

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

In the Matter of)	
)	
Facilitating the Provision of Spectrum-Based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services)	WT Docket No. 02-381
)	
2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services)	WT Docket No. 01-14
)	
Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and to Facilitate Capital Formation)	WT Docket No. 03-202
)	

To: The Commission

COMMENTS OF RURAL CELLULAR ASSOCIATION

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SUMMARY

The Commission's policies for promoting the provision of spectrum-based services in rural and underserved areas will be furthered by many of the proposals under consideration in this proceeding. Among the various actions that might be taken, several stand out as potentially the most effective to advance rural wireless development, namely: 1) licensing spectrum according to MSA/RSA boundaries, not larger geographic areas; (2) reclaiming unused spectrum for relicensing to entities prepared to use it for service offerings; (3) continuing to make available to rural wireless carriers high cost support from the USF; and (4) avoiding new "unfunded mandates" on wireless carriers because small carriers lack pricing power in their markets and therefore cannot recover the costs associated with such mandates from their relatively small subscriber base.

Advancing the development of service in rural areas is promoted by a broad definition of "rural," such as any area within a Rural Service Area as defined by the Commission for cellular licensing purposes, or any county with a population density of 100 persons or fewer per square mile, even if located within a Metropolitan Statistical Area. Furthermore, geographic area not served by a licensee should become available to others via the "unserved area" licensing process. Adoption of a "substantial service" alternative for wireless services should be accompanied by the condition that areas that remain unserved by a date certain will be returned to the Commission and become eligible for relicensing.

In addition to the above-listed "core" actions to promote spectrum use in rural areas, RCA also endorses (i) increased power levels wherever they can be used effectively, according to benefit, cost, propagation behavior prevention of interference

and radiation exposure potential, (ii) relaxation of cellular cross-interest restrictions so that they are applied only in those RSAs with three or fewer broadband PCS and/or cellular competitors, and (iii) proposals that permit infrastructure sharing. On the subject of security interests for lenders, RCA suggests that the FCC should refrain from favoring the Rural Utilities Service with security interests that are not available to other lenders. Indeed, there is no need to grant any lender a security interest in licenses because they already may obtain the proceeds from the sale of a license.

Overall, RCA requests the Commission to consider how each action it takes concerning wireless services may impact small company efforts to serve the rural areas, and to avoid imposing new and costly requirements that have the effect of impeding rural service providers in delivering the same quality and choices to rural citizens as are available in metropolitan areas.

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Rural Cellular Association (“RCA”)¹, by its attorneys, respectfully submits these Comments in response to the invitation of the Federal Communications Commission (“FCC” or “Commission”)² to comment on matters relevant to the rapid an efficient deployment of spectrum-based services in rural areas. Recognizing that the economics of providing service can be significantly different in rural areas as compared to urban areas, and seeking to achieve regulatory flexibility at minimized costs, the FCC invited input on measures to facilitate access to service among Americans who reside, travel or conduct business in rural areas. RCA is pleased to participate in this proceeding.

¹ RCA is an association representing the interests of nearly 100 small and rural wireless licensees providing commercial services to subscribers throughout the nation. Its member companies provide service in more than 135 rural and small metropolitan markets where approximately 14.6 million people reside. RCA was formed in 1993 to address the distinctive issues facing wireless service providers.

² *Notice of Proposed Rulemaking*, WT Docket Nos. 02-381, 01-14 and 03-202, FCC 03-222, released October 6, 2003 (“NPRM”).

Introduction

RCA presents herein its comments upon the Commission's proposals to facilitate spectrum access, capital formation, build-out and coverage in rural areas. Because of the unique composition of its membership, RCA is able to provide primary perspective on such matters as the characteristics and definition of rural areas, the potential for "unused" spectrum, the effect of construction requirements and power limits, the size of geographic licensing areas, the Rural Utilities Service ("RUS") low interest loan program, the cellular cross-interest rule in Rural Service Areas ("RSAs"), infrastructure sharing, and other regulatory, demographic and technical issues relevant to the provision of wireless services in rural areas. RCA filed comments in response to the Commission's *Notice of Inquiry*,³ which preceded the NPRM, and to the Commission's *Notice of Proposed Rulemaking* on service rules for 90 MHz of spectrum to be auctioned for Advanced Wireless Services ("AWS"),⁴ providing recommendations arising from the concerns of its members who provide cellular and/or broadband Personal Communications Services ("PCS") in rural and small markets of the United States. RCA members have an outstanding record of subscriber service, and they share with the Commission a desire to improve offerings of new wireless technologies, so that rural consumers may benefit from the same advanced telecommunications services as are enjoyed by urban citizens.

The Commission's goals in this proceeding are commendable but a prime opportunity to promote those goals was missed to a substantial extent in a recently adopted decision that involves

³ Facilitating the Provision of Spectrum-Based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Notice of Inquiry*, 17 FCC Rcd 15554 (2002) ("Rural NOI").

⁴ Service Rules for AWS in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02-353, *Notice of Proposed Rulemaking*, 17 FCC Rcd 24135 (2002) ("AWS Services Rules NPRM").

service and licensing rules for AWS.⁵ There, the Commission adopted a licensing framework that is intended to “...ensure that this spectrum is efficiently utilized and will foster the development of new and innovative technologies and services, as well as encourage the growth and development of broadband services.”⁶ However, the Commission made available only one of five license blocks created, with only 10 MHz of the available 90 MHz, for licensing according to Metropolitan Statistical Area (“MSA”)/RSA boundaries. Auction history shows that small entities whose focus is service to rural areas cannot successfully compete at auction for geographic license areas that are significantly larger than MSAs/RSAs. Service history shows that large entities that acquire licenses for large geographic areas have not been successful in bringing the benefits of the latest wireless technologies to the most rural portions of their license areas. And when partitioning and/or disaggregation is accomplished, it is on terms determined by the large company license holder. The Commission still can reconsider its decision in the AWS proceeding and RCA will request that it do so. In this proceeding RCA asks that the Commission not lose sight of the core problems and issues faced by smaller entities who have a sincere desire to offer rural areas and businesses the same services and choices that are available to the public in metropolitan areas. Those problems and issues are: (1) Inability of small entities to compete effectively for licenses auctioned for geographic areas larger than MSA/RSA, meaning that all licenses should be offered at auction according to MSA/RSA boundaries to promote the maximum competition among bidders; (2) “Wasted” license rights to already licensed spectrum in services, other than the Cellular Radiotelephone Service where “unserved area” licensing rules apply; (3) Need by wireless carriers willing to satisfy the 9-point checklist of essential services for continued access to high-cost support from the Universal Service

5 In the Matter of Service Rules for Advanced Wireless Services (“AWS”) in the 1.7 GHz and 2.1 GHz Bands, *Report and Order* in WT Docket No. 02-353 (FCC 03-251), released November 25, 2003.

6 *Id.*, para. 1.

Fund in order to promote competition in and economic growth in rural areas; and (4) Unfunded mandates that require small carriers that lack pricing power in their markets to offer services or capabilities without a practical means to recover the costs of doing so.

The focus of attention should remain on these critical issues in order to promote spectrum use and service choices for consumers in rural areas. At the same time RCA offers comments on certain specific issues on which the Commission has invited comments in this proceeding.

A. Definition of “Rural”

Of the FCC’s enumerated proposals for the definition of “rural,” several are untenable because of fluidity of conditions and impractical access to current data. For example, definitions keyed to the number of persons per square mile and/or the number of miles from a census-designated place, are impractical to understand and administer. Likewise, definitions constructed by the RUS for loan programs, or by the FCC for schools, libraries and health care providers’ universal support, are definitions that are ancillary to the purpose of wireless services operations. Such connective construction would require constant monitoring for changes, exceptions and additions that may affect wireless licensing and operations. The simpler and predictable approach is one that follows county boundaries. It would comport with license areas and has the benefit of demographic data being readily available to interested parties. The fact that areas of population may be geographically congregated within a county does not override the purpose of recognizing the county as rural, since the objective in this instance is to promote wireless services to travelers as well as to residents. The public interest lies in connecting persons with the wireless network, wherever they happen to be at the moment.

RCA favors adoption of a two-part definition of “rural”:

(1) For purposes of spectrum licensing, the continued use of RSAs is both efficient and appropriate. As the Commission observed, county boundaries seldom change and use of RSAs for licensing purposes provides continuity to a licensing scheme that has not been compromised through the years by political and revenue generation goals.

(2) For the purpose of imposing and administering operational requirements, RCA would favor a broader definition of “rural” that includes a) area within an RSA or b) FCC proposition No. 1: counties with a population density of 100 persons or fewer per square mile. Certainly, any counties with such sparse density are rural, even if they happen to be located within an MSA. Wireless operators in such places share the concerns and challenges of RSA operators, and for regulatory purposes should be treated as being subject to comparable circumstances.

B. Improved Access to Unused Spectrum

The Commission seeks to improve access to and use of spectrum in rural areas. As observed in the *NPRM* in this proceeding, flexibility in use may come from a combination of market-based incentives and regulatory policies. FCC rules adopted in the *Report and Order and Further Notice of Proposed Rulemaking* in the Secondary Markets proceeding facilitate the exchange of usage rights through measures that include spectrum leasing. At the same time the Commission retains the option to reclaim unused spectrum, particularly in the market-based Cellular Radiotelephone Service, where geographic area not served by a licensee becomes available to other parties via the “unserved area” licensing process. Unserved PCS areas, usually rural, can remain licensed but unserved. The unserved area licensing process should be extended to PCS and other radio services to allow entities willing to use spectrum to apply and obtain licenses for unserved areas.

In the broadband PCS, failure to meet build-out benchmarks can result in loss of the entire

license, including the authorization for constructed facilities. If the benchmark is met, however, it is usually in economically stimulated areas where construction is rewarded with customers. While spectrum leasing mechanisms may add some service area, the Commission should maintain the “keep-what-you-use” approach of reclaiming unused spectrum at a mid-point or end of a license term.

“Use” of Spectrum. It is important to define “use” of spectrum in order to identify what spectrum is not subject to reclamation by the Commission. The traditional definition of “use” as reflecting construction and operation of specified facilities by the licensee is applicable as a baseline standard. RCA agrees with the Commission’s proposal that rural area spectrum that is leased by a licensee should be construed as “used” in geographical areas where the lessee has constructed and is operating pursuant to the license. Mere leasing of spectrum that remains fallow should not be considered “use.”

Wireless service providers, not just licensees, should be permitted to submit reports to the Commission to demonstrate use of spectrum, based upon where service is provided under the criteria for their respective services. Licensees prefer certainty in measuring construction. A concrete coverage benchmark, such as the cellular 39 dBu contour, is useful for assessing coverage area, and can be verified by the Commission and by competing carriers. PCS providers’ use of a range to determine coverage, in terms of a signal strength between -92 and -104 dBm, is also a material and predictable parameter to assure licensing protection. On the other hand, the idea of permitting carriers to freely assess their own buildout performance would lead to confusion and time consuming challenges, and would increase risk to the miscalculating licensee. The Commission should therefore establish a baseline for minimal compliance with substantial service requirements, on a service-by-service basis.

Re-Licensing vs. Market-Based Mechanisms. When spectrum is returned to the Commission it should be re-licensed to other users with new mechanisms adopted by the Commission to measure spectrum use. The new license should bear a “keep-what-you-use” rather than a “complete forfeiture” condition as a means to continue to get spectrum into the hands of those who will make use of it. At the same time, the Commission should clarify for existing licensees subject to a substantial service buildout requirement what is expected of them.

The concepts of “substantial service safe harbor” and “keep-what-you-use” are mutually exclusive. The service provider either meets the standard for keeping the entire market area, or meets the standard for keeping the service area that has been established by a date certain under specific criteria. Knowing in advance of a deadline whether sufficient service has been achieved is valuable to the business of wireless service operation, as is knowing what area is protected by license and what area is exposed.

Improvements to the unserved area licensing rules that could promote service in rural areas include case-by-case availability of temporary relief from mandates that, insofar as the prior licensee was concerned, made service to the area cost prohibitive. As examples, to add a customer only when Enhanced 911 Phase II location accuracy is achievable in the area, or to initiate a subscriber and then have to accommodate a number portability request, may render a new rural service offering cost prohibitive. Case by case relief from federal mandates can enhance service availability to rural areas, and the Commission should be receptive to showings of those types. In rural areas it may be more important to place basic 911 calls, and to activate numbers, than it is to permit service only if attended by desirable but costly service enhancements.

C. Performance Requirements

Providing geographic area licensees with the option of satisfying a “substantial service” benchmark will provide flexibility to licensees while assuring service to the public. RCA supports adoption of a “substantial service” alternative construction requirement for all wireless services that are licensed on a geographic area basis. Geographic area and population-based criteria would also be favorable as alternative means of compliance. Offering all geographic licensees a substantial service option, however, will increase the likelihood that not all will serve the same population centers and/or major highways, and will permit licensees to pursue rural customers while satisfying the Commission’s construction requirements.

Substantial Service Construction Benchmarks. As to all outstanding licenses, retention of current construction benchmarks set forth in the FCC’s service-specific rules sections is advisable. Adoption of a “substantial service” alternative for all wireless services that are licensed on a geographic area basis is also acceptable. Both should be accompanied by the condition that areas that remain unserved by a date certain will be returned to the Commission and become eligible for relicensing. The construction requirement should be based on the licensee’s choice of a construction benchmark (*i.e.* service to a percentage of either the geographic area or population of the market) or a substantial service showing (*i.e.* a specialized service that is of benefit to consumers in a given area or to a niche market). Under either scenario the incentive to serve rural areas is that any area that is not served is forfeited by the licensee. Naturally, initial licensees may choose to serve the more populous, profitable areas. But the directive to “use it or lose it to one who will” is a competitive impetus that will cause properly motivated service providers to reach the rural areas for the present and potential customers and revenues they offer.

The percentage of area or population that must be served in order to meet a construction requirement should not be too low. Twenty-five percent is reasonable. Some requirement is necessary to prevent warehousing of licenses and speculation in spectrum. As for a substantial service benchmark, a “safe harbor” concept based upon provision of service is useful. Providing mobile wireless services to “at least 75 percent of the geographic area of at least 20 percent of the rural counties within its licensed area,” as proposed in the *NPRM*, at para. 41, is reasonable, provided that by a date certain the unserved rural areas become available for relicensing.

Renewal License Terms. Additional construction requirements during license terms subsequent to the initial license term, or “renewal term,” are unnecessary when unserved area is forfeited. Performance requirements should be unnecessary in the competitive wireless industry where service quality is mandated by customers. If unserved area is not forfeited by the licensee, however, then unwieldy renewal term construction requirements come into play. Rather than guess at what those should be – years from now – it is simpler and more predicable to adopt a policy that provides for return of unused spectrum to the FCC for relicensing.

D. Relaxed Power Limits

Modifications to FCC regulations governing power limits and technical specifications for operations in rural areas should be adopted to provide efficient and flexible use of radio spectrum. The potential for interference among licensees can be minimized by intelligent system design. For base/mobile systems, higher transmitter power levels at the base station generally increase contour coverage and improve the economics of providing spectrum-based radio services in rural areas. Higher powered mobile units (*i.e.* handsets) would return a signal to the base station antenna from a greater distance. Similarly, point-to-point microwave path distance can be increased by increasing transmitted power, among other methods. The increased attenuation of signal strength and the “cliff

effect” at the outer edges of the area of signal propagation is a factor, but one that should be up to the carrier to consider in deciding whether to adopt increased power techniques. Other factors would include protection of other stations from unacceptable levels of interference and increased exposure to electromagnetic radiation for workers and the public. However, having increased power levels as an extra tool in the toolbox would empower carriers to deploy spectrum with greater efficiency, to the economic benefit of rural customers.

The Commission asks how to define “rural” for purposes of permitting increased power levels. RCA suggests, however, that increased power levels be permitted wherever they can be used effectively. A workable formula can be applied in each instance to assess the benefit, cost, propagation behavior in the terrain, and interference and radiation exposure potential, among other factors. Predicted problems would have to be solved, for example by shielding or directionalization, before the increased power levels would be deployed. Working with vendors, carriers can explore the advantages of smart antenna” systems and other new products, such as Nortel’s CDMA cell which uses a high power amplifier for the forward link and a tower top amplifier for improved sensitivity in the reverse link from incoming mobile systems.

E. Appropriate Size of Geographic Service Areas

The use of auctions as the primary means to assign spectrum to licensees inherently favors entities with access to money from the public markets over entities that normally depend upon internal resources and debt financing. RCA members are in the second category, and must compete in auctions against entities that can sell additional stock or bonds to raise virtually any sum that is required to cover the cost of success in acquiring spectrum at auctions.⁷ The Commission should

⁷ A few small entities with financial ties to large entities may have the same abilities as large, publicly-held

be attentive to how its decisions that govern each auction may add to the large-company advantage that is inherent in the auction system and impact (i) the opportunities of small entities to acquire spectrum; and (ii) the likelihood that purchased spectrum will be utilized in rural areas.

The size of license areas offered at auction is frequently too large to allow rural service providers to compete successfully in the acquisition of needed spectrum. Large license areas such as Economic Areas (“EAs”), or even larger areas such as Regional Economic Areas (“REAGs”), contain urban areas with high population densities that make the purchase of license rights too expensive for an entity that desires primarily to serve the rural areas. **Use of MSAs and RSAs as license areas is the proper balance in market size. It allows all bidders to mix and match rural and urban areas according to their individual business plans and financial capabilities.** The availability of RSA licenses, which by definition encompass only counties that are outside of all MSAs, is especially important to small entities, and it does not disadvantage the large entities because large companies can make an independent choice of whether to pursue licenses for rural markets in addition to metropolitan markets.

Uniformity Needed in Geographic License Areas. Not only should MSA- and RSA-sized areas be available in any spectrum auction, but **all licenses offered in auctions should be MSA- and RSA-sized.** This would promote access to spectrum by entities of all sizes and encourage deployment of service over the purchased spectrum. **When the Commission sells EA- or REAG-sized license areas, it is effectively limiting competition for those licenses to a subset of entities that can afford to bid on the concentrations of populations in those areas.**⁸ When licenses

companies to raise capital in order to acquire spectrum at auction. As these comments will explain, the Commission’s attempts to assist small entities through bidding credits have not been effective to level the playing field for small entities that are without ties to large companies, as opposed to entities that are organized in a manner to capture bidding credits but which also benefit from access to capital from large companies.

8 The Commission establishes minimum bids for licenses based upon the population of the market area.

covering larger areas are offered in combination with MSA/RSA sized licenses,⁹ maximum competition among bidders is possible only as to the MSA/RSA licenses, which serve as the common denominator of available licenses.

Moreover, it is an inefficient assignment of spectrum to group rural counties with metropolitan areas when geographic areas are licensed. Companies that can afford to purchase metropolitan area licenses may have less interest in serving the rural areas, and yet they are required to purchase both when the Commission bundles the rural counties with densely populated counties. While the Commission's rules allow large companies to partition and assign unneeded portions of license areas, such areas are often not partitioned for a variety of reasons.¹⁰ The effect of excessively large or inefficiently sized geographic license areas is a lost opportunity to allow spectrum to reach an entity that would make better use of it.

F. Facilitating Access to Capital

Access to capital is a critical factor in the deployment of spectrum-based services in rural areas. The U.S. Department of Agriculture's Rural Utilities Service (RUS) program has been utilized by RCA members. While cumbersome and time consuming, the RUS program has provided funds for wireless system development.

RUS Security Interests. RCA opposes the proposal to permit RUS to obtain security interests in the spectrum licenses of their borrowers. Collateralization of FCC licenses would not enhance RUS financing opportunities. There is no inherent value in the bare license, only in the proceeds of

⁹ In Auction #44, for the Lower 700 Band licenses, the Commission offered MSA/RSA-sized licenses as well as licenses for larger geographic areas. The Commission may take official notice of the fact that interest and bidding activity on the MSA/RSA licenses substantially exceeded that evidenced for the larger license areas.

¹⁰ See Section VI, *infra*.

a license sale and lenders already hold the tools necessary to protect their interests and obtain those proceeds. RUS should have no interest in the license *per se* or in becoming the licensee. It is sufficient that the Commission currently permits licensees to grant security interests in the stock of the licensee, in the physical assets used in connection with the licensed spectrum, and in the proceeds from operations associated with the licensed spectrum. The RUS lending process would become even more onerous and costly if acquiring a security interest in the license were to be added to the process. RUS would likely consider itself obligated as a matter of due diligence to pursue a security interest in the license(s) in every instance of lending to a licensee. Likewise, RUS should not be granted favored status vis a vis the rights of other creditors or potential lenders.

Even if, in fulfillment of statutory obligations, the FCC is required to grant prior approval before RUS can assume control of a license in perfection of a security interest, the formalities do not fulfill the policy objective of adding to the overall availability of capital to wireless service providers in rural areas. There is no public interest in helping RUS become a licensee. Such a plan could inadvertently cause private loans to become so completely subordinated to RUS loans that private capital resources are diminished as a result. In a case of extreme distress, the license itself should be assigned, pursuant to FCC oversight, to a new operator as part of a sale of the ongoing wireless operation. If there is no operation for a qualified buyer to acquire, then the license should be returned to the FCC for reauction.

Cellular Cross-Interests in Rural Service Areas. It is no longer necessary to maintain the current rule against cellular cross-interests in all RSAs. The rule should be applied only in RSAs with three or fewer CMRS competitors. The rule should no longer apply to RSAs with an ample number of competitors.

The current rule, limiting at 5 percent the ownership interest one licensee may have in another licensee in the same RSA, stifles investment in those rural markets where there is adequate competition. The waiver process is costly, impractical and unpredictable. Assuming the Commission perceives the need for a competitive safeguard, then it should revise the rule to provide that when at least three broadband PCS or cellular competitors will continue serve the RSA, the cellular cross-ownership rule is eliminated immediately. No sunset period is necessary. Likewise, the 5% cap for licensee ownership in a second license in the RSA should be raised to permit non-controlling overlapping interest in all RSAs. Case-by-case competitive review should be reserved for instances where there are three or fewer CMRS carriers will remain to serve the RSA.

G. Infrastructure Sharing

The sharing of equipment, towers, equipment and spectrum should be permitted as a means to minimize capital costs among cooperating carriers and to provide service to more consumers in rural areas. It is appropriate for the Commission to review infrastructure sharing arrangements that involve a transfer of control. The Commission should view as “in use” that spectrum which is involved in sharing arrangements, and not require forfeiture or re-licensing of such spectrum.

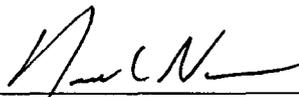
Conclusion

The Commission quite appropriately has expressed interest in how to promote the availability of wireless services in all regions of the country, both rural and urban alike. Now that urban areas typically have seven or more wireless competitors the time is ripe to examine why many rural areas lack the same service choices for consumers, and to institute policies that will promote development of existing networks and opportunities for new service providers.

RCA submits that the most effective steps that the Commission can take to advance rural area spectrum use are to (1) auction all newly available and reclaimed spectrum according to MSA/RSA boundaries; (2) reclaim unused spectrum after notice to licensees that they must “use it or lose it”; (3) continue policies that make available to wireless carriers high cost support from the USF; and (4) avoid imposing new “unfunded mandates” on wireless carriers. These four measures alone would provide a host of opportunities and incentives for existing and new wireless carriers that have an interest and plan to serve rural areas. Other policy concepts set forth by the Commission and discussed in these comments are also meritorious and should be given appropriate consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel Ladmirault, an employee in the law offices of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have on this 29th day of December, 2003, sent by hand-delivery, a copy of the foregoing COMMENTS OF RURAL CELLULAR ASSOCIATION to the following:

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