

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

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

To: The Commission

**PETITION FOR RECONSIDERATION
OF
NORTHCOAST COMMUNICATIONS, LLC**

Theresa Zeterberg Cavanaugh
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, NW
Second Floor
Washington, DC 20006
(202) 659-9750

October 5, 2000

TABLE OF CONTENTS

I. BACKGROUND 2

II. LEGAL ARGUMENT..... 5

 A. The FCC’s Rationale Supporting its BTA Tiering Decision, and the Decision to Remove Eligibility Restrictions for the Majority of DE Spectrum in Tier 1 Markets, is Factually Erroneous 5

 B. The Decision to Allow Open Bidding for F Block Licenses Cannot be Supported..... 8

 C. The Basis for the Commission’s Bidding Credit Decisions is Factually Flawed 9

III. CONCLUSION11

SUMMARY

Northcoast Communications, LLC (“Northcoast”) respectfully requests that the Commission reconsider the following aspects of the *Sixth Report and Order*, and urges the Commission to:

- Reverse the decision to divide Basic Trading Areas (“BTAs”) into two tiers based on whether the market population is equal to or greater than 2.5 million;
- Preserve at least 20 MHz of spectrum for closed bidding by DEs in all markets;
- Re-institute closed bidding for 10 MHz F block licenses; and
- Increase the current, inadequate 15 and 25 percent bidding credits in open auctions, and maintain bidding credits for closed auctions.

Without these changes, it will be impossible for small business designated entities (“DEs”) to effectively compete for spectrum in Auction No. 35 in any market with a population of 2.5 million or above. Because these rule changes were not supported by the record developed in the underlying proceeding, and because certain important facts have come to light since interested parties were last allowed to comment, the Commission’s decisions in the *Sixth Report and Order* regarding these changes were both factually and legally erroneous, and consequently, should be reconsidered and revised.

appreciates the political and practical reality that some compromise was inevitable.

Consequently, Northcoast does not request reconsideration of the Commission's entire *Sixth Report and Order*. Rather, Northcoast focuses its reconsideration request on those aspects of the *Sixth Report and Order* that will make it impossible for small business designated entities ("DEs") to effectively compete for spectrum in Auction No. 35 in any market with a population of 2.5 million or above. Therefore, Northcoast respectfully requests that the Commission reconsider the following aspects of the *Sixth Report and Order*, and urges the Commission to:

- Reverse the decision to divide Basic Trading Areas ("BTAs") into two tiers based on whether the market population is equal to or greater than 2.5 million;
- Preserve at least 20 MHz of spectrum for closed bidding by DEs in all markets;
- Re-institute closed bidding for 10 MHz F block licenses; and
- Increase the current, inadequate 15 and 25 percent bidding credits in open auctions, and maintain bidding credits for closed auctions.

Northcoast submits that the Commission's decisions in the *Sixth Report and Order* regarding these issues were both factually and legally erroneous because they were not supported by the record developed in the underlying proceeding, and because certain important facts have come to light since the comment cycle ended that materially impact decisions made in the *Sixth Report and Order*.

I. BACKGROUND

Northcoast participated in Auction No. 11 as a qualified very small business DE, and ultimately was awarded 49 D, E and F block 10 MHz licenses to provide broadband PCS in various markets located in the northeastern and midwestern portions of the United States.³

³ An affiliate of Northcoast's, North Coast Mobile Communications, Inc. ("NCMC"), was a bidder

Northcoast expects to launch service in its first market, Cleveland, by the end of 2000 (well ahead of its third quarter 2002 five year build-out deadline), in Boston and Minneapolis by second quarter 2001, in Columbus, Providence and New Haven by the third quarter of 2001, and in the New York BTA by the end of 2001. Despite the Commission's decisions in the *Sixth Report and Order*, Northcoast still intends to participate in Auction 35, and hopes to obtain additional broadband PCS licenses in certain key markets in order to supplement its service footprint.

Northcoast actively participated in all aspects of this proceeding,⁴ consistently opposing any changes to the entrepreneur block eligibility rules for Auction No. 35 as unnecessary, inequitable, and unsupported by the record. Northcoast submits that the record facts in this proceeding still do not support the major rule changes made in the *Sixth Report and Order*. Specifically, the record in this proceeding does not contain concrete evidence of changed circumstances sufficient to permit the Commission to deviate from its original, carefully crafted determination that:

small entities stand little chance of acquiring licenses in ... 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

in the FCC's C Block auction. However, NCMC withdrew from the auction in late March 1996 after determining that the prices being bid in NCMC's targeted markets had become excessive and outside the scope of even its most aggressive business plan.

⁴ See Reply Comments of Northcoast Communications, LLC, filed in this docket on June 30, 2000; Comments of Northcoast Communications, LLC, filed in this docket on June 22, 2000; Opposition of Northcoast Communications, LLC, filed April 17, 2000, in response to FCC Public Notice DA 00-760; Reply Comments of Northcoast Communications, LLC, filed March 10, 2000, in response to FCC Public Notice DA 00-318 (opposing petitions for waiver and forbearance of the CMRS spectrum cap rules); Comments of Northcoast Communications, LLC, filed February 22, 2000 and Reply Comments filed March 1, 2000, in response to FCC Public Notice DA 00-191 (opposing petitions and waiver requests of Nextel Communications, Inc. ("Nextel") and SBC Communications Inc. that seek to eradicate the FCC's DE rules).

a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business.”⁵

Further, there has been very little change in overall circumstances since the Commission more recently twice considered, and rejected, arguments by Nextel in 1998 and 1999 that entrepreneur’s block auctions should not be restricted to DEs. Arguably, one important change in circumstances is the continued consolidation within global wireless industry, which necessarily should cause concern about the negative impact on competition.⁶ Certainly this ongoing trend of global industry consolidation does not support the Commission’s decision to eliminate the opportunity to compete for spectrum for an entire class of competitors.

However, certain new facts *have* come to light since the Commission ended acceptance of *ex parte* presentations in this proceeding that are directly relevant to certain critical decisions made in the *Sixth Report and Order*. Consequently, Northcoast believes that certain *Sixth Report and Order* decisions are erroneous,⁷ and it urges the Commission to reconsider the following rulings.

⁵ *Fifth Report and Order* in PP Docket No. 93-253, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 5532, ¶ 121 (1994).

⁶ “The wireless communications industry has been experiencing significant consolidation, and we expect that this trend will continue”. See “Verizon Wireless Plans IPO”, *Washington Post*, August 25, 2000, p. E9, quoting Verizon SEC Form S-1.

⁷ For that reason, Northcoast reiterates its strong support for consideration of a reasonable compromise approach. Specifically, to retain all eligibility restrictions during Auction No. 35, and if any licenses remain unsold after that auction, to *promptly* reacquire all remaining licenses at an open auction.

II. LEGAL ARGUMENT

A. The FCC's Rationale Supporting its BTA Tiering Decision, and the Decision to Remove Eligibility Restrictions for the Majority of DE Spectrum in Tier 1 Markets, is Factually Erroneous

Pursuant to the *Sixth Report and Order*, in Auction No. 35, the Commission will divide all BTAs into Tier 1 and Tier 2 categories. Tier 1 markets will consist of BTAs with populations that are equal to or greater than 2.5 million, and Tier 2 markets will be comprised of the remaining BTAs.⁸ The Commission's rationale for adopting this market tiering approach is that it will make more spectrum available for open bidding in the most populous markets where the demand for spectrum by existing CMRS carriers is the greatest and the prospects for a spectrum shortage for these carriers is the most acute."⁹ In addition, the Commission stated that the tiering approach would keep most of the spectrum in Auction No. 35 closed, "in all but the very largest markets".¹⁰ Similarly, the basis for the Commission's decision to remove the eligibility restrictions on the majority of spectrum in Tier 1 markets is based on the "shortage of suitable available spectrum".¹¹

As it did during the comment cycle in this proceeding, Northcoast disputes these factual bases for the Commission's tiering and eligibility decisions. Until relatively recently, most major carriers were telling Wall Street, and Wall Street believed, that a "spectrum glut" existed. Due to this spectrum glut, many major wireless carriers made strategic decisions not to

⁸ See *Sixth Report and Order* at ¶ 18.

⁹ *Id.* at ¶ 19.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 23.

participate in spectrum auctions.¹² In fact, at least one of the largest CMRS carriers never participated in the A and B, or D and E block auctions.

In less than a year, however, the U.S. appears to have gone from a spectrum glut to a spectrum deficit. Although apparently, this spectrum scarcity concept is selectively, and conveniently, employed by the major CMRS carriers. For example, while pleading spectrum poverty to the FCC, most major carriers simultaneously advise the financial markets and their investors that they have more than enough spectrum to meet their present service needs.¹³ In a late-filed (July 21) *ex parte* presentation by the Personal Communications Industry Association (“PCIA”), PCIA brought to the Commission’s attention a July 19, 2000 *Washington Post* article that *directly refuted* Nextel’s spectrum scarcity and 3G roll-out claims.¹⁴ (Because the submission necessarily was late-filed - the story was published after the *ex parte* deadline - the Commission refused to consider PCIA’s filing.) Nextel later told *Wireless Week* “that Nextel has enough spectrum for its 10-year business plan.”¹⁵ Similarly, Sprint recently admitted that it

¹² See, e.g., “Spectrum Glut Feared - PCS Networks’ Value May Decline”, *Wireless Week*, January 12, 1998.

¹³ “While mega-carriers suggest to regulators a dire need for more spectrum, they tell investors another story. In February, Sprint PCS said it is using less than 8 megahertz of its 30 megahertz holdings in most major metropolitan areas. In April, Sprint and U S West Wireless LLC petitioned the FCC to overturn the rules restricting C- and F-Block PCS licenses and let large carriers bid in the re-auction. Also in February, AT&T Wireless Services told the FCC that without additional PCS spectrum, the firm would be hard-pressed to rollout 3G services. In the same filing, AT&T Vice President Douglas Brandon noted that AT&T is not facing spectrum constraints today—instead, it is reserving spectrum for increased demand and for fixed wireless services. “Spectrum Woes: Real or Feigned?”, *Wireless Week*, July 31, 2000.

¹⁴ Nextel presently “has enough spectrum to serve nearly five times its current customer base” and that “[t]he wireless industry will begin implementing ‘third-generation’ technology in 2003 or 2004, at the earliest.” “Nextel’s Loss Narrows, Subscriber List Grows”, *Washington Post*, July 19, 2000, at pp. E1-E2.

¹⁵ “Spectrum Woes: Real or Feigned?”, *Wireless Week*, July 31, 2000.

has sufficient spectrum, and that if using their spectrum efficiently, other large carriers should not be in any different condition.¹⁶

The Commission has made clear that the present “spectrum shortage” is one of the primary reasons, if not the single most important reason, for the entrepreneur block program rule revisions adopted in the *Sixth Report and Order*.¹⁷ Since this is the case, then facts, especially new facts, that refute the Commission’s chief rationale for its decision become critically important and cannot be ignored.

Northcoast also disputes the Commission’s notion that a majority of spectrum in Auction No. 35 will be available for open bidding on in “all but the very largest markets”. With a population cut-off of 2.5 million, open bidding will be allowed on a majority of available spectrum in the top 15 markets available in Auction No. 35. Within the next 15 months, Northcoast intends to roll out service in seven markets, four of which are “Tier 1” markets. Under the new tiering rule, Northcoast will not be able to bid competitively for available C block spectrum in markets such as Pittsburgh (2.5 million pops), Washington, DC (4.1 million pops) and Philadelphia (5.89 million pops), all of which are natural extensions of its present footprint, and in all of which Northcoast could offer a competitive product.¹⁸ Indeed, this competitive limitation on Northcoast clearly demonstrates that the FCC’s 2.5 million population demarcation

¹⁶ See “No Spectrum Worries For Sprint,” *Wireless Review*, September 15, 2000, at p. 9.

¹⁷ The Commission’s apparent reliance on selective news media reports to support its decision is an entirely arbitrary and untested substitute for reasoned decisionmaking. See *Sixth Report and Order* at ¶23 n. 71 (citing articles in the *Wall Street Journal* and *Washington Post*). While the news media certainly can be an appropriate source for information about current trends, *all* points of view should be included in the record and analyzed, not just those that provide support for a preordained decision.

¹⁸ Northcoast has determined that the incremental cost of developing a market with a current population of approximately 4.4 million (i.e., Boston) versus the cost of developing a market with a current population of 1.5 million (i.e., Columbus) is *de minimus*. Specifically, the difference equates to the rapidly diminishing incremental costs of cell sites and operations personnel.

is arbitrary, and impossible to justify. (As discussed later, also arbitrary is the Commission's decision to allow open bidding for F block licenses, which means that, realistically, Northcoast will be unable to bid competitively for the only license available in Milwaukee - population 1.75 million - since that is an F block license.) Consequently, Northcoast urges the Commission to reassess and simplify its tiering and eligibility restriction decisions by eliminating all tiering aspects and allowing open bidding only for a single 10 MHz C block license in all markets.

B. The Decision to Allow Open Bidding for F Block Licenses Cannot be Supported

In the *Sixth Report and Order*, the Commission determined that all F block licenses available in Auction No. 35 should be subject to open bidding.¹⁹ The Commission appears to have two bases for this decision. First, the Commission states that the F block has evolved differently from the C block, and consequently there is no longer a need to treat both blocks identically.²⁰ While Northcoast does not dispute the fact that the C and F block have evolved differently, it does question how this difference supports the elimination of the eligibility restriction for the F block in Auction No. 35, or even how this point is relevant to the discussion. Indeed, since F block entrepreneurs such as Northcoast are in the process of building out their systems, the logical conclusion should have been that the equities support *maintaining*, rather than eliminating, the F block set-aside.

The Commission's other basis for this rule change is that "allowing open eligibility for all available F block licenses *might* lead to more expeditious provision of service to consumers."²¹

¹⁹ *Sixth Report and Order* at ¶ 24.

²⁰ *Id.* at ¶ 26.

²¹ *Id.* (emphasis added).

It should be axiomatic that an existing rule promulgated under the Administrative Procedure Act cannot be changed based solely on the premise that the change *might* result in a desired outcome. The lack of support for the Commission’s F block eligibility rule change is further confounded by the fact that service to the public by F block licensees has not been delayed. Section 24.203(b) of the Commission’s rules affords F block licensees five years to meet their build-out obligations. For most F block licensees, such as Northcoast, approximately two years remain before the requisite service showing must be made. Therefore, it is unreasonable and unsupportable for the Commission to imply that the performance of F block licensees generally has been so substandard that it justifies the loss of the eligibility requirement. This is especially so given the fact that the Commission did not penalize any A or B block licensee for not beating their Section 24.203(a) five year build-out obligation.

C. The Basis for the Commission’s Bidding Credit Decisions is Factually Flawed

Northcoast also urges the Commission to reconsider both of its decisions regarding bidding credits. In explaining its reasoning behind maintaining the existing 15 and 25 percent bidding credits for open bidding, the Commission stated simply that it agreed with the comments, submitted exclusively by and/or for large CMRS operators, that the existing bidding credits “will allow effective competition by small businesses in open C and F block bidding.”²² To justify this inexplicable decision, the Commission then pointed to two previous auctions (900 MHz SMR and DEF Block auctions), where smaller bidding credits were used, in a comparison that is totally inapposite.

²² *Id.* at ¶ 44.

The 900 MHz SMR auction was one of the first auctions held by the Commission, and attracted only less than five large companies as bidders. The DEF auction, on the other hand, occurred shortly after the C block auctions (Auction Nos. 5 and 10), at a time when wireless spectrum values clearly were depressed, and consequently, the competition level at the auction was impacted. By any account, there is significant interest in Auction No. 35, and predicted auction revenues are in the tens of billions of dollars. Indeed, over one year ago, Nextel offered the FCC \$8 billion for the NextWave spectrum alone, just last week, the head of the new SBC Communications/BellSouth Corp. wireless joint venture reportedly said it could spend more than \$6 billion for spectrum between Auction No. 35 and Auction No. 31 (the 700 MHz auction),²³ and an article in yesterday's *Washington Post* reported the value of the NextWave spectrum to be "as much as \$18 billion."²⁴

A more relevant and appropriate comparison, and action, would have been to follow the example of the original LMDS auction model (Auction No. 17). In that auction, the FCC originally had adopted bidding credits of 15 and 25 percent, for small and very small businesses, respectively. However, shortly before the start of Auction No. 17, the Commission modified its LMDS auction rules by eliminating a preference, namely its auction installment payment program. In lieu of removing the installment payment preference, the FCC adopted a revised bidding credit program of 25, 35 and 45 percent, for entrepreneurs, small businesses and very small businesses, respectively.²⁵ (Even then, many of the largest U.S. communications companies did not participate in Auction No. 17, due to cross-ownership restrictions.)

²³ "SBC/BellSouth May Pay \$6 Billion in US Airwave Tenders", *European Telecommunications*, September 29, 2000.

²⁴ "Bid for Vital Airwaves Falter", *Washington Post*, October 4, 2000, at p. A4.

²⁵ *See Second Order on Reconsideration* in CC Docket No. 92-297, 12 FCC Rcd 15082

Given the extraordinary level of interest in Auction No. 35, and the exceptional prices paid recently by “global” wireless companies for access to wireless spectrum in other countries, the Commission’s determination that such relatively nominal bidding credits will allow “effective competition by small businesses in open C and F block bidding”²⁶ is absolutely absurd, unsupported and should be reconsidered.

Northcoast also contests the Commission’s decision that bidding credits should be eliminated for closed bidding in Auction No. 35, reasoning that the bidding credits no longer serve their intended purpose.²⁷ The Commission should be well aware that due to the FCC’s existing grandfathering and entrepreneur eligibility rules, small businesses will be competing in Auction No. 35 closed bidding against certain comparatively huge, operational “DEs” that presently are generating millions of dollars in revenue, and potentially have billions of dollars of assets.²⁸ Under these circumstances, the need for bidding credits to address these clear competitive disparities is as compelling as when originally adopted.²⁹

III. CONCLUSION

The Commission’s revised entrepreneur block rules adopted in the *Sixth Report and Order* favor the largest CMRS carriers, leaving small business wireless carriers without the

(1997).

²⁶ *Sixth Report and Order* at ¶ 44.

²⁷ *Id.* at ¶ 45.

²⁸ For example, as of today’s filing date, NASDAQ estimates TeleCorp’s market capitalization to be \$1.789 billion. Assuming the auction starts on schedule in December, TeleCorp may participate as a DE under the recently-upheld grandfathering exception.

²⁹ Ironically, the proponents cited by the Commission in support of eliminating closed bidding credits are companies such as the almost-merged Telecorp/Tritel and Dobson, each of which formerly took advantage of such credits under precisely the carefully structured applicant forms that they now criticize.

spectrum needed for the provision of new wireless services. In addition to being poor policy, the rule changes are not supported either by the record evidence in this proceeding, or additional facts that continue to come to light, and therefore are erroneous. Consequently, Northcoast urges the Commission to reconsider its decisions on tiering, eligibility and bidding credits.

Respectfully submitted,
NORTHCOAST COMMUNICATIONS, LLC

By: /s/ Theresa Z. Cavanaugh
Theresa Zeterberg Cavanaugh
Its Attorney

COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, NW
Second Floor
Washington, DC 20006
(202) 659-9750

October 5, 2000