

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

In the Matter of	)	
	)	
Petition for Rulemaking or, Alternatively, a	)	RM – 11019
Waiver of the Closed Bidding Rules for C	)	
Block Licenses in the Broadband Personal	)	
Communications Services	)	

**COMMENTS OF T-MOBILE USA, INC.**

Thomas Sugrue, Vice President  
Government Affairs  
Robert Calaff, Director  
Federal Policy  
T-MOBILE USA, INC.  
401 9<sup>th</sup> Street, NW  
Suite 550  
Washington, DC 20004  
(202) 654-5900

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## EXECUTIVE SUMMARY

T-Mobile strongly supports the CTIA Petition seeking to allow open bidding on all of the licenses in Auction No. 58. As discussed further herein, the Commission's restrictive C and F block bidding rules were created at a time when the future evolution of the mobile services marketplace was undefined and governed by a cellular duopoly. The set aside rules were a reasonable attempt to diversify ownership of mobile services facilities. With the benefit of today's historical perspective, however, these regulations are no longer justifiable either as a matter of public policy or economics. T-Mobile accordingly urges the FCC, whether through rulemaking or waiver, to utilize less restrictive, but nonetheless effective, means to promote small business opportunities instead of artificial and unsupportable eligibility restrictions.

In an attempt to facilitate full competition in the wireless services market, the Commission adopted, in 1995, a series of rules that were intended to encourage participation by entrepreneurs and small businesses in the wireless services market. At that time, the market consisted primarily of two large wireless providers. Today, however, there are six national wireless providers and a number of large regional operators. This development is due to consumers' demand for national, rather than local or niche, services and the economies of scope and scale that result from providing service on a national scale. In light of these developments, the Commission has gradually eliminated the majority of its restrictive ownership policies in favor of market-based mechanisms. The only restriction that remains is the Commission's bidding eligibility restrictions in the C and F blocks. It is now time to finish the task and eliminate these restrictions so all competitors will have a chance at acquiring these valuable licenses.

Moreover, historical perspective demonstrates that restrictive entry rules have proven ineffective at promoting entrepreneurship in the PCS bands. Bidders in these bands inevitably overbid for their licenses and most designated entity licensees have either gone bankrupt or are simply waiting to be bought by a larger provider. Such actions impose extraordinary, unjustifiable costs on the public, especially in light of the fact that other mechanisms are more effective at encouraging participation in the wireless services market by entrepreneurs. Dr. Simon J. Wilkie indicates in the attached declaration that these costs could range anywhere between \$13.6 billion and \$32 billion, and that each additional year's delay in deployment will cost consumers at least another \$3.5 billion. The Commission has also recognized the efficacy of bidding credits and there are now many other opportunities, including access to unlicensed spectrum that enables parties without extensive capital interests to engage in entrepreneurial pursuits.

In light of these changed circumstances, the Commission should expeditiously act on CTIA's Petition and initiate a rulemaking to eliminate the use of closed auctions. As discussed further in T-Mobile's comments, the initiation of such a rulemaking would not unduly delay Auction No. 58, and the certainty that results from such a rulemaking will also ensure a more efficient and expedient roll out of services.

Alternatively, the Commission should grant a waiver of its eligibility restrictions for the licenses voluntarily returned to the Commission by NextWave. These restrictions reasonably apply in circumstances where a licensee defaults on its license without fulfilling its build-out obligations. The licenses in Auction No. 58, however, were fully constructed by NextWave and then returned to the Commission as partial payment for a debt it owed the U.S. Government. NextWave could have opted to retain or sell these licenses, free of the designated entity

restrictions. As such, good economic policy, as well as fairness and consistency, dictate that the Commission waive its eligibility restrictions for these licenses.

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**COMMENTS OF T-MOBILE USA, INC.**

T-Mobile USA, Inc. (“T-Mobile”) strongly supports the Petition of CTIA – The Wireless Association (“CTIA”) for Expedited Rulemaking or, Alternatively, a Waiver (“Petition”), which calls for elimination of the Commission’s eligibility restrictions on broadband Personal Communications Services (“PCS”) licenses scheduled to be included in Auction No. 58.<sup>1</sup> As discussed further below, while the original designated entity (“DE”) policies were a reasonable attempt to foster competition and diversity in a nascent industry, the evolution of the Commission’s competitive bidding policies and the development of the commercial mobile radio

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<sup>1</sup> Petition for Rulemaking or, Alternatively, a Waiver of the Closed Bidding Rules for C Block Licenses in the Broadband Personal Communications Services, RM-11019 (filed July 8, 2004) (“Petition”). In 1995, the Commission established that 30 MHz of C block and 10 MHz of F block PCS licenses would be set aside for small businesses and women and minority owned businesses (designated entities (“DEs”)). *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5580 ¶ 113 (1994) (“*DE Order*”). More recently, in 2000, the Commission liberalized the restricted nature of these licenses and allowed non-DEs to bid for a portion of this spectrum. *See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Sixth Report and Order and Order on Reconsideration, 15 FCC Rcd 16266, 16268 ¶ 2 (2000) (“*C/F Block Sixth R&O*”). Specifically, the Commission restricted bidding for 10 MHz of C block spectrum to DEs in Basic Trading Areas (“BTAs”) with populations equal to or greater than 2.5 million and for 20 MHz of C block spectrum to DEs in all other BTAs. *See id.*

services market no longer support the use of restricted auctions. T-Mobile urges the FCC accordingly to eliminate the use of “closed” licenses for Auction No. 58, consistent with CTIA’s Petition.

## **I. INTRODUCTION**

As one of six nationwide wireless carriers, T-Mobile operates a fully digital Global System for Mobile Communications (“GSM”) network, offering service in the 1900 MHz band in 46 of the top 50 U.S. markets. T-Mobile’s service footprint encompasses a total of 254 million pops, including areas covered by its own facilities-based network, roaming agreements, and other arrangements.

To provide advanced data services, T-Mobile deployed a General Packet Radio Service (“GPRS”) network, the first nationwide wireless packet data network, reaching a total of 224 million pops. T-Mobile expects to roll out Enhanced Data Rates for GSM Evolution (“EDGE”) by the first quarter of 2005.<sup>2</sup> While T-Mobile generally holds 20 to 30 MHz of spectrum in most markets, it is limited to only 20 MHz of spectrum in seven of the top 15 markets. T-Mobile’s ability to compete effectively as a price and value leader depends upon its access to sufficient spectrum to support existing services, as well as to roll out new broadband services.

And, T-Mobile is widely recognized as a price and value leader in the wireless marketplace.<sup>3</sup> T-Mobile has been first to the market with a number of innovative products,

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<sup>2</sup> T-Mobile’s deployment of GPRS and EDGE networks represent its continuing effort to provide next-generation services that offer higher data transfer speeds and increased voice capacity. T-Mobile’s GPRS network offers transfer speeds of up to 115 kbps, while its planned EDGE network is expected to raise peak network speeds to 384 kbps.

<sup>3</sup> Dan Meyer, *T-Mobile USA Exploits Niche as Value Leader*, RCR Wireless News (Nov. 3, 2003) (quoting wireless industry analyst) (“Meyer Article”); *US Wireless*, Goldman Sachs at 2 (Apr. 13, 2004) (“T-Mobile remains more focused on being a value-leader among consumers”); *Telecommunications Services* at 3 (Mar. 28, 2004) (T-Mobile “is sticking with its game plan to

services, and consumer pricing plans, including:

- first to offer 1,000 anytime nationwide minutes for \$39.99 per month;
- first to offer a multi-line family plan with unlimited mobile-to-mobile minutes;
- first GSM provider to offer unlimited data service plans;
- first to introduce camera phones for under \$100.00;
- first to offer video messaging services, allowing customers to record and send full-motion video messages with sound from a mobile phone;
- first to launch a nationwide wireless packet data network;
- first to offer seamless transatlantic mobile phone services based on the global GSM standard;
- first to introduce an all-in-one “hiptop” wireless device, the T-Mobile Sidekick (named Product of the Year for 2003 by PC World and Handheld Computing), providing Internet access, e-mail, instant messaging, entertainment, and voice communications services;
- first to integrate instant messaging capabilities into certain handsets; and
- first to operate a Wi-Fi wireless broadband network, the largest Wi-Fi network in the country with more than 4,200 public access “hot spot” locations.

Thus, through its “first to market” services and products, T-Mobile has quickly established a reputation as a service and product innovator for the benefit of competition and consumers.

By effectively meeting the demands of consumers for high quality mobile voice and data services at reasonable prices, T-Mobile has been able to realize the fastest rate of growth in the industry. In the last two years alone, T-Mobile has added enough new subscribers to double its total number of users to 14.3 million nationwide. As a result of this rapid growth, T-Mobile

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(Continued . . .)

be the leader in value pricing of its services in the consumer market”); *Telecommunications Services—Wireless*, Citigroup Smith Barney at 2 (Oct. 16, 2003) (T-Mobile “has countered with the most sustainable pricing strategy at an already industry leading level at the popular \$40-price point”).



recently passed Nextel to become the nation's 5th largest wireless carrier (in terms of subscribership). At the same time, the company is experiencing exponential growth in terms of minutes-of-use ("MOU"). Average usage per customer exceeded 800 MOUs per month in the first quarter of 2004. All this growth points to the need for more spectrum in the future to maintain our strong position as an aggressive competitor in the Commercial Mobile Radio Services ("CMRS") marketplace.

**II. THE PUBLIC INTEREST DICTATES THAT THE LICENSES IN AUCTION NO. 58 BE MADE WIDELY AVAILABLE TO ALL INTERESTED BIDDERS.**

The Commission's DE rules were originally intended to promote full competition in the wireless services market. This market, however, has dramatically changed since the implementation of these rules, rendering these rules no longer necessary to the fulfillment of their objective. Today, entrepreneurs and small businesses have many other opportunities to provide wireless services, without the use of a government-imposed set-aside. Moreover, recent transactions indicate small businesses can effectively purchase spectrum in an open market.<sup>4</sup> Experience has shown that the Commission's DE rules, which set aside spectrum solely for acquisition by DEs, have proven ineffective at fulfilling the Commission's goals. As such, these rules must be eliminated to ensure full access to spectrum by all competitors in the wireless services market.

**A. The Wireless Services Market Has Dramatically Changed Since The Commission's Original Adoption Of The Eligibility Restrictions In The C And F Blocks.**

The market for wireless services has dramatically changed since the Commission's

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<sup>4</sup> See, e.g., Press Release, MetroPCS, MetroPCS Enters into Agreement to Acquire Additional PCS Licenses, available at <http://www.metropcs.com/press/20040708.pdf> (July 8, 2004) (announcing MetroPCS' acquisition of two licenses from NextWave for \$43.5 million).

original adoption of the DE rules for PCS. For example, the DE rules were implemented at a time when competition in the provision of wireless services was highly constrained. Indeed, at that time, the market was a tight duopoly with extremely limited opportunities for new competitive entry. The Commission sought to remedy this situation by allocating a significant amount of new spectrum for mobile wireless services – 120 MHz of PCS spectrum – and licensing it in a manner to promote new competitive entry. At that time, the Commission also assumed that the market would be fairly localized in nature (as cellular service largely was at that time) and there would be substantial demand for a variety of niche or highly specialized services, which could be provided efficiently by a large number of small entrepreneurial firms. The Commission’s licensing approach reflected these assumptions as well.<sup>5</sup> Accordingly, as a critical part of that licensing scheme, the Commission adopted certain eligibility restrictions on some of the licenses to ensure that new entrants into the market were able to receive licenses, including a prohibition on the incumbent cellular providers acquiring the A or B block 30 MHz licenses,<sup>6</sup> a spectrum cap limiting the amount of spectrum any one entity could hold,<sup>7</sup> and the DE “set-aside” rules, which only permitted small businesses to acquire and hold C and F block licenses.<sup>8</sup>

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<sup>5</sup> See *DE Order* at 5534 ¶ 3, 5536 ¶ 7.

<sup>6</sup> See *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, Second Report and Order, 8 FCC Rcd 7700, 7728 ¶ 61, 7745 ¶ 106 (1993); see also *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd 4957, 4984 ¶ 67 (1994).

<sup>7</sup> See *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Third Report and Order, 9 FCC Rcd 7988, 8100-1 ¶¶ 238-240 (1994).

<sup>8</sup> See *DE Order* at 5580 ¶ 113. For purposes of these comments, we hereby define a “closed auction” as one that is subject to restricted bidding under these FCC Orders and an “open auction” as one that is open to all bidders.

Since then, the Commission's pro-competitive goals have largely been realized, but in a different manner than expected. Today, there are six national carriers and a number of substantial regional players in the market. As a result, 71 percent of Americans can choose from among six or more wireless carriers for service, and 83 percent have a choice of five or more carriers.<sup>9</sup> Contrary to the Commission's expectations, however, consumers have demonstrated a clear demand for national wireless services, as opposed to niche or local services. To compete effectively in this national and super-regional market, providers must develop extensive footprints to achieve economies of scale and scope that benefit consumers. Such an achievement, however, is extremely capital intensive, requiring tens of billions of dollars of investment.<sup>10</sup>

The use of closed auctions does not stimulate competition in mobile services, because it does not facilitate competition among the national and super-regional players. Manifestly, any carrier capable of constructing the infrastructure to provide competitive national services is not an entity that should require closed auctions to obtain licenses. There are, however, newer PCS carriers, such as T-Mobile, that have successfully entered this national market. These newer entrants have a compelling need for additional spectrum so they can continue to expand their footprints and offer new services in competition with the largest wireless providers—providers that have evolved nationwide footprints from their cellular beginnings and that have larger

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<sup>9</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993), Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eighth Report, 18 FCC Rcd 14783, 14823 ¶ 84 (2003).

<sup>10</sup> For example, T-Mobile recently agreed to acquire a network in one state, California, for \$2.5 billion. While California is the largest single state in the country by population, it still represents only about 10% of the nation's population. By year end 2003, the wireless industry had invested approximately \$145 billion in capital expenditures with about 90% or \$130 billion coming in the last ten years since the PCS rules were adopted.

swaths of spectrum available to them over which they can provide new services. Because competitive carriers like T-Mobile do not qualify as DEs, restrictive closed auctions prevent them from gaining access to critical spectrum, even though they need it and value it the most.

In recognition of these significant developments, the Commission has moved to eliminate the eligibility restrictions it originally adopted for PCS licenses finding that, while they may have been appropriate in a duopoly environment, they are no longer necessary in today's competitive environment. Indeed, the Commission has generally concluded that such eligibility restrictions, by artificially restricting the access of some carriers to the critical spectrum resource, can actually reduce efficiency, innovation, and competition, thus undermining the very goals these restrictions were supposed to promote.<sup>11</sup> Accordingly the Commission eliminated the restriction on cellular carriers holding A or B block licenses,<sup>12</sup> modified and then eliminated the spectrum cap,<sup>13</sup> and modified the DE set-aside rules for the C and F block licenses.<sup>14</sup> But in the latter case, the Commission stopped short of eliminating the set-aside restrictions altogether. As a result, a substantial amount of spectrum remains off limits to the vast majority of carriers in the industry – carriers that are actually in the marketplace, building networks, and providing services on a competitive basis to consumers. T-Mobile asserts that the time has come for the Commission to

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<sup>11</sup> When the Commission allowed the spectrum aggregation limit lapse, it noted that it “should move from the use of inflexible spectrum aggregation limits to case-by-case review of spectrum aggregation and enforcement of other safeguards applicable to such carriers based on evidence of misconduct” rather than continuing to deploy an absolute restriction on spectrum aggregation. *See 2000 Biennial Regulatory Review; Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668, 24670-1 ¶ 6 (2001) (“*Spectrum Cap Order*”).

<sup>12</sup> *See Spectrum Cap Order* at 22707 ¶ 84.

<sup>13</sup> *Id.* at 22669 ¶ 1.

<sup>14</sup> *See C/F Block Sixth R&O* at 16268 ¶ 2.

finish the task and eliminate this last vestige of an otherwise abandoned licensing regime so as to afford all competitors a chance at acquiring these valuable licenses.

**B. Eligibility Restrictions Are Not Necessary To Ensure Participation By Entrepreneurs In Wireless Services Markets.**

Since the adoption of the restrictive set-aside policies, alternative meaningful opportunities for entrepreneurs in the wireless area have developed. The Commission has implemented a number of “non-set-aside” policies that provide a variety of opportunities for entrepreneurs, including the encouragement and development of unlicensed spectrum use and secondary markets. With these policies in place, small entities that are seeking opportunities in the wireless marketplace have sufficient flexibility to engage in entrepreneurial pursuits. These opportunities are ideal for entrepreneurs because they allow for and encourage innovation without extensive capital requirements. As indicated by the prevalence of a variety of unlicensed products, these policies have successfully encouraged entrepreneur participation in the wireless services market.<sup>15</sup>

Furthermore, as the Commission has acknowledged, bidding credits are an effective mechanism for providing opportunities for small businesses. The FCC has conducted over 50 auctions for spectrum licenses and utilized closed auctions in only a handful of narrow circumstances. Yet, as has been shown time and again, small businesses effectively bid for spectrum with bidding credits alone. In fact, nearly 80 percent of all the winning bidders in FCC

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<sup>15</sup> See Remarks of Michael K. Powell, Chairman, Federal Communications Commission at the Broadband Access Network Coordination (BANC) Event, San Francisco, California (July 12, 2004) (stating that “unlicensed uses and WiFi have far exceeded what any one expected” and that “the entrepreneurial efforts of WISPs have shown us the tremendous potential for providing wireless broadband services in the license-exempt space”).

auctions that were open have been small businesses.<sup>16</sup> For example, in the just concluded 24 GHz auction, which provided only bidding credits, two-thirds of the winning bidders were small business DEs,<sup>17</sup> while in the MVDDS auction conducted earlier this year, three-fourths of the winning bidders were DEs.<sup>18</sup>

As Dr. Simon Wilkie notes, in a declaration accompanying these comments, the only possible public interest benefit from having a closed auction is to foster innovation through the development of new services or serving niche markets. Since 1994, however, the Commission has boldly championed the growth of unlicensed spectrum. Dr. Wilkie further indicates that unlicensed spectrum “has been a huge success in fostering a wealth of new products and services and true entrepreneurial activity,”<sup>19</sup> in stark contrast with the DE set-asides. Indeed, Dr. Wilkie observes that “[t]he allocation of unlicensed spectrum . . . now enables the Commission to foster real entrepreneurship without requiring that entrepreneurs use their capital on acquiring licenses.”<sup>20</sup> Similarly, the Commission has found a better policy tool for promoting service to underserved market niches through the fostering of secondary markets and creative leasing solutions. Like opportunities in unlicensed spectrum allocations, secondary markets and spectrum leasing “allow an entrepreneur wishing to serve a niche area the ability to find a market

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<sup>16</sup> See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 18 FCC Rcd 25162, 25219-20, ¶ 148 (2003); *C/F Block Sixth R&O* at 16278 ¶ 22 n. 67.

<sup>17</sup> See Summary of All Bidders in Auction No. 56 Table announcing winning bidders, at <http://wireless.fcc.gov/auctions/56/charts/56bidder.xls>.

<sup>18</sup> See Summary of All Bidders in Auction No. 53 Chart announcing winning bidders, at <http://wireless.fcc.gov/auctions/53/charts/53market.xls>.

<sup>19</sup> See Declaration of Simon J. Wilkie, 20 (attached) (“Wilkie Declaration”).

<sup>20</sup> *Id.*

solution for access to spectrum, without the capital expense of acquiring a license in the auction.”<sup>21</sup> These regulatory solutions to the problems of fostering innovation are far superior to the blunt instrument of set-asides that the Commission had in 1996.

Therefore, the Commission’s own experience clearly demonstrates that eligibility restrictions are not necessary to ensure entrepreneurs have access to spectrum opportunities. DEs have a multiplicity of business opportunities available to provide service to the public (most of which are less capital-intensive) while also competing effectively in the marketplace. By contrast, the Commission’s restricted C and F block auctions have resulted in false opportunities and many failures that have had a huge cost in terms of lost service and underutilized spectrum. In sum, eligibility restrictions trade real gains in efficiency and competition that would directly benefit consumers for an illusory public benefit that experience has shown. The public interest is ill-served by such an approach.

**C. Restricted Bidding Imposes Significant, Unjustifiable Costs On The Public.**

Even if some marginal public benefit is found in closed auctions, the costs to the public that result from restricted bidding are not justifiable. Historically, closed auctions have imposed extraordinary costs on the public. Due to the series of defaults, bankruptcies, and litigation, associated with the C block auction, as well as the inability (or lack of interest) of many non-defaulting bidders to fund network construction, there was a substantial delay in deploying services on most of that spectrum, with a large share of the C block frequencies still totally unused even today. Dr. Simon Wilkie estimates the consumer surplus cost from this delayed and

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<sup>21</sup>

*Id.*

unrealized deployment at between \$13.6 billion and \$32 billion, and that each additional year's delay in deployment will cost consumers at least another \$3.5 billion.<sup>22</sup>

Dr. Wilkie concludes that the eligibility restrictions for the C block licenses, *i.e.*, the DE set-aside rules, were a significant contributing factor to the failures of the C block auction and the resulting multi-billion dollar loss of consumer surplus. One reason for this is that in a closed auction, bidders are especially vulnerable to the “winner’s curse.”<sup>23</sup> The prospect of overbidding is exacerbated in a closed auction due to a lack of quality information by the eligible bidders. DEs are generally not actually offering service, or doing so only on a limited basis, and therefore have less information as to the true value of the available licenses than companies that are active market participants. As a result, DEs historically tend to overbid in a closed auction because of the lack of fully informed bidders who can signal to DEs the true value of the spectrum. This dilemma of overvaluing licenses leads to a much higher probability of business failure, as indicated by the number of DEs who won licenses in closed auctions that have since gone bankrupt.<sup>24</sup>

The Commission’s bidding experience has shown that even if entities do not go bankrupt, inefficiencies are inevitable when small entities that are not partnered with larger providers receive this overvalued spectrum. In the wireless marketplace, economies of scale and scope are

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<sup>22</sup> See *id.* at Table 1.

<sup>23</sup> The “winner’s curse” refers to fact that the winner of any item through competitive bidding may overvalue the desired item and therefore overbid. *Id.* at 4.

<sup>24</sup> See, *e.g.*, *In re NextWave Personal Communications, Inc. et. al.*, 235 B.R. 263 (Bankr. S.D.N.Y. 1999); *In re Urban Communicators PCS Limited Partnership*, Case Nos. 98-B-47996, 98-B-47997, 98-B-10086 (Bankr. S.D.N.Y. 1998) (Jointly Administered); *United States v. GWI PCS I, Inc.*, 245 B.R. (N.D. Tex. 1999); Public Notice, Commission Staff Requests Submission of Superior Alternatives to Proposed Agreement to Resolve Pocket Communications Bankruptcy, DA 98-547 (Mar. 23, 1998).



necessary to compete as consumers increasingly desire more national networks and ubiquitous access to voice and data services. This scale and scope has benefited customers in terms of value, price, and innovation and has stimulated rapid growth in demand for such services. This growth in demand has in turn led to a corresponding growth in demand for spectrum. As a result, the value of the spectrum generally tends to increase over time.<sup>25</sup> A rational actor that does not plan to offer service on a national scale will recognize that it will receive the greatest value for its spectrum if it is the last party to be acquired by one of the larger national providers. If this regulatory arbitrage is the goal of the entity, then it is pointless for this entity to invest capital and deploy services on this spectrum only to be ultimately bought out by another entity.<sup>26</sup> As indicated by Simon Wilkie in the attached declaration, “each small firm selling its license would attempt to be the last entity to sell, so that it can extract as much surplus as possible from the prospective buyer. This bargaining process, which by itself may entail significant transaction costs, will . . . harm consumers as they will not receive desired services in a timely fashion.”<sup>27</sup> Thus, this valuable spectrum resource lies fallow – or with only the most minimal development sufficient to satisfy the FCC’s build-out rules – until a larger entity buys out the DE, resulting in significant losses to the public.<sup>28</sup>

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<sup>25</sup> See Wilkie Declaration at 19.

<sup>26</sup> While the Commission maintains build-out requirements for licensees, the build-out benchmarks do not necessarily correspond with robust service. Moreover, there are provisions whereby a licensee may be able to meet its FCC-mandated build requirements with a niche offering, for example, that does not correspond with the highest valued use of the spectrum.

<sup>27</sup> Wilkie Declaration at 6.

<sup>28</sup> Real life examples of this result include AT&T Wireless’s \$4.7 billion acquisition of TeleCorp PCS, Inc., *see, e.g.*, [http://telephonyonline.com/ar/telecom\\_atts\\_telecorp\\_purchase/](http://telephonyonline.com/ar/telecom_atts_telecorp_purchase/), and, more recently, NorthCoast PCS who purchased its spectrum for a value of \$118 million at a Commission auction, *see* FCC Broadband PCS D/E/F Block Auction Final Chart announcing top

In contrast, bidding credits applied in an open auction minimize most of these concerns while simultaneously encouraging a diverse set of licensees and access to spectrum by all (*i.e.*, the goals of the Commission's eligibility restrictions). Open auctions that allow all bidders to bid on licenses help ensure that the license is not ultimately overvalued and that it goes to the most highly valued user. In open auctions, larger, more informed bidders inherently impart valuation data to smaller bidders and licenses are more appropriately valued, thereby decreasing the likelihood of ultimate bankruptcy by the winning bidder. Furthermore, as described above, bidding credits have proven very effective at ensuring a diverse set of licensees. Therefore, in light of the effectiveness of bidding credits at accomplishing the Commission's goals for increased competition and a diverse set of licensees, the costs incurred by the public through the use of restricted bidding are unwarranted and unjustifiable.<sup>29</sup>

### **III. THE COMMISSION SHOULD EXPEDITIOUSLY ACT ON CTIA'S PETITION AND INITIATE A RULEMAKING.**

The auctioning of important spectrum in Auction No. 58 without eliminating the eligibility restrictions will only prolong the effective deployment of this spectrum for use by the public. As described above, open bidding ensures that the spectrum will be acquired by the entity that desires it the most, thereby ensuring an expeditious and efficient roll-out of services.

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ten bidders for Auction No. 11 by total dollars of net bids, *at* <http://wireless.fcc.gov/auctions/11/charts/11cursum.gif>, only to sell this spectrum to Verizon Wireless at a substantial premium for \$750 million, *see* Verizon Buys PCS Licenses from Cablevision, internetnews.com, Dec. 19, 2002, at <http://www.internetnews.com/wireless/article.php/1559701>.

<sup>29</sup> *See e.g.*, *DE Order* at 5571-2 ¶¶ 93-95 (demonstrating that the FCC has previously acknowledged that bidding credits fulfill its statutory requirements under Section 309(j) of the Communications Act to make available, so far as possible, licenses to the broadest variety of applicants as practically possible).

In contrast, closed bidding has shown historically that winning bidders fail or that the licenses are eventually sold. Even for DEs to bid on such spectrum, experience has shown that partnerships with larger entities are needed to raise the significant capital required; post-auction, these partnerships have required extensive review to ensure compliance with eligibility restrictions. This review process, while well meaning and necessary to avoid “shams,” inevitably delays deployment and increases the administrative burdens in contravention of the Commission’s mandate to create competitive bidding rules that further “the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays.”<sup>30</sup> In particular, the review process for winning DE bidders in Auction No. 35 took over a year to complete.<sup>31</sup> By contrast, non-DE licenses were granted within approximately 3 months after the completion of the auction.<sup>32</sup>

As described above, and supported in the attached declaration, DE auction winners in a closed auction environment have largely failed to fulfill the goals set forth in Section 309(j) of the Communications Act. Experience demonstrates they are much more likely to either (a) overbid and correspondingly seek bankruptcy protection or (b) hold onto valuable spectrum licenses while providing a minimal level of service to the public in the hopes of recouping the

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<sup>30</sup> 47 U.S.C. §309(j)(3)(A). Given the extensive compliance issues associated with policing the controlling interestholder regime underlying the DE rules, petitions to deny DE applications are much more common than non-DE applications where review is strictly limited to legal qualification.

<sup>31</sup> See, e.g., *Applications of Alaska Native Wireless, LLC, Auction No. 35 – C & F Block Broadband PCS*, Order, 17 FCC Rcd 4231 (2002). The Commission’s review of the DE status of Alaska Native Wireless took approximately 15 months to resolve post-Auction No. 35.

<sup>32</sup> See, e.g., *Application of Cook Inlet/VoiceStream PCS LLC*, File No. 0000012949 (winning bidder announced Apr. 20, 1999, application filed May 18, 1999, and application granted in part June 30, 1999).

increased value associated with the licenses that will arise over time.<sup>33</sup> These cases have also been riddled with litigation that has tied up the use of the spectrum and denied the promise of additional competition and service.<sup>34</sup>

A focused, single-issue rulemaking that eliminates these eligibility restrictions in Auction No. 58 will ensure the spectrum goes in the first instance to those most motivated to build out and provide service. Certainly, this is the case with T-Mobile. As outlined above, T-Mobile is the newest entrant into the national market and the fastest growing carrier in that market. To achieve these results, T-Mobile has sought to position itself as the value leader in wireless by offering large “buckets” of minutes at reasonable prices. To continue to compete aggressively against the largest carriers in the market, however, T-Mobile needs additional spectrum. Auction No. 58 could play an important role in providing T-Mobile and similarly situated carriers with the opportunity to acquire this critical resource. But if over half the licenses remain unavailable, the potential benefits of Auction No. 58 to competition and consumers will be substantially undermined.

T-Mobile therefore urges the Commission to promptly adopt a Notice of Proposed Rulemaking focused solely on the issue of eliminating the eligibility restrictions for the licenses in Auction No. 58 in order to deploy this spectrum more widely in the most efficient and effective manner without administrative or judicial delay.<sup>35</sup> The Commission can establish a

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<sup>33</sup> See discussion *infra* pp. 10-12; Wilkie Declaration at 6, 7-8.

<sup>34</sup> Also see, *United States, ex rel., R.C. Taylor III v. Mario Gabelli*, Civ. A. No. 01-0333 (D.D.C. filed Feb. 14, 2001) (S.D.N.Y. transferred Sept. 30, 2003).

<sup>35</sup> See 47 U.S.C. § 309(j)(3) (mandating that the Commission “seek to promote...the development and rapid deployment of new technologies, products, and services for the benefit of the public...[and the] efficient and intensive use of the electromagnetic spectrum”).

very short comment cycle because it will already have a full record developed from the comments on the Auction No. 58 Public Notice, most of which primarily focused on the Commission's use of eligibility restrictions in Auction No. 58, and the comments filed in response to this Petition.<sup>36</sup> Such a comment cycle would enable the Commission to complete the rulemaking in less than three months, as it did for Auction No. 35.<sup>37</sup> Furthermore, the Commission need not wait six months following adoption of the new rules before beginning the auction process. As in Auction No. 35, three months will be sufficient.<sup>38</sup> Accordingly, if the Commission acts expeditiously, it can complete a rulemaking and have the rules take effect in a timeframe that would allow Auction No. 58 to commence in the first quarter of 2005. Thus, any delay in the start of the auction from the January 2005 date the Bureau has announced will be extremely brief, and more than made up for post-auction by the much more rapid licensing and actual deployment of the spectrum that an open auction will make possible. In these circumstances, the benefits of taking a little extra time up front to "do it right" far outweigh the costs for the public, industry, and the FCC.<sup>39</sup>

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<sup>36</sup> T-Mobile proposes a 10-day comment cycle and a 7-day reply comment cycle.

<sup>37</sup> *See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Further Notice of Proposed Rulemaking, 15 FCC Rcd 9773 (June 7, 2000) (seeking comment on bidder eligibility for Auction No. 35 and announcing comments were due June 22, 2000, reply comments were due June 30, 2000, and ex parte presentations were allowed only until July 12, 2000); *C/F Block Sixth R&O* (Aug. 29, 2000) (modifying the eligibility rules for the C and F blocks).

<sup>38</sup> The Commission's rulemaking proceeding on bidder eligibility for Auction No. 35 concluded on August 29, 2000. *C/F Block Sixth R&O*. Auction No. 35 subsequently began on December 12, 2000, just over three months later.

<sup>39</sup> *See* 47 U.S.C. § 309(j)(3)(A), 309(j)(3)(D).

**IV. ALTERNATIVELY, THE COMMISSION SHOULD WAIVE ITS ELIGIBILITY RESTRICTIONS FOR THE NEXTWAVE LICENSES INCLUDED IN AUCTION NO. 58.**

Alternatively, the Commission should waive its eligibility rules for the licenses returned to the Commission by NextWave, based on the unique history surrounding NextWave's authorizations. Specifically, these licenses have been fully constructed by a DE that subsequently returned them to the Commission as partial payment for a debt it owed the United States Government. Having been certified as fully constructed to meet the five-year benchmark by the FCC, the spectrum should no longer be considered restricted, as NextWave itself could have assigned these authorizations to any entity without the imposition of unjust enrichment payments.<sup>40</sup> These unique facts make the application of the current eligibility rule to these licenses especially inappropriate, inconsistent with Commission policy, and contrary to the public interest.

Pursuant to Section 1.3 of its rules, the Commission may waive any of its rules for good cause.<sup>41</sup> More specifically, the Commission "may grant a request for waiver if it is shown that:

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<sup>40</sup> Indeed, the Commission has already shown a willingness to waive such provisions and grant restricted licenses to non-DEs when it approved the sale of such licenses to Cingular from NextWave. *See, e.g.*, Application for Consent to the Assignment of License Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Pacific Telesis Mobile Services, LLC, subsidiary of Cingular Wireless LLC, File No. 0001462360, Exhibit 1 (filed Sept. 26, 2003).

<sup>41</sup> The Commission regularly relies on this waiver authority under Sections 1.3 and 1.925 of its rules to waive regulations that it considers not to be in the public interest when applied in certain circumstances. In fact, as recently as May of this year, the D.C. Circuit has confirmed the FCC's authority to waive its rules, provided the Commission sufficiently justifies its decision. *AT&T Wireless Services, Inc. v. Federal Communications Commission*, 365 F.3d 1095 (D.C. Cir. 2004) (upholding FCC's decision to affirm prior waiver grant that consistent with the D.C. Circuit's Remand Order, 270 F.3d 959 (2001), provided sufficient justification for granting the waiver).

- (i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case and that a grant of the requested waiver would be in the public interest; *or*
- (ii) [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>42</sup>

The circumstances surrounding the NextWave licenses that have been returned to the Commission, after years of litigation and delay, clearly indicate that waiver of the Commission's eligibility restrictions is warranted under either of these prongs.

As an initial matter, T-Mobile has clearly demonstrated that the underlying purpose of the Commission's rules would not be served by application of the restricted eligibility rule to the licenses in Auction No. 58. As T-Mobile has discussed above, the purpose of the eligibility restriction was to foster nascent competition and to create opportunities for entry by a range of diverse entities. In retrospect, however, restrictions on entry do not serve to provide a sound basis for entry into mobile services by entrepreneurs, and other policies and rules have evolved to address those needs. Moreover, T-Mobile, and the Wilkie Declaration, document how closed auctions, in fact, have caused substantial delays, imposed significant costs, and potentially undermine competition. On these facts, the Commission should conclude that the underlying purpose of the restricted entry rules does not serve the Commission's mandates under Section 309.

There are also present in this case unique facts that render application of the closed auction rule inequitable, unduly burdensome, and contrary to the public interest. NextWave, a

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<sup>42</sup> 47 C.F.R. § 1.925 (emphasis added). See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

DE found to be acceptable and legitimate after extensive Commission review, acquired these licenses in 1997.<sup>43</sup> Subsequently, NextWave constructed these licenses in accordance with Commission standards and complied with all of the Commission's regulations, thereby rendering these licenses no longer subject to the PCS eligibility restrictions.<sup>44</sup> But for the return of the NextWave licenses to the FCC, this spectrum would have been available for purchase on an unrestricted basis in the secondary market. Thus, these licenses are equivalent to licenses held by any other PCS licensee in good standing, which, the Commission's rules provide, can be freely transferred in the marketplace. Rather than have returned these licenses to the FCC, NextWave could have retained or sold these licenses to pay off its outstanding debt to the government, and in that event these licenses could have been purchased by any interested bidder, not just DEs. Returning these licenses to restricted status, under these circumstances, impedes deployment of the spectrum and unfairly compensates the taxpayer for the value of the NextWave settlement. NextWave, by contrast, is selling its retained licenses to the highest bidder without restriction and reaping significant value by being able to sell to any interested bidder.<sup>45</sup> In fact, NextWave has recently sold several of its retained spectrum licenses for considerable premiums over market value.<sup>46</sup>

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<sup>43</sup> See *NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, Memorandum Opinion and Order, 12 FCC Rcd 2030 (1997).

<sup>44</sup> See, e.g., Application of NextWave Personal Communications Inc., File No. 0000837054 (filed Apr. 4, 2002) (granted Apr. 21, 2003) (acknowledging compliance with construction requirements for NextWave's Albany, NY license, KNLF669).

<sup>45</sup> NextWave did in fact choose to retain some of its licenses and sell some of its licenses, both free of DE restrictions. See, e.g., Application for Consent to the Assignment of License Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Pacific Telesis Mobile Services, LLC, subsidiary of Cingular Wireless LLC, File No. 0001462360, Exhibit 1 at 4 (filed Sept. 26, 2003) (assigning C3 block license for San Diego,



Further, the situation in Auction No. 58 is far afield from the scenarios envisioned in the eligibility restrictions. The Commission's restricted eligibility rules for the reauction of reclaimed C block licenses were intended to apply in circumstances where a licensee defaulted prior to fulfilling its license obligations and the license was returned to the Commission as a result.<sup>47</sup> This is not the case with the Auction No. 58 licenses. Instead, these licenses were returned to the Commission voluntarily after being fully constructed. The re-imposition of eligibility restrictions on these licenses would thus not only result in poor economic policy, but would also be contrary to fairness and consistency and would directly contravene the purpose of the underlying Commission rules concerning DE construction.

Indeed, the Commission has regained these licenses as a result of its role as a creditor of NextWave's, not as a regulator of a licensee. As such, the Commission has a fiduciary duty to the American taxpayer to ensure that these reclaimed licenses are auctioned and re-licensed for the best value possible, just as NextWave has in its transactions with Cingular and its July 2004 private auction. Moreover, the NextWave licenses, which have an extraordinarily unique set of circumstances associated with them, are ideally suited for differentiated treatment by the Commission through a waiver of the set-aside rules. Having been auctioned, licensed, and fully constructed, these licenses should now be, as they would be in the secondary market per the Commission's own rules, freely and actively available for all interested parties to obtain. Under

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(Continued . . .)

CA, KNL651).

<sup>46</sup> See Wilkie Declaration at 10 (noting that NextWave purchased 30 MHz of spectrum in New York for \$994 million, yet eight years later, NextWave sold only 10 MHz of this spectrum for \$930 million, thereby almost tripling its bid).

<sup>47</sup> DE Order at 5588-9 ¶¶ 128-129.

almost any other scenario, this is exactly the result that would be expected and therefore strongly favors the waiver of the stringent eligibility requirements associated with these licenses. At this point, no DE should have had any reasonable expectation that these licenses would be made available again on a set-aside basis. They have no equity claim to have the Commission reimpose these restrictions that it had just recently lifted pursuant to build-out certifications.

For T-Mobile, restrictions on the Auction No. 58 licenses are significant and harm its ability to compete. In particular, the licenses returned by NextWave include markets where T-Mobile has a need to add more capacity to improve service quality, offer new services, and strengthen its competitive position. In the near term, this auction represents the best option to meet T-Mobile's business needs.

Upon these unique and extraordinary facts, a waiver of the Commission's restricted eligibility rules for the licenses that were returned to the Commission by NextWave is in the public interest and the failure to provide such a waiver would undermine the purpose of these restrictions. In addition, there are no other reasonable licensing alternatives available to T-Mobile to pursue at this time, further justifying a limited waiver of the eligibility restrictions for the reclaimed NextWave licenses. T-Mobile encourages the Commission to consider such relief, absent broader rule changes to the overall set-aside structure in place for the PCS C and F block licenses.

## **V. CONCLUSION**

The wireless services market has dramatically changed since the Commission's adoption of its eligibility restrictions for C and F block licenses. As a result, these restrictions are no longer necessary to ensure entrepreneur participation in this market. Furthermore, the continued application of these restrictions imposes significant and unjustifiable costs on the public. For the foregoing reasons, T-Mobile urges the Commission to either expeditiously initiate a rulemaking

to eliminate its eligibility restrictions on C and F block licenses or grant a waiver of these rules for the licenses in Auction No. 58 that were returned to the Commission by NextWave.

Respectfully submitted,

T-MOBILE USA, INC.

By: /s/ Thomas Sugrue

Thomas Sugrue, Vice President

Government Affairs

Robert Calaff, Director

Federal Policy

T-MOBILE USA, INC.

401 9<sup>th</sup> Street, NW

Suite 550

Washington, DC 20004

(202) 654-5900

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