

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

In the Matter of)	
)	
Amendment of the Commission's Rules)	WT Docket No. 97-82
Regarding Installment Payment Financing for)	
Personal Communications Services (PCS))	
Licenses)	
)	
)	

Petition for Reconsideration

The Office of Advocacy of the United States Small Business Administration (Advocacy) respectfully submits this Petition for Reconsideration, requesting that the Federal Communications Commission (FCC) reverse its recent decision to modify rules governing re-auction of Personal Communications Services (PCS) spectrum licenses on the C and F Blocks.¹ In the past, the FCC has offered C- and F-Block licenses exclusively to small businesses. The FCC has now decided to divide the 30 MHz C-Block licenses into three licenses of 10 MHz each, and has lifted small-business eligibility restrictions on C-Block and F-Block licenses. To date, the FCC has offered no rationale sufficient to alter the well-reasoned and long-standing PCS small business "set-aside". The FCC should reconsider its decision and should re-auction the spectrum according to its prior rules.

1. The FCC should retain C-Block eligibility restrictions and license sizes.

The FCC has offered no reason to depart from its long-standing policies regarding the PCS C Block. The FCC established these policies in response to congressional instruction that

¹ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Sixth Report and Order on Reconsideration, WT Docket No. 97-82, released August 29, 2000 ("Sixth Report and Order").

the FCC promote the deployment of new services and disseminate licenses among a variety of applicants, including small businesses.² As the FCC correctly notes in its Sixth Report and Order, Congress did not require the FCC to specifically set aside spectrum for the exclusive use of small business. However, when crafting its C-Block rules, the FCC interpreted its congressional mandate to require it to take steps “necessary to ensure that designated entities have a realistic opportunity to obtain broadband PCS licenses.”³ The FCC 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.”⁴ The FCC found that small businesses could not reasonably hope to compete for PCS spectrum against large businesses; therefore the FCC set aside the C and F Blocks for exclusive participation by small businesses.⁵

In past auctions, the FCC had used other methods, like bidding credits, to ensure small business participation. But for PCS, the FCC recognized that bidding credits would not be enough to ensure participation by small business, “because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high.”⁶ The FCC did “not think bidding credits in an uninsulated block would have a meaningful effect.”⁷ The FCC found that “small entities stand

² Congress requires the FCC 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.

³ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 9.

⁴ Id., paragraph 10.

⁵ Id., paragraph 12.

⁶ Id., paragraph 96.

⁷ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 131.

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.”⁸ In the words of the FCC, permitting large companies to outbid small businesses would “frustrate Congress’s goal of disseminating licenses among a diversity of licenses.”⁹

The FCC offers no evidence that these findings are invalid. In fact, the FCC has repeatedly reaffirmed its set-aside policy, and has specifically rejected the very arguments raised by larger businesses in this proceeding.¹⁰ There is no evidence that small business no longer needs exclusive access to PCS C-Block spectrum in order to have a reasonable opportunity to provide services over this spectrum.¹¹ In the absence of evidence that its previous findings are no longer sound, the FCC should not abandon them.

There also is no evidence that the PCS policies have failed. In fact, the success of the last C-Block re-auction strongly suggests the set aside is beginning to work. The FCC had eliminated installment payments, which many parties argue contributed to the initial financial difficulties of the original C-Block licensees. And since the elimination of installment payments, the FCC has successfully licensed the C-Block to small businesses.¹² There have been no

⁸ Id., paragraph 121.

⁹ Id., paragraph 123.

¹⁰ See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order, WT Docket No. 97-82 (1998), paragraph 16; Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82 (1998), paragraph 56; Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order, WT Docket No. 97-82 (1997); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order, PP Docket No. 93-253 (1994), paragraph 16.

¹¹ The FCC touts the E-Block auction as proof that small business can successfully bid against large business for PCS. But the FCC does not indicate how many successful small businesses were forced to bid against large businesses for their spectrum licenses.

¹² For example, SBC Communications holds this view: “Of course, some designated entities . . . have fared better

additional defaults or bankruptcies.

The FCC does not address the fact that the C-Block policies are finally beginning to succeed. But it appears to prefer an alternative view, that small business has failed to provide PCS services to the public, and only through licensing this spectrum to large businesses will the public quickly receive service. The FCC does not provide support for this view.

The FCC states, “Section 309(j)(3) does not require the Commission to promote the participation of small businesses in PCS auctions at the expense of other, potentially conflicting, objectives enumerated in the section, such as the promotion of competition and the rapid deployment of new technologies and services.”¹³ This implies that competition and deployment conflict in this case with small business participation, but the FCC gives no support for this view, nor the view that large business participation is necessary to achieve these goals. In fact, small business participation in any industry, including PCS, is essential to the promotion of competition. Small businesses employ most of the public, provide most new jobs to the U.S. economy, and are the major source of product and service innovation.

Additionally, the major rationale the FCC expresses for permitting large businesses to hold C-Block licenses is to alleviate their spectrum shortage. But it is hard to see how permitting existing companies to supplement their current spectrum holdings will increase competition. It would appear obvious that encouraging new entrants to the market would increase competition, but permitting existing service providers to amass more spectrum would not increase competition. Of course, it is possible that other large businesses might newly enter a market and increase competition, but the FCC gives no reason why competition by a large business is

than NextWave, so [the FCC’s policy of encouraging viable small business participation] has already borne fruit.” Petition of SBC Communications Inc. for Waiver of the Eligibility Requirements of 47 C.F. R. § 24.709 for the PCS Frequency Blocks C and F Auction to Begin on July 26, 2000 (“SBC Petition”), DA 00-191, January 21, 2000, p. 5.

¹³ Sixth Report and Order, 13.

preferable to competition by a small business.¹⁴ By contrast, Congress prefers competition by a wide variety of businesses, including small businesses.¹⁵

Perhaps the FCC perceives the failure of NextWave Personal Telecommunications, Inc. as indicative of general failure by small businesses to provide PCS services. That certainly would be a reason to abandon current policy, if it were true. But the FCC never states it believes this, and there is no evidence that this is the case. In fact, the evidence strongly shows that the small business set-aside policies are bringing small business participation to PCS, along with competition, deployment of service, and recovery of a portion of the value of the public spectrum.

2. The FCC should not depart from its F-Block policies.

The FCC provides a rationale for abandoning its set-aside policy for the F-Block. Unfortunately, this rationale is illogical and self-contradictory. The FCC indicates that the F-Block has not experienced financial difficulty. Somehow, the FCC appears to conclude from this that small business and large business are on a par financially and that small business could easily compete at auction unaided. Thus, the time has come to open bidding on all F-Block spectrum to big businesses.¹⁶ In reality, the lack of financial difficulty on the F-Block refers to licensees' ability to pay for their licenses, not a situation in which small business has overcome its general difficulty attracting capital. Small business has faced severe disadvantages vis a vis large business when it comes to attracting capital, and these disadvantages remain. It was this

¹⁴ Advocacy notes that 10 MHz spectrum blocks are more ideally suited to supplementing existing services than to encouraging new service providers to enter the market. 30 MHz are better suited to full-service new entrants.

¹⁵ See *supra.*, footnote 2.

¹⁶ The FCC points that that no one suggested breaking the F-Block licenses into smaller licenses, so the FCC must either retain the set-aside entirely, or eliminate it. If the FCC means to suggest that no party supports a compromise, Advocacy notes that the 10 MHz F-Block licenses are hardly large enough to consider dis-aggregating.

difficulty that formed the basis for the FCC's establishing the set-aside on the C and F Blocks.¹⁷

But to follow the FCC's logic, if lack of financial difficulty on the F-Block is the reason for abandoning the set-aside, then the presence of financial difficulty on the F-Block would be a reason for retaining the set-aside. Applying this consistently to the C-Block, financial difficulty on that band would be a rationale for retaining the set-aside on the C-Block. But the financial difficulty of some C-Block licensees serves as a major factor in the FCC's decision to abandon the C-Block set-aside. It is inconsistent for the FCC to use *lack of financial difficulty* to justify abandoning the set-aside on the F Block and the *presence of financial difficulty* to justify abandoning the set-aside on the C Block. There is no logic to this, and it illustrates the strained reasoning of the FCC's approach to both bands. Advocacy is left wondering what the FCC's true motivation might be in altering its C-Block and F-Block spectrum policies.

Conclusion.

The FCC reserved the C and F Blocks for small businesses because it wanted to introduce small business competition to PCS, consistent with Congress's will. The FCC judged that small business would be unable to compete at auction for such valuable spectrum, even with bidding credits, unless it had exclusive access to a portion of the PCS spectrum. After many false starts, that policy is beginning to succeed. The FCC adjusted its rules to eliminate installment payments and has successfully auctioned C and F Block spectrum to small businesses which

¹⁷ The FCC has indicated that "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."” Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11. Also, in 1994, the Commission stated, "We do not accept . . . that we should do away with the entrepreneurs' blocks and instead offer bidding credits . . . [I]n our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against. Without the insulation of the entrepreneurs' block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS." Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order, PP Docket No. 93-253 (1994), paragraph 16.

have paid for their licenses and which are providing PCS services to the American public.

But now, after understandable frustration with NextWave Personal Telecommunications, Inc. and under intense pressure from industry giants, the FCC will hand the C and F Blocks over to large businesses. The FCC offers no compelling rationale for this policy about-face, and Advocacy urges the FCC to reconsider.

Respectfully submitted,

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October 5, 2000

APPENDIX A
Comments filed June 22, 2000

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

In the Matter of)	
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Amendment of the Commission's Rules)	WT Docket No. 97-82
Regarding Installment Payment Financing for)	
Personal Communications Services (PCS))	
Licenses)	
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Comments of the Office of Advocacy, U.S. Small Business Administration

The Office of Advocacy of the United States Small Business Administration (Advocacy)¹ respectfully submits these comments regarding a further notice of proposed rulemaking (FNPRM) in which the Federal Communications Commission (FCC) proposes to modify rules governing re-auction of Personal Communications Services (PCS) spectrum licenses on the C- and F-Blocks. Current rules provide that C- and F-Block licenses be offered exclusively to designated entities, essentially small businesses. C-Block spectrum is offered in 30 MHz and 15 MHz licenses and F-Block spectrum is offered in 10 MHz licenses. The licenses being offered in the upcoming re-auction include some of the nation's most populous markets, and are largely drawn from licenses previously held by NextWave Personal Telecommunications, Inc. (NextWave). The FCC proposes dividing the 30 MHz C-Block licenses into three licenses of 10 MHz each, and proposes lifting the small-business eligibility restrictions on some C-Block licenses, as well as all F-Block licenses. Advocacy opposes the FCC's proposal to open the C- and F-Blocks to bidding by large companies. However, should it do so nonetheless, the FCC

¹ Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305 to represent the interests of small business within the Federal government. See 15 U.S.C. §§ 634 (a)-(g), 637. Advocacy serves as a focal point for concerns regarding the government policy as it affects small business. Advocacy develops proposals for changes in Federal policy and communicates proposals to the Federal agencies. See 15 U.S.C. § 634(c)(1)-(4).

should open fewer licenses to large business bidding than the FCC proposes in its FNPRM.

1. The FCC offers no reason to depart from its current policy, and should not do so.

Discussion surrounding C-Block eligibility issues has been underway for some months, within the context of petitions for waiver of the rules filed by SBC Communications Inc. (SBC) and Nextel Communications, Inc. (Nextel).² These companies raised long-standing arguments that changes in the industry and experience with the C-Block auction process make the designated entity set-aside undesirable and demonstrate that small business cannot compete in the wireless communications marketplace. Advocacy has argued that the only change that has occurred since the FCC last reiterated the set-aside policy has been the successful C-Block re-auction to designated entities.³ In fact, since the FCC eliminated installment payments for the C-Block, and successfully re-auctioned licenses in this spectrum, not one additional licensee has declared bankruptcy or failed to provide competitive services. SBC's and Nextel's arguments, in Advocacy's view, thinly disguise their desire for more spectrum, nothing more.

Advocacy has anxiously awaited the FCC's views on the subject. Originally, the FCC established the designated entity set-aside and has since assiduously defended it against Nextel's multiple attempts to gain C-Block spectrum. As the FCC has repeated throughout the C-Block licensing process, small businesses need help gaining access to spectrum in order to provide competitive wireless services; PCS spectrum is in such demand that bidding credits alone would be insufficient to permit small business to compete at auction with heavily capitalized large

² See Petition of SBC Communications Inc. for Waiver of the Eligibility Requirements of 47 C.F. R. § 24.709 for the PCS Frequency Blocks C and F Auction to Begin on July 26, 2000 ("SBC Petition"), DA 00-191, January 21, 2000, Petition for Expedited Rulemaking or, in the Alternative, Waiver of the Commission's Rules ("Nextel Petition"), DA 00-191, January 31, 2000.

³ See Comments in Opposition, filed by Advocacy, DA 00-191, February 22, 2000, Reply Comments, filed by Advocacy, DA 00-191, March 1, 2000, letter filed by Advocacy, DA 00-191, April 10, 2000, and Comments in Opposition, filed by Advocacy, WT Docket No. 97-82, April 17, 2000.

entities.⁴

But this time, the FCC seems to accept the arguments of SBC, Nextel, and others, that times have changed and the eligibility restrictions should be loosened.⁵ The FCC offers scant reason for accepting, without specific and explicit information, the views of the large companies. The FCC offers no sound public policy reason for eliminating or loosening eligibility restrictions on any C- and F-Block license.

The FCC finds that few small businesses are actually providing service and that many C-Block licenses have become subject to bankruptcy proceedings.⁶ But this occurred before the FCC amended its rules to eliminate installment payments. The FCC offers no new data on the small business PCS picture since it amended its rules and offered defaulted C-Block licenses for re-auction. In point of fact, no small business has declared bankruptcy since the re-auction, all have paid for their licenses in full, and many are rolling out services. The only circumstance that has changed is the FCC's removal of installment payments, which has created a climate in which small PCS firms can offer competitive services.

Moreover, while the FCC finds limited small business success in the top twenty markets, it does not consider that many of the top licenses were held by NextWave and thus have been out of reach of other potential licensees. Based on one business's failure, then, the FCC seems to find truth in big business's argument that Los Angeles is no place for rural folk. The FCC needs

⁴ See Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82 (1998), Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order, WT Docket No. 97-82 (1998), Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order, WT Docket No. 97-82 (1997), and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order, PP Docket No. 93-253 (1994).

⁵ The FCC states, "Since 1994, circumstances in the industry have changed. In light of significant technology developments and increased demand for spectrum, it is appropriate for the Commission to consider reassessing the proper balance of its spectrum policies." FNPRM, paragraph 25.

⁶ See FNPRM, paragraph 20.

more specific evidence before making such drastic policy changes.

The FCC cites increased demand for spectrum and changes in technology as sound reasons to allow big business a shot at C-Block licenses.⁷ This implies that demand for spectrum or swift technology development comes as a surprise and was not to have been anticipated. But big businesses have wanted this spectrum all along, as evidenced by the tireless efforts Nextel has made over the years to get its hands on the C-Block. While it is true that wireless spectrum is in great demand, that is no reason to place greater value on the needs of large business. New spectrum will soon find its way into the hands of the large providers, interested in providing nationwide service with advanced “3G” technologies. They do not need the C-Block as well.

The FCC suggests that bidding credits will be sufficient to assure small business access to PCS spectrum.⁸ This is a turnaround from prior FCC findings that bidding credits are not sufficient for PCS because of the large sums of money involved.⁹ The FCC offers no reason why this previous finding is no longer valid. Why is the FCC reluctant to make its reasoning transparent? Could it be that there is no rationale?

The FCC should give its past C-Block remedies a chance to work. In response to the financial trouble experienced by many small licensees after the original auction (which was perhaps due to easy money and irresponsible bidding), the FCC decided to eliminate installment payments. The FCC then retrieved and re-auctioned the defaulted licenses. While it may be too early to declare small business PCS a success, the re-auction was successful, and the licensees paid for their licenses and are rolling out service. The NextWave bankruptcy has grabbed

⁷ See FNPRM, paragraph 26.

⁸ See FNPRM, paragraph 16.

⁹ See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order, WT Docket No. 97-82 (1998), paragraph 16, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraphs 16, 121.

headlines but does not change the fact that the FCC's remedy appears to have prevented a repeat of the financial difficulties that beset the first batch of C-Block licensees. NextWave and other bankrupts have failed spectacularly, but small business has not failed. The FCC should give small businesses a chance to get their systems running after the last re-auction, before attempting a more disruptive change to its rules. The FCC should offer NextWave's licenses for re-auction according to its existing rules.

2. If the FCC changes its rules, it should open bidding on fewer licenses than proposed, and increase bidding credits for small and very small businesses.

Advocacy believes the FCC should not alter its C- and F-Block eligibility rules. No party, including the FCC, has demonstrated the necessity of such a change. While large service providers may be experiencing a spectrum shortage, this is no reason to cut the heart out of small business PCS. For these reasons, Advocacy is absolutely opposed to any modifications to the current C- and F-Block eligibility restrictions. Advocacy would only consider modifying this total opposition if the FCC adopts more modest changes than it proposes, as outlined below.

If the FCC insists on permitting large businesses to alleviate congestion with C-Block spectrum, it should make fewer licenses available to large businesses than it proposes in its FNPRM. And it should increase bidding credits for open licenses, as it proposes. If the largest markets are where spectrum shortages are most acute, this is where the FCC should open bidding, and modestly. The FCC should not open licenses in every market, and should limit the amount of open spectrum it offers in the largest markets.

a. The FCC should open bidding for only 10 MHz in the very largest markets.

The FCC proposes opening two of three 10 MHz licenses to big business bidding in all markets with populations of 2.5 million or more persons, the top 17 markets. The FCC should raise this threshold, to permit big businesses to bid in fewer markets. The FCC also should

permit open bidding on only 10 MHz of spectrum in these top markets. The FCC should preserve the remaining 20 MHz as a single license, for exclusive bidding by designated entities. The FCC has presented no evidence to indicate that small businesses cannot provide wireless services to the largest markets in the country. Many of the large-market licenses have been held up in bankruptcy, so it is difficult to predict whether a small business can compete. But it is impossible to conclude that small business cannot compete in these markets. In light of this dearth of evidence, the FCC should minimize its loosening of bidding restrictions and leave a full 20 MHz for designated entities in the largest markets.

The FCC should find a middle ground between accommodating big business spectrum needs in these most populous markets and encouraging small business entry into these same markets. 20 MHz, rather than 10 MHz, is a more appropriate amount of spectrum with which to start a new business, as it permits a full range of wireless voice and data services. 10 MHz is suitable for providing more limited services and is an adequate amount for spectrum relief. The FCC need not encourage large businesses to establish new PCS businesses in these largest markets; other spectrum offerings, such as the upcoming “3G” auction, will be available for building new nationwide services. The FCC’s aim should be to provide some spectrum relief for service providers that may be experiencing congestion on existing systems, yet continue to promote diversity among license holders.¹⁰

Thus, Advocacy recommends that the FCC reserve 20 MHz for designated entities in the top markets and permit large businesses to bid on 10 MHz in these same markets. Current bidding restrictions should remain in effect for licenses in all smaller markets.

¹⁰ In this regard, Advocacy does not oppose the FCC’s proposal to permit open bidding on previously unsold 15 MHz C-Block licenses. If there is no demonstrated interest in these licenses by designated entities, it is appropriate to use these licenses for spectrum relief as well.

b. The FCC should prohibit open bidding on licenses in all smaller markets.

The FCC proposes open bidding on one of three 10 MHz licenses in markets with populations under 2.5 million persons.¹¹ But spectrum shortages justify loosening PCS bidding restrictions, if at all, in only the very largest markets.¹² Those markets with the highest populations and highest percentages of wireless customers have experienced service limitations due to inadequate spectrum, and this may be a serious problem. But this does not justify widespread big business participation in the C-Block. Small business can bring increased competition to even these largest markets, and the introduction of another wireless service provider in these markets would ease spectrum shortages just as surely as giving additional spectrum to existing licenses would.

There is no evidence that small businesses cannot compete in the PCS marketplace, even in the big cities. Thus, spectrum relief and assuring access to spectrum for small business are competing demands, and should be accommodated with care. Spectrum relief should only occur in the largest markets, where it is most needed, and then only to the extent it will not impede the FCC's and Congress's goal to distribute wireless licenses among a variety of applicants, including small businesses and businesses owned by minorities and women.¹³ In smaller markets, where spectrum shortages are not as acute, the FCC should not alter current C-Block eligibility, and should retain the single 30 MHz C-Block license.

c. The FCC should prohibit open bidding for F-Block licenses.

The FCC proposes open bidding for all F-Block licenses.¹⁴ The FCC presents no reason for abandoning eligibility for F-Block licenses. The FCC indicates that the F-Block has been free of the difficulties that have plagued the C-Block. The logical conclusion from this statement

¹¹ See FNPRM, paragraphs 28. 30.

¹² Again however, Advocacy would not oppose bidding credits on unsold 15 MHz licenses, even in smaller markets.

¹³ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994).

is that the F-Block should be left alone, but the FCC draws the opposite conclusion, apparently forgetting that it proposes loosening C-Block eligibility in part *because* of the problems that licensees of that spectrum have faced.¹⁵ If the C-Block had not experienced widespread defaults, the FCC would not be exploring changes to the rules. Therefore, the FCC should not entertain changes to the rules for the relatively trouble-free F-Block.

d. The FCC should raise bidding credits for all licenses subject to open bidding.

The FCC proposes to raise its bidding credits for small businesses from 15 percent to 25 percent and its credits for very small businesses from 25 percent to 40 percent.¹⁶ The FCC has repeatedly indicated that the high capitalization requirements of PCS render bidding credits inadequate to permit small businesses to compete at auction with large businesses.¹⁷ Only setting aside a portion of PCS spectrum would assure that small businesses have a realistic opportunity to enter the PCS market and compete for customers. Nonetheless, the FCC seems inclined to remove the set-aside, at least for some licenses. Therefore, Advocacy supports the FCC's proposal to increase bidding credits, in an effort to provide something of a level competitive playing field for small business. If the FCC also takes Advocacy's recommendation to permit open bidding for only 10 MHz in just the largest markets, increasing bidding credits for these 10 MHz may be adequate to assure that small business has a reasonable opportunity to

¹⁴ See FNPRM, paragraph 31.

¹⁵ Perhaps the FCC is operating throughout this proceeding upon the unsupported premise that set-aside is not necessary to assure small business participation in PCS. The FCC does state, with regard to the smoother F-Block, "Accordingly, we may not be faced with the same equity considerations in maintaining a set-aside of F block spectrum as we are for the C block." FNPRM, paragraph 31. This non sequitur suggests that the C-Block problems are the "equity considerations" for maintaining the set-aside. But these problems form the FCC's argument for *loosening* the set-aside. In fact, the set-aside is based on the congressional policy to encourage diversity among license holders. The FCC repeatedly has found that bidding credits are insufficient to assure small business access to PCS spectrum. The FCC does not explain its change in policy.

¹⁶ See FNPRM, paragraph 41.

¹⁷ See footnotes 3 and 8.

compete in the PCS marketplace.

3. Conclusion

Advocacy is disappointed that the high-profile failure of NextWave and others to pay for their licenses has brought the FCC to the point of changing its well-reasoned C- and F-Block designated entity policy. The FCC offers no sound reasons for changing its policy. The C-Block bankruptcies have tied up many valuable licenses for years, perhaps exacerbating spectrum shortages but certainly keeping service from the public for far too long. But the fact of the matter is that the FCC has already resolved the problem, by removing installment payments. The FCC has successfully re-auctioned initial defaulted licenses to small businesses that have responsible financing and that are providing service or preparing to. The FCC should permit this modest but important rule change to bear fruit. Until recently, NextWave has managed to hold onto its vast number of licenses, which includes many large markets. This has obscured the fact that the FCC's amended C-Block rules have already effected a successful re-auction of PCS C-Block spectrum, exclusively to designated entities. The FCC should not abandon its commitment to small business PCS because of fatigue over its long fight with one licensee. The FCC should not change its C-Block rules at this time.

If the FCC insists on using the C-Block to provide spectrum relief to large service providers, despite providing no rationale, Advocacy will consider tempering its opposition only if the FCC permits open bidding on only 10 MHz in the very largest markets. This would preserve small business's ability to enter PCS markets and bring competitive and innovative services to the public, while allowing existing service providers and their customers relief from congestion.

Respectfully submitted,

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June 22, 2000

APPENDIX B
Letter comments filed April 10, 2000

April 10, 2000

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Petition for Waiver of Eligibility Requirements for the
Personal Communications Services (PCS) Frequency
Blocks C and F Auction to Begin July 26, 2000; DA 00-191

Dear Ms. Salas:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) opposes elimination of designated entity eligibility requirements that the Federal Communications Commission (Commission) established for the PCS C and F Blocks.¹ No party has presented any reason for the Commission to abandon its well-reasoned and long-standing C-Block licensing scheme. In fact, sound public policy, as well as Commission precedent, compel the continuation of these eligibility restrictions, which are designed to ensure that designated entities (including small businesses and women- and minority-owned businesses) have an opportunity to compete for the provision of wireless services. Therefore, for the upcoming C and F Block re-auction, the Commission should retain restrictions limiting eligibility for those licenses to designated entities, for all licenses in all markets.

SBC Communications Inc. (SBC) has presented a “compromise” position, according to which the Commission would permit non-designated entity bidding eligibility for any market with a population of 700,000 or more persons.² For all other markets, the Commission would waive its rules limiting non-designated entity investment in designated entity companies.³ US WEST Wireless, LLC and Sprint Spectrum dba Sprint PCS have suggested dividing the 30 MHz C-Block licenses into three 10 MHz licenses (and permitting large companies to bid on the licenses), arguing that the resulting increase in total licenses will increase small business opportunity to obtain spectrum licenses.⁴

These positions are not compromises at all. SBC’s new position would relegate small businesses to only those markets deemed undesirable to large businesses, just as surely as SBC’s original proposal to permit non-designated entity bidding in all markets. Under SBC’s “compromise”, a large business could bid on its own for any market above 700,000 persons, and could obtain a controlling interest in a designated entity applicant for any smaller market the

¹ See *Comments of Advocacy*, dated February 22, 2000 and *Reply Comments of Advocacy*, dated March 1, 2000.

² See *Ex Parte Presentation; C&F Block Auction; DA 00-191 & DA 00-318*, dated March 21, 2000.

³ *Id.*

⁴ See *Petition for Reconsideration (Expedited Action Requested)*, WT Docket No. 97-82, dated April 4, 2000.

large company might desire. This is equivalent to permitting non-designated entities to bid for any market or license.

Similarly, increasing the number of licenses as a way of increasing small business opportunity is illusory. Any large business interested in any 10 MHz license in any market will successfully bid for that license against any small business. Therefore, designated entities could obtain only those licenses desirable to no large business.

The Commission recognizes that small businesses cannot prevail at auction against large companies.⁵ The Commission found that to fulfill Congress's mandate of increasing competition, it must assure designated entities have access to PCS spectrum.⁶ The Commission saw that bidding credits would be insufficient to compensate for the large sums of money that PCS licenses would likely command.⁷ Therefore, the Commission set aside PCS spectrum for exclusive access by designated entities.⁸

Experience has proved the Commission right. PCS spectrum has produced astonishing revenue for the federal treasury. And this spectrum continues to hold value and attract big money.⁹ And in the course of a prior re-auction of C-Block PCS spectrum, the Commission reiterated (not for the first time) that designated entities must have exclusive access to the C- and F-Blocks, if they are to have any opportunity to compete to provide PCS services.¹⁰

No new development alters the Commission's analysis. Several C-Block licensees have been unable to pay for their bids. But in response to these repayment problems, the Commission eliminated its installment payment plan, which may have contributed to excessive bidding in the original PCS C- and F-Block auction. Since then, the Commission has successfully re-auctioned C- and F-Block licenses, for reasonable sums, to licensees who have paid for their licenses in full. Many of these licensees are providing service, and many more will begin to in the coming months. The Commission's C-Block policies are beginning to bear fruit, as even SBC concedes.¹¹

⁵ See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order*, PP Docket No. 93-253 (1994). The Commission recognizes that auctions erect barriers to participation by designated entities by raising the cost of entry into spectrum-based services. *Id.*, paragraph 9.

⁶ Congress seeks to diversify the telecommunications marketplace and discourage concentration of licenses among a few companies. See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order*, PP Docket No. 93-253 (1994). Congress believes that disseminating licenses among various applicants, including small businesses, minority-owned businesses, and women-owned businesses, will increase competition for telecommunications services. *Id.*

⁷ *Id.*, paragraph 96.

⁸ *Id.*, paragraph 12.

⁹ Chairman Kennard expects the licenses formerly held by NextWave Personal Telecommunications, Inc. to sell for as high as \$10 billion. See *Communications Daily*, February 14, 2000, vol. 20, number 29.

¹⁰ See *Installment Payment Financing for Personal Communications Services (PCS) Licenses, Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82 (1988). See also, *Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Report and Order*, WT Docket No. 97-82 (1987); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order*, PP Docket No. 93-253 (1994).

¹¹ See *Petition of SBC Communications Inc. for Waiver of the Eligibility Requirements of 47 C.F.R. §24.709 for the PCS Frequency Blocks C and F Auction to Begin on July 26, 2000*, DC 00-191, dated January 21, 2000.

This is no time to abandon the Commission's C-Block eligibility restrictions, for any market. To do so would eliminate the chance that any additional designated entities will enter the PCS marketplace, and would seriously damage those designated entities that are currently licensed on this spectrum.

No matter how the Commission slices it, no small business will be able to obtain any PCS license in any market valued by large companies, if the Commission relaxes its eligibility standards for C- and F-Block licenses. This is true for all markets. Permitting large businesses to bid for C- and F-Block licenses in the most populous markets will assure that only large businesses will obtain these licenses, if they want them. Permitting large businesses to obtain control of designated entity applicants for all other markets will assure that only large business-controlled entities will obtain these licenses, if they want them.

The Commission should retain its designated entity restrictions, without reservation, for the upcoming C- and F-Block re-auction. Only through diversity will competition come to PCS. The Commission should ignore the avarice of the telecom giants, ignore the allure of enormous bids, and stay its present course. Only then will the nation achieve Congress's goal of diversity and competition in telecommunications services.

Respectfully submitted,

Jere W. Glover
Chief Counsel for Advocacy

R. Bradley Koerner
Assistant Chief Counsel for Telecommunications

cc: Chairman Kennard
Commissioner Ness
Commissioner Furchtgott-Roth
Commissioner Powell
Commissioner Tristani
Kathleen O'Brien Ham

Amy Zoslov
Francisco Montero

APPENDIX C
Reply Comments filed March 1, 2000

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

In the Matter of)	
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Petition of SBC Communications Inc. for the)	DA 00-191
Waiver of the Eligibility Requirements of)	
47 CFR Section 24.709 for the PCS)	
Frequency Blocks C and F Auction to)	
Begin on July 26, 2000)	
)	
Reauction of Certain C and F Block Broadband)	
PCS Licenses; Petition by Nextel Communications,)	
Inc. for Expedited Rulemaking or, in the)	
Alternative, Waiver of the Commission’s Rules)	
)	

Reply Comments

The Office of Advocacy of the United States Small Business Administration (“Advocacy”) opposes the petition for waiver filed by SBC Communications Inc. and the petition for expedited rulemaking or waiver filed by Nextel Communications, Inc., (collectively “Petitioners”). Permitting large companies to bid in the upcoming re-auction of Personal Communications Services (“PCS”) C- and F-Block licenses would drive small businesses from the telecommunications marketplace. Such a course would harm small business, both as service providers and as customers, would delay – not speed – service to the public, and would deter competition. The Commission’s PCS designated entity policies have begun to succeed, as the last auction of PCS C-Block spectrum demonstrates. Greater success is likely. But abandoning small business exclusivity would encourage further concentration of the telecommunications services, contrary to Congress’s goal of disseminating licenses among a variety of licensees in order to promote competition, innovation, and diversity in telecommunications.

Strong public policy reasons urge the Commission to retain its current designated entity

rules. Congress encourages diversity in the telecommunications marketplace and discourages concentration of many licenses among few companies, so that competition and innovation flourish.¹ Congress believes disseminating spectrum licenses among a variety of applicants, including small, minority, and women owned businesses, will increase competition and bring innovative technologies to the American consumer.²

The Commission has pursued policies that fulfill Congress's mandate. To ensure that designated entities have a realistic opportunity to obtain broadband PCS licenses, the Commission set aside the C- and F-Blocks for exclusive participation by small businesses.³ The Commission recognizes that small entities stand little chance of acquiring licenses if required to bid against large companies.⁴ Thus, to prevent the auction process itself from becoming a barrier to small business entry, the Commission reserved a portion of the available spectrum for the exclusive use of small businesses.⁵

The Commission's designated entity policies are succeeding. A few companies failed to pay for licenses for which they bid too high, but the Commission has eliminated its installment plan, reclaimed defaulted licenses, and successfully re-auctioned PCS C-Block spectrum to designated entities. All these bidders have paid for their licenses, and many have launched subscription services to customers. Many more are poised to do so in the coming months.

Petitioners suggest that the Commission's PCS designated entity provisions are anti-competitive. The opposite is true. The designated entity provisions increase the variety of market participants. This increases competition and brings innovative products to the

¹ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994).

² Id.

³ Id.

⁴ Id.

⁵ Id.

marketplace. This benefits customers, including small business customers, by increasing consumer choice, improving service quality, and offering products tailored to customer needs. The rules also permit wide latitude for large companies to form strategic partnerships with small businesses;⁶ such collaborations are bringing competitive services to customers. Thus, the designated entity rules increase the variety of market players and service offerings, and increase competition.

Petitioners offer no public policy reasons for altering the Commission's designated entity principles. Petitioners offer NextWave Personal Telecommunications, Inc.'s bankruptcy as an indictment of small business competitiveness and the Commission's designated entity plan. This is a smoke screen, designed to disguise the fact that these big businesses want more spectrum. But ceding to their wishes would have profound, negative, public policy consequences. Surrendering the PCS C-Block would *encourage* concentration in telecommunications, the exact opposite of Congress's desire in enacting the Telecommunications Act of 1996. This would give big business a lock on wireless spectrum, would eliminate the chance that another small business would ever again be licensed on any PCS spectrum valued by a large business, would wreak havoc with financing of current small business licensees, and would limit the quality and variety of wireless services available to consumers.

Big business has more than enough wireless spectrum. Big businesses operate the vast majority of PCS licenses, on the A-, B-, D-, and E-Blocks. And the rules permit large businesses to partner with designated entities competing for C- and F-Block licenses. In addition, the Commission is about to offer spectrum at 700 MHz, for 3G technology, in an auction ideally suited to large-footprint operations and not subject to spectrum caps on commercial mobile radio

⁶ See 47 CFR § 24.709 (1998).

services.⁷ Large business is limping right along despite the PCS designated entity provisions.

Small businesses are crucial to the American economy. They are a chief force for experimentation, innovation, new technology, and economic growth. Small businesses form a large proportion of the American customer base, employ most of the labor force, and create almost all new jobs. Small business also is the primary mechanism for entry to the American economy for millions of people, including minorities, women, and immigrants, who historically have had few opportunities to share the American dream.

The designated entity provisions benefit consumers and benefit competition, and are succeeding. And the upcoming re-auction promises to be as successful, if not more so, than the last one; the licenses at stake cover some of the largest markets in the country, and financing appears abundant. Thus, the Commission should offer these licenses to designated entities, without the availability of installment financing, in exact accordance with its well-reasoned policies and the expectations of the telecommunications and small business communities.

Respectfully submitted,

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Chief Counsel for Advocacy

R. Bradley Koerner
Assistant Chief Counsel
for Telecommunications

March 1, 2000

⁷ See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, First Report and Order, WT Docket No. 99-168, released January 7, 2000.

APPENDIX D
Comments filed February 22, 2000

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

In the Matter of)	
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)	
Petition of SBC Communications Inc. for the)	DA 00-191
Waiver of the Eligibility Requirements of)	
47 CFR Section 24.709 for the PCS)	
Frequency Blocks C and F Auction to)	
Begin on July 26, 2000)	
)	
Reauction of Certain C and F Block Broadband)	
PCS Licenses; Petition by Nextel Communications,)	
Inc. for Expedited Rulemaking or, in the)	
Alternative, Waiver of the Commission's Rules)	
)	

Comments in Opposition

The Office of Advocacy of the United States Small Business Administration (“Advocacy”)¹ files these comments in opposition to a petition for waiver filed by SBC Communications Inc. (“SBC”) and a petition for expedited rulemaking or waiver filed by Nextel Communications, Inc. (“Nextel”), each seeking big business participation in the upcoming re-auction of Personal Communications Services (“PCS”) C-Block licenses, which have been set aside for the exclusive use of small business.

1. Summary and introduction.

For years, Nextel has been circling the C-Block, attempting to sink its teeth into this valuable spectrum. Now, as the Federal Communications Commission (“Commission”) prepares to re-auction a large number of C-Block licenses cancelled for non-timely payment, Nextel is

¹ Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305 to represent the interests of small business within the Federal government. See 15 U.S.C. §§ 634 (a)-(g), 637. Advocacy serves as a focal point for concerns regarding the government policy as it affects small business. Advocacy develops proposals for changes in Federal policy and communicates proposals to the Federal agencies. See 15 U.S.C. § 634(c)(1)-(4). Advocacy also has a statutory duty to monitor and report to Congress on the Commission’s compliance with the RFA.

trying again. Nextel and SBC asks the Commission to reverse its well-reasoned and thoughtful prior rulings so that they can expand their spectrum and services. Nextel and SBC hope to persuade the Commission that small business has no place competing with big business in the provision of broadband PCS.

Nextel and SBC regurgitate arguments that have been raised in the past, arguments the Commission has repeatedly and rightly rejected, to persuade the Commission essentially that failure by NextWave Personal Telecommunications, Inc. (“NextWave”) to pay for its licenses demonstrates that small business cannot compete.² But NextWave’s failure to pay for its licenses on time does not mean, as Nextel argues, that small business has been afforded a realistic opportunity to provide broadband PCS services or that small business should no longer be granted exclusive access to the C-Block. Nor does it indicate that other small businesses, upon re-auction, would bid sums they cannot afford. In fact, the Commission’s experience from past spectrum re-auctions belies this. Since eliminating installment payments, C-Block licensees have paid for their licenses and many are providing competitive services to customers.

SBC and Nextel argue that their participation in the re-auction will spur competition. This is incorrect. Quite the opposite will occur. SBC is one of the largest PCS operators in the country. 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 like SBC continue to merge with other communications service providers.

Increasing the variety of market participants, by including small business, will increase competition on the supply side of the equation. Increasing competition will bring innovative

² NextWave’s licenses constitute the bulk of the spectrum that the Commission plans to re-auction this summer.

products to the marketplace. As for small businesses as customers, when they have but a few large service providers to choose from, their product and service choices are limited and the cost of service is high. High cost and poor service choice have a significant negative affect on small businesses as customers. Small businesses represent ninety-five percent of all American businesses, and small businesses tend to have limited resources, which renders them vulnerable to high prices. Thus, small business customers are in particular need of the benefits of competition in telecommunications, to lower prices and increase choice.

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 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. And the Commission's public policy goal of promoting a competitive marketplace, a premise of the Entrepreneurs' Block, remains valid.

The Commission should not be swayed by argument that re-auction to small business entrepreneurs will not yield the \$8 billion that Nextel would pay for NextWave's licenses. It is unclear what price these licenses will bring upon re-auction, but maximizing revenue is not the goal of the C-Block. Excluding unlimited large business resources is precisely the point of insulating the C-Block. Small business is bringing competition to broadband PCS markets. This trend can and will continue, as existing systems grow their customer base, as new licensees launch systems, and as the Commission re-auctions additional licenses to small businesses. But this trend will stop, and broadband PCS will become the sole domain of large companies, if the Commission pits small business against large business in bidding competition. The Commission should preserve the integrity of its auction processes by offering the subject licenses to small business in accord with its existing rules.

To summarize, 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 foster 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.

2. Small business needs exclusive access to spectrum to compete in PCS.

Nextel and SBC argue that small business has difficulty attracting capital. Advocacy agrees, as do Congress and the Commission: “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.””³ 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.⁴

The Commission interpreted this congressional mandate to require it to take steps “necessary to ensure that designated entities have a realistic opportunity to obtain broadband PCS licenses.”⁵ 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.”⁶

Thus, the Commission set aside the C- and F-Blocks for exclusive participation by small

³ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11.

⁴ 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.

⁵ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 9.

⁶ Id., paragraph 10.

businesses.⁷ In past auctions, the Commission had used other methods, like bidding credits, to ensure small business participation. But it recognized that bidding credits would not be enough to ensure participation by small business in the provision of broadband PCS, “because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high.”⁸ The Commission did “not think bidding credits in an uninsulated block would have a meaningful effect.”⁹ 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.”¹⁰ And permitting large companies to outbid small businesses would “frustrate Congress’s goal of disseminating licenses among a diversity of licenses.”¹¹ 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”.¹²

3. The Commission should not deviate from its small business public interest goals.

Nextel and SBC argue the Commission should abandon its policy reserving the PCS C-

⁷ Id., paragraph 12.

⁸ Id., paragraph 96.

⁹ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 131.

¹⁰ Id., paragraph 121.

¹¹ Id., paragraph 123. At least twice in the past, Nextel has asserted that the Commission can provide adequate opportunity to small business through bidding credits. This “would allow [small business] to compete with larger entities that may choose to bid on these returned licenses and would further the public interest by assigning the returned C Block licenses to those who value them most highly and can expeditiously put them to the highest and best use.” Comments of Nextel Communications, Inc., WT Docket No. 97-82, November 13, 1997, page 5. The Commission disagrees.

¹² Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 123.

Block for small business. They argue that market changes since 1994 have altered the Commission's fundamental assumptions about small business competitiveness. But on multiple occasions in the past, the Commission has rejected similar arguments and has repeatedly reaffirmed the C-Block set-aside.¹³ In 1994, the Commission stated,

We do not accept . . . that we should do away with the entrepreneurs' blocks and instead offer bidding credits . . . [I]n our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against. Without the insulation of the entrepreneurs' block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS.¹⁴

Three years later, the Commission determined that "no party has provided a convincing rationale for deviating from the public interest goals articulated by the Commission [and] the Commission affirms its ruling . . . to limit eligibility . . . to applicants meeting the current definition of "entrepreneur"."¹⁵ In August, 1998, the Commission again affirmed its commitment to the entrepreneur's block, again rejecting the arguments Nextel and SBC raise in this proceeding:

Nextel argues that a restricted auction skews the marketplace and that the increasing level of competition in the wireless arena makes it less likely that small business entrepreneurs can survive. According to Nextel, the Commission could enable small businesses to bid competitively by providing them bidding credits No other commenter supports Nextel's views, and several parties oppose them. As stated, we recently denied Nextel's request . . . and the record in this proceeding provides us with no basis to alter our decision.¹⁶

Nextel and SBC again argue that the Commission's original assumptions about small

¹³ See Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82 (1998), Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order, WT Docket No. 97-82 (1997), and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order, PP Docket No. 93-253 (1994).

¹⁴ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order, PP Docket No. 93-253 (1994), paragraph 16.

¹⁵ Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82 (1998), paragraph 56.

¹⁶ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications

business have changed. But the Commission did not think so in 1994, nor in 1997, nor in 1998. Instead, it has consistently rejected this argument, and nothing relevant has changed in the last two years. The only factors that have changed are these: successful C-Block re-auction to small businesses, increasingly contentious bankruptcy developments, and Nextel's offer to pay \$8 billion for NextWave's licenses. Only the first of these factors would seem to bear on the Commission's public policy conclusions regarding entrepreneur's use of the C-Block, and this factor *supports* the continued insulation from big business bidding competition.

Nextel and SBC argue that the experience with NextWave shows that small business cannot compete against large business in the provision of services such as broadband PCS. But NextWave's failure to satisfy the Commission's payment requirements is no reason to abandon Congress's goal that small business be afforded the opportunity to compete for wireless telephone customers. 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. 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 are bringing competitive PCS services to the marketplace.

SBC states, "Allowing a non-designated entity like SBC to participate will encourage successful entry of smaller companies because it will increase the likelihood that they will only attempt to enter the markets where they can be competitive."¹⁷ SBC also claims that "[o]pening

Services (PCS) Licensees, Fourth Report and Order, WT Docket No. 97-82 (1998), paragraph 16.

¹⁷ Petition of SBC Communications Inc. for Waiver of the Eligibility Requirements of 47 C.F.R. § 24.709 for the PCS Frequency Blocks C and F Auction to Begin on July 26, 2000 ("SBC Petition"), DA 00-191, January 21, 2000, page ii. Nextel agrees with this outrageous proposition: "expanding participation . . . to companies other than designated entities will in no way undermine their opportunity to participate in the reauction." Petition for Expedited Rulemaking or, in the Alternative, Waiver of the Commission's Rules ("Nextel Petition"), DA 00-191,

up the auction will not compromise the Commission’s policy of encouraging – on a viable basis – participation by smaller companies.”¹⁸ On the contrary, SBC’s participation would destroy the Commission’s policy of encouraging participation by smaller companies, except for confining them to markets of no interest to larger companies. Indeed, SBC indicates that large carriers might “focus on larger markets, which will require very substantial outlays of capital, while smaller companies might choose to focus on smaller markets that they can afford to enter”.¹⁹ Large businesses will secure all the spectrum they want because, as the Commission has correctly found, a small business cannot outbid a large business.²⁰

SBC argues that the C-Block set-aside caused small bidders to choose to enter markets where they could not compete. But SBC’s evidence for this view is not that these small bidders entered the market and failed to succeed against larger companies. Rather, the small bidders could not afford their licenses, because the ready availability of installment financing encouraged too-high bidding, or because the market price of the C-Block licenses plummeted soon after the auction, or because they simply overbid. In any event, now that installment payments are gone and C-Block licenses have been selling on re-auction to small bidders who can afford them, the upcoming re-auction is unlikely to see above-market bids or a new generation of NextWaves.

The results of previous re-auctions demonstrate that small business is interested in providing broadband PCS and is capable of competing with large business to do so. The

January 31, 2000, page 16. In fact, Nextel argues it “enhances” the ability of small business to participate. Nextel Petition, page 17. Nextel offers no real explanation how this is possible. In fact, Nextel’s proposed \$2 billion upfront payment and minimum opening bid for bulk bidding underscores how different a Big Business C-Block Auction would be from the successful C-Block re-auctions the Commission has conducted to date. See Nextel Petition, page 21. Nextel continues to urge that bidding credits are sufficient to ensure small business participation, but as noted, the Commission has repeatedly disagreed. See, e.g. Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order, WT Docket No. 97-82 (1998), paragraph 16.

¹⁸ SBC Petition, page 5.

¹⁹ SBC Petition, pages 16-17.

²⁰ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order,

licensing process has been slow, and PCS is still in its early stages of development, but a number of small operators have launched service in the last year and a half,²¹ and a dozen more plan to begin service in the coming months. Many of these companies will provide service to rural communities, despite Nextel's assertion that smaller companies will not serve these areas.²² And these licenses are all paid in full. Much of what went wrong on the C-Block can be attributed to installment payments. Since the Commission eliminated these, C-Block licensing has proceeded much more smoothly, and re-auction participants have bid amounts well within their means. Even SBC concedes that the Commission's small business policy has been working,²³ but it is important to note that this success has occurred within the context of C-Block exclusivity, not in an atmosphere of big-business bidding competition.

While many PCS markets still have but one or two operating PCS systems, issuing licenses to small businesses will bring competition to these markets as well. The Commission prepares to re-auction licenses for the nation's top markets, and it has a real opportunity to assure that small business has the chance to compete in these markets. To give these PCS licenses to big business, however, will forever drive small business from the largest cities. Thus, it is just as important as ever to provide opportunity for small business, and women and minority-owned business, to compete in the market by guaranteeing their access to spectrum.

4. Maximizing auction revenue is no valid reason to exclude small business from PCS.

Advocacy trusts that the Commission will not be swayed by Nextel's and SBC's deep

PP Docket No. 93-253 (1994), paragraph 121.

²¹ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Fourth Report, FCC 99-136 (rel. June 24, 1999), page 31.

²² See Nextel Petition, page 10. Nextel pledges to provide service to Native American tribal lands (see Nextel Petition, page 11), but large businesses have traditionally ignored service to low income and sparsely populated areas. In Advocacy's experience, local companies, with strong personal ties to the communities, are the ones who will provide telecommunications services, including wireless services, to tribal lands. See Comments of Advocacy, WT Docket No. 99-266, November 9, 1999.

pockets. Permitting big business onto the C-Block to maximize revenue would constitute the greatest imaginable violation of C-Block auction integrity, and would be a tortured interpretation of Congress's will.

But Chairman Kennard recently testified to the U.S. Senate Budget Committee that taxpayers might lose billions of dollars if the Commission accepted NextWave's offer to pay its entire debt of \$4.3 billion, instead of re-auctioning the spectrum.²⁴ In this regard, Chairman Kennard testified that the Commission is still considering Nextel's offer to pay twice this amount for the licenses;²⁵ he also judged the worth of the licenses to be as high as \$10 billion.²⁶ There also have been reports of staff discussions with Nextel regarding how much money Nextel would pay for NextWave's licenses and whether the spectrum should be transferred to Nextel.²⁷

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 re-auction to designated 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.²⁸ Issues of auction revenue generation are irrelevant to this objective. Congress directed the Commission to provide competitive opportunities for women, minorities, and small business. The commission decided that the way to do this for PCS

²³ SBC states, "Of course, some designated entities . . . have fared better than NextWave, so [the Commission's policy of encouraging viable small business participation] has already borne fruit." SBC Petition, page 5.

²⁴ Communications Daily, February 14, 2000, vol. 20, number 29.

²⁵ Id.

²⁶ Id.

²⁷ Communications Daily, September 30, 1999, vol. 19, number 189.

²⁸ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraph 11.

(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. Advocacy therefore urges the Commission to reject SBC's and Nextel's bankroll as a reason to abandon its still-valid small business goals.

5. Conclusion

Nextel and SBC offer no sound public policy reason for the Commission to deviate from its C-Block rules in order to permit big business participation in the upcoming re-auction. NextWave's failure to pay for its licenses does not impugn the ability of other small businesses to compete. Nor does it invalidate Congress's and the Commission's legitimate policy of affording small businesses the access to spectrum that will promote competition.

Market shifts and other factors have greatly complicated the fulfillment of Congress's and the Commission's goals for the C-Block, but the underlying rationale is even more strongly justified now. Large businesses so dominate the use of wireless spectrum that the C-Block is the only opportunity small businesses will ever have to compete in broadband PCS. Selling the licenses to Nextel or SBC will increase concentration, decrease competition, and further complete large business dominance of wireless telecommunications. Customers, including small business, will suffer. This will be the last opportunity for the Commission to help structure

competition in this emerging service market. This is no time for the Commission to throw up its hands and permit Nextel and SBC to push small business from the broadband PCS market. The Commission should not let its desire to achieve full value for its spectrum licenses blind it to the fact that small business and the marketplace need this spectrum in 2000 as much as they did in 1994. Entrepreneurial spirit is alive in this country, and small businesses are prepared to compete with Nextel, SBC, and other telecommunications giants.

Respectfully submitted,

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