

**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**

**REPLY TO OPPOSITION TO PETITIONS FOR RECONSIDERATION**

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 submits a reply to the July 14, 2006 Opposition to Petitions for Reconsideration (“Opposition”) filed by CTIA – The Wireless Association® (“CTIA”). CTIA’s Opposition addresses in part the Blooston Rural Carriers’ June 2, 2006 Petition for Partial Reconsideration and/or Clarification of the *Second Report and Order and Second Further Notice of Proposed Rule Making* in the above-captioned proceeding (hereinafter “Petition”), regarding the rules governing the award of bidding credits in spectrum auctions.<sup>1</sup>

---

<sup>1</sup> 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*” or “*Second FNPRM*”).

In general, CTIA's primary concern seems to be avoiding a delay of the upcoming AWS auction.<sup>2</sup> The issue of whether the AWS auction should be delayed during further deliberation over the auction rules has been thoroughly briefed pro and con by other parties in this proceeding, and final decisions are being made by the Commission and the Courts on this issue. The Blooston Rural Carriers have not asked for a stay of the *Second R&O*; and those that have decided to participate in the AWS auction have filed their short form applications and are ready to proceed. However, there are certain aspects of the new bid credit rules that will 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); and other aspects of the revised rules are ambiguous, making compliance difficult at best. The problems associated with the revised auction rules will create adverse consequences for rural telephone companies and small businesses for years to come. *It is respectfully submitted that the Commission must not let the urgency of the AWS auction prevent the correction of rules that will have such far reaching consequences; and that the reconsideration process allows the Commission to address many of the issues raised by the Blooston Rural Carriers outside of the AWS auction process. Indeed, refinement of some of these rules, even after the auction, will help the eventual AWS license winners.*

**I. The Public Did Not Receive Adequate Notice and Opportunity to Comment on The Revised Rules.**

CTIA argues that the public received adequate notice and opportunity to comment on the Commission's decision to extend the unjust enrichment penalty period from five

---

<sup>2</sup> Opposition at pp. 3, 6-7.

years to ten years, and to eliminate the reduction in penalty amount if a licensee has not met its construction requirements.<sup>3</sup> In this regard, CTIA argues that notice was given because the *Further Notice of Proposed Rule Making* in this proceeding (“*Further Notice*”)<sup>4</sup> discussed the possibility of changes to the unjust enrichment penalty. CTIA further argues that “under the Administrative Procedures Act, the FCC must provide notice of any proposed rules and the final rule must be a ‘logical outgrowth’ of the proposed rule.”<sup>5</sup> There is a certain amount of vagueness inherent in the phrase “logical outgrowth”. However, in this instance the revised unjust enrichment rule was not a “logical outgrowth of the proposed rule”, because the *Further Notice contained no proposed rules*. There was no rule wording attached to the *Further Notice* whatsoever. And there was certainly no mention of the possibility of eliminating the graduated reduction of the unjust enrichment penalty if a license was unconstructed. Instead, the *Further Notice* contained a vague and indefinite discussion of various avenues on which the Commission wanted to gather ideas, in the nature of a Notice of Inquiry. It is respectfully submitted that the Commission must present the public with a more focused rule proposal, once it has gathered input in response to such a broad and unfocused inquiry, before adopting such a significant rule change.

The same infirmity applies to the Commission’s decision to adopt its “impermissible material relationship” and “attributable material relationship” criteria. The *Further Notice* focused on relationships between designated entities and *large* companies, and between designated entities and entities with “significant interests in communications

---

<sup>3</sup> Opposition at pp. 3-4.

<sup>4</sup> 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 Rule Making*, 21 FCC Rcd 1753 (2006).

<sup>5</sup> *Id* [citing *Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991)].

services.”<sup>6</sup> No rule wording was proposed. The Commission should have set forth proposed rules before adopting such a far-reaching change. The confusing and vague nature of the material relationship requirements identified by the Petition and acknowledged by the Commission in its June 2, 2006 *Order on Reconsideration of the Second Report and Order*<sup>7</sup> demonstrate that a detailed rule should have been proffered for public comment prior to adoption. Again, it is respectfully submitted that the time pressure of the AWS auction forced a hasty and inadequately vetted set of rules; and that these infirmities should be corrected on reconsideration. In this instance, correction and refinement of the auction rules on reconsideration should not be administratively difficult, since the Commission is planning on making further revisions anyway, in response to the *Second FNPRM* in this proceeding.<sup>8</sup>

## **II. The Public Interest Dictates Correction/Clarification of The Revised Rules.**

Aside from the question of whether or not the Commission provided adequate notice, the revised rules should be revisited as a matter of public interest. As noted in the Petition, the rural telephone industry (through the National Telecommunications Cooperative Association [NTCA] and RTG) did in fact raise concerns about the Commission’s discussion concerning restrictions on material relationships. Petition at p. 5. However, the Commission did not adequately address these objections, despite the

---

<sup>6</sup> *Further Notice* at para. 14.

<sup>7</sup> Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Order on Reconsideration of the Second Report and Order*, FCC 06-78, 21 FCC Rcd \_\_\_\_ (June 2, 2006) at para. 26.

<sup>8</sup> The Second FNPRM was published in the Federal Register at 71 FR 35594 (June 21, 2006). Comments on the *Second FNPRM* are due August 21, 2006; Reply Comments are due September 19, 2006.

pendency of a rule making designed to create access to spectrum for rural carriers.<sup>9</sup>

Moreover, no one has refuted the showing of the Blooston Rural Carriers that the record in this proceeding is void of any evidence of bid credit abuse involving relationships between rural carriers or between small businesses; or the showing that the revised rules concerning material relationships and the unjust enrichment penalty failed to consider less restrictive alternatives, such as applying the new requirements only to relationships between designated entities and *large* businesses. *See* Petition at pp. 4-5.<sup>10</sup> The Commission should take the opportunity on reconsideration to limit the scope of the new restrictions, so that it does not hinder spectrum leases and other arrangements between *bona fide* rural carriers.<sup>11</sup>

### **III. The Material Relationship and Unjust Enrichment Rules Must Be Clarified.**

Aside from the need to limit the scope of the new rules as discussed above, the material relationship rule must be clarified. The Petition (at pp. 7-8) identifies several aspects of the material relationship rule that are vague and confusing to the point that

---

<sup>9</sup> *See Report and Order and Further Notice of Proposed Rulemaking*, WT Docket Nos. 02-381, 01-14 and 03-202, 33 CR 1162, 19 FCC Rcd 19078 (released September 27, 2004).

<sup>10</sup> The Commission did clarify that the ten-year unjust enrichment restriction would not apply to licenses granted prior to April 25, 2006, in its *Order on Reconsideration of the Second Report and Order*. The Blooston Rural Carriers applaud this clarification, and believe that it demonstrates that other imprecise or unintended aspects of the revised rules can be corrected without derailing the AWS auction.

<sup>11</sup> CTIA expresses concern with the Petition's mention of "situations in the past in which giant corporations were able to garner the benefit of billions of dollars of bid credits." Petition at p. 3. CTIA fears that this statement "wrongly implies that large carriers have obtained bidding credits in prior auctions through fraud or abuse . . ." Opposition at p. 5. To allay CTIA's concern, the Blooston Rural Carriers hereby confirm that the Petition does not imply or intend to imply that large corporations have engaged in fraud or abuse. To the contrary, the Commission itself has confirmed that these large companies obtained the benefit of bid credits by crafting an arrangement that complied with the rules that were in effect at the time. *See, e.g.*, Applications of Alaska Native Wireless, L.L.C, Auction No. 35 – C & F Block Broadband PCS, *Order*, FCC 03-121, 29 CR 299, 18 FCC Rcd 11640 (2003). The Petition merely observes the fact that the instant rulemaking grew largely out of a public policy debate over the appropriateness of such large companies obtaining bid credits. *See, e.g.*, *Further Notice at paras. 5, 8, 10 and 11; Second Report and Order* at pp. 68-69, *Statement of Commissioner Jonathan S. Adelstein Approving in Part and Dissenting in Part* ("I stand alone in dissenting from our decision today not to close this obvious loophole.")

applicants and licensees cannot reasonably be expected to comply with the rule. No one has refuted the need for clarification, and NTCA has submitted comments supporting the Petition in this regard. Moreover, Royal Street Communications, LLC has filed a July 14, 2006 Petition for Partial Reconsideration pointing out an infirmity in the new unjust enrichment rule, since this rule does not exempt *pro forma* transactions from its scope. The Blooston Rural Carriers support Royal Street's request, since a licensee should not have to pay unjust enrichment fees if it merely transfers its license to an affiliated entity. The Blooston Rural Carriers also repeat their request that the Commission clarify the numerous other issues created by the imprecise wording of the *Second Report and Order* in this proceeding.

The Blooston Rural Carriers applaud the important clarification that the Commission included in its *Order on Reconsideration of the Second Report and Order*, stating that the Commission will accept a "MHz \* pop" approach as one way to gauge compliance with the "spectrum capacity" aspect of the material relationship rule.<sup>12</sup> However, it is respectfully submitted that the questions raised by Blooston and others must be addressed as well, since in the absence of clarification rural carriers and other designated entities face a legal minefield, in which they must guess whether a particular arrangement is in compliance. If after the auction the Commission disagrees with the applicant's interpretation, it is generally too late to repair the situation and avoid a loss of bid credits.

---

<sup>12</sup> *Id.* at para. 26.

#### **IV. The Commission Should Exempt Small Business and Rural Telephone Relationships from the Annual Reporting Requirement**

No commenter has refuted the Petition's showing that rural carriers and small businesses should be exempt from the annual reporting requirement imposed by revised Rule Section 1.2110. The Petition demonstrates that any relevant information is already being disclosed pursuant to the short form, long form, and "prior approval of material relationship" requirements in the new rules. The annual reporting requirement is an unnecessary and duplicative burden, with no apparent benefit. The fact that carriers with multiple auction licenses (each having a different grant date) must file multiple reports each year only exacerbates this burden.

Indeed, the reporting burden imposed on rural telephone companies has grown with the Commission's recent "clarification" that designated entities must seek approval of changes in "controlling interests" that may affect their bid credit eligibility. Now, a family-owned rural telephone carrier will have to file an application for prior approval, and supplement its annual report, if it seeks to elect a director that owns or controls an outside business interest with enough revenues to affect bid credit eligibility.<sup>13</sup> Thus, if a rural telephone company wishes to gain the expertise of a community bank president by electing that person to serve on its board, this licensee may face the prospect of "lawyering up" to determine the impact this banker may have on its bid credit eligibility, possibly seeking prior Commission approval, and then including a lengthy disclosure (including a showing of the bank's revenues) in an annual report(s). If the rural carrier bid on a Rural Service Area license that cost, e.g., \$100,000, then its \$25,000 bid credit will quickly be eroded by

the “gift that keeps on giving”: Burdensome approval and annual reporting requirements concerning a director that cannot actually control the board, and a bank that will not be making its money available to the licensee except through the same arms’ length loan process that any other citizen can apply for. Under these circumstances, the rural carrier is likely to forego bidding credits, or the banker’s expertise, or both. It is respectfully submitted that this undesirable outcome can largely be avoided if the annual reporting requirement is deleted, and the material relationship approval requirement is applied only to relationships between a designated entity and a *large* company.<sup>14</sup>

---

<sup>13</sup> *Order on Reconsideration of the Second Report and Order at para. 7. Qualified rural telephone cooperatives are exempt from classifying officers and directors as “controlling interests”, but this exemption does not apply to family-owned rural carriers.*

<sup>14</sup> The Blooston Rural Carriers have suggested a possible definition of “large” as at least \$125 million in average gross revenues over the past three years, i.e., the benchmark used to differentiate “entrepreneurs” from non-qualified entities in certain prior auctions. However, a number of other definitions of large may be appropriate.



## CERTIFICATE OF SERVICE

I, Cary Mitchell, an attorney with Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, certify that on this 24<sup>th</sup> day of July, 2006, I did serve by electronic mail, hand delivery and/or by first class U.S. Mail, postage prepaid, a copy of the foregoing *Reply to Opposition to Petitions for Reconsideration* on the following individuals:

Kevin J. Martin, Chairman  
Federal Communications Commission  
445 12th Street SW, Room 8-B201  
Washington, DC 20554

Jonathan S. Adelstein, Commissioner  
Federal Communications Commission  
445 12th Street SW, Room 8-A302  
Washington, DC 20554

Robert M. McDowell, Commissioner  
Federal Communications Commission  
445 12th Street SW, Room 8-C302  
Washington, DC 20554

Catherine W. Seidel, Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street SW, Room 3-C255  
Washington, DC 20554

Steve C. Hillard, Esq.  
George T. Laub, Esq.  
Jonathan B. Glass, Esq.  
Council Tree Communications, Inc.  
2919 17<sup>th</sup> Avenue, Suite 205  
Longmont, CO 80503

David Honig, Executive Director  
Minority Media and Telecommunications  
Council  
3636 16<sup>th</sup> Street, NW, Suite B-366  
Washington, DC 20010

Anastasia C. Hoffman  
Marc D. Stemp  
Bethel Native Corporation  
Box 719  
Bethel, AK 99559

Michael J. Copps, Commissioner  
Federal Communications Commission  
445 12th Street SW, Room 8-B115  
Washington, DC 20554

Deborah Taylor Tate, Commissioner  
Federal Communications Commission  
445 12th Street SW, Room 8-A204  
Washington, DC 20554

Samuel Feder, General Counsel  
Federal Communications Commission  
445 12th Street SW, Room 8-C273  
Washington, DC 20554

Christopher Guttman-McCabe, Esq.  
Brian Josef, Esq.  
CTIA – The Wireless Association  
1400 16<sup>th</sup> Street, NW, Suite 600  
Washington, DC 20036

Paul C. Besozzi, Esq.  
Carly T. Didden, Esq.  
Patton Boggs, LLP  
2550 M Street, NW  
Washington DC 20037  
*Counsel to Royal Street Communications, LLC*

Daniel Mitchell, Esq.  
Jill Canfield, Esq.  
National Telecommunications Cooperative  
Association  
4121 Wilson Blvd., 10th Floor  
Arlington, VA 22203

Keith Sanders, Senior Vice President-  
Land and Legal Affairs  
Cook Inlet Region, Inc.  
2525 C Street, Suite 500  
Anchorage, Alaska 99509-3330

Christine E. Enemark, Esq.  
Kurt Wimmer, Esq.  
Covington & Burling  
1201 Pennsylvania Avenue, NW  
Washington, D.C. 20004-2401  
*Counsel to Cook Inlet Region, Inc.*

Best Copy and Printing, Inc.  
445 12th Street, SW  
Room CY-B402  
Washington, D.C. 20554  
[fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)

Caressa D. Bennet, Esq.  
Gregory W. Whiteaker  
Bennet & Bennet, PLLC  
10 G Street, NE, Seventh Floor  
Washington, DC 20002  
*Counsel to Rural Telecommunications Group*

/s/  
D. Cary Mitchell