2000)

³³ This calculation does not include partial licenses that were returned to the FCC as part of C and F Block restructurings. Nor does this calculation include PCS licenses that may be re-auctioned by the FCC in the future.

A. The Commission Should Reserve at Least 20 MHz of Spectrum for Designated Entities in All BTAs

RTG and OPASTCO urge the Commission to abandon its plan to split the 30 MHz C Block into three 10 MHz license and take back 20 MHz from designated entities in “Tier 1” markets and 10 MHz in “Tier 2” markets. Nothing in this extensive record justifies such a fundamental re-ordering of the carefully crafted PCS band plan at this time. It is simply too early to conclude that designated entities in general or designated entity licensees cannot or will not succeed in any market in which they obtain licenses. The Commission simply cannot draw a negative inference from the few C and/or F Block bankruptcies. The Commission can not act on sweeping generalities charging that C and F block licenses have failed to build out when these licenses have not yet even reached their five year buildout deadlines. Moreover, the Commission cannot place any credence in the general claims of established carriers as to spectrum shortages. Even if such shortages occur, the Commission should promote the use of the myriad of secondary market mechanisms and require a showing of increased technical efficiency before taking this drastic step. The Commission should also expedite its pending and imminent wireless allocation proceedings to bring additional mobile spectrum to market for all carriers.

Rather than this draconian reduction in its designated entity program, the Commission should adopt a compromise that provides an additional 10 MHz of “open” spectrum in all BTAs while providing designated entities not less than 20 MHz of the existing 30 MHz C Block licenses.

Without 20 MHz of spectrum, rural providers will not be able to provide consumers with the full range of voice and advanced data services that are on the horizon. As noted above, even the larger companies that may hold MTA (or BTA) licenses in rural or other low population areas are unlikely to serve the sparsest areas of their geographic areas. It falls to the rural telephone companies to serve these consumers, and these consumers should not receive second class treatment. Section 309(j)(3)(A) of the Communications Act directs the Commission to ensure that new wireless services are available to rural Americans and Section 309(j)(4)(D) directs the Commission to ensure that rural telephone companies can provide them. Ten (10) MHz of spectrum is simply not enough spectrum to provide advanced mobile services. Rural telephone companies, the overwhelming majority of whom qualify as small companies, do not have the financial wherewithal to bid against the nation's largest carriers for the spectrum needed to serve their communities. Congress, and an earlier Commission, recognized this economic reality. This Commission should ensure that rural communities do not suffer a wireless Digital Divide.

B. The Commission Should Reverse its Decision to Divide the 30 MHz C Block Licenses

The Commission need not split the 30 MHz C Block licenses in order to provide larger carriers with incremental spectrum infusions. Instead, it could simply make available the remaining 10 MHz F Block licenses to open bidding, and, as additional F Block licenses are returned to the Commission or otherwise become available, make these available to all carriers.

If the Commission rejects this alternative, it should instead provide entities with a means of combinatorial bidding on the disaggregated licenses. Designated entities should not be faced with piece meal bidding that may find them holding less spectrum than is necessary to operate in a market. RTG and OPASTCO members will either need to add 20 MHz to existing PCS licenses or create a minimum 20 MHz license to offer competitive services with larger carriers. They should therefore not be permitted to bid for licenses only in independent 10 MHz increments.³⁴

C. The Commission Should Retain the 10 MHz F Block licenses for Designated Entities

If the Commission maintains its decision to take back the C Block licenses as set forth in the *Sixth Report*, it should reconsider moving the remaining F Block licenses to open bidding. The Commission's justification for eliminating the F Block set aside is wholly unsupported and is contrary to rational decision making.

The Commission's justification is flawed in several respects. First, as explained above, the Commission has not adequately justified the need to provide additional spectrum to the largest carriers nor does the record support it. Second, the Commission cannot use the success of designated entities in using F block spectrum as a justification for taking it back. It is simply counter-intuitive for the Commission to point to the lack of controversy in this band and the paucity of returned licenses by designated entities as a reason for taking back the licenses.³⁵ The Commission also states that "build out of

³⁴ A and B Block licensees were given the chance to create 30 MHz blocks through one bid. With the changed rule, designated entities would need to be successful in three independent auctions.

³⁵ *Sixth Report* at ¶ 26; *Further NPRM* at ¶ 31.

these bands has not progressed as quickly as we may have anticipated”³⁶ but does not explain why F Block carriers, who received licenses less than five years ago, should be held to a build out standard shorter than established by the rules. The Commission fails to explain why it should expect F Block service to consumers faster than its rules require and why a failure to exceed its rules justifies elimination of the designated entity set aside. Finally, the Commission cannot point to the continued existence of a 30 MHz designated entity operator in the particular market to support continued “diversity of opportunity” unless it commits to taking back F Block licenses only in markets where a 30 MHz designated entity operates.

D. The Commission Should Prospectively Apply Its Unpurchased License Rule

RTG and OPASTCO urge the Commission not to apply retroactively a policy that would allow set-asides on any given license for only one auction. Instead, the Commission should prospectively apply this policy so that all designated entities are aware that the Commission will place a set aside on a license for only one auction.

The Commission concludes that it should remove the set aside from all 15 and 30 MHz C Block licenses that were available but not sold in Auction #22. It also will lift the set aside for all remaining C and F Block licenses that are not sold in Auction #35 or a future auction.³⁷ RTG and OPASTCO agree with the Commission that it is reasonable to provide designated entities with just one opportunity to bid for spectrum in closed auctions. However, it is not reasonable to impose this rule retroactively. If Auction #22’s designated entity bidders had been aware of this rule, these licenses might have been

³⁶ *Further NPRM* at ¶ 31.

³⁷ *Sixth Report* at ¶¶ 27-29.

purchased in 1999. Instead, they were operating under the impression that any auction inventory that went unsold would be available in the next closed auction. It is not fair to undermine the business strategies of these bidders or new entrepreneurs who were not able - or did not even exist - to bid for these licenses. RTG and OPASTCO are especially concerned that rural telephone companies would lose the chance to bid on the Auction #22 C Block inventory since many of these licenses are located in rural markets.³⁸ Instead, the Commission should revise its rules to replace all unsold set aside licenses for Auction #35 with open bidding. If these designated entity licenses are not sold in Auction #35, they would move to open bidding in a future auction. Any set-aside licenses made available for the first time in a future auction would be subject to the set aside for only one auction.

E. The Commission Should Increase Bidding Credits For Both Open and Closed PCS Auctions

The Commission concludes that it should retain a 15 percent credit for small businesses and a 25 percent credit for very small businesses in open auctions but eliminate the credits completely for any closed auction.³⁹ RTG and OPASTCO urge the Commission to increase the size of bidding credits in both open and closed auctions. While RTG and OPASTCO agree that the absence of a “total assets” to determine bidding credit eligibility may create inequities, the solution is not to eliminate bidding credits in the context of PCS, but to revise the rule as the Commission is currently contemplating in one of its other proceedings.⁴⁰

³⁸ *Further NPRM* at ¶ 32.

³⁹ *Sixth Report* at ¶¶ 44-45.

⁴⁰ Amendment of Part 1 of the Commission’s Rules—Competitive Bidding Procedures, *Fourth Further Notice of Proposed Rule Making* in WT Docket No 97-82, FCC 00-274 ¶¶ 80-82 (rel. August 14, 2000).

In 1994, the Commission recognized that broadband PCS was unlike any other radio service in that its profit potential and high start up costs made it both very attractive to established carriers and extremely capital intensive. Therefore, it was necessary to offer more than bidding credits “to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in other, less costly spectrum-based services.”⁴¹ However, if the Commission is unwilling to retain designated entity set asides in previously-reserved bands, it must provide significantly higher bidding credits in order to ensure that these congressionally-identified entities have the same opportunity to participate in this industry.

The Commission simply cannot rely on the impact of bidding credits in less costly services to justify its replacement of the broadband PCS set aside with bidding credits.⁴² The Commission attempts to justify its new stand on bidding credits by pointing to the “success” of Auction #11, where designated entities won 14 percent of the available D and E block licenses without bidding credits.⁴³ If anything, this low success rate indicates the crucial need for bidding credits. Moreover, even this paltry success rate needs to be put in historical perspective. That auction occurred at a time when the largest carriers were still digesting their initial A and B block purchases and did not participate in these auctions with the same fervor. In addition, some of these carriers were spectrum cap-constrained in several markets. In addition, even the 14 percent success rate is misleading because only four designated entities purchased more than half of the D and E licenses won by small companies. Today, as the interest in this proceeding indicates, the

⁴¹ *Fifth Report* at ¶ 96.

⁴² *See Sixth Report* at ¶ 44 (relying on results of SMR auctions) and footnote 67 (citing to overall success of entrepreneurs who used bidding credits).

⁴³ *Sixth Report* at ¶ 44.

nation's largest carriers are targeting the C and F block bands. The one time modest success of designated entities in Auction #11 does not justify retaining the modest credit levels. The Commission should raise the bidding credits to at least 45 percent to reflect today's market reality.

The Commission does not justify the elimination of bidding credits in closed auctions. In 1994, the Commission explicitly recognized the need for credits even in closed auctions. Then, the Commission concluded that reserving C and F blocks for bidding by relatively small businesses would not, by itself, be sufficient to ensure that these businesses have the opportunity to obtain broadband PCS. The Commission explained, that small businesses with gross revenues not exceeding \$40 million "will be at a disadvantage in competing against companies with gross revenues of as much as \$125 million."⁴⁴ The Commission also adopted bidding credits even in the closed auctions because it felt that the extremely capital-intensive nature of PCS would mean that bidding credits in the open auctions would not have a meaningful effect.⁴⁵ With the smallest companies having a meaningful opportunity to enter the PCS industry only in the closed auctions operating with bidding credits, the discrepancy in capital access between small and very small entities and the larger entrepreneurs still qualifying as designated entities in earlier auctions is magnified in Auction #35. With the implementation of the Commission's grandfathering rules, entities with revenues of less than \$15 million will be forced to go head-to-head with entities with hundreds of millions (even billions) of dollars in revenues and assets.⁴⁶ While RTG and OPATSCO do not

⁴⁴ *Fifth Report* at ¶ 13.

⁴⁵ *Id.* at ¶ 131.

⁴⁶ For example, among the companies that are eligible to bid in auction #35 are Telecorp PCS, with \$127.5 million in total revenues through the first six months of 2000 and \$952 million in assets at the end of 1999.

oppose the grandfathering policy per se, the Commission should exercise the same equities that resulted in the grandfathering policy itself by giving the very smallest companies the same relative chance to bid against grand-fathered companies of unlimited size as existed in earlier closed auctions with revenue and asset caps for all participants.⁴⁷

The Commission also decides to eliminate bidding credits for the closed auctions because the standard for small and very small businesses does not contain a “total assets” test. Without a total assets test, the Commission believes that certain entrepreneurs could skew the results.⁴⁸

The discrepancies noted by the Commission occur in any auction where it authorizes the use of bidding credits. The solution is not to eliminate bidding credits for PCS, a service where they are most needed, but to revise the generic auction rules to incorporate a total assets test. The Commission has an ongoing proceeding requesting comment on this very issue.⁴⁹ The Commission should not end the use of bidding credits in closed auctions, while maintaining them in open auctions, if it believes a total assets test is necessary. Instead, the Commission should either delay Auction #35 until it has revised its generic test for determining eligibility for bidding credits, or, retain the current “assets-only” test for use in all broadband PCS auctions prior to modification of this rule by the Commission.

Other companies potentially bidding include Dobsen with \$231 million in revenues for the first six months of 2000 and \$1.65 billion in assets; Tritel with \$41 million in revenues in the first six months of 2000 and \$1.196 billion in assets; Voicestream, who has acquired both Ominpoint PCS and Cook Inlet Western wireless, with \$475 million in 1999 in total revenues and \$2.221 billion in assets. Even if Voicestream does not qualify, its partner Cook Inlet is gearing up to re-enter the auctions through the use of targeted legislation that gives it a chance to raise significant revenues. *See* Department of Defense Appropriations Act § 8149 (m), Pub. L. 106-259 (2000).

⁴⁷ In effect, the grandfathering policy makes all licenses in Auction #35 subject to a version of open bidding by only certain companies of unlimited financial size. Consistent with the Commission’s treatment of bidding credits for open auctions, it should retain or increase credits in auctions where grandfathered companies are eligible to participate.

⁴⁸ *Sixth Report* at ¶ 45; *Further NPRM* at ¶ 42.

IV. CONCLUSION

For the reasons stated above, RTG and OPASTCO request that the Commission reconsider its decision to diminish the PCS C and F Block designated entity set aside program. The prior division of spectrum between the largest wireless carriers and entrepreneurs clearly met Congress's intent to ensure that a wide variety of entities received PCS licenses in all size markets.

Respectfully submitted,

**RURAL TELECOMMUNICATIONS
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⁴⁹ *Fourth Further NPRM* at ¶¶ 80-82.