

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands)	WT Docket No. 12-70
)	
Fixed and Mobile Services in Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 200-2020 MHz and 2180-2200 MHz)	ET Docket No. 10-142
)	
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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Summary

The Commission's proposed restructuring of the 2 GHz band MSS licenses requires that the licenses as newly configured be opened to competing applicants. Any other course is contrary to the public interest because it would not only deny significant funds to the treasury and create a \$6 billion dollar windfall for the incumbent, but would also deviate from the Commission's long held policy of using auctions to ensure that licenses get into the hands of those who are willing to put them to the best and highest uses.

Once the Commission determines that the public interest favors accepting competing applications for the licenses as substantially modified, the Commission must conduct an auction to resolve mutual exclusivity. Consistent precedent treats licenses modified to the degree these would be modified as "initial licenses" for purposes of Section 309(j) of the Act and thus subject to competitive bidding.

To treat the incumbent fairly, it should be permitted to withdraw its request to modify its licenses and simply keep them as is. In the absence of a major change to the licenses, there would be no windfall to the incumbent and no basis to open up the licenses to competing applications. If Dish Network did not choose to keep its licenses as is, it could be given credit in the auction for the price it paid for them in the bankruptcy proceedings. This would credit its investment and give it an advantage against other bidders in the auction. Finally, if Dish did not win the auction, the winner should be required to pay it the amount it paid for the license, thus making it whole.

If the incumbent does not remain the licensee, the Commission should simply delete the satellite usage of the band and dedicate it entirely to terrestrial use. This will eliminate complicated, expensive and limiting needs to protect satellite operations while maximizing the utility of the band for what the market clearly sees as its best and highest use – terrestrial operations.

Finally, in structuring the auction, the Commission has a unique opportunity to ensure that smaller carriers who have been increasingly excluded from the auction banquet table will have a realistic shot at acquiring the spectrum. To ensure diversity of ownership, as required by Section 309(j)(3)(B) of the Act, the Commission should reserve one of the two 20 MHz bands for smaller carriers with less than \$100 million in assets.

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NTCH, Inc. (“NTCH”), by its attorneys, hereby offers these comments in connection with the above-captioned proceeding. NTCH is a Tier III cellular carrier who is experiencing spectrum constraint in several of the markets it operates in. The prospect of getting access on fair and equitable terms to the 40 MHz of spectrum at issue in this proceeding is therefore of considerable importance to it and many other carriers, large and small, who will need additional bandwidth in the years ahead to meet rapidly expanding demand.

NTCH’s comments here will focus primarily on the fairness and lawfulness of the Commission’s tentative proposal to effectively convert the 2 GHz MSS band (“the 2 Gig Band”) to terrestrial use and donate that spectrum, as converted, to Dish Network. As will be explained below, the Commission’s proposal would not only be unlawful, but would result in both an undeserved windfall for Dish Network and a large financial loss to the public treasury. This blow to the treasury comes at a time when Congress is scouring every sofa cushion for coins to fund other Federal priorities without having to raise tax revenues. The Commission’s path here is seriously misdirected.

If the 2 Gig Band is opened up for other applicants to file for, the auction process should be configured to encourage diversity in the ownership of spectrum. The Commission is at a historic crossroads in the way the wireless communications industry in this country is to be structured. It can be a duopoly dominated by two giant carriers who set rates and conditions, monopolize access to the best and newest equipment, overcharge for roaming, and allow other carriers to survive largely on their sufferance, or it can be a truly vibrant and competitive marketplace where carriers vie to serve customers at lower cost, with better quality, using cheaper, more innovative and more efficient equipment. The Commission needs to act boldly

and decisively to divert the track it has been taking to one that leads to a brighter, alternative future.

I. Converting the 2 Gig Band to Terrestrial Use

A. We should start by acknowledging the obvious, something which the NPRM failed forthrightly to do. Dish Network acquired the 2 Gig Band at bargain prices out of the ashes of Terrestar and DBSD. It acquired the spectrum and the associated hard assets for a total of \$2.75 billion. Of course, both of these licenses had been issued to the original licensees gratis, so the treasury has not realized a penny from this spectrum to date. The spectrum component for the Terrestar segment of the acquisition has been valued at about \$.23 per pop.¹ The Commission now proposes with a sweep of its alchemical wand to take the dross of two failed and bankrupt satellite licenses and transform them into the purest gold of consolidated terrestrial spectrum. Had that 40 MHz of spectrum been auctioned for terrestrial use, it would surely have fetched prices at least commensurate with the price agreed to by Verizon for SpectrumCo's AWS spectrum: \$.69 per pop.² We recognize that the comparison is not exact since the propagation characteristics of the bands are not exactly the same, but at the same time the demand, both real and perceived, for large unbroken swaths of virgin spectrum has risen sharply in the last two years. The Commission's National Broadband Plan itself sounded a loud alarm that additional spectrum would be desperately needed to meet broadband requirements in the next five to ten years. At the same time, the price paid by Dish Network for the assets bought out of bankruptcy included significant satellite assets (including network revenues garnered from its agreement with AT&T) over and above the pure value of the spectrum. But being conservative,

¹ Telecom Deals Ratchet UP Price of Wireless Spectrum, Forbes, <http://www.forbes.com/sites/elizabethwoyke/2011/12/02/telecom-deals-ratchet-up-price-of-wireless-spectrum/>.

² Ibid.

we can safely agree with Forbes that there is a gaping chasm of about \$6 billion(!) between what Dish Network paid for the 2 Gig Band and what the spectrum would be worth on the open market as terrestrial spectrum. This proceeding must forthrightly confront whether that difference in value represents a public asset whose benefit should be secured by the FCC for the public, or a \$6 billion gift to a private company.

B. The Commission Is Required by Law to Auction the Reallocated Spectrum. On the face of it, the prospect of fundamentally altering the nature of the spectrum licensed to Dish Network raises a question as to whether the modified spectrum must be made available to the public to apply for, and bid on, if mutually exclusive applications are filed. The answer is yes. Under normal Commission rules and policy, a major modification to a license must appear on public notice. A major modification is treated for most purposes as a new application. Major modifications, absent special circumstances not here present, trigger the right of potential competing applications to file for the modified license. For many years the Commission believed that the *Ashbacker* doctrine required the acceptance of competing applications when a major modification of a license was proposed. (When a broadcast licensee proposed to change its community of license pursuant to a change in the Table of Allotments, the FCC noted: “This opportunity for competing filings is not only required under *Ashbacker* but in policy terms alone is preferable because it allows us to select the applicant which will best serve the public interest.” *Amendment of Table of Assignments, Riverside and Santa Ana, CA*, 65 FCC 2d 920 (1977).) The Commission later decided that *Ashbacker* does not absolutely require the acceptance of competing applications to major mods, *Modification of FM and TV Authorizations to Specify a New Community of License* (“1989 Change-of-Community Policy”), Report and Order, 4 FCC

Rcd 4870, 4873 (1989), but it did note that “as a general matter, policy considerations may favor permitting the filing of competing applications.” *Id.*

What this means in the present context is that the Commission must make an affirmative determination that it is in the public interest for the incumbent licensee to receive a financial windfall on the order of several billion dollars while being permitted to operate in a manner wholly different from its original license. Perhaps most importantly, the FCC has consistently held that auctioning spectrum ensures that the licenses will be in the hands of those most incented to put the licenses to their best and highest use. Here Dish Network bought the licenses as MSS facilities with ancillary ATC authority. Common sense suggests that other potential mobile services licensees who had no interest in satellite operations but are *very* interested in terrestrial ones, might very well be better qualified and better incented to offer the latter services than a satellite-based broadcaster. This is certainly true of NTCH, which would apply for the licenses if they were open for competing applications. There would be a very high hurdle here for the Commission to overcome for it to refuse to accept competing applications, and literally no fairness or public interest considerations support such an extraordinary action.

Once competing applications are accepted, Section 309(j) requires the competing applications to be put up for auction:

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission *shall* grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection. (Emph. added)

Since none of the exceptions applies, we need only determine whether the fundamental change which the Commission proposes to make in the modified licenses qualifies as an “initial license.”

(“Where a modification would be so major as to dwarf the licensee’s currently authorized facilities and the application is mutually exclusive with other major modification or initial applications, the Commission would consider whether these applications are in substance more akin to initial applications and treat them accordingly for purposes of competitive bidding.”

Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 9 FCC Rcd. 2348, 2355 (1994). The Commission and the DC Circuit have both indicated that a change on the order of that proposed here does merit initial license treatment.

In *Fresno Mobile Radio, Inc. v. FCC*, 165 F. 3d 965 (DC Cir. 1999), the Court of Appeals was called upon to consider whether the Commission had correctly denominated a change in existing licenses to be “initial licenses.” There the Commission had adopted rules changing SMR licenses from site-based to geographic-based, changed the build-out timetable, and permitted auction winners to forcibly evict existing licensees from the spectrum, provided they paid for relocation expenses. Aggrieved licensees argued that the Commission could not auction off spectrum that had been previously licensed to users who would then be compelled to vacate the spectrum. The Court rejected the argument that the term “initial license” refers only to “a license for a new radio service, for an existing service in a newly served area, or for previously unused spectrum.” Instead, the Court accepted the Commission’s view that a license is initial “if it is the first awarded for a particular frequency under a new licensing scheme, that is, one involving a different set of rights and obligations for the licensee. Even if such a license authorizes no new service and covers spectrum already in use, it is the first license for that spectrum issued under the new regulatory regime.” *Fresno Mobile* at 970-971. Pointing to the substantial differences in the licensing scheme from the original scheme, the Court upheld the Commission’s determination that the licenses were “initial” and were thus amenable to auction.

The Commission had previously determined that mod applications qualify for “initial license” treatment “if the modification application is substantial enough to require prior permission from the Commission.” *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd. 2348, 2355 (1994). There can be no doubt that the radical changes proposed by the Commission for the 2 Gig Band would render the modified licenses “initial” under the *Fresno Mobile* test. Virtually every technical and operational element of the band would be changed so that it is not even recognizable as the original service. Indeed, the Commission proposes to give the band a new name (AWS-4) to emphasize that it is now part of the AWS service family in a different rule part (Part 27) from the original MSS family (Part 25) in which it started life.

In addition, as the Commission noted in *Implementation of Section 309(j)*, *supra*, it is required by Section 309(j)(3) of the Act to consider several factors in determining whether to auction classes of licenses:

....In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring 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;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource

The Commission cannot ignore the fact that failing to auction these modified licenses would deny recovery for the public of a portion of the value of the spectrum. Instead, Dish Network would enjoy a totally undeserved windfall for nothing but speculating in distressed companies.

C. How to Deal Fairly with the Incumbent

While NTCH believes that the Act and sound public policy require the modified licenses to be auctioned, it also believes that the incumbent, Dish Network, should be treated fairly. This can be accomplished in several ways without disserving the public interest.

First, Dish Network can be given the option of retaining the 2 Gig Band in its present mobile satellite status without ATC waivers. This would leave Dish Network exactly where it was when it bought the subject licenses, with obligations to provide satellite service and some limited and truly ancillary ATC authority. There is no unfairness to Dish Network since it would be keeping exactly what it paid for without getting any windfall and it could then develop the satellite system in accordance with the Commission's original plan for the band. Since there would be no modified license for competing applicants to file against, there would be no auction.

Second, if Dish Network instead opted to have its licenses modified, it could be credited in the auction with the price it paid for the licenses in acquiring them out of bankruptcy. This value presumably represents the fair market value of the licenses in the current configuration since anyone could have bid on the licenses as part of the bankruptcy proceedings. This procedure would give Dish Network a substantial leg up in the auction *vis-a-vis* other bidders and would reflect its significant investment in the licenses to date.

Third, as the Commission and the Court determined in the *Fresno Radio* case, *supra*, the Commission is under no obligation to maintain existing licensees in place if it determines that there is a better use for the spectrum under a different allocation scheme. While

the Commission has never simply abolished the rights of existing licenses, it has had no problem relocating them at the expense of new entrants. (See, for example, the microwave relocation procedures adopted for PCS, MSS and AWS licensees in part 24). While Dish Network has no “property” right in the 2 Gig Band licenses it now holds, as a matter of equity the Commission should require a winning bidder other than Dish Network to pay it the amount it paid for the licenses, thus making Dish Network whole. As a practical matter, bidders in the auction would have to take this payment into account in devising their bids, thus reducing the public benefit from the auction, but it would also eliminate the sting in the involuntary loss of licenses which Dish Network lawfully acquired through normal channels.

The foregoing measures would ensure that everyone has a full and fair opportunity to compete for the 2 Gig Band as now proposed to be configured while also fairly accommodating the incumbent’s reasonable expectations.

II. Dropping the Satellite Allocation

The history of the 2 Gig Band strongly suggests that the market for, and economics of, mobile satellite service have not come to fruition as the Commission originally contemplated. The detritus of a host of bankrupt satellite companies should tell the Commission more strongly than any comment or study that what the public wants and needs, and what will sustain a viable business operation, is not satellite-based mobile radio but terrestrial-based radio. Rather than continuing to beat against the current by insisting that this spectrum be used for MSS despite the higher and better need for terrestrial operations, the Commission should delete the rules that either require or permit satellite operation in this band, except for the incumbent if it wins the license at auction and wishes to maintain its current allocation along with full terrestrial service rights.

This approach would eliminate the need for either the incumbent (unless it opted to simply retain its current authorization unchanged and forego an auction) or any other winning bidder from having to provide satellite service or protect satellite operations in this band from interference. Since Dish Network would have been fully compensated by the auction winner for its licenses under the process described above, there would be no unfairness to Dish Network in eliminating its residual satellite authority. Dish Network might even be relieved at that prospect. At the same time, terrestrial use of the 2 Gig Band would be far more effective and efficient on a going-forward basis without having to accommodate legacy satellite operations of questionable utility. By eliminating the need to protect those operations, the Commission would also enhance the price likely to be paid by bidders since the spectrum would be that much more useful. It is time to simply let go of the satellite allocation here and allow the spectrum to be put to its highest use unfettered by unnecessary interference considerations.

III. Auction Procedures Should Encourage Diversity

The Commission's proposed procedures for auctioning these licenses largely track its standard auction procedures. The one addition which NTCH would suggest is that the procedures should offer a greater opportunity for small carriers to acquire some of the spectrum. As noted above, Section 309(j)(3)(B) of the Act requires the Commission, when devising auction methodologies and determining eligibility for auctioned licenses to "avoid[] excessive concentration of licenses and disseminat[e] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." It is high time that the Commission took that enjoinder seriously. The history of the last major auctions of large amounts of spectrum has been that the two biggest carriers and a few other national carriers buy up the vast majority of the available spectrum,

leaving smaller carriers with scraps, if anything. This is true even when modest discounts are offered to smaller business entities. The discounts offered are simply too small to permit relatively small businesses (even those in the \$100 million dollar range) to outbid the behemoths that can command billions in ready cash or financing.

The inevitable result is that the spectrum-rich keep getting spectrum-richer. Verizon itself is on record as complaining that it will not be able to meet its customers' spectrum needs in the next few years despite having a huge inventory of spectrum, some of which it is not even using.³ Unless the Commission takes fairly bold steps to make auctioned spectrum more accessible to smaller carriers, this pattern will simply continue, and competition, diversity and locally based commercial mobile radio service will largely perish from the earth.

NTCH proposes that the Commission adopt eligibility rules that preserve one of the 20 MHz licenses for entities with less than \$100 million in assets. The other 20 MHz block would be open to anyone. This would ensure that smaller entrepreneurs would have a decent chance to acquire the spectrum. To police this benefit to small carriers, the Commission should strictly apply its anti-trafficking rules, perhaps even tightening them further to discourage speculative acquisitions while leaving smaller carriers the flexibility to finance their construction and operation. To further foster the ability of smaller independent carriers to participate in this spectrum opportunity, as required by the principles enunciated in Section 309(j)(3)(B), the Commission should auction the spectrum in geographic chunks no larger than EAs. Smaller blocks permit independents to acquire only those territories that they need for their service requirements at an affordable cost. Smaller blocks also avert the phenomenon now prevalent of

³ See Docket 12-4 dealing with Verizon's proposed acquisition of spectrum from SpectrumCo and Cox.

having huge tracts of licensed territory left unserved by the ostensible licensee who cannot possibly build out the expanses involved in the time available.

The obligation to reimburse Dish Network for its loss of the spectrum would then have to be paid as a proportion of the entire pool of auction proceeds. That is, if the band reserved for smaller carriers generated \$1 billion in total bids, and the unreserved band generated \$3 billion in total bids, the winners from each band would pay 25% and 75% respectively of the total due to Dish.

IV. Conclusion

The steps outlined above should quickly make 40 MHz of prime mobile spectrum available for terrestrial purposes, fairly compensate the incumbent for the loss of its licenses or give it a preference in bidding for the licenses anew, repurpose the MSS allocation for the terrestrial use which is in far greater demand, and ensure that competition and diversity in the broadband market are preserved. That would not be a bad day's work.

Respectfully submitted,
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