

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Reallocation and Service Rules for the 698-746 MHz Spectrum Band</b>	)	<b>GN Docket No. 01-74</b>
	)	
	)	
<b>Auction of Licenses in the 698-746 MHz Band</b>	)	<b>DA 02-200 (Auction No. 44)</b>
	)	
	)	

**REPLY COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.**

Leap Wireless International, Inc., on behalf of itself and its affiliated entities (collectively, “Leap”), hereby offers these reply comments in connection with the above-captioned proceeding.<sup>1</sup> Leap applauds the Commission’s efforts to adopt fair and economically sound policies to govern the auction of licenses in the lower 700 MHz band. But Leap believes that certain modifications to the proposed rules could more effectively and efficiently allocate these spectrum licenses to their highest valued use.

**I. THE COMMISSION SHOULD AUCTION EAG LICENSES SEPARATELY FROM MSA LICENSES.**

Leap agrees with the majority of the commenters, and with the Commission, that all EAG licenses, including those in the lower 700 MHz band, should be auctioned together.<sup>2</sup> To do otherwise would dramatically reduce the efficiency of the auction process. Bidders will likely

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<sup>1</sup> See *Public Notice*, Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002 (rel. Jan 24, 2002).

perceive EAG licenses in both the upper and lower 700 MHz bands as relatively substitutable, and will implicitly place values on each EAG license with reference to the price and availability of all others.<sup>3</sup> The auction market will function best – and allocate those licenses most efficiently to their highest valued use – if no barriers impede cross-bidding, and thus the immediate substitution of one license for another of like kind. Likewise, the ability of bidders to value these licenses will be assisted if they are sold side-by-side, and if bidders are not forced to speculate in each round as to whether the as-yet unauctioned licenses might be sold for more or less at a later date than those currently up for bid. Therefore all EAG licenses should be sold in parallel at one time.

However, the FCC should *not* merely combine Auctions 31 and 44. Rather, the MSA/RSA licenses should be auctioned separately from the EAG licenses. To include all of the MSA/RSA licenses in the proposed package-bidding scheme of Auction 31 would be unmanageable: this would produce more than  $10^{200}$  possible combinations of MSA/RSA licenses and potentially complementary or overlapping EAG licenses – a number so great there is no word for it in the English language. This complexity would severely hinder the ability of bidders to make a rational assessment of their opportunities. In order to facilitate the most efficient outcome, the FCC should not include the MSA/RSA licenses in the same package-bidding auction with the EAG licenses. One auction should dispose of the very large (EAG) licenses, and another auction, without package bidding, should dispose of the more local (MSA/RSA) licenses.

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<sup>2</sup> See, e.g., TCA Comments at 2; Rural 700 MHz Group Comments at 2.

<sup>3</sup> There is little support for the Spectrum Exchange Group’s claims that “incumbency differences” render the upper 700 MHz licenses unlike the lower. Spectrum Exchange Comments at 7. In fact there is at present little difference in incumbency between the two blocks.

## **II. LOWER 700 MHZ SHOULD BE RESERVED FOR MSA LICENSES.**

The Commission has wisely rejected suggestions that it eliminate the MSA/RSA license block in favor of an all-EAG licensing scheme. To do so would abandon small businesses entirely, and effectively erect a barrier to entry against all but the largest and best-financed carriers in the world. Without “bite-sized” licenses, there would be no place for smaller operators and rural providers, as well as new entrants like Leap, which has shown its ability to provide new and innovative services in noncontiguous local areas. To require carriers to enter one-sixth of the country (or not at all) would pose a major barrier to entry and would accordingly hinder competition, stifle development, and harm the public interest. Moreover, to do so would abdicate the Commission’s explicit statutory mandate to preserve opportunities for such new and innovative entrepreneurial providers.<sup>4</sup>

To the contrary, the Commission should create more MSA/RSA licenses out of the lower 700 MHz spectrum. As it stands, only one block out of seven in the reclaimed UHF bands will be licensed on a local, as opposed to a vast super-regional, basis. Just fifteen percent of all the spectrum reallocated for CMRS will be made available to small businesses – or indeed any businesses aside from very largest and best capitalized. Affording a single spectrum block for all those who cannot afford to buy a license that covers one-sixth of the United States does not serve the public interest.

Indeed, the very nature of the lower 700 MHz spectrum cries out for a more local licensing scheme. As a practical matter, incumbency will dictate that for the foreseeable future this spectrum will only be available for CMRS in mutually-isolated geographic blocks that resemble conglomerations of several MSA/RSAs. As Paxson states: “To put it bluntly, there is

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<sup>4</sup> See 47 U.S.C. § 309(j)(3).

no chance of clearing the lower 700 MHz band in the near future (*i.e.* not for many, many years).”<sup>5</sup> What could be the purpose of requiring auction participants to bid for an entire EA grouping? No one can seriously claim that the heavily encumbered lower 700 MHz band offers a new entrant the prospect of an instant nationwide or even regional footprint. In reality, the winner of a lower 700 MHz EAG license will hold rights to serve a random smattering of isolated areas in which it can actually operate, along with option to buy out the incumbents – an option that Paxson admits is unlikely to be exercised, and that at present looks so far out of the money as to be essentially worthless. In this way, the band resembles an odd collection of distinct goods, each with vastly different values. The fractured availability of the lower 700 MHz belies the Commission’s attempt to combine its disparate usable blocks throughout the country into a handful of EA groupings.

The retention of EAG licensing in the lower 700 MHz band acts as a barrier to the efficient allocation of radio spectrum. Most obviously, it impedes the allocation among competing wireless users. An entity that wishes to bid on all the MSAs and RSAs within a particular EAG can always do so, no matter how small the units are. But the converse is not true: an entity that is the highest value user of only one portion of an EAG cannot bid only for that portion.<sup>6</sup> Thus, an entity that rationally places a very high value on a particular area – because it needs to fill in its existing footprint, or has business plans tailored only to one type of market, or perhaps because it has an advantage in band-clearing in that area – may be prevented

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<sup>5</sup> Paxson Comments at 8.

<sup>6</sup> Nor can an entity that wants to use only one portion of an EAG be expected to buy the entire EAG and then sell off the parts it does not want. The carrying and transaction costs of doing so would be prohibitive, and result in tremendous social waste. Not only would the purchaser have to negotiate and consummate (at significant cost) the requisite sale transactions, but the purchaser would have to finance the entire license and carry that cost until such time as it could accomplish the desired disaggregation. And in the meantime, of course, the undesired spectrum would lie fallow.

from acquiring that area. And a rival firm may have little incentive to sell spectrum to an innovative new entrant which, if successful, could threaten its profitability. And by denying spectrum to its highest valued user, the public interest would suffer.

Likewise EAG licensing impedes the allocation of spectrum between incumbent broadcasters and wireless providers, as it may hinder certain private band-clearing initiatives that would otherwise be achievable through bilateral negotiations. In such a bilateral negotiation, a broadcaster might sell to a particular wireless provider the option to buy out the broadcaster for a negotiated fee. Holding this option would dramatically increase the value to the wireless provider of the conglomeration of two or three MSA/RSAs in which the broadcaster's incumbency would otherwise prevent operations. By lumping together multiple broadcasters into a single EA grouping, the Commission has introduced profound holdout and collective action problems to the spectrum clearing process. Nor has the industry's experience with the upper 700 MHz band – which has yet to be cleared – provided much hope that a solution to those problems can be easily found. With EAG allocation, a wireless provider must negotiate with multiple broadcast incumbents, each of whom is incentivized to play the holdout and demand an inordinate (and, when aggregated, economically untenable) share of the profits to be reaped from band-clearing. In sum, the use of EAGs impedes the allocation of spectrum *among* wireless providers (by forcing all-or-nothing bids), and it also impedes the allocation *between* wireless providers and broadcasters (by requiring collective action to achieve band clearing).

The Commission should therefore reject any suggestion to abandon entirely the use of MSA/RSA licensing in the lower 700 MHz. To the contrary, the Commission should set aside an additional 12 MHz block for MSA/RSA licensing – so that two of the five lower band licenses are licensed on a scale that makes them attractive for new entrants and small businesses.

**III. AUCTION NO. 44 SHOULD TAKE PLACE CONCURRENT WITH AUCTION NO. 31, AND BOTH SHOULD FOLLOW FINAL DISPOSITION OF AUCTION NO. 35.**

The Commission's primary responsibility in this proceeding is to ensure that the 700 MHz band be allocated to its highest and best use. The Commission should therefore avoid any decision that places a premium on speed for its own sake, at the expense of certainty and efficiency. The relative timing of these auctions is therefore important. In general, the Commission should seek to hold its various auctions in such a sequence that participants are not prompted to acquire "second choice" spectrum solely out of uncertainty as to whether they will be able to acquire their "first choice" spectrum. In the 700 MHz band, this principle dictates that the upper 700 MHz band should be auctioned concurrently with the lower 700 MHz band, so as to reduce the likelihood of inefficient bidding and allocation. Likewise, the Commission should not proceed with the proposed Auction 44 if Auction 31 is delayed.

Indeed, the Commission should recognize the strong interests in delay. The apparent failure of band-clearing initiatives in the upper 700 MHz band militates in favor of a postponement until those issues can be resolved. And the downturn in telecom equities indicates that the capital markets may be relatively unwilling to fund significant spectrum acquisitions in the near term. At present Leap believes it may be wise to delay both auctions, but in any event Auction 44 should not be held long before Auction 31.

Moreover, Leap believes that neither Auction No. 31 nor Auction No. 44 should occur before the status of Auction No. 35 is resolved. The 700 MHz auctions should not occur while there is still doubt among prospective bidders as to whether they might be held to their bids in Auction No. 35. So long as the status of Auction 35 is unknown, the winners in that auction must hold in reserve capital resources sufficient to meet their commitments in that auction. Likewise the Auction 35 winners cannot know the true extent of their spectrum needs

until they know whether they will receive the licenses they won in that auction. To hold the 700 MHz auctions while such doubt and uncertainty lingers would inevitably skew the results. Potential bidders might stay home, and those that participate may bid far less (or more) than would be optimal; or less (or more) than if they had foreknowledge of the disposition of Auction No. 35. To hold Auctions 31 and 44 before the final disposition of Auction 35 would skew the results of the 700 MHz auctions, would probably result in less-than-maximum spectrum values, and would certainly undermine the efficient allocation of spectrum to its highest valued use.

#### **IV. AUCTION PROCEDURES MUST FACILITATE EFFICIENT PARTICIPATION.**

Leap agrees that it is appropriate to set some minimum opening bid, but the Commission appears to have imposed an arbitrary and inflated minimum amount that will tend to discourage participation. The proposed minimum opening bids do not take into account the disparate circumstances of the various available licenses. Though some proposed licensed areas are far more encumbered than others, the Commission appears not to have factored these disparities into its minimum bids. This will increase the likelihood that licenses will remain unsold at the end of the auction, and thus may reduce competition and delay the roll-out of new services. Therefore little purpose would be served. Leap agrees with those commenters who state that the minimum opening bid should not exceed the upfront payment required for each license.<sup>7</sup>

Leap believes that the FCC should retain a stopping rule that the auction should only close if one round in Stage 3 (or the final stage if there are different number of stages) passes in which no bidder submits a "pro-active" waiver, a withdrawal, a new bid on any license (whether or not it was already a high bidder on the license). The auction should close if, in the

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<sup>7</sup> See, e.g., Rural Group Comments at 4; TCA Comments at 5-6.

final stage only automatic waivers are registered, and no bidder submits a new bid, a withdrawal or a pro-active waiver.

**V. CONCLUSION**

Leap largely concurs with the Commission's plans and proposals for the lower 700 MHz band, but believes that the allocation process could be made more efficient by implementing the various points discussed herein.

Respectfully Submitted,

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