

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of:	)	
	)	
Auction of Broadband Radio Service	)	
(BRS) Licenses Scheduled for October 27,	)	
2009	)	AU Docket No. 09-56
	)	
Comment Sought on Competitive	)	
Bidding Procedures for Auction 86	)	

**COMMENTS OF THE WIRELESS COMMUNICATIONS ASSOCIATION  
INTERNATIONAL, INC.**

**I. INTRODUCTION AND SUMMARY**

The Wireless Communications Association International (“WCAI”), the trade association of the wireless broadband industry, in response to the Public Notice issued by the Federal Communications Commission (“FCC” or “Commission”) on April 24, 2009 in the above-referenced matter<sup>1/</sup> hereby submits its comments regarding the competitive bidding procedures proposed by the FCC for the auction (“Auction 86”) of Broadband Radio Services (“BRS”) licenses, scheduled for October 27, 2009. As the Commission noted in the Auction Procedures PN, 75 of the licenses offered at auction are “overlay” licenses for Basic Trading Areas (“BTAs”)<sup>2/</sup> originally offered by the FCC in Auction 6 that are now available as a result of default, cancellation, or termination.<sup>3/</sup> The auction also includes three newly-established BRS

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<sup>1/</sup> *Auction of Broadband Radio Service (BRS) Licenses Scheduled for October 27, 2009; Comment Sought on Competitive Bidding Procedures for Auction 86*, Public Notice, AU Docket No. 09-56, DA 09-843 (rel. Apr. 24, 2009) (“Auction Procedures PN”).

<sup>2/</sup> BTAs are material copyright ©1992 Rand McNally & Company.

<sup>3/</sup> Auction Procedures PN ¶ 3. Overlay licenses cover geographic areas in which there are incumbent, pre-auction licensees.

licenses for the Gulf of Mexico. WCAI urges the Commission to modify and clarify its Auction 86 procedures in two ways.

First, as discussed below, several of the licenses to be auctioned are so heavily encumbered by pre-existing incumbent BRS licenses that the proposed upfront payment and corresponding minimum opening bid amounts may discourage potential bidders from participating unless those payments are modified to reflect the incumbency. WCAI urges the FCC to adjust both the upfront payment and the corresponding minimum opening bid amounts to reflect differing levels of existing encumbrances among the licenses offered for auction. Specifically, WCAI urges the Commission to modify its formula for calculating upfront payments to  $\$0.005 * \text{MHz} * \text{BTA population}$  when the BTA's total encumbered population ("Pops") is greater than 50% but less than 80%. Further, the Commission should adjust its upfront payment formula to  $\$0.001 * \text{MHz} * \text{BTA population}$  when the BTA's total encumbered Pops is greater than 80%. These modified upfront payment amounts should be accompanied by a corresponding adjustment in minimum opening bid amounts. Adjustment of upfront payment and minimum opening bid amounts for heavily encumbered licenses will help the Commission avoid unsold licenses or skewed bidding that otherwise would be detrimental to the Commission's auction process, the public interest, and the deployment of BRS services.

Second, as the Bureau noted in its Auction Procedures PN, the BRS spectrum is in the midst of being transitioned to a new band plan. WCAI recommends that in its Order establishing the procedures for Auction 86 the Commission remind potential bidders that licenses issued pursuant to the auction will be subject to the reimbursement obligations set forth in Sections 27.1237(b) and 27.1239 of the FCC's rules. Such a reminder will ensure that potential bidders

take into account the reimbursement obligations associated with a license as they conduct their pre-auction due diligence.

Similarly, the Commission should also caution potential bidders that although new licenses will be issued under the post-transition band plan, incumbents within the BTAs subject to auction are at varying stages with regard to the transition. In fact, data provided to WCAI by its members indicates that the transition is incomplete in 46 of the 75 BTAs scheduled for re-auction. Since incoming BTA licensees must protect incumbent operations, this may mean that an auction winner's use of its spectrum may be delayed until transition-related issues are resolved and the transition is completed.

## II. DISCUSSION

### A. Significant Levels of Incumbency Compromise the Value of Many Auction 86 Licenses

As the Commission noted in the Auction Procedures PN, the BTA licenses offered in Auction 86 are “overlay” licenses that are subject to the rights of pre-existing BRS incumbent licenses.<sup>4/</sup> The Commission specifically warned bidders that “[a]ny licenses granted pursuant to this auction will not include the geographic service areas of any overlapping, co-channel incumbent licenses.”<sup>5/</sup> A BTA licensee's obligation to protect incumbents is indefinite. Indeed, only if an incumbent license is cancelled or forfeited does the BTA licensee obtain the right to operate within that area.<sup>6/</sup> Similarly, on the E and F channel groups, grandfathered Educational

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<sup>4/</sup> Auction Procedures PN ¶ 3.

<sup>5/</sup> *Id.* ¶ 5.

<sup>6/</sup> 47 C.F.R. § 27.1206(b).

Broadband Service (“EBS”) licenses may continue to operate indefinitely and must be protected by the BRS BTA licensee.<sup>7/</sup>

In establishing a formula for calculating upfront payment amounts for Auction 86, the FCC proposes, with regard to all of the licenses offered for auction, to use a formula that it has employed in the past for spectrum that the FCC determines may not attract significant bidding interest --  $\$0.01 * \text{MHz} * \text{BTA population}$ .<sup>8/</sup> In proposing the use of that formula in this instance however, the Commission did not make the important distinction between encumbrances that are time limited and those, as is the case with BRS overlay licenses, that are likely permanent. Unlike other spectrum bands, there is no requirement for BRS and EBS incumbents to relocate or otherwise cease operations. Consequently, the level of existing incumbency is likely the single most important factor considered by potential bidders as they evaluate the value of the licenses offered at auction. Yet, the Commission’s proposed formula fails to take this important factor into account despite the fact that the level of incumbency among the BTA licenses to be auctioned varies greatly.

As the chart attached hereto as Attachment 1 illustrates, WCAI’s analysis of the incumbents associated with the overlay licenses shows that of the 75 overlay licenses subject to

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<sup>7/</sup> Auction Procedures PN ¶ 6.

<sup>8/</sup> The FCC has routinely adopted lower minimum opening bid amounts for licenses that may not be as likely to be sold at auction as other licenses. *See, e.g., Auction of 700 MHz Band Licenses Scheduled for January 24, 2008*, Public Notice, 22 FCC Rcd 18141, ¶ 211 (2007) (“We recognize concerns . . . regarding proposed minimum opening bids and the potential for some licenses . . . to remain unsold after the auction. . . . Accordingly, we adopt the revised minimum opening bid amounts . . . [including] for licenses covering geographic areas for which a corresponding Auction 66 license was unsold, [an amount of]  $\$0.01/\text{MHz-pop}$ .”); *Auction of AWS-1 and Broadband PCS Licenses Rescheduled for August 13, 2008*, Public Notice, 23 FCC Rcd 7496, ¶¶ 192-194 (2008) (setting a minimum opening bid amount of  $\$0.01$  for certain types of licenses). The Commission proposes the same formula for calculating minimum opening bid amounts with a minimum opening bid of  $\$20,000$ . Auction Procedures PN ¶ 40.

auction, 21 have levels of incumbency that exceed 50% of the BTA's MHz\*Pops. Of those 21 licenses, seven have levels of incumbency that exceed 80% of the BTA's MHz\*Pops. For these 21 licenses, rote application of the FCC's proposed upfront payment formula produces a required payment/minimum opening bid per available MHz\*Pop that significantly exceeds the Commission's \$0.01 target. For example, in BTA 293 (Miami-Fort Lauderdale), existing incumbents account for 90% of the market's MHz\*Pops leaving only 10% of the MHz\*Pops available to an auction winner. Using the FCC's proposed formula, a potential bidder would be required to make an upfront payment/minimum opening bid equivalent to \$0.097 per available MHz\*Pop, a result that exceeds by nearly ten-fold the Commission's \$0.01 MHz\*Pop target.

BTA 444 (Toledo-Ohio) provides an even starker example of the incongruities that result from application of the FCC's proposed formula if significant incumbency is ignored. In that BTA, incumbents claim 82% of the BTA's MHz\*Pops, yet the FCC proposes that potential bidders make an upfront payment/minimum opening bid of \$604,000 or \$0.058 per available MHz\*Pop. In Auction 6, the winning bid for the Toledo BTA license -- which has since been returned to the Commission for re-auction -- was \$407,070, almost \$200,000 less than the upfront payment/minimum opening bid amount that the Commission now contemplates for that market based on its proposed formula. The following are other examples of instances in which the FCC's proposed upfront payment/minimum opening bid exceeds its \$0.01 MHz\*Pop target and exceeds or nearly matches the Auction 6 winning bid for the BTA:

<b>BTA</b>	<b>Proposed Upfront/Minimum Payment</b>	<b>% Incumbency</b>	<b>Proposed Minimum Opening Bid \$/MHz*Pop</b>	<b>Prior Winning Bid Amount</b>
BTA 8 Albuquerque, NM	\$636,000	87%	\$0.076	\$221,124
BTA 56 Brownsville- Harlingen, TX	\$272,000	68%	\$0.031	\$74,200
BTA 113 Dickinson, ND	\$27,000	77%	\$0.043	\$27,109
BTA 244 Las Cruces, NM	\$191,000	63%	\$0.027	\$81,995
BTA 456 Victoria, TX	\$126,000	53%	\$0.021	\$63,850
BTA 488 San Juan, PR	\$2,046,000	78%	\$0.045	\$716,000

**B. Significant Incumbency Should be Reflected in Adjustments to the Commission’s Required Upfront Payment and Minimum Opening Bid Amounts**

The Commission’s often-stated goal of requiring upfront payments is to protect against frivolous or insincere bidding.<sup>9/</sup> Minimum opening bid amounts, on the other hand, are intended to accelerate the competitive bidding process. As is its usual practice, in Auction 86, the FCC proposes to use the same formula to set both upfront payment and minimum opening bid amounts. In both cases, however, the efficacy of these auction tools is undermined and the auction process is distorted if the payments are set at the wrong levels.

In the case of upfront payments, bidders typically analyze their desired level of eligibility and match it against the funds they can afford to have unavailable for the duration of an auction, often many months. If upfront payment levels are set too high for particular licenses, bidders

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<sup>9/</sup> Auction Procedures PN ¶ 24.

may unnecessarily limit their initial eligibility levels to stay within their upfront payment budgets, artificially reducing auction participation in general and with respect to encumbered licenses in particular. Similarly, if minimum opening bid amounts are excessive, bidding may be distorted because opening bids will be too close to, or in excess of, the license's market value. At best, this distortion will limit opportunities for price discovery, and at worst, in cases where there is significant or excessive incumbency, it will result in no initial bids for those licenses. Both upfront payments and minimum opening bids are entry fees for the auction. Application of a "one-size fits all" formula that ignores incumbency will create artificially high entry fees and dissuade auction participation in general and in connection with the most encumbered, and potentially most problematic, licensees in particular.

Nevertheless, adjusting for incumbency does not eliminate the rationale for using a  $\$0.01 * \text{MHz} * \text{BTA}$  population target in this auction, which inherently involves "odd lots." Any auction for such "odd lots" – whether spectrum or otherwise – is subject to the risks described above. Carpet, for example, has an easily quantifiable value if it can be cut into a uniform size that fits an average room. Small, odd-shaped, or non-uniform remnants, however, may have almost no value or only limited value to a small pool of buyers. In an auction of such remnants, setting the "gate fee" low enough that potential bidders are not deterred may be necessary to attract a buyer.

WCAI believes that these pitfalls can be avoided by adjusting the Commission's formula for setting upfront payments and minimum opening bid amounts to account for excessive levels of incumbency. WCAI recommends that the FCC modify its proposed formula to account for two levels of incumbency. For *significant* levels of incumbency, where 50% to 80% of the BTA Pops are claimed by existing licensees, the formula should be adjusted to  $\$0.005 * \text{MHz} * \text{BTA}$

population. This adjustment results in an effective payment for available MHz\*Pops that is much closer to the \$0.01 target proposed in the Auction Procedures PN and is in line with the majority of the licenses offered in the auction.

For *excessive* levels of incumbency, where more than 80% of the BTA Pops are claimed by existing licensees, the formula should be adjusted to  $\$0.001 * \text{MHz} * \text{BTA population}$ . This adjustment is justified because excessive incumbency, even in desirable markets, erodes the value of the license so significantly that market value is difficult to assess. In addition, as in the case of *significantly* encumbered licenses, this adjustment for *excessively* encumbered licenses results in an effective payment for available MHz\*Pops that is much closer to the \$0.01 target proposed in the Auction Procedures PN and is in line with the majority of the licenses offered in the auction.

**C. Potential Bidders Should be Mindful of Their Obligation to Reimburse Transition Proponents and of Transition-Related Delays**

As the Commission noted in the Auction Procedures PN, the BRS spectrum is in the midst of being transitioned to a new band plan.<sup>10/</sup> WCAI recommends that in its Order establishing the procedures for Auction 86 the Commission remind potential bidders that licenses issued pursuant to the auction will be subject to the reimbursement obligations set forth in Sections 27.1237(b) and 27.1239 of the FCC's rules. Such a reminder will ensure that potential bidders take into account the reimbursement obligations associated with a license as they conduct their pre-auction due diligence.

In addition, the Commission should also caution potential bidders that although new licenses will be issued under the post-transition band plan, incumbents within the BTAs subject

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<sup>10/</sup> Auction Procedures PN ¶ 4.

to auction are at varying stages with regard to their transition to the new band plan. In fact, data provided to WCAI by its members indicates that the transition is incomplete in 46 of the 75 BTAs scheduled for re-auction. In those cases where a transition is complete, an auction winner will be able to immediately commence operations under the new band plan. If the transition is incomplete however, an auction winner's access to its spectrum may be delayed or compromised.

The reasons a market may not yet have transitioned are varied both in terms of the cause of the delay and the complexity associated with getting the issue resolved. In some markets, no transition proponent has stepped forward and incumbents are in the midst of a self-transition process that is not scheduled for completion until October 10, 2010. In other cases, there is no proponent, self-transition is underway for some licenses, but other incumbent licensees within the market have ignored their obligation to initiate the self-transition process, thus creating a question as to the status of these licenses and the timing of the market's move to the new band plan. In yet other cases, incumbent licensees have obtained an "opt-out" from the FCC that allows them to continue operations under the old band plan or they have an "opt-out" request pending, but unresolved, with the FCC. Each of these scenarios raises questions as to when, if ever, an auction winner may commence unfettered operations under the new band plan. Since incoming BTA licensees must protect incumbent operations, transition-related issues may mean that an auction winner's use of its spectrum may be delayed or compromised until transition-related issues are resolved and the market's transition is completed. To preserve the integrity of the auction process, the Commission should warn bidders to be mindful of transition-related issues with regard to the licenses scheduled for re-auction.

### III. CONCLUSION

The Wireless Communications Association International, Inc. hereby submits the foregoing comments and asks that the FCC take actions consistent with the views expressed herein.

Respectfully submitted,

Wireless Communications Association  
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**ATTACHMENT 1**

Attachment 1 - WCAI Comments on Auction 86 Competitive Bidding Procedures

BTA_No	BTA_Name	Population*	MHz	Total MHz*Pops	Bidding Units	Upfront Payment	Minimum Opening Bid	Proposed Minimum Opening Bid \$/MHz-Pop2000	% Encumbered	Modified Prcie/MHz-Pops	Modified Upfront Payment	Modified Price/MHz-Pop
8	Albuquerque, NM	831,850	76.5	63,636,525	636,000	\$636,000	\$636,000	\$ 0.076	87%	\$ 0.001	\$ 63,637	\$ 0.008
25	Atlantic City, NJ	354,878	76.5	27,148,167	271,000	\$271,000	\$271,000	\$ 0.054	81%	\$ 0.001	\$ 27,148	\$ 0.005
56	Brownsville-Harlingen, TX	355,309	76.5	27,181,139	272,000	\$272,000	\$272,000	\$ 0.031	68%	\$ 0.005	\$ 135,906	\$ 0.016
105	Davenport, IA-Moline, IL	429,924	76.5	32,889,186	329,000	\$329,000	\$329,000	\$ 0.066	85%	\$ 0.001	\$ 32,889	\$ 0.007
113	Dickinson, ND	35,772	76.5	2,736,558	27,000	\$27,000	\$27,000	\$ 0.043	77%	\$ 0.005	\$ 13,683	\$ 0.022
179	Hagerstown, MD-Chambersburg, PA-Martinsburg, WV	366,345	76.5	28,025,393	280,000	\$280,000	\$280,000	\$ 0.026	61%	\$ 0.005	\$ 140,127	\$ 0.013
183	Harrisonburg, VA	152,235	76.5	11,645,978	116,000	\$116,000	\$116,000	\$ 0.055	82%	\$ 0.001	\$ 11,646	\$ 0.006
244	Las Cruces, NM	249,902	76.5	19,117,503	191,000	\$191,000	\$191,000	\$ 0.027	63%	\$ 0.005	\$ 95,588	\$ 0.013
252	Lexington, KY	927,633	76.5	70,963,925	710,000	\$710,000	\$710,000	\$ 0.022	54%	\$ 0.005	\$ 354,820	\$ 0.011
270	McCook, NE	33,749	76.5	2,581,799	26,000	\$26,000	\$26,000	\$ 0.030	66%	\$ 0.005	\$ 12,909	\$ 0.015
293	Miami-Fort Lauderdale, FL	3,955,969	76.5	302,631,629	3,026,000	\$3,026,000	\$3,026,000	\$ 0.096	90%	\$ 0.001	\$ 302,632	\$ 0.010
370	Reading, PA	373,638	76.5	28,583,307	286,000	\$286,000	\$286,000	\$ 0.028	64%	\$ 0.005	\$ 142,917	\$ 0.014
380	Rockford, IL	456,277	76.5	34,905,191	349,000	\$349,000	\$349,000	\$ 0.034	71%	\$ 0.005	\$ 174,526	\$ 0.017
388	Rutland-Bennington, VT	100,394	76.5	7,680,141	77,000	\$77,000	\$77,000	\$ 0.024	58%	\$ 0.005	\$ 38,401	\$ 0.012
408	Sarasota-Bradenton, FL	622,168	76.5	47,595,852	476,000	\$476,000	\$476,000	\$ 0.035	71%	\$ 0.005	\$ 237,979	\$ 0.017
412	Scranton--Wilkes-Barre--Hazleton, PA	672,498	76.5	51,446,097	514,000	\$514,000	\$514,000	\$ 0.022	55%	\$ 0.005	\$ 257,230	\$ 0.011
444	Toledo, OH	789,378	76.5	60,387,417	604,000	\$604,000	\$604,000	\$ 0.057	82%	\$ 0.001	\$ 60,387	\$ 0.006
456	Victoria, TX	165,277	76.5	12,643,691	126,000	\$126,000	\$126,000	\$ 0.021	53%	\$ 0.005	\$ 63,218	\$ 0.011
476	Williston, ND	25,498	76.5	1,950,597	20,000	\$20,000	\$20,000	\$ 0.051	80%	\$ 0.005	\$ 9,753	\$ 0.025
483	York-Hanover, PA	473,043	76.5	36,187,790	362,000	\$362,000	\$362,000	\$ 0.022	55%	\$ 0.005	\$ 180,939	\$ 0.011
488	San Juan, PR	2,674,278	76.5	204,582,267	2,046,000	\$2,046,000	\$2,046,000	\$ 0.045	78%	\$ 0.005	\$ 1,022,911	\$ 0.023