

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

FCC 94-295

In, the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act -)
Competitive Bidding)

MEMORANDUM OPINION AND ORDER

Adopted: November 16, 1994;

Released: November 17, 1994

By the Commission:

I. INTRODUCTION

1. By this action, we reconsider, on our own motion, decisions made in the **Fourth Memorandum Opinion and Order in this** proceeding, which addressed petitions for reconsideration of the **Fifth Report and Order** concerning auction design and procedures for the auction of licenses to provide personal communications services in the 2 GHz band ("broadband PCS").¹ In light of our experience in the national and regional narrowband PCS license auctions, we find it desirable to modify our rules pertaining to three aspects of auction design for the broadband PCS auctions: procedures triggering the close of an auction, timing of the auctions for the entrepreneurs' blocks, and anti-collusion rules.

II. STOPPING RULES

2. In the **Fifth Report and Order** we stated that a simultaneous multiple round auction with a simultaneous stopping rule will close when a single round has passed in which there is no new acceptable bid on any license and no activity rule waiver is submitted.² In the **Fourth Memorandum Opinion and Order** we allowed for two types of activity rule waivers, "proactive" waivers, which will keep an auction open in a round in which no new valid bids

¹ **Fourth Memorandum Opinion and Order** in PP Docket No. 93-253, FCC 94-264 (Rel. October 19, 1994) (**Fourth Memorandum Opinion and Order**); **Fifth Report and Order** in PP Docket No. 93-253, FCC 94-178 (Rel. July 15, 1994) (**Fifth Report and Order**).

² **Fifth Report and Order** at ¶¶ 46, 56.

bid increments, which speed the pace of the auction, without risking a premature auction close.

III. TIMING OF AUCTIONS IN THE ENTREPRENEURS BLOCKS

6. In *the Fifth Report and Order*, the Commission chose to divide broadband PCS licenses into three groups and to hold a simultaneous multiple round auction for the licenses in each group. The license group to be auctioned **first** consisted of blocks A and B, each with 30 MHz of spectrum and MTA geographic scope. The next group consisted of blocks C and F (the entrepreneurs' blocks), which have been reserved for bidding by smaller entrepreneurial firms. The group to be auctioned last consisted of blocks D and E, with 10 MHz of spectrum each and BTA geographic **scope**.⁶ We concluded that in order to promote efficient license allocation, highly interdependent licenses should be grouped together and put up for bid at the same time in a multiple round auction. Doing so, we concluded, would provide bidders information about the prices of complementary and substitutable licenses while such licenses were still up for bid, and thus would facilitate awarding licenses to the bidders who value them most highly. Nevertheless, we noted that the cost and complexity of auctioning a very large number of interdependent licenses simultaneously might outweigh the informational, **and** bidding flexibility advantages.⁷ In the *Fourth Memorandum Opinion and Order* we reaffirmed our decision concerning the sequence of auctions.⁸

7. We now believe that we may wish to hold two separate auctions for the C and F block **licenses**.⁹ In light of our experience with the narrowband auctions, we are concerned that auctioning simultaneously the 986 licenses in the two entrepreneurs' blocks may create excessive administrative complexity for the Commission and for bidders, particularly when neither will have had experience with more than 99 licenses in a single auction. In addition, we have found that as we gain experience with license auctions we identify certain modifications that are necessary to improve the efficiency and administration of the auction process. We may wish to benefit from such experience in administering the highly complex designated entity provisions that apply to competitive bidding for licenses on the C and F blocks. Further, it appears now that few, if any, potential applicants have any interest in

⁶ *Id.* at ¶ 36.

⁷ *Id.*

⁸ *Fourth Memorandum Opinion and Order* at ¶ 29.

⁹ Potential bidders or their representatives have requested that the Commission auction the C and F blocks separately. See *ex parte* comments of the National Association of Black Owned Broadcasters, *Inc.*, filed November 3, 1994 at 2; *ex parte* comments of North American Wireless, Inc., filed November 3, 1994 at 3-4; *ex parte* comments of National Association of Investment Companies, filed November 4, 1994 at 7.

have an attributable interest in the entity with which they are so associated.” This is entirely consistent with the intent of the anti-collusion rules. Indeed, if holders of attributable interests were not considered applicants, collusive arrangements would be possible simply through the creation of a separate entity to act as the “applicant.” Further, this clarification conforms with other Commission rules regarding the competitive bidding process. For example, Section 24.813(a) requires parties applying to participate in broadband PCS auctions to provide, **among** other things, information with respect to “any person holding five percent or more of each class of stock, warrants, options or debt securities”¹⁵

10. We believe, however, that allowing holders of non-controlling attributable interests in an applicant greater flexibility to form agreements with other applicants may enable applicants to acquire the capital necessary to bid successfully for licenses. Our anti-collusion rules are intended to protect the integrity and robustness of our competitive bidding process. In pursuit of that goal, however, we do not wish to restrict unreasonably the formation of non-collusive bidding *consortia*. For example, *in the Fourth Memorandum Opinion and Order*, we added to our Rules Section 24.833, which provides that parties that after the auction hold non-controlling ownership interests in more PCS spectrum than a single entity is entitled to hold may divest sufficient properties to come into compliance with the spectrum aggregation limits.¹⁶ Section 24.833 clearly contemplates entities holding ownership interests in two applicants for licenses in the same markets. Nevertheless, when one **entity** holds an attributable interest in more than one applicant for licenses in the same **geographic** license area, the potential for collusion is present because of the opportunity for the common owner to influence the bidding of the applicants. Thus, our rules permit applicants to change their ownership, enter into joint bidding arrangements and form consortia after the filing of short-form applications only if the parties to such arrangements have not applied for licenses in any of the same geographic areas.”

11. We believe that so long as collusive conduct can be reliably prevented, the public interest favors allowing holders of non-controlling attributable interests in one applicant for a particular license to obtain ownership interests in or enter into consortium arrangements with a second applicant for licenses in the same geographic area(s). Accordingly, we will amend the anti-collusion rules to permit a holder of non-controlling attributable interests in an applicant to obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area, provided that the attributable interest holder certifies to the Commission that it has observed and will observe certain restrictions on communication concerning the applicants in which it holds an attributable interest or with

¹⁴ 47 C.F.R. § 24.204(d)(2)(vii).

¹⁵ 47 C.F.R. § 24.813(a)(3).

¹⁶ 47 C.F.R. § 24.833.

¹⁷ 47 C.F.R. § 1.2105(c)(2), (3).

taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).¹⁹

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹⁹ Pursuant to 5 U.S.C. § 553(d)(3), we conclude that “good cause” exists to have the rule changes take effect immediately because a delay would not provide applicants with sufficient time to **finalize** their bidding strategies and business plans for the upcoming broadband PCS auctions. Immediate implementation of the rule changes set forth herein also provides applicants with the required certainty to proceed with their bidding and business strategies, alleviating concerns that last-minute modifications to our Rules would impede the success of their auction plan. See 5 U.S.C. § 553(d)(1).

(i) the attributable interest holder certifies to the Commission that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for licenses in the same geographic license area(s); and

(ii) the arrangements do not result in any change in control of an applicant.

Applicants must modify their short-form applications to reflect any changes in ownership or in the membership of consortia or joint bidding arrangements.

(5) For purposes of this subsection,

(i) the term “applicant” shall include the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 5 percent or more of the equity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all **officers** and directors of that entity; and

(ii) the term “bids or bidding strategies” shall include capital calls or requests for additional funds in support of bids or bidding strategies.

EXAMPLE: Company A is an applicant in area 1. Company B and Company C each own 10 percent of Company A. Company D is an applicant in area 1, area 2, and area 3. Company C is an applicant in area 3. Without violating the Commission’s Rules, Company B can enter into a consortium arrangement with Company D or acquire an ownership interest in Company D if Company B certifies either (1) that it has communicated with and will communicate neither with Company A or anyone else concerning Company A’s bids or bidding strategy, nor with Company C or anyone else concerning Company C’s bids or bidding strategy, or (2) that it has not **communicated** with and will not communicate with Company D or anyone else concerning Company D’s bids or bidding strategy.