

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of)
)
NEXTEL LICENSE ACQUISITION CORP.) File No. 0000000009
)
for New 800 MHz Specialized Mobile)
Radio Licenses)
)

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1998

Released: June 15, 1998

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. By this *Memorandum Opinion and Order*, we dismiss, in part, and deny, in part, I.E. Communications Inc.'s (IE) blanket Petition¹ against Nextel License Acquisition Corp.'s (Nextel) application for Specialized Mobile Radio (SMR) licenses in the 800 MHz band Nextel won in Auction No. 16. In its Petition, IE requests that the Commission deny Nextel's SMR licenses because Nextel's Form 175 was defective. IE further alleges that Nextel is warehousing spectrum and acted in an anticompetitive manner by violating the Commission's auction rules with its bidding strategy, citing the Reno, Nevada (BEA151) Economic Area (EA) as an example.² IE also alleges that Nextel engaged in collusive behavior. For the reasons set forth below, we dismiss, in part, and deny, in part, IE's Petition.

II. BACKGROUND

1. Form 175 applications for the 800 MHz auction were filed on September 29, 1997, and accepted on October 3, 1997.³ Nextel was the high bidder for 475 markets in the 800 MHz auction for the upper 200 channels, which closed December 8, 1997.⁴ Nextel's application appeared on public notice as accepted for filing on January 20, 1998.⁵ On February 20, 1998, IE filed its Petition, requesting that the

¹ Petition to Deny (filed February 20, 1998) (Petition).

² Petition at 11-12.

³ See Auction of 800 MHz Specialized Mobile Radio Licenses, *Public Notice*, DA 97-2153 (rel. Oct. 3, 1997).

⁴ See 800 MHz SMR Auction Closes, *Public Notice*, DA 97-2583 (rel. Dec. 9, 1997) (*Winning Bidder Notice*).

⁵ See 800 MHz Specialized Mobile Radio Service Information, *Public Notice*, 13 FCC Rcd. 2056 (1998).

Commission deny the grant of Nextel's application for SMR licenses in every market won by Nextel.⁶ IE was eligible to participate as a bidder in six EAs for channel blocks A, B and C in the 800 MHz auction.⁷ In the Reno, Nevada EA cited to by IE in its Petition, Nextel topped its own bids eighteen times during the 235 rounds in the auction.⁸ Nevada Wireless won the A-block license, while Nextel won the B and C-block licenses for the Reno, Nevada EA.⁹

III. DISCUSSION

2. Standing. Section 309(d)(1) of the Communications Act, as amended,¹⁰ and as implemented in section 90.163 of the Commission's rules,¹¹ permits any "party in interest" to file a petition to deny any application. To establish standing, a petitioner must allege sufficient facts to demonstrate that a grant of the subject application would cause the petitioner to suffer a direct injury.¹² The petition must further demonstrate a causal link between the claimed injury and the challenged action.¹³ In the competitive bidding context, we have decided previously that a petitioner has standing to challenge licenses which an applicant has won at auction only if the petitioner was qualified to bid in those markets.¹⁴ IE participated as a bidder in only six out of 175 EAs in the 800 MHz auction. Accordingly, IE's standing to challenge Nextel's licenses is limited to those markets listed on IE's Form 175 application.¹⁵

3. Form 175 Application. IE first alleges that Nextel's Form 175 application was defective. Specifically, IE alleges that Nextel did not properly certify that it was not in default on any Commission licenses. IE further alleges that the Wireless Telecommunications Bureau (Bureau) had issued a Notice of Apparent Liability (NAL) to Nextel on December 9, 1997, finding that Nextel was in violation of the Commission's rules for failing to notify the Commission of the relocation of a transmitter site for an SMR

⁶ Nextel filed one application consolidating all 475 markets it won in the 800 MHz auction.

⁷ IE listed the following markets, BEA068, 072, 094, 096, 097, and 098, on its FCC Form 175-S.

⁸ The Auctions Division of the Wireless Telecommunications Bureau has verified that Nextel topped its own bids eighteen times in the Reno, Nevada EA (BEA151).

⁹ *See Winning Bidder Notice.*

¹⁰ 47 U.S.C. § 309.

¹¹ 47 C.F.R. § 90.163.

¹² *See Los Angeles Cellular Telephone Company*, 13 FCC Rcd. 4601, ¶ 5, (CWD, 1998), *citing AmericaTel Corporation*, 9 FCC Rcd. 3993, 3995 (1994) *citing Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

¹³ *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74, 81 (1978).

¹⁴ *See Nextwave Personal Communications*, 12 FCC Rcd. 2030, 2034 ¶ 11 (WTB, 1997), *citing DCR PCS, Inc.*, 11 FCC Rcd. 16849, 16856 ¶ 22-23 (WTB, 1996).

¹⁵ *See DCR PCS, Inc.*, 11 FCC Rcd. 14479 (WTB, 1996) (because the petitioner could have bid in only four of the markets the petitioner had, at best, demonstrated that it was a party-in-interest with respect to those four markets).

station in a timely manner.¹⁶ IE argues that Nextel was required to report the NAL on Nextel's Form 175.¹⁷ Nextel argues that it properly certified its Form 175 application in accordance with the Form 175 requirements.¹⁸ Nextel further argues that the Commission's rules do not require any "extra" certifications other than certifying that the applicant is not in default on any payment for Commission licenses and that it is not delinquent on any non-tax debt owed to any federal agency.¹⁹

4. We find that Nextel complied with our certification requirements on its FCC Form 175 by certifying that it was not in default on any payment for Commission licenses and that it is not delinquent on any non-tax debt owed to any federal agency. The Form 175 application requires only that each bidder certify that it is not in default on payments to the Commission or non-tax debt to other federal agencies.²⁰ We also note that the NAL was issued on December 9, 1997 after the 800 MHz auction closed on December 8, 1997, which was several months after Nextel filed its Form 175 application. Therefore, we find that IE's allegation regarding the inadequacy of Nextel's Form 175 has no merit.

5. Anticompetitive behavior. IE also alleges that Nextel's participation in the 800 MHz auction was anti-competitive because Nextel bid on spectrum that was beyond the amount Nextel needed to deploy its system.²¹ IE cites to a statement made by Nextel in Nextel's 10-Q report, filed with the Securities and Exchange Commission in November 1997, that its "present [spectrum] holdings . . . are generally adequate and foreseeable for the current and reasonably foreseeable future."²² IE also argues that Nextel's debt will cause Nextel to charge unjust and unreasonable rates to its subscribers.²³ Nextel replies that the 800 MHz spectrum purchased at auction is the same spectrum mentioned in its SEC 10-Q filing. Nextel further states that the auctioned spectrum is essential to its nationwide digital SMR system to compete with cellular and

16 Petition at 4 *citing* Nextel Communications, Inc., *Notice of Apparent Liability*, DA 97-2561 (WTB, rel. Dec. 9, 1997).

17 Petition at 4.

18 Nextel Opposition at 6-7.

19 Nextel Opposition at 7 *citing* Certification, Question 8, Form 175.

20 See Form 175; see also Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, *Order, Memorandum, Opinion & Order and Notice of Proposed Rulemaking*, 12 FCC Rcd. 5686, 5692, ¶ 8 (1997).

21 Petition at 4.

22 Petition at 4-5 *citing* Form 10-Q, filed by Nextel Communications, Inc. with the Securities and Exchange Commission on November 17, 1997 at p. 14.

23 Petition at 3.

PCS providers.²⁴ Nextel also states that the amount of 800 MHz spectrum in each market is well below the 45 MHz spectrum cap for all CMRS licensees.²⁵

6. We find that IE has not demonstrated that Nextel has acted in an anticompetitive manner through Nextel's bidding strategies in the 800 MHz auction. We do not require auction bidders to demonstrate a "need" for the spectrum. Our auction-based system for assigning frequencies allows the market to decide the value of a frequency. Since Nextel was the highest bidder, Nextel must value these frequencies more than other potential licensees. Regarding IE's assertion that Nextel may charge unjust and unreasonable rates for its service, the Commission has found that CMRS markets are sufficiently competitive that rate regulation is not required, and consequently we have forborne from rate regulation of CMRS licensees.²⁶ Consequently, IE's assertions, even if correct, do not warrant the Commission's action. We also note that in a competitive market, such as the wireless market,²⁷ customers may choose to obtain service from a competing carrier if they are not satisfied with Nextel's pricing and service.

7. Bid Signaling. IE also alleges that Nextel violated the Commission's auction rules in its bidding during the 800 MHz auction.²⁸ Specifically, IE alleges that Nextel signaled its bidding strategy to competing bidders and suggested to them the actions to take to win certain other markets. According to IE, Nextel accomplished this bid signaling through a pattern of raising its own bids, retaliatory bidding, and bid withdrawals.²⁹

8. IE alleges that Nextel deliberately topped its bids in several markets where it bid against Nevada Wireless, another bidder in the auction.³⁰ IE asserts that Nextel was signaling to other bidders that Nextel would not be willing to allow any other bidder to succeed on particular licenses.³¹ Nextel purportedly signaled to competitors that they should cease bidding in markets of prime interest to Nextel, and, in

24 Nextel Opposition at 3.

25 *Id.* at 6.

26 Implementation of Sections 3(n) and 332 of the Communications Act, *Second Report and Order*, 9 FCC Rcd. 1411, 1478-1481 (1994) ("*CMRS Second Report and Order*"); *see also* Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, *Report and Order*, 10 FCC Rcd. 7025 (1995), *aff'd sub nom*, *Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (D.C. Cir. 1996).

27 *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Conditions With Respect to Commercial Mobile Services, *Third Report*, FCC 98-91 (rel. June 11, 1998).

28 Petition at 8-11.

29 *Id.* at 9.

30 *Id.*

31 Petition at 10.

exchange, Nextel would yield certain A block licenses to competing bidders.³² IE cites Nextel's conduct in the Reno EA as illustrative of its allegations. Second, IE alleges that Nextel acted anticompetitively to impair other bidders from obtaining licenses. Specifically, IE argues that Nextel's bidding strategy invited collusive behavior from Nevada Wireless in certain markets.³³ Nextel disagrees with IE's allegations. Nextel argues that topping its bids was not bid signaling. Specifically, Nextel argues that its bidding strategy was similar to "jump bidding."³⁴ Nextel also argues that other bidders, including IE and Nevada Wireless topped their own bids during the auction.³⁵

9. We note that IE did not participate as a bidder in the Reno market or any other market where Nevada Wireless bid and thus does not have standing to raise this issue.³⁶ Nevertheless, we have examined IE's allegations of collusive behavior by Nextel. Given the Commission's reliance upon auctions as a primary licensing tool, the protection of the integrity of the auction process is of paramount importance. Consequently, we are concerned about bidding practices that can have the effect of compromising the integrity of the auction process, especially with regard to behavior that may violate the anti-collusion rule in section 1.2105(c) of the Commission's rules.³⁷ The purpose of the anti-collusion rule is to preserve the integrity and competitiveness of the auction process.³⁸

10. Bidding techniques such as jump bidding, retaliatory bidding, and bid withdrawals do not involve direct and specifically targeted offers of collusion. In cases of "jump bidding," a bidder increases an existing bid more than necessary, purportedly to demonstrate a keen interest in a specific market.³⁹ "Retaliatory bidding" occurs when one bidder places a bid against a second bidder in another market because the second bidder was bidding in a market targeted by the first bidder, purportedly to punish the first bidder.⁴⁰ "Strategic bid withdrawal" is a technique in which a bidder submits, then quickly withdraws, a bid, sometimes in the same round, to signal bidding intentions."⁴¹ For example, a company that bids, withdraws and then rebids at the same level may be signaling to competitors that it has targeted that market and wants the competition to either withdraw from or cease bidding." They may warn or punish competing bidders for undesired behavior, but there is no attempted meeting of the minds. In the case of jump bidding, a bidder

32 *Id.* at 9.

33 *See* 47 C.F.R. § 1.2105(c); *see also Mercury PCS I*, 12 FCC Rcd. 17970 (WTB, 1997) (*Mercury*) (winning bidder in PCS auction assessed fine for bid signaling strategies).

³⁴ Nextel Opposition at 10.

35 *Id.*

36 *See* para. 3, *supra*.

37 47 C.F.R. § 1.120(c).

³⁸ *See CMRS Second Report and Order*, 9 FCC Rcd. 2348, 2386-87 (1994) (anti-collusion rule adopted).

39 *See Mercury*, 12 FCC Rcd. at 17977 at n.31.

40 *Id.* at n.30.

41 *Id.* at n.32.

may be signaling to the class of bidders as a whole that a particular market is important to it. However, there is no *quid pro quo* offered. Similarly, in the case of retaliatory bidding, a bidder may punish another bidder for the second bidder's conduct in a market targeted by the first bidder, but the action occurs after the fact; there is no specific prospective offer to enter into a mutual agreement with regard to particular markets.

11. The Commission has expressly "prohibited bidders from discussing the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application."⁴² The Commission has further stressed that any bidder found in violation of the anti-collusion rule faces potential sanctions of license revocation or forfeiture and may be prohibited from participating in future auctions.⁴³

12. Based on the record before us, we believe that further investigation of Nextel's bidding strategy is not warranted. We conclude that Nextel did not violate our anti-collusion rule in the 800 MHz auction in its bidding strategy. Nextel's topping of its bids in its bidding strategy did not invite any other auction participants to cooperate and collaborate on their bidding in specific markets. Nextel's bids did not include any specific information embedded in the bid itself, or trailing bids, and made no offer of any kind.⁴⁴

13. IE relies on the bidding records for the 800 MHz auction to support its inference of collusion.⁴⁵ IE offers no independent corroborative evidence of any violations by Nextel of our anti-collusion rules. However, the bidding records do not indicate that Nextel violated our auction rules and procedures, including our anti-collusion rule.⁴⁶ The Commission's rules do not prohibit a bidder from raising its own bid, using retaliatory bidding, or withdrawing bids in two or fewer rounds.⁴⁷ For these reasons, we find that Nextel's bidding strategy did not offend the integrity of our auctions processes and did not violate section 1.2105(c) of the Commission's rules.⁴⁸

IV. CONCLUSION

14. We find that IE's standing is inadequate to file a blanket petition to deny all of the licenses Nextel won in the 800 MHz auction because it was only a bidder in six EAs where Nextel also participated. In markets where IE did not participate as a bidder, IE's alleged claim of direct injury is tenuous and hypothetical. We have also examined Nextel's bidding strategy of topping its own bids. We find that Nextel did not act anticompetitively or in collusion with any other bidders in the 800 MHz auction. We also find that

⁴² See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fourth Report and Order*, 9 FCC Rcd. 6858, 6866 (1994); see also *Fifth Report and Order*, 9 FCC Rcd. 5532, 5570-71 (1994).

⁴³ See *Fifth Report and Order*, 9 FCC Rcd. at 5570-71.

⁴⁴ *But see Mercury*, 12 FCC Rcd. 17970 (winning bidder assessed fine for bid signaling).

⁴⁵ See Petition at 8.

⁴⁶ 47 C.F.R. § 1.1205.

⁴⁷ See *Mercury*, 12 FCC Rcd. at 1797-1798.

⁴⁸ 47 C.F.R. § 1.2105(c).

Nextel's participation in the 800 MHz auction was consistent with the Commission's rules and the goals of Congress and the Commission for a competitive CMRS marketplace.

15. For the reasons set forth above, we dismiss IE's Petition, in part, in all of the markets where IE did not participate as a bidder. We also deny IE's Petition in all of the markets where IE participated as a bidder.⁴⁹

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(d); and section 90.163 of the Commission's Rules, 47 C.F.R. § 90.163, IE Communications, Inc.'s Petition to Deny filed on February 20, 1998, IS DISMISSED, in part.

17. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(d); and section 90.163 of the Commission's Rules, 47 C.F.R. § 90.163, IE Communications, Inc.'s Petition to Deny filed on February 20, 1998, IS DENIED, in part.

18. This action is taken pursuant to delegated authority in accordance with section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau

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49 See para. 4, *supra*.