

**Before the
Federal Communications Commission
Washington, DC 20554**

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| In the Matter of |) | |
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| Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands |) | WT Docket No. 04-356 |
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| Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands |) | WT Docket No. 02-353 |
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COMMENTS OF NTCH, INC.

NTCH, Inc. (“NTCH”) hereby submits its comments on the Commission’s proposed service rules for the 1915-1920, 1995-2000, 2020-2025 and 2175-2180 MHz bands of the Advanced Wireless Service. NTCH is a relatively small regional carrier which provides alternative PCS services in California, the upper Rockies, Tennessee, Colorado, the Pacific Northwest, Arizona and elsewhere. NTCH’s business model is not to compete head-on with the major nationwide carriers on their own terms but rather to fashion low cost and innovative service plans tailored to specific market segments which are not being adequately served by the larger players. The continued existence and success of Tier II and Tier III carriers like NTCH demonstrates that there remains a strong place in the contemporary telecommunications market for local or regional carriers. Not only can such carriers compete with the majors on price, but they are able to be much more innovative in their offerings, more adaptable to local conditions, more nimbly responsive to changing market conditions or needs, and more efficient in delivering service than the lumbering and increasingly bloated Tier I giants. The Commission’s policies should therefore

promote and support the ability of smaller enterprises to acquire the spectrum necessary to make these offerings at affordable prices and in manageable geographic sizes.

Not only is this wise policy from the standpoint of stimulating competition and innovation, it is the policy imposed by Congress. Section 309(j) of the Communications Act charges the Commission with “ensuring” that small businesses and other designated entities are afforded an opportunity to participate in the provision of spectrum-based services. The Commission has tried to fulfill this responsibility primarily by using either limited eligibility auctions (such as the C and F block PCS auctions) or small business bidding credits. These efforts have been partially successful. Indeed, it was the availability of limited eligibility for the re-auctioned C block licenses that afforded NTCH’s controlling shareholder, Glenn Ishihara, the opportunity to acquire spectrum that almost certainly would have been snapped up by larger players. Those acquisitions provided the base from which NTCH has been able to expand and grow its PCS offerings. NTCH believes the Commission should follow a similar course here to ensure that not only NTCH but new small entrepreneurs trying to break into the advanced wireless service will have the same opportunity that NTCH had. However, the limited eligibility process must be reformed to prevent the abuses that plagued the C block auctions. To this end, NTCH submits the following suggestions in response to the Commission’s input.

A. The Spectrum Should Be Licensed on a BTA or RSA Basis

The Commission has repeatedly heard from regional carriers and their associations that relatively smaller geographic units substantially enhance the accessibility of spectrum to these carriers. Because they operate in localized or regional markets which are on the scale of BTAs or RSAs, they have neither the desire nor the wherewithal to purchase the vast nationwide or semi-nationwide territories offered by the Commission in past auctions. If this spectrum is licensed in huge territorial regions, it will have the direct effect of absolutely excluding small carriers from any opportunity to compete for it. That in turn has the effect of reserving the field of advanced wireless services to the five nationwide carriers. The benefits of innovation and price competition which we have seen in the PCS industry would be eliminated at the outset. This is exactly the opposite of what Congress ordained.

Use of BTA or RSA-sized units also would comfortably relate these advanced service licenses to the PCS or cellular licenses with which they are likely to be associated. NTCH sees this particular spectrum as a natural adjunct to existing PCS and cellular spectrum. It can be used to expand the potential services of these carriers to include 2.5 or 3G offerings. By making the spectrum available in similar sized units to their natural adjuncts, the Commission can make them most useful and most precisely tailored to the needs of the PCS/cellular carriers and their customers.

NTCH tends to believe that nationwide licenses are unmanageable in any case. It is virtually impossible to establish or police a build-out policy for nationwide licenses, and even if one could be fashioned, vast portions of the licensed service area still goes unserved by the licensees. They just serve the territories where they perceive a need and have the financial ability to provide service. It is wholly unrealistic to think that any company – even the very

largest ones – would be able to build out an entire nation in some reasonable timeframe. On the other hand, as the development of the cellular radio service proved, a host of smaller carriers working independently can and will simultaneously construct and operate hundreds of individual markets. The result is that the entire nation will get service much more quickly. Using a single nationwide license (or huge EAG licenses) simply ensures that large areas will go unserved for the indefinite future.

B. Closed Bidding Should Be Adopted for Half of the Spectrum

This AWS spectrum consists of 20 MHz of bandwidth. The only sure way to give small businesses a reasonable opportunity to acquire some of it is to make at least half of it available only through closed bidding. NTCH recognizes that the Commission has generally moved away from “closed bidding” toward bidding credits as its preferred method for fostering small business licenseeship. This development has occurred because the larger carriers did not want to be precluded from bidding on the available spectrum. (See, for example, the recent efforts to open Auction 58 to non-entrepreneurs. *Eligibility Restrictions on C Block Licensees in the Personal Communications Service*, FCC 04-249, rel. October 15, 2004) We agree that larger carriers should not be barred from licenseeship – but neither should they dominate it. 90 MHz of AWS spectrum is already going to be available to giant carriers in the 1710-1755 and 2110-2155 MHz band. An additional 10 MHz would be available here for a total of 100 MHz of spectrum. That should be sufficient to satisfy even the most gargantuan needs of the major carriers. A set-aside of a mere 10 MHz for small businesses in the overall scheme is a very effective way of both meeting the Congressional mandate and realistically giving these carriers a chance to acquire spectrum and deliver the benefits described above.

Merely using 15% and 25% bidding credits is inadequate to accomplish this objective. History has shown that the largest carriers have such deep pockets that the modest bidding credits provided by the Commission do not prevent them from easily outbidding small businesses. This is why the large carriers were quite comfortable suggesting that the re-auctioned C block licenses should be open but subject to bidding credits – they knew they would be able to outbid small businesses in such a contest. For bidding credits to work effectively, they must be substantially more dramatic in scale – on the order of 75% and 85%. Anything less does not accomplish the intended purpose.

This is evident by comparing the potential resources of a hypothetical small business with less than \$15,000,000 in annual revenue against, for example, Verizon, with \$67 billion in annual revenue. The disparity ratio is approximately four thousand to 1, yet the 15% and 25% credits offered by the Commission give only a slight advantage to the small carrier. A bidding credit designed to level the bidding playing field must be sufficiently large to accurately reflect the true magnitude of the original disparity. If the Commission allowed bidding credits on this order, there would be no need for a closed auction.

C. Closed Auctions Must Be Truly Closed

The difficulty with closed auctions or, indeed, with any type of bidding credit scenario, is that companies will game (and have gamed) the system to take advantage of the credit. In the original C Block auction, for example, the Commission seemed to fairly invite companies to set up structures with artificial “control groups” composed of Indian tribes or other entities. As another small carrier, Corr Wireless, pointed out in comments filed in Docket 02-381, the Commission’s application procedures do not adequately ensure that putative small carriers are truly small. The Commission would have to be blind not to recognize that in many of the auctions to date, companies have qualified as “small businesses” despite being “passively” owned in large part by mammoth corporations which guarantee huge funding commitments. This is how Nextwave was able to qualify as a “small” business while bidding more than \$4 billion dollars in the original C block auction, a result which rendered the “small business” classification somewhat absurd. What is going on in auctions is the same type of thing which occurred in the broadcast area when comparative preferences were awarded to entities with female and minority owners. The D.C. Court of Appeals eventually threw up its hands in disgust at the “strange and unnatural” business arrangements which that policy engendered. *Bechtel v. FCC*, 957 F. 2d 873, 880 (D.C. Cir. 1992). It is simply preposterous that “small businesses” are out there auction after auction bidding literally billions of dollars for licenses. That circumstance turns the concept of “small business” inside out; it cannot have been what Congress intended when it directed the FCC to take steps to ensure that small businesses had access to auctioned spectrum.

There is a simple structural solution to this problem which would not involve any adjustment or re-working the ownership attribution rules as they now exist. The Commission

should either cap the number of licenses a “small business” could successfully bid on in any one auction, or cap the amount a “small business” can bid while retaining its small business status. A bidder which is the high bidder on more than twenty-five different licenses should presumptively be deemed not to be a small business and lose its small business discount regardless of whether its ownership structure meets the technical small business definitions in the rules. (Such businesses could still win any number of licenses; they just would not receive the small business discount.) Similarly, a bidder which bids more than \$50 million in any one auction should lose its theoretical small business status regardless of its technical compliance with the revenue and asset limits. This measure recognizes the practical reality that any company bidding those amounts or acquiring that much spectrum is just not a small business.

A similar rule would apply to “entrepreneurs” eligible for closed bidding. No putative entrepreneur (i.e., an entity with less than \$500 million in assets and \$250 million in average revenues) would be allowed to bid on more than 25 closed markets or bid more than \$50 million in a single auction. Big companies would have less of an incentive to create phony “front” applicants because the benefit would be significantly reduced. The imposition of these caps would put a stop to the contorted and artificial business arrangements designed to squeeze big businesses into the small business holes.

D. Apply PCS-like Build-out Requirements to Ensure Performance

The Commission often emphasizes that the object of its licensing procedures is to ensure the rapid delivery of service to the American people. This objective should be no less true of small businesses than others. NTCH therefore believes that the Commission should retain construction buildout schedules designed to require winning bidders to actually go forward and

build the systems they have won. This incentive would be especially true of small businesses who won licenses with substantial discounts or with the advantage of closed bidding. To hold these carriers' feet to the fire, the Commission should require that build-out occur in not more than two years. In that time period, the licensee would have to have provided service to at least 500 customers. This is a reasonable number which a serious service provider should be able to achieve. If this level of service were not achieved, the license would be cancelled and could then be re-auctioned on an open basis.

NTCH has found that the presence of a five-year build-out deadline has been a very strong incentive in the PCS and cellular areas for carriers to construct systems and begin operations. By imposing this aggressive timetable, the Commission can ensure that if the original winning carrier does not use the spectrum to provide service, another carrier can quickly have the opportunity to do so.

E. Conclusion

Adoption of the measures proposed above will secure for the American people the benefits of competition from small, innovative businesses while also giving large carriers a fair opportunity to acquire large chunks of unreserved spectrum. The caps on small business acquisitions eliminate gamesmanship and better reflect the reality of small businesses.

Respectfully submitted,

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