

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

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Federal Communications Commission
Office of Secretary

In the Matter of)
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Petition for Rulemaking or, Alternatively, a)
Waiver of the Closed Bidding Rules for C Block)
Licenses in the Broadband Personal)
Communications Services)

WT Docket No. _____

PETITION OF CTIA — THE WIRELESS ASSOCIATION™ FOR EXPEDITED
RULEMAKING OR, ALTERNATIVELY, A WAIVER

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SUMMARY

CTIA requests a rulemaking to remove the entrepreneur eligibility restrictions in order to permit open bidding for all C block licenses that will be made available in future auctions, including Auction 58. Alternatively, CTIA requests a waiver of the application of the entrepreneur eligibility restrictions to Auction 58. Much of the C block spectrum has remained fallow for nearly eight years. By opening the spectrum to all bidders, the Commission will ensure prompt and efficient use of the spectrum to provide broadband services to both rural and urban areas.

Significant market changes have occurred during the four years since the Commission last modified the entrepreneur eligibility rules. The capital market has changed substantially, as the wireless industry has continued to mature. More importantly, the drive to acquire additional spectrum to satisfy consumer demand for broadband services and national or regional coverage has become more urgent in recent years. At the same time, substantial blocks of premium C block spectrum have remained unused, and the shortage of suitable CMRS spectrum is even more severe today than four years ago. The Auction 58 spectrum will be the most desirable spectrum available below 3 GHz for at least the next two to three years.

The closed bidding rules that the Commission adopted for Auction 35 is a vestige of a regulatory regime that the Commission has long abandoned. In fact, bidding credits and other regulatory measures have proven to be more effective in enabling small businesses to acquire licenses and construct systems.

Furthermore, Auction 58 presents unique circumstances warranting re-assessment of the entrepreneur eligibility restrictions. Unlike the case of the licenses available in previous re-auctions, five-year construction notices were filed for the vast majority of the Auction 58

licenses, which consist largely of returned NextWave licenses. Under the FCC's rules, these licenses were eligible for sale to any qualified purchaser, including a non-Designated Entity, upon satisfaction of the five-year construction requirement. If these licenses had not been returned to the Commission, they could have been sold to any qualified purchaser, subject only to acceleration of any installment financing. Fairness and consistency require that the Commission allow these licenses to be made available to all qualified parties on the same basis, regardless of whether they are returned to the Commission for re-auction or sold in the secondary market.

In view of the changed circumstances, the Commission will best serve the public interest and achieve the stated objectives of Section 309(j) of the Communications Act by permitting open bidding for all available C block licenses. Open bidding will speed the delivery of new services to the public and promote efficient and intensive use of the spectrum. It also will enhance CMRS competition, while maximizing auction revenues for the public. Furthermore, small businesses will continue to receive ample opportunities to acquire licenses in open auctions through the use of bidding credits. Consequently, the Commission's move away from Designated Entity set-asides and toward the application of bidding credits should be continued in Auction 58 and beyond.

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**PETITION OF CTIA — THE WIRELESS ASSOCIATION™ FOR EXPEDITED
RULEMAKING OR, ALTERNATIVELY, A WAIVER**

I. INTRODUCTION

CTIA — The Wireless Association™ (“CTIA”)¹, pursuant to Section 1.401 of the rules of the Federal Communications Commission (“FCC” or “Commission”),² requests the Commission to initiate a rulemaking to eliminate the entrepreneur eligibility restrictions under Section 24.709³ of the FCC’s rules in order to permit open bidding for all C block licenses that will be made available in future auctions, including Auction 58. Alternatively, the Commission, pursuant to Sections 1.3 and 1.925 of its rules,⁴ should waive its rules to permit open bidding for all C block licenses available in Auction 58. The elimination or waiver of the entrepreneur

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. CTIA membership covers all Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² 47 C.F.R. § 1.401.

³ *Id.* § 24.709.

⁴ *Id.* §§ 1.3, 1.925.

eligibility rules is crucial to ensuring that C block spectrum, much of which has languished for nearly eight years, will be promptly and fully utilized to provide broadband services to both rural and urban areas.

The Commission last modified its entrepreneur eligibility rules four years ago to permit open bidding for certain C and all F block licenses, while retaining closed bidding for other C block licenses. Since that time, significant market changes have occurred that require a re-assessment of those rules. Notably, the need for additional spectrum to support broadband deployment and nationwide services has intensified, while substantial blocks of premium C block spectrum have remained unused for nearly eight years. Moreover, the capital market has changed significantly, as the wireless industry has continued to mature. The closed bidding rules that the Commission adopted for Auction 35 is a vestige of a regulatory regime that the Commission has long abandoned. The Commission has not provided spectrum set-asides for any FCC auction conducted since Auction 35. In fact, the C block broadband PCS spectrum is unique in that it is the only auctioned spectrum that remains subject to closed bidding rules.

Small businesses have shown that they can compete, and indeed have competed successfully, for licenses without reliance upon any spectrum set-aside. Licensees that won set-aside spectrum for C and F block licenses have encountered myriad bankruptcies, substantial delays in service launches, and increased transactional costs.

The Auction 58 spectrum will be the most desirable spectrum available below 3 GHz for at least the next two to three years. Wireless carriers' current need for additional suitable spectrum to extend and improve service areas, as well as to support broadband and other new services, makes it even more important that the Auction 58 spectrum be available to the broadest possible group of bidders.

II. BACKGROUND

The FCC's upcoming Auction 58, scheduled to commence on January 12, 2005, marks the first time in the four years since Auction 35 that the public will have an opportunity to acquire prime PCS spectrum through a public auction. CTIA's members are intensely interested in this opportunity to acquire greatly needed spectrum, and CTIA commends the Commission for the steps it has taken to make this auction possible. Auction 58 will make available a total of 234 C and F block licenses covering 117 Basic Trading Areas ("BTAs").⁵ These licenses consist largely of C and F block licenses that NextWave returned to the Commission as a result of a privately negotiated settlement, which also allowed NextWave to retain its remaining licenses. The returned NextWave licenses represent two-thirds of the number of available Auction 58 licenses.

The *Auction 58 Public Notice* proposes to apply the entrepreneur eligibility rules that were initially adopted for Auction 35 to the upcoming auction. Under these rules, the majority of the available licenses (or 119 of 234 licenses), including most of the returned NextWave licenses (or 91 of 150 returned NextWave licenses), will be available only to small business entrepreneurs, or Designated Entities ("DEs"), through closed bidding. The remaining 115 licenses will be available to all bidders through open bidding.

The Commission adopted the current entrepreneur eligibility rules four years ago in response to various requests for elimination, modification, or waiver of the former eligibility

⁵ See FCC Public Notice, *Broadband PCS Spectrum Auction Scheduled for January 12, 2005*, DA 04-1639 (June 18, 2004) ("*Auction 58 Public Notice*").

requirements for participation in Auction 35.⁶ At that time, the Commission reconfigured each 30 MHz C block license available for auction into three 10 MHz licenses. It also established open bidding for (1) two of the three reconfigured 10 MHz C block licenses in the largest markets, or “Tier 1” markets; (2) one of the three reconfigured 10 MHz C block licenses in all other markets, or “Tier 2” markets; (3) all F block licenses; (4) all 15 MHz C block licenses in Tier 1 markets; and (5) all C block licenses that were unsold in a prior auction.⁷ The Commission, however, retained its closed bidding requirements for the remaining C block licenses consisting of (1) one of the three reconfigured 10 MHz C block licenses in Tier 1 markets; (2) two of the three reconfigured 10 MHz C block licenses in Tier 2 markets; and (3) all 15 MHz C block licenses in Tier 2 markets.

Application of the Auction 35 rules to the upcoming Auction 58 means that bidding on the “closed” licenses will be limited only to those entities that satisfy the Designated Entity (“DE”) requirements—gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. In addition to identifying the licenses that would be set aside for DEs, the Auction 35 rules also liberalized certain elements of the Designated Entity qualifications, further facilitating sizeable financial contributions from non-Designated Entities in Designated Entities that participated in the auction. Those rules also would apply in Auction 58. Finally, size-based bidding credits would *not* be available for licenses won in “closed” bidding.

⁶ See *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Sixth Report and Order and Order on Reconsideration, 15 FCC Rcd 16266, ¶ 1 (2000) (“*C/F Block Sixth R&O*”).

⁷ *Id.* ¶ 2.

III. THE COMMISSION SHOULD PERMIT OPEN BIDDING TO ENSURE THE HIGHEST-VALUED SPECTRUM USE AND PROMPT DELIVERY OF INNOVATIVE SERVICES TO THE PUBLIC

In advance of Auction 35, the Commission recognized that it was appropriate to address the spectrum shortage created by the introduction of wireless broadband services by significantly reducing the number of “closed” licenses. The Commission found that open bidding would “enable larger carriers to obtain additional spectrum,” thus allowing them to implement their business plans and to fill out their national or regional footprints.⁸ This, in turn, would “promote the further development of CMRS competition and innovation.”⁹ The Commission’s rationale for permitting open bidding is even more compelling today than when it last considered the issue four years ago. Moreover, the Commission’s experience with spectrum management demonstrates that open bidding better serves the public interest than closed bidding, and the Commission can advance its policy objective of assisting smaller businesses more effectively through other measures such as bidding credits.

A. Changed Circumstances Warrant Elimination of the Closed Bidding Requirements

1. Increased Consumer Demand for National and Regional Broadband Services Has Driven the Need for Additional Spectrum

As the highly competitive CMRS industry has matured, consumer demand for new applications requiring greater bandwidths and for improved service quality and coverage has triggered an even greater need for additional spectrum. During the four years since the Commission last modified the entrepreneur eligibility restrictions, substantial blocks of valuable

⁸ *Id.* ¶ 23.

⁹ *Id.*

PCS spectrum have languished and additional spectrum has not become deployable, while the demand for spectrum has grown.

The drive to acquire additional spectrum to satisfy consumer demand for broadband services and national or regional coverage has become more urgent in recent years. As the Commission acknowledged, “[s]ince the end of 1999, carriers have been building nationwide footprints through various forms of transactions.”¹⁰ By acquiring larger footprints, carriers can compete more effectively and achieve greater economies of scale and efficiencies.¹¹ Thus, in its *Eighth Annual CMRS Report*, the Commission noted that “[m]ore recently, national operators have sought to fill in gaps in their coverage areas, as well as to increase the capacity of their existing networks.”¹² Additional spectrum is fundamental to wireless carriers’ ability in recent years to satisfy their coverage and capacity needs.

The spectrum to be offered in Auction 58 is undisputedly the best spectrum available to meet consumer demand because it is largely unencumbered and now readily deployable. The fact that these licenses are in the PCS band means that carriers have immediate access to “off the shelf” equipment, and can take advantage of significant economies of scale in their purchases. Moreover, these spectrum blocks are adjacent or near to many existing carriers’ spectrum holdings, and offer valuable expansion opportunities that will enable both large and small carriers in this band to better serve their customers by providing additional spectrum capacity or

¹⁰ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Eighth Report, 18 FCC Rcd 14783, ¶ 41 (2003) (“*Eighth Annual CMRS Report*”).

¹¹ *Id.*

¹² *Id.*

filling in their footprints. These factors make the spectrum licenses in Auction 58 uniquely attractive to CMRS carriers.

2. *The Shortage of Suitable CMRS Spectrum Is Even More Severe Today than Four Years Ago*

Despite the Commission's efforts to provide additional spectrum for broadband services, a shortage of spectrum persists in many markets. Additional suitable spectrum is unlikely to be made available in the short-term. For example, it will be some time before the Commission can schedule an auction for the 90 MHz of spectrum in the 1710-1755/2110-2155 MHz band that it reallocated in November 2002 for advanced wireless use.¹³ Even assuming that an auction will be scheduled in the next year or two, the spectrum is heavily encumbered by federal government operations and is unlikely to be fully cleared for at least several years.¹⁴ Additionally, although the Commission reallocated 30 MHz of spectrum in the 2 GHz band to accommodate new

¹³ *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Second Report and Order, 17 FCC Rcd 23193 ¶ 1 (2002). The National Telecommunications and Information Administration ("NTIA") has stated that it will not support an auction of the spectrum until the identification of alternative spectrum to accommodate displaced federal government incumbents has been completed. See Letter from Michael D. Gallagher, Acting Assistant Secretary for Communications and Information, NTIA, to Richard B. Cheney, President of the Senate (undated), available at http://www.ntia.doc.gov/ntiahome/congress/2004/3Gletter_04152004.htm (posted Apr. 15, 2004).

¹⁴ See NTIA Report, U.S. Dept. of Commerce, *An Assessment of the Viability of Accommodating Advanced Mobile Wireless (3G) Systems in the 1710-1755 MHz and 2110-2170 MHz Bands*, at 1 (Jul. 22, 2002) available at <http://www.ntia.doc.gov/ntiahome/threeg/va7222002/3Gva072202web.htm> ("2002 Viability Assessment").

broadband services, it has not yet completed its pending rulemaking on the specific uses of the reallocated spectrum and will also have to adopt service and licensing rules.¹⁵

Furthermore, although the Commission recently adopted an order providing for a reconfigured band plan for Broadband Radio Services (formerly, “Multipoint Distribution Services” or “MDS”) and Instructional Television Fixed Service (“ITFS”) in the 2.5 GHz band, the full text of the order has not been released yet.¹⁶ It is unclear whether additional service rules will be necessary to permit mobile services in the band. It also is unclear how much spectrum, if any, will be made available to parties that currently do not hold licenses in the band. Moreover, substantial time will be required to implement the transition from the existing complex band plan.

The Commission also is not in a position to schedule an auction for the upper 700 MHz band at 746-764/776-794 MHz or for the majority of the lower 700 MHz band at 698-746 MHz because of concerns that this spectrum remains heavily encumbered by incumbent broadcast operations.¹⁷ Finally, unlike the spectrum available through Auction 58, none of these bands

¹⁵ *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Third Report and Order, 18 FCC Rcd 2223 (2003). The reallocated spectrum also is subject to several petitions for reconsideration challenging the reallocation. See Satellite Industry Association Petition for Reconsideration, ET Docket No. 00-258 (Apr. 14, 2003); TMI Communications and Company, LP Petition for Reconsideration, ET Docket 00-258 (Apr. 14, 2003); ICO Global Communications Petition for Reconsideration, ET Docket No. 00-258 (Apr. 14, 2003). Even after the Commission disposes of these petitions, litigation is likely to further delay the availability of this spectrum for auction.

¹⁶ FCC News Release, *FCC Promotes the Deployment of Wireless Broadband Services by Creating New Rules for the 2495-2690 MHz Band While Protecting Educational Services* (June 10, 2004).

¹⁷ The Commission staff announced a plan, supported by Chairman Powell, that would further motivate broadcasters to clear the spectrum, but not until 2009. See Brigitte Greenberg, *Broadcasters Appreciate Push-Back of Transition to 2009*, Comm. Daily, Apr. 19, 2004.

currently hosts CMRS operations, adding development cycles and additional costs before the spectrum can be utilized by CMRS licensees. Thus, the continued lack of alternative, suitable CMRS spectrum heightens the need for the Commission to ensure access to valuable C block spectrum by all bidders.

3. *Bidding Credits and Other Measures Have Proven More Effective in Promoting Small Business Participation*

Since Auction 35, the Commission has avoided closed bidding requirements altogether and instead relied upon bidding credits to encourage small business participation. Indeed, C block spectrum is the only auctioned spectrum that remains subject to a set-aside. The Commission has long recognized that bidding credits provide small businesses with an opportunity to compete successfully against larger, better financed companies.¹⁸ In all of the open auctions utilizing small business bidding credits, nearly 80 percent of the winning bidders were small businesses.¹⁹

The results of the most recent PCS auction, Auction 35, re-affirm the conventional wisdom that bidding credits are a better vehicle for enabling small businesses to acquire licenses than closed bidding. Specifically, in Auction 35, small businesses used bidding credits to acquire nearly half of the licenses available in *open* bidding. Additionally, in the 24 BTA markets where both open and closed licenses were available, licensees using bidding credits won 16 open licenses at a lower price than the closed licenses available in the same markets. In four of the 24 markets, licensees using bidding credits paid approximately the same price as the licensees that purchased the closed licenses. In the remaining four markets, licensees using

¹⁸ See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 18 FCC Rcd 25162, ¶ 148 (2003).

¹⁹ See *id.* ¶ 148; *C/F Block Sixth R&O*, ¶ 22 n.67.

bidding credits paid more for a license than at least one of the licenses available through closed bidding in the same market. Thus, in 20 of these 24 markets, small businesses using bidding credits paid less (or no more) for their open licenses than the winners of the closed licenses.

Over the years, the Commission has adopted additional measures intended to encourage small business entry into CMRS markets. For example, by reconfiguring available 30 MHz C block licenses into 10 MHz licenses, the Commission provided small businesses with a significant opportunity to launch services that require less spectrum.²⁰ Additionally, allowing licensees to partition and disaggregate spectrum holdings has provided an opportunity for small businesses to continue to add to their footprint, provide new services, or even enter the CMRS market. Furthermore, the Commission's adoption of secondary market rules and policies last year and today, which provide opportunities for short- and long-term leasing, further enhance the ability of small businesses to enter the wireless markets with viable business plans.²¹ By adopting those rules and policies, the Commission expressly intended to provide for "lower transaction and spectrum acquisition costs," thus "ensuring that many small businesses have significant new opportunities to provide spectrum-based services."²²

4. *Auction 58 Presents Unique Circumstances*

Unlike other re-auctioned licenses that were canceled for payment default or other rule violations, Auction 58 licenses in large part consist of NextWave licenses that were returned to

²⁰ See *C/F Block Sixth R&O*, ¶¶ 11, 14, 23.

²¹ See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20604, ¶ 45 (2003); see also *FCC Expands Spectrum Leasing Rules and Speeds Processing to Create Additional Opportunities for Access to Spectrum Through Secondary Markets*, FCC Press Release, July 8, 2004.

²² *Id.*

the Commission as a result of a settlement agreement between NextWave and the Commission. These unique circumstances warrant making the spectrum available to all bidders. In reaching a settlement agreement with NextWave, the Commission intended to achieve the following objectives: “(i) putting the NextWave spectrum that lay dormant for so long to active use; (ii) recouping value from NextWave for the U.S. government; and (iii) facilitating a final resolution to the entire matter within the context of the Supreme Court’s *NextWave* opinion.”²³ Open bidding is the best way to achieve these objectives and to ensure that the returned NextWave licenses are placed in the hands of those that would make prompt and full use of the spectrum.

Furthermore, unlike the case of the licenses available in previous re-auctions (most of which were revoked for non-payment and were never constructed), five-year construction notices were filed for all of the returned NextWave licenses, as well as for approximately 17 non-NextWave Auction 58 licenses. Under the FCC’s rules, these licenses were eligible for sale to any qualified purchaser, including a non-DE, upon satisfaction of the five-year construction requirement.²⁴ Because more than five years passed since their initial grant (even factoring in the additional holding period applicable to the NextWave licenses), these licenses became accessible to all buyers in the secondary market without any required refund of any bidding credits.²⁵ If these licenses had not been returned to the Commission, they could have been sold to any qualified purchaser, subject only to acceleration of any installment financing.²⁶

²³ See FCC News Release, *FCC Announces NextWave Settlement Agreement* (Apr. 20, 2004).

²⁴ See 47 C.F.R. § 24.839(a)(6).

²⁵ See *id.* §§ 24.839(a)(1) and 1.2111(d)(2).

²⁶ See *id.* § 1.2111(d)(1).

NextWave was able to sell a number of licenses that it retained under its settlement with the Commission (which had the exact same history as the licenses returned to the Commission) to Cingular, a non-DE, at market price.²⁷ NextWave also has announced plans to commence a private auction of six of its retained licenses on July 8, 2004. Several of these licenses, including a 10 MHz C block license for the New York BTA with a sale price of \$930 million, were sold to interested bidders on July 8, 2004.

The Commission should not limit the availability of the re-auctioned C block licenses that otherwise would be available to all buyers if sold in the secondary market. Fairness and consistency require that the Commission allow these licenses to be made available to all qualified parties on the same basis, regardless of whether they are returned to the Commission for re-auction or sold in the secondary market. Disparate treatment would allow NextWave to sell the licenses that it retained at market prices, while limiting the value of the returned licenses that are subject to closed bidding.

Without providing any opportunity for public comment, the Commission allowed NextWave to keep for itself many of the premium licenses that otherwise would be subject to open bidding at auction. Had the Commission required NextWave to return these open licenses to the Commission, many of them would have been available for auction through open bidding. For example, had the Commission required NextWave to return its 30 MHz C block license for the New York BTA, two of the three reconfigured 10 MHz licenses for that market would have been available for auction through open bidding. Small businesses would have had a better

²⁷ See *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC*, 19 FCC Rcd 2570, ¶ 1 (2004) (“*NextWave/Cingular Order*”).

chance of obtaining those licenses at the FCC auction with the use of bidding credits than at the private auction without the use of any bidding credits.

B. Open Bidding Promotes the Public Interest and Is Consistent with Section 309(j)

Section 309(j)(3) of the Communications Act of 1934, as amended (“Communications Act”), instructs the Commission to promote certain objectives in exercising its auction authority, including (1) “rapid deployment of new technologies, products, and services;” (2) “promoting economic opportunity and competition...by disseminating licenses among a wide variety of applicants, including small businesses;” (3) “recovery for the public of a portion of the value of the public spectrum;” and (4) “efficient and intensive use of the electromagnetic spectrum.”²⁸ As the Commission recognized, the Communications Act affords the Commission “wide latitude in determining how to achieve the stated objectives [under Section 309(j)]” and “does not mandate the use of set-asides, or any other particular method, to promote the participation of small businesses in spectrum auctions.”²⁹ Opening all C block licenses available for auction to all bidders will advance all of the enumerated objectives under Section 309(j)(4) and will produce substantial public benefits by bringing new services quickly to the public, facilitating efficient and intensive use of the spectrum, enhancing competition, ensuring the recovery of the maximum value of the spectrum for the public, and providing economic opportunities for small businesses.

²⁸ 47 U.S.C. § 309(j)(3).

²⁹ *C/F Block Sixth R&O*, ¶ 22.

1. *Open Bidding Will Speed the Delivery of New Services to the Public and Facilitate Efficient and Intensive Spectrum Use*

A basic tenet of the Commission's spectrum policies has long been that spectrum should be placed in the hands of those who value it the most and who will put the spectrum to its highest valued use.³⁰ Open auctions ensure that the spectrum will be fully and efficiently used to provide service to the public at the earliest possible time. As the Commission recognized, the returned NextWave spectrum has remained fallow for far too long—nearly eight years, in fact.³¹ One of the Commission's stated objectives in providing for the return of the spectrum is to ensure that the spectrum will finally be utilized.³² Opening the spectrum to all available bidders is the best means of ensuring that the spectrum will be assigned to those who are most able to use the spectrum to bring new services quickly to the public.

The C block experience has shown that consumers have not received the full benefits of the spectrum that has been made available. Many of the licenses have never been fully utilized. Of the 493 C block licenses auctioned in 1996, over 300 were canceled or terminated according to the FCC's ULS database.

Maintaining spectrum set-asides has resulted in substantial administrative, legal, and transactional costs and delays. Challenges to a winning bidder's eligibility for a spectrum set-

³⁰ See, e.g., Spectrum Policy Task Force, Report, ET Docket No. 02-135 at 38 (Nov. 2002) (explaining that the Commission should apply the exclusive use model to most spectrum because that is the scheme most likely to ensure that parties put spectrum to its "highest valued use").

³¹ See *supra* note 23.

³² See *supra* note 23.

aside can delay or place a regulatory cloud over the Commission's license grant.³³ Moreover, licenses assigned through closed bidding routinely end up in complex bankruptcy proceedings that have tied up use of substantial amounts of spectrum for a number of years.

2. *Open Bidding Will Enhance Competition While Maximizing Auction Revenues for the Public*

The Commission will enhance CMRS competition significantly by broadening the pool of participants in the upcoming Auction 58 and in future auctions of C block licenses. Broadening the pool of auction participants would ensure that only the most vigorous competitors acquire the spectrum, thus strengthening competition in general. It also offers an opportunity not only for small businesses to acquire spectrum to launch new services, but also for more established carriers to acquire additional spectrum to fill out their national or regional footprints. The Commission has recognized that CMRS competition in recent years has been marked by a drive to acquire larger footprints, allowing carriers to compete more effectively and achieve greater economies of scale and efficiencies.³⁴ Thus, enabling carriers to expand or fill out their footprints by acquiring additional licenses through open bidding would produce greater efficiencies and more effective competition. At the same time, open bidding will ensure that the

³³ For example, Leap Wireless International, Inc. ("Leap") was the winning bidder in Auction 22 for 36 C Block licenses. Several parties, however, opposed granting Leap's long form applications, arguing that Leap was not qualified as a designated entity when the applications were filed. Although the Wireless Bureau rejected this argument and ultimately granted Leap's long form applications, regulatory uncertainty persisted as the Commission continued to consider an application for review of the license grants. The Commission took nearly a year to consider the application for review before ultimately denying it. *See Application of Leap Wireless International, Inc. For Authorization to Construct and Operate 36 Broadband PCS C Block Licenses*, 15 FCC Rcd 13557 (2000).

³⁴ *See Eighth Annual CMRS Report*, ¶ 41.

public receives the full market value of the auctioned licenses by allowing the licenses to be assigned to those who value them the most.

3. *Open Bidding Will Provide Economic Opportunities for Small Businesses*

Small businesses will continue to have ample opportunities to acquire licenses through open bidding. In particular, the continued availability of bidding credits will enhance the ability of small businesses to compete successfully against other bidders. As discussed in Section III(A)(3) above, small businesses have been able to acquire spectrum at lower average prices in open bidding with bidding credits than in closed bidding without bidding credits.

IV. THE FCC ALTERNATIVELY SHOULD WAIVE THE RULES TO PERMIT OPEN BIDDING FOR C BLOCK LICENSES AVAILABLE IN AUCTION 58

If the Commission declines to permit open bidding for all C block licenses through a rule change, it should waive the rules to permit open bidding for all C block licenses in Auction 58.³⁵ Waiver of the Commission's rules is permitted upon a showing of "good cause."³⁶ Parties must demonstrate "either that (i) the underlying purpose of the applicable rule would not be served, or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative."³⁷ Waiver is appropriate when it would not frustrate the policy objectives of the underlying rule and would otherwise serve the

³⁵ At a minimum, the Commission should initiate a proceeding to explore whether elimination, modification or waiver of the set-aside rules is appropriate in the context of the unique circumstances presented by Auction 58.

³⁶ 47 C.F.R. § 1.3.

³⁷ *NextWave/Cingular Order*, ¶ 44; see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

public interest.³⁸ Generally, the Commission may grant a waiver if special circumstances warrant a deviation from the general rules and that deviation would better serve the public interest than strict adherence.³⁹

Permitting open bidding for all Auction No. 58 licenses would better advance the public interest and underlying purpose of the entrepreneur eligibility rules than strict adherence to the rules. The entrepreneur eligibility restrictions for C block licenses, initially adopted for Auction No. 35, were intended both (1) to enable larger carriers to obtain additional spectrum, thus promoting additional wireless competition and innovation, and (2) to provide opportunities for small businesses to enter the market.⁴⁰ Waiving these restrictions to permit open bidding for all Auction No. 58 licenses would facilitate wireless competition and innovation, while still allowing small businesses to acquire the licenses through bidding credits. As discussed in Section III (B) above, open bidding is the best means of quickly placing spectrum in the hands of those who are willing and able to put the spectrum to its highest valued use. It also will strengthen competition by allowing robust competitors to acquire needed spectrum to enter the market or fill out their footprints. At the same time, small businesses participating in Auction 58 will be able to compete successfully for licenses through the use of bidding credits. Furthermore, as discussed in Section III (A)(4) above, Auction 58 presents special circumstances that warrant lifting the closed bidding requirements for licenses to be made available in that auction.

³⁸ See *WAIT Radio v. FCC*, 418 F.2d at 1157.

³⁹ See *EarthWatch Inc.*, 15 FCC Rcd 13594, ¶ 9 (IB 2000).

⁴⁰ See *C/F Block Sixth R&O*, ¶ 23.

V. CONCLUSION

Based on the foregoing, CTIA urges the Commission to conduct an expedited rulemaking to permit open bidding for all C block licenses that will be made available in future auctions, including Auction 58. CTIA alternatively requests the Commission to waive the entrepreneur eligibility rules for Auction 58.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Phuong N. Pham, hereby certify that on this 8th day of July 2004, the foregoing Petition of CTIA-The Wireless Association for Expedited Rulemaking or, Alternatively, a Waiver was filed by courier with the Secretary's office, and copies were served by electronic mail on the following, unless otherwise indicated:

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