

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

In the Matter of)
)
Petition for Rulemaking or, Alternatively, a) RM-11019
Waiver of the Entrepreneur Eligibility Restrictions)
on C Block Licenses in the Broadband Personal)
Communications Services)

REPLY OF CTIA — THE WIRELESS ASSOCIATION™

I. INTRODUCTION

CTIA — The Wireless Association™ (“CTIA”)¹ submits this reply to the comments and oppositions filed in response to its above-captioned petition for rulemaking (“Petition”).² The record in this proceeding, in addition to comments filed in response to the *Auction 58 Public Notice*,³ demonstrates solid support by diverse segments of the wireless industry for CTIA’s proposal to eliminate or waive the entrepreneur eligibility restrictions, or closed bidding requirements, under Section 24.709⁴ of the rules of the Federal Communications Commission (“FCC”). These varied interests, including equipment manufacturers and wireless carriers of all

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 See FCC Public Notice, *Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Rep. No. 2663 (July 15, 2004).

³ See FCC Public Notice, *Broadband PCS Spectrum Auction Scheduled for January 12, 2005*, DA 04-1639 (June 18, 2004) (“*Auction 58 Public Notice*”).

⁴ 47 C.F.R. § 24.709.

sizes,⁵ recognize the limited value of retaining obsolete eligibility restrictions in the face of dramatic market changes.

Even among the small business interests that would appear to benefit the most from the entrepreneur eligibility restrictions, no consensus has formed on whether the Commission should retain the restrictions. In fact, the Rural Cellular Association (“RCA”), which represents “approximately 100 small and rural wireless licensees” that “provide service in more than 135 rural and small metropolitan markets where approximately 14.6 million people reside,”⁶ voiced serious doubts concerning the effectiveness of the entrepreneur eligibility restrictions. RCA observed that “there are more effective tools available to the Commission than closed bidding to provide opportunities for small businesses to compete successfully and obtain licenses, including C-block licenses.”⁷

The record in this proceeding offers ample evidence to support immediate elimination or waiver of the closed bidding rules as applied to Auction 58. Open auctions, in conjunction with bidding credits and other measures such as geographic partitioning, spectrum disaggregation, and spectrum leasing, have proven much more effective in promoting small business participation and encouraging new entrants than spectrum set-asides.

In contrast, the vast majority of commenters opposing CTIA’s Petition (“Opponents”) offer little more than conclusory statements in support of closed bidding. As Verizon Wireless

⁵ See, e.g., Comments of Motorola; Comments of Rural Cellular Association (“Comments of RCA”); Comments of T-Mobile; Comments of Verizon Wireless; Reply Comments of Qualcomm (filed on July 15, 2004, in response to *Auction 58 Public Notice*). Unless otherwise noted, all filings referenced herein were filed in the above-captioned proceeding on July 30, 2004, and are short cited.

⁶ Comments of RCA at 1 n.1.

⁷ *Id.* at 3.

notes, courts have long held that the Commission is obligated to re-assess its rules when the underlying assumptions are no longer valid or have been overtaken by new facts.⁸ Accordingly, the record evidence submitted in support of eliminating or waiving the restrictions, along with the range of views proffered on this issue, should lead the Commission at a minimum to re-examine the justification for those restrictions.

As CTIA previously noted, Commission review of the closed bidding rules need not delay the commencement of Auction 58.⁹ A rulemaking could be completed expeditiously on a narrow issue such as is presented here. The Commission also could ensure there would be no auction delay by granting a waiver of the closed bidding rules for the relevant Auction 58 licenses, or for some subset of these licenses.

II. THE RECORD SHOWS THAT BIDDING CREDITS AND OTHER MEASURES MORE EFFECTIVELY PROMOTE SMALL BUSINESS PARTICIPATION THAN CLOSED BIDDING

The record supports CTIA's and other commenters' conclusion that bidding credits, along with other measures such as the Commission's secondary market rules and policies, are more effective than closed bidding in providing small businesses with an opportunity to compete for and retain licenses. The Opponents fail to rebut this record evidence. Specifically, the Opponents, without justification, dismiss data showing that small businesses represent nearly 80 percent of all winning bidders utilizing small business bidding credits in all open auctions.¹⁰

⁸ See Petition for Reconsideration of Verizon Wireless at 11 n.26 (filed on July 19, 2004, in response to the *Auction 58 Public Notice*) ("Verizon Petition") (citing *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979); *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992)).

⁹ See CTIA Reply Comments at 5 (filed on July 15, 2004 in response to the *Auction 58 Public Notice*).

¹⁰ See CTIA Petition at 9.

This is the very same data that the Commission relied upon in finding that bidding credits “will allow effective competition by small businesses in open C and F block bidding.”¹¹

The Opponents also ignore the Auction 35 results that saw nearly half of the available open licenses won by small businesses using bidding credits.¹² The Auction 35 results further show that in virtually all of the markets where both open and closed licenses were made available, small businesses using bidding credits acquired licenses at a lower price than small businesses that acquired closed licenses without bidding credits.¹³ Thus, small businesses gained a greater price advantage through an open auction with bidding credits than through a closed auction without bidding credits. Additionally, based on data contained in the FCC’s ULS database, small businesses using bidding credits in Auction 35 won licenses representing 30 percent of the total MHz/pops covered by all available open licenses.

The sole empirical evidence that the Opponents proffer to question the effectiveness of bidding credits consists of data suggesting that DEs represent 19 percent of the total value of the net winning bids for open auctions generating revenues of at least \$50 million, where DEs competed against large national carriers.¹⁴ As an initial matter, the policy objective of promoting small business participation requires no more than that small businesses have a meaningful

¹¹ *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 15 FCC Rcd 16266, ¶ 44 (2000) (“*C/F Block Sixth R&O*”); see also *id.* ¶ 22 n.67.

¹² See CTIA Petition at 9.

¹³ *Id.* at 9-10.

¹⁴ See Opposition of Council Tree Communications, Inc. (“Council Tree”), Attachment 1, at 1-3.

opportunity to acquire licenses. It does not, and cannot, guarantee that small businesses will acquire a certain number or type of licenses.¹⁵

Furthermore, measuring DE success in terms of the value of the winning bids produces a distorted picture and does not offer any meaningful assessment of the effectiveness of bidding credits. It merely reflects the fact that DEs have not won some of the largest, most expensive markets in the country, and have been able to win licenses at a lower cost than some other auction winners. It does not offer any useful information regarding the DEs' success in competing for licenses through bidding credits, either in terms of the number of licenses obtained or the size of the markets covered by those licenses.

Even assuming that the value of winning bids is a reliable measure of DE success, Council Tree inexplicably excluded the results of open auctions where DEs did not compete against large national carriers, as well as open auctions generating revenues of less than \$50 million, in order to produce the lowest possible success rate.¹⁶ If the results of these open auctions were properly considered, DEs would represent nearly a quarter of the total value of the net winning bids for all open auctions.

The Opponents argue that disaggregation and partitioning have “proven to be a disappointment”¹⁷ and “have not been widely utilized,”¹⁸ but again fail to offer any empirical

¹⁵ See *C/F Block Sixth R&O*, ¶ 22 (“Section 309(j)(4)(D) [of the Communications Act] does not require the Commission to ensure that licenses actually are granted to small businesses but, rather, requires only that these small businesses be given the *opportunity* to participate in the provision of spectrum-based services.”) (emphasis in original).

¹⁶ See Opposition of Council Tree, Attachment 1, at 1-2.

¹⁷ See Comments of the Law Firm of Blooston, Mordkofsky, Dickens, Duffy & Prdendergast at 3 (“BloostonLaw”).

¹⁸ See Opposition of Council Tree at 23.

evidence. In fact, the available data demonstrates that disaggregation and partitioning of CMRS licenses are quite common. For example, although the FCC initially created 102 A and B block PCS licenses (*i.e.*, 51 A block licenses and 51 B block licenses), the ULS database shows 291 active A block PCS licenses and 129 active B block licenses, for a total of 420 current active licenses.¹⁹ Thus, more than 300 additional active A and B block PCS licenses have been created as a result of geographic partitioning and spectrum disaggregation. Carriers have used the ability to disaggregate or partition spectrum in order to focus or expand their coverage and service areas. This, in turn, has allowed broader entry and participation in the wireless marketplace.

Additionally, although the Commission originally created 734 cellular markets and a total of 1,468 A and B block cellular licenses, the ULS database shows that there are now 1,720 active cellular licenses. Thus, more than 200 additional active cellular licenses have been created as a result of geographic partitioning, permitting small operator entry into the wireless marketplace.²⁰ This is in addition to the small wireless operators that already held licenses among the 1,468 licenses created by the Commission.

The Opponents also claim that use of the Commission's spectrum leasing rules has been "tepid,"²¹ but fail to acknowledge that these rules were not issued until October 2003 and did not

¹⁹ These data results are based on a search of the ULS database conducted on August 5, 2004.

²⁰ These data results are based on a search of the ULS database conducted on August 4, 2004.

²¹ *See* Opposition of Council Tree at 23.

become effective until January 26, 2004.²² Carriers simply have not had sufficient time to take full advantage of the new rules, which have been in effect for only six months.

Furthermore, BloostonLaw contends that “perhaps the most significant factor in determining the auction success of true small businesses and rural telephone carriers is the size of the licenses being sold.”²³ BloostonLaw entirely ignores, however, that the Commission significantly enhanced small businesses’ ability to acquire C block licenses by reconfiguring available 30 MHz C block licenses into 10 MHz licenses.²⁴ This reconfiguration enabled small businesses using bidding credits in Auction 35 to obtain nearly half of all available 10 MHz C and F block open licenses, representing 30 percent of the total MHz/pops.

III. THE RECORD SHOWS THAT CLOSED BIDDING IMPOSES SIGNIFICANT CONSUMER COSTS AND DISSERVES THE PUBLIC INTEREST

The Opponents offer no evidence that closed bidding maximizes consumer welfare or otherwise serves the public interest. To the contrary, T-Mobile submits specific economic data prepared by Dr. Simon Wilkie, former Chief Economist of the FCC, showing that the service delays and underutilization of spectrum caused by reliance upon closed bidding for C block licenses have resulted in consumer surplus losses ranging from \$13.6 billion to \$32 billion.²⁵ Additionally, Dr. Wilkie provides detailed economic analysis demonstrating that closed bidding causes additional public interest harms by (1) preventing the allocation of scarce spectrum

²² See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20604, ¶ 45 (2003), published in 68 Fed. Reg. 66,252 (Nov. 25, 2003).

²³ See Comments of BloostonLaw at 3.

²⁴ See *C/F Block Sixth R&O*, ¶¶ 11, 14, 23.

²⁵ See Comments of T-Mobile, Attachment (Wilkie Decl.), at 16.

resources to the bidder that values the spectrum the most; (2) preventing bidders from efficiently obtaining information about the true values of the available licenses through the auction process, thus resulting in overvaluation of licenses and payment defaults; and (3) preventing national carriers from achieving economies of scale and scope.²⁶

In contrast, the Opponents rely merely upon broad generalizations regarding the need to promote small business participation and upon dated, four-year-old FCC findings regarding the suitability of closed bidding.²⁷ This, however, begs the question of whether the assumption that closed bidding offers substantial public interest benefits remains valid, particularly in view of the market changes that have occurred over the last four years and the mounting evidence challenging that assumption. CTIA fully supports the Congressional and FCC objective of promoting small business participation in wireless services, but no party has submitted any data suggesting that closed bidding effectively advances that objective or otherwise produces substantial public interest benefits.

Closed bidding may guarantee that certain categories of businesses initially obtain licenses, but it does not assure that a “small” business will launch service or remain active participants in the wireless markets. None of the Opponents disputes data provided in the Petition showing that the vast majority of the 493 closed C block licenses auctioned in 1996 were never utilized by their initial winners and ultimately were canceled or terminated.²⁸ Moreover,

²⁶ *Id.* at 3-7.

²⁷ *See, e.g.*, Opposition of Council Tree at 5-8; Opposition of the Rural Telecommunications Group and the Organization for the Promotion and Advancement of Small Telecommunications Companies at 4; Opposition of Designated Entity Program Supporters at 5-6.

²⁸ *See* CTIA Petition at 14.

no party disputes that the bulk of the Auction 58 spectrum, consisting largely of returned NextWave spectrum, has remained fallow for nearly eight years, despite or, rather, because of the Commission's various DE rules. In fact, T-Mobile offers economic evidence demonstrating that closed bidding was at least partly responsible for payment defaults and bankruptcies that have prevented or delayed the use of much of the C block spectrum.²⁹

Rather than diminishing competition, as the Opponents suggest, open bidding will strengthen competition by ensuring that only the party that values the spectrum the most will acquire the spectrum. As Verizon Wireless notes, open bidding promotes small business participation by ensuring that licenses are assigned to small businesses "that value the licenses because they are ready to put this spectrum into service and have the financial wherewithal to do so."³⁰

IV. OPEN BIDDING IS PARTICULARLY APPROPRIATE FOR AUCTION 58

The Opponents do not dispute that the Auction 58 licenses largely consist of returned NextWave licenses that have been built out and that could have been sold to any large or small business if offered in the open market rather than through an FCC auction. Council Tree, however, asserts without any basis that this fact is "irrelevant" and that "the Commission anticipated the very circumstances present here."³¹ This is nonsense. When the Commission adopted the closed bidding requirements four years ago, none of the available Auction 58 C block licenses had been built out. In fact, at that time, the Commission did not address the issue

²⁹ See Comments of T-Mobile, Attachment (S. Wilkie Decl.), at 7-11.

³⁰ See Verizon Petition at 10.

³¹ See Opposition of Council Tree at 17.

of whether the closed bidding requirements should be applied to C block licenses that have been built out and that otherwise could be sold to any qualified purchaser in the open market.

Fairness and consistency require that the Commission allow these licenses to be made available to all parties on the same basis, regardless of whether they are returned to the Commission for re-auction or sold in the secondary market. Whether through a rulemaking or a waiver, there are ample grounds to allow open bidding for the Auction 58 licenses. The long saga of the returned NextWave licenses – which were the product of a unique bankruptcy settlement agreement and were built out before being returned to the Commission – provide the best example of why it would be particularly appropriate to waive the closed bidding rules in this context. It makes no sense to treat similarly situated NextWave licenses differently; all these licenses were part of the settlement agreement and were built out, so there is no justification for allowing NextWave to auction some of them privately on the open market, while requiring the FCC to set aside the remainder in a closed auction. A waiver would be the appropriate remedy for this anomalous situation.

V. CONCLUSION

Based on the foregoing, CTIA urges the Commission to grant the Petition by waiving the entrepreneur eligibility restrictions for Auction 58 or initiating an expedited rulemaking to permit open bidding for all C block licenses to be made available in all future auctions, or both.

Respectfully submitted,

/s/ Diane Cornell

Diane Cornell
Vice President, Regulatory Policy

Michael Altschul
Senior Vice President, General Counsel

Christopher Guttman-McCabe
Assistant Vice President, Regulatory Policy and
Homeland Security

CTIA — The Wireless Association™
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

Dated: August 9, 2004

CERTIFICATE OF SERVICE

I, Theresa Rollins, hereby certify that on this 9th day of August 2004, copies of the foregoing **Reply of CTIA-The Wireless Association** were served by electronic mail on the following:

Bryan Tramont
Chief of Staff
Office of Chairman Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Sheryl Wilkerson
Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jennifer Manner
Senior Counsel
Office of Commissioner Abernathy
Federal Communications Commission
445 Twelfth Street, N.W.
Washington, D.C. 20554

Sam Feder
Legal Advisor on Spectrum and International
Issues
Office of Commissioner Martin
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Paul Margie
Spectrum and International Legal Advisor
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Barry Ohlson
Senior Legal Advisor, Legal Advisor for
Spectrum and International Issues
Office of Commissioner Adelstein
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

John Muleta
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Peter Tenhula
Acting Deputy Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

David Furth
Associate Bureau Chief/Counsel
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Lauren Patrich
Legal Advisor for Media and Public Affairs
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Dr. Walter D. Strack
Chief Economist
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Margaret Wiener
Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

William Kunze
Division Chief, Spectrum and Competition
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Erin McGrath
Mobility Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Dwain Livingston
Mobility Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Lisa Stover
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

John Branscome
Legal Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Kathryn Garland
Deputy Division Chief, Auctions and Spectrum
Access Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Audrey Bashkin
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

JoAnn Epps
Mobility Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jeff Crooks
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

/s/ Theresa Rollins
Theresa Rollins