

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

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In the Matter of)	
)	
Auction of Advanced Wireless Services)	AU Docket No. 06-30
Licenses Scheduled for June 29, 2006)	
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COMMENTS OF METROPCS COMMUNICATIONS, INC.

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Summary

MetroPCS is one of the fastest growing wireless broadband service providers in the United States and has an innovative business plan. MetroPCS is planning to participate in the upcoming auction of Advanced Wireless Service (“AWS”) spectrum, and files these comments to promote procedures that will result in a fair and efficient auction.

The consistent theme of the MetroPCS comments is that the Commission should not alter tried and true auction procedures in the absence of a compelling public interest justification for doing so. Consequently, MetroPCS favors the proposed use of a Simultaneous Multiple Round (“SMR”) auction format, and opposes the use of packaged or combinatorial bidding and concurrent simultaneous auctions. As the Commission correctly notes, using combinatorial bidding and conducting concurrent simultaneous auctions would increase the complexity of the auction process exponentially and there is no strong reason for adopting so radical a change.

The AWS band plan contains licenses of varying spectrum bandwidths in geographic areas of different sizes including large Regional Economic Area Groupings (“REAGs”). Prior auction experience shows that carriers interested in attaining a nationwide license will be able to assemble such a license by focusing their bidding attention on the large regional areas (in this instance, the REAGs). Meanwhile, running two simultaneous auctions of fungible spectrum with different auction procedures could result in carriers winning duplicate unwanted licenses or failing to win any license for which they have the highest and best use. A likely result of combinatorial bidding and concurrent simultaneous auctions would be less participation and success by smaller carriers and new entrants. In sum, combinatorial bidding injects significant risks and uncertainty into the auction without any significant corresponding benefits.

MetroPCS also opposes the Commission proposal to withhold the bidding information that traditionally has been available both before and during the auction process. The Commission's speculative concern about collusive bidding is far outweighed by the *pro-competitive* public interest benefits of allowing bidders to have the relevant bidding information critical to enable them to bid rationally. Smaller carriers and new entrants need to know the identity of competitors in a particular market, and their spectrum holdings in order to be able to assess their prospects of bringing a distinguishable service to a market. Blind bidding also will chill investments into small and very small businesses because of the increased risk of a run away auction and the general unease of financial investors when there is a lack of relevant information to support a financial commitment. Again, MetroPCS submits that the prior auctions have worked well and have succeeded in getting licenses into the hands of licensees who value them most. The Commission should not risk making a significant untested change in the auction procedures which could have serious adverse unattended consequences.

Finally, MetroPCS urges the Commission to allow sufficient time following the adoption of the final rules before AWS auction applications must be filed so that smaller players who will be relying upon outside financing can complete their business plans and raise the necessary funds needed to participate meaningfully in the auction. Consistent with prior timetables, MetroPCS requests that the Commission allow sixty days following the adoption of the auction rules before having participants submit their short form applications.

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COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its comments in response to the *Public Notice*, DA 06-238, released January 31, 2006 (the “*Notice*”)² in the above-captioned proceeding. The following is respectfully shown:

I. PRELIMINARY STATEMENT

MetroPCS is a dynamic, rapidly growing, facilities-based wireless telecommunications carrier that provides broadband wireless services to over 2 million subscribers in certain major metropolitan areas throughout the United States. MetroPCS offers wireless voice and data services on a no-contract, flat rate, unlimited usage basis, with rate plans beginning as low as \$30/month. MetroPCS targets the mass market which is largely underserved by the national

¹ For purposes of these Comments, the term “MetroPCS” refers to the parent company (MetroPCS Communications, Inc.) and all of its FCC-licensed subsidiaries.

² Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedures, AU Docket No. 06-30, *Public Notice*, DA 06-238 (released Jan. 31, 2006).

wireless carriers. MetroPCS' calling plans are differentiated from the more complex and long-term contracts required by other carriers. MetroPCS' customers pay for their service on a pay in advance basis, and use their phone substantially more on average than customers of the other wireless carriers. As a result, MetroPCS customer surveys indicate that approximately 40% of MetroPCS' customers use their MetroPCS service as their sole telecommunications service and a similar percentage of MetroPCS' subscribers are completely new to wireless. This makes MetroPCS a significant new entrant and competitor to existing wireless carriers, and a competitor to wireline carriers.

MetroPCS also is one of the fastest growing wireless carriers in the United States. MetroPCS plans to sustain this growth by continuing to penetrate its existing metropolitan areas, and by expanding its services into additional metropolitan areas with attractive demographics. MetroPCS commenced service in and around the San Francisco, Sacramento, Miami, Tampa and Atlanta metropolitan areas and demonstrated a substantial unmet market need in these areas. Now MetroPCS is expanding service on broadband PCS licenses in Detroit and Dallas acquired as result of the divestitures required by the Commission in the AT&T Wireless and Cingular Wireless merger. MetroPCS also is an investor in Royal Street Communications, LLC which won licenses in Los Angeles and Orlando/Jacksonville/Gainesville, among others in Auction No. 58.

The MetroPCS business plan calls for MetroPCS to continue to acquire spectrum in additional metropolitan areas. MetroPCS views the upcoming Advanced Wireless Service ("AWS") auction as a significant and unique opportunity to acquire spectrum in additional

attractive metropolitan areas. Accordingly, MetroPCS was an active participant in the Commission proceeding which resulted in the AWS band plan.³ MetroPCS plans to actively participate in Auction No. 66 and is filing these comments in support of auction procedures that will allow MetroPCS, and other entrepreneurial companies and new entrants, to participate in the auction in a meaningful fashion.

MetroPCS would like to see the AWS auction proceed sooner rather than later, and commends the Commission for taking steps to commence the auction promptly following the resolution of issues pertaining to the Spectrum Relocation Fund established by the Commission Spectrum Enhancement Act.⁴ However, MetroPCS urges the Commission to allow sufficient time following the adoption of the final auction rules and procedures for smaller bidders and new entrants, such as MetroPCS, to properly plan for the upcoming auction.⁵ MetroPCS notes in this regard that the *Notice* proposes several *significant* changes in the tried and true auction procedures that have been honed for more than a decade since the Commission conducted Auction No. 1 in 1994. MetroPCS, which has participated in a number of Commission auctions, believes that the procedures utilized in Auction No. 58 (PCS Broadband) worked well and that nothing occurred in that auction which would warrant some of the substantial changes proposed

³ See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WTO Docket No. 02-353, *Order on Reconsideration*, 20 FCC Rcd 14058 (2005).

⁴ See Implementation of the Commercial Spectrum Enhancement Act and Modification of the Commission's Competitive Bidding Rules and Procedures, WTO Docket No. 05-211, *Report and Order*, FCC 06-4, released January 24, 2006.

⁵ In order to participate in an auction, MetroPCS will be required to undertake a number of activities, including identifying markets with attractive market and customer demographics, creating business plans, reviewing information on incumbents who must be cleared from the spectrum, obtaining financing and negotiating loan documents, and negotiating arrangements with potential investors. Many of these activities will be impacted by the auction procedure rules and the proposed designated entity changes.

by the Commission. As a consequence, MetroPCS is biased against any significant changes in the well-established procedures absent a compelling reason grounded in factual matters flowing from prior broadband PCS auctions.

The AWS auction is the most significant broadband auction to be conducted by the Commission in the next several years and perhaps ever since the total available spectrum (90 MHz) exceeds the spectrum made available in either the initial A and B Block PCS auction (60 MHz) and the PCS C Block Auction (30 MHz). Given the significance of this AWS allocation and frequency assignments, the Commission can ill afford to change tried and true auction procedures and methods to untested auction procedures that could have substantial unintended consequences.⁶ Moreover, the continued integrity of the auction process requires that this important auction proceed smoothly and without controversy. The best way to guarantee this result is to avoid making substantial changes to the auction procedures that are not dictated by compelling public interest justifications.⁷

If the Commission adopts some of the more dramatic proposed changes to the auction procedures (e.g., combinatorial bidding and/or blind bidding), MetroPCS submits that significant additional time will be necessary for bidders, such as MetroPCS, to prepare for and participate in the auction. As the Commission properly observes in the *Notice*, Section 309(j)(3) of the

⁶ For example, if the Commission's proposed auction rules end up causing new entrants not to participate or cause investors or financial markets to curb their support of potential bidders, the auction procedures rules will have significant negative effects on competition in the wireless markets for years to come. Moreover, if the auction procedures end up unfairly favoring one group over another, which MetroPCS believes is the case with respect to blind bidding, it could have profound effects on who wins in the upcoming auction because new entrants may be unable to properly value the spectrum. *See infra* at p. 9.

⁷ As will be developed by MetroPCS in comments to be filed in response to the Commission's proposed changes to the designated entity program with respect to the AWS Auction, adequate public interest justification exist for revising the designated entity qualifications criteria in order to assure that the program satisfies its statutory mandate.

Communications Act of 1934, as amended, requires the Commission to ensure that “potential bidders have adequate time to familiarize themselves with the specific rules that will govern the day-to-day conduct of an auction.”⁸ Equally important, the auction bidders should have adequate time to assess the auction procedures, to adjust their business plans (if necessary), to finalize necessary financing, and to conclude any necessary business arrangements. In the case of MetroPCS, it will need to go to the capital markets in order to finance its participation in the AWS Auction.⁹ Those financial markets require certainty in the auction rules and an applicant’s business plans and arrangements.¹⁰ For this reason, MetroPCS urges the Commission to allow a minimum of **sixty days** following the adoption of an order establishing procedures pursuant to the *Notice* before applications to participate in the AWS Auction are accepted for filing.¹¹ This

⁸ *Notice* at p. 4.

⁹ MetroPCS suspects that other smaller bidders and new entrants will have a similar need for time in order to finalize their business plans and secure financing for their participation.

¹⁰ For example, one of the typical clauses inserted in financing arrangements is a provision that states that a lender can avoid funding if there has been a material adverse change in the prospects of a borrower or its business. The changes in auction rules as described *infra* could have a substantial effect on the prospects of valuation of the spectrum. Accordingly, at a minimum, borrowers will need to make sure that the rules are effective for a period of time before they commit to the auction since they can ill-afford to begin bidding without certainty that the funding will occur (e.g., that the lender will not claim that the changed rules result in a material adverse change) and they will need the ability to seek alternative funding if the first source decides not to lend. All of this naturally takes time. Since this is probably not a problem faced by the large national carriers who may be able to self fund their participation, these concerns are unique to small bidders and new entrants. If the Commission does not wait long enough after the finalization of the rules, it will be skewing the auction in favor of the larger incumbent carriers which is not in the public interest.

¹¹ This time schedule need not impact in any significant manner the proposed auction start date. MetroPCS believes that the Commission can use a relatively short period of time between the deadline for submission of applications and the commencement of the auction. Given the magnitude of the auction and the potential for substantial rule changes, the period of time before applications are due is critical and the timeframe between when the applications are due and the commencement of the auction is less important. The reason for this is that an applicant is required to submit certain information in the application which it cannot change after the submission of the application – such as any bidding arrangement with third parties – and the Commission’s anti-collusion rules preclude such discussions or agreements once applications are filed. Accordingly, MetroPCS suggests that the time between the filing of the application and the start of the auction should be no longer than 45 days and could be reduced to 30 days if necessary to meet its current auction date.

request is based on the fact that a number of important auction elements are “in play” now and need to be settled before MetroPCS can finalize its auction plans.

II. COMBINATORIAL BIDDING AND A SIMULTANEOUS CONCURRENT AUCTION SHOULD NOT BE UTILIZED IN AUCTION NO. 66

MetroPCS wholeheartedly supports the Commission proposal to auction all of the AWS-1 licenses in a single auction using the Commission’s standard simultaneous multiple-round (“SMR”) auction format. The SMR format allows bidders to maximize their ability to bid on spectrum that they value most with the least amount of complexity. MetroPCS strenuously opposes the alternate suggestion of allocating the AWS-1 licenses among two auctions: one using the standard SMR format and the other using the FCC’s package bidding format (“SMR-PB”).

The *Notice* correctly observes that “package bidding under the SMR-PB format may be more complex for bidders”.¹² This is a particularly significant concern with regard to smaller bidders and new entrants, such as MetroPCS. The *Notice* recognizes that having two simultaneous auctions would require bidders to “coordinate their bidding across auctions”¹³ which is a particularly difficult task for small bidders and new entrants, which have limited personnel and resources to devote to the auction process. For example, one of the most important aspects of an auction is maintaining eligibility during the course of the auction in order to be able to continue to bid on licenses of interest to the bidder. As the *Notice* points out, running simultaneous concurrent auctions will require bidders to maintain eligibility in two

¹² *Notice* at p. 5.

¹³ *Id.*

auctions which will require them to bid on what they want in both auctions.¹⁴ This could lead to anomalous results such as bidders winning more than they truly want – or can finance.

MetroPCS is extremely concerned that there is a significant risk that a bidder who has to straddle two simultaneous auctions could end up with duplicate unwanted licenses. This increases the prospect of defaults which would further complicate, prolong, and disrupt the bidding process and delay license assignments.¹⁵ There also is an increased risk that a company would not win any desired licenses for which it has the highest and best use simply because of the difficulty of properly maintaining eligibility in two separate simultaneous auctions.

Of equal concern is the logistical difficulty of assessing likely outcomes when two auctions containing certain fungible spectrum are being conducted simultaneously but, under different auction procedures. The *Notice* correctly observes that the complexity of the auction can increase “exponentially” and the number of bidding combinations can become “very large very quickly.”¹⁶ A bidder also may be unable to win because, although it values a particular geographic license more than others, a combinatorial bid may allocate value to another geographic area which could make the entire bid exceed the sum of its parts. The possible risk

¹⁴ *Id.*

¹⁵ Running two simultaneous concurrent auctions also could result in bidders withdrawing bids at the last possible moment because they cannot be assured until the end that they in fact are the winners of a particular license. Moreover, if bidders are required to bid blind, they will not know whether there is any possibility that they could be replaced by another bidder – they will have no way of tracking eligibility of other bidders. This could result in a bidder either not withdrawing (and potentially defaulting) or withdrawing and having a bidder who has remaining eligibility take out the withdrawing bidder on the license that they are the high bidder on – thus the bidder may not be eligible to bid on the withdrawn license. All of this points to the enormous complexity associated with running two concurrent auctions and the fact that there could be substantial unintended consequences.

¹⁶ *Notice*, note 20.

of a bidder who values spectrum most not winning overshadows any public interest in auctioning spectrum in a package.

Finally, running two concurrent auctions disfavors smaller bidders and new entrants. In order to participate in both auctions, bidders will be required to submit separate and duplicate upfront payments. Although MetroPCS believes that the upfront payment amount currently is set properly, duplicating this cost for two auctions doubles the upfront payment. Since smaller bidders and new entrants probably will have to finance both the upfront payment and any bids won, this could force bidders to borrow significant additional amounts just to participate in the auction. This is not a burden borne by larger incumbent carriers who will undoubtedly be able to pay the upfront payment out of existing cash reserves. Accordingly, running simultaneous concurrent auctions will have a disproportionate impact on smaller bidders and new entrants and, accordingly, will not serve the public interest.

Furthermore, there is no compelling evidence indicating that package bidding is necessary in order to conduct an efficient auction. The Regional Economic Area Groupings (“REAGs”) are similar in geographic scope to the large regions utilized in Auction No. 3 (Narrowband PCS Regional Auction). The final results in Auction No. 3 demonstrated that carriers interested in assembling a nationwide license were able to do so.¹⁷ This obviously relevant precedent indicates that the SMR auction format is adequate to allow carriers to

¹⁷ Of the six licenses offered in the Regional Narrowband PCS Auction, four of the licenses were acquired by a single applicant in each of the five regions, resulting in four nationwide licenses. *See Public Notice*, PNWL 94-27, released November 9, 1994.

assemble nationwide licenses when licenses are grouped in large areas such as REAGs.¹⁸

Consequently, there is no compelling reason to inject the enormous uncertainty and complexity that would come with a move towards untested package bidding procedures.¹⁹

In sum, MetroPCS respectfully submits that the Commission should adopt its proposed conclusion not to impose combinatorial bidding or utilize a concurrent simultaneous auction. There is no compelling reason to abandon the well tested SMR bidding process for a risky package bidding alternative of uncertain benefit.

III. THE COMMISSION SHOULD NOT ADOPT BLIND BIDDING PROCEDURES

The *Notice* proposes withholding certain bidding information that previously has been available to bidders both before and during auctions.²⁰ The *Notice* cites no specific auction abuses or collusive bidding instances which have given rise to this proposed change. Rather, the *Notice* cites general “economic theory.” The Commission should not alter the well-established auction procedures based upon theoretical concerns. Moreover, the Commission proposal overlooks the substantial *pro-competitive* public interest benefits associated with providing the bidding information which traditionally has been available in SMR auctions.

¹⁸ The Notice suggests that package bidding might be appropriate for certain of the REAG licenses. *Notice* at p. 5. In the view of MetroPCS, this makes no sense. Each of the REAG areas is sufficiently large to be capable of sustaining a commercial operation on a stand alone basis. Consequently, the need for package bidding rules goes down. Ironically, a better case could be made for combinatorial bidding with regard to the MSA/RSA licenses. In those situations, the loss of a larger adjoining MSA could cause a bidder to lose all interest in a smaller adjacent RSA which might not be economically sustainable on a stand alone basis. However, as far as MetroPCS is aware, the advocates of MSA/RSA licenses are not in favor of combinatorial bidding for those licenses, and as a consequence, MetroPCS does not think it makes any sense for the Commission to implement such a bidding procedure for them.

¹⁹ MetroPCS also notes that, in the reconsideration phase of the AWS band plan proceeding, there was no strong push for nationwide licenses.

²⁰ *Notice* at pp. 6-7.

MetroPCS has acquired licenses in auction proceedings and it has also acquired spectrum in the open market through private transactions.²¹ In determining whether to purchase spectrum, and how to value spectrum, in a new market through private transaction, MetroPCS assesses certain key demographics of the relevant market. Among the most important factors MetroPCS takes into consideration are (in no particular order): the size of the market, the population make-up of the market, the number of competitors in the market serving the target market of MetroPCS, the spectrum holdings of each competitor, the identity of the competitors, and the competitors' respective business plans.²² The proper consideration of these factors enables MetroPCS to ascertain that it would bring a valuable *distinguishable* service to each market with resulting public benefits.

This is precisely the kind of market information that MetroPCS or any new entrant needs to properly assess the value of a license to MetroPCS in an auction context. MetroPCS will be able to make better business decisions if it knows the number and identity of competitors in a market, and can assess whether the MetroPCS business model would represent a new unique service offering in a metropolitan area. It also matters whether MetroPCS will be competing against a large number of carriers with small spectrum holdings or against a smaller number of carriers with larger spectrum holdings. MetroPCS submits that the public interest benefits of

²¹ For example, the MetroPCS licenses in Tampa-Sarasota, Redding, Daytona Beach, Detroit, Dallas, and Bakersfield were acquired in private transactions.

²² These factors are important because they allow MetroPCS to ascertain the competitive landscape in a market and improve MetroPCS' ability to fulfill its business plan. Since a significant amount of the cost of providing service to a geographic area is tied to construction of a network, these factors are used to determine whether MetroPCS should enter the area at all and how much it can pay for a license. Obviously, MetroPCS would not want to acquire a license if it did not make economic sense to construct the network.

allowing relevant information of this nature to be available during the auction far outweighs the theoretical risk of collusive behavior identified by the Commission in the *Notice*.²³

MetroPCS also disagrees with the Commission's claim that the benefits of full transparency in terms of bidding information are less significant in this upcoming auction of AWS-1 licenses. For example, the Commission claims that technical information conveyed through bidder identities will be of limited value because AWS spectrum can be put to so many alternate and flexible uses.²⁴ This is incorrect. Although AWS spectrum may be put to a variety of uses, this does not change the fact that certain carriers are wedded to certain technologies (e.g., CDMA and EVDO in the case of MetroPCS), and these technology platforms are likely to be extended into the AWS band. For example, it would be important from a roaming perspective to know who may be acquiring spectrum in adjacent markets to determine whether roaming in this service will even be possible. Furthermore, knowing who is bidding also will be helpful in determining what services may be offered in an area and what unique opportunities may be available for new entrants to offer services in the area. It remains highly relevant, therefore, for a

²³ One of the largest components of the cost of providing service in an area is the cost of construction of the network. Since the network construction cost is substantial, no rational new entrant would bid on spectrum without knowing who is in the area providing service and the prospects for the new entrant to recover their costs of buying the license and building out the network. Given that smaller bidders and new entrants will undoubtedly finance the cost of the license and the build out by borrowing money, third party lenders will need to be satisfied that the borrower will be able to pay back the loan. If a small bidder or new entrant is prohibited from knowing the very information that it needs in order to value a license, it will have a Hobson's Choice – either reduce its bid price and not win the license or bid on what it thinks will occur (e.g., who will win what in the auction) and run the risk of not being able to finance its bid and build out. This is not a choice that the large incumbent carriers face since they will be existing carriers in most markets and the cost of building out networks is an incremental cost which they may be able to finance out of existing cash resources. Furthermore, since large incumbent carriers are already in the market, the information on other bidders is not as important and will have a reduced effect on their valuation of spectrum. This means that withholding bidding information results in large incumbent bidders being favored to the detriment of smaller bidders and new entrants who need this information in order to properly value their participation in a market.

²⁴ *Notice* at p.7.

bidder to know whether a high bidder in an adjoining territory is operating on a compatible technological platform.

MetroPCS also submits that providing bidder information is particularly important to smaller carriers and new entrants who will be relying upon outside financing to support their auction bids. The reality of the U.S. broadband market is that there are certain market leaders (e.g., Verizon Wireless; Cingular Wireless) whose valuation decisions with regard to spectrum will have a significant impact on the perception of the financial community of the value of spectrum.²⁵ If MetroPCS is paying similar prices per MHz POP as one of the leading carriers, it can proceed with some comfort that its financial backers will continue to support the MetroPCS bids and MetroPCS will have confidence that it will be able to fund both the acquisition and build-out of acquired spectrum. In contrast, if the market-setting bids are being placed by less experienced, less well-known companies, the financial markets will not be as comfortable and, depending on the prices, may refuse to support bids and or finance build-out. Blind bidding serves to withhold this relevant information and could result in bidders who truly value spectrum being unable to bid what they truly believe the spectrum is worth (and not winning the spectrum) or run the risk of default after the fact. While MetroPCS will generate its own license valuations,

²⁵ As the Commission knows, spectrum has no inherent value – it is determined largely through what willing buyers and auction bidders are willing to pay. In prior auctions of PCS spectrum the financial community used prior auction results and private transactions to determine a range of values for spectrum. Here, since the amount of spectrum dwarfs prior auctions and the uses that this spectrum can be put to are diverse, it will be more important than ever to the financial community to know what the perceived market leaders are willing to pay for spectrum to determine the range of values of AWS spectrum.

it is useful in the course of an auction to have bidder identity information in order to validate bidding strategies.²⁶

Complete transparency also is important to the United States financial markets and helps promote confidence in the Commission's auction process. Many of the smaller bidders and new entrants have either publicly or privately traded securities or debt, some of which may have been obtained to help finance their participation in the auction. During the course of the auction, these securities or debt will undoubtedly be traded by their holders. All of the Commission's previous auctions for broadband PCS have allowed the financial markets to view round results in real time and to take the results into account in valuing various bidders. However, if the Commission implements blind bidding, the financial markets will be unable to ascertain in real time what financial liabilities bidders may have undertaken, some of which may be material. In addition, Congress and the Securities and Exchange Commission ("SEC") are moving towards more real-time disclosure of financial information.²⁷ For example, Section 409 of the Sarbanes-Oxley Act of 2002 encouraged the SEC to move towards real-time disclosure of material changes in issuers by adding Section 13(l) to the Exchange Act which provides that "each issuer .. shall disclose to the public on a *rapid and current basis* ... material changes in the financial condition or operations of the issuer."²⁸ Information on bids being placed by the issuer company and others is

²⁶ Blind bidding also increases the risk of a run-away auction. In contrast, bidding with full transparency is likely to lead to more discipline since the bids of the established carriers are likely to bring some stability. Simply stated, the judgment as to whether a license will sustain a further bid is better assessed based upon the actions of Verizon Wireless than upon the actions of NextWave II. There is, therefore, a benefit in having the bidders identified.

²⁷ For example, the Securities and Exchange Commission recently amended the 8-K disclosure rules to require more timely disclosure of material changes in financial condition or operations. Rel. 33-8400 (Mar. 16, 2004), 69 F.R. 15594 (Mar. 25, 2004).

²⁸ 15 U.S.C. 78a-78jj, as amended by Pub. L. No. 107-204, 116 Stat. 745 (2002) (emphasis added).

material information to the financial market and a necessary component of promoting confidence in the Commission's auction process with the financial markets.²⁹ This could chill enthusiasm of investors and lenders to provide the funds necessary for small bidders and new entrants to fully participate in the AWS auction. Moreover, a lack of this information could have adverse consequences for the financial markets. For example, when the auction results are announced at the conclusion of all bidding, the financial markets may decide that a bidder (or a number of bidders) has significantly overpaid as a result of reviewing the bids placed by a bidder relative to the other bidders. This could lead to situation where the stock or debt trading price diminishes and the bidder is unable to secure funding to construct its network.³⁰

MetroPCS notes that certain of its principals were actively involved in Auction No. 1 (Nationwide Narrowband PCS), in which certain bidder identity information was withheld, and Auction No. 3 (Regional Narrowband PCS) in which all auction bidder information was disclosed. The results in those two auctions -- which involved a consolidating industry seeking fungible spectrum between auctions during a proximate period of time -- provide no support for the view that releasing bidding information results in collusive bidding behavior and reduces auction prices. To the contrary, the regional auction in which nationwide PCS licenses were assembled actually resulted in higher per license prices than was the case in the nationwide auction in which blind bidding was utilized. Consequently, there does not seem to be any

²⁹ The SEC generally finds information to be material when there is a substantial likelihood that a reasonable investor would consider the fact important in deciding whether to buy or sell the company's securities. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988).

³⁰ The Commission should remember that this breakdown in the financial market (albeit for different reasons) was one of the reasons that many of the original C Block licensees were unable to obtain financing.

evidence in the auction record indicating that disclosing bidder identities results in collusive behavior and lower bidding prices.³¹

Ironically, the desire of the Commission to withhold bidding information to reduce the prospects of collusive behavior would have an unintended *negative* consequence. MetroPCS believes that the Commission is most likely to learn of improper collusive behavior by being alerted to suspicious activity by those parties who are actively participating in the bidding process. However, when the bidders are denied bidding information, they are less likely to be able to identify and disclose suspicious bidding patterns by other bidders. MetroPCS submits that the integrity of the auction will be best maintained if all bidders have substantial bidding information during the auction and are able to act as potential third party enforcers if and when collusive bidding activity is discerned.

Based on the foregoing considerations, MetroPCS respectfully requests that the Commission reconsider its proposal to withhold bidder information. The pro-competitive public interest benefits of having this information are clearly outweighed by any potential theoretical benefits of withholding this information. The public interest will be best served by retaining the prior bidding procedures and releasing the information that was made available in the past.

³¹ MetroPCS notes that in Auction No. 1 the Commission made available the bidder number – without the bidder name. Although certain bidder behavior may have been ascertainable from bidder number, the plain fact was that the actual identity of the bidder was not disclosed so bidders had no confidence that a particular bidder was in fact who they may have thought it was. Indeed, if the bidder number was a complete surrogate for bidder identity, one would have expected the results of Auction No. 1 to be in line with Auction No. 3 where all bidder information was disclosed. However, Auction No. 3 resulted in license prices over 10% *higher* across the board for all nationwide licenses than Auction No. 1. Such a result clearly demonstrates MetroPCS' point that more bidder information allows bidders to value spectrum more.

IV. METROPCS SUPPORTS THE PROPOSED MINIMUM OPENING BID FORMULA

The *Notice* proposes to calculate minimum opening bids on a license-by-license basis using a \$0.05-MHz/POP formula.³² This represents a welcome change from the minimum opening bid requirement in Auction No. 58 and MetroPCS supports this change. Because the AWS Auction includes significantly more spectrum, larger spectrum blocks and more diverse geographic areas than were available in Auction No. 58, it makes sense to have a more modest opening bid requirement on a per MHz POP basis. MetroPCS believes that a higher minimum opening bid amount could result in unsold licenses and in a less competitive AWS Auction.

V. THE PROPOSED CHANGES TO THE BID REMOVAL AND BID WITHDRAWAL PENALTIES SHOULD BE REVISITED

The Commission proposes significant increases in the interim bid withdrawal penalty (from 3% to 10%) and the default penalty (also from 3% to 10% in an SMR format auction).³³ Obviously, MetroPCS is not entering the AWS Auction with the intention of defaulting on bids or withdrawing bids. MetroPCS can affirmatively state, however, that the previous 3% penalty level did act as a meaningful deterrent towards bid withdrawal or default. This would appear to be confirmed by the fact that relatively few default penalties were assessed and paid following Auction No. 58.³⁴

Further, given the sheer number of licenses and the complexity of an SMR auction with so much spectrum, there is a very real possibility that an error could occur during the AWS

³² *Notice* at p. 15.

³³ *Notice* at pp. 18-19.

³⁴ See *Public Notice*, DA-05-459, released February 18, 2005, Attachment C (reflecting only 8 withdrawal payments).

auction which would justify a bidder withdrawing a bid. The Commission's stated goal in establishing a withdrawal penalty was to ensure that bidders were not gaming the system – not to punish bidders who might otherwise make an honest mistake or who may as a result of the complexity of the auction be a high bidder on spectrum that they ultimately do not want.³⁵ A 3% penalty is sufficient to deter gaming without unduly punishing mistakes.

The public policy reasons for raising the interim withdrawal penalty also are not present. In the *Notice*, the Commission explained that it may impose a higher interim withdrawal payment percentage when, for example, “few licenses are offered that are not on adjacent frequencies or in adjacent areas”.³⁶ That is clearly not the case with AWS. The Commission is auctioning 90 MHz of spectrum nationwide and the licenses are both on adjacent frequencies and in adjacent areas. In addition, the Commission should not place the same penalty on a bidder who during the auction withdraws a bid since the delay in getting the license into the market would be markedly different than after the auction closes. Indeed, the Commission should want to encourage bidders to withdraw during the auction rather than buy spectrum they do not ultimately want – and have to engage in a private market transaction to sell the spectrum to someone who values it more or default.³⁷ In the view of MetroPCS, there is no compelling reason for a change.

³⁵ *Notice* at p. 21.

³⁶ *Id.*

³⁷ This is another area where smaller bidders and new entrants will be disproportionately impacted. Larger bidders will more likely be able to absorb mistakes and withdrawal penalties than smaller bidders and new entrants who may have had to finance their participation in the auction.

If the Commission decides to revisit its penalty levels, MetroPCS submits that changing the interim bid withdrawal penalty is less important than increasing the default penalty. Obviously, a post-auction default is much more disruptive of the auction process than a interim bid withdrawal in which bidders still have an opportunity to bid upon the defaulted license. If an increase in the penalty is considered, MetroPCS respectfully suggests that it only be applied in the post auction default context. Even in this circumstance, since the Commission has offered no justification for the dramatic increase from 3% to 10%, a smaller increase (e.g., to 5% rather than 10%) would be more understandable.

VI. CONCLUSION

In light of the foregoing, MetroPCS respectfully requests that the Bureau adopt auction procedures in conformance with these Comments.

Respectfully submitted,

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