Before the
Federal Communications Commission
Washington, D.C. 20554

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

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION

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SUMMARY

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its rural telephone clients (the "Blooston Rural Carriers") and pursuant to Section 1.429 of the Commission's Rules, hereby requests partial reconsideration and/or clarification of the *Second Report and Order and Second Further Notice of Proposed Rule Making* in the above-captioned proceeding.

The Blooston Rural Carriers urge the Commission to rescind or significantly modify its revised unjust enrichment rule, and the newly-adopted "material relationship" restrictions. These rules will prevent legitimate small businesses and rural telephone companies from obtaining bid credits in future auctions, and will work an unjust hardship on designated entities that entered into lease and resale arrangements in the past that they cannot now terminate. The new rules are also vague and overly broad.

The Commission should also eliminate the annual reporting requirement for designated entities, since the information sought by the annual report is already being provided to the Commission in other required filings.

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The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its rural telephone carrier clients (the "Blooston Rural Carriers") and pursuant to Section 1.429 of the Commission's Rules, hereby requests partial reconsideration and/or clarification of the *Second Report and Order and Second Further Notice of Proposed Rule Making* in the above-captioned proceeding, regarding the rules governing the award of bidding credits in spectrum auctions.[1] In general, the Blooston Rural Carriers applaud the Commission's decision to better ensure that small business bidding credits are available only to *bona fide* small businesses and rural telephone companies. Bidding credits can be a valuable tool for small and/or rural carriers that might otherwise have difficulty gaining access to spectrum in areas where they are best suited to provide service. However, there are certain aspects of the new bid credit rules that may create unnecessary obstacles to rural telephone participation in spectrum auctions, contrary to the mandate of Section 309(j) of the Communications Act of 1934, as amended (the Act).

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[1] *See* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Second Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 05-211, FCC 06-52 (*rel.* April 25, 2006) ("*Second R&O*").

Moreover, certain aspects of the rule changes render the FCC's spectrum lease mechanism virtually unavailable to small businesses and rural telephone companies. Finally, many aspects of the revised rules are ambiguous, making compliance difficult at best.

Statement of Interest

The Commission can take official notice that Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP represents a large number of rural telephone companies that are engaged in the provision of wireless services in less populated areas of the country. Each has a significant interest in the outcome of this proceeding, because each has an interest in seeing that the FCC adopts policies and rules that ensure meaningful rural telephone company and small business participation in both spectrum auctions and the secondary spectrum market, and that encourage the rapid deployment of advanced telecommunications services in rural America.[2]

I. The Commission Should Rescind or Modify the Ten Year Unjust Enrichment Period.

In the *Second R&O,* the Commission extended the unjust enrichment period for repayment of bidding credits from five years to ten years, and eliminated the gradual reduction of the unjust enrichment penalty in those instances in which the licensee has not yet met its build out requirement. It is respectfully submitted that this rule change should be rescinded, or modified as discussed below. First, the industry was not given adequate notice of the specifics of this change. While the *Further Notice of Proposed*

[2] The Blooston Law Firm filed comments and reply comments on behalf of a group of its rural carrier clients in WT Docket No. 00-230, which established the spectrum leasing rules that are significantly affected by the Commission's *Second R&O* in the captioned proceeding. *See* Comments of the Blooston Law Firm, *filed* February 9, 2001; Reply Comments of the Blooston Law Firm, *filed* March 12, 2001. The Blooston Law Firm also filed comments to the Commission's *Further Notice* in WT Docket No. 00-230. *See* Comments of the Blooston Law Firm, *filed* December 5, 2003.

Rule Making issued in this proceeding[3] mentioned a revisiting of the unjust enrichment rule, it did not adequately describe the scope of the rule changes the Commission ultimately adopted, and indeed was silent on the special provision regarding unconstructed licenses. Moreover, the public was never provided with proposed wording for the new rule.

More importantly, the rule change is actually harmful to small businesses and rural telephone companies in its present form. The extension of the unjust enrichment period to ten years will upset the expectations that have formed the basis of legitimate agreements for the upcoming AWS auction, and past auctions as well. Existing licensees have entered into financing and other arrangements in reliance on the original five year period. The benefits to be gained by the new rule are unclear at best, and unsupported in the record. There is no evidence of bid credit abuse by small businesses entering into transactions with other small businesses. Indeed, the tenor of the *Further Notice of Proposed Rule Making* was to prevent bid credit abuse by *large* entities. Yet the final rule does not adequately address the situations in past auctions in which giant corporations were able to garner the benefit of billions in bid credits, but instead unfairly restricts small businesses and rural telephone companies. The Commission has in essence thrown out the baby and *kept* the bath water. To remedy this problem, the Commission should either rescind the ten year rule altogether, and revert to the rule in place prior to the issuance of the *Second R&O*, or it should limit the applicability of the new rule to situations in which the relationship triggering the unjust enrichment payment involves a large entity (e.g., an entity with average gross revenues over the past three

[3] *See* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Further Notice of Proposed Rule Making*, WT

years greater than $125 million). The Commission is required to consider the impact of its actions on small businesses, pursuant to the Small Business Act,[4] and to provide designated entities with adequate time to "develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services" when implementing changes to auction procedures.[5] The ten year rule does not adequately meet these requirements. Moreover, the Commission is required to consider less restrictive alternatives when implementing such restrictions.[6] Restricting the harsher unjust enrichment penalty to situations involving large entities (i.e., those entities that would benefit most by engaging in "sham" application arrangements) is an obvious less restrictive alternative.

II. The Commission Should Rescind or Modify the "Impermissible Material Relationship" and "Attributable Material Relationship" Rules.

The *Second R&O* modified both the bid credit eligibility rule and the unjust enrichment penalty rule, to count "impermissible material relationships" and "attributable material relationships" against auction applicants and licensees. An impermissible material relationship is defined as an agreement with one or more entities for the lease or resale/wholesale of, on a cumulative basis, more than 50 percent of the spectrum capacity of any individual license. Such relationship renders an applicant ineligible to receive bid credits, and renders a licensee liable for immediate repayment of bid credits, with interest. An attributable material relationship is defined as an agreement for the lease or resale of more than 25 percent of the spectrum capacity of any individual license to a

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Docket No. 05-211, FCC 06-8, released February 3, 2006.

4 Small Business Act, 15 USC §632 (1996).

5 *See* 47 U.S.C. 309(j)(3)(E).

6 *See* Telocator Network of America v. FCC, 691 F. 2d 525, 537 (D.C. Cir. 1982).

single person or entity. This relationship will cause the lessee/reseller's revenues to be attributed to the applicant for purposes of calculating its eligibility for bid credits, and will trigger the unjust enrichment penalty against a licensee. This penalty is supposed to be applied "on a license-by-license basis".[7]

It is respectfully submitted that the "material relationship" restrictions suffer from most of the same infirmities as the expanded unjust enrichment penalty: The public was not given adequate notice of the rule change, and therefore did not have a full opportunity to sufficiently develop the record; auction applicants were not given an adequate opportunity to incorporate the new restrictions into their business plans; the new rules work an undue hardship on rural telephone companies and small businesses, without adequate justification in the record; and the material relationship restrictions have been unfairly imposed on a retroactive basis.

Indeed, the rural telephone industry filed comments in response to the *Further Notice of Proposed Rule Making*, objecting to the new restrictions, and pointing out their chilling effect on the ability of rural telephone carriers to utilize spectrum leasing and resale arrangements to enter into the kind of arrangements necessary to bring advanced wireless services to rural America. *See Second R&O* at para. 19 n. 69. However, the merits of these comments were not addressed. Instead, the Commission concluded that spectrum lease and resale arrangements "by their very nature, are generally inconsistent with an applicant's or licensee's ability to achieve or maintain designated entity eligibility because they are inconsistent with Congress's legislative intent." *Id.* at para. 23. It is respectfully submitted that this conclusion is unsupported, as there is no

[7] *See Further Notice of Proposed Rule Making* at para. *15.*

evidence in the record that the current *de facto* control standards are inadequate for policing sham relationships; and while Congress evidenced an intent that the Commission should deter abuses of the bid credit mechanism, it did not mandate a bright line decree that all spectrum leases and resale arrangements are shams in which the other party has assumed control of the applicant or licensee. The assumption that such relationships are *per se* abuses of the bid credit rules is rather startling, considering that the Commission adopted the spectrum leasing rules less than three years ago, following a lengthy rule making and development of an extensive record showing that the public interest was served by allowing rural telephone companies and small businesses to utilize spectrum leasing.

It is particularly unfair to retroactively apply the material relationship restrictions. While the Commission correctly concludes that it cannot use these new rules to rescind bid credits already awarded, it nonetheless would apply these rules to existing relationships entered into with the Commission's blessing and encouragement, so as to deprive the designated entities of future bidding credits. In essence, a rural telephone company that entered into a spectrum lease two years ago, amidst the Commission's praise of spectrum leasing as a valuable new tool furnished to rural carriers, will now be punished for being involved in the lease (since the lessee's revenues will be attributed to the rural lessor). Not only did this rural telephone carrier enter into the lease in good faith reliance on the secondary spectrum market rules, but it likely cannot get out of the lease so as to preserve its opportunity for bid credits. This carrier is now contractually bound by the lease document, and the lessee has likely expended a great deal of resources on purchasing and implementing infrastructure to provide service to the public pursuant to the terms of the lease.

In essence, the material relationship rules will rescind the spectrum leasing and resale options for small businesses and rural telephone companies. Virtually all of these entities rely on bid credits in order to obtain spectrum at auction, or to preserve bid credits when obtaining spectrum in the aftermarket. The new rules make it clear to these entities that they risk forfeiting bid credits if they enter into spectrum leases or resale arrangements. Therefore, these designated entities simply will no longer enter into such agreements in the vast majority of cases. Indeed, the Blooston Law Firm has already had to counsel a client intending to participate in an upcoming auction that it should not enter into a spectrum lease proposed by a fellow rural telephone company that wanted to use 700 MHz spectrum to provide internet access service to those counties making up its certificated rural service area. This cannot be the outcome desired by the Commission in crafting the spectrum lease and bid credit rules.

The material relationship rules are also vague and overly broad. For example, the following issues are not addressed by the wording of the new requirements:

1. Why is a spectrum manager lease attributable to an applicant or licensee to the same extent as a *de facto* control lease, when the Commission went to great lengths to fashion two different regulatory paradigms in its lease rules, with one ceding more control to the lessee than the other?

2. How does a licensee calculate if it is leasing or wholesaling 25 percent (or 50 percent) of its capacity? What if it is leasing 75 percent of its capacity to various entities, but only over 10 percent of the land area (or population?) of its license area? Will a multiplier be used, so that such lease only amounts to 7.5 percent of available capacity? Or will a lease of a small and otherwise unserved portion of a license area cost the

licensee its entire bid credit for the license? This will obviously prevent lease arrangements among fellow rural carriers.

3. How can a licensee determine what percentage of spectrum capacity is being made available to a reseller? Many arrangements contemplate that the reseller can use as much capacity as is needed to satisfy subscriber demand. In one month, that may amount to 22 percent of capacity; in another month, it may amount to 53 percent, especially if the reseller's subscriber holds a convention, tournament or other event that creates unusual demand.

4. Paragraph 38 of the *Second R&O* indicates that "the Commission must be reimbursed for the entire bidding credit amount owed, plus interest, if a designated entity loses its eligibility for a bidding credit for any reason, including but not limited to, entering into an 'impermissible material relationship' *or an 'attributable material relationship,' . . .*" [Emphasis added, footnote omitted] Does this mean that if a "very small business" licensee (eligible for a 25 percent bid credit) leases spectrum to a "small business" (eligible for a 15 percent bid credit), and the combined revenues of the two entities still qualifies for a 15 percent bid credit, the licensee must nonetheless pay back its entire bid credit because it entered into an attributable material relationship and lost eligibility for the original 25 percent credit?

These and numerous other questions must be answered before applicants and licensees could reasonably be expected to comply with the new rules. However, as discussed above, the public interest requires rescission or substantial modification of the new rules due to the infirmities described herein.

III. The Commission Should Exempt Rural Telephone Companies and Small Businesses From the Annual Eligibility Reporting Requirement.

The *Second R&O* imposes an annual requirement for each designated entity to file a report concerning its continuing eligibility for bid credits. It is respectfully submitted that this reporting rule (embodied in Rule Section 1.2110) imposes an unnecessary burden on the entities that can least afford more reporting requirements. The object of the new bid credit rules is to detect and prevent abuses. Applicants are already required to provide the Commission with a detailed description of agreements and relationships that affect their bid credit eligibility, as part of the short form and long form applications. Moreover, the Commission has adopted Rule Section 1.2114, requiring designated entities to seek prior Commission approval before entering into any relationship that "might effect their ongoing eligibility." *Second R&O* at para. 46. There is no indication in the record that an annual reporting requirement will provide the Commission with any information not already furnished to it under the above described rules.[8] And because the annual report would not be due on a date certain, but instead would be due on the anniversary of a license grant, it would appear that a single entity may be required to file a report for each license it has obtained in various auctions. This will require many licensees to submit multiple reports, due on different days, since revised Rule Section 1.2110(n) does not appear to provide for a consolidated report by the holders of multiple licenses. This requirement will be confusing and unduly burdensome, for little or no offsetting benefit.

[8] While the Commission cites to the comment of Cook Inlet in support of an annual report, Cook Inlet did not describe how the annual report would exceed the requirements of revised Rule Section 1.2110. If there is a licensee that is suspected of abuse, the Commission has armed itself with an audit process that can be applied to such situation. *See Second R&O at para. 50.*

CONCLUSION

The instant petition brings to the Commission's attention certain aspects of the resulting rules and policies that warrant reconsideration and/or clarification, to ensure that the new bidding credit rules bring the greatest benefit to the public, consistent with the mandate of Section 309(j) of the Act.

Respectfully Submitted,

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