

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

In the Matter of)
)
Nextel Communications Inc.'s Petition for)
Expedited Action to Modify the Auction Design for)
Auction No. 35, the C and F Block Reauction)
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ORDER

Adopted: December 14, 2000

Released: December 14, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a Petition for Expedited Action to Modify the Auction Design for Auction No. 35, the C and F Block Reauction ("Petition") filed by Nextel Communications, Inc. ("Nextel").¹ Nextel requests that the Wireless Telecommunications Bureau ("Bureau") revise the bidding procedures for Auction No. 35 to allow package (combinatorial) bidding.² For the reasons set forth below, we deny Nextel's Petition.

II. BACKGROUND

2. On January 12, 2000, the Bureau, pursuant to its delegated authority, announced the next auction of C and F block broadband Personal Communications Services ("PCS") licenses, Auction No. 35.³ The *January 2000 Public Notice* stated that Auction No. 35 would include 30 MHz and 15 MHz C block licenses, as well as F block licenses (all 10 MHz each), for operation on frequencies for which previous licenses had automatically cancelled or had been returned to the Commission.⁴ On March 3, 2000, the Bureau released a public notice seeking comment on reserve prices or minimum opening bids,

¹ See Petition for Expedited Action to Modify the Auction Design for Auction No. 35, the C and F Block Reauction filed by Nextel Communications, Inc. (filed November 6, 2000) ("Petition").

² *Id.* at 1.

³ See "Auction of C and F Block Broadband PCS Licenses; Notice of Auction Scheduled for July 26, 2000," *Public Notice*, 15 FCC Rcd 693 (2000) ("*January 2000 Public Notice*").

⁴ *Id.*

and the procedures to be used in Auction No. 35.⁵

3. The announcement of Auction No. 35 prompted petitions from a number of parties, including Nextel, asking that the Commission waive, modify, or eliminate its eligibility requirements for participation in the auction and make other modifications to the C and F block rules.⁶ The Commission sought comment on the issues raised in these petitions in a *Further Notice of Proposed Rulemaking* (“*Further Notice*”), released on June 7, 2000.⁷ Among the issues on which the *Further Notice* sought comment was Nextel’s “bulk bid” proposal under which the Commission would reconfigure the available 30 MHz C block licenses into separate 20 MHz and 10 MHz licenses and offer the newly created 20 MHz C block licenses and the available 15 MHz C block licenses together on a bulk bid (i.e., winner-take-all) basis.⁸

4. In the *C/F Block Sixth Report and Order*, the Commission, modified the auction and service rules for C and F block PCS licenses, but rejected Nextel’s bulk bid proposal, finding that there was no support for it in the record.⁹ The Commission stated its concern that bulk bidding would unduly favor Nextel to the possible exclusion of most other potential applicants.¹⁰ Instead, the Commission left to the Bureau, under its existing delegated authority, the final selection of a competitive bidding design and methodology for Auction No. 35, including the decision whether to implement a combinatorial bidding design for the auction.¹¹

⁵ See “C and F Block Broadband PCS Spectrum Auction Scheduled for July 26, 2000; Comment Sought On Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues,” *Public Notice*, 15 FCC Rcd 4702 (2000) (“*March 2000 Public Notice*”).

⁶ See e.g., “Wireless Telecommunications Bureau Seeks Comment on Nextel Communications, Inc.’s Petition Regarding PCS C and F Block Spectrum, Extension of Filing Deadline for Comments to SBC Communications Inc.’s Request for Waiver,” *Public Notice*, 15 FCC Rcd 2104 (2000); “Wireless Telecommunications Bureau Seeks Comment on SBC Communications Inc.’s Request for Waiver of the Eligibility Requirements for Participation in the Upcoming PCS C and F Block Auction,” *Public Notice*, 15 FCC Rcd 1953 (2000); “Wireless Telecommunications Bureau Sets Comment Schedule for Petitions for Reconsideration of the Order on Reconsideration of the Fourth Report and Order in WT Docket No. 97-82,” *Public Notice*, 15 FCC Rcd 6079 (2000).

⁷ See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Further Notice of Proposed Rulemaking*, 15 FCC Rcd 9773 (2000) (“*Further Notice*”).

⁸ *Further Notice*, 15 FCC Rcd at 9791, ¶¶ 34-35.

⁹ See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Person Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, FCC 00-313, at ¶ 36 (rel. August 29, 2000)(*inter alia*, Auction No. 35 and future C and F block auctions also reconfigured 30 MHz C block licenses into three 10 MHz licenses and removed eligibility restrictions for some 10 MHz C block licenses, all 15 MHz C block licenses, all F block licenses, and all C block licenses that were available but unsold in Auction No. 22 or any subsequent auctions)(“*C/F Block Sixth Report and Order*”).

¹⁰ *Id.* at ¶ 36.

¹¹ *Id.*

5. After release of the *C/F Block Sixth Report and Order*, the Bureau released a public notice providing a revised list of available licenses, and seeking comment on reserve prices or minimum opening bids, and procedures to be used in Auction No. 35.¹² In the *Auction No. 35 Comment Public Notice*, the Bureau proposed to use a simultaneous multiple round bidding methodology.¹³ Nextel did not file comments in response to this public notice, and no party that filed comments opposed this bidding methodology.¹⁴ The Bureau subsequently released the *Auction No. 35 Procedures Public Notice* on October 5, 2000, in which, *inter alia*, it adopted simultaneous multiple round bidding for Auction No. 35.¹⁵ The *Auction No. 35 Procedures Public Notice* set the short-form application deadline for November 6, 2000 and the commencement of the auction for December 12, 2000.¹⁶

6. On November 6, 2000, the same day that Auction No. 35 applicants were required to file their short-form applications, Nextel filed its Petition seeking to change the Auction No. 35 design to allow package bidding.¹⁷ In its petition, Nextel argues that recently announced spectrum swaps by incumbent PCS and cellular licensees AT&T Wireless Services, Inc., (“AT&T”), Cingular Wireless, L.L.C. (“Cingular”), Sprint Spectrum, L.P. (“Sprint”), and VoiceStream Wireless Corp. (“VoiceStream”) in major markets will largely satisfy their spectrum needs and allow those incumbents to bid on markets critical to new entrants.¹⁸ Nextel maintains that by such bidding the incumbent carriers will frustrate the new entrants’ efforts to aggregate sufficient spectrum to achieve a national footprint and become another nationwide PCS competitor.¹⁹ Nextel contends that the addition of package bidding to Auction No. 35, will

¹² See “C and F Block Broadband PCS Spectrum Auction Schedule for November 29, 2000 Rescheduled for December 12, 2000; Revised List of Available Licenses; Comment Sought on Reserved Prices or Minimum Opening Bids and Other Procedural Issues,” *Public Notice*, DA 00-2038, at 7 (rel. September 6, 2000) (“*Auction No. 35 Comment Public Notice*”).

¹³ *Id.*

¹⁴ Comments were filed by AT&T Wireless Services, Inc., BellSouth Corporation/SBC Communications, Inc., Verizon Wireless. Reply comments were filed by AT&T Wireless Services, Inc., BellSouth Corporation/SBC Communications, Inc.

¹⁵ See “C and F Block Broadband PCS Spectrum Auction Schedule for December 12, 2000; Notice and Filing Requirements for 422 Licenses in the C and F Block Broadband PCS Spectrum Auction, Minimum Opening Bids, Upfront Payments and Other Procedural Issues For Final Auction Inventory,” *Public Notice*, DA 00-2259, at 9 (rel. October 5, 2000) (“*Auction No. 35 Procedures Public Notice*”).

¹⁶ *Id.*

¹⁷ See Petition. See also Nextel Reply Comments and Oppositions on the Petition For Expedited Action to Modify the Auction Design for Auction No. 35, the C and F Block Reauction (filed November 22, 2000) (“Reply”). Nextel proposes that the Commission permit bidders to assemble packages of their own design, or, in the alternative, that the Commission either permit package bidding as adopted for Auction No. 31, in which bidders may bid on up to 12 packages, or specify a single package that includes one license in all open markets. See Petition at 10-11 n.28. See also Statement of Gregory L. Rosston In Support of Petition For Expedited Action To Modify The Auction Design For Auction No. 35 at 7 (“Rosston Statement”).

¹⁸ See Petition at 1-3, 6-8.

¹⁹ *Id.* at 3, 7; Reply at 2-3. See also Rosston Statement at 6. Footprint” is an industry term of art that refers to the total geographic area in which a wireless provider can offer service over its own facilities.

eliminate the exposure risk faced by a bidder that might win some but not all of its desired licenses, and would allow bidders to aggregate sufficient spectrum to achieve a national presence.²⁰ Nextel also argues that modifying the current bidding design for Auction No. 35 will not significantly delay the auction and will not adversely impact the interests of other participants in the auction.²¹ AT&T, Cingular, Sprint, VoiceStream, and Verizon Wireless (“Verizon”), each in separate filings, asked the Bureau to either dismiss Nextel’s Petition as untimely or procedurally defective, or, in the alternative, to deny the Petition on substantive grounds.²²

III. DISCUSSION

7. Most commenters argue that we should dismiss the Petition as an untimely request for reconsideration of the *C/F Block Sixth Report and Order*.²³ These commenters contend that the Petition is a late filed attempt to seek reconsideration of the Commission’s decision to reject Nextel’s bulk bidding proposal.²⁴ We disagree. Under Nextel’s original bulk bid proposal the Commission would have grouped together a number of reconfigured 20 MHz licenses with the available 15 MHz C block licenses and made them available to bidders solely on an “all-or-nothing” basis. This differs considerably from Nextel’s current request to allow auction participants to choose either to bid on individual licenses or on packages of licenses.²⁵ Thus, we think Nextel’s present package bidding proposal, while involving similar elements, is sufficiently distinguishable from its original bulk bid proposal that Nextel was not barred from advancing the former in a petition other than a petition for reconsideration of the *C/F Block Sixth Report and Order*.²⁶

In addition, while the Commission rejected Nextel’s original bulk bidding proposal, it left to the Bureau, under its existing delegated authority, the final selection of a competitive bidding design for Auction No. 35.²⁷ Therefore, Nextel’s current package bidding proposal would not properly have been a petition for

²⁰ See Petition at 3-5, 7-9; Reply at 5-6. See also Rosston Statement at 5-7.

²¹ See Petition at 6; Reply at 4. See also Rosston Statement at 7.

²² See Comments of AT&T Wireless Services, Inc. (filed Nov. 15, 2000) (“AT&T Wireless Comments”); Response of Cingular Wireless L.L.C. to Nextel’s Petition for Expedited Action (filed Nov. 13, 2000) (“Cingular Comments”); Sprint Spectrum Response to Petition, (filed Nov. 16, 2000) (“Sprint PCS Comments”); Comments of VoiceStream Wireless Corporation (filed Nov. 21, 2000) (“VoiceStream Comments”); Verizon Wireless Opposition to Nextel Petition For Expedited Action (filed Nov. 16, 2000) (“Verizon Comments”). Nextel filed its reply to these comments on November 22, 2000. See *supra* note 17.

²³ See Cingular Comments at 2-3; Sprint PCS Comments at 1-4; Verizon Comments at 1-2; VoiceStream Comments at 3-4.

²⁴ See Cingular Comments at 2; Sprint PCS Comments at 1-2; Verizon Comments at 1-2; VoiceStream Comments at 3; *C/F Block Sixth Report and Order* at ¶ 36.

²⁵ See Petition at 4 n.9, 6; Reply at 4. See also Rosston Statement at 7. Nextel proposes that we permit bidders to specify a number of packages or, in the alternative, that we pre-select a single package of licenses. Because both of these options would permit auction participants to bid on individual licenses, both options are essentially different from Nextel’s bulk bidding proposal.

²⁶ See Reply at 3-4.

²⁷ See *C/F Block Sixth Report and Order* at ¶ 36; Amendment of Part 1 of the Commission’s Rules — Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697-98, ¶ 16 (1997).

reconsideration of the *C/F Block Sixth Report and Order*, rather Nextel could have made its proposal in response to the Bureau's *Auction No. 35 Comment Public Notice*.

8. Many commenters also argue that we should dismiss Nextel's Petition as procedurally defective, because it is actually a request for reconsideration of the *Auction No. 35 Procedures Public Notice*.²⁸ These commenters contend that our rules preclude Nextel from seeking a reconsideration of the *Auction No. 35 Procedures Public Notice* because it did not file initial comments or reply comments in response to the *Auction No. 35 Comment Public Notice*.²⁹ We disagree. Although Nextel did not file comments or reply comments in response to the *Auction No. 35 Comment Public Notice*, Section 1.106(b)(1) of the Commission's rules permits Nextel to file a petition for reconsideration if it "state[s] with particularity the manner in which the person's interests are adversely affected . . . and show[s] good reason why it was not possible . . . to participate in the earlier stages of the proceeding."³⁰ Nextel claims that the basis for its Petition is several spectrum transactions that were announced by incumbent PCS licensees after the close of the comment period for the *Auction No. 35 Comment Public Notice*. Although, as discussed below, we do not believe these transactions constitute circumstances that warrant revision of the competitive bidding procedures for Auction No. 35, we think that Nextel has shown adequate reason why the issues in its Petition were not raised in comments or reply comments responding to the *Auction No. 35 Comment Public Notice*.³¹ Accordingly, we address the merits of Nextel's Petition below.

9. Nextel argues that recent spectrum swaps by AT&T, Sprint, Cingular, and VoiceStream have allowed those PCS and cellular carriers to satisfy their spectrum needs largely outside of Auction No. 35, thus permitting them to play "spoiler" by strategically bidding up the price of licenses in certain markets to thwart the entry attempts of another nationwide PCS competitor.³² Nextel therefore advocates the use of package bidding and claims that package bidding will eliminate the unacceptable risks of winning some but not all of the licenses it wants and paying more than the value to them of the partial package it wins.³³ Sprint, AT&T, and Verizon refute Nextel's allegation that they will bid in Auction No. 35 for the purpose of thwarting entry by a potential competitor.³⁴ They point out that spectrum swaps and similar transactions are commonplace events that should have been anticipated by Nextel.³⁵ In addition, AT&T and Verizon maintain that the spectrum swaps have not met all of the existing carriers' demands for

²⁸ See Cingular Comments at 2-3; Sprint PCS Comments at 1-4; Verizon Comments at 1-2; VoiceStream Comments at 3-4.

²⁹ See Cingular Comments at 2-3; Sprint PCS Comments at 3-4; Verizon Comments at 2; VoiceStream Comments at 4.

³⁰ 47 C.F.R. § 1.106(b)(1).

³¹ Pursuant to 47 C.F.R. § 1.106(f), petitions for reconsideration of the *Auction No. 35 Procedures Public Notice* were due on Nov. 6, and Nextel's Petition was filed on this date.

³² See Petition at 1-3, 6-8; Reply at 2-3. See also Rosston Statement at 6.

³³ See Petition at 3-5, 7-9; Reply at 4. See also Rosston Statement at 5-7.

³⁴ See Sprint PCS Comments at 6; AT&T Wireless Comments at 2; Verizon Comments at 3.

³⁵ See Sprint PCS Comments at 1, 4-5; Verizon Comments at 2.

additional spectrum, and that such demand will be the basis for bidding activity in Auction No. 35.³⁶

10. We agree with the commenters that the spectrum transactions cited by Nextel do not warrant revision of the bidding methodology or design for Auction No. 35.³⁷ Nextel could reasonably have anticipated spectrum acquisition in the secondary market, whether through swap, sale, merger, or other agreement, and Nextel had the same opportunity as the incumbent PCS and cellular carriers to engage in similar transactions prior to the auction.³⁸ Indeed, we note that Nextel has been an active participant in the secondary market in acquiring spectrum in the 800 MHz band.³⁹ Nextel's concern that the recent spectrum swaps by AT&T, Cingular, Sprint, and VoiceStream will result in anti-competitive behavior by the incumbent carriers in Auction No. 35 is unsubstantiated. We agree with Cingular and Sprint that there is just as much likelihood that the subject spectrum swaps will reduce demand in the affected markets and lower prices, making it less, rather than more, difficult for Nextel to acquire the spectrum it desires.⁴⁰

11. Nextel contends that the Bureau can adopt package bidding for Auction No. 35 without significant delay of the auction and without harming the interests of other bidders that have a preference for individual licenses.⁴¹ Commenters opposing Nextel's request disagree, responding that changing the bidding procedures a short time before the auction begins would unfairly disadvantage other bidders and would not be in the public interest.⁴² Verizon notes that bidders have already expended significant

³⁶ See AT&T Wireless Comments at 2-3; Verizon Comments at 3.

³⁷ As Nextel admits, the parties to the swaps have not identified all of the markets included in the transactions. Petition at 2. Thus, a decision to revise our bidding procedures as Nextel proposes would be based on incomplete information.

³⁸ See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Fifth Report*, FCC 00-289, (rel. August 18, 2000) at 10-12, Appendix B-5.

³⁹ On July 28, 1995, Nextel acquired all of Motorola's 800 MHz SMR licenses in the continental United States. See, Nextel Communications, Inc., Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities and Exchange Act of 1934, For the Fiscal Year Ended December 31, 1999 at 17, U.S. Securities and Exchange Comm'n, Commission File No. 0-19656, available at <http://www.sec.gov/Archives/edgar/data/824169/0000950133-00-001264-d1.html>. Earlier this year, Nextel stated that it might obtain additional spectrum from third parties through "negotiated acquisitions" in the secondary market. See, Nextel Communications, Inc., Form 10-Q, Quarterly Report Pursuant to Section 13 or 15(d) of the Securities and Exchange Act of 1934, For the Quarterly Period Ended September 30, 2000 at 23, U.S. Securities and Exchange Comm'n, Commission File No. 0-19656, available at <http://www.sec.gov/Archives/edgar/data/824169/000095013300004523/w42483e10-q.htm>.

⁴⁰ See Cingular Comments at 4; Sprint Comments at 1, 6.

⁴¹ See Petition at 6, 10; Reply at 4. See also Rosston Statement at 7. Nextel further maintains that such an auction design change could occur quickly if package bidding is patterned directly on the rules and procedures the Bureau has established for the auction of licenses in the 747 – 762 MHz and 777-792 MHz bands ("Auction No. 31"). Petition at 10-12. See Auction Of Licenses For The 747 – 762 and 777-792 MHz Bands Scheduled For September 6, 2000: Procedures Implementing Package Bidding For Auction No. 31, Bidder Seminar Scheduled For July 24, 2000, *Public Notice*, DA 00-1486, (rel. July 3, 2000)("Auction No. 31 Public Notice").

⁴² See Cingular Comments at 3-4; Sprint Comments at 4; AT&T Comments at 3; Verizon Comments at 3; VoiceStream Comments at 4.

resources to prepare for the auction, including many hours to develop bidding strategies based on the current set of auction procedures.⁴³ We disagree with Nextel's assertion that the addition of package bidding would cause only insignificant delay. We do not think the public interest would be served by implementing package bidding for Auction No. 35 at this late date.

12. First, as noted, Nextel made its request on the day of the short-form application deadline. Before establishing modified bidding procedures for Auction No. 35, we would need to delay the auction to seek comment on such procedures, and, after establishing the procedures, provide bidders with an opportunity to develop new bidding strategies and business plans.⁴⁴ We find that imposition of such delay on the auction participants, especially after the short-form application filing deadline, is not in the public interest.

13. Moreover, we disagree with Nextel's contention that package bidding can be implemented without impacting the timing of Auction No. 35, simply by using procedures patterned on those established for Auction No. 31.⁴⁵ The Commission previously sought comment on possible ways for bidders to efficiently aggregate licenses in Auction No. 35, noting that implementation of combinatorial bidding might be impractical for Auction No. 35.⁴⁶ Many of the commenters responding to the *Further Notice* agreed that such a design would be complex and impractical to implement for this auction, particularly in light of the large number of licenses involved.⁴⁷ Nextel has also previously recognized that the initial test of combinatorial bidding should be made during an auction with only a few licenses. In its comments on the bidding procedures to be used for the auction of licenses in the 747-762 MHz and 777-792 MHz bands (Auction No. 31), Nextel argued that Auction No. 31 is particularly suited for the Commission's first use of combinatorial bidding because of the small number of licenses available.⁴⁸ Insofar as Nextel filed its

⁴³ Verizon Comments at 3.

⁴⁴ The Balanced Budget Act of 1997 requires the Commission to provide an adequate period for notice and comment on proposed auction procedures before their issuance, and to ensure that after issuance of auction procedures, potential applicants have a sufficient amount of time to develop bidding plans and assess market conditions. See Section 3002(a)(1)(B)(iv), Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997) ("Balanced Budget Act"); 47 U.S.C. § 309(j)(3)(E).

⁴⁵ Nextel's argument ignores the work that would be required to adapt the Auction No. 31 software to the bidding procedures for Auction No. 35. Our existing package bidding procedures for Auction No. 31 would have to be modified for Auction No. 35 to take into account the number of licenses available and the specific rules applicable to the auction of those licenses. See *C/F Block Sixth Report and Order* at ¶¶ 17-29. Furthermore, as Verizon has noted, package bidding procedures in Auction No. 35 might differ from the procedures established in Auction No. 31 because certain licenses included in Auction No. 35 may be the subject of Commission or judicial proceedings initiated by parties claiming to have continuing interests in the licenses. See Verizon Comments at 5-6. See also *Auction No. 35 Procedures Public Notice* at Section I.B.4. A package bid is not a bid for a specific license, and thus, does not establish the value or price of an individual license in the package. Should a decision in a pending proceeding ultimately require that a winning bidder surrender only some of the licenses in a package, we concur with Verizon that the Commission would have to consider how to return payment for specific licenses to the winning bidder. See Verizon Comments at 5-6. Moreover, such an occurrence would have the potential to undo any benefits of package bidding for the affected winning bidder.

⁴⁶ See *Further Notice*, 15 FCC Rcd at 9785, ¶ 17.

⁴⁷ See *C/F Block Sixth Report and Order* at ¶ 37 ; AT&T Comments at 3-4.

Petition to seek combinatorial bidding at such a late date and given the large number of licenses offered in the auction, we continue to believe that our decision not to use package bidding for Auction No. 35 is in the public interest.

IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED THAT the Petition for Expedited Action to Modify the Auction Design for Auction No. 35, the C and F Block Reauction filed by Nextel Communications, Inc. IS DENIED. This action is taken pursuant to authority delegated by Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham, Deputy Chief
Wireless Telecommunications Bureau

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⁴⁸ See Comments of Nextel Communications, Inc., DA 00-1975, at 1 (filed June 9, 2000); Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000: Comment Sought on Modifying the Simultaneous Multiple Round Auction Design to Allow Combinatorial (Package) Bidding, *Public Notice*, DA 00-1075, (rel. May 18, 2000).