

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Implementation of the Commercial Spectrum) WT Docket No. 05-211
Enhancement Act and Modernization of the)
Commission's Competitive Bidding Rules and)
Procedures)

COMMENTS OF VERIZON WIRELESS

The 2004 Commercial Spectrum Enhancement Act ("CSEA") requires the "total cash proceeds" from any auction of "eligible" frequencies to equal at least 110 percent of the total estimated relocation costs provided to the Commission by National Telecommunications and Information Administration ("NTIA").¹ In the above captioned *Declaratory Ruling and Notice of Proposed Rule Making*,² the Commission has correctly determined that total cash proceeds as used in the CSEA means winning bids net of any applicable bidding credit discounts.

The NPRM also seeks comments on changes to the Commission's competitive bidding rules necessary to implement CSEA, as well as changes to update the competitive bidding rules more generally. Verizon Wireless submits these comments on the several proposals in the NPRM. Verizon Wireless urges the Commission to (1) adopt a flexible rule that will allow it to

¹ Commercial Spectrum Enhancement Act, Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004) (codified in Title 47 of the United States Code) ("CSEA").

² *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Declaratory Ruling and Notice of Proposed Rule Making, WT Docket No. 05-211 (released June 14, 2005) ("NPRM").

set reserve amounts either for individual licenses or for the total auction, (2) increase the default and withdrawal penalties to discourage speculation, and (3) harmonize its Part 1 and Part 73 auction rules by modifying Section 1.2109(a) to provide that final payments by high bidders will not be due until the Commission is ready to grant the bidders' applications.

I. THE COMMISSION SHOULD RETAIN FLEXIBILITY TO SET RESERVE PRICES AND APPORTION BIDS AMONG LICENSES IN A PACKAGE.

As the NPRM indicates, the Commission has always had as part of its auction authority the ability to establish reserve prices or minimum bids.³ However, the CSEA requirement that total cash proceeds equal 110 percent of the total estimated costs of relocating government users compels the FCC to adopt a reserve price rule that is nondiscretionary with respect to the auction of any CSEA eligible frequencies. As the Commission notes, this mandatory reserve price gives rise to additional issues, for example, whether the total cash proceeds attributable to eligible frequencies should be assessed on a license-by-license basis or on a total auction basis.⁴

The Commission proposes a rule that generally would require it to set reserve prices for any auction of eligible frequencies under CSEA, but that does not specify the details of whether it is by license or by auction. Verizon Wireless agrees that this is the appropriate approach. In this manner, the FCC can retain flexibility with respect to CSEA reserve prices and thus choose to set reserve prices at the auction level, or individual license level, depending on the circumstances of specific auctions. For example, where the Commission employs a diverse licensing scheme, some licenses are likely to be less valuable on a per-MHz pop basis than others and a license-by-license approach might result in many markets going unsold. On the

³ NPRM at ¶ 14.

⁴ NPRM at ¶ 13.

other hand, where licenses being auctioned are relatively close in size, or where the Commission holds an auction of both eligible and ineligible frequencies, it might set a license-by-license reserve price. Verizon Wireless believes that the Commission should retain the flexibility to make these decisions on a case-by-case basis.

Finally, with respect to apportioning bids among licenses in a package, the Commission should adopt a rule that also permits it to retain maximum flexibility to use either a proportionate or a market approach. Under most circumstances, it is preferable for the Commission to estimate the market price for each license in a package and thus better approximate the real cost of subsequent default, a bidding credit or an unjust enrichment obligation. However, there might be reasons not to use this approach in specific circumstances and thus the Commission should have the flexibility to choose the best method for a specific auction.

II. THE COMMISSION SHOULD CHANGE ITS DEFAULT AND WITHDRAWAL RULES TO DISCOURAGE SPECULATION.

The Commission should raise the limit on both withdrawal and default payments in order to reduce the risk of speculative bidding behavior. In 1994, recognizing that defaults are more damaging to the auction process than withdrawals, the Commission established a payment for defaults in addition to that required for withdrawals, as an incentive to bidders to withdraw bids during the auction rather than default after the auction closes.⁵ The new NPRM acknowledges that it may be time to increase the level of that additional payment.⁶ Verizon Wireless agrees

⁵ NPRM at ¶ 30 citing to *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2374 at ¶ 154(1994).

⁶ NPRM at ¶ 30.

that raising the default payment is timely and will help curtail speculation and provide increased incentive for bidders to “conduct the necessary analysis and refrain from placing bids they cannot afford.”⁷ Not only is this a greater deterrent to ill-informed or speculative behavior, it also puts the burden of such behavior squarely on the shoulders of the individual bidder responsible for creating the inefficiencies that result from payment defaults.

The Commission correctly notes that withdrawals, particularly late round withdrawals, can also negatively affect the auction process. The use of withdrawals in Auction No. 58 unnecessarily extended that auction, such that bidders may have had to pursue less efficient choices based on bids that were subsequently withdrawn. Requiring a higher interim withdrawal payment should help deter these kinds of late-in-the-day withdrawals. The Commission should also consider a “tiered” interim withdrawal payment under which withdrawals made in the last stage of the auction would require the highest interim payment. The Commission should increase both the maximum default payment and the maximum interim withdrawal payment to 20 percent. The increase in both payments will provide the Commission with an important tool in deterring inappropriate use of both defaults and withdrawals.

III. THE BROADCAST RULE FOR PAYMENT AT TIME OF LICENSE GRANT SHOULD BE INCORPORATED INTO THE PART 1 AUCTION RULES.

The NPRM asks whether the Commission should make its auction rules for broadcast services contained in 47 CFR Part 73 rules consistent with the 47 CFR Part 1 payment rules. Verizon Wireless believes that harmonizing the rules is appropriate. However, rather than change the broadcast rules to mirror all of the Part 1 rules, the Commission should instead adopt in its Part 1 rules the procedure set forth in Section 73.5006(d), which indicates that the balance

⁷ NPRM at ¶ 33.

of a bidder's winning bid is not due until after the release of a public notice indicating that its application is ready to grant. This rule correctly links in time payment of all remaining amounts owed by the high bidder for a license with the grant of the license to the bidder. There is in effect an exchange of money for the license, as the statutory auction process contemplates.

Section 1.2109(a), in contrast, is not as precise on the payment process, merely requiring high bidders to submit the balance of winning bids within 10 days of the date of a public notice specifying the payment deadline. For many auctions, the Wireless Bureau followed the practice set forth in Section 73.5006(d); that is, final payments were due upon issuance of a "ready to grant" notice, enabling licensees to receive their licenses upon full payment. However, in more recent auctions, including the most recent auction of PCS licenses, Auction No. 58, the Bureau has required final payments just after the auction closed and well prior to license grant, rather than (as was the Bureau's prior practice) at the time of license grant. This new procedure effectively penalizes winning bidders by requiring them to pay the full amount of their bids without knowing when (or whether) they will receive their licenses.

The NPRM appears to base this change in its payment procedures on the Supreme Court's ruling in *NextWave*,⁸ which, the Commission states, held that "Section 525 of the Bankruptcy Code, 11 U.S.C. § 525, prohibits the cancellation of a Commission-issued *license* held by a *licensee* in bankruptcy proceedings where the *cancellation* is based upon the *licensee's* failure to make full and timely payment on the *license*."⁹ However, in that case, NextWave had *already* received its licenses and had executed commercial loan documents with the Commission. In this instance, by contrast, there would be no license grant until after the license

⁸ See *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003) ("NextWave").

⁹ NPRM at n. 82 (emphasis added).

is paid in full, only an *application* for a license. Moreover, requiring that all participants pay in advance of license grant penalizes all auction participants rather than just those that are at greatest risk for default. Finally, the risk of default due to bankruptcy is now far lower if not nonexistent, especially since the FCC no longer provides an installment payment option for small businesses. *NextWave* does not justify the current Bureau practice of forcing bidders to pay for their licenses without receiving their licenses in return.

In addition, full payment for a license that will not be granted for weeks or longer disserves the public interest. A license, once granted, will not produce revenues for months after grant while facilities are designed and constructed, further increasing the financial burden of paying in full for licenses substantially in advance of their receipt. Full and immediate payment is disproportionately burdensome to smaller carriers, which are more thinly capitalized, have limited access, at generally higher interest rates, to debt financing and whose applications usually receive greater scrutiny due to relationships with strategic partners.

The process for Auction No. 58 makes vividly clear the unfairness of the Bureau's current payment practice enabled by Section 1.2109(a). Although bidders were forced to pay the full amounts owed for their licenses shortly after the close of the auction in February 2005, *six months later*, some bidders have still not received their licenses – even though no petitions to deny or other objections were filed to those bidders. Bidders are essentially being forced to incur the cost of capital for months without being able to put the spectrum they paid for to work. The fact that most of the Auction 58 bidders which have not received their licenses are designated entities makes the situation particularly objectionable, since these are the very entities the Commission has sought to promote in auctioning spectrum. The Bureau's current payment

procedure is clearly at odds with Commission efforts to create opportunities for small business.

Alternatively, the Commission could amend the current rules to provide for a larger down payment, one that is large enough to act as a deterrent to default, but not so onerous as to be commercially unreasonable. For example, a 50 percent down payment, rather than payment in full would substantially reduce the cost of funding while continuing to provide a substantial deterrent to default. Such a change, in combination with the changes to the default and withdrawal rules above, would ensure that “only serious, financially qualified applicants receive license and construction permits so that the provision of the service to the public is expedited,”¹⁰ but will not unfairly harm small businesses or other parties with no intentions to default. The Bureau’s current “all-or-nothing” approach penalizes all parties for the possible default of a few.

Verizon Wireless thus urges the Commission to change the final payment rule to require final payment only after the license is ready to be granted, by changing Section 1.2109(a) to incorporate the approach followed by Section 73.5006(d). There is no countervailing reason to require full payment before the Commission is ready to grant an auctioned license.

¹⁰ NPRM at ¶ 49.

IV. CONCLUSION

Verizon Wireless urges the Commission to (1) adopt a flexible rule that will allow it to set reserve amounts either for individual licenses or for the total auction, (2) increase the default and withdrawal penalties to discourage speculation, and (3) harmonize its Part 1 and Part 73 auction rules by modifying Section 1.2109(a) to provide that final payments by high bidders will not be due until the Commission is ready to grant the bidders' applications.

Respectfully submitted,

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