

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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Broadband PCS Spectrum Auction Scheduled)
for January 12, 2005)
)
Comment Sought on Reserve Prices or)
Minimum Opening Bids and other Auction)
Procedures)
)

Federal Communication Commission
Bureau/Office
DA 04-1639
Report No. AUC-03-58-A
(Auction No. 58)

To: Chief, Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION

VERIZON WIRELESS

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TABLE OF CONTENTS

Summary	ii
I. Restricting Eligibility to Bid on Licenses in Auction No. 58 Disserves the Statutory Objectives for Competitive Bidding Set Forth in Section 309(j) of the Communications Act.	2
II. Open Eligibility for Bidding on All of the Licenses in Auction No. 58 Would Serve The Public Interest.	6
A. Changes in the Market for Wireless Services Compel a Fresh Look at the Auction Eligibility Policy.	6
B.. Opening Eligibility for Auction No. 58 Would Speed New Service Initiation and Need Not Delay the Auction.	11
III. Especially With Respect To Spectrum Formerly Licensed To NextWave, There Is No Valid Rationale for Restricting Bidding To Entrepreneurs	13
IV. Conclusion.	14

SUMMARY

The Wireless Telecommunications Bureau's recent *Public Notice* announcing an auction of 234 broadband Personal Communications Service ("PCS") licenses gave notice that the C Block set-aside rules adopted for Auction No. 35 would be applied in Auction No. 58. Restricting eligibility to bid on many of the licenses being offered in this upcoming auction will exclude many carriers (including Verizon Wireless) from bidding on these licenses.

For the reasons set forth in this petition, the Bureau (or, by referral, the full Commission) should reconsider the decision to use the Auction No. 35 rules for Auction No. 58. Placing restrictions on eligibility to bid on licenses in Auction No. 58 would disserve the objectives that Congress articulated for competitive bidding in Section 309(j) of the Communications Act. Only by opening all Auction No. 58 licenses for bidding by any qualified bidder will Commission promote the prompt deployment of new services and the efficient and intensive use of the spectrum, and maximize the recovery for the public on the value of public spectrum. In addition, as the Commission has found with respect to other services, set-asides are not necessary to enable designated entities to compete successfully in auctions against larger, well-financed entities.

The Commission considered changes in the market for wireless services when it restructured the C Block in 2000 and made some C Block spectrum available in open bidding in Auction No. 35. In light of events in the marketplace over the past four years, a further reassessment of the auction eligibility policy is required. A fresh look at this policy will show that using the C Block set-aside for Auction No. 58 is unjustifiable. This fact is especially clear with respect to the spectrum returned to the Commission by NextWave, which recently completed a court-supervised auction of spectrum without any restrictions on prospective buyers' eligibility to bid.

A reexamination of the C Block set-aside policy could be conducted expeditiously and need not delay the Commission conduct of Auction No. 58.

The Commission has other means to accomplish its designated entity objectives. As it has with other spectrum bands in which licenses have been recently auctioned, the Commission should discard the set-aside rule for the C Block spectrum being offered in Auction No. 58.

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Broadband PCS Spectrum Auction Scheduled for January 12, 2005)	DA 04-1639
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Comment Sought on Reserve Prices or Minimum Opening Bids and other Auction Procedures)	Report No. AUC-03-58-A (Auction No. 58)
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To: Chief, Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION

In the above-captioned *Public Notice*, the Wireless Telecommunications Bureau (“Bureau”) announced an auction of 234 broadband Personal Communications Service (“PCS”) licenses to commence on January 12, 2005 (Auction No. 58).¹ The *Public Notice* constituted the first notice of the application for this upcoming auction of the eligibility rules that the Commission adopted for use in Auction No. 35, the last re-auction of PCS spectrum.² Under those rules, certain C Block PCS licenses in Auction No. 58 would be set aside for bidding only by a restricted class of bidders, with the practical effect of excluding many carriers (including Verizon Wireless) from bidding on more than half the licenses being offered. Verizon Wireless is therefore aggrieved by this action, and in accordance with Section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106, Verizon Wireless hereby respectfully requests that the Bureau reconsider its

¹ *Broadband PCS Spectrum Auction Scheduled for January 12, 2005, Comment Sought on Reserve Prices or Minimum Opening Bids and other Auction Procedures*, Public Notice, DA 04-1639, Report No. AUC-03-58-A (Auction No. 58) (rel. June 18, 2004) (“*Public Notice*”).

² See 47 C.F.R. §24.709(a)(3), (4).

determination to use the Auction No. 35 rules for Auction No. 58. Instead, for the reasons discussed below, all of the licenses in Auction No. 58 should be made open for competition by all bidders. If the Bureau determines that it lacks the authority to take this action, Verizon Wireless requests that it refer this petition for reconsideration to the full Commission for action.³

I. Restricting Eligibility to Bid on Licenses in Auction No. 58 Disserves the Statutory Objectives for Competitive Bidding Set Forth in Section 309(j) of the Communications Act.

In ordering the Commission to use competitive bidding to award spectrum licenses, Congress articulated several objectives that the Commission must promote in its design of auction methods.⁴ As the Commission has recognized, these objectives are “sometimes conflicting”,⁵ but it is clear in the context of Auction No. 58 that they would

³ See 47 C.F.R. § 1.106(a)(1). The instant petition for reconsideration provides an alternative vehicle for the relief suggested by CTIA – The Wireless Association in its Petition for Rule Making (“CTIA Petition”), filed July 8, 2004. The Commission is seeking comment on the CTIA Petition. See *Public Notice*, Report No. 2663 (rel. July 15, 2004). Verizon Wireless supports the CTIA Petition, and urges the Commission to adopt the rule making proceeding suggested therein.

⁴ Section 309(j)(3) of the Communications Act directs the Commission, among other things, to seek to promote the following objectives: (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays; (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women; (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; (D) efficient and intensive use of the electromagnetic spectrum; and (E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed (i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures, and (ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services. 47 U.S.C. § 309(j)(3).

⁵ *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration* (“*Sixth Report and Order*”), 15 FCC Rcd 16266 (2000), at ¶ 22.

be disserved if some interested bidders are precluded from placing bids on licenses being offered.

Congress has directed the Commission to promote in its spectrum auction program “the development and rapid deployment of new technologies, products, and service for the benefit of the public”⁶ The Commission has repeatedly stated that, in furtherance of this goal, the spectrum auction process is designed to ensure that licenses are awarded to the parties that value them most highly, because these parties are most likely to put them to prompt use.⁷ Especially in light of the sad history of the C Block, in which restricting eligibility to small businesses has largely failed to provide meaningful opportunities in the provision of spectrum-based services to so-called “designated entities,” the Commission must allow Auction No. 58 to proceed as an open auction, enabling market forces, not regulation, to ensure that those parties that most highly value the spectrum (and can thus be expected to put it to prompt use) are free to compete.

Open eligibility for bidding on licenses in Auction No. 58 also will promote the statutory objectives of “recovery for the public of a portion of the value of the public spectrum resource” and promoting the “efficient and intensive use of the electromagnetic spectrum.”⁸ It is only by allowing all entities who are interested in the PCS licenses being offered in Auction No. 58 to bid on them that the Commission can meet its responsibility to promote these objectives.

⁶ 47 U.S.C. § 309(j)(3)(A).

⁷ See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994), at ¶ 5; *In re FCC Report to Congress on Spectrum Auctions*, 13 FCC Rcd 1906 (1997) (“[A]uctions encourage firms who value the spectrum the most to use it productively and in innovative ways”).

⁸ 47 U.S.C. § 309(j)(3)(C), (D).

Furthermore, the Commission need not apply eligibility restrictions to certain set-aside licenses in order to satisfy the Section 309(j) objective of promoting economic opportunity 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.”⁹ The Commission has long recognized and repeatedly acknowledged that other tools besides set-asides (*e.g.*, bidding credits) are available to promote this objective and that they have been effective in providing designated entities with an opportunity to compete successfully in auctions against larger, well-financed entities.¹⁰

An open bidding process does not preclude entrepreneurs from participating in and winning licenses at auction or from acquiring licenses in the secondary market. Elsewhere the Commission has provided statistics demonstrating that open bidding, with bidding credits for small businesses, has been successful in putting licenses into the hands of small businesses.¹¹ As the Commission states, “bidding credits without a set aside

⁹ 47 U.S.C. § 309(j)(3)(B).

¹⁰ See, *e.g.*, *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 02-353, *Report and Order*, 18 FCC Rcd 25162 (2003) (“*AWS Order*”), at ¶ 148; *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000), at ¶ 45; *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, WT Docket No. 96-18, PR Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030 (1999), at ¶ 112.

¹¹ See *In the Matter of Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, *Further Notice of Proposed Rulemaking*, 21 CR 2163 (rel. June 7, 2000) (“*Auction No. 35 Further Notice*”), at ¶ 40; see also *Sixth Report and Order* at ¶ 44 and <http://wireless.fcc.gov/auctions/35/>.

enable small businesses to compete effectively in open auctions, even auctions of broadband PCS licenses.”¹²

No auction since the C and F block auctions and the subsequent reauctions (Auctions 10, 22 and 35) have included a set-aside for entrepreneurs. Instead, the Commission’s standard practice has become to employ open auctions with bidding credits for small businesses; it has held nearly 30 auctions to date using that mechanism. In recent years the Commission, in fact, has declined several times to set aside spectrum for the exclusive use of “small business.”¹³ In both the AWS and 700 MHz proceedings, the Commission chose not to set aside spectrum for designated entities or other restrictive categories of bidders.¹⁴ Most recently, in the AWS proceeding it stated that a set-aside was unnecessary and that “opening these bands to as wide a range of applicants as possible would encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure efficient use of this spectrum.”¹⁵ Moreover, the

¹² *Id.* License set-asides benefit a handful of small businesses, while not achieving the objectives of Congress in Section 309(j)(3) of the Communications Act to have services deployed quickly and to recover for the public the full value of the spectrum. On the other hand, where Verizon Wireless and others have deployed service, thousands of small businesses have benefited. These businesses, and many thousands more, are likely to continue to benefit greatly from the continuing development of voice and data services. In auctioning this spectrum, the Commission should seek to promote these services. Doing so will in turn be most likely to promote growth of small businesses everywhere. This can best be done through an open, unrestricted bidding process.

¹³ It makes no sense whatsoever to include bidding credits for open spectrum in an auction where a significant portion of the spectrum is open only to designated entities. The Commission declined to adopt any special provisions for DEs bidding on D and E blocks in Auction 11, where the closed F block was auctioned alongside the open D and E blocks, and it should decline to do so here. *See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824 (1996), at ¶¶ 68-72.

¹⁴ *See AWS Order, supra*, at ¶ 68; *see also 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), at ¶ 85.

¹⁵ *AWS Order* at ¶ 68. “We do not see a need to supplement the incentives for small business participation provided elsewhere in this order by foreclosing any of the licenses to other bidders.” *Id.*

Commission noted that its disaggregation and newly-adopted leasing rules would help small businesses to negotiate after-auction access to spectrum.¹⁶ To proceed with restrictions that have proven not to serve the public interest, in the face of other Commission decisions finding that the goals of Section 309(j) are fully achieved by open auctions, would be arbitrary and unlawful.

Putting aside the other compelling policy reasons, discussed below, to open up the bidding on all C Block spectrum in Auction No. 58, one need only see that the C Block spectrum has gone virtually unused since it was allocated for PCS more than 10 years ago to understand that set-asides have failed to meet the statutory objectives set by Congress for competitive bidding. The Commission reserved certain broadband PCS licenses for bidding solely by “entrepreneurs” in Auction Nos. 5, 10, 11, 22 and 35, but because PCS is not a “small business business,” this policy has failed to produce meaningful opportunities for this favored group to become serious competitors in the marketplace. The Commission must turn away from repeating this mistake again and reconsider the *Public Notice*’s determination to apply the set-aside rules from Auction No. 35 to Auction No. 58. Instead, the Commission should act to permit the widest possible participation in Auction No. 58.

II. Open Eligibility for Bidding on All of the Licenses in Auction No. 58 Would Serve The Public Interest.

A. Changes in the Market for Wireless Services Compel a Fresh Look at the Auction Eligibility Policy.

Four years have passed since the Commission last looked at the issue of whether it should retain the set-aside of PCS licenses for “entrepreneurs” based on an assessment

¹⁶ *Id.*

of the market at that time. Even four years ago, the Commission decided to make considerable changes to its Entrepreneurs' Block policies in light of the changing marketplace, noting that that the PCS industry had changed dramatically since the implementation of its rules in 1994: "The introduction of wireless Internet, advanced data, and 3G services, and global competition within these services, has created a shortage of suitable available spectrum."¹⁷ To the extent that the Commission was concerned then about a lack of suitable spectrum for commercial mobile radio service ("CMRS") expansion, it should be even more concerned now. The number of wireless subscribers has increased exponentially, as have the number of minutes each subscriber uses. Furthermore, there has been an increase in data applications including mobile Internet access, text messaging and camera phones that portend an even greater reliance on wireless devices in the future. Since 2000, many carriers have completed the deployment of the first generation of mobile data with technologies permitting mobile access at 56-130 kbps, and are now introducing true mobile broadband services.¹⁸

The change in the wireless landscape over the past four years has significantly increased the existing carriers' needs for additional spectrum to maintain their quality of service and to provide advanced services. The PCS spectrum that the Commission intends to auction in Auction No. 58 is perfectly suited to meet these needs.

It is particularly critical that all auction participants be able to bid on all of the spectrum to be offered in Auction No. 58 because PCS spectrum is the only candidate for

¹⁷ See *Sixth Report and Order*, *supra*, at ¶ 23.

¹⁸ Verizon Wireless was the first carrier to launch what will become a nationwide high-speed wireless data network, and its entry has already prompted competitive responses from other carriers who plan to offer their own broadband wireless services. Verizon Wireless first offered its EV-DO service in San Diego and Washington, D.C. in October 2003, and has committed to invest \$1 billion over the next two years to deploy the service nationwide. EV-DO as well as other broadband services require additional spectrum.

near-term deployment of advanced services in the United States. The only other expansion band is the Advanced Wireless Service (AWS) spectrum, which will take a number of years to clear of government users and make available for CMRS use. These facts make it even more essential that all carriers have an opportunity to compete in any auction of the remaining PCS spectrum.

The Commission has many proceedings in which it is looking at the benefits of broadband communication and how to encourage its deployment.¹⁹ Last May, the Chairman inaugurated a Task Force to look at these issues in the wireless arena.²⁰ Commissioners are all on the record as seeing the benefits of wireless broadband and recently held a forum on the economic, regulatory and technological factors that affect the deployment of wireless broadband. Access to suitable spectrum is certainly a factor in such deployment. It makes no sense, and clearly disserves the public interest, to restrict the very carriers who will put new PCS spectrum to broadband and other uses to respond to growing public demand from bidding for such spectrum.

After several auctions and reauctions, there has now been an eight-year delay in putting the C Block to substantial use. During this time there has been a five-fold increase in the number of wireless subscribers, from 33 million to more than 160

¹⁹ See, e.g., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, FCC 04-55 (rel. March 17, 2004); *Wireless Broadband Access Task Force Seeks Public Comment on Issues Related to Commission's Wireless Broadband Policies, Public Notice*, GN Docket No. 04-163, DA 04-1266 (rel. May 5, 2004).

²⁰ See *FCC News Release*, "FCC Chairman Michael K. Powell Announces Formation of Wireless Broadband Access Task Force", rel. May 5, 2004.

million.²¹ As the Commission acknowledged four years ago, the business plans of many wireless carriers, small and large, depend in part on obtaining additional spectrum to meet this demand for wireless service.²² That fact is even more evident today. Carriers need additional spectrum to provide high-speed, wide-bandwidth technologies, multimedia Internet access, imaging and other advanced wireless services. Making additional PCS spectrum available will enable CMRS carriers to respond to the demand for existing services and these new spectrum-intensive services.

In contrast, nowhere in the evidence of phenomenal growth of demand for these services is there any evidence that the award of Entrepreneurs' Block licenses to designated entities has produced service to the public that would justify a continuing set-aside for one class of carriers. But even if such facts may exist, the Commission must first seek them, examine them and make an active decision to retain, rather than simply default to, restrictive bidding rules.²³

The Bureau's cursory discussion in the *Public Notice* stands in stark contrast to the Commission's and Bureau's actions in the months leading up to Auction No. 35, when the Commission actively considered whether it should continue the set-aside, and after reviewing the record, concluded that it should remain in some form but that bidding

²¹ See CTIA's *Semi-Annual Wireless Industry Survey*; http://www.ctia.org/public_policy/statistics/index.cfm/AID/10030.

²² *Sixth Report and Order*, *supra*, at ¶¶ 16-29.

²³ We note that, in comments on the *Public Notice*, at least two designated entities also are on record seeking changes to the rules that would govern Auction No. 58. See Comments and Reply Comments of Council Tree Communications, Inc. (seeking designation of additional "closed" licenses and the establishment of a personal net worth limitation); Comments of Dobson Communications Corporation (seeking a waiver of the sunset provision of the grandfather rule). These filings further demonstrate the need for the Commission re-examine the rules governing this auction.

for many licenses should not be restricted.²⁴ In the *Public Notice*, the Bureau makes no attempt to justify continued reliance on the unsuccessful DE set-aside rules. Nor does the Bureau attempt to address the fundamental public interest questions raised by restricting access to spectrum or to deal with the plain fact that the Commission has not achieved its goals or met its expectations from the set-aside rules.

The right approach to achieve the Commission's public interest goals and auction obligations is also the simplest. The Commission should permit any interested party to apply for and bid on any and all of C block licenses available for reauction. By eliminating up-front barriers to eligibility, the Commission will draw the broadest possible range of bidders, including small businesses that value the licenses because they are ready to put this spectrum into service and have the financial wherewithal to do so.

Preserving an Entrepreneurs' Block set-aside mistakenly places regulatory convenience as a higher priority than rapid deployment of service to the public. Ten years ago, when PCS was a new service and the Commission had 120 MHz to distribute, there were only two mobile service competitors in each market, and demand for mobile service was much less than it is now. At that time, a spectrum set-aside may have been appropriate. Now, however, the Commission can see that in most markets its policy has resulted in fallow spectrum and delays in service to the American public. Even with strict implementation milestones, the auction and reauction cycle has precluded efficient and effective use of this spectrum. Indeed, Auction No. 58 is the fourth "reauction" of C or F block spectrum, while there has been very limited reauction of A, B, D or E block

²⁴ See generally *Sixth Report and Order*, *supra*.

PCS licenses.²⁵ Given the rapid increase in demand for spectrum, the growth in the number of CMRS competitors in both large and small markets across the nation, and the failure of the set-aside program to lead to the deployment of much of the spectrum it covered, retaining the set-aside for a restricted group of bidders is clearly unjustified on both policy and legal grounds.²⁶

B. Opening Eligibility for Auction No. 58 Would Speed New Service Initiation and Need Not Delay the Auction.

The *Public Notice*'s use of the Auction No. 35 eligibility rules may have been motivated by a belief that this course would avoid the need for a rule making proceeding and thereby result in more expeditious service initiation on this long-fallow spectrum. If so, this belief is fundamentally misguided for three reasons: (1) reconsidering the eligibility rules need not derail the Commission's January 2005 auction schedule; (2) licensing decisions involving set-aside licenses have historically taken much longer than those involving open bidding; and most importantly, (3) designated entities have not demonstrated the capability to actually initiate commercial services that can compete in the marketplace for the benefit of consumers.

As history attests, sufficient time exists to solicit comment on this petition (and on the CTIA Petition), consider the relatively discrete issues raised, and make a decision in

²⁵ Six E block licenses were involved in Auction No. 22 in 1999 and 14 E block, 9 D block and 2 A block licenses are offered for auction in Auction No. 58. No A, B, D or E block spectrum was included in the other PCS reactions.

²⁶ Courts have held that the Commission cannot continue to adhere to rules when the original assumptions for those rules are no longer valid or have been overtaken by new facts. *See Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979) (reversing Commission for maintaining cable rules after the premise for the rules had changed); *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987) (reversing Commission where subsequent developments undermined the predictions that led to the rule); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (reversing Commission order; "it is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision . . . has been removed'" (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981))).

time to accept Form 175 applications in November 2004 for a January 2005 auction.²⁷ For Auction No. 35, the Commission moved from rule making to auction in only about six months.²⁸ It took even less time for the first Entrepreneurs' Block auction, Auction No. 5, to adopt new rules when the Commission had to alter the fundamental eligibility for participation after the Supreme Court's *Adarand* decision in 1995. The Commission started that auction less than six months after it issued a notice of proposed rule making, even though that auction was stayed in the interim.²⁹ There is similarly no reason why consideration of the eligibility rules for Auction No. 58 needs to delay that auction. The Commission should act expeditiously on this petition (and on the CTIA Petition) so as to allow the auction to proceed as scheduled under rules that will best serve the public interest.

Using the existing set-aside rules will do nothing to speed up the post-auction application review process, which would undoubtedly involve a detailed and time-consuming review of designated entity arrangements. The Auction No. 35 experience is again instructive. The Commission spent many months exhaustively analyzing the qualifications of certain DE bidders in Auction No. 35, with the result that issuance of the licenses was considerably delayed. Indeed, licenses were granted to non-designated

²⁷ As it did with the CTIA Petition, the Commission could promptly seek public comment on this petition for reconsideration and meet the January 2005 auction date. For example, the Commission could employ the following schedule:

FCC Public Notice seeking comment:	July 30, 2004
Comments due:	August 20, 2004
Reply comments due:	August 30, 2004
FCC Order:	Late-September or Early-October 2004

²⁸ See *Auction No. 35 Further Notice*, *supra*; see also <http://wireless.fcc.gov/auctions/35/>.

²⁹ See *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, PP Docket 93-253, *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 11872 (1995); see also <http://wireless.fcc.gov/auctions/05/>.

entities who won them in open bidding in that auction many months before they were granted to designated entities who won them in closed bidding.

III. Especially With Respect To Spectrum Formerly Licensed To NextWave, There Is No Valid Rationale for Restricting Bidding To Entrepreneurs.

Even if the Commission were to decide to keep the Entrepreneur's Block rules for some of the licenses, there is absolutely no rationale to apply those rules to the former NextWave spectrum. As part of a settlement with the Government, NextWave returned many of its PCS licenses to the FCC, which the Bureau then disaggregated for auction into 155 licenses. The *Public Notice* indicates that 91 of those licenses will be available for bidding only by DEs, even though they are licenses that NextWave previously built out³⁰ and could have sold, free of DE restrictions, to any other carrier earlier this year. These licenses could just as easily have been part of the package of licenses that NextWave is auctioning privately – again, without any restrictions.³¹ Having agreed to lift the restrictions on the spectrum that it allowed NextWave to sell, the Commission would be acting inconsistently to impose those restrictions on the spectrum that was returned by NextWave for reauction by the Commission. It makes no sense that these same licenses would now be closed to the bidders that can use them the most.

³⁰ See *NextWave Personal Communications Inc. and NextWave Power Partners Inc. Petition for Declaration of Compliance With, and Clarification of, Broadband PCS Construction Deadline; or in the Alternative, for Waiver and Extension of First Construction Deadline*, Order, File Nos. 0000855872, et al (rel. Mar. 3, 2003).

³¹ Indeed, Verizon Wireless was the successful bidder on a 10 MHz license in the New York, NY BTA in NextWave's court-supervised auction. See *Final Order Pursuant to Sections 105, 363 and 1146(c) of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002 and 6004 (A) Approving the Terms and Conditions of an Agreement for the Sale of the Debtors' Right and Interest In and To a Certain Designated License; and (B) Authorizing the Sale Fee and Clear of All Liens, Claims, Interests and Encumbrances, Subject Only to FCC Regulatory Review and Approval and HSR Approval (New York, NY (Call Sign KNL644))*, Case No. 98 B 21529 (ASH) (B.Ct. S.D.N.Y.), rel. July 15, 2004.

In two separate decisions earlier this year, the Commission decided the policy question of whether non-designated entities should be allowed to hold spectrum formerly licensed to NextWave. First, the Commission consented to a sale of NextWave spectrum to Cingular Wireless, in the process granting an unprecedented waiver of the unjust enrichment rules.³² Shortly thereafter, as part of its “Global Resolution Agreement” with NextWave, the Commission placed no restrictions on the parties to whom NextWave can sell its remaining licenses today or in the future. Given the Commission’s actions with regard to spectrum retained and sold by NextWave, it would be inconsistent and arbitrary for the Commission to retain its restrictive set-aside rules for its own auction of the same spectrum.

IV. Conclusion.

The Bureau (or, by referral, the full Commission) should reconsider the determination in the *Public Notice* to restrict eligibility to bid on certain licenses in Auction No. 58 under the rules adopted for Auction No. 35. Reconsideration of this determination is warranted because, if allowed to stand, it would (1) run counter to the objectives set forth in Section 309(j)(3) of the Communications Act, (2) ignore changed circumstances in the wireless telecommunications industry and inhibit the introduction of new advanced wireless services that could provide benefits to consumers, (3) stand in conflict with the Commission policy with respect to other sales of former NextWave spectrum.

³² See *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, WT Docket No. 03-217, *Memorandum Opinion and Order*, FCC 04-26 (rel. February 12, 2004).

With all other spectrum bands in which licenses have been recently auctioned, the Commission has discarded set-asides and relied instead on bidding credits to encourage the participation of small business entities. The Commission's recent authorization of spectrum leasing provides small business entities with yet another new way to gain access to spectrum. Restricting eligibility in spectrum auctions thus is not needed to provide opportunities for entrepreneurs to participate in the provision of spectrum-based services.

The Commission should not ignore the very real costs – in service delay as well as in auction revenue – that set-asides impose on the licensing process. Reconsideration need not delay the scheduled start of Auction No. 58, if the Commission acts quickly in soliciting comment on this petition and on the CTIA Petition.

Respectfully submitted,

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