

**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, <i>en banc</i> .		

**COMMENTS OF
AMERICAN ASSOCIATION OF PAGING CARRIERS**

THE AMERICAN ASSOCIATION OF PAGING CARRIERS (AAPC), by its attorney, respectfully submits its comments to the Federal Communications Commission in response to the Commission’s Further Notice of Proposed Rulemaking (FNPR) in the captioned proceedings, FCC 08-158, released June 20, 2008 and published at 73 Fed. Reg. 35995 (June 25, 2008).¹ In summary, while AAPC commends the Commission for its efforts to “promote the deployment and ubiquitous availability of broadband services across the country” (FNPR at ¶1), AAPC respectfully suggests that the Commission has paid inadequate attention to other fundamental public interest objectives of the Communications Act, *viz.*, promoting competition where feasible, especially by small businesses. Accordingly, AAPC respectfully submits that additional requirements should be imposed on the licensee in the 2155-2180 MHz band, in order to satisfy these basic statutory requirements. As discussed more fully hereinafter, they should include the requirement that the licensee offer fee-based services on a wholesale basis to third parties, without retail price controls, and the prohibition that Tier I and Tier II broadband CMRS licensees or

¹ By Order DA 08-1614, adopted and released July 8, 2008, the Chief, Wireless Telecommunications Bureau extended the deadline for filing comments and replies to July 25, 2008 and August 11, 2008, respectively.

affiliated entities may not hold the license for the 2155-2180 MHz band. As its comments in response to the FNPR, AAPC respectfully states:

Introduction

AAPC's interest in this proceeding relates primarily to the licensing and related rules applicable to the proposed 2155-2180 MHz band,² designated for "wireless broadband service," *i.e.*, high speed access to the Internet. The Commission proposes to license a single entity on a nationwide basis, and to require the licensee to dedicate up to 25% of its spectrum capacity for the provision of free service delivering 768 kbps downstream or better, including network filters for obscene or pornographic content. The licensee also must maintain an "open" network for user devices and applications.

The Commission also proposes to have an open eligibility policy for the 2155-2180 MHz license for otherwise qualified entities, and to require the licensee to provide coverage and service to at least 50% of the nation's population within four years and to at least 95% of the population within 10 years. The initial license term is 10 years, with 10-year renewal terms. Traditional licensee prerogatives would also be permitted, including the flexibility to disaggregate, partition and lease the spectrum.

AAPC is the national trade association representing the interests of paging carriers throughout the United States. AAPC's members include a majority of the paging operators with nationwide licenses pursuant to Parts 22, 24 and 90 of the Commission's rules and a representative cross-section of operators of regional and local paging systems also licensed pursuant to Parts 22, 24 and 90, as well as equipment suppliers and other vendors to the carrier industry. Members of AAPC are entrepreneurs and small businesses within the meaning of Section 257 of

² The FNPR for the first time proposes to license 2155-2180 MHz as a single 25 MHz block, rather than licensing 2155-2175 MHz as a single block and pairing 2175-2180 MHz with 2020-2025 MHz. AAPC understands that the FNPR proposal is designed to resolve harmful interference objections by AWS-1 licensees and urges the Commission to adopt it.

the Communications Act, 47 U.S.C. §257; and many of them are interested in developing wireless broadband Internet service as a component of their businesses, if reasonable opportunities are available. Part of AAPC's mission is to foster new business opportunities for its members, and its comments in this proceeding are in furtherance of that objective.

The Commission states that the objective of the FNPR is to “promote the development and ubiquitous availability of broadband services across the country” and to “facilitate the use of AWS spectrum for the benefit of consumers”. (FNPR ¶1). These unquestionably are laudable public interest objectives as far as they go, and AAPC commends the Commission for its proposals in the FNPR designed to accomplish them. Nonetheless, those two objectives clearly do not by any means embody the entirety of the “public interest” standard of the Communications Act which the Commission is charged with implementing, and AAPC strongly urges the Commission to remedy its inadequate attention to other, fundamental components of the public interest standard when promulgating the final rules herein.

More specifically, AAPC urges the Commission to adopt a requirement that the licensee must offer any fee-based services on a wholesale basis in the 2155-2180 MHz band, and an eligibility standard that excludes the principal existing broadband CMRS carriers (*i.e.*, Tier I and II broadband CMRS licensees and affiliated entities)³ from obtaining the nationwide license for that band. Both of these steps are minimum steps reasonably necessary in order to foster “mar-

³ In its 2002 Order to Stay issued in the E911 proceeding, the Commission defined Tier I and Tier II broadband CMRS carriers, respectively, as the (then) six nationwide carriers (Tier I), and other broadband CMRS carriers serving more than 500,000 subscribers as of the end of 2001 (Tier II). Revision of the Commission's Rules to Ensure the Compatibility with Enhanced 911 Emergency Calling Systems (*Order to Stay*), 17 FCC Rcd 14841, at ¶¶7 & 22 (FCC 2002). More recently, the Commission exempted its emergency power backup requirements from applying to non-nationwide CMRS providers with no more than 500,000 subscribers, noting that its exclusion is based on the Tier III CMRS definition. Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks (*Order*), EB Docket No. 06-119, FCC 07-107, adopted May 31, 2007 and released June 8 2007, at ¶78 & n. 103. The Commission thus should similarly here update its definition of Tier II to include non-nationwide broadband CMRS carriers serving 500,000 or more subscribers, and its definition of Tier III to include non-nationwide broadband CMRS carriers serving fewer than 500,000 subscribers, as of the date the short

ket entry for entrepreneurs and small business in the provision and ownership of . . . information services” and in the “provision of parts or services to providers of . . . information services,” as the Commission is explicitly required to do by Section 257 of the Communications Act, 47 U.S.C. §257.

Comments

1. The Commission Should Require the Licensee to Offer Any Fee-Based Service on a Wholesale Basis to Non-Affiliated Entities, Without Retail Price Controls.

Whatever else may be said about the auction regimen for distributing licenses to use the radio spectrum, one clearly unfortunate byproduct of it has been to largely foreclose traditional small business entrepreneurs from participating in the growth and development of advanced wireless services subsequent to the initial cellular band at 800 MHz. While the Commission has attempted from time to time to remedy this omission by employing a variety of devices, such as installment payments, closed auctions, bidding credits and designated entities, they have notably failed to prevent domination of the wireless industry by a relative handful of traditional telecommunications giants. This domination has happened despite Section 257's explicit mandate that the Commission foster “market entry for entrepreneurs and small business in the provision and ownership of telecommunications and information services” and in the “provision of parts or services to providers of telecommunications and information services.”

The 2155-2180 MHz band is one of the last opportunities for the foreseeable future – if not *the* last opportunity – available to the Commission to adopt meaningful policies to try to remedy this rather glaring omission; and the Commission should not waste it.

AAPC accepts the Commission’s judgment that a single, nationwide licensee in the 2155-2180 MHz band is necessary, at least initially, in order to implement the Commission’s vision of

form applications are due to be filed for the auction for the AWS-3 spectrum band.

ubiquitous broadband wireless service. Given that premise, the most obvious way to foster participation in that band by small business entrepreneurs, in accordance with Section 257 of the Act, is to impose an explicit requirement on the nationwide licensee – as a companion to the requirements to offer free service and maintain an “open” network – to offer all fee-based services on a wholesale basis, without retail price controls. Such a requirement would not preclude the licensee from having its own retail division if it wishes to do so. If it chooses to do so, however, the licensee should be required to offer all such services to third parties on a wholesale basis as well. Accordingly, AAPC strongly urges the Commission to adopt a requirement that the 2155-2180 MHz licensee offer all fee-based services in that band on a wholesale basis to third party entities, without retail price controls over the services provided by third party entities to the public.

2. The Principal Existing Broadband CMRS Licensees Should Not Be Eligible for the License in the 2155-2180 MHz Band.

It is beyond dispute that a fundamental purpose of the 1996 amendments to the Communications Act was to promote competitive entry into the telecommunications and information services industry where feasible, and thus to firmly embed promotion of competition where possible as a primary component of the public interest standard of the Act. Accordingly, in crafting its licensing rules for the 2155-2180 MHz band, the Commission is obligated to promote competition where feasible to do so, which it has entirely failed to do in the FNPR.

The broadband CMRS industry has consolidated over the years into a relative handful of telecommunications giants, most notably AT&T, Verizon, Sprint and Deutsche Telecom, and the consolidation trend continues with pending acquisitions of Alltel and Rural Cellular Corporation by Verizon. The broadband CMRS industry has its own, fee-based versions of wireless broad-

band service (about \$60 per month) which it has increasingly emphasized in its marketing in recent years, in evident recognition of the potential for growth in that market in the future.

Clearly, the Commission's proposal for the 2155-2180 MHz band, principally including the offer of a level of free service in addition to fee-based services, is perceived by the existing licensees as a threat to their traditional business model. This blunt fact is not only intuitively obvious, it is unambiguously evidenced by their representatives' rather frenzied attempts in recent days and weeks to kill the basic features of the FNPR, or indefinitely delay its issuance and any decision on it. Under these circumstances, the Commission properly may not, consistent with its mandate to promote competition where feasible, allow the established broadband CMRS entities with their hostile economic interests and intent, to obtain the nationwide license for the 2155-2180 MHz band.

Nonetheless, the FNPR's proposal for "open" eligibility for the nationwide license almost certainly will assure precisely that one of those entities will wind up as the licensee. One need only review the results of recent AWS and 700 MHz auctions to understand the obvious, *i.e.*, that the established broadband CMRS interests are able and willing to pay whatever it takes to keep new spectrum firmly under their control and to exclude any potential for meaningful competitive entry. The Commission lawfully may not simply bury its head in the sand and remain oblivious to this consequence of a nominally "open" eligibility policy for the 2155-2180 MHz band. Instead, the Commission is obligated by statute to affirmatively address and prevent a result similar to the AWS and 700 MHz auctions, or to explain, if it can, why precluding competitive entry in this manner serves the public interest.

In this regard, AAPC further points out that the aggressive buildout requirements proposed in the FNPR will not themselves do anything to prevent broadband CMRS interests hostile

to the free-service concept from obtaining the 2155-2180 MHz license in the auction. The established CMRS industry can well afford the relatively small auction price for the spectrum, and can be expected to devote and divert it to their own purposes, which do not include aggressive development of ubiquitous free Internet access service.

Indeed, in this regard, AAPC is aware of press reports that the established CMRS industry is eyeing the 2155-2180 MHz band simply as extra video downstream capacity for its 3G and 4G services already on the drawing board. Whether additional spectrum capacity properly should be employed for this purpose is not the issue. The point here is that the established CMRS industry's concept of how the 2155-2180 MHz spectrum should be deployed is vastly different than the service envisioned by the FNPR.

Nor are the requirements for free service and an "open" network, by themselves or in combination with any of the other requirements proposed in the FNPR, adequate to promote either competitive entry or the FNPR's vision for this band. In order for the FNPR's vision to have a chance of working, the licensee must firmly believe in it and must firmly believe that it represents a viable business opportunity. Only a licensee that does not carry the baggage of significant conflicting economic interests can satisfy that requirement; and the established broadband CMRS industry plainly does not satisfy that criterion.

The Commission's recent experience with the AT&T/BellSouth merger aptly illustrates why the free service requirement proposed in the FNPR is not adequate to promote the public interest objectives of the Commission for the 2155-2180 MHz band, if the licensee is an established broadband CMRS licensee. As one of the conditions of that merger, AT&T agreed to offer, within 12 months of consummation of the acquisition, stand-alone DSL service for \$20.00 per month. To say the least, AT&T agreed to this condition quite reluctantly.

As a result, what happened is that AT&T used the 12-month window to launch a vigorous marketing effort to lock new and existing customers into service contracts for traditional, higher-priced DSL services before the \$20.00 offering was made available, so that those customers could not practicably take advantage of the offering when it did become available. Equally important, and perhaps more ominously, AT&T's customer service representatives were known to adamantly deny the availability of the \$20.00 stand-alone offering, even after the 12-month window expired and the offer in fact was available. Moreover, prior to the expiration of the 12-month window, they were known to adamantly deny that the \$20.00 offer *would be* available. In short, AT&T did everything it could to subvert the merger condition; and an established broadband CMRS licensee, if it obtains the 2155-2180 MHz license, can be expected to behave exactly the same way with respect to the free service requirement in that band. The Commission can and properly should draw upon its historical experience in similar situations to anticipate and prevent perversion of its laudable public interest objectives for the 2155-2180 MHz band.

For much the same reason, the requirement to wholesale fee-based services requested by AAPC is likely to be subverted if a member of the established broadband CMRS industry winds up with the 2155-2180 MHz license. The business model of the established industry is based only on sales agency relationships with third-party entrepreneurs, not wholesale arrangements. Indeed, the industry has always been hostile to wholesaling, and the overwhelming failure of MVNOs to survive is one of the consequences of that hostility. Therefore, in order to have a meaningful requirement to offer fee-based services on a wholesale basis, it is vitally important that the Commission ensure that the licensee in the 2155-2180 MHz band not be an entity with either the incentive or history of hostility to genuine wholesale arrangements with third-party small business entrepreneurs.

In this regard, while a flat prohibition against broadband CMRS licensees being eligible for the 2155-2180 MHz license obviously would be effective to accomplish the essential public interest objectives discussed above, AAPC does not believe a total prohibition is necessary to accomplish those objectives. Tier III broadband CMRS licensees have relatively limited geographic scopes of operations and economic resources and, if they choose to bid for the nationwide 2155-2180 MHz license, are not likely to have the same overriding incentives as the other broadband CMRS licensees to subvert the FNPR's vision for that spectrum band. Therefore, AAPC respectfully submits that it would be sufficient to exclude Tier I and Tier II broadband CMRS licensees, and entities affiliated by contract or stock ownership with Tier I or Tier II licensees, from eligibility for the nationwide 2155-2180 MHz license.

Conclusion

For the reasons stated above, the rules proposed in the FNPR for licensing the 2155-2180 MHz band remain fundamentally inadequate to satisfy the public interest standard of the Communications Act. To remedy this omission, the Commission can and properly should impose a requirement that the licensee offer all fee-based services on a wholesale basis to third-parties, without control over the retail pricing by third parties, and should exclude Tier I and Tier II

broadband CMRS licensees and affiliated entities from eligibility for the nationwide 2155-2180 MHz license.

Respectfully submitted,

AMERICAN ASSOCIATION OF PAGING
CARRIERS

By: s/Kenneth E. Hardman

2154 Wisconsin Avenue, NW, Suite 250

Washington, DC 20007

Direct Dial: (202) 223-3772

Facsimile: (202) 315-3587

kenhardman@att.net

July 25, 2008

Its Attorney