

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Petition for Rulemaking or,)
Alternatively, a Waiver of the) RM-11019
Eligibility Restrictions on C Block)
Licenses in the Broadband Personal)
Communications Services)

OPPOSITION OF DESIGNATED ENTITY PROGRAM SUPPORTERS

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July 30, 2004

The Designated Entity Program Supporters (“DE Supporters”) ^{1/} hereby submit their opposition to the “Petition for Rulemaking, or, Alternatively, a Waiver of the Eligibility Restrictions on C Block Licenses in the Broadband Personal Communications Services” filed by CTIA on July 8, 2004 (“CTIA Petition”) in response to the rulemaking notice issued by the Consumer & Governmental Affairs Bureau. ^{2/} The DE Supporters have been engaged in the Wireless Bureau’s initial proceeding regarding Auction 58, having filed comments and reply comments. ^{3/} Like most parties that have submitted pleadings to date, the DE Supporters strongly believe that the Commission must maintain the existing designated entity (“DE”) program incentives that were put in place for Auction 35, including both the bidding credits and, most importantly, the closed license set-aside bidding. The Commission’s rationale for maintaining DE license set-asides is even more valid today than it was when the Commission established the DE set-aside in the original C and F block PCS auctions. Because our comments and reply comments in response to the Auction 58 Public Notice (attached hereto and incorporated by reference) thoroughly explain why the DE set-aside should be maintained in Auction 58, we will not repeat all of those points here. Instead, we will focus our discussion on the fact that the CTIA Petition fails to adequately address the extensive congressional and Commission record developed to establish the need for a DE set-aside when auctioning broadband PCS spectrum.

^{1/} The DE Supporters include the Minority Media and Telecommunications Council, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Association of Black Telecommunications Professionals, National Coalition of Hispanic Organizations, Hispanic Americans for Fairness in Media, Hispanics in Information Technology and Telecommunications, Lawyers Committee for Civil Rights Under the Law, National Association for the Advancement of Colored People, National Association of Black Owned Broadcasters and the National Urban League. This Opposition reflects the institutional views of each of the DE Supporters and is not intended to reflect the views of any of their individual members, directors or advisors.

^{2/} Consumer & Governmental Affairs Bureau Reference Information Center Petition For Rulemaking Filed, *Public Notice*, Report No. 2663 (rel. July 15, 2004).

^{3/} See Comments of the Designated Entity Supporters in Response to Report No. AUC-03-58-A (*Auction 58 Public Notice*)(July 8, 2004); Reply Comments of Designated Entity Supporters in Response to Report No. AUC-03-58-A (*Auction 58 Public Notice*) (July 15, 2004).

The CTIA Petition completely ignores Congress's clear mandate to establish the DE program, the Commission's resulting policy and legal findings that a DE set-aside is essential to ensuring that Congress's goals of meaningful inclusion are achieved with respect to the dissemination broadband PCS licenses, the unfortunate erosion of the DE rules in general (and the PCS C Block DE rules in particular), the reliance of DEs on the Commission's previous pronouncements of continued set-asides, and the reasons why bidding credits alone are not sufficient to ensure meaningful access by DEs to broadband PCS licenses. These fatal flaws warrant dismissal of the CTIA Petition and prompt movement toward the auction.

Congress and the Commission have long recognized the need to increase diversity in the wireless marketplace by promoting the entry of smaller businesses, and businesses owned by minorities and women. Even before Congress granted the Commission auction authority, it expressed a fear that if auctions for wireless licenses were required, small businesses and businesses owned by minorities and women would have even more difficulty acquiring spectrum licenses than under the Commission's previous wireless license assignment schemes because of the significant disadvantages they have accessing capital. According to a 1993 House Budget Committee Report on the legislation that ultimately became the Omnibus Budget Reconciliation Act of 1993:

The Committee is concerned that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries. ^{4/}

The Report went on to state that:

One of the primary criticisms of utilizing competitive bidding to issue licenses is that the process could inadvertently have the effect of favoring only those with 'deep pockets,' and would therefore have the wherewithal to participate in the bidding process. This would have the effect of favoring incumbents, with established revenue streams, over new companies or start-ups. ^{5/}

^{4/} H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993).

^{5/} *Id.* at 255.

On that basis, as part of the grant of Section 309(j) auction authority, Congress directed the Commission to promote the dissemination of “licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,” 6/ and to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services” 7/

In implementing its new auction authority, the Commission followed Congress’s direction, stating:

We agree [with Congress] that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business. 8/

The Commission limited bidding for broadband PCS blocks C and F licenses exclusively to “entrepreneurial” companies. 9/ As the Commission later made clear, it created these set-aside blocks after concluding that bidding credits and installment payment terms alone would not be sufficient to enable DEs to overcome the substantial capital-raising advantages enjoyed by most incumbent providers:

[I]n our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against. Without insulation of the entrepreneurs’

6/ 47 U.S.C. § 309(j)(3)(B).

7/ 47 U.S.C. § 309(j)(4)(D).

8/ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report & Order*, 9 FCC Rcd 5532 (1994) (“*Competitive Bidding Fifth Report & Order*”) at 5585.

9/ *Id.* The Commission defined an entrepreneur as an entity with gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million, and supplemented the creation of the entrepreneurs’ license blocks with additional benefits available to entrepreneurs who fell within specific DE categories.

block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS. 10/

Since that time, however, the number of incentives available to DEs in the Commission's spectrum auctions has declined. In 1995, Congress eliminated the availability of tax certificates for members of minority groups. 11/ The Commission no longer offers the installment payment financing that enhanced the ability of smaller businesses to acquire licenses in competitive bidding, 12/ no longer permits smaller businesses to qualify for an auction with a reduced upfront payment, 13/ and, with the exception of broadband PCS, no longer sets aside licenses for bidding only by DEs. 14/ Not satisfied with these actions to weaken the DE program, CTIA now aims to deliver the final blow to Congress's and the Commission's efforts to stem the negative impact of using auctions as the primary vehicle for assigning broadband PCS licenses. The fact that the CTIA Petition does nothing to address the comprehensive record developed to support the need for a DE set-aside in auctions for broadband PCS licenses should serve as a primary basis for rejecting the CTIA Petition and moving forward promptly with Auction 58 under the current DE rules. The CTIA Petition provides no legitimate basis for scrapping the DE set-aside and giving up on the goal of fostering more diverse participation in the wireless industry.

Finally, it is worth noting that although it weakened the DE rules prior to Auction 35, the Commission announced that the current DE rules would apply to "any subsequent auctions of C of F block licenses, including any spectrum made available or reclaimed from

10/ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion & Order*, 10 FCC Rcd 403, 414-15 (1994).

11/ See Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, § 2, 109 Stat. 93 (1995).

12/ *Part 1 Fifth Report & Order*, 15 FCC Rcd 15322.

13/ See, e.g., Amendment of Parts 20 & 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report & Order*, 11 FCC Rcd 7824, 7859-60 (1996).

14/ See, e.g., Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report & Order*, FCC 03-251 ¶ 68 (rel. Nov. 25, 2003).

bankruptcy proceedings in the future.” ^{15/} Smaller carriers in particular, have a need to rely on the Commission’s pronouncements. The CTIA Petition does not adequately address why, in view of the Commission’s very clear guidance on eligibility for future C and F block auctions, the Commission should disavow its previous, unqualified statements and take a dramatic step backward in its efforts to diversify participation in the wireless industry.

Respectfully submitted,

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[The Comments and Reply Comments of the Designated Entity Program Supporters in the Auction 58 Proceeding are appended hereto as separate files.]

^{15/} *Sixth Report & Order*, 15 FCC Rcd 16266 ¶ 1; FCC Revises Rules For Upcoming C and F Block Auction: The Rapid Deployment of Wireless Services, *FCC News Release* (rel. Aug. 25, 2000). *See also* Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS), *Order on Reconsideration*, 16 FCC Rcd 1343, 1345 ¶ 6 (2001); 47 C.F.R. §§ 24.229(b), 24.709(a).

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 30th day of July, 2004 caused a copy of the foregoing "Opposition of Designated Entity Program Supporters" to be delivered by e-mail to the following:

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