

**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.

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August 9, 2004

EXECUTIVE SUMMARY

T-Mobile USA, Inc. ("T-Mobile") strongly urges the Commission to act on the recommendations of the CTIA Petition. While T-Mobile supports an expedited rulemaking to modify the eligibility requirements applicable to future PCS auctions, T-Mobile also believes that the present factual underpinnings of Auction No. 58 provide a compelling case for waiving the set-aside provisions of Section 24.709. At a minimum, T-Mobile believes the FCC should waive those requirements with respect to those licenses returned by NextWave, licenses which in any event should no longer be subject to eligibility limitations.

As discussed herein and in T-Mobile's initial comments, set-asides are an outmoded and demonstrably inefficient mechanism to further the statutory goals of Section 309(j). In fact, contrary to the assertions of Council Tree, the use of bidding credits without set-asides in auctions for new spectrum have resulted in designated entities ("DEs") winning three quarters of the available authorizations. When viewed in combination with the track record from prior PCS auctions of DEs in financial distress, sales to entities that would not have qualified as DEs, delays in roll-out, and litigation over licenses, the social cost of set-asides is staggering – between \$13.6 and \$32 billion – and the use of set-asides is no longer responsible public policy. In particular, the implementation of set-asides for PCS is unjustifiable in light of the vast capital requirements for the deployment of the types of services consumers are demanding of mobile telephony providers.

Rather, T-Mobile believes that the goals of Section 309(j) would be better served if the Commission were to act by waiver to exempt the Auction No. 58 licenses from Section 24.709. This step could be taken immediately, based upon the record before the agency, and permit the FCC to maintain its currently scheduled auction date of January 12, 2005.

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REPLY COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”) submits this reply to the comments filed in response to the Petition of CTIA – The Wireless Association (“CTIA”) for Expedited Rulemaking or, Alternatively, a Waiver.¹ As evidenced by the initial comments, set-asides impose significant costs on the public welfare and, in any event, are ill-suited to encourage participation in the wireless services industry by designated entities (“DEs”). In contrast, bidding credits have proven effective at ensuring radio authorizations are disseminated to a variety of licensees. At the very least, however, there is a strong argument that the licenses returned to the FCC via the NextWave settlement should be made available without any eligibility restriction pursuant to the unique circumstances that surround them. T-Mobile therefore urges the Commission to act expeditiously on the relief requested in the CTIA Petition and either initiate a rulemaking to eliminate its eligibility restrictions or, alternatively, grant a waiver of the eligibility restrictions for some — or all — of the licenses available in Auction No. 58.

¹ 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) (“CTIA Petition”).

I. THE RECORD SUPPORTS REMOVAL OF THE ELIGIBILITY RESTRICTIONS IN AUCTION NO. 58 EITHER BY RULEMAKING OR BY WAIVER

A variety of parties filed comments in support of the CTIA Petition, including T-Mobile, Verizon, Sprint PCS, Motorola, and the Rural Cellular Association.² A number of other commenters also encouraged the Commission to review its current restricted eligibility rules, but in different ways than proposed by CTIA.³ The variety of comments filed in response to the CTIA Petition, and in response to the prior Public Notice for Auction No. 58, demonstrates the need to initiate a rulemaking to address all of the considerations raised in response to restricted bidding. If the Commission does not believe that it can complete such a rulemaking in an expeditious fashion and maintain the current scheduled auction date, it should grant CTIA's request for a waiver, especially with respect to the returned NextWave licenses. Clearly, the record establishes that there is a unique set of circumstances associated with this spectrum that makes strict compliance with the eligibility rules inconsistent with the public interest.⁴

II. THE COMMUNICATIONS ACT DOES NOT MANDATE THE USE OF SET-ASIDES

Contrary to several commenters' implicit assertions,⁵ Section 309(j) of the Communications Act of 1934, as amended ("Communications Act"), does not compel the use of

² See Comments of Verizon Wireless, Comments of Sprint PCS, Comments of Motorola, Inc., and Comments of Rural Cellular Association ("RCA"). While T-Mobile concurs with RCA regarding the inadvisability of closed auctions, T-Mobile does not support enhanced bidding credits or universal use of small license areas. T-Mobile, as discussed herein, believes that the existing program of bidding credits has ensured that licenses are disseminated to a variety of participants, including rural carriers. Moreover, T-Mobile believes the size of license areas should be determined by the nature of the service involved, rather than by artificial gerrymandering.

³ See, e.g., Comments of Blooston, Mordkofsky, Dickens, Duffy & Prendergast at 3-4 (encouraging the Commission to review its eligibility restrictions with regard to certain markets), Comments of Council Tree Communications at 24-26 (proposing the addition of a personal net worth limitations and the reduction of minimum opening bids).

⁴ See, e.g., *AT&T Wireless Services, Inc. v. Federal Communications Commission*, 365 F.3d 1095 (D.C. Cir. 2004).

⁵ See, e.g., Comments of Council Tree Communications at 6-9, Comments of Designated Entity Program

set-asides.⁶ Section 309(j) merely provides that the Commission, through auctions, seek to promote “economic opportunity and competition . . . 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.”⁷ Indeed, although Section 309(j) offers a number of examples of possible means to achieve this goal, set-asides are not mentioned anywhere in the statute.

While the implementation of set-asides might have seemed appropriate in 1994, even a quick review of the FCC’s auction history demonstrates that set-asides are an inefficient tool to promote the Commission’s statutory objectives. As many commenters note, the goals of Section 309(j) have been fulfilled more effectively through the use of other mechanisms, such as bidding credits, than through size-based restrictions on eligibility.⁸ For that reason, the use of set-asides has been limited to the C and F Block PCS auctions where regulatory inertia, rather than considered policymaking, has kept the restrictions in place. The FCC has made determinations that bidding credits alone are sufficient to provide entry opportunities for smaller carriers in all other cases.⁹

Supporters at 3.

⁶ See 47 U.S.C. § 309(j).

⁷ *Id.*, § 309(j)(3)(B).

⁸ See, e.g., Comments of Blooston, Mordkofsky, Dickens, Duffy & Prendergast at 3 (“history shows that perhaps the most significant factor in determining the auction success of true small businesses and rural telephone carriers is the size of the licenses being sold”), Comments of Rural Cellular Association at 2-3 (noting that bidding credits and small geographic license areas are more effective at providing opportunities to small businesses to acquire licenses).

⁹ See, e.g., *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, ¶ 252 (2002) (finding that bidding credits alone will “provide[] a variety of businesses, including local businesses, with opportunities to participate in the auction of licenses for [MMVDS] spectrum”).

As demonstrated in T-Mobile's original comments, the use of closed bidding in the PCS auctions has cost consumers between \$13.6 billion and \$32 billion in lost opportunity.¹⁰ This result is diametrically opposed to the underlying goal of disseminating licenses to a variety of entities, which is to create a diversified mobile marketplace with innovation in service offerings and pricing competition that inures to the benefit of the public. Instead of concentrating on consumer welfare, however, those proponents of closed auctions concentrate on the perceived welfare of a subset of providers—those entities able to secure DE benefits. The ultimate touchstone in evaluating policies for encouraging participation by DEs must still be whether the public at large benefits from such actions, not whether certain private entities are able to secure perceived gains for their own profit.¹¹

III. BIDDING CREDITS HAVE BEEN DEMONSTRABLY SUCCESSFUL IN MEETING THE GOALS OF THE COMMUNICATIONS ACT

Relevant historical auction data affirms that DEs have succeeded in obtaining licenses in open bidding against non-DE bidders. Although Council Tree's Appendix attached to its comments attempts to bolster its conclusion that DEs are unlikely to win at auction absent set-asides, the data used by Council Tree is fatally flawed and its empirical conclusions erroneous.¹²

As demonstrated in the tables below, DEs have been very successful in auctions where size-

¹⁰ T-Mobile's initial comments contained a declaration by Simon J. Wilkie, former Chief Economist of the FCC, demonstrating that the consumer surplus cost from delays and unrealized deployment due to the former C Block policies was 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. See T-Mobile Comments at 10-11; Attachment A – Declaration of Simon J. Wilkie, Comments of T-Mobile Communications ("Wilkie Declaration"). Since that time, T-Mobile has become aware of an independent econometric modeling analysis by Thomas Hazlett, another former Chief Economist of the FCC, which provides further support for the conclusions in the Wilkie Declaration. See Hazlett, Thomas W. and Munoz, Roberto E., "A Welfare Analysis Of Spectrum Allocation Policies" (June 10, 2004) ("Hazlett Study"). Moreover, the Hazlett Study calculates that the welfare costs of the C Block policies in the United States are close to \$40 billion since 1996.

¹¹ Section 309(j)(3) notes that the policy of "avoiding excessive concentration of licenses and . . . disseminating licenses among a wide variety of applicants, including small businesses," is ultimately to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible *to the American people*." 47 U.S.C. §309(j)(3)(B) (emphasis added).

¹² See "Analysis Of Council Tree Auction Data" (attached as Attachment A).

based bidding credits were available (often acquiring over 50% of the licenses available in any single auction) and where auction results were not distorted by pre-existing incumbents of the same class.

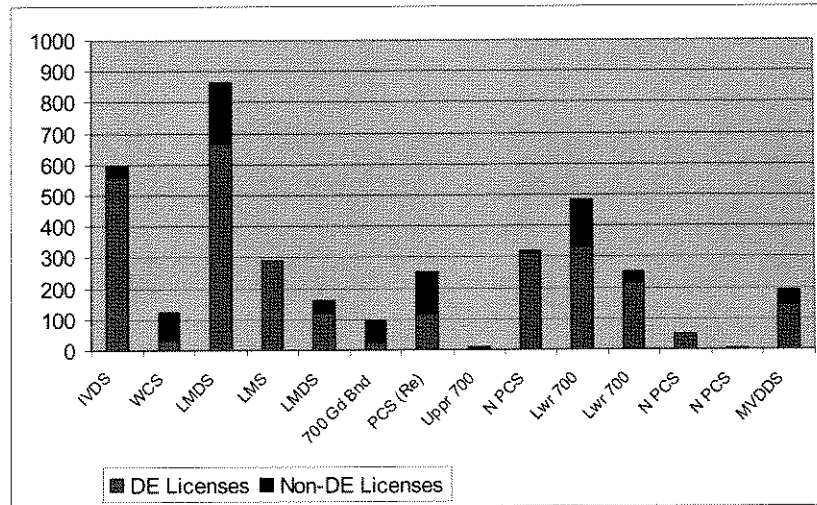


Table 1: Designated Entity Licenses v. Non-Designated Entity Licenses Acquired at Auction

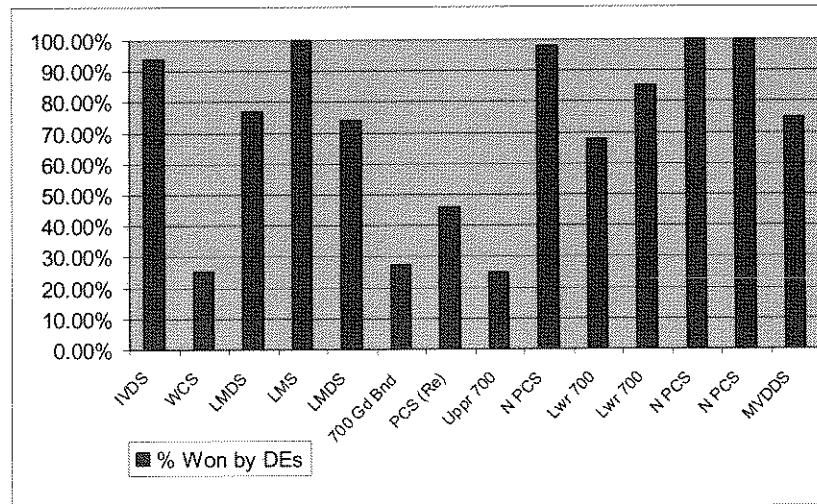


Table 2: Designated Entity Licenses as Percentage of Licenses Acquired at Auction

When the results of all of these auctions are combined, DEs acquired over three quarters of all available licenses in open auctions where bidding credits were available. Similarly, DEs

accounted for almost 30% of the gross bids in these auctions – 58% of the gross bids if Auction No. 35 is eliminated.¹³

Furthermore, RTG and OPASTCO also argue that the current DE rules must be maintained to provide rural companies with a meaningful opportunity to acquire additional spectrum which, in turn, will allow rural companies to continue to develop innovative services for the benefit of wireless consumers living in rural areas. Additionally, RTG and OPASTCO argue that the elimination of the eligibility restrictions from all future PCS spectrum auctions ignores the realities of the rural marketplace and flies in the face of Section 309(j).¹⁴

However, experience contradicts these assertions. The Commission very recently licensed a significant portion of spectrum in the C Block of the 700 MHz band in small regional areas at the request of rural carriers.¹⁵ These licenses, per comments made by RTG and Council Tree,¹⁶ were licensed in the 734 Metropolitan Statistical Areas (“MSAs”) and Rural Service Areas (“RSAs”), a geographic service area grouping favorable for rural carriers to obtain spectrum.¹⁷ The Commission found this action to be consistent with its Congressional mandate to promote “economic opportunity and competition” and to disseminate licenses “among a wide

¹³ Auction No. 35 accounts for \$12.3 billion of \$14.3 billion total gross bids for the listed auctions. However, \$5 billion of the total gross bids for Auction No. 35 is accounted for by four specific licenses.

¹⁴ See Comments of the Rural Telecommunications Group (RTG) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) at 2-3.

¹⁵ See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, Report and Order, 17 FCC Rcd 1022 (2002) (“*Lower 700 MHz Order*”); see also, Public Notice “*Lower 700 MHz Band Auction Closes*”, DA 02-2323, rel. Sept. 20, 2002 (found at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2323A1.pdf).

¹⁶ See e.g., RTG Comments at 4; Council Tree Opposition to Petitions for Reconsideration (Mar. 14, 2002) at 8-9.

¹⁷ See *Lower 700 MHz Order* at ¶ 95.

variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”¹⁸

As would be expected, the auction of the 700 MHz band C Block found that the overwhelming majority of winning bidders were DEs and rural interests, in particular. In the two auctions for these licenses, Auctions 44 and 49, 74% of the 734 licenses were won by DEs in an open auction with bidding credits provided and at least 24% of these licenses were won by rural carriers.¹⁹ Clearly, these auctions demonstrate that DEs, including rural carriers, can bid and gain access to spectrum without limiting eligibility. Moreover, Basic Trading Areas (“BTAs”), while larger than MSAs/RSAs,²⁰ are still one of the smaller geographic licensing areas the Commission has used. Thus, what CTIA has proposed is that Auction No. 58 use small geographic areas and bidding credits for DEs, exactly the auction configuration that parties seeking the retention of restricted eligibility in Auction 58 argued promotes DE participation.

IV. THERE IS NO POLICY BASIS TO REQUIRE SET-ASIDES BASED UPON THE PCS MARKET

Despite several commenters’ allegations,²¹ there is no empirical basis favoring set-asides for PCS in contrast to other auction-based services. In fact, if anything, set-asides are even more inappropriate in the PCS bands than in other spectrum bands because of the capital-intensive

¹⁸ *Id.* See also 47 U.S.C. § 309(j)(3)(B). Specifically, in establishing policies regarding competitive bidding for spectrum licenses, Congress mandated that the Commission “prescribe area designations and bandwidth assignments that promote ... economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.” 47 U.S.C. § 309(j)(4)(C).

¹⁹ See <http://wireless.fcc.gov/auctions/44/charts/44cls2.pdf> and <http://wireless.fcc.gov/auctions/49/charts/49cls2.pdf> From review of the Commission’s auction application database, 175 of the licenses in Auctions 44 and 49 were won by bidders who reported to be rural carriers on the FCC Form 175.

²⁰ The MSAs/RSAs divide the country into 734 regions, as opposed to the 493 BTA divisions.

²¹ See, e.g., Comments of Council Tree Communications at 13-14

nature of providing PCS services. As evidenced by the substantial number of bankruptcies,²² acquisitions,²³ and defaults²⁴ of PCS DE licensees and the relatively small number of DEs that are currently providing service to the public,²⁵ it is clear that PCS is the type of capital-intensive service that does not favor facilities-based participation by smaller entities. In the past, the Commission has noted that provisions encouraging participation by DEs are not appropriate in auctions for spectrum that is to be used for capital-intensive, inherently nationwide services. For example, in the *DBS Order*, the Commission specifically found that “[b]ecause of the extremely high implementation costs associated with satellite-based services . . . no special provisions should be made for designated entities.”²⁶ In making this determination, the Commission specifically rejected arguments suggesting that provisions for designated entities should be established for DBS licenses because the Commission must “balance its goals of providing rapid service to the public with other public interest goals, including the participation of [DEs] in the

²² 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).

²³ See, e.g., *Applications for Consent to the Assignment of Licenses 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 subsidiaries of Cingular Wireless LLC*, Memorandum Opinion and Order, 19 FCC Rcd 2570 (Feb. 12, 2004).

²⁴ See, e.g., *Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction filed by BDPCS, Inc.*, Order, 11 FCC Rcd 22450 (1996) (denying BDPCS, Inc.’ request for waiver of the Commission’s down payment rules and thereby ruling that BDPCS, Inc. had defaulted on its licenses).

²⁵ See Appendix B.

²⁶ *DBS Order* at ¶ 211.

electronic mass media fields,²⁷ arguments that several commenters have made in this context as well.²⁸

As was the case with the DBS auctions, the public interest demands that this spectrum be auctioned in a manner that will ensure the most expedient roll-out of services. As demonstrated in T-Mobile's original comments, consumer demand is for ubiquitous coverage, increased data services, and increased quality of service.²⁹ This demand, however, is not being met by DEs.³⁰ This is not surprising in light of the tremendous capital costs – requiring in the tens of billions of dollars – of providing the types of mobile services that consumers are demanding that carriers deliver. A strong case can be made that, as with DBS, the capital costs of providing service in the mobile telephony market are so substantial that no special DE provisions, including bidding credits, should be used for this auction. Nevertheless, neither CTIA nor T-Mobile are asking the Commission to take this step. But at the very least, the set-aside restrictions, which are much more disruptive to the industry and costly to the public than bidding credits, should be eliminated.

V. A WAIVER OF THE ELIGIBILITY RULES FOR AUCTION NO. 58 IS IN THE PUBLIC INTEREST

As noted in the CTIA Petition and the T-Mobile comments, the facts surrounding the licenses to be sold in Auction No. 58 present a compelling case for a waiver in the event the Commission determines not to pursue a rulemaking, or in the event that the Commission

²⁷ *Id.* at ¶ 214.

²⁸ *See, e.g.*, Comments of Council Tree Communications at 20-21.

²⁹ *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Action of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Eighth Report, 18 FCC Rcd 14783, ¶ 12 (2003) (concluding that “there is effective competition in the CMRS marketplace”).

³⁰ *See* Comments of Verizon Wireless at 3 (noting that “despite the set-aside, the majority of service in the top 200 F block markets is offered by licensees that are not now and were not at the time of auction qualified to participate in a set-aside”).

determines a rulemaking would be inconsistent with the proposed timing of the auction.

T-Mobile, in fact, provided a thorough showing of why the grant of a waiver of the restricted eligibility requirements of Section 24.709³¹ is fully consistent with the standards enunciated in *WAIT Radio v. FCC*.³² Should the Commission nonetheless determine that the relief requested by CTIA is unwarranted, precedent nonetheless supports grant of a waiver with respect to those licenses returned to the agency by NextWave. Moreover, grant of a waiver would indisputably ensure that Auction No. 58 would proceed on the current scheduled date, thus promoting the statutory goal of 309(j) to ensure the expedited licensing of services for the American public.

A. The Facts Surrounding the Licenses Available in Auction No. 58 Present a Compelling Case for Waiver Relief

The record demonstrates that the failure to grant a waiver of the eligibility rules under the facts would both contravene the purpose of the rules and render application of the rule contrary to the public interest. As Council Tree notes, the Commission's DE rules are intended to "stimulate the ability of diverse entities to gain access to the wireless marketplace."³³ As documented by both CTIA and T-Mobile, in the past, however, set-asides, particularly in the PCS bands, have proven ineffective at achieving this goal.³⁴ Instead, set-asides ensure that DEs overbid for spectrum, forcing them to either ultimately fail or be acquired by the highest bidder.³⁵ Furthermore, bidding credits and other mechanisms have proven effective at ensuring

³¹ 47 C.F.R. §24.709.

³² *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *see also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). *See also AT&T Wireless Services, Inc. v. Federal Communications Commission*, 365 F.3d 1095 (D.C. Cir. 2004).

³³ Comments of Council Tree Communications at 28.

³⁴ T-Mobile has provided, as Attachment B, a series of tables describing the disposition of the licenses for the top bidders, by net bid amount, in the PCS auctions. *See also* Wilkie Declaration (discussing the prevalence of bankruptcies by DEs that acquired PCS licenses in closed bidding).

³⁵ *See* Wilkie Declaration.

participation by DEs in auctions.³⁶ Thus, DEs' ability to obtain spectrum in Auction No. 58 will not be impeded by a waiver of the Commission's set-aside rules because they will have access to all of the licenses available and will be able to compete effectively for those licenses by using bidding credits. In the meantime, the public is harmed because this spectrum will not effectively be assigned to those who value it the most, and who are most likely to deploy service consistent with Section 309(j).³⁷ The result of eligibility restrictions is certain delay in the deployment of service. Such a result therefore not only thwarts the purposes of Section 309(j) and the DE rules, but also substantially harms the public interest.

The Commission regularly relies on its authority under Sections 1.3 and 1.925 of the Communications Act to waive its rules, even in circumstances where such a grant may impact parties other than the petitioner.³⁸ CTIA's request for waiver is limited in scope as required. It only asks the Commission to waive its rules with respect to the limited amount of spectrum being auctioned in Auction No. 58. The party that is seeking the waiver and the number of parties that may be affected by grant of such a waiver are irrelevant concerns that need not be taken into consideration.

Finally, Council Tree argues that grant of CTIA's request for waiver is not justified because larger carriers may make passive investments in qualified closed license bidders.³⁹ As discussed in the Wilkie Declaration, however, such actions only increase transaction costs,

³⁶ See *infra* Section D; Comments of T-Mobile at 8-10.

³⁷ 47 U.S.C. §309(j)(3)(A) (commanding the FCC to adopt auction rules that promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays").

³⁸ See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; TDS Telecommunications Corporation, Petition for Waiver of Coding Digit Requirement; International Telecard Association, Petition for Reconsideration of Payphone Compensation Obligation; Airtouch Paging, Petition for Waiver of Payphone Compensation Obligation, *Memorandum Opinion and Order*, 13 FCC Rcd 4998 (1998) (granting a class of local exchange carriers a waiver of several Commission rules, per the request of USTA and a LEC Coalition).

³⁹ Comments of Council Tree Communications at 29.

thereby increasing costs to the public, while thwarting the goals of the DE rules.⁴⁰ Similarly, the fact that any closed licenses that must be subsequently reaucted will not be subject to the Commission's restricted eligibility rules is immaterial.⁴¹ This reaucting imposes significant, unjustifiable additional costs on the public, especially in light of the fact that most of this spectrum has already been auctioned to DEs that failed in the marketplace. These costs could be eliminated simply through the auctioning of this spectrum to the most highly valued user in Auction No. 58.

B. At a Minimum, Waiver Relief Is In the Public Interest for Authorizations Previously Held by NextWave

Even if, contrary to sound public policy, the FCC determines that it should not waive Section 24.709⁴² with respect to the licenses in Auction No. 58, the agency must, at a minimum, waive the eligibility rules for that subset of Auction No. 58 licenses returned by NextWave. As noted by T-Mobile, the returned NextWave licenses are authorizations to which the eligibility rules no longer apply – NextWave, the original C Block holder, was deemed by the FCC to have met the five year buildout benchmarks for the licenses and therefore, under Section 24.839(a)(6),⁴³ the licenses are freely alienable. The mere fact that those licenses have been returned to the agency pursuant to a financial settlement that could not have been predicted should not result in the licenses once again becoming subject to eligibility restrictions. Indeed, at the time the FCC applied the eligibility rules to those same licenses in Auction No. 35, the basis for the return of the licenses was that the authorizations were canceled at the time NextWave entered into bankruptcy, and therefore represented an implicit determination that NextWave had

⁴⁰ See Wilkie Declaration.

⁴¹ See 47 C.F.R. § 24.709(a)(4)(ii). See Comments of Council Tree Communications at 30.

⁴² 47 C.F.R. §24.709.

⁴³ 47 C.F.R. §24.839(a)(6).

not built out the licenses according to their terms. The procedural history of the NextWave licenses for Auction No. 58 is wholly different.

In any event, the Commission has already determined that deviations from the ordinary DE rules are warranted with respect to the NextWave licenses. In the order approving the Cingular acquisition of certain NextWave authorizations, in fact, the FCC waived the application of the unjust enrichment provisions of Section 1.2111 and 24.714. These rule waivers were based upon, among other things, “the unique facts and circumstances of the history of the NextWave litigation.”⁴⁴ In that case, the FCC transferred licenses to Cingular finding that public interest benefits supported a waiver to “allow this spectrum to be put into immediate use for the benefit of consumers,”⁴⁵ “consistent with our statutory obligation in Section 309(j)(3)(A)-(B) to promote competition and to speed the deployment of services for the benefit of the public.”⁴⁶ These considerations apply with equal force to the NextWave licenses returned to the FCC.

As a final matter, T-Mobile observes that grant of the waiver specifically with respect to the returned NextWave licenses would also effectively make available only larger metropolitan area licenses to all bidders, which are markets that rural interests presumably have no interest in acquiring. Should the FCC determine that rural interests would be harmed by grant of the broad relief requested in the CTIA Petition, narrowing the relief to those authorizations returned by NextWave would address that concern.

⁴⁴ 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, WT Docket 03-217 (Feb. 12, 2004) at ¶44.

⁴⁵ *Id.*

⁴⁶ *Id.* at ¶45.

C. Grant of a Waiver Would Further the Statutory Goal of Promoting the Expeditious Roll-Out of New and Innovative Services for the American Public

T-Mobile further believes that grant of a waiver to exempt the Auction No. 58 licenses – in whole or in part – from the eligibility requirements of Section 24.709 would further the statutory goal of “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.”⁴⁷ T-Mobile, in fact, has documented the ways in which set-asides are affirmatively contrary to this goal, since they impose delays occasioned by financial distress, litigation, and secondary markets transactions. Even at the administrative level, however, grant of a waiver under these facts promotes the goals of Section 309(j). The Commission clearly has before it a sufficient record upon which to grant a waiver – including the filings in response to the CTIA Petition and in response to the Auction No. 58 Public Notice (which should be incorporated in this docket). Simply put, a waiver order issued within the next few weeks could modify the eligibility requirements applicable to Auction No. 58 while preserving the current scheduled auction commencement date of January 12, 2005.

VI. CONCLUSION

For these reasons, and the reasons stated in T-Mobile's original comments, T-Mobile urges the Commission to grant CTIA's Petition expeditiously and either initiate a rulemaking to

⁴⁷ 47 U.S.C. §309(j)(3)(A).

eliminate its restricted eligibility rules or, alternatively, grant a waiver of the eligibility restrictions for some — or all — of the licenses available in Auction No. 58.

Respectfully submitted,

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APPENDIX A ANALYSIS OF COUNCIL TREE AUCTION DATA

In furtherance of the goal of maintaining closed auctions, Council Tree has provided an analysis to support its contention that, absent set-asides, DEs are unlikely to win licenses at auction. As discussed in this appendix, Council Tree's evidence in its Appendix 1 is empirically suspect for a number of reasons.

The heart of Council Tree's empirical data lies within several tables that categorize the various auctions held to date into a series of classes. Each class of auction is denoted by a line number, where Line (1)⁴⁸ represents "closed auctions"; Line (2a) represents "open auctions with bidding credits" that includes participation by "dominant large carrier bidders"; Line (2b) represents "open auctions with bidding credits," but without "dominant large carrier bidders"; and Line (3) represents auctions "without bidding credits or closed licenses." Each category is analyzed below.

Line (2a) in Tables 1 and 2 defines a universe of "open auctions with bidding credits" that includes participation by "dominant large carrier bidders." This categorization includes six auctions:

- i. Auction No. 1, for nationwide Narrowband PCS licenses
- ii. Auction No. 3, for regional Narrowband PCS licenses
- iii. Auction No. 16, for 800 MHz SMR "whitespace" areas
- iv. Auction No. 33, for 700 MHz Guard Band authorizations
- v. Auction No. 34, for other 800 MHz SMR "whitespace" area
- vi. Auction No. 35, for PCS C and F Block licenses reclaimed by the Commission

Council Tree uses these auctions to support the conclusion that "DEs fare poorly with bidding credits alone when competing against deep-pocketed large carriers, most notably in broadband PCS auctions."⁴⁹ However, Council Tree fails to discuss the fact that, in Auction Nos. 1 and 3, bidding credits were not available to small businesses or very small businesses.⁵⁰ Moreover, in Auction Nos. 16 and 34, Nextel was the dominant player because, as the incumbent, it already owned the vast majority of the available POPs. In the remaining two auctions, DEs fared very well when competing against larger wireless providers. Specifically, in Auction No. 33, DEs succeeded in winning 27% of the licenses, and in Auction No. 35, DEs succeeded in winning 46% of the open licenses.⁵¹

⁴⁸ Line (1) in Tables 1 and 2 merely shows the tautology that in closed auctions, designated entities win all of the available licenses.

⁴⁹ Comments of Council Tree Communications at 14.

⁵⁰ In both the nationwide and regional Narrowband PCS auctions, the Commission provided bidding credits only for women and minority owned licensees and only on a limited subset of the licenses. See Auction 1: Nationwide Narrowband PCS Fact Sheet, at <http://www.wireless.fcc.gov/auction/01/biddingcredits>; Auction 3: Regional Narrowband PCS Fact Sheet, at <http://www.wireless.fcc.gov/auction/03/biddingcredits>.

⁵¹ See Summary of All Bidders in Auction No. 33 Chart announcing winning bidders, at <http://wireless.fcc.gov/auctions/33/charts/33bidder.xls>; Summary of All Bidders in Auction No. 35 Chart announcing winning bidders, at <http://wireless.fcc.gov/auctions/35/charts/35bidder.xls>.

Line (2b) of Council Tree's exhibit defines a universe of "open auctions with bidding credits," but without "dominant large carrier bidders" to support its contention that "DEs fare reasonably well with bidding credits in smaller auctions with more limited big carrier competition." The selected auctions include Auction Nos. 2 (IVDS), 6 (MDS), 7 (900 MHz SMR), 17 (LMDS), 25 (Closed Broadcast), 30 (39 GHz), 44 (Lower 700 MHz), 49 (Lower 700 MHz Reauction), and 53 (MVDDS). Eliminating the whitespace auctions—the MDS auction, the 900 MHz SMR, and the 39 GHz auction—as well as the Closed Broadcast auction where bidding credits were not available, DEs won 94% of the IVDS licenses, 77% of the LMDS licenses, 68% of the Lower 700 MHz licenses, 85% of the Lower 700 MHz reauction licenses, and 75% of the MVDDS licenses.

The reasoning behind Line (3) of Council Tree's Appendix 1 is also faulty. Council Tree cites Auction Nos. 4 (PCS A & B), 8 (DBS), 9 (DBS), the D and E Block of Auction 11, and 15 (DARS) in defining auctions "without bidding credits or closed licenses." Three of these auctions, however, were for satellite orbital slots. In those auctions, the FCC specifically determined that the capital intensive nature of the service did not warrant the use of bidding credits.⁵² Moreover, because Auction No. 4 did not offer bidding credits, there was no attempt made to determine whether the auction winners would, or would not, have been eligible for DE status. In the only auction without bidding credits where the FCC did track company size—the D and E Blocks in Auction No. 11—DEs succeeded in obtaining 14% of the available licenses even though they did not receive a bidding credit for D and E Block spectrum and even though the vast majority of their capital was likely concentrated on the F Block licenses that were set-aside for DEs.

⁵² *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712, ¶ 214 (1995) ("DBS Order") (stating that the Commission's "assertion that the implementation costs associated with satellite-based services are extremely high was not challenged by commenters . . . [t]hese high costs formed the basis for our tentative conclusion that no designated entity provisions should be made for auctioning channels at 110 and 148," and therefore declined to adopt bidding credits. See also *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, ¶ 175 (1997) (stating "we previously concluded that, because of the extremely high implementation costs associated with satellite-based services, no special provisions for designated entities would be made . . . [i]n part, this conclusion was reached because it was unclear whether small businesses could attract the capital necessary to implement and provide satellite-based services").

APPENDIX B
STATUS OF TOP AUCTION WINNERS BY NET DOLLARS OF HIGH BIDS

Auction 5 – C-Block

Bidder	Net \$ / # of High Bids	DE	Current Status
NextWave Personal Comm., Inc.	\$ 4,201,186,654 / 56	Y	Bankruptcy.
DCR PCS, Inc.	\$ 1,426,762,891 / 43	Y	Bankruptcy. All licenses returned under restructuring.
GWI PCS, Inc.	\$ 1,059,657,750 / 14	Y	Bankruptcy. Emerged and operating under the name Metro PCS, Inc.
BDPCS, Inc.	\$ 873,783,913 / 17	Y	Defaulted. Licenses reauctoned.
Omnipoint PCS Entrepreneurs, Inc.	\$ 509,133,256 / 18	Y	Some licenses returned under restructuring. Acquired by T-Mobile/VoiceStream.
PCS 2000, LP	\$ 344,293,125 / 15	Y	Most licenses returned under restructuring. Operating as NewComm, but pending sale to Telefonica. Other licenses sold to Metro PCS
Chase Telecommunications, Inc.	\$ 175,090,520 / 11	Y	Licenses disaggregated under restructuring. Acquired by Leap Wireless.
21 st Century Telesis Joint Venture	\$98,192.838 / 17	Y	Licenses disaggregated under restructuring. Remaining licenses cancelled for default or sold to AT&T/TeleCorp.
Carolina PCS I LP	\$ 92,660,091 / 9	Y	Some licenses returned under restructuring. Continues to operate remaining licenses.
Aer Force Communications LP	\$ 87,336,004 / 12	Y	Assigned to Fortunet Communications. Licenses returned/disaggregated under restructuring. Disaggregated licenses ultimately acquired by Cingular, via Sunshine PCS.
Mobile Tri-States LP 130	\$ 74,745,026 / 8	Y	Changed name to DiGiph PCS, Inc. Licenses acquired by T-Mobile/Eliska.
Urban Communicators PCS LP	\$ 74,622,750 / 10	Y	Bankruptcy.
Mercury PCS, LLC	\$ 70,998,773 / 6	Y	Licenses disaggregated under restructuring. Licenses acquired by AT&T/TeleCorp and affiliates.
Wireless PCS, Inc.	\$ 70,982,270 / 13	Y	Changed name to Airadigm Communications Inc. Bankruptcy.
Cook Inlet Western Wireless PV/SS PCS, LP	\$ 67,662,792 / 13	Y	Licenses returned/disaggregated under restructuring. Acquired by T-Mobile.
R & S PCS, Inc.	\$ 63,060,750 / 8	Y	All licenses returned under restructuring.
Fortunet Wireless Comm., LP	\$61,531,500 / 4	Y	Licenses returned/disaggregated under restructuring. Disaggregated licenses ultimately acquired by Cingular, via Sunshine PCS.
Meretel Communications, LP	\$ 61,170,075 / 5	Y	All Licenses returned under restructuring. Currently a Sprint reseller operating under the name Gulf Coast Wireless. In bankruptcy.
Indus, Inc.	\$ 60,001,502 / 1	Y	Acquired by AT&T/TeleCorp.
Southeast Wireless Comm. LP	\$ 41,261,255 / 6	Y	Assigned to Fortunet Communications. Licenses returned/disaggregated under

Bidder	Net \$ / # of High Bids	DE	Current Status
			restructuring. Disaggregated licenses ultimately acquired by Cingular, via Sunshine PCS.

Auction 10 – C-Block Reauction

Bidder	Net \$ / # of High Bids	DE	Current Status
NextWave Personal Comm. Inc.	\$ 542,461,396 / 7	Y	Bankruptcy.
CH PCS, Inc.	\$ 213,807,750 / 1	Y	Defaulted. Applications for licenses won in Auction No. 5 were also dismissed for failure to make payments.
Magnacom Wireless, LLC	\$ 108,519,750 / 5	Y	Licenses returned/disaggregated under restructuring. Defaulted and remaining licenses cancelled.
Mountain Solutions, Ltd., Inc.	\$ 23,619,778 / 2	Y	Some licenses returned under restructuring. Defaulted and remaining licenses cancelled.
Cook Inlet Western Wireless PV/SS PCS, I	\$ 9,202,500 / 1	Y	Acquired by T-Mobile.
Redwood Wireless Corporation	\$ 6,828,043 / 1	Y	License returned under restructuring.
Westel, LP	\$ 170,250 / 1	Y	Licenses cancelled for failure to construct.

Auction 11 – Broadband PCS D/E/F Blocks

Bidder	Net \$ / # of High Bids	DE	Current Status
SprintCom, Inc.	\$ 544,200,663 / 160		Operational as Sprint PCS.
AT&T Wireless PCS, Inc.	\$ 406,773,532 / 222		Operational as AT&T Wireless.
BellSouth Wireless, Inc.	\$ 205,144,775 / 39		Operational as Cingular.
OPCSE-Galloway Consortium (Omnipoint PCS Entrepreneurs)	\$ 181,387,337 / 109	Y	Acquired by T-Mobile/VoiceStream.
ALLTEL Mobile Communications	\$ 144,771,391 / 73		Operational.
NextWave Power Partners Inc.	\$ 128,971,750 / 32	Y	Bankruptcy.
Northcoast Operating Co., Inc.	\$ 117,569,992 / 49	Y	Acquired by Verizon.
Rivgam Communicators, Inc.	\$ 84,862,435 / 12		Acquired by Verizon.
Western PCS BTA I Corporation	\$ 80,862,731 / 100		Acquired by T-Mobile.
US West Communications, Inc.	\$ 57,085,100 / 53		Acquired by Qwest. Qwest assets being sold to Verizon.
Cook Inlet Western Wireless PV/SS PCS, LP	\$ 50,510,000 / 7	Y	Acquired by T-Mobile.
Puerto Rico Telephone Company	\$ 49,141,000 / 2		Currently operating.
Mercury PCS II, LLC	\$ 35,727,000 / 32	Y	Licenses acquired by AT&T/TeleCorp and affiliates.
McLeod, Inc.	\$ 32,775,000 / 26		Bankruptcy. Some licenses cancelled for failure to construct. Some licenses sold.
Powertel, Inc.	\$ 31,251,000 / 25		Acquired by T-Mobile.
TeleCorp Holding Corp., Inc.	\$ 29,714,000 / 8	Y	Acquired by AT&T.
Aer Force Communications, B, LP	\$ 18,950,000 / 5	Y	Ultimately acquired by T-Mobile via East/West.
Comcast PCS Communications, Inc.	\$ 17,485,000 / 12		Acquired by Cingular/SBC
Devon Mobile Communications, LP	\$ 17,410,000 / 19	Y	Liquidated.

Bidder	Net \$ / # of High Bids	DE	Current Status
AirGate Wireless, LLC	\$ 14,681,000 / 4	Y	Sprint Affiliate.

Auction 22 – C/D/E/F Block Broadband Auction

Bidder	Net \$ / # of High Bids	DE	Current Status
Cook Inlet/VoiceStream PCS	\$ 192,254,957 / 28	Y	Acquired by T-Mobile.
OPCS Three, LLC (Omnipoint PCS Entrepreneurs, Inc.)	\$ 45,071,938 / 34	Y	Acquired by T-Mobile/VoiceStream.
Viper Wireless, Inc.	\$ 32,285,993 / 6	Y	Acquired by AT&T/TeleCorp.
ABC Wireless, LLC	\$ 30,211,639 / 64	Y	Acquired by Cascade Wireless.
Leap Wireless International, Inc.	\$ 18,722,344 / 36	Y	Bankruptcy.
BCN Communications, LLC	\$ 13,305,000 / 3	Y	Operational.
Beta Communications, LLC	\$ 12,933,000 / 3	Y	Licenses sold.
American Wireless, LLC	\$ 7,234,163 / 7	Y	Licenses sold.
Telepak, Inc.	\$ 6,953,000 / 2	Y	Operational.
Eliska Wireless, Inc.	\$ 6,461,250 / 2	Y	Acquired by T-Mobile.