

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

In the Matter of  
DA 02-200  
January 24, 2002  
AUCTION OF LICENSES IN THE 698-746 MHz BAND  
SCHEDULED FOR JUNE 19, 2002  
COMMENT SOUGHT  
ON RESERVE PRICES OR MINIMUM OPENING BIDS AND  
OTHER AUCTION PROCEDURAL ISSUES  
Report No. AUC-02-44-A (Auction No. 44)

**COMMENT OF:**

**McBride Spectrum Partners, LLC**

***Chairman Reed E. Hundt,***

“In the long and tragic history of inequality between races and gender in America, today we are creating the greatest single opportunity ever made fairly available to small businesses, women and minorities. For the first time in our nation’s history, the federal government is creating opportunities in a new industry in which all Americans will have a fair chance to compete from day one”. “Entrepreneurs’ C Block” is established, which is designed to fulfill the statutory mandate to ensure that small businesses, rural telephone companies and businesses owned by minorities and /or women (“referred to as “designated entities”) have the opportunity to participate in providing broadband PCS”.<sup>1</sup>

**TRUE SMALL BUSINESS**

I respectfully submit these Comments in the above-captioned proceeding. The Federal Communications Commission (FCC) in the past had established auction rules and policies in response to congressional instruction that the FCC promote the deployment of new services and disseminate licenses among a variety of applicants, including small businesses.

Auction No. 44 is an opportunity for the Commission to help small business and have real competition in wireless market. This is not the time for the Commission to throw up its hands and permit the huge wireless companies to push small business from the wireless market. The Commission should not let its desire to achieve full value for its spectrum licenses blind it to the fact that small business is the lifeblood of America and

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<sup>1</sup> See Report No.DC-2621 June 29, 1994 Commission Adopts Competitive Bidding Procedures For Broadband PCS (PP Docket Action No. 93-253)

that we bring many benefits to the wireless landscape which helps it stay alive, and well. Without the small fish that feed and live in the wetlands, you would have no whales.

Entrepreneurial spirit is alive in this country, and small businesses are prepared to compete with the telecommunications giants. Permitting large players to expand their spectrum, or expand their service offerings, at the expense of small business participation, will effectively reduce the opportunity to promote diversity in the marketplace. This is a realistic danger as large companies continue to merge with other communications service providers. Increasing the variety of market participants, by including small business, will increase competition.

Small businesses play a crucial role in experimentation and innovation, which lead to the development of new technologies and the growth of economic productivity. Small businesses create virtually all new jobs and serve as an essential mechanism for entry by millions of people, including minorities, women, and immigrants, into the American economy. Given the tremendous rate of mergers and alliances between large companies, small businesses are the best hope to provide competition and choice of under-served areas. Congress has recognized this. Congress saw that disseminating spectrum licenses among a variety of applicants, notably small, minority, and women owned businesses, would increase competition and bring innovative technologies to the American consumer. Congress also saw that small businesses (including minority and women owned businesses) do not have ready access to capital or the resources to acquire telecommunications licenses, for reasons unrelated to their ability to provide competitive services. Therefore, Congress directed the Commission to consider special incentives to promote economic opportunities to address financial market imperfections and to compensate for the lack of ready access to capital. With the passage of the Telecommunications Act of 1996, Congress began to unlock doors to telecommunications markets that had long been dominated by one or two large firms. The Commission should continue to promote Congress's mandate that small business be ensured a realistic opportunity to compete for wireless broadband customers. The Commission has concluded that only insulating small businesses from large business bidding resources will afford small businesses an opportunity to compete in PCS. Nothing that has occurred since 1994, or since last year's C-Block re-auction, has changed this fundamental fact, The Commission's public policy goal of promoting a competitive marketplace, is a must.

The Commission should not be swayed by argument that small business entrepreneurs will not yield the billions that big telecom would pay for wireless licenses, small business is the lifeblood of the American economy. Small business telecommunications providers are the ones, which can bring innovation to the marketplace, and small business customers are the ones who benefit from competition. Thus, it is vital to the development of an innovative marketplace that the Commission fosters the participation of a variety of service providers, not just a handful of national operators. It has been an important public policy objective of the Commission and of Congress to promote diversity of product and service offerings and to create an atmosphere where many players, including small businesses, women-owned businesses, and minority-owned businesses, can participate in the competitive marketplace. Congress has recognized that "small business concerns,

which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit.<sup>2</sup> In fact, it is for this very reason that Congress mandates that the Commission afford small business the opportunity to participate in the provision of wireless services. The Commission interpreted this congressional mandate to require it to take steps "necessary to ensure that designated entities have a realistic opportunity to obtain wireless licenses. The Commission also recognized that while "auctions have many beneficial aspects, they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women by raising the cost of entry into spectrum-based services. The Commission cannot fail to take notice of the realities faced by the small businesses that participate in its auctions.

The Commission found that "small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business. And permitting large companies to outbid small businesses would "frustrate Congress's goal of disseminating licenses among a diversity of licenses. Thus, the Commission set a specific asset cap that it judged would exclude companies that could outbid smaller companies, but still permit participation by companies likely to have the "financial ability to provide sustained competition for the PCS licenses".

The failure of one or a few companies to pay for spectrum for which they had bid too high does not equal a failure of all small businesses to compete in the wireless marketplace, but only a failure of some the small business auction asset cap rules. Small businesses bring competition and innovation to markets they enter, and small business customers are a chief beneficiary of the increased choices and decreased prices that competition and innovation brings. Today, small businesses like Clear Talk PCS are bringing competitive PCS services to the marketplace.

### **MAXIMIZING AUCTION REVENUE IS NO VALID REASON TO EXCLUDE SMALL BUSINESS FROM THE FCC SPECTRUM AUCTIONS.**

Indeed, one benefit of the Commission's auction program is that it tends to put licenses in the hands of those who value them most highly. Revenue generation is a fortunate by-product of auctioning valued spectrum, and it remains to be seen what price these licenses may bring upon auction to designate entities.

But as the Commission realizes, increasing federal revenue is not Congress's goal. Rather, the Telecommunications Act seeks to bring competition, innovation, and diversity to the nation's communications marketplace. Issues of auction revenue generation are irrelevant to this objective. Congress directed the Commission to provide

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<sup>2</sup> Congress also requires the Commission to "promot [e] economic opportunity and competition and ensur [e] 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 business, rural telephone companies, and businesses owned by members of minority groups and women." Implementation of Section 309(J) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11.

competitive opportunities for women, minorities, and small business. The commission decided that the way to do this for PCS (which it expected would involve high capital costs) was to guarantee access to spectrum for small businesses, women-owned businesses, and minority-owned businesses.

Maximizing short-term revenue for the federal treasury should not be the prime goal of the Commission's C-Block re-auction. Providing licenses to "deep pocket" bidders who can pay the most should not be elevated above the public policy goal of assuring opportunity for small business to compete and laying the groundwork for competition in a developing service. Congress never intended that revenue be the prime goal of spectrum auctions. And the Commission did not set aside the C-Block in order to maximize revenue but to permit small business participation in PCS service.<sup>3</sup>

### **RECOMMENDATIONS FOR THREE BASIC SMALL BUSINESS PRINCIPLES FOR FAIR AUCTION BIDDING LIMIT RULES**

I recognize that a "one-size fits all" approach to resolving these concerns would not be reasonable given the range of issues before the Commission and the different needs of small business licensees. I have consulted with finance, investment, and entrepreneurship experts and divisions of the U.S. Small Business Administration, in addition to talking to PCS C block, small business, and members of congress and investment companies. These bidding limit RECOMMENDATIONS are a result of these efforts.

The Commission has a difficult task in resolving many complex issues and balancing the widely divergent interests of the parties. I ask that the Commission consider the following principles before reaching any final decision on the rules for auction no.44.

We also agree that it is important to preserve the integrity of the FCC's auction process, particularly for continued small business participation. However, I am most concerned about the ability of small businesses not only to compete against larger entities and incumbents in the auction process on an equal playing field, but also compete in the telecommunications marketplace as viable service provider. Small businesses need equitable rules and decisions from federal regulatory bodies; rules that eliminate market entry barriers in this still monopolistic industry. Providing a level playing field for small businesses is in the public interest, pursuant to the Commission's statutory mandate under the Communications Act of 1934, as amended by the Telecommunications Act of 1996,<sup>4</sup> and the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>5</sup>

<b><u>Business Size</u></b>	<b><u>Revenues</u></b>	<b><u>Bidding Credit</u></b>	<b><u>Bidding Limit</u></b>
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<sup>3</sup> See Implementation of Section 309(J) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11

<sup>4</sup> See Implementation of Section 309(J) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11

<sup>5</sup> 15 U.S.C. 601 *et seq.* (Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).

<b>Large Business</b>	<b>N/A</b>	<b>0%</b>	<b>*Unlimited</b>
<b>Small Business</b>	<b>\$40 M</b>	<b>15%</b>	<b>\$500 Million</b>
<b>Very Small Business</b>	<b>\$15 M</b>	<b>25%</b>	<b>\$300 Million</b>
<b>True Small Business</b>	<b>\$3 M</b>	<b>35%</b>	<b>\$100 Million</b>

**\*No one company will be allowed to bid more than 20% of the total net bids in any one auction.**

### **OVER BIDDING HINDERERS THE ABILITY OF SMALL BUSINESS LICENSEES**

To allow a very small business to over bid seriously undermine the integrity of the auction as well as sets a dangerous precedent for small business participation in future auctions. Auction No.5 and auction No.35 demonstrates the gapping loopholes and pit falls of the existing small business asset and affiliation rules. In the real world a very small business cannot spend \$ 5 billion, \$2 billion or even \$1 billion and be truly in control of its license applications having zero assets and zero revenues. Any investor willing to make an investment in the billions and willing to put this kind of money at risk would ask for some kind of secured assets or request it has control of the licenses that the small business wins unless the small business is without a doubt just a front company and not the true bidder at all. The Commission should revisit the issue of its affiliation rules and procedures that lead- to small business bidding unlimited amounts in the billions with so-called unsecured capital from investors. Financial leverage in the billions by small business with zero assets and zero earnings in is not reasonable and would be unacceptable to most any investment banker in the world.

No Money Wireless is a very small business and bids \$2 billion on licenses so it can offer wireless service to the people of Crazy City. The company first must win and pay for the spectrum and build a wireless system. The cap-ex plus the cost of operation and you have a cost of about \$6 billion, give or take a few hundred million. No Money Wireless has zero assets and zero income, and a debit to equity ratio is off the wall. In the post DOT- COM bust, real income is needed for the financial well being of any company. This kind of extreme leverage is putting every one including the American taxpayer at risk. It is this kind of over leverage the Commission must say doesn't meet the financial qualifications that are ask for and must be answered on the short and long form applications. A company like Crazy Wireless could collapse overnight as the likes of Enron. The Commission has to ask the question, do we have loopholes in our rules and if so, how can we fix it. Under the current rules it is very possible for a very small business to bid \$15 billion or \$20 billion and win 50% to 100% of the licenses in one auction and then turn around and blackmail the Commission to bail them out.<sup>6</sup>

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<sup>6</sup> See Implementation of Section 309(J) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11

Therefore, the FCC operates not only as regulator, but also serves in the capacity of government-as-the bartender who must keep notice of his drinking patrons who need a ride home.

The Commission under delegated authority can limit the bidding with bidding limits for small business to make sure that small business doesn't over bid which is essential to the success of all new entrants unlike larger and more established entities, small businesses have fewer resources and can't afford to mess up from the start by over bidding. Bidding limits for small businesses can be a truly effective auction tool that would help the commission run the auctions with out delays.

Having a bidding limit for small business doesn't directly affect the ability of large bidders in the auction, bidding on the MSA and RSA markets. The only rule that a large bidder would have to bear is the 20% total net bid limit rules. The rules would be enforced upon all of the bidders in the auction 44. The 20% rule is also a way for the Commission to make sure that it meet the needs of Congress that requires the Commission to "promot [e] economic opportunity and competition and ensur [e] 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 business, rural telephone companies, and businesses owned by members of minority groups and women.<sup>7</sup> The 20% rule would make sure the no less then 5 companies could win all of the licenses in any one auction. The uncertainty of having no limits on how much a small business can bid opens the door to all kinds of disasters that in the pass have put obstacles in the way of license granting proceeding and the ability of a small business licensee to secure investors and execute business plans.

I appreciate the Commission's down payment rules which are intended to ensure that winning bidders "have the financial capability to attract capital to rapidly deploy their systems and operate them in an efficient manner, and to discourage default. These are unquestionably valid and vital policy considerations. Winning bidders that attempt to game the Commission's rules deserve to face the full weight of the Commission's penalties provisions. Some of the cases of overbidding in pass auctions clearly undermine the auction policy suggesting inadequate financing or an attempt to game the Commission's small business rules.

Bidding limits is one way for the commission to greatly improve upon the auction rules and prevent future bankruptcies or defaults. The bidding limit rules would also keep the commission independent and would keep the Commission from becoming a hostage to any one company who bids more then 50% of the total net bids in any one auction, In the pass this was the case when one company total net bids are 50% of the total net bids in the auction. What happens is that the one company now has control over the auction and

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<sup>7</sup> . " Implementation of Section 309(J) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11.

starts to demand to the Commission with time dead lines and all, on how and when it will pay for its licenses. In one auction the commission had to order the suspension of installment payments to a date uncertain, has in effect, put some licensees in a worse position than they were in prior to the suspension. The suspension has created a misperception that all C block licensees are in trouble causing further uncertainty about the viability of C block licensees to compete. This unanticipated stigma on C block as a whole has inhibited licensees from performing their contractual obligations to construct their systems and thus, has increased the cost of doing business considerably. This conservative approach of bidding limits is very understandable and will likely reduce litigation, delay and uncertainty created by over bidding by any one company. Bidding limits will have the potential of making the FCC spectrum auctions, the next best thing to ebay.

## **CONCLUSION**

The bidding limit rule's purposes are clear: to encourage only qualified bidders and, ultimately, to deter defaults. The down payment rules and the small business asset limits do play a vital role in assuring the integrity of the Commission's auctions. But as laudable as these goals are, it is simply unsound to assume that asking a small business to meet the total asset test, that it would not try to undermine them. For these reasons, I reiterate my recommendations: Whatever steps the Commission takes each step must be executed with finality. It is also very important to send a clear and unequivocal message to the industry and financial markets that there will be no changes in the auction rules after the auction and anyone who abuses the rules will be disqualified from the auctions. As demonstrated by the pass circumstances on continued uncertainty is the death knells for small businesses.

It is also within the Commission's authority to encompass bidding limits and stop defaults, and taking such an alternative approach would serve the underlying policy of its auction rules. Regardless of the alternative the Commission might choose to employ, it is clear that, at least in some cases, the Commission would better effect its overall policy goals by imposing bidding limit rules. The Commission ultimately, can exercise its authority, and set the auction bidding limit rules that meet the underlying goals of small business participation in spectrum auctions and diversity of ownership.

Respectfully submitted,

Vincent D. McBride  
McBride Spectrum Partners, LLC

Tuesday, February 05, 2002