

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of)

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

RM-11019

To: The Commission

REPLY COMMENTS OF QUALCOMM INCORPORATED

QUALCOMM Incorporated ("QUALCOMM") submits these Reply Comments to urge the FCC to adopt open bidding rules for Auction 58 to permit all bidders to bid for all of the licenses to be auctioned, instead of applying the Auction 35 rules, which would preclude non-designated entity ("DE") bidders from bidding on more than half of the PCS licenses to be auctioned.¹

I. Introduction

As set forth more fully herein, the Commission has a legal duty to reexamine its auction rules in light of changed circumstances that have taken place after their adoption. The wireless industry has changed dramatically since the Commission adopted the rules for Auction 35 in 2000. Since then, a total of nine carriers in the United States have deployed 3G wireless technology, offering a wide variety of advanced wireless services, and additional deployments

¹ These Reply Comments mirror Reply Comments filed by QUALCOMM on July 15, 2004 in response to the Public Notice issued by the Wireless Telecommunications Bureau seeking comments on the procedures for Auction 58. See Public Notice, Broadband PCS Spectrum Auction Scheduled for January 12, 2005, DA 04-1639, rel. June 18, 2004 (the "Public Notice").

are under way. Two carriers, Verizon Wireless and Sprint PCS, are in the midst of deploying high speed wireless broadband service, known as 1xEV-DO, on a nationwide basis. Other carriers, including Cingular Wireless and AT&T Wireless, are in the process of deploying 3G technology known as WCDMA or UMTS. The total number of wireless subscribers in the United States has grown rapidly—from approximately 97 million people in 2000 to over 166 million today. Subscribers have come to insist that their carriers' footprints extend wherever they go. Despite the inherent spectral efficiency of CDMA technologies, when faced with this burgeoning demand and use, wireless carriers, even those deploying some flavor of CDMA, need additional spectrum to expand their footprints to keep up with the demand, and the spectrum to be auctioned in Auction 58, within the currently allocated PCS band, is well suited to meet this need because there are no technical issues that would preclude its immediate use.

Going forward with the auction under the old Auction 35 rules, as set forth in the Wireless Bureau's Public Notice, would ignore these marketplace realities, and on this basis alone, the Commission should go forward with a rulemaking to open up the bidding on all of the licenses to all bidders. Furthermore, it is especially important that the Commission do so because the spectrum at issue has not been used to serve anyone for many years now, and setting aside the majority of the spectrum for DEs, many of whom will likely be start-ups, is bound to cause even further delays in the use of some of this spectrum. The Commission's own experience with setting aside broadband PCS spectrum for DEs, a history replete with litigation and delay after delay that frustrated the initiation of service, is more than ample justification for the Commission not to hold Auction 58 with a set-aside of spectrum for DEs.

No commenter in this proceeding has supplied, or could supply, a sufficient justification for the Commission to hold Auction 58 with more than half of the licenses set aside for DEs in

light of the current realities in the wireless marketplace and the past history with such set asides in broadband PCS auctions. The Commission has used a series of other measures to spur participation in licensed services by small businesses, including bidding credits and the creation of secondary markets, and the Commission should rely on those measures with respect to the spectrum to be auctioned in Auction 58.

The public interest lies in seeing that this long fallow PCS spectrum is finally and quickly put to use. This situation has imposed a real cost on the public—indeed, Dr. Simon J. Wilkie estimates the harm to the public from the original C Block set aside at between \$13.6 to \$32 billion, and those losses would continue to mount if Auction 58 results in additional litigation over DEs ensues after the Auction, *i.e.*, if past is prologue. See Declaration of Dr. Simon J. Wilkie. Excluding most of the nation’s wireless carriers from bidding for more than half of the PCS licenses at stake, and failing even to consider changes to the rules, would be contrary to the public interest.

For all of these reasons, QUALCOMM urges the Commission to start a rulemaking as soon as possible to change the rules to govern Auction 58 so that all bidders can bid on all of the licenses.

II. The Commission Should Change the Rules to Govern Auction 58 So That All Bidders Can Bid on All of the Licenses to Be Auctioned

Courts have long held that the Commission cannot continue to apply rules or policies when the circumstances that gave rise to the rules or policies when they were adopted no longer apply. See, e.g., Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992), quoting WWHT v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981) (“it is settled law that an agency may be forced to reexamine its approach ‘if a significant factual predicate of a prior decision . . . has been removed.’”); Meredith Corp. v. FCC, 809 F. 2d 863, 874 (D.C. Cir. 1987), quoting National Broadcasting Co.

v. United States, 319 U.S. 190, 225 (1943) (“If time and changing circumstances reveal that the ‘public interest’ is not served by the application of the regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.”); Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) (“Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. It can hardly be supposed that the vitality of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continued operation.”).

Accordingly, the Commission should reexamine the current wireless marketplace and whether the Commission needs to change its rules before Auction 58 proceeds under the same rules as governed Auction 35. The wireless industry is consolidating because carriers are trying to deploy 3G services as quickly as possible, and they need a bigger footprint, with more spectrum, to keep up with consumer demand. The public interest will not be furthered by keeping more than half of the spectrum at stake in Auction 58 out of the hands of the carriers who need it most.

In 2000, when the Commission last reviewed its auction rules, no carrier had yet deployed 3G technology. Today, the U.S. wireless market is very different. As already noted, today, a total of nine carriers in the United States have deployed various 3G technologies.² Two carriers, Verizon Wireless and Sprint PCS, are in the midst of deploying high speed wireless broadband service, known as 1xEV-DO, on a nationwide basis. Other carriers, including Cingular Wireless and AT&T Wireless, are in the process of deploying 3G technology known as

² These carriers are: Verizon Wireless, Sprint PCS, ALLTEL, US Cellular, Western Wireless, Cellular South, NTELOS, Kiwi PCS, and Leap Wireless. Additional information about 3G technology and deployments is available at www.3gtoday.com.

WCDMA or UMTS. The total number of wireless subscribers in the United States has grown quite rapidly—from approximately 97 million people in 2000 to over 166 million today.

Total minutes of wireless use are up over 400% from 2000 through the present. There are now more minutes of use of wireless than wireline service. By any indicator, ranging from minutes of use for wireless voice to numbers of data downloads or bandwidth of data downloaded to overall average revenue per user, the demand for wireless services in the United States is at record levels. Despite the inherent spectral efficiency of CDMA technologies, when faced with this burgeoning demand and use, wireless carriers, even those deploying some flavor of CDMA, need additional spectrum to expand their footprints to keep up with the demand, and the spectrum to be auctioned in Auction 58, in the currently allocated PCS band, is well suited to meet this need because there are no technical issues that would preclude immediate use.

Thus, it is against this backdrop of fundamentally changed circumstances that the Bureau released the Public Notice. Based on the changed circumstances, the Commission should reconsider the auction rules by starting the rulemaking as requested by CTIA and permit all bidders to bid on all licenses in the upcoming Auction 58.

Over and above the changed circumstances, there are other reasons why the Commission should change the rules to govern Auction 58. The Commission should not ignore history. Despite the very best of intentions, the DE concept has not lead to a proliferation of new small business deploying innovative services on PCS spectrum, as originally envisioned. Instead, for a whole variety of reasons, the Commission has been mired in litigation on top of litigation, and the C and F Block PCS spectrum set aside for DEs in Auction 58 under the Public Notice has not been used to deliver commercial service to anyone. At the same time, the Commission has effectively abandoned the concept of spectrum set-asides for DEs in all other services and

auctions as the Commission has conducted countless spectrum auctions using bidding credits, not set asides, to encourage the participation of small businesses. The Commission has also adopted rules to facilitate the creation of a secondary market in PCS and other licensed wireless spectrum, also to spur more participation by small businesses in PCS and other licensed wireless services.

The public interest in the conduct of Auction 58, particularly in light of the historic problems with setting aside the particular spectrum at issue for DEs, lies in the FCC ensuring that the spectrum is finally used to deliver service to the public as quickly as possible. That objective will be thwarted if the FCC precludes the nation's non-DE wireless carriers, who are so well positioned to put this spectrum to use as quickly as possible to yield immediate and important benefits for the public, from bidding on more than half of the licenses to be auctioned.

At the end of the day, in all likelihood, whether through post-auction transactions, joint ventures, management agreements, or non-controlling investments in various DEs, the nation's non-DE wireless carriers will ultimately gain access to much if not all of the spectrum set aside to DEs under the Public Notice. Continuation of the set aside will only make the consolidation process significantly more time consuming and more expensive by permitting financial players to reap windfall profits as a result of the financial opportunity borne in the FCC rules, rather than as the result of any true innovation. The FCC should not force the use of these artificial financial vehicles and facilitate windfall profits for financial players who will not bring any innovative service or product to the American people, but instead will reap rewards by gaming the FCC's set aside.

Rather, the Commission should let the non-DE wireless carriers bid in their own names for all the licenses so they can deliver the innovative services that the public wants as quickly and as inexpensively as possible.

III. Conclusion

Wherefore, QUALCOMM respectfully requests that the Commission start a rulemaking as soon as possible to change its rules to permit all bidders to bid for all the licenses at issue in Auction 58.

Respectfully submitted,

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Dated: August 9, 2004

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I, Dean R. Brenner, do hereby certify on this 6th day of August 2004 that a true and correct copy of the foregoing Reply Comments was served by U.S.mail, postage prepaid, on:

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