

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands)	WT Docket No 06-150
)	
Revisions of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems)	CC Docket No. 94-102
)	
Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones)	WT Docket No. 01-309

COMMENTS OF MILKYWAY BROADBAND, LLC

MilkyWay Broadband, LLC (“MilkyWay”), by counsel and pursuant to the Commission’s Order of September 15, 2006,¹ hereby submits its Comments in the captioned proceedings.²

By these Comments, MilkyWay responds to the core inquiries posed by the Commission in its NPRM. Chief among these is the issue of proper license market size in the upcoming 700 MHz auction scheduled for January 2008. On that critical issue, MilkyWay urges the Commission to offer licenses in a number of different market sizes, including Cellular Market Areas (“CMAs”) for the 12 MHz B Block consisting of channels 53 and 58. The offering of

¹ Order, in DA 06-1880, released September 15, 2006 (“Order”). Pursuant to the Order, these Comments are timely submitted.

² Notice of Proposed Rule Making, Fourth Further Notice of Proposed Rule Making, and Second Further Notice of Proposed Rule Making in WT Docket No. 06-150, CC Docket No. 94-102, and WT Docket No. 01-309, 71 Fed. Reg. 48506-01 (August 21, 2006), _____ FCC Rcd ____ (2006) (“NPRM”)

licenses in different market sizes is the single most critical step the Commission can take to make the upcoming 700 MHz auction a successful one.

I. MILKYWAY'S PERSPECTIVE

MilkyWay holds 48 licenses in the Lower 700 MHz Band.³ Most of these are rural areas or small markets. MilkyWay is an independent, bona fide, small business licensee. MilkyWay has paid for its licenses in full and on time. Prior to becoming a 700 MHz licensee, MilkyWay came to understand the inherent advantages of the spectrum, including its superior coverage and build-out cost savings, especially in rural markets.

II. DISCUSSION

A. The Commission Should Make Available Through Competitive Bidding Licenses That Cover Many Different Market Sizes, Including CMAs

Among the first, and most pivotal, questions posed by the Commission in its NPRM was what is the most appropriate market size, or sizes, for unauctioned spectrum in the 700 MHz Band. NPRM at para 2. Specific inquiry was made regarding the possible use of CMAs and other smaller markets. Id.

Providing CMA licenses of at least 12 MHz bandwidth is the single most important change that the Commission should make prior to the 2008 auction. CMA licensing is essential to furthering the public interest for a number of reasons. First and foremost, it is the best way to provide service to rural areas. Second, it is the best way to provide a bona fide opportunity for

³ That band consists of frequencies 698-746 MHz (the "Lower 700 MHz Band".)

small businesses to be a meaningful part of the auction.⁴ Lastly, inclusion of CMAs and other small market license areas is critical to the Commission complying with its statutory mandate to avoid undue concentration within the licenses that are being auctioned. 47 U.S.C. § 309(j)(3)(B)

The benefits of small market licensing are both self-evident and interwoven. When the Commission licenses spectrum in large market sizes, the winning bidders naturally (and appropriately) have a strong motivation (indeed an obligation to their investors) to maximize return on monies invested in the auction and on market build-out. This usually translates into licensees focusing on those portions of markets with the highest return on investment. That, in turn, means concentrating on largely urban and suburban areas where population is more dense and where commercial business and industry are more present. While eminently logical, and good for large cities and businesses, this equates to there being a relative dearth of service to smaller communities and to rural areas. Significantly, this is not merely theory, it is fact. Review of ten year build-out data submitted to the FCC by all licensees of PCS Major Trading Area (“MTA”) spectrum shows that, on average, only 80% of the population in those markets is even claimed to be covered. Given that the Commission accepts build-out showings with incredibly weak signal (as low as -104 db) at the perimeter of the service area, a more realistic estimate of actual population coverage would be much lower, and perhaps less than one-half of the geographic area of the average market would be covered. More significantly, virtually all of the uncovered areas are those that are sparsely populated and thus commercially less desirable.

⁴ The Communications Act requires, among other things, that in prescribing regulation for auction, it “ensure” that small businesses “are given the opportunity to participate in the provision of spectrum-based services....” 47 USC 309(j)(4)(D).

With smaller markets, much of the less desirable area becomes “core” area and is more likely to be covered, thus obviating the problem discussed above.

There is yet another reason why smaller markets result in service being provided to less urban and more rural areas: the parties who acquire small market licenses are often the ones who know the most about small markets generally, and perhaps about the markets at issue specifically. The result of the Commission’s last two 700 MHz auctions demonstrates this vividly. Rural telephone companies often acquired the licenses for their particular areas of interest.⁵ They proved to be the ones who know the markets best and were best positioned to provide service to them – and not to focus merely on the largest population hubs in wide-area markets. In a great number of other instances, the 700 MHz small market licenses were acquired by entities with a rich history of serving small market areas.⁶ Those entities are also well positioned to serve those markets.⁷

MilkyWay urges that CMAs be only one component of the Commission’s licensing program – albeit the single most important one. Another should be a 12 MHz BEA allocation, with the remaining allocations being REA-based, or whatever else the Commission deems appropriate. Thus, MilkyWay advocates the “combination” approach outlined in the NPRM, at paras 15 and 40. This is the same approach that the Commission spoke of with approval in its

⁵ See, e.g. CMAs #674m 718, and 723, each acquired by Union Telephone Company.

⁶ See, e.g., CMA # 341, 256, and 370, won by Aloha Partner, L.P., DataCom Wireless, LLC and Harbor Wireless, LLC, respectively. The controlling principals of each of these entities have considerable experience with wireless.

⁷ In its NPRM, the Commission asked how any change in the band allocation will translate into the provision of services. As set forth above, the changes urged by MilkyWay will provide the spectrum that is the foundation for service provision and will put the licenses into the hands of those persons most capable of serving small markets.

Rural Wireless Order, 19 FCC Rcd 19078, 19087 (2004). It is also the same approach that the Commission used successfully in the recently complete AWS Auction. Service Rules for AWS, 18 FCC Rcd 25162 (2003).

In a related context, the Commission asked whether the fact that there is already some wireless allocated on a small market basis undermines the need for more. It does not, for several reasons. First, most of the spectrum allocated in that manner has propagation characteristics, projected build-out costs and expected uses that are far different from (and inferior to) 700 MHz. Moreover, in many instances the spectrum already allocated, while apparently sufficient for anticipated wireless uses when allocated, is no longer adequate given new and innovative desired offerings. Lastly, it warrants noting that many (perhaps most) of the prior spectrum allocations were for larger size markets, not small ones, thus arguing against a need for more large market allocations at this time.

In contrast to the multiple advantages of providing a wide array of market sizes, including CMAs and BEAs, there are no meaningful disadvantages to doing so. Experience with prior auctions and subsequent secondary market transactions demonstrates that any transaction costs associated with market re-configuration (either through effectively combining markets or disaggregating or partitioning licenses) are truly minimal when compared to overall spectrum and other system costs. Moreover, given that CMA licensing has been used in other auction contexts, additional CMA licensing would not be in any way disruptive to existing licensees. Similarly, given the Commission's limits on out-of-band emissions, licensing in the CMA mode would present no increased risk to spectrally adjacent users. Lastly, experience with prior auctions demonstrates vividly that while small carriers have very little success in acquiring large

market licenses, the converse is not true. Large carriers bid aggressively, and successfully, for smaller markets. To illustrate, in Auction No. 66, 99% of Sprint Spectrum Co. spending was for BEAs; 62% of Cingular's spending was for CMAs and BEAs; and 32% of T-Mobile's spending was for CMAs and BEAs.

In sum, the public interest would be well served by the Commission auctioning 700 MHz spectrum in a wide variety of market sizes, including CMAs and BEAs, each having at least 12 MHz of bandwidth. It would facilitate service to those areas most in need of it, and would substantially increase participation by small businesses. Moreover, as discussed below, there is no meaningful cost associated with utilizing such licenses areas, as history teaches us that auction revenues through small market licenses generally approximate that which results from only larger markets being auctioned.

B. CMA Allocations Must Be For At Least 12 MHz to be Useful

MilkyWay has been working closely with equipment manufacturers to develop 700 MHz base stations and handsets that can be used for broadband service. Based on those discussions, MilkyWay believes that rural operators will require at least 10 MHz of paired spectrum in order to provide broadband service. The only 700 MHz broadband equipment that is available today requires at least 10 MHz of paired spectrum. Most industry experts agree that to consistently deliver broadband speeds, an operator needs at least 10 MHz of spectrum. Whereas, various parties may hold different views of precisely how much spectrum is needed to provide different services, it seems clear that at least 12 MHz is needed to provide licensees with the flexibility to be able to provide a variety of services, as this is what is now available and is what the equipment vendors have been designing equipment for.

C. **Heightened Performance Requirements Should Not Be Applied to Existing Licensees**

Understandably concerned that many areas would not be properly and timely served in the absence of certain additional incentives from the Commission, the Commission raised the specter of establishing additional performance standards to encourage service to areas that may otherwise not be served with the 700 MHz spectrum to be auctioned in 2008.

Performance standards are a complex issue. At this time, MilkyWay comments only on the possible applicability of such standards to existing 700 MHz licensees. Simply put, new, more demanding performance requirements cannot legitimately be placed upon existing 700 MHz licensees. Those entities made business determinations when they bought and paid for their licenses that took into consideration core obligation of licensees, such as the then-existing performance standards. To change the rules after the fact would be arbitrary and capricious in violation of both the Administrative Procedure Act and the Communications Act of 1934, as amended. It would also violate fundamental elements of equity and due process. Finally, it would be wholly unnecessary, given that additional spectrum is being licensed in the same frequency band in all areas of the country, which spectrum should assure service to rural areas.

D. **The Substantial Service Definition Associated with Renewal Should Not be Revised or Applied Differently**

The Commission asked whether its existing substantial service criteria should be revised, or applied regardless of whether there are challenges to a renewal application. For the reasons set forth below, MilkyWay submits that no changes should be made.

When the Commission initially established its substantial service criterion, it did so in a manner designed to maximize flexibility for licensees. The intent was not to lock into quantitative standards or to dictate the nature of offerings to be made. Instead, the totality of the licensees' offerings could be considered. *Id.* This process appears to have worked very well. Since the inception of the renewal process for high tech wireless services such as cellular and PCS, there have been no reported disputes in the context of renewal procedures regarding whether substantial service has or has not been provided. Given such a sterling track record, MilkyWay submits that no changes should be made.

Nor should the Commission broaden the scope of application of the substantial service rules to include all license renewals and not merely contested renewals. There are several reasons for this. First, there is no known need for such a change. The renewal process works quite well as it now operates. Second, given the considerable volume of renewal applications that are filed annually, inclusion of a comprehensive substantial service requirement would present at least two genuine risks. First, if the Commission were to review all such submissions carefully, such review would completely overwhelm the Commission's staff. In the alternative, if renewal applications were granted without substantial review of such submissions, it would create problems due to applicants appropriately relying on submissions that had previously been associated with other, granted applications, only to later learn of possible failings with them. Among other things, this could result in issues of the type of disparate treatment that reviewing courts have frowned upon in Melody Music and its progeny. Any broadening of applicability of the substantial service standard would also add considerably to licensee workload. Notably,

there would be no meaningful counterbalancing benefit to any of the considerable costs noted above.⁸

E. 700 MHz Licensees Should Be Governed By the Same Power Measurement Mechanisms That the Commission Adopts in WT Docket No. 03-264.

In WT Docket No. 03-264 (the 2002 Biannual Review), the Commission is considering how most appropriately to calculate permissible power in this era of multiple bandwidth and operating techniques. In that proceeding a clear consensus position within the wireless industry has emerged. It simply urges that the Commission revise its rules so that wideband operations, not be penalized by virtue of more narrow bandwidth operations being permitted to operate at a higher spectrum density than those with wider bandwidths. Here, MilkyWay presents the same urging for 700 MHz licenses.

III. CONCLUSION

Spectrum allocations, market sizes and auction processes are not simple matters. The Commission astutely arrived at arrangements that work, most recently in its AWS auction, and before that in its Rural Wireless Order. Chief among the keys to success has been the offering of varying market sizes in a single auction. Such offerings facilitate service to rural and sparsely populated areas, provide for meaningful participation by small businesses and come with no meaningful costs, either financial or otherwise. The Commission should thus implement this plan for the upcoming 700 MHz auction scheduled for January 2008. Specifically, in that

⁸ As a result, such regulation could well violate the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. § 603 by presenting unwarranted burden on small businesses.

auction the Commission should allocate at least 12 MHz for licensing on a CMA basis, and at least 12 MHz for licensing on a BEA basis.

MilkyWay's urges regarding other matters about which the Commission inquired should also be heeded, and are set forth herein.

Respectfully Submitted,

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