

05-211

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Subject: WT Docket No. 05-211, FCC 06-52

Attached Comments in Support of Petitions for Reconsideration were filed by the National Telecommunications Cooperative Association.

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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) **WT Docket No. 05-211**
Commission's Competitive Bidding Rules and)
Procedures)

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
COMMENTS IN SUPPORT OF PETITIONS FOR RECONSIDERATION**

The National Telecommunications Cooperative Association (NTCA)¹ hereby submits these comments in support of Petitions for Reconsideration² of the above referenced docket.³ NTCA generally supports the Commission's efforts to tighten the rules governing the award of bidding credits in spectrum auctions. Small business bidding credits should be made available only to *bona fide* small businesses and rural telephone companies and abuses of the designated entity provisions should be curtailed. However, the rules adopted in the proceeding may have the effect of hindering the ability of legitimate small businesses to participate in the provision of spectrum-based services.

¹ NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, 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's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

² See, Petition for Partial Reconsideration and/or Clarification submitted by Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP (filed June 2, 2006) ("Blooston Petition"); Petition for Expedited Reconsideration submitted by the Minority Media and Telecommunications Council, Council Tree Communications, Inc., and Bethel Native Corporation (filed May 5, 2006) ("Council Tree Petition"); and Petition for Reconsideration and Clarification submitted by Cook Inlet Region, Inc. (filed June 5, 2006) ("Cook Inlet Petition").

³ 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).

I. THE COMMISSION SHOULD RESCIND 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. NTCA agrees with the Blooston Petition and the Council Tree Petition that the Commission should rescind the ten-year unjust enrichment period.

In its Further Notice of Proposed Rulemaking⁴ that preceded the Second R&O, the Commission sought comment on ways to prevent bidding credit abuse by large entities. NTCA and the record supported restrictions on specific business arrangements between large carriers and small licensees that enable large carriers to circumvent the intent of the designated entity provisions and take advantage of bidding credits. However, the rules adopted restrict the business opportunities of small businesses and rural telephone companies, but do not target actual abuse. There was nothing in the Further Notice, nor information in the record, to suggest that small businesses entering into transactions with other small businesses amounts to an abuse of bidding credits. NTCA agrees that the Commission should either revert to the rule in place prior to the issuance of the Second R&O, or at the very least limit the applicability of the new rule to situations in which the relationship triggering the unjust enrichment payment involves an entity that is itself a “large” entity.⁵

⁴ Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, *Further Notice of Proposed Rule Making*, WT Docket No. 05-211, FCC 06-8, (rel. Feb. 3, 2006).

⁵ The Blooston Petition defines a “large entity” as one with annual average gross revenues over the past three years greater than \$125 million.

II. THE COMMISSION SHOULD RESCIND OR MODIFY THE “IMPERMISSIBLE MATERIAL RELATIONSHIP” AND “ATTRIBUTABLE MATERIAL RELATIONSHIP” RULES

The Second R&O modified 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 occurs when an applicant has an agreement with one or more entities for the lease or resale/wholesale of, on a cumulative basis, more than 50% of the spectrum capacity of any individual license. Under these circumstances, the applicant is ineligible to receive bid credits or must repay bid credits with interest. An attributable material relationship is defined as an agreement for the lease or resale of more than 25% of the spectrum capacity of any individual license to a single person or entity. This relationship may also trigger the unjust enrichment penalty.

NTCA agrees with the Blooston Petition that the material relationship provisions should be rescinded. Rural telephone carriers should be permitted to utilize spectrum leasing and resale arrangements to their full extent to bring advanced wireless services to rural America. As the Blooston Petition points out, the Commission just recently found that the public interest was served by allowing rural telephone companies and small businesses to utilize spectrum leasing.⁶ The material relationship provisions will have a chilling effect on small carriers and there is nothing in the record to support the Commission’s finding that spectrum lease and resale arrangements are inconsistent with the intent of the designated entity provisions.

The Blooston Petition also lists several unanswered questions that demonstrate the flaws of the new rules and that must be answered before the rural carriers can comply with them. At

⁶ See Blooston Petition, p. 6.

the very least, the Commission should rescind the material relationship provisions and develop a *full and complete record on the issues before determining whether they should be revived and in what form.*

III. CONCLUSION

NTCA continues to support restrictions on relationships that permit otherwise ineligible carriers to take advantage of bidding credits. Bidding credits are one of the few means still available to rural telephone companies that permit them to attempt to compete in the market to provide spectrum based services. However, the rules at issue stymie the efforts of legitimate small businesses, while doing little, if anything, to curb actual bidding credit abuse. The Commission should rescind the rules as discussed above and give thoughtful consideration to the ramifications of new rules after developing a full and complete record in the Second Further Notice of Proposed Rulemaking in this proceeding.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS
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July 14, 2006

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments in Support of Petitions for Reconsideration of the National Telecommunications Cooperative Association in WT Docket No. 05-211, FCC 06-52 was served on this 14th day of July 2006 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons.

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