

Before
the
Federal Communications Commission

In re
Notice and Filing Requirements
for Auction 96

Docket AU Docket 13-178

Petition for Reconsideration

NTCH, Inc. (NTCH) hereby petitions the Commission to reconsider certain aspects of *Notice and Filing Requirements, Reserve Price, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 96*, DA 132-1885, released September 13, 2013. ("*Auction 96 Procedures Order*").¹ NTCH here relies on facts and circumstances which were not known or available prior to the Bureau's issuance of the *Auction 96 Procedures Order*. Developments which have come to light since then have compelled NTCH to seek reconsideration in view of these new developments. Consideration of these new facts in connection with the auction procedures, as will be shown below, is in the public interest and is therefore warranted. See 47 CFR 1.429(b).

1. The RWA petition for reconsideration should be addressed before the auction. On September 16 the Rural Wireless Association (RWA) filed a petition for reconsideration of the underlying H Block service rules. RWA challenges the Commission's use of large Economic Areas (EAs) as the geographic unit used for licensing in this service. RWA points out, correctly, that use of such large geographic areas to license this service effectively excludes smaller

¹ This petition was originally filed on October 17 but is being re-filed in view of the Commission's October 17, 2013 Order (DA 13-2025) indicating that the Commission was not "open for filing of documents with statutory deadlines" until October 22, 2013.

carriers from participation in the auction because the sheer size of such areas vastly exceeds the needs of smaller carriers to serve their customers. Contrary to the Commission's oft-repeated hope, the secondary market very rarely serves to make smaller subsets of these vast territories available to small carriers. The end result is that small carriers will be frozen out of access to this important spectrum resource at a time when they most need access to new spectrum in order to meet the demand for more and more data-hungry services for their customers. Unless the Commission acts to ensure that spectrum is available for smaller carriers in smaller blocks and at prices that are affordable by such carriers, it will be directly causing and accelerating the demise of small independent carriers.

Not only is this contrary to the public interest in preserving diversity of service by carriers of all sizes, but it also directly contravenes the mandate of Section 309(j)(3) and (4) of the Act, which *requires* the Commission to design its auction procedures so as to avoid excessive concentrations of spectrum, to promote the dissemination of licenses to a variety of applicants, including small businesses, and to promote an equitable distribution of licenses among geographic areas. The H Block service rules, by using EAs as their licensing unit, directly violate these Congressional directives.

The Commission's usual practice is to act on such recon petitions many years after the auction has already happened and after the winning licensees have already built out their networks. This delay effectively makes it impossible for the Commission to realistically reconsider its decision without serious adverse consequences to the firms that participated in the auction and relied on the extant rules. Even courts, as we saw in the case of *Council Tree Telecommunications, Inc. v. FCC*, 619 F. 3d 235 (3rd. Cir. 2010), are reluctant after the fact to set aside flawed auction procedures on which parties have long relied, even when the

Commission's procedures were plainly unlawful. The practice of delaying action on well-founded recon petitions like RWA's subverts the orderly process of reaching a decision, reconsidering it upon reasonable request, and having it be subject to prompt judicial review.

NTCH therefore requests that the Commission either delay the currently scheduled auction date of January 14, 2014 or act swiftly on the RWA petition so that the geographic units can be revised in accordance with the Act. If RWA's petition is granted, there must be sufficient time between that action and the short form filing deadline for those carriers who were effectively precluded from participation by the current geographic structure to prepare and file a short-form auction. While NTCH would prefer that the auction move forward without delay, some small delay, as a practical matter, may be necessary just to give the Commission staff, who have been forbidden during the government shutdown from even putting the RWA petition in the Federal Register for comment, a chance to complete the pleading cycle on the petition, review the comments, prepare an appropriate order revising the rules, and give interested parties enough time to adjust their auction plans in response. There is no crushing exigency to holding this auction in January. It is better to do it right than to do it fast and then have to redo it later.

2. The Reserve Price should be significantly reduced. The reserve price set in auctions is usually -- absent other controlling statutory directives -- near or at the minimum bid level. The minimum bid level is set by taking into account winning bids in other comparable auctions and therefore is rationally related to what the Commission may hope, at a minimum, to garner by the auction. In the *Auction 96 Procedures Order*, the Commission itself acknowledged this usual relationship between the reserve price and minimum bids. "While minimum opening bids, which we are separately adopting for Auction 96, effectively function as license by license reserve

prices, we agree with Sprint that calculating license-by-license reserve prices consistent with our higher aggregate reserve price would be inefficient and complicated." Id. at Para. 176. Here the minimum bid level was proposed to be set at \$.07/MHz/pop, adjusted up or down for different markets on the basis of past auction results. The minimum so adjusted would range from \$.01 per MHz/pop to \$.16. *Proposed Auction 96 Procedures*² at Paragraphs 52- 55. At this price level, the normal reserve price would have been set at about \$218,960,000. The Commission proposed no particular reserve price for this auction so there was no reason to think that the reserve price would be set at a number radically different from metrics used in the past.

Yet when the *Auction 96 Procedures Order* came out, it adopted a reserve price of \$.50 per Mhz/pop (\$1.564 billion) - more than 4 times the highest minimum bid level set by the Commission and fifty times the lowest minimum bid. What had happened in the meantime? DISH Network filed an ex parte comment on September 9, 2013 in Docket No. 13-178 proposing a 50 cents per MHz/pop reserve price. Given the late date of its filing, no one had a realistic opportunity to comment on the proposal before the September 13 adoption of the Auction 96 Procedures Order. Equally importantly, the reserve price appears to have been part of a deal brokered by the Commission to achieve interoperability in the 700 MHz band. DISH made a number of concessions in that process, among them proposing to bid at least 50 cents a MHz/pop in Auction 96, in exchange for certain waivers and extensions which it also sought. The existence of this deal is incontrovertible, yet this factor appears nowhere in its analysis of why the Commission suddenly adopted a radically different reserve price from what it normally

² Auction of H Block Licenses in the 1915-1920 and 1995-2000 MHz Bands; Comment Sought on Competitive Auction Procedures, rel. July 15, 2013. DA 13-1540 ("Proposed Auction 96 Procedures")

adopts and from what all other commenters had proposed. The minimum bid prices were adopted as originally proposed.

The setting of a reserve price at these astronomical levels again effectively cuts out the smaller carriers from the ability to compete and win licenses in this auction because the prices paid for major markets would have to be exceedingly high to meet the reserve price, even if bids at or near the minimum bid price were made in the smaller markets. For the reasons set forth above in Section 1, the Commission must under the auction statute -- and should as a public interest policy -- establish auction reserves at levels that promote small business participation and make possible small business successes. Like the EA geographic unit, this reserve price directly contravenes the Congressional policy.

The high reserve price exacerbates the skewing of the auction that is posed by the Commission's decision to require Sprint to be reimbursed for its clearing efforts in this band on a pro rata basis across the entire band. Hitherto, without exception, the Commission has always required spectrum clearers to be reimbursed for a portion of their costs by later spectrum users who benefit by their efforts. This is perfectly fair and reasonable. Here, however, the Commission is requiring auction winners who may have gotten no benefit whatsoever from Sprint in large regions of the country to nevertheless pick up the tab for those regions of the country where Sprint did clear the band. The real world effect of this rule is that rural licensees will be subsidizing more urban H Block licensees who will have experienced the main benefits of Sprint's license clearing activity. The requirement of an across-the-board reimbursement obligation applicable to licensees (typically rural licensees) who will have received no benefit from microwave clearing must be balanced out by procedures that favor bidders for rural licenses. One relatively simple solution would be to either reduce the minimum bid for rural

areas to .5 cents per MHz/pop in order to compensate for the favored status that Sprint and DISH have been granted for most of the licenses. As it is, the auction seems to have been designed to ensure that only Sprint and DISH will be able to win any licenses.

3. The DISH deal should be part of the record of the auction procedures here. If, as appears to be the case, the Commission has struck a bargain by which DISH has agreed to bid at least 50 cents per MHz/pop for the whole band, this arrangement must be made part of the record. Auction 96 on its face is supposed to be an open auction with anyone able to make a bid at levels set according to the Commission's usual procedures. Instead, there is apparently a deal in place under which one firm is required to make a certain bid in exchange for other FCC benefits. That factor, if true, hopelessly skews the fairness and openness of the auction. NTCH has separately opposed grant of the waiver and extension requested by DISH on the grounds, inter alia, that granting waivers based on promises to bid certain amounts in an auction is contrary to the public interest and undermines the integrity of the auction process. This is especially true when the arrangement happens behind closed doors with no public acknowledgement of the quid pro quo.³ Until the tainting effect of the DISH deal is excised from the procedures of this auction, it will be hopelessly compromised. At a minimum, the public should be given the opportunity to comment on and, if appropriate, challenge the auction procedures which have been driven not by the factors enumerated by the Commission in the *Auction 96 Procedures Order* but by the deal with DISH.

4. The status of the adjacent AWS-4 band should be resolved before the auction begins.

As noted by NTCH in its opposition to DISH's waiver request, uncertainty regarding the status of

³ See Comments of NTCH, Inc. filed in Docket 13-225 on September 30, 2013.

the uplink or downlink use of the AWS-4 band immediately adjacent to the H Block directly affects the value of the H Block. As DISH itself recognized in its waiver request, converting the 2000-2020 MHz band to downlink operation rather than the currently mandated uplink operation directly affects the utility and hence the attractiveness of the H Block. Yet DISH seeks a waiver that would permit it unilaterally to elect either uplink or downlink operation for that band. If granted, this would mean that DISH -- which has already committed to bid in the H Block auction -- would have an enormous advantage over all other bidders who would not know what the interference potential from the adjacent block would be. Granting a single bidder in an auction what is effectively insider knowledge about the value of the spectrum is unprecedented. The integrity of the auction process requires that all bidders have equal access to knowledge about the licensing rules that govern the spectrum at stake and the licensing rules that govern adjacent blocks which could impact the spectrum at stake. The DISH proposal so strongly favors a single auction bidder that the integrity of the auction is completely undermined. The DISH waiver request as currently formulated must therefore be denied before the auction process can proceed.

Respectfully submitted,

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By _____/s/_____

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