Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band	)	WT Docket No. 07-195
	)	
Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands	)	WT Docket No. 04-356

To: The Commission

COMMENTS OF NTCH, INC.

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July 18, 2008

SUMMARY

With respect to AWS3, NTCH suggests that:

- There are no compelling grounds to justify offering this spectrum on a nationwide basis rather than a CMA or BTA basis. Smaller license areas will permit far more inclusive and diverse involvement by many smaller carriers, increase auction revenues, and speed service to rural communities. Section 309(j) of the Act therefore precludes nationwide licensing.

- If offered on a more granular geographic basis, there would be a benefit in having a uniform, market-driven, nationwide standard which would be voluntarily adopted by bidding entities.

- Instead of simply requiring free broadband service to be provided, the Commission should use this spectrum as a means of providing phone service to high cost areas, with significantly reduced support for only those markets which receive no bids for commercial service. This would eliminate completely the need for continued USF support in most markets and very substantially reduce the cost of support in the remaining markets. It would save the American consumer billions of dollars per year and simplify the USF bureaucracy and paperwork, while also delivering affordable phone service to consumers in high cost areas. The treasury would take less of a one-time hit under this proposal than the bald "free broadband" requirement now proposed.

- The build-out requirement must be feasibly reachable

- The obscenity and pornography filter is not only completely unworkable but cannot possibly pass constitutional muster. It should be deleted from the proposed rules.

With respect to the H block, NTCH recommends that:

- Carriers be required to cap roaming rates at their lowest retail rate per minute
- The build-out requirements should be robust and strictly enforced

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NTCH, Inc. offers these comments on the Commission's proposal to offer the latest AWS spectrum block on a basis never before attempted including obligations never before imposed, on common carriers. In addition, the Commission has requested comment on its service rules for the H block. NTCH is a Tier III carrier with an interest in acquiring spectrum in this band, building it out on a practical basis, and offering high quality service at remunerative levels. Its comments here will be limited to certain key structural components of the Commission's AWS proposal. It also urges access to the H block be improved by imposing stricter roaming obligations.

I. AWS 3 Issues

A. Smaller Geographic License Areas Will Expand Participation, Generate More Revenue and Speed Construction

Offering licenses on a nationwide scale automatically precludes the participation in the auction of any small or regional carriers who not only have no need to serve the entire country but cannot possibly have the resources to bid on the license or build out the national system. This directly contravenes the statutory directive set out in Section 309(j)(3)(B) of the Act that the Commission's auction designs must:

> B) promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women

There is absolutely nothing in the record of this proceeding which warrants overriding this national policy directive. In addition, two of the other policy directives of Section 309(j) also strongly support the offering of licenses on a smaller scale. For to the extent the Commission must "recover a portion of the value of the spectrum,[1]" the lesson of the last few auctions is that auction revenues go *up* when smaller areas are available. This should not be surprising since smaller areas mean more potential bidders and bidders with a greater need or desire for specific markets. Again, there is no basis anywhere in the record to ignore that policy. And, finally, the third policy imperative set forth in the statute – the development and

[1] 309(j)(3)(C).

rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas[2] – is also better served by issuing more licenses in smaller areas. Locally based carriers can be counted on to construct facilities in their local areas far more quickly than a single carrier who would, of necessity, offer service first to urban areas where the densest customer populations are, and only later work its way down to high cost, low return rural areas. In short, to offer this spectrum on a single-provider, nationwide basis would violate three of the five mandates imposed on the Commission by Congress in auctioning licenses.

B. Let the Winning Bidders Decide on a Nationwide Network By Opting for Particular System Manager

Rather than having the Commission adopt a specific technology for this service, NTCH envisions a unique process in which the technology platform governing this network would be adopted by the participating carriers themselves. The process would work like this. Prior to the auction, the Commission would entertain proposals from different private entities to be the network manager. Different companies could proffer their plans and specifications for building out a network that would meet the needs of the public. There might well be several different plans and proponents. The proposals would have to include the implementation of a 4G platform as well as system standards which would have to be met by all participating carriers. The proposal would also have to include a commitment by all participating carriers to contribute to the build-out of markets

[2] 309(j)(3)(A).

which receive no bids. Of course, the proponents would have a strong incentive to set the standards for this network to the highest commercial standards since the new network would have to be competitive with the other existing and developing commercial networks. The proponent of such a network, in conjunction with its participating carriers, would be required to build out and serve any portions of the country which do not elicit a winning bidder, using the limited USF support explained below. Before the auction, therefore, there would be several competing proposals to lead and manage the nationwide network pursuant to a stated protocol.

As part of the auction process, individual carriers bidding on individual BTAs would in effect vote for one of the competing systems by indicating what their bid would be for any particular market under a particular proponent's plan. For example, a prospective licensee might bid a million dollars for a particular market under the plan proposed by nationwide proponent A but only $500,000 for the same market under the plan proposed by nationwide proponent B, and nothing at all for that market under proponent C's plan. At the end of the auction, the Commission would tally up the total high bids nationwide under each proponent's plan and the proponent receiving the most "votes" by virtue of receiving the highest bids would become the nationwide network manager. If there were any markets where there were no bidders willing to participate in that proponent's plan, the proponent itself would become the licensee in that market and would therefore take on the responsibility to provide service there. This ensures that a single nationwide

system would be adopted that is both commercially feasible and has a participating commercial licensee in every market.

In order to make this system work, there will need to be some pre-auction communication among prospective bidders and prospective network managers. The anti-collusion rules should be eased to allow a full exposition by the competing nationwide managers of their respective plans prior to the auction. That process will necessarily entail coordination between prospective managers, prospective bidders, and the Commission, all of which would be hampered by strict application of the anti-collusion rules. The prospective managers could explain their respective visions of the network to companies who had registered to bid, and prospective bidders would develop plans to ensure wide coverage. The plans would include a system of providing service in markets where no one places a bid. Once the auction actually begins, of course, the anti-collusion rules would apply as usual.

NTCH itself would plan to be a proponent of nationwide deployment program. NTCH has a demonstrated track record of building out high quality systems and constructing towers at price levels which are less than half the industry average. This is possible because it is a lean operation with low overhead, hands-on management, and strong incentives to bring projects in at the lowest cost. This business model permits NTCH to offer service to niche markets at rates that cannot be matched by the "high-priced" carriers with huge overheads and bloated management structures. NTCH's experience demonstrates that there is a place in the mobile communications industry for smaller players who are inventive, agile

and offer consumers a real choice to the dominant players. By serving as a nationwide manager and setting system criteria based on its own successful experience, NTCH can disseminate its methods to participating independent local and regional operators. The resulting efficiencies, scaled up to a nationwide level, will result in very significant cost savings for the entire network and resulting lower prices to consumers.

C. Require the Winning Bidder to Provide Phone and Broadband Service on a Discounted Basis to High Cost Areas

This unique proposal, which NTCH has put forth for other available spectrum bands, would save consumers billions of dollars while achieving other important Commission goals. Instead of requiring the auction winners to provide free broadband service everywhere, the plan would require both broadband and phone service to be provided at discounted levels in high cost areas which now qualify for USF support. There are many benefits to this proposal:

1. The free nationwide broadband proposal is both unnecessary and too costly. The Commission's own data shows that broadband is actually available in many markets in the U.S., and more and more broadband is being rolled out each day. These roll outs are driven by the market incentive to make a profit. By 2011 or 2012, there are likely to be at least three or four broadband providers in most metro areas. In these areas the market is working perfectly well to deliver high quality broadband to consumers and no government intervention is necessary. In fact, government intervention might actually *dampen* the willingness of commercial providers to make the huge investment in broadband

facilities if this AWS licensee is going to be offering free service in their markets. Indiscriminate free service would severely undermine the ongoing commercial broadband rollout.

2. At the same time, any "free" service is likely to wasteful. The laws of economics teach that anything that is free is used wastefully since the normal economic constraints on consumption are not present. The free network would therefore be quickly overwhelmed, be subject to frequent crashes and, at best, work sluggishly.

3. The real problem the Commission should be addressing is getting broadband to the rural and high cost areas where market forces are *failing* to meet the need. It is there and only there that government intervention is necessary or useful. And it is in those same areas that USF subsidies are being doled out by the billions, primarily to rural LECs. The Commission can here kill two birds with one stone: require the auction winners to deliver both broadband service and telephone service to these areas at a rate that does not exceed the national average. This would have several salutary effects:

i. It would eliminate the need for USF funding of high cost service altogether in any areas that garner a winning bid and reducing it by half in the remaining areas. In high cost markets where a winning bidder gets the license, there would be no need for high cost support at all. The bidder would have factored into its bid the obligation to provide service at nationally averaged rates to consumers in this market, despite the presumptively high cost of creating

the network infrastructure to serve the market. This means that the auction prices for high cost markets would be lower than they otherwise would be, but at the same time the need to provide on-going, multi-billion dollar support year after year would be drastically reduced. Consumers in these areas would be getting guaranteed access to phone service at rates comparable to non-high cost areas, which is really all that the USF high cost support program was ever supposed to accomplish. Service would be provided directly by the AWS carrier to the needy high cost customer with no intervening bureaucracy.

In those relatively few markets in the country which garnered no bids whatsoever (presumably because the revenue potential was so poor vis a vis the cost of construction and operation), USF support would continue, albeit at a reduced rate. It is these markets where a government subsidy is actually needed and justified, and the absence of any commercial bidder for the market would confirm that. Here the nationwide manager, along with its participating carriers, would have assumed the obligation to provide service in default of any winning bidders. The provider would receive annually 50% of the annual high cost support which was previously distributed to these markets, an amount which we feel should be quite adequate to enable service to be provided while maintaining the rates to consumers at no greater than the national average. These steps would save about 80% of the $4 billion per year in consumer contributions to the USF system, and would virtually eliminate the need for a cumbersome collection and distribution process for USF funds.

ii. It would ensure that broadband access is available in the parts of the U.S. where it is not now available while not interfering with market driven deployments in other areas. This should result in universal nationwide broadband access at a much lower overall cost than the current proposal.

iii. It would regulate broadband usage by providing for a discounted fee rather than free service. No other commodity in America is delivered "free" to people, so it is unclear why the Commission is considering making this one free. As noted above, unlimited free access to any broadband network would likely result in wasteful consumption of the resource to the detriment of all users. Also, by permitting the imposition of a discounted cost, the carriers offering the service can better hope to recover some of the costs involved in building out network facilities in areas which are not otherwise commercially attractive or viable. This should encourage more bidders and thus more auction revenue.

D. The Build-out Goals Must be Achievable

If the Commission were to adopt the proposal to make this spectrum the source for high cost support, it would be necessary for the participating carrier to provide very far-reaching coverage, but in order for such a system to be successful, it must be achievable on a practical level. The proposed rules call for service to 95% of the U.S. population by the end of the first license term. That goal is an ambitious one, but it also would allow, on a national basis, huge geographic areas (all of Alaska, Wyoming and Montana, for example) to be left completely untouched. By licensing on the granular level proposed here, the Commission can ensure that large

parts of *all* CMAs get service during the first term. However, for this same reason, it would very difficult to capture the most disparate outposts in the most remote areas of the most rural CMAs. NTCH therefore believes that it is more feasible to require 85% population coverage in each CMA by the end of the term – a higher figure than the Commission has ever imposed. The carrier would also have to ensure that no customer presently receiving phone service or broadband service would lose service once the new carrier assumed high cost responsibilities.

E. The Obscenity Filter is Unconstitutionally Vague and Cannot Be Imposed in Any Event

The Commission proposes an "always on" filter that is intended to weed out access to pornographic materials by children and teenagers. That goal, while laudable, is one which the Constitution flatly denies to the government. The proposed rule, for example, would require the filtering of material "harmful" to teenagers. It is frankly impossible for that vague standard to be applied since no one could possibly determine what constitutes "harm." And even if they could, the First Amendment does not permit the government to make that determination. The proposed rule also prohibits "pornography," a term which has no recognized definition despite decades of struggles by the courts and legislatures to come up with one. And, of course, the courts have made it clear that even indecency measures aimed at children cannot be so broad as to preclude adults from access to lawful material of their choosing, something a filter would not be able to permit. The rule is literally as incapable of effectuation as a rule requiring telephone companies to bleep out any naughty word which is uttered by anyone over the

phone network. Simply stated, the proposed filtering rule is so patently unconstitutional on its face that the rule could only be adopted as a political stunt with the perfect assurance that the courts would overturn it on appeal. The Commission should concentrate on doing what it can lawfully do.

In that regard, the Commission might usefully require the carriers to make available at no cost filtering programs that could be installed by parents on their and their children's broadband devices. This would remove the government and the AWS carriers from the filtering function and place it squarely where it belongs: on the parents and the families.

II. H Block Issues

A. Fair Roaming Rates Must Be Charged

In Docket WT 05-265, the Commission recognized that the current market structure of wireless communications in this country requires the continuation of automatic roaming obligations. The original cellular market structure consisted of numerous large, medium-sized and small carriers with independent operations in different parts of the country. This structure made fair roaming agreements a necessity for all carriers since every carrier was dependent on others for roaming availability just to serve its own customers. Each carrier had to charge reasonable roaming rates to others since they had reciprocal needs in large parts of the country where they did not themselves have service. Those days are long gone.

Now we have a system of highly concentrated megalithic national carriers who continue to swallow up not only other megaliths but also Tier II carriers like ALLTEL, Dobson, Rural Cellular and others. We are left with a smattering of smaller local or regional carriers like NTCH and the big four of AT&T, Verizon, T-Mobile and Sprint/Nextel. Each of the national carriers itself has a nationwide or quasi-nationwide footprint and therefore now has no economic impetus to enter into fair roaming arrangements with its comparatively Lilliputian colleagues. But this market structure leaves the customers of the smaller carriers at risk of being gouged for exorbitant roaming rates by the majors.

This situation is exactly what the Commission aimed to prevent when it conceived of cellular from the very beginning as a service that would permit ubiquitous nationwide roaming. "Throughout the cellular proceeding an essential objective has been for cellular service to be designed to achieve nationwide compatibility. In this regard, we expressly stated that a cellular subscriber traveling outside of his or her local service area should be able to communicate over a cellular system in another city." [3] The current market structure has effectively defeated this "essential objective." Regulatory intervention is therefore needed to correct an imbalance which the market now cannot adequately redress.

To be sure, in Docket WT 05-265, the Commission required carriers to provide automatic roaming on just, reasonable and non-discriminatory terms.[4] However, NTCH's experience is that roaming rates are kept secret by the majors and therefore there is no solid basis to find discriminatory treatment, nor are there any dependable benchmarks to determine what a just and reasonable rate is. This leaves the majors free to assess confiscatory for roaming rates which obviously bear no relationship whatsoever to the actual cost of providing the service. For each and every small carrier to bring a Section 201 or 203 complaint against the majors would be hugely costly and time-consuming not only for the carriers involved but

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[3] *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 FCC 2d 469 (1981).

[4] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 (2007).

also for the Commission and its staff. It makes more sense to deal with the issue forthrightly and generically.

NTCH's suggestion is that the Commission should take a leaf from its solution to the problem of CLECs who were attempting to gouge connecting carriers by imposing non-reciprocal charges that vastly exceeded their costs. *In the Matter of Access Charge Reform*, *Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001). Like the situation at hand, unscrupulous CLECs could charge exorbitant rates because the traffic was largely one-way to affiliated or friendly ISPs and there were no countervailing economic incentives to be reasonable. The Commission saw that "the market structure prevented competition from effectively disciplining prices," and therefore acted to impose a cap on termination rates at a level no higher than the level of the access charge imposed by the competing LEC, which it deemed to be presumptively reasonable. That action largely put an end to price gouging by CLECs.

The comparable solution here is to set a cap on roaming rates not to exceed the lowest retail rate charged by a carrier for voice or data. Such a rate is necessarily remunerative to the roamed-upon carrier since it is an actual rate being charged to a retail customer. It would also be readily established by access to the company's website or advertising material. By establishing this presumptive basis for the reasonableness of roaming rates, the Commission can ensure that roaming is

provided on a reasonable basis to millions of consumers without a torturous process of carrier by carrier complaint proceedings. Of course, roaming rates could always be set lower by negotiated agreement, but the cap would impose a reasonable limit within which the negotiations could range.

B. Build-Out Requirements Should Be Strictly Enforced

The Commission proposes a four year period within which 35% of the population in the market must be served. NTCH is concerned that this build-out period may permit warehousing of the spectrum for too long. NTCH suggests that a three year build-out period should be more than adequate to permit any serious licensee to serve 35% of the population of the coverage area in a service as tried and true as a voice-based 1900 MHz band. If that level of build-out is not achieved by the end of three years, the carrier should forfeit its license. Then, following the 700 MHz model, if coverage of 70% of the population is not achieved within six years, the licensee should lose any part of the licensed territory which is not being served at the six year mark. This "use it or lose it" approach served as a very persuasive stick to encourage cellular carriers to build out most of their service areas within five years. It also had the effect of opening the unserved areas to people who were willing to construct and operate almost immediately. These two modifications to the proposed rule structure will serve both to speed construction and widen availability of service at lower costs.

III. Conclusion

This is perhaps a last opportunity to address both the need for broadband and universal phone service through an economical spectrum-based solution. The Commission should not let the opportunity escape.

Respectfully submitted,

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_____/s/_____
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