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Docket #05-211

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

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

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION PETITION FOR RECONSIDERATION

Pursuant to 47 C.F.R. §1.429, the National Telecommunications Cooperative Association (NTCA)[1] hereby petitions the Federal Communications Commission (FCC or Commission) to reconsider a portion of its Report and Order[2] in the above captioned proceeding dealing with the consortium exception for designated entities and entrepreneurs bidding for spectrum at the FCC's spectrum auctions.[3] NTCA requests that the Commission reconsider its rule that requires a consortium comprised exclusively of eligible small businesses, such as rural telephone companies, to aggregate their gross revenues in order to determine whether the consortium meets the financial caps to become eligible for small business bidding credits. NTCA specifically recommends that the Commission amend its rules so that a consortium made up of small businesses would be eligible for bidding credits, if each member of the consortium individually meets the financial caps for small business bidding credits (or broadband PCS entrepreneur

[1] NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 567 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, CATV, IPTV, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.
[2] In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Report and Order, WT Docket No. 05-211, FCC 06-4 (rel. January 24, 2006). (Order).
[3] Order, ¶¶ 47-52; pp. 26-28.

status), regardless of whether the aggregate gross revenues (or total assets) of all consortium members would exceed the financial caps for small business bidding credits eligibility. This will facilitate the deployment of wireless service to consumers in high-cost rural areas and further Congress's goal of ensuring that rural telephone companies have access to spectrum and the opportunity to participate in the provision of spectrum-based services.

I. INTRODUCTION

On January 24, 2006, the Commission released its order revising its consortium exception for designated entities and entrepreneurs. Under the previous consortium exception, when an applicant or licensee is a consortium comprised exclusively of members eligible for small business bidding credits or broadband PCS entrepreneur status, or both, the gross revenues (and, when determining broadband PCS entrepreneur eligibility, the total assets) of the consortium members are not aggregated.[4] Therefore, so long as each member of a consortium individually meets the financial caps for small business bidding credits (or broadband PCS entrepreneur status), the consortium will be eligible for such credits (or for closed bidding in auctions of broadband PCS licenses), regardless of whether the gross revenues (or total assets) of all consortium members would, if aggregated, exceed the caps. The consortium exception, originally adopted on a service-by-service basis where capital costs of auction participation were expected to be high, was intended to enable small businesses or entrepreneurs to pool their resources to help them overcome challenges raising capital for the Commission's spectrum auctions.[5]

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[4] 47 C.F.R. § 1.2110(b)(3)(i) revised as of October 1, 2004 (previous consortium exception rule).

[5] *See, e.g.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7276-78 ¶¶ 81-85 (1994); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5591 ¶ 133, 5601 ¶ 158, ¶ 179 (1994).

In its most recent order, the Commission adopted the following modifications to the bidding credit consortium exception for designated entities and entrepreneurs:

1. Require consortium members to file individual long-form applications for their respective, mutually agreed-upon license(s), following an auction in which the consortium has won one or more licenses.[6]
2. In order for two or more consortium members to be licensed together for the same license(s) (or disaggregated or partitioned portions thereof), members are required to form a legal business entity, such as a corporation, partnership, or limited liability company.
3. Require any such entity to comply with the applicable small business or entrepreneur financial limits.[7]

Since the order, it has come to NTCA's attention that these modifications would effectively prohibit many rural telephone companies from forming new consortiums and pooling their resources so that they may use their combined bidding credits to overcome capital formation difficulties and enhance their ability to compete for available spectrum at auction. The new consortium exception will force many rural telephone companies that have formed a bidding consortium or are considering forming a bidding consortium to choose between two options that will be detrimental to rural communities and rural consumers:

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[6] The dissolution of a consortium that applied to participate in an auction into its constituent members or groups of members for purposes of filing long-form applications will not constitute a "change in control" of the applicant for purposes of sections 1.927, 1.929, or 1.2105 of the Commission's rules. *See* 47 C.F.R. §§ 1.927, 1.929, 1.2105. Because the Commission's application system requires that all long-form license applications for licenses won in an auction use the same FCC Registration Number ("FRN") as the auction applicant/winning bidder, the members filing separate long-form applications will continue to use the consortium's FRN on their long-form applications. However, within ten business days after release of the public notice announcing grant of a long-form application, that licensee must update its filings in the Commission's Universal Licensing System ("ULS") to substitute its individual FRN for that of the consortium. In addition, ULS accepts applications only for whole licenses won in an auction. Accordingly, if a consortium plans to partition or disaggregate a license among members after the auction, one member of the consortium will have to file the applicable long-form application and append the relevant partitioning or disaggregation agreement to the application. After the long-form application has been granted, members will have to file assignment applications to partition or disaggregate the license pursuant to the terms of the agreement attached to the original license application. Order, ¶ 51, p. 28, footnote 93. 47 C.F.R. §§ 1.948(e)-(f) and 1.2107(d).

[7] A newly formed legal entity comprising two or more consortium members that does not qualify for as large a size-based bidding credit as that claimed by the consortium on its short-form application will be awarded a bidding credit, if at all, based on the entity's eligibility for such credit at the long-form filing deadline. A license won by the consortium in broadband PCS closed bidding will be granted only to a legal entity whose gross revenues and total assets do not, at the long-form filing deadline, exceed the financial limits for broadband PCS closed bidding. Order, ¶ 51, p. 28, footnote 94. 47 C.F.R. §§ 1.2110 and 24.709.

A. Require each individual consortium member to give up their bidding credits at auction, if: (1) the aggregate gross revenues (or total assets) of all consortium members would exceed the financial caps for small business bidding credits eligibility; and (2) the consortium provides wireless services as a single entity post auction; or

B. Disband the consortium post auction and forgo any cost savings and operational synergies that would have been available to the consortium members through the consortium providing wireless services as a single entity post auction, if the consortium: (1) wins spectrum at auction; and (2) seeks to use its bidding credits to purchase the spectrum.

Option A will reduce a consortium's potential highest bid at auction by subtracting its bidding credits and thus making the small business consortium less likely to win spectrum at auction against other regional and national wireless providers bidding for the same spectrum. Option B will prevent many rural telephone companies from taking advantage of operational cost savings and other synergies as a post auction consortium/partnership/corporation operating as a single entity offering wireless service to rural consumers in high-cost areas of the United States. The new consortium exception is a *Catch 22,* which discourages the formation of new small business consortiums, if the aggregate revenues of all consortium members would exceed the financial caps for bidding credit eligibility, and discourages small businesses from taking advantage of operational cost savings and synergies as a post auction consortium/partnership/ corporation operating as a single entity, if the consortium members want to use their bidding credits to keep spectrum won at auction. The consortium exception has, in effect, made it much more difficult for rural telephone companies to pool their financial resources to raise the necessary capital to more effectively compete against regional and national wireless providers at auction and to compete against these same providers post auction.[8]

[8] Although the consortium has been seldom used it has been used by NTCA members in the past. Order, p. 27. The recent changes to the consortium exception will make it less of a viable option for small rural communications services providers in the future.

II. THE COMMISSION SHOULD RECONSIDER AND AMEND ITS CONSORTIUM EXCEPTION FOR DESIGNATED ENTITIES AND ENTREPRENEURS BASED ON FACTS NOT PREVIOUSLY AVAILABLE AND BASED ON THE PUBLIC INTEREST

The Commission has the authority to grant a petition for reconsideration "which relies on facts which have not previously been presented to the Commission" if it is in the public interest to do so. 47 C.F.R. § 1.429(b), (i). In late fall of 2005, NTCA surveyed its members on their activities in the areas of providing wireless services to their customers. The results of NTCA's 2005 wireless survey, however, were not available during the comment cycle in this proceeding.[9] The survey was sent to more than 560 local exchange carriers that provide telecommunications service(s) in 44 states, primarily in rural areas. Approximately 300 of NTCA's member companies offer some type of wireless service.[10] All NTCA members are small carriers that are "rural telephone companies" as defined in the Act.[11] While some offer local exchange service to as few as 44 lines and a small handful to 50,000 or more, nearly fifty percent (50%) of NTCA members serve between 1,000 and 5,000 lines.[12] Population density in most member service areas is in the 1 to 5 customers per square mile range.[13]

Fifty-seven (57%) percent of survey respondents indicated that they currently hold at least one wireless license. Forty-seven (47%) percent of those who hold a license have a 700 MHz license, 37% PCS license, 22% LMDS license, 18% paging license, and 17% cellular license. Sixty-two percent (62%) of survey respondents are currently providing wireless services to their rural communities.[14] Of those providing wireless service, fifty-six percent (56%) offer

[9] NTCA 2005 Wireless Survey Report (Attachment A). The results of the survey became available on January 24, 2006.
[10] NTCA 2005-2006 Membership Directory and Yellow Pages, p. 28, Telephone Company Member Profiles.
[11] 47 U.S.C. §153(37).
[12] NTCA 2005 Wireless Survey Report, Attachment A, p. 5.
[13] *Id.*
[14] Includes respondents utilizing unlicensed spectrum to provide wireless service.

broadband,[15] 46% mobile voice, 27% paging, and 17% data.[16] Survey respondents indicated that they have invested considerable resources in wireless under the FCC previous wireless spectrum auction rules. The average total (cumulative) investment in wireless facilities, excluding spectrum, was $2.6 million, ranging from a high of $20 million to a low of $5,000.[17] Average total (cumulative) investment in spectrum totaled $270,000.[18] Survey respondents invested an average of $1.2 million in wireless facilities in the twelve-month period prior to the survey.[19]

Most pertinent to this proceeding are NTCA member answers to the survey questions concerning the main impediments to their providing wireless service. Twenty-seven percent (27%) of respondents cited they are concerned about their ability to obtain spectrum at auction. Twenty-six (26%) stated that they are concerned about their ability to make necessary investments in the future.[20] Obtaining financing for wireless projects poses a significant challenge for survey respondents. Of those with experience in obtaining financing, thirty-four percent (34%) of the survey respondents categorized the experience as "somewhat difficult," 14% categorized the experience as "very difficult," and an additional 14% of the respondents categorized the experience as "virtually impossible."[21] In sum, sixty-two percent (62%) of the survey respondents find it difficult to obtain financing for wireless projects. The new consortium exception now makes future spectrum financing even more difficult because rural telephone companies with individual bidding credits cannot pool their resources and enhance the value of their bidding credits through the use of the consortium exception, if their aggregate gross

[15] For the purposes of this survey, broadband is defined to be data transmission speeds of at least 200 kilobits per second in one direction.
[16] NTCA 2005 Wireless Survey Report, Attachment A, p. 7.
[17] *Id.*, p. 8.
[18] *Id.*
[19] *Id.*
[20] *Id.*, p 8.
[21] *Id.*, p 9.

revenues (or total assets) of all consortium members would exceed the financial caps for small business bidding credits eligibility.

The Commission correctly recognizes that participating in the provision of spectrum-based services is capital intensive.[22] In many instances, the only way for small carriers to compete with large carriers for spectrum at auction is to pool their resources so they can place higher bids at auction. Similarly, these same small carriers may need to pool their resources post auction to take advantage of their combined resources and cost savings to provide a viable wireless service in unserved/underserved areas and provide competitive wireless service in served areas. Efficiencies of scale and competitiveness are needed during the bidding process and during post auction operation of small rural wireless systems. It is extremely expensive and difficult to serve the vast sparsely populated areas in rural America beyond the major highways and town centers. The build-out of a wireless system in rural communities costs more and the returns on investment are far less than compared to wireless systems serving urban, metropolitan and suburban communities. Rural communities benefit from the efficiencies gained by rural carriers pooling their resources to provide ubiquitous service in communities not served by regional and national wireless carriers. Rural telephone company consortiums provide needed capital at auction and needed manpower and equipment post auction. The pooling of rural telephone company resources in no way turns small carriers into large carriers, and small business consortiums do not make up for the disparate resources of small carriers as compared to vast financial resources available to regional and national wireless carriers.

[22] Order, ¶ 47.

The Commission stated that it believed the modifications to the consortium exception will provide greater transparency, thereby promoting clearer planning by smaller entities[23] and recognized that the consortium exception is intended to enable small businesses or entrepreneurs to pool their resources to help them overcome the challenge of capital formation.[24] Although the intent of the rule change is to promote use of the consortium exception, the effect will be to actually reduce the use of the exception. Small businesses are less likely to join forces for purposes of the auction, now that they must either operate alone post auction or give up their bidding credits at auction.

It is in the public interest for the Commission to amend its consortium rule to allow small businesses to keep their bidding credits as a consortium, if each member of the consortium individually meets the financial caps for small business bidding credits (or broadband PCS entrepreneur status), regardless of whether the aggregate gross revenues (or total assets) of all consortium members would exceed the financial caps for small business credits eligibility.[25] The Commission has an obligation under Section 309(j) of the Act to ensure that designated entities, including rural telephone companies, have access to spectrum and the opportunity to participate in the provision of spectrum-based services. The public interest warrants that these small companies remain designated entities even if they pool their resources before, during and after a spectrum auction. Rural telephone companies do not intend, nor are they able, to become dominant players in the nationwide wireless arena. In this day of communications industry

[23] Order, ¶ 52.
[24] Order, ¶ 47.
[25] 47 C.F.R. §1.429, states that the Commission will grant a petition for reconsideration if one of the following circumstances exists: (1) The facts relied on are related to the events which have occurred or circumstances have changed since the last opportunity to present them to the Commission; (2) The facts relied on were unknown to the petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) The Commission determines that consideration of the facts relied on is required in the public interest.

consolidation, unless the Commission intends for there to be just a few nationwide wireless providers serving urban, metropolitan and suburban areas within the United States, the Commission should do all that it can to ensure that rural telephone companies and other small wireless providers have the ability to use their bidding credits as a consortium at auction and operate as a consortium post auction to service the unserved and underserved areas in rural America.

III. CONCLUSION

For the foregoing reasons, the Commission should reconsider and amend its rule for the consortium exception for designated entities and entrepreneurs. Specifically, the Commission should delete the Commission's existing 47 C.F.R. § 1.2110(b)(3)(i) and replace this section with its previous language, which stated the following:

> *Exceptions.* (i) *Consortium.* Where the applicant (or licensee) is a consortium of small businesses, very small businesses, or entrepreneurs, as those terms are defined in the service specific rules, the gross revenues of each consortium members shall not be aggregated. Each consortium member must constitute a separate and distinct legal entity to qualify.

In addition, the Commission should delete its new 47 C.F.R. § 1.2107(g)(1) - 47 C.F.R. § 1.2107(g)(3).

These changes to the Commission's rules will allow newly formed small business bidding consortium entities to comply with the small business financial limits. They will also facilitate the deployment of wireless service to consumers in high-cost rural areas and further

Congress's goal of ensuring that rural telephone companies have access to spectrum and the opportunity to participate in the provision of spectrum-based services.

Respectfully submitted,

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March 9, 2006

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Petition for Reconsideration of the National Telecommunications Cooperative Association in WT Docket No. 05-211, FCC 06-4 was served on this 9th day of March 2006 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons.

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