

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

In the Matter of)
)
Service Rules for the 698-746, 747-762) WT Docket No. 06-150
and 777-792 MHz Bands)
)
Implementing a Nationwide, Broadband,) PS Docket No. 06-229
Interoperable Public Safety Network in)
the 700 MHz Band)

To: The Commission

REPLY COMMENTS OF
COUNCIL TREE COMMUNICATIONS, INC.

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July 7, 2008

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SUMMARY

The Commission must take specific steps to avoid another failed D Block license auction and to create the conditions under which the 700 MHz Public/Private Partnership is viable. Among other things, the Commission should undertake to promote a new entrant designated entity (“DE”) as the D Block licensee and it must decouple the DE rules applicable to the D Block licensee from pending litigation.

The Commission should prohibit the National Carriers from participating in the D Block reauction. Council Tree agrees with the Public Safety Spectrum Trust Corporation that the mere threat of National Carrier participation in the D Block license reauction will have a chilling effect on participation by others.

On the subject of the network sharing agreement (“NSA”), the Commission should not step in and declare by rulemaking what can be established through private negotiations. The Commission should see that the negotiations are conducted in good faith by all parties, and it should require the parties to continue to work to resolve differences in an ongoing process.

The Commission should also continue to offer the D Block spectrum as a single, nationwide license. If the Commission were to break up the D Block, it would run the grave risk that licenses for more rural areas of the nation would go unsold at auction. Finally, the network construction requirements for the D Block license should be modified to match those that applied to the Upper 700 MHz Band C Block licenses awarded in Auction 73.

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Council Tree Communications, Inc. (“Council Tree”), pursuant to Section 1.415 of the Commission’s Rules, 47 C.F.R. § 1.415, submits these reply comments in response to the captioned *Second Further Notice of Proposed Rulemaking* (FCC 08-128) adopted and released by the Commission on May 14, 2008 (“*Second FNPRM*”).^{1/}

I. INTRODUCTION

In its Comments filed in the captioned proceeding on June 20, 2008, Council Tree urged the Commission to create the conditions for a viable private-public partnership using the Upper 700 MHz Band D Block (758-763/788-793 MHz) (“D Block”) spectrum by implementing seven pragmatic policies. They are: (1) the

^{1/} A summary of the *Second FNPRM* was published in the Federal Register on May 21, 2008. See 73 Fed. Reg. 29,582 (May 21, 2008).

Commission must take steps to promote a new-entrant designated entity (“DE”) as the D Block licensee; (2) the Commission should decouple the DE rules applicable to the D Block licensee from pending litigation; (3) the Commission should prohibit national incumbent wireless carriers AT&T Wireless, Verizon Wireless, Sprint, and T-Mobile (hereinafter referred to jointly as the “National Carriers”) from participating in the D Block reauction and using the spectrum to pad their already dominant holdings; (4) the D Block reserve price must be realistic; (5) in the absence of a showing of bad faith, the D Block licensee should not be faced with a financial penalty for failing to reach agreement on network sharing agreement (“NSA”) terms; (6) the D Block license term should be extended to twenty years; and (7) the Public Safety Broadband Licensee should be required to operate as an accountable mobile virtual network operator (“MVNO”) with respect to public safety users.

In these Reply Comments, Council Tree will address comments on four of these policies: promotion of a new entrant DE as the D block licensee and decoupling the DE rules applicable to the D Block licensee from pending litigation, prohibition of the National Carriers from participating in the reauction of the D Block license, and negotiation of the NSA and the penalty for failure. Likewise, Council Tree will address those comments that suggest that the D Block spectrum should be licensed in smaller geographic areas and the merits of modifying the D Block performance requirements.

II. THE COMMISSION MUST TAKE STEPS TO PROMOTE A NEW ENTRANT DE AS THE D BLOCK LICENSEE AND DECOUPLE THE DE RULES APPLICABLE TO THE D BLOCK FROM PENDING LITIGATION

First, as Council Tree demonstrated in its Comments, the Commission must take steps to promote a new entrant DE as the D Block licensee and it must decouple the DE rules applicable to the D Block licensee from pending litigation.

Other commenters agree. Wirefree Partners III, LLC discussed the importance of DE rules in promoting new entrant participation,^{2/} and it addressed the impact of the Commission's changes to the DE rules in 2006.^{3/} According to Wirefree Partners, "[t]he 2006 changes have dampened DE participation in spectrum auctions since the AWS auction. This trend can be reversed but it will require going beyond the limited exception to the material relationship rule suggested by the Commission in the [*Second FNPRM*]" ^{4/}

Council Tree endorses this remedy, and it notes that Wirefree Partners' suggestion can be implemented in the near term by continuing the waiver of the

^{2/} See Comments of Wirefree Partners III, LLC at 8.

^{3/} See *id.* at 9 (discussing the effects of the rules adopted in *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*, 21 FCC Rcd 4753, 4766-67 (2006) ("DE Second Report and Order"). The new rules are jointly referred to hereinafter as the "2006 DE Rule Changes."

^{4/} Comments of Wirefree Partners III, LLC at 9.

impermissible material relationship rule with respect to the D block licensee,^{5/} and by waiving application of the attributable material relationship rule and the ten year hold rule as well. As discussed in the Council Tree Comments, the purpose of these waivers is to decouple the D Block and the 700 MHz Public/Private Partnership from the pending litigation relating to the 2006 DE Rule Changes. To the extent there is a risk that the pending litigation will have the effect of invalidating the results of auctions conducted under those rules — and such an outcome is possible — the D Block must be insulated to ensure the success of the 700 MHz Public/Private Partnership.

Council Tree opposes the comments of MetroPCS Communications, Inc. (“MetroPCS”) that “the Commission should not offer any bidding credits, or designated entity eligibility, to applicants for the D-Block license.”^{6/} MetroPCS claims that DEs should not be encouraged to bid for the D Block license on the theory that “the Commission should not risk this monumental responsibility on an entity that needs an additional discount on spectrum to compete in an auction.”^{7/}

^{5/} See also Comments of the National Association of Telecommunications Officers and Advisors et al. at 21 (preemption of the impermissible material relationship rule may “help smaller companies bid for the [D Block] spectrum”).

^{6/} Comments of MetroPCS Communications, Inc. at 34.

^{7/} *Id.* at 35. MetroPCS also suggested that the Commission should not continue the waiver of the impermissible material relationship rule with respect to the D block licensee. See *id.* at 35. Yet, MetroPCS elsewhere states that “it does not agree with the Commission’s contention that wholesale arrangements are inconsistent with the statutory scheme for DEs. *Id.* at 35 n.79. This latter

Yet, since the inception of the Commission’s spectrum auctions — until the Commission’s improvident adoption of disabling rules changes in 2006 — the DE program has proven to be a highly effective gateway for introducing new entrants and new competition in the wireless industry. Prior to the DE Rule Changes, DEs could be counted on to acquire sizable amounts of spectrum. In the six major commercial mobile radio service (“CMRS”) spectrum auctions from 1996 to 2005, DEs acquired 74 percent of the spectrum sold (as measured by dollar value of licenses), paying approximately \$21 billion in the aggregate.

And, with that spectrum, DEs have built successful and sizable businesses. No better example exists than National Carrier T-Mobile, whose predecessor companies owed their toehold and success to the gateway created by the DE program. Properly structured DE rules for the D Block license reauction will ensure that DE bidders can attract the capital and resources necessary to implement a successful nationwide public safety network rollout.

Moreover, the Commission is directed under Section 309(j) of the Communications Act to promote “economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies,

MetroPCS position strongly supports the continuation of the waiver of this deeply flawed rule.

and businesses owned by members of minority groups and women,”^{8/} and to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services”^{9/}

The failure of the Commission to implement these directives here would expose the 700 MHz Public/Private Partnership to certain litigation. This is due in part to the unique opportunity that the D Block spectrum represents. In the *Second FNPRM*, the Commission appreciated that the D Block constitutes a competitive opportunity that “is unlikely to present itself again in the foreseeable future,” *Second FNPRM* at ¶ 156, and the Commission even asks, “Should the auction rules favor new entrants?” *Id.* at ¶ 158. As Council Tree observed in its Comments, the National Carriers have a chokehold on the wireless services industry, and one or more of them may seek to acquire the D Block spectrum merely to block the development of a new, national competitor. In these circumstances, *withdrawing* DE benefits that the Commission already resolved to offer would threaten to embroil the 700 MHz Public/Private Partnership in challenges that will delay the successful implementation of the Commission’s efforts.

It is also essential to the success of the 700 MHz Public/Private Partnership that the D Block licensee have the incentive to construct the nationwide 700 MHz

^{8/} 47 U.S.C. § 309(j)(3)(B).

^{9/} *Id.*, § 309(j)(4)(D).

network using the D Block spectrum to compete against the National Carriers. In contrast, the National Carriers have their existing network infrastructure and facilities in place, so the D Block opportunity will necessarily be less important to their operations. The 700 MHz Public/Private Partnership requires a licensee that is dedicated to its success, not one that is merely undertaking to keep the spectrum from others.

III. THE COMMISSION SHOULD PROHIBIT THE NATIONAL CARRIERS FROM PARTICIPATING IN THE D BLOCK REACTION AND USING THE SPECTRUM TO PAD THEIR ALREADY DOMINANT HOLDINGS

Second, as Council Tree demonstrated in its Comments, the Commission should prohibit the National Carriers from participating in the D Block reaction and using the spectrum to pad their already dominant holdings. A number of commenters expressed similar views. The Rural Cellular Association and Leap Wireless International, Inc. each recommended that the Commission exclude from eligibility to bid on the D Block license carriers that already enjoy meaningful 700 MHz band spectrum holdings.^{10/}

NTCH, Inc. suggested that no entity should be permitted to hold more than 20 MHz of 700 MHz band spectrum in any market.^{11/} The Rural Telecommunications Group, Inc. indicated that it intends to ask the Commission to restore a generalized spectrum cap for commercial mobile spectrum and, in the

^{10/} See Comments of Rural Cellular Association at 3-4; Comments of Leap Wireless International, Inc. at 4-9.

^{11/} See Comments of NTCH, Inc. at 13-14.

meantime, establish that no entity should be permitted to hold more than 24 MHz of 700 MHz band spectrum in any market.^{12/}

Spectrum Acquisitions, Inc. urged the Commission to set aside the D Block license for DEs only.^{13/} The Public Safety Spectrum Trust Corporation observed that the mere possibility that Verizon Wireless and AT&T might bid would “have a chilling effect on auction participation” by others, and it urged the Commission to scrutinize their intentions.^{14/}

In its Comments, Council Tree noted that, following Auction 73, the National Carriers control 87 percent of wireless service spectrum in top-50 domestic markets (based on MHz-POPs).^{15/} As of December 31, 2007, these National Carriers have 90 percent of the nation’s wireless service subscribers and accounted for 96 percent of domestic wireless industry revenue (for the preceding twelve months).^{16/}

^{12/} See Comments of Rural Telecommunications Group, Inc. at 8.

^{13/} See Comments of Spectrum Acquisitions, Inc. at 13.

^{14/} See Comments of Public Safety Spectrum Trust Corporation at 44-45. Though it did not appear to endorse the exclusion from eligibility of the National Carriers, MetroPCS discussed the substantial need for spectrum among mid-tier and rural carriers and the spectrum chokehold maintained by Verizon Wireless and AT&T. See Comments of MetroPCS at 10-11.

^{15/} This figure, which does not include the impact of Verizon Wireless’s proposed acquisition of Alltel, was derived from material in Stifel, Nicolaus & Company, Inc., Washington Telecom, Media & Tech Insider, March 28, 2008, at 9.

^{16/} These figures are pro forma for Verizon Wireless’s proposed \$28 billion acquisition of Alltel.

For these reasons, Council Tree strongly urges the Commission to prohibit the National Carriers from participating in the D Block reauction and using the spectrum to pad their already dominant holdings. Likewise, Council Tree opposes the comments of those who urge the Commission to permit the National Carriers to bid for the D Block license and commandeer this spectrum as well.^{17/} Not surprisingly, those supporting this position include Verizon Wireless.^{18/}

Having satisfied their immediate spectrum needs, and having shown historical distaste for spectrum subject to material restrictions, the National Carriers will likely show little strategic or economic interest in the D Block and the 700 MHz Public/Private Partnership. To the contrary, the natural interest of the National Carriers lies in seeing a failed reauction of the D Block license, particularly if such failure means that the spectrum will be reoffered in the future without the restrictions of the 700 MHz Public/Private Partnership.

To the extent that any National Carrier does emerge to show an interest in

^{17/} See, e.g., Comments of Verizon Wireless at 22. Verizon Wireless and AT&T Inc. also favor eliminating the auction of the D Block license and replacing it with a request for proposal (“RFP”) process. See *id.* at 19; Comments of AT&T Inc. at 5-8. Council Tree opposes this idea. The D Block license will almost surely be the subject of mutually exclusive applications, and the statutory mandate to grant the license through a system of competitive bidding will be triggered. See 47 U.S.C. § 309(j)(1).

^{18/} See, e.g., Comments of the National Association of Telecommunications Officers and Advisors et al. at 21; Comments of the Association of Public-Safety Communications Officials International, Inc. (“APCO”) at 38; Comments of Motorola, Inc. at 17-18; Comments of CTIA at 8; Comments of Qualcomm Incorporated at 11; Comments of Consumer Electronics Association at 5.

the D Block license reauction, it will likely be to see that this national license does not fall into the hands of a new entrant competitor. Indeed, Council Tree agrees with Public Safety Spectrum Trust Corporation that the mere threat of National Carrier participation in the D Block license reauction — whether or not it leads to actual National Carrier participation in the auction — will have a chilling effect on auction participation by others. Indeed, the threat alone will thwart the realistic prospects for capital formation by new entrant wireless carriers. Excluding the National Carriers from eligibility to bid for the D Block license will signal to the market that a new entrant can — and will — succeed with a nationwide allocation, and it will help to ensure that the National Carriers’ goal of a failed reauction is not realized.

IV. IN THE ABSENCE OF A SHOWING OF BAD FAITH, THE D BLOCK LICENSEE SHOULD NOT BE FACED WITH A FINANCIAL PENALTY FOR FAILING TO REACH AGREEMENT ON NSA TERMS

Third, in its Comments, Council Tree demonstrated that, in the absence of a showing of bad faith, the D Block licensee should not be faced with a financial penalty for failing to reach agreement on NSA terms. Such a penalty creates an insurmountable barrier to capital formation for prospective bidders, other than the National Carriers. And, in the course of NSA negotiations, such a penalty emboldens the Public Safety Broadband Licensee to impose non-economic technical requirements that multiply costs, or non-economic price constraints that limit revenues, increasing the threat of failure in NSA negotiations. To address this, the Commission should see that the negotiations are conducted in good faith by all

parties to the NSA,^{19/} and it should require ongoing and transparent discussions to allow any differences regarding the NSA to be resolved by the parties without forced-deal mechanisms that work to the disadvantage of the D Block licensee.

Several commenters agreed that penalties should not apply, or should be limited, in the case of a D Block licensee that has negotiated in good faith but still does not conclude terms of the NSA.^{20/} In contrast, MetroPCS claimed that the Commission should establish a significant default payment for any D Block licensee.^{21/} As Council Tree has demonstrated, however, a financial penalty for negotiation failure, absent a demonstration of bad faith, creates a negotiation imbalance that is self-evident to capital markets. It will have the effect, *ex ante*, of keeping capital from the D Block licensee. If the Commission chooses to incorporate a penalty, and to the extent that the Commission also permits the National Carriers to participate in the D Block license reauction, then such penalty should be applicable solely to an auction winner who is also a National Carrier.

Separately, Council Tree demonstrated that the Commission should require ongoing and transparent discussions to allow any differences regarding the NSA to be resolved by the parties without forced-deal mechanisms that work to the disadvantage of the D Block licensee. Likewise, Wirefree Partners observed that

^{19/} See 47 C.F.R. § 27.1315(b).

^{20/} See, e.g., Comments of National Emergency Number Association at 2; Comments of APCO at 38.

^{21/} See Comments of MetroPCS at 34.

the D Block licensee should be the final arbiter of technical standards regarding the shared public safety broadband network.^{22/} Council Tree concurs.

In contrast, certain commenters urged the Commission to establish additional parameters for the NSA.^{23/} The National Public Safety Telecommunications Council indicated that the requirements of the shared network should be defined, but that the Commission should not “micromanage” the process.^{24/} Council Tree understands the desire of these and other parties for greater certainty regarding the requirements of the NSA. Indeed, the D Block licensee must meet not only the Commission’s published requirements, but also the now-unknown requirements of the NSA, which increases uncertainty somewhat.

The Commission should not, however, step in and declare by rulemaking what can be established through private negotiations. The Commission should see that the negotiations are conducted in good faith by all parties to the NSA,^{25/} and it should require the parties to continue to work to resolve any differences in an open,

^{22/} See Comments of Wirefree Partners at 14.

^{23/} See, e.g., Comments of Ericsson Inc. at 32; Comments of APCO at 38; Comments of Alcatel-Lucent at 4; Comments of the Public Safety Spectrum Trust Corporation at 27-38; Comments of United States Cellular Corporation at 23; Comments of Leap Wireless International, Inc. at 10; Comments of AT&T Inc. at 9-12.

^{24/} See Comments of National Public Safety Telecommunications Council at 9-10.

^{25/} See 47 C.F.R. § 27.1315(b).

ongoing process. The conditions for a successful 700 MHz Public/Private Partnership will be present if the process, not the result, is supervised by the Commission.

V. THE COMMISSION SHOULD CONTINUE TO OFFER THE D BLOCK SPECTRUM AS A SINGLE, NATIONWIDE LICENSE

Fourth, the Commission should continue to offer the D Block spectrum as a single, nationwide license. Several commenters endorsed this approach.^{26/} Other commenters urged the Commission to break the D Block into smaller license areas for various reasons — some in the hope that it would assist smaller or rural entities to acquire spectrum and some based on the idea that regional network development within a national framework would be beneficial.^{27/}

If the Commission were to break up the D Block, however, it would run the grave risk that licenses for more rural areas of the nation would go unsold at auction due to the lower customer density and different business model those areas require. As Sprint Nextel Corporation showed, this would create gaps in the

^{26/} See, e.g., Comments of Ericsson Inc. at 34; Comments of the Public Safety Spectrum Trust Corporation at 38; Comments of the Rural Cellular Association at 2; Comments of Sprint Nextel Corporation at 11.

^{27/} See, e.g., Comments of United States Cellular Corporation at 4-15; Comments of AT&T Inc. at 24; Comments of Spectrum Acquisitions, Inc. at 14, Comments of NTCH, Inc. at 14; Comments of Motorola, Inc. at 16-17; Comments of Verizon Wireless at 29; Comments of Rural Telecommunications Group, Inc. at 5; Comments of MetroPCS at 20.

nationwide networks,^{28/} which would have the effect of denying the benefits of the 700 MHz Public/Private Partnership to those who do not live in more densely-populated urban areas. The Commission cannot risk such an outcome. The Commission should continue to offer the D Block spectrum as a single, nationwide license, and it should implement the other pragmatic policies identified in Council Tree's Comments to create the conditions under which the reauction of the D Block license will be successful.

VI. THE COMMISSION SHOULD MODIFY THE D BLOCK PERFORMANCE REQUIREMENTS

Finally, the Commission should modify the D Block performance requirements. Leap Wireless International, Inc. proposes that the network construction requirements for the D Block license be modified to match those that applied to the Upper 700 MHz Band C Block licenses awarded in Auction 73,^{29/} which required coverage of 75 percent of the population of the service area by year 10 of the license term.^{30/} Council Tree endorses this approach. Establishing that the public safety users must finance terrestrial network construction beyond this level, and by providing for non-terrestrial applications and mandatory roaming for public safety users with compatible devices, will help the D Block licensee attract financing for the network to be constructed and see that service is provided as part

^{28/} See Comments of Sprint Nextel Corporation at 11.

^{29/} See Comments of Leap Wireless International, Inc. at 13.

^{30/} See 47 C.F.R. § 27.14(h).

of the 700 MHz Public/Private Partnership on a realistic basis. It will also promote the establishment of useful network redundancy features in the event that the shared public safety broadband network is rendered non-functioning. This, along with implementation of the other pragmatic policies identified in Council Tree's Comments, will create the conditions under which the reauction of the D Block license will be successful.

VII. CONCLUSION

For these reasons, and for the reasons set forth in its Comments in the captioned proceeding, Council Tree urges the Commission to implement the following seven pragmatic policies for the reauction of the D Block: (1) the Commission must take steps to promote a new-entrant designated entity ("DE") as the D Block licensee; (2) the Commission should decouple the DE rules applicable to the D Block licensee from pending litigation; (3) the Commission should prohibit the National Carriers from participating in the D Block reauction and using the spectrum to pad their already dominant holdings; (4) the D Block reserve price must be realistic; (5) in the absence of a showing of bad faith, the D Block licensee should not be faced with a financial penalty for failing to reach agreement on NSA terms; (6) the D Block license term should be extended to twenty years; and (7) the Public Safety Broadband Licensee should be required to operate as an accountable MVNO with respect to public safety users. Council Tree also urges the Commission to continue to offer the D Block spectrum as a single, nationwide license and to modify

the D Block performance requirements to match those applicable to the Upper 700 MHz Band C Block licenses awarded in Auction 73.

Respectfully submitted,

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