

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

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

COMMENTS OF T-MOBILE USA, INC.

Sara F. Leibman
Robert G. Kidwell
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Of Counsel

Thomas J. Sugrue
Vice President, Government Affairs
Kathleen O'Brien Ham
Managing Director,
Federal Regulatory Affairs
Patrick T. Welsh
Corporate Counsel,
Federal Regulatory Affairs

T-MOBILE USA, INC.
401 Ninth Street, N.W.
Suite 550
Washington, D.C. 20004
(202) 654-5900

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T-Mobile USA, Inc. (T-Mobile) hereby submits its comments on the Commission’s Further Notice of Proposed Rulemaking, issued February 3, 2006, in the above-captioned proceeding.^{1/} As discussed below, T-Mobile does not believe that the changes proposed to the DE rules are either warranted or wise. Whether or not the Commission decides to adopt some or all of the proposed revisions, however, T-Mobile urges it to reach a decision promptly, so as not to delay, under any circumstances, the upcoming Advanced Wireless Services (AWS-1) auction.

INTRODUCTION AND SUMMARY

Of paramount importance to T-Mobile is that the Commission’s consideration of the issues raised in this proceeding not be allowed to derail the AWS-1 auction, currently scheduled for June 29, 2006 (“Auction 66”). As the Commission is well aware, recent mergers and acquisitions have resulted in much of the currently available spectrum becoming consolidated with a few large wireless carriers. T-Mobile is not one of those

^{1/} *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Further Notice of Proposed Rulemaking, FCC 06-8 (rel. Feb. 3, 2006) (“*DE FNPRM*”).

carriers and, as it emphasized in its recent comments on the *Auction 66 PN*,^{2/} the substantial spectrum advantage enjoyed by its three largest competitors underscores the need to put valuable AWS licenses into the hands of smaller nationwide, regional, and rural providers as soon as possible to promote continued competition and product choice in the marketplace for advanced services.^{3/} It would be ironic indeed if the proposals advanced by Council Tree Communications, Inc. (“Council Tree”), which ostensibly are designed to increase competition in the wireless services market, were to handicap -- by delaying the introduction of essential spectrum resources -- the entities best poised to deliver that competition.

Not only is T-Mobile concerned that adoption of the proposed designated entity (“DE”) rule revisions could engender requests for postponement of Auction 66, it disputes Council Tree’s contention that there is a need for such changes to the currently comprehensive DE program. Although the Commission mentions protecting the integrity of the competitive bidding process as a basis for engaging in DE rule reform, the recommended amendments appear to be designed to address spectrum concentration among certain wireless carriers, as opposed to alleged abuse of the DE policies, by these carriers. The growing disparity in spectrum holdings may well be a cause for concern, but attempting to cure it through alterations to unrelated DE rules instead of in individual merger proceedings or other rulemakings would actually exacerbate the problem by limiting DEs’ access to capital and operational knowledge. At the same time, the

^{2/} Public Notice, *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, DA 06-238 (rel. Jan. 31, 2006) (“*Auction 66 PN*”).

^{3/} See T-Mobile Comments on *Auction 66 PN* at 2-3.

proposed rules are woefully under-inclusive because they do nothing to address possible abuses of the DE program by non-carriers.

It is critical that the Commission stay the course with regard to the timing of Auction 66. Although revision of the existing DE program is neither prudent nor necessary, if the Commission decides to adopt some or all of the proposals in the *DE FNPRM*, T-Mobile urges it to complete the proceeding and give auction participants notice of the changes at the earliest possible date.

DISCUSSION

I. CONSIDERATION OF DE REFORM PROPOSALS SHOULD NOT BE PERMITTED TO DELAY AUCTION 66

T-Mobile sincerely appreciates the Commission's pledge to complete its reexamination of the DE rules in advance of Auction 66 without delaying the auction.^{4/} While T-Mobile recognizes that meeting the compressed pleading, review, and drafting schedule will be challenging for all parties -- especially Commission staff -- it cannot emphasize enough how important it is for competition and consumers to keep the auction on track. The AWS licenses are the most desirable and readily usable frequencies that have been made available for wireless broadband services since 1997 -- they encompass a full 90 megahertz of spectrum and cover the entire United States. T-Mobile and many other parties plan to compete vigorously for these licenses.

^{4/} *DE FNPRM* ¶ 1 (“We intend to complete this proceeding in time so that any modifications to our rules resulting from this proceeding will apply to the upcoming auction of licenses for Advanced Wireless Services (“AWS”). . . .”); *see id.*, Separate Statements of Commissioners Copps (“I said before that I am committed to sticking to our schedule for the AWS auction.”) and Adelstein (“I have repeatedly stated my commitment to try to avoid unnecessary delays to the AWS auction.”).

T-Mobile is an independent Commercial Mobile Radio Service (“CMRS”) provider and the smallest of four nationwide wireless carriers.^{5/} Through its subsidiaries and affiliates, T-Mobile constructs and operates broadband Personal Communications Services (“PCS”) systems throughout the country. Because of recent mergers and acquisitions in the wireless industry, much of the spectrum now available has become concentrated in the hands of T-Mobile’s larger competitors.^{6/} Although T-Mobile’s growth and sustained ability to attract and retain customers has been remarkable, its continued success will depend upon access to sufficient spectrum to meet consumer demands for an increasing range of affordable and advanced wireless services. T-Mobile, along with other independent wireless carriers, has an immediate need for the licenses that will be offered in Auction 66.

The United States Congress, the President, the Commission, and the Department of Commerce have all been working diligently to ensure a June 2006 auction. On December 23, 2004, Congress passed, and the President signed into law, the Commercial Spectrum Enhancement Act (“CSEA”), which set up a trust fund for relocation of government incumbents and provided for an auction of AWS spectrum within 18 months of the Commission’s notice to the National Telecommunications and Information

^{5/} T-Mobile holds licenses covering more than 275 million people in 46 of the top 50 U.S. markets and currently serves more than 21.7 million customers. Via its HotSpot service, T-Mobile also provides Wi-Fi (802.11b) wireless broadband Internet access in more than 6,700 convenient public locations, such as Starbucks coffee houses, airports, and airline clubs, making it the largest carrier-owned Wi-Fi network in the world.

^{6/} Publicly available data show the following top 50 BTA-weighted spectrum positions: Cingular, 58 MHz; Sprint, 50 MHz (excludes Nextel’s 800 and 900 MHz spectrum but includes the 10 MHz G block); Verizon, 42 MHz; and T-Mobile, 25 MHz. *See* Exane BNP Paribas, Deutsche Telekom Equity Research Report, at 17 (Dec. 8, 2005).

Administration (“NTIA”).^{7/} A week later, the Commission provided the requisite notice to NTIA, stating that it would be holding the AWS auction in June 2006. On August 5, 2004, after receiving and reviewing proposals and comments on proposals from carriers, manufacturers and numerous other interested parties, the Commission issued a new pro-competitive band plan for the AWS spectrum.^{8/} NTIA timely delivered its relocation report, with estimated costs and schedules on December 27, 2005 -- allowing the auction to commence six months later.^{9/} On January 24, 2006, the Commission issued an Order implementing the CSEA.^{10/} Having raised congressional and industry expectations that the AWS-1 auction will commence on June 29, 2006, it is incumbent upon the Commission to do everything within its power to keep the ball rolling.

To the extent the Commission decides to amend its DE rules, it should stick by its commitment to do so expeditiously without disrupting the auction schedule. While it is unfortunate that Council Tree’s misguided proposals are being considered at this late date, the Commission’s most important public interest goal should be to ensure that essential spectrum resources are introduced into the marketplace with all due haste.

^{7/} Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004) (codified in various sections of Title 47 of the United States Code).

^{8/} *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Order on Reconsideration, 20 FCC Rcd 14058 (2005) (“*AWS-1 Service Rules Reconsideration Order*”).

^{9/} See NTIA Website: <http://www.ntia.doc.gov/osmhome/reports/specrelo/index.htm>. The Department noted that “[t]he total number of frequency assignments that will be relocated by 12 federal agencies is 2,240 and the cost for the relocation of Federal Government operations is estimated to be \$935,940,312.”

^{10/} *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Report and Order, FCC 06-4 (rel. Jan. 24, 2006) (“*CSEA Order*”).

II. THE PROPOSED REVISIONS TO THE COMPREHENSIVE DE PROGRAM ARE UNWARRANTED

Instead of promoting competition in the wireless services market, the proposed changes to the Commission's DE rules would impede the progress of the entities best positioned to offer that competition. Although the Commission ostensibly is seeking through this proceeding to ensure that "its small business provisions [are] available only to bona fide small businesses," it has proposed to deny bidding credits only to a very small category of potential designated entities -- those in which "large, in-region, incumbent wireless service providers" are passive investors. The Commission cites no evidence to demonstrate -- indeed, it makes no allegations -- that such wireless carriers have attempted to circumvent the letter or spirit of the Commission's DE rules or have otherwise been responsible for "undermining" the program.

Instead, the Commission bases its proposed restriction on an unsupported claim from a single party, Council Tree, that "if the Commission does not limit the availability of bidding credits and other designated entity benefits in such instances, spectrum rights will be concentrated in the hands of large, incumbent wireless service providers."^{11/} Although Council Tree may be correct that recent mergers have allowed certain carriers to amass significant amounts of spectrum, efforts to address spectrum consolidation through adjustments to regulations involving DE benefits are ill-advised for a number of reasons.

First, the proposed rule revisions are misguided because they are not based on any documented abuse of the Commission's DE rules. While Council Tree points to a December 2005 *Wall Street Journal* article that discusses pending litigation involving

^{11/} *DE FNPRM* ¶ 8.

firms backed by mutual fund-manager Mario Gabelli as proof of the need for DE reform, a limitation on wireless company investment will have no impact on the type of DE arrangement raised in the article.^{12/} Mr. Gabelli is not a wireless operator, nor is he even an “entity with significant interests in communications services” (an expanded category of companies for which the *DE FNPRM* recommends restrictions on DE participation). If the Commission’s purpose in this proceeding is to “ensure that bidding credits and other benefits are awarded to the appropriate entities,”^{13/} then the Gabelli example suggests that an approach involving enhanced scrutiny of DE applicants and enforcement of existing DE rules would be warranted.

The Commission acknowledges that its rules currently incorporate a “strict eligibility standard that [is] focused on whether the applicant maintained control of the corporate entity.”^{14/} Building on this existing standard, Cook Inlet Region, Inc. (“Cook Inlet”) proposes that the Commission establish a minimum equity investment to be made by the controlling DE.^{15/} Cook Inlet has successfully partnered with T-Mobile in competitive bidding and service provision for more than a decade and, in Auction 58, it contributed \$80 million of its own cash to the DE applicant.^{16/} T-Mobile agrees that

^{12/} See Letter from George T. Laub, Council Tree, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 02-353, 04-356, Attachment at 3 (filed Jan. 13, 2006) (referring to John R. Wilke, *In FCC Auctions of Airwaves, Gabelli Was Behind the Scenes*, WALL ST. J., Dec. 27, 2005, at A1).

^{13/} *DE FNPRM* ¶ 7.

^{14/} *DE FNPRM* ¶ 6.

^{15/} See Letter from Christine Enemark, Covington & Burling, Counsel for Cook Inlet, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-211, Attachment at 4 (filed Feb. 16, 2006) (“*Cook Inlet Feb. 16, 2006 Ex Parte*”).

^{16/} *Cook Inlet Feb. 16, 2006 Ex Parte*, Attachment at 2. T-Mobile’s experience in partnering with Cook Inlet in Auction 58 demonstrates that the Commission already has instituted stringent procedures designed “to ensure that only legitimate small businesses reap the benefits of the Commission’s designated entity program.” See *DE FNPRM* ¶ 6. In Auction 58, the licenses

straightforward DE policy revisions, such as requiring a significant upfront investment by small business partners, as well as subjecting questionable applications to more thorough review, would be considerably more useful in deterring sham bidders than simply precluding participation in the DE program by a particular class of carrier.

Nor, if the Commission is concerned with DEs joining forces with large corporate partners, does it provide a reasoned basis for confining its proposed DE partnership restrictions to wireless carriers as opposed to much larger, multinational conglomerates that presently lack wireless divisions. There does not appear to be a justification for permitting Microsoft or Wal-Mart to participate in a DE joint venture while precluding T-Mobile from doing so. Drawing the line between these types of companies is especially arbitrary given that wireless carriers, by virtue of their status as holders of multiple licenses vulnerable to revocation, have a significant incentive to comply with the Commission's rules. Even favoring such companies as Microsoft over all "entities with significant interests in communications services" (as opposed to just wireless carriers) does not make much sense if the Commission's objective is to ensure that small business bidders are actually small businesses. DE rule reform cannot be accomplished by targeting only a handful of entities and ignoring all other potential DE investors.

Second, if spectrum concentration is the true spotlight of the Commission's inquiry in this proceeding, then it is not clear why the Commission would adopt Council Tree's "wireless gross revenues" criterion as a means to distinguish between appropriate

won by Cook Inlet/VS GSM VII PCS, LLC ("CIVS VII") were granted three and a half months after the long form application was filed, but the grant was conditioned on the submission to and approval by the Commission of any operating agreements between T-Mobile and the designated entity. That approval was not given until nearly six months later, after multiple meetings between CIVS VII and Wireless Telecommunications Bureau staff, and after the licensee made a number of Bureau-suggested revisions to the operating agreements.

and inappropriate DE partners. Although T-Mobile, as a growing nationwide carrier, plainly has revenues that meet Council Tree's recommended \$5 billion threshold, that threshold has no relevance when comparing T-Mobile's spectrum holdings to those of its competitors on a market-by-market basis. It certainly does not take into account the relative spectrum positions of the five carriers that would be subject to the rule. Nor does it recognize that some regional carriers are significant competitors to T-Mobile, with more spectrum and greater market share in a number of areas. Indeed, Council Tree's suggested \$5 billion revenues standard does not appear to be based on any principle other than a desire to disqualify DEs that partner with the five largest U.S. wireless carriers, while allowing Council Tree to continue to partner with Leap Wireless as it did in Auction 58. Arbitrary line-drawing of this sort cannot be deemed reasoned or rational decision-making.

Finally, the proposed rule revisions will undermine Congress's directive that the Commission prescribe regulations that "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."^{17/} From the inception of the DE program, the Commission has recognized that small businesses lack the ability to bid for and win spectrum, much less construct wireless networks, absent significant financial and operational support from established companies. T-Mobile wholeheartedly agrees with Cook Inlet that "[t]he Commission's DE policies have

^{17/} 47 U.S.C. § 309(j)(4)(D).

resulted in unquestionable public interest benefits, and its rules have made it possible for numerous DEs to participate in auctions that otherwise would have been out of reach.”^{18/}

Over the past ten years, T-Mobile and Cook Inlet have forged a strong relationship that not only is mutually beneficial to both companies and their customers, but directly advances Congress’s goal of “promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”^{19/} A Commission decision to ban this partnership from participating as a DE in future auctions should be based on concrete evidence of harm -- which does not exist -- instead of the hyperbolic and self-interested claims of a wireless competitor.

In the *DE FNPRM*, the Commission acknowledges that it “must strike a delicate balance between encouraging the participation of small businesses in the provision of spectrum based services, and ensuring that those small businesses who do participate in competitive bidding have sufficient capital and flexibility to structure their businesses to be able to compete at auction, fulfill their payment obligations, and ultimately provide service to the public.”^{20/} As Cook Inlet explains, adoption of the *DE FNPRM*’s proposals would needlessly tip this balance away from legitimate small bidders: “Eliminating participation by large wireless carriers will severely restrict access to capital for

^{18/} Letter from Kurt Wimmer and Christine Enemark, Covington & Burling, Counsel for Cook Inlet, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 02-353, at 1 (filed July 28, 2005).

^{19/} 47 U.S.C. § 309(j)(3)(B).

^{20/} *DE FNPRM* ¶ 7.

designated entities who are trying to succeed in a competitive, capital-intensive industry, reducing overall participation in the program.”^{21/}

Partially at the urging of T-Mobile and the Rural Telecommunications Group (“RTG”), the band plan adopted by the Commission for the AWS-1 auction includes a variety of license sizes that vary in geography and bandwidth.^{22/} As the Commission explained, the revised AWS allocation scheme “will foster service to rural areas and tribal lands and thereby bring the benefits of advanced services to these areas,” as well as “enable a wide variety of carriers -- including not only incumbent PCS and cellular providers but also new entrants and smaller, rural wireless providers -- to acquire smaller spectrum blocks to deploy advanced services effectively, increase their footprint, and improve service quality.”^{23/} In contrast to Council Tree’s proposal to deal with spectrum inequality through clumsy restrictions on wireless carrier investment -- measures that undoubtedly will have adverse consequences for small bidders -- the AWS-1 band plan, combined with tiered bidding credits for DEs, offers the best opportunity for entities of all sizes to participate in the auction and provide spectrum-based services to the public.^{24/}

In sum, T-Mobile believes this is the wrong proceeding to address spectrum consolidation by certain wireless carriers. The Commission has approved multiple mergers and acquisitions in the past several years without significant divestiture

^{21/} *Cook Inlet Feb. 16, 2006 Ex Parte*, Attachment at 7.

^{22/} *AWS-1 Service Rules Reconsideration Order* ¶¶ 10-21; *see also* Letter from Thomas J. Sugrue, T-Mobile, and Caressa D. Bennet, RTG, to Marlene H. Dortch, FCC, WT Docket No. 02-353 (Mar. 11, 2005).

^{23/} *AWS-1 Service Rules Reconsideration Order* ¶¶ 14, 17.

^{24/} *See AWS-1 Service Rules Reconsideration Order* ¶ 35 (finding that “two small business size standards and corresponding tiers of bidding credits . . . are appropriate and offer sufficient incentives for smaller businesses to compete effectively”).

requirements, and it eliminated the CMRS spectrum aggregation limit in 2001 based on “the strong growth of competition in CMRS markets since the initiation of the spectrum cap.”^{25/} If the Commission now has concluded that those decisions have resulted in too great a level of spectrum consolidation in the industry, then it should address that issue directly. Singling out five wireless carriers for disparate treatment in connection with DE investment, however, would merely serve to cut off small businesses from the sources of capital and operational expertise they need to compete successfully at auction and in the marketplace.

^{25/} *2000 Biennial Regulatory Review; Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668, ¶ 6 (2001).

CONCLUSION

As the foregoing demonstrates, there is no reasonable basis to adopt the rule revisions proposed in the *DE FNPRM*. If the Commission nonetheless determines that some or all of the proposed changes are warranted, however, T-Mobile urges it to complete the proceeding as expeditiously as possible, keeping Auction 66 on target for June 29, 2006.

Respectfully submitted,

T-MOBILE USA, INC.

Sara F. Leibman
Robert G. Kidwell
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Of Counsel

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/s/
Thomas J. Sugrue
Vice President, Government Affairs
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Federal Regulatory Affairs
Patrick T. Welsh
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