

**T-Mobile Position Paper:
The FCC's Contractual Obligation to AWS-1 Licensees**

The Federal Communications Commission has a contractual obligation to protect the integrity of the E and F Block spectrum for which licenses were sold in the first Advanced Wireless Services (“AWS-1”) auction. As the courts made abundantly clear in the *NextWave* litigation, an FCC spectrum auction makes the Government a party to a contract, with all the obligations that entails. As a contractual party, the Government may be subject to a suit for monetary damages if the Commission adopts rules for the AWS-3 band that breach its duties to AWS-1 licensees by significantly impairing the ability of E and F Block licensees to use the licensed spectrum to provide AWS services to their customers.

I. The AWS-1 Auction Created an Enforceable Contract Between the Government and the Licensees.

Under settled precedent, the Commission entered into a binding contract with AWS-1 licensees when it issued a Public Notice confirming the results of the AWS-1 auction. It is well established that an auction is a mechanism for the exchange of an offer and an acceptance, resulting in a contract. Specifically, “the close of the auction – traditionally the drop of the hammer – signals acceptance of an offer and forms an enforceable contract.” *In re NextWave Personal Commc’ns, Inc.*, 200 F.3d 43, 60 (2d Cir. 1999).^{1/}

Both the Commission and the courts have recognized that spectrum auctions, like other types of auctions, create binding contracts between the Government and the winning bidder. The Commission has explained that a spectrum auction creates “a binding mutual obligation between the Commission and the winning bidder as of the close of the auction.”^{2/} Similarly, the Commission has noted that “[t]he announcement of the winning bidder in an auction conducted by the Commission [is] like the acceptance of high bids in auctions in other settings,” and “federal government auctions are viewed under the same rules pertaining to the formation of contracts generally.”^{3/} In the *NextWave* case, the Second Circuit accepted the Commission’s argument that a spectrum auction results in an enforceable contract. *NextWave*, 200 F.3d at 61-62 (noting that “the obligations NextWave seeks to avoid arose no later than the announcement of the winning bid, . . . [t]he FCC was bound, and so was NextWave”). In accordance with these precedents, the AWS-1 auction generated binding contracts between the Government (acting through the Commission) and the winning bidders.

^{1/} See also 7 AM. JUR. 2D *Auctions and Auctioneering* § 34 (1997); U.C.C. § 2-328 (2004); *Blossom v. Railroad Co.*, 70 U.S. (3 Wall.) 196, 206 (1865); *Commodities Recovery Corp. v. United States*, 34 Fed. Cl. 282, 289 (1995).

^{2/} Second Order on Reconsideration of the Second Report and Order, *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 14 FCC Rcd 6571, 6581 ¶ 17 n.66 (1999).

^{3/} Memorandum Opinion and Order, *BDPCS, Inc.*, 15 FCC Rcd 17590, 17599-17600 ¶ 16 & n.63 (2000).

II. Allowing the Use of TDD in the AWS-3 Band Would Breach the Government's Auction Contracts with the E and F Block AWS-1 Licensees.

The terms of the Government's offer to sell the AWS-1 licenses at auction became part of the sales contract between the Government and the licensees. Those terms were set out by the Commission in a series of public notices and orders outlining the service rules and license conditions for the AWS-1 band.^{4/} Most notable among these are the order establishing service rules for AWS-1 and the public notice for the auction.^{5/} These documents ensured prospective bidders that the spectrum was being offered for the provision of AWS services and would be suitable for that purpose.^{6/} While the Commission warned bidders that it did not warrant the suitability of the spectrum for any individual licensee's "particular service[],"^{7/} it nevertheless made clear that the spectrum was being provided for the *class* of services known as "Advanced Wireless Services," which it defined to include "new and innovative fixed and mobile terrestrial wireless applications using bandwidth that is sufficient for the provision of a variety of applications including those using voice and data (such as Internet browsing, message services, and full-motion video) content."^{8/}

In short, a central term of the AWS auction was that the spectrum would be usable for AWS services. This condition was of course a key factor in the decision by the E and F Block licensees to bid for the spectrum, since it defined the usability and usefulness of the licenses at issue. And the FCC did not simply promise that the spectrum would be generally usable for AWS services – it promised bidders that the licenses they obtained would be governed by "technical rules" that would "permit licensees to provide a wide variety of services in these bands *with a minimum of interference*, and will permit both in-band and adjacent band licensees to *operate with sufficient certainty and clarity regarding their rights and responsibilities*."^{9/}

^{4/} See RESTATEMENT (SECOND) OF CONTRACTS § 28 (1981) ("Unless a contrary intention is manifested, bids at an auction embody terms made known by advertisement, posting or other publication of which bidders are or should be aware, as modified by any announcement made by the auctioneer when the goods are put up."); see also *id.* at cmt. e ("A bid need not repeat such terms; it is understood as embodying them.").

^{5/} See, e.g., Public Notice, *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006*, 21 FCC Rcd 4562, 4569 ¶ 14 (2006) ("*Auction 66 Public Notice*"); Report and Order, *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 18 FCC Rcd 25162 (2003) ("*AWS-1 Rules Order*").

^{6/} See, e.g., *Auction 66 Public Notice*, 21 FCC Rcd at 4578 ¶ 38.

^{7/} *Id.*

^{8/} *Id.* at 4564 ¶ 1 n.1 (emphasis added).

^{9/} *AWS-1 Rules Order*, 18 FCC Rcd at 25168 ¶ 15 (emphasis added); see also *id.* at 25178 ¶ 44 (stating that the larger spectrum blocks, including the F Block, would "enable a broader range of broadband services, including Internet access at faster speeds. These larger blocks should also accommodate future, higher data rates, and provide operators with additional capacity, and, importantly, with greater flexibility.").

That promise was further reinforced by the Commission's rejection of a proposal to include TDD in the AWS-1 spectrum; the Commission determined that interference caused by TDD would be incompatible with other AWS-1 services.^{10/}

Adopting AWS-3 rules that allow TDD in the AWS-3 spectrum would necessarily violate these promises and breach the contracts the Commission made with winning AWS-1 bidders. The proposed rules would subject the AWS E and F Block spectrum to harmful interference, thereby rendering it far less usable and in some circumstances potentially *unusable* for the AWS services for which the Commission offered it. The Commission accordingly would be giving AWS-1 auction winners something very different from what it promised: spectrum that is *not* protected from interference when the license winners are providing the AWS services that motivated their winning bids.

M2Z's suggestion that auction winners did not have a reasonable expectation that their spectrum would in fact be protected from TDD interference is without foundation. Even leaving aside the Commission's *specific* commitment here to such interference protection, the Commission's own consistent course of dealing reinforced this eminently reasonable expectation.^{11/} As T-Mobile explained in its comments in this proceeding, the Commission virtually always requires later-licensed entities to protect and accommodate the services of earlier licensees, so that earlier licensees can expect to be protected from interference caused by later spectrum actions.^{12/} It would be virtually unprecedented for the Commission to do what it proposes here: expose incumbent licensees that already have begun to offer service to an unmitigated risk of harmful interference by a later licensee, thereby effectively requiring the incumbents to curtail their services or invest in new equipment or technology in order to try to mitigate the risk.

Nothing about the Commission's AWS-1 auction terms indicated that the Commission would adopt this radical new approach for the AWS-1 spectrum. Indeed, it is inconceivable that bidders would have invested so heavily in this spectrum with the understanding that, at any moment, the FCC might impede its use by allowing adjacent, interfering TDD operations. The F Block in particular fetched the highest revenue per POP per MHz of all the licenses offered in the AWS-1 auction, suggesting a high degree of bidder confidence that the spectrum being offered was a valuable and protected commodity.

^{10/} *AWS-1 Rules Order*, 18 FCC Rcd at 25179 ¶ 46; *id.* at 25203-25205 ¶¶ 107-111; *see also* Comments of T-Mobile USA, Inc., filed in WT Dockets No. 07-195 & 04-356, July 25, 2008, at 29-31 ("T-Mobile Comments").

^{11/} *See* U.C.C. § 1-205(3) ("A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 221 & cmt. a (1981).

^{12/} T-Mobile Comments at 25-28.

In any event, any ambiguity would have to be resolved in favor of the AWS-1 bidders. It is undisputed that the terms here were unilaterally imposed by the Commission: the *Auction 66 Public Notice* itself stated that “the terms contained in the Commission’s rules, relevant orders, and public notices are not negotiable.”^{13/} In these circumstances, the doctrine of *contra proferentem* requires that any lack of clarity in those terms be construed against the Commission, which supplied the terms.^{14/} The Supreme Court has held that, in cases involving contracts with the United States Government, “[t]his principle is appropriately accorded considerable emphasis . . . because of the Government’s vast economic resources and stronger bargaining position in contract negotiations.” *United States v. Seckinger*, 397 U.S. 203, 216 (1970).

Finally, allowing the use of TDD in the AWS-3 band would violate the Commission’s implied contractual obligation of good faith and fair dealing to AWS-1 licensees. As the D.C. Circuit has recognized, it is an “intuitive premise that an agency cannot, in fairness, radically change the terms of an auction after the fact.” *U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000). The E and F Block licensees expended billions of dollars to obtain spectrum that the Commission promised could be used for advanced wireless services. If the Commission later adopts rules that impair the use of the spectrum for that purpose, the Commission will have breached its contractual duty of good faith and fair dealing.

III. A Breach of Contract Would Subject the Commission to Suit for Money Damages.

Like any other contracting party, the Government is bound by the terms of its contracts: “When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.” *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (internal quotation marks and citation omitted). That includes liability for money damages where the Government breaches its contractual obligations. As the Commission knows, courts have indicated their willingness to consider a failure by the Commission to meet its obligations under an auction contract for spectrum licenses.^{15/}

The E and F block licensees spent billions of dollars to buy licenses in the AWS-1 auction, in reliance on the auction terms stated by the Commission – including the specific commitment that the spectrum would be usable for the provision of AWS services without

^{13/} *Auction 66 Public Notice*, 21 FCC Rcd at 4569 ¶ 14.

^{14/} See RESTATEMENT (SECOND) OF CONTRACTS § 206 (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words . . .”).

^{15/} See, e.g., *Cellco Partnership d/b/a Verizon Wireless v. United States*, 54 Fed. Cl. 260 (2002) (denying Government request for stay of contract action based on failure to deliver auctioned licenses). The Government ultimately settled the case. See also *Biltmore Forest Broad. FM, Inc. v. United States*, 80 Fed. Cl. 322 (2008) (suggesting that an implied-in-fact contract claim should be brought in the court of appeals); cf. *Folden v. United States*, 379 F.3d 1344 (Fed. Cir. 2004) (similarly suggesting courts of appeals are the proper venue for contract claims relating to the Communications Act).

interference. They relied also on the Commission's duty of good faith and fair dealing. The licensees since have invested billions of dollars to build facilities to utilize the AWS-1 spectrum and to deploy services in major markets across the United States. Their business plans and revenue models are based on the Commission's commitment that the spectrum will be usable for AWS services. If the Commission were to break its contractual obligations to the licensees, the benefit of the bargain they struck would be seriously undermined. The E and F Block licensees would have recourse for monetary damages against the Government to redress this loss.

To avoid such a breach of contract and consequent legal action, and for the reasons discussed in T-Mobile's previous filings in this proceeding, T-Mobile again urges the Commission not to adopt rules allowing TDD in the AWS-3 spectrum. The Commission has the ability to adopt alternative technical rules in the AWS-3 band for downlink-only use that will avoid causing harmful interference to AWS-1 licensees, and T-Mobile strongly urges the Commission to do so as a matter of sound law and good public policy.