

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

In the Matter of )  
 )  
Eligibility Restrictions on C Block Licenses in the ) RM-11019  
Broadband Personal Communication Services )  
 )

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 15, 2004**

**Released: October 15, 2004**

By the Commission:

**I. INTRODUCTION**

1. We have before us three separate requests to alter or to waive the Commission's entrepreneur eligibility rules associated with certain C block licenses in the broadband personal communications services ("PCS"), which will be available for bidding in the upcoming broadband PCS auction (Auction No. 58).<sup>1</sup> By this Order, we address a petition filed by Verizon Wireless ("Verizon Wireless") seeking reconsideration of the public notice of the Wireless Telecommunications Bureau, which sought comment on the procedures for Auction No. 58;<sup>2</sup> a request for waiver filed by Dobson Communications Corporation ("Dobson") seeking an extension of the expired entrepreneur eligibility provisions of Section 24.709(a)(5)(i) to allow it and other entities to participate in closed bidding in Auction No. 58;<sup>3</sup> and a petition for rulemaking, or in the alternative, a request for waiver filed by CTIA – The Wireless Association ("CTIA") seeking the elimination of the entrepreneur eligibility requirements completely or in the context of Auction No. 58.<sup>4</sup> For the reasons set forth below, we dismiss or deny all three requests.

<sup>1</sup> See Broadband PCS Spectrum Auction Scheduled for January 12, 2005; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures, *Public Notice*, DA 04-1639 (rel. June 18, 2004). The Bureau released an erratum to the public notice of June 18, 2004. See Erratum to Broadband PCS Spectrum Auction Scheduled for January 12, 2005; Correction to Formulas for Upfront Payments and Minimum Opening Bids (rel. June 21, 2004) (the public notices of June 18, 2004 and June 21, 2004, are collectively referred to as the "*Auction No. 58 Comment Public Notice*"). The Bureau later included an additional eight D and E block broadband PCS licenses to the inventory of licenses to be auctioned. See Revised Inventory for Broadband PCS Spectrum Auction; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures, *Public Notice*, DA 04-2451 (rel. Aug 3, 2004). See also Broadband PCS Spectrum Auction Scheduled for January 12, 2005; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 58, *Public Notice*, DA 04-3005 (rel. Sept. 16, 2004) ("*Auction No. 58 Procedures Public Notice*").

<sup>2</sup> Verizon Wireless, Petition for Reconsideration (July 19, 2004) (Verizon Wireless Petition).

<sup>3</sup> Dobson Communications Corporation, Comments and Request for Waiver (July 8, 2004) (Dobson Request).

<sup>4</sup> CTIA – The Wireless Association, Petition for Expedited Rulemaking or, Alternatively, a Waiver (July 8, 2004) (CTIA Petition).

## II. BACKGROUND

2. When the Commission originally established the framework for C and F block auctions in the *Competitive Bidding Fifth Report and Order*, it reserved the C and F blocks of broadband PCS spectrum as “set-aside” licenses for which eligibility would be limited to entities, defined as “entrepreneurs,” that met a specified financial threshold.<sup>5</sup> The initial C block licenses were awarded through two auctions, Auction No. 5, which ended on May 6, 1996, and Auction No. 10, which concluded on July 16, 1996. The initial F block licenses were awarded in Auction No. 11, which concluded on January 14, 1997. In these initial auctions, small businesses and entrepreneurs placing high bids were permitted to pay for licenses through the Commission’s installment payment plans. Subsequently, in the *Part 1 Third Report and Order*, the Commission suspended the use of installment payments for the foreseeable future, observing, among other things, that installment payments may not be necessary to ensure meaningful opportunity for small businesses to participate in the spectrum auction program.<sup>6</sup>

3. Not long after the close of Auction Nos. 5 and 10, many winning bidders began to experience financial difficulties, and several, including NextWave Personal Communications Inc., NextWave Power Partners Inc. and NextWave Telecom, Inc. (collectively “NextWave”), eventually filed for bankruptcy protection under Chapter 11 of United States Bankruptcy Code (“Bankruptcy Code”). In an effort to assist financially strapped C block licensees, the Commission responded by creating a package of restructuring options.<sup>7</sup> As a result of the restructuring options as well as additional license cancellations due to defaults of installment payments, a number of C and F block licenses were returned to or reclaimed by the Commission. Some of that spectrum was subsequently auctioned in Auction No. 22, which concluded on April 15, 1999.

4. As more C and F block licenses were reclaimed or returned to the Commission, and following a favorable decision in the bankruptcy litigation with NextWave by the United States Court of Appeals for the Second Circuit, the Wireless Telecommunications Bureau (“Bureau”) in January 2000 announced its next broadband PCS auction, Auction No. 35.<sup>8</sup> The auction announcement prompted several parties to file petitions requesting various modifications of the C and F block rules, including requests for the Commission to eliminate the entrepreneur eligibility restrictions for the set-aside licenses. In response to the various petitions, comments, and other filings, the Commission released a Further Notice of Proposed Rulemaking (“*C/F Block Further Notice*”), which set forth tentative conclusions and proposals concerning the C and F block rules.<sup>9</sup>

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<sup>5</sup> The Commission required that in order to be eligible to bid, an applicant, including attributable investors and affiliates, must have had gross revenues of less than \$125 million in each of the last two years and must have less than \$500 million in total assets. See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-82, ¶ 115 (1994). See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 420-21 ¶¶ 28-30 (1994).

<sup>6</sup> Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 397-401, ¶¶ 38-43 (1997).

<sup>7</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997), *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998).

<sup>8</sup> "Auction of C and F Block Broadband PCS Licenses, Notice of Auction Scheduled for July 26, 2000," *Public Notice*, 15 FCC Rcd 693 (2000).

<sup>9</sup> 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) (“*C/F Block Further Notice*”).

5. Although the comments filed in response to the *C/F Block Further Notice* addressed a number of issues related to C and F block licenses, the entrepreneur eligibility requirements were the primary focus of the extensive record and the ensuing Report and Order adopted by the Commission in August 2000 (*C/F Block Sixth Report and Order*).<sup>10</sup> In the *C/F Block Sixth Report and Order*, the Commission removed the entrepreneur eligibility restrictions for all F block licenses and some C block licenses.<sup>11</sup> Specifically, the Commission reconfigured the license size for the C block, creating three 10 megahertz licenses,<sup>12</sup> and divided Basic Trading Areas (“BTAs”) into two categories based on population: Tier 1 markets are those BTAs with populations equal to or greater than 2.5 million and Tier 2 markets are the BTAs with populations below 2.5 million.<sup>13</sup> The Commission then adopted “open bidding” (i.e., bidding open to both entrepreneurs and non-entrepreneurs) for two of the three newly reconfigured 10 megahertz C block licenses in Tier 1 markets, and for one of the three newly reconfigured 10 megahertz C block licenses in Tier 2 markets.<sup>14</sup> The remaining 10 megahertz C block licenses in Tier 1 and 2 were reserved for entrepreneurs.<sup>15</sup> For 15 megahertz C block licenses, the Commission eliminated the entrepreneur eligibility requirements in Tier 1 markets, but maintained them in Tier 2 markets.<sup>16</sup> The Commission removed the eligibility restriction on all F block licenses regardless of market. The *C/F Block Sixth Report and Order* stated that these rules would apply to “any subsequent auctions of C or F block licenses, including any spectrum made available or reclaimed from bankruptcy proceedings in the future.”<sup>17</sup> Applying these rules to the license inventory for Auction No. 58 results in 123 licenses being available to all bidders and 119 licenses being available only to entrepreneurs in closed bidding.<sup>18</sup>

6. Following the adoption of the *C/F Block Sixth Report and Order*, the Commission held Auction No. 35, which included 422 C and F block broadband PCS licenses, 170 of which were set-aside licenses, i.e., those available in “closed” bidding only to entities that qualified as entrepreneurs. Auction No. 35 concluded with a total of thirty-five winning bidders for the 422 licenses and a total of approximately \$16.9 billion dollars in net bids.<sup>19</sup> As the Commission had made clear to prospective Auction No. 35 bidders, however, the spectrum associated with 216 of the 422 licenses included in the auction was the subject of ongoing litigation between the Commission and NextWave.<sup>20</sup> After the

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<sup>10</sup> Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd. 16266 (2000) (“*C/F Block Sixth Report and Order*”).

<sup>11</sup> *Id.* at 16275-80 ¶¶ 17-24. The Commission also eliminated bidding credits in closed bidding. *Id.* at 16288 ¶ 45.

<sup>12</sup> *Id.* at 16273-75 ¶¶ 12-15.

<sup>13</sup> *Id.* at 16276 ¶ 18.

<sup>14</sup> *Id.* at 16276-77 ¶ 20.

<sup>15</sup> See 47 C.F.R. § 24.839. The assignment or transfer of control of C and F block licenses within the first five years of the initial license grant to entities that do not qualify as entrepreneurs can occur if the licensee has first met the five-year construction requirement for that license. *Id.* The Commission also adopted open bidding for all F block licenses. *C/F Block Sixth Report and Order* at 16279-80 ¶ 24.

<sup>16</sup> *Id.* at 16276-77 ¶ 20.

<sup>17</sup> *C/F Block Sixth Report and Order* at 16267 ¶ 1.

<sup>18</sup> See *Auction No. 58 Procedures Public Notice* at A-5.

<sup>19</sup> C and F Block Broadband PCS Auction Closes; Winning Bidders Announced; Down Payments Due February 12, 2001, FCC Forms 601 and 602 Due February 12, 2001; Ten-Day Petition to Deny Period, *Public Notice*, 16 FCC Rcd. 2339 (WTB 2001).

<sup>20</sup> NextWave had been the high bidder on 95 licenses in the broadband PCS C, D, E and F Block auctions that concluded in 1996 and 1997. See Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and

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auction, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) ruled that Section 525 of the Bankruptcy Code prevented the cancellation of licenses held by NextWave for failure to make installment payments after it filed for bankruptcy.<sup>21</sup> Consistent with a mandate issued by the D.C. Circuit,<sup>22</sup> the Bureau returned to active status the licenses previously issued to NextWave.<sup>23</sup>

7. As the Commission awaited the appeal of the matter to the United States Supreme Court (“Supreme Court”), winning bidders from Auction No. 35 sought relief from their auction obligations. In March 2002, in response to a joint request by a group of Auction No. 35 winning bidders for a refund of their down payments in that auction,<sup>24</sup> the Commission released an Order (the “*Partial Refund Order*”) pursuant to which it returned a significant portion of the down payments made for the spectrum at issue.<sup>25</sup> Ultimately, due to concerns regarding the financial health of wireless telecommunications providers and the negative effect of the economic downturn on consumers and the telecommunications sector, as well as the uncertainties associated with the then ongoing litigation over the subject licenses, the Commission granted additional relief to certain Auction No. 35 winning bidders.<sup>26</sup> The resulting decision allowed certain Auction No. 35 winning bidders an opportunity to make a single election to withdraw with prejudice their pending long-form applications for licenses that were associated with spectrum that was subject to the on-going litigation, with the Commission refunding such bidders their remaining monies on deposit without the possibility of facing the default rules.<sup>27</sup> All bidders eligible for this relief elected to exercise this option offered by the Commission.

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NextWave Power Partners, Inc., Debtor-in Possession, to Subsidiaries of Cingular Wireless LLC, WT Docket 03-217, *Memorandum Opinion and Order*, 19 FCC Rcd. 2570, 2571 ¶ 2 (2004)

<sup>21</sup> *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001).

<sup>22</sup> *Id.*

<sup>23</sup> “Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave Personal Communications Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation,” *Public Notice*, 16 FCC Rcd 15970 (WTB 2001).

<sup>24</sup> See *Joint Request for Immediate Refund of Auction No. 35 Down Payments for NextWave Licenses* filed on January 4, 2002 by 3DL Wireless, LLC, 3G PCS, LLC, Alaska Native Wireless, L.L.C., Cellco Partnership d/b/a Verizon Wireless, Cook Inlet/V5 GSM V PCS, LLC, DCC PCS, Inc., Lafayette Communications Company, L.L.C., Leap Wireless International, Inc., MCG PCS II, Inc., Northcoast Communications, L.L.C., Salmon PCS LLC, SVC BidCo, L.P., and VoiceStream PCS BTA I License Corporation (“Joint Request”). The Commission also responded to an additional nine winning bidders requesting relief but not parties to the Joint Request: Black Crow Wireless, L.P., Mint GSM, Poplar PCS-Central, Scott Reiter, SLO Cellular, Theta Communications, Unbound PCS, LLC, Vincent McBride, and Last Wave Partners, LP. LastWave Partners, LP, Black Crow Wireless, L.P. and Unbound PCS, LLC each filed separate requests for refunds of down payments made in Auction No. 35 for spectrum that was previously licensed to NextWave. See Request For Immediate Refund of Auction No. 35 Down Payment for NextWave License filed by LastWave Partners, LP on January 7, 2002; Request for Refund of Downpayments filed by Black Crow Wireless, L.P. on January 25, 2002; and Request for Refund of Downpayments filed by Unbound PCS, LLC on February 6, 2002. In addition, Vincent McBride and Scott Reiter had filed similar requests for refunds. See Letters from Vincent McBride and Scott Reiter to Michael K. Powell, Chairman, Federal Communications Commissions, dated July 9, 2001, July 16, 2001, August 25, 2001 and October 22, 2001. See also Letter from Donald J. Evans, counsel for Vincent McBride and Scott Reiter, to Kathleen O’Brien Ham, Deputy Chief, Wireless Telecommunications Bureau, dated October 31, 2001.

<sup>25</sup> Requests for Refunds of Down Payments Made In Auction No. 35, *Order*, 17 FCC Rcd 6283 (2002) (“*Partial Refund Order*”).

<sup>26</sup> Disposition of Down Payment and Pending Applications by Certain Winning Bidders in Auction No. 35; Requests for Refunds of Down Payments Made in Auction No. 35, WT Docket No. 02-276, *Order and Order on Reconsideration*, 17 FCC Rcd. 23354 (2002).

<sup>27</sup> *Id.* at 23359-62 ¶ 10.

8. In January 2003, the Supreme Court affirmed the D.C. Circuit's decision, finding that because NextWave was under protection of Chapter 11 of the Bankruptcy Code, its licenses did not automatically cancel for nonpayment while it was in bankruptcy.<sup>28</sup> Subsequently, in April 2004, the Commission and NextWave agreed to a global settlement of the outstanding issues between the parties ("NextWave Settlement").<sup>29</sup> Under the terms of the settlement, NextWave agreed to return 60 C block and 2 F block PCS licenses to the Commission and to extinguish any further claim to those licenses thereby freeing vital spectrum resources for immediate use to improve innovation and service to consumers.

9. Following the NextWave Settlement and the return or cancellation of other licenses,<sup>30</sup> the Bureau announced an auction for 234 broadband PCS licenses, Auction No. 58, which is currently scheduled to begin on January 12, 2005. The Bureau later added eight licenses to the inventory for Auction No. 58.<sup>31</sup> In response to the *Auction No. 58 Comment Public Notice*, 19 comments and 5 reply comments were filed.<sup>32</sup> In addition, Verizon Wireless filed a petition for reconsideration of the *Auction No. 58 Comment Public Notice* ("Verizon Wireless Petition") arguing that the public notice constituted the first notice that the Commission intended to apply the existing eligibility rules to certain licenses that would be available in Auction No. 58.<sup>33</sup> Verizon Wireless requests that the Bureau, or the Commission if necessary, reconsider the application of the entrepreneur eligibility rules before the start of Auction No. 58.<sup>34</sup>

10. In its comments responding to the *Auction No. 58 Comment Public Notice*, Dobson also included a request for waiver ("Dobson Request") to extend the expired entrepreneur eligibility provisions of Section 24.709(a)(5)(i) of the Commission's rules to allow it to bid on C block licenses that would otherwise be reserved for closed bidding.<sup>35</sup> Specifically, Dobson requests that the Commission extend or waive its rules to the extent necessary to permit it and other entities to participate in closed bidding pursuant to Section 24.709(a)(5)(i), which allowed entities that had been eligible for and had participated in Auction No. 5 or Auction No. 10 to bid for C block licenses offered in closed bidding in any auction beginning within two years of March 23, 1999, even if those entities did not meet the size requirements to participate in closed bidding.<sup>36</sup>

11. In addition to filings made pursuant to the *Auction No. 58 Comment Public Notice*, CTIA filed a petition for rulemaking, or in the alternative, a request for waiver of the eligibility restrictions C block licenses reserved for closed bidding ("CTIA Petition"). In particular, CTIA seeks the elimination

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<sup>28</sup> *FCC v. NextWave*, 537 U.S. 293 (2003), *aff'g* 254 F.3d 130 (D.C. Cir. 2001).

<sup>29</sup> "FCC Announces NextWave Settlement Agreement; Vital Spectrum Resources Freed, Nets at Least \$4 Billion," *News Release*, dated April 20, 2004.

<sup>30</sup> For example, eight C block and two F block broadband PCS licenses were returned to the Commission pursuant to a recent settlement agreement with Devon Mobile Communications, L.P.

<sup>31</sup> See Revised Inventory for Broadband PCS Spectrum Auction; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures, *Public Notice*, DA 04-2451 (rel. Aug. 3, 2004).

<sup>32</sup> For a complete list of the parties that filed comments and reply comments, see Attachment A. The attachment also indicates the short-form citation of each filing.

<sup>33</sup> Verizon Wireless Petition at 1.

<sup>34</sup> *Id.* at 2-14.

<sup>35</sup> 47 C.F.R. § 24.709(a)(5)(i). Dobson Request at 4.

<sup>36</sup> 47 C.F.R. § 24.709(a)(5)(i). Entities that had earlier returned C block spectrum to the Commission pursuant to the disaggregation, prepayment, or amnesty/prepayment restructuring options, however, were barred from bidding on that spectrum until two years after the start date of the reacquisition of that spectrum. See 47 C.F.R. § 24.709(a)(5)(iv).

of the entrepreneur eligibility requirements completely or, at least, for Auction No. 58 either by rulemaking or through a waiver. The CTIA Petition was placed on public notice, and 21 comments and/or oppositions were filed and 8 replies were filed.<sup>37</sup>

12. On September 16, 2004, the Bureau released a public notice setting forth the auction procedures, including the filing requirements, minimum opening bids, and upfront payments for Auction No. 58 (*Auction No. 58 Procedures Public Notice*). In the public notice, the Bureau noted the pendency of the Verizon Wireless Petition, the CTIA Petition and the Dobson Request, but explained the issues raised in these requests were to be addressed separately.<sup>38</sup> The Bureau, however, did note that, unless the Commission decided otherwise, the current broadband PCS rules would apply to Auction No. 58.<sup>39</sup>

### III. DISCUSSION

13. By this Order, we address the Verizon Wireless Petition, the CTIA Petition, including its request for waiver, the comments filed in response to the *Auction No. 58 Comment Public Notice* regarding C block entrepreneur eligibility, and the Dobson Request. For the reasons set forth below, we deny or dismiss the petitions and requests for waiver. Accordingly, the current broadband PCS eligibility rules will remain in effect for the upcoming auction of broadband PCS licenses.

#### A. Verizon Wireless Petition for Reconsideration

14. Verizon Wireless cites Section 1.106 of the Commission's rules as the procedural basis for its petition for reconsideration of the *Auction No. 58 Comment Public Notice*.<sup>40</sup> It asserts that the *Auction No. 58 Comment Public Notice* constituted the first notice of the Commission's intention to apply the existing eligibility rules for Auction No. 58.<sup>41</sup> We find the filing procedurally defective for two reasons. First, Section 1.106(a)(1) of our rules is clear that, with one noted exception not relevant here, the Commission (or a designated authority) will entertain petitions for reconsideration only of final actions.<sup>42</sup> The *Auction No. 58 Comment Public Notice* made no final determination as to the application of the Commission's entrepreneur eligibility rules in Auction No. 58, but rather sought comment on competitive bidding procedures and conducting an auction pursuant to established PCS service rules, including the eligibility rules adopted by the Commission in 2000 in the *C/F Block Sixth Report and Order*. Thus, the Verizon Wireless Petition should be dismissed because there was no final action taken in the *Auction No. 58 Comment Public Notice*. Second, we disagree with Verizon Wireless that the public notice constitutes the first notice that we would apply our existing C block eligibility rules to C block licenses at auction. The eligibility rules were adopted in 2000 with the *C/F Block Sixth Report and Order*. In challenging the applicability of these rules, the Verizon Wireless Petition is effectively an

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<sup>37</sup> For a complete list of the parties that filed comments and reply comments, see Attachment B. The attachment also indicates the short-form citation of each filing. In addition, on October 4, 2004, the Advisory Committee on Diversity for Communications in the Digital Age, which was chartered to make recommendations to the Commission on policies and practices to further enhance the ability of minorities and women to participate in the telecommunications and related industries, adopted a resolution that "strongly urges the Commission to maintain effective Designated Entity rules to increase opportunities for small and minority and women owned businesses." See "Advisory Committee on Diversity for Communications in the Digital Age Makes Recommendations," *News Release* (rel. Oct. 6, 2004).

<sup>38</sup> *Auction No. 58 Procedures Public Notice* at n.2, 3, 12-13.

<sup>39</sup> *Id.* at 3, 12-13.

<sup>40</sup> 47 C.F.R. § 1.106. Verizon Wireless Petition at 1.

<sup>41</sup> Verizon Wireless Petition at 1.

<sup>42</sup> 47 C.F.R. § 1.106(a)(1). See also 47 C.F.R. § 1.102(b)(2) ("Petitions for reconsideration of interlocutory actions will not be entertained.").

untimely petition for reconsideration of that order and is therefore procedurally defective.<sup>43</sup> Accordingly, we dismiss the Verizon Wireless Petition.

## **B. CTIA Petition and Request for Waiver**

### **1. Petition for Rulemaking**

15. For the reasons set forth below, we find that CTIA and other commenters have failed to offer any persuasive arguments to warrant a reexamination at this time of the Commission policies set forth in the *C/F Block Sixth Report and Order*. After full consideration of the entrepreneur eligibility issue in 2000, the Commission balanced the competing interests of large and small carriers when it chose to open some C block licenses to all bidders and retain the remainder for entrepreneurs.<sup>44</sup> The petitioner and supporting commenters have not provided sufficient reasons, as required under Section 1.407 of our rules, to initiate a rulemaking to reexamine the Commission's decision and the underlying policies.<sup>45</sup> Therefore, we deny the petition for rulemaking filed by CTIA.

16. CTIA and supporting commenters assert that a rulemaking to review the current eligibility rules for the C block is necessary because of an increased demand for spectrum immediately usable by national carriers for additional capacity required for new applications and to fill in their nationwide footprints.<sup>46</sup> These parties argue that the better financed, more established, national carriers value this spectrum more than smaller, unproven companies and will put it to better use by providing new applications that require greater bandwidth and improving service quality.<sup>47</sup> While we recognize that the need by carriers, both national and otherwise, for additional spectrum has not dissipated since we modified our rules in 2000, we are not convinced that initiating and completing a rulemaking, regardless of the outcome, would result in more rapid or efficient deployment of service of this spectrum for the benefit of the public. We have only recently resolved the legal uncertainties that previously afflicted our attempts to assign licenses for much of this spectrum. These recent developments have now removed impediments to the future licensing and deployment of this spectrum. For this reason, we agree with those commenters who argue that significant portions of the broadband PCS C block have lain fallow for far too long.<sup>48</sup> Initiating yet another rulemaking proceeding at this point, no matter how expedited, would have the strong potential to return such spectrum to a state of regulatory and/or legal uncertainty and further delay its deployment.

17. Some commenters argue that the Commission should once again modify the C block eligibility rules and allow entities that would not qualify as entrepreneurs to acquire more spectrum on the grounds that the entrepreneur set asides are ineffective and that the policy behind them no longer reflects the current state of competition in the commercial wireless market.<sup>49</sup> In response, a number of parties

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<sup>43</sup> 47 C.F.R. § 1.106(f) (petition for reconsideration must be filed within 30 days of final action).

<sup>44</sup> *C/F Block Sixth Report and Order* at 16276 ¶ 19.

<sup>45</sup> 47 C.F.R. § 1.407.

<sup>46</sup> CTIA Petition at 2,5; T-Mobile Comments at 6; Verizon Wireless Comments at 3; Sprint Comments at 2; Qualcomm Reply Comments at 2.

<sup>47</sup> CTIA Petition at 5. Both CTIA and T-Mobile argue that consumers want nationwide coverage and that only larger, well-financed carriers can meet this demand. CTIA Petition at 6; T-Mobile Comments at 6. T-Mobile further argues that, as a relatively new entrant to the market, its need for more spectrum is even greater. T-Mobile Comments at 6-7.

<sup>48</sup> See, e.g., Sprint Comments at 1; T-Mobile Comments at 7; Qualcomm Reply Comments at 2-3. See also, DE Supporters Auction 58 Reply Comments at 5.

<sup>49</sup> T-Mobile Comments at 1-2, 4-8; Motorola Comments at 1; Verizon Wireless Comments at 6; Qualcomm Reply Comments at 1-3. For example, some parties assert that the Commission is under a legal obligation to initiate a

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advocate maintaining the eligibility rules and in a few cases, even suggest increasing the amount of spectrum set aside for entrepreneurs.<sup>50</sup> The Commission, however, thoroughly examined the policy of setting aside certain C block licenses for entrepreneurs in 2000, striking what it found to be a “reasonable balance of the various competing public interest factors involved with this issue.”<sup>51</sup> The circumstances that the petitioner and other commenters provide as a possible justification for a change in policy, by either eliminating closed bidding or setting aside more licenses for entrepreneurs, have not altered the dynamic between the competing interests. In fact, as the record currently before us demonstrates, the conflicting goals of entrepreneurs and non-entrepreneurs continue to exist today. Moreover, many of the specific circumstances that the petitioner and other commenters provide as a possible justification for eliminating the entrepreneur eligibility (e.g., need for additional spectrum for new applications and to fill in nationwide footprints) were specifically addressed by the Commission in the *C/F Block Sixth Report and Order* when it concluded that such factors must be balanced against the needs of the small carriers and were considered when it adopted the current rules.<sup>52</sup> Thus, we find that the petitioner and commenters have not provided sufficient reasons to reexamine the underlying policy for the current C block eligibility rules at this time.

18. Parties that advocate eliminating the set aside licenses also suggest that there are means, other than eligibility requirements, that small businesses can use to gain access to spectrum. A number of parties argue that bidding credits are a sufficient means for helping small businesses acquire spectrum at auction and some note that the Commission has not used set-asides in other services.<sup>53</sup> CTIA even asserts that, in Auction No. 35, there were “24 BTA markets where both open and closed licenses were available” and in those markets small businesses using bidding credits “won 16 open licenses at a lower price than the closed licenses available in the same market.”<sup>54</sup> Parties also point to spectrum leasing, partitioning and disaggregation, and unlicensed spectrum as other measures for small entities to use spectrum.<sup>55</sup>

19. We do not deny that alternatives, such as those mentioned by some of the commenters, are available to small and new entities, but we do not find that the existence of these measures now warrants a further reexamination of the entrepreneur rules. Bidding credits were available in auctions for broadband PCS licenses, among others, when the Commission reassessed the C block rules in 2000 and it

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rulemaking because of the changes that have occurred in the industry since 2000. *See Verizon Wireless Auction Comments at 7-8 n. 13* (Commission should not “adhere to rules when the original assumptions for those rules are no longer valid or have been overtaken by new facts”); *Qualcomm Reply Comments at 1-3*; *CTIA Reply Comments at 3*.

<sup>50</sup> *See, e.g., 3G PCS Comments at 1*; *ASRC Comments at 1*; *Blooston Comments at 1*; *Council Tree Comments at 13, 26-27*; *DE Supporters Comments at 1*; *McBride/Reiter Comments at 1*; *NTCH Comments at 2*; *RTG/OPASTCO Comments at 1-2*. In addition, as noted above, the Advisory Committee on Diversity for Communications in the Digital Age “strongly urges” that we “maintain effective Designated Entity rules to increase opportunities for small and minority and women owned businesses.” *See supra* note 37.

<sup>51</sup> *C/F Block Sixth Report and Order at 16276 ¶ 19*.

<sup>52</sup> *Id.* at 16278-79 ¶ 23.

<sup>53</sup> *CTIA Petition at 9*; *T-Mobile Comments at 8, 13*; *Sprint Comments at 3*; *RCA Comments at 3*; *CTIA Reply Comments at 2-3*; *PF Foundation Reply Comments at 5*; *Nokia Reply Comments at 2*; *Qualcomm Reply Comments at 3*.

<sup>54</sup> *CTIA Petition at 9*. *CTIA* states that in 4 of the remaining eight markets, entities using bidding credits “paid approximately the same price as the licensees that purchased the closed licenses.” *Id.*

<sup>55</sup> *T-Mobile* and *Motorola* also argue that other measures, such measures are more appropriate for smaller entities because they are less capital intensive. *T-Mobile Comments at 8*; *Motorola Reply Comments at 2*.



concluded that the public interest would best be served by maintaining certain spectrum for eligible entrepreneurs. Nothing that the petitioner nor any commenters has presented leads us to believe that we must reexamine this conclusion now. Likewise, the fact that set-asides have not been adopted in other services does not warrant a reevaluation at this time of the balance that the Commission established in the *C/F Block Sixth Report and Order*. In response to the specific Auction No. 35 data provided by CTIA, we note that there were in fact 84 BTAs in which both open and closed licenses were available and the highest net license price in the large majority of these markets (67 of 84 BTAs) was for an open license.<sup>56</sup> Thus, we find that these data do not suggest that the entrepreneur rules must be reexamined at this time. Furthermore, we agree with CTIA and other commenters that spectrum leasing is relatively new and that carriers may not have had sufficient time to take advantage of this option.<sup>57</sup> We further agree with commenters that additional spectrum access alternatives, such as those mentioned above, are available to small and new entities. We note, however, that many of these measures are also available to all carriers, subject to certain limitations,<sup>58</sup> and we disagree that the existence of such alternatives now warrants a further reexamination of the entrepreneur rules.

20. A number of those parties favoring the elimination of the set-aside eligibility restrictions also argue that they have few or no viable alternatives for acquiring spectrum in the immediate future.<sup>59</sup> To the extent that this argument is true, it is true for carriers of all sizes that are interested in acquiring more spectrum. When we weigh the potential delay that a further rulemaking could pose to the deployment of the spectrum generally against the limited benefits that could potentially be gained by a change in rules for such a small portion of spectrum, we conclude that initiating a rulemaking would not be in the public interest. Moreover, as some commenters point out, because much of the spectrum in set-aside licenses available in Auction No. 35 was held up by litigation, Auction No. 58 will effectively be the first time since the new eligibility rules were adopted in the *C/F Block Sixth Report and Order* that entrepreneurs will be able to acquire many of the licenses in closed bidding. All of these factors point to the conclusion that the rapid deployment of the available C block spectrum is best served by not initiating a rulemaking.

21. Finally, we note that the eligibility restrictions are, by their very nature, limited in duration. The current eligibility rules ensure that small entities have the opportunity to access spectrum by limiting both the eligible bidders in the auction and any subsequent assignments or transfers of control within five years following the initial license grant or until the five-year construction benchmark is satisfied.<sup>60</sup> After that time, any entity can acquire the spectrum through assignment or transfer of control (subject only to applicable unjust enrichment provisions). Moreover, any licenses that are offered in

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<sup>56</sup> There were 24 markets with a total of 77 licenses in which a designated entity claiming eligibility for a bidding credit won an open license and an entrepreneur won the closed license. As CTIA claims, in most of those 24 markets, the price paid for the open license won by the designated entity was no greater than the price paid for the closed license. However, focusing on this small subgroup misses the more general point that open licenses on average sold for significantly higher net prices than did closed licenses in Auction No. 35 (\$2.17 per MHz\*pop versus \$1.65 per MHz\*pop, respectively). See generally <http://wireless.fcc.gov/auctions/35/>.

<sup>57</sup> See, e.g., Blooston Comments at 3; CTIA Reply Comments at 7.

<sup>58</sup> For example, the Commission rules do not prohibit a non-entrepreneur from leasing spectrum from an entrepreneur, so long as the transactions meet the relevant Commission regulations, including those regarding control. See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604, 20654-55 ¶¶ 113, 20666-67 ¶ 145 (2003), *Erratum*, 18 FCC Rcd 24817 (2003), *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, FCC 04-167, 34-42 ¶¶ 67-82 (rel. Sept. 2, 2004).

<sup>59</sup> CTIA Petition at 10; T-Mobile Comments at 8-9; Verizon Wireless Comments at 6.

<sup>60</sup> See 47 C.F.R. § 24.839.

closed bidding but remain unsold in Auction No. 58 will be open to all entities in any future auction.<sup>61</sup> In that case, entities that do not qualify as entrepreneurs will have the opportunity to acquire the spectrum in a future auction.

## 2. Request for Waiver

22. We further find that CTIA and supporting commenters fail to meet either prong of the Commission's waiver standard and that these parties do not present persuasive arguments to establish good cause to warrant relief from our existing eligibility rules.<sup>62</sup> For the reasons discussed below, we therefore deny the requests to waive the entrepreneur eligibility rules for either all or some of the C block licenses available in Auction No. 58.

23. Specifically, CTIA requests that, in the event we decline to open bidding for all C block licenses through a rule change, we waive the rules to permit open bidding for all C block licenses in Auction No. 58.<sup>63</sup> In support of its waiver request, CTIA reiterates the arguments for its request to initiate a rulemaking.<sup>64</sup> CTIA also argues that a waiver is warranted because open bidding for all C block licenses in Auction No. 58 would better advance the public interest and the underlying purpose of the entrepreneur eligibility rules than strictly adhering to those rules.<sup>65</sup> Similarly, certain commenters, such as T-Mobile, offer alternative suggestions on how the Commission might tailor a rule waiver based on what they allege to be unique circumstances.<sup>66</sup> In particular, T-Mobile and its supporters argue that due to the unique circumstances presented by the NextWave Settlement the Commission should, at a minimum, waive the eligibility rules for the licenses being returned to the Commission through that agreement.<sup>67</sup>

24. Pursuant to Section 1.925 of the Commission's rules, the Commission may grant a request for a rule waiver if the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant would be in the public interest.<sup>68</sup> Alternatively, the Commission may grant a request for waiver if, in view of the unique or unusual factual circumstances of the specific situation, application of the rule would be inequitable, unduly burdensome or contrary to the public interest or the entity requesting the waiver has no reasonable alternative.<sup>69</sup> For the following reasons, we find that neither the petitioner nor supporting commenters meet either prong of the waiver standard for their request to waive the Commission's entrepreneur eligibility rules.

25. As an initial matter, we disagree that CTIA and its supporters have shown that the underlying purpose of the eligibility rules would be frustrated by their application in Auction No. 58 or that a waiver would serve the public interest.<sup>70</sup> In the scope of the rulemaking that resulted in the *C/F Block Sixth Report and Order*, the Commission carefully considered the benefits of maintaining its entrepreneur set-aside policy and in so doing struck a careful balance between providing additional

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<sup>61</sup> See *C/F Block Sixth Report and Order* at 16281 ¶ 27.

<sup>62</sup> 47 C.F.R. § 1.925.

<sup>63</sup> CTIA Petition at 16.

<sup>64</sup> *Id.* at 16-17.

<sup>65</sup> *Id.* at 17.

<sup>66</sup> T-Mobile Comments at 17-21

<sup>67</sup> *Id.* at 20.

<sup>68</sup> 47 C.F.R. § 1.925(a)(3).

<sup>69</sup> *Id.* Additionally, Section 1.3 of the Commission's rules provides authority for a rule waiver upon a showing of good cause. 47 C.F.R. § 1.3

<sup>70</sup> See 47 C.F.R. § 1.925(b)(3)(i).

spectrum opportunities for larger carriers while still preserving its rules to ensure that small businesses would have an opportunity to bid for spectrum in the PCS market.<sup>71</sup> The proponents of a rule waiver have failed to demonstrate that removing the eligibility requirements for all or some of the C block licenses in Auction No. 58 would not undermine that balance and would not frustrate the underlying purpose of the Commission's decision to continue to reserve certain portions of the C block spectrum for entrepreneurs. CTIA also argues that bidding credits are actually more beneficial to small businesses than closed bidding.<sup>72</sup> CTIA supports this argument by asserting that, in the majority of the BTAs which had both open and closed bidding in Auction No. 35, entities using bidding credits paid less for a license in open bidding than the price of the license in closed bidding. As indicated above,<sup>73</sup> however, in the large majority of these markets (67 of 84 BTAs) in which both open and closed licenses were available in Auction No. 35, the highest net license price was for an open license. Therefore, we are not persuaded that the underlying purpose of the eligibility rules would be frustrated by their application here .

26. Given the ultimate fate of the results of Auction No. 35,<sup>74</sup> we are sympathetic to commenters that oppose the grant of a waiver and who argue that Auction No. 58 will provide all bidders an opportunity to benefit from the careful balancing the Commission undertook in revising its rules prior to Auction No. 35, including those entrepreneurs who were deprived of their ability to access additional spectrum on account of the Supreme Court's decision.<sup>75</sup> Opening the bidding on all or most of the C block licenses now may extinguish the very opportunity that smaller providers have been waiting to achieve since our decision in 2000. On the other hand, preserving the existing rules affords large carriers the ability to bid on almost half of the available C block licenses in Auction No. 58 and provides such carriers with significant possibilities to meet their increased needs. The underlying purpose of our current eligibility rules, which allow both open and closed bidding, is to promote wider auction participation and license distribution consistent with our goals in Section 309(j) of the Communications Act of 1934, as amended (the "Act").<sup>76</sup> In reaching the decision in 2000 to maintain eligibility requirements for some C block spectrum, the Commission concluded that both large and small carriers had credible arguments about their needs for additional spectrum.<sup>77</sup> The record here does not persuade us that this underlying purpose will be frustrated by continued application of the rules we adopted in 2000. We see significant benefits in adhering to an approach that allows us to balance various competing public interest factors that bear on both sides of the issue of eligibility. CTIA has not demonstrated otherwise. Furthermore, for the same reasons we concluded that the public interest would not be served by initiating a rulemaking at this time, we believe that the proponents of waiving our rules to open all or the majority of the C block spectrum in Auction No. 58 have not proven that upsetting the compromise the Commission struck in 2000 will serve the public interest.

27. CTIA and supporting commenters attest that the Auction No. 58 spectrum may be the most desirable spectrum available for auction below 3 GHz for at least the immediate future. While we do not speak to the validity of such a pronouncement, we do note that the desirability of this spectrum by larger carriers does not rise to the level of demonstrating the "good cause" necessary to support waiving the rule. Rather, if such alleged desirability is of any probative value, it may, as those opposing the grant of a waiver argue, serve as further evidence of the need to preserve our entrepreneur rules to fulfill our

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<sup>71</sup> *C/F Block Sixth Report and Order* at 16276-81 ¶¶ 19-26.

<sup>72</sup> CTIA Petition at 9-10; T-Mobile Comments at 8-9, Wilkie Declaration.

<sup>73</sup> *See supra* para. 20.

<sup>74</sup> *See supra* paras. 6-8.

<sup>75</sup> *See e.g.*, Council Tree Comments at 18.

<sup>76</sup> 47 U.S.C. § 309(j)(3) and (4).

<sup>77</sup> *C/F Block Sixth Report and Order* at 16276 ¶ 19.

statutory obligation in Section 309(j) to provide smaller carriers with an opportunity to participate in the provision of spectrum based services.<sup>78</sup> As Council Tree Communications, Inc. argues, “[l]ike the larger carriers, smaller carriers are also struggling to satisfy their coverage and capacity needs, and are experiencing the effects of increased consumer demand combined with an extremely limited ability to purchase or otherwise acquire additional spectrum.”<sup>79</sup> In light of these conflicting arguments, we cannot agree here that any particular carrier’s self interest provides good cause or promotes the public interest so as to justify the grant of a waiver.

28. Additionally, contrary to the arguments offered by the proponents of a rule waiver, we do not believe that the facts and circumstances surrounding Auction No. 58 are so unique or unusual that application of the entrepreneur eligibility rule would be inequitable, unduly burdensome, or contrary to the public interest.<sup>80</sup> CTIA and supporting commenters maintain that the circumstances surrounding much of the C block spectrum available in Auction No. 58 are unique because the licenses returned through the NextWave Settlement had met the construction requirements and, but for the settlement, would have been available in the secondary market to any qualified purchaser.<sup>81</sup> CTIA argues that fairness and consistency require the Commission to allow all of these licenses to be available in open bidding.<sup>82</sup> T-Mobile argues that at a minimum the Commission must grant a waiver of the eligibility rules with respect to licenses for this spectrum.<sup>83</sup>

29. We do not believe, however, that CTIA and others have demonstrated that either the fact that the licenses were returned through a litigation settlement or that the licenses previously complied with the Commission’s construction requirements warrants a finding of unique circumstances that render application of the rule inequitable, unduly burdensome or contrary to the public interest. The Commission did not specifically address, in the *C/F Block Sixth Report and Order*, the status of spectrum that would be returned to the Commission under a settlement or that had met the construction requirements. It did, however, state the modifications to its rules would apply to “any subsequent auctions of C or F block licenses, including any spectrum made available or reclaimed from bankruptcy proceedings in the future.”<sup>84</sup> Given the circumstances surrounding the NextWave litigation, including an earlier effort to settle the litigation, we reject the argument that such a statement should not be interpreted to include spectrum auctioned after being returned to the Commission through settlement.<sup>85</sup> Moreover, we recognize that if the Commission had intended the benchmark for future eligibility to rest upon whether the spectrum associated with a previous license had met the construction requirements, it could have added that factor to the distinguishing characteristics it used to determine open and closed bidding, but it did not. Indeed, in the same Order, the Commission adopted a construction exception to allow for unrestricted transfers of set-aside licenses in the secondary market but it did not apply this exception to the eligibility criteria for licenses available in future auctions.<sup>86</sup>

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<sup>78</sup> See e.g., Council Tree Comments at 15-16.

<sup>79</sup> *Id.* at 16.

<sup>80</sup> 47 C.F.R. § 1.925(b)(3)(ii).

<sup>81</sup> CTIA Petition at 10-13.

<sup>82</sup> *Id.*

<sup>83</sup> T-Mobile Comments at 17-21.

<sup>84</sup> *C/F Block Sixth Report and Order* at 16267, ¶ 1.

<sup>85</sup> See e.g., DE Supporters Comments at 5-6; Council Tree Comments at 12, 17 (“Smaller carriers have relied on this pronouncement, which is also embedded in the Commission’s rules.”); 47 C.F.R. § 24.709 (eligibility for licenses for frequency Blocks C and F).

<sup>86</sup> *C/F Block Sixth Report and Order* at 16290 ¶ 49.

30. Finally, we note that this spectrum is being offered through Commission auction and is not available in the secondary market because it was returned to the Commission in exchange for extinguishing outstanding debt and obligations in litigation. Those supporting the grant of a waiver have not shown that it is inequitable to apply our rules under such circumstances. Furthermore, the fact that our rules preclude certain entities from bidding upon the licenses is not unduly burdensome. For specific policy reasons, the Commission elected to maintain the entrepreneur requirements in its decision in the *C/F Block Sixth Report and Order*. Although certain commenters have argued that our current rules are contrary to their own particular interests, the parties supporting a waiver have offered insufficient proof to establish that maintaining these rules for this auction is contrary to the public interest. We therefore deny parties request to waive our rules for some or all of these licenses.

### C. Dobson Request for Waiver

31. Dobson seeks a waiver to extend the expired entrepreneur eligibility provisions of Section 24.709(a)(5)(i) of the Commission's rules to allow it and other entities to participate in closed bidding in Auction No. 58.<sup>87</sup> Specifically, Section 24.709(a)(5)(i) formerly allowed entities that had been eligible for and had participated in Auction No. 5 or Auction No. 10 to bid for C block licenses offered in closed bidding in any auction beginning within two years of March 23, 1999, which was the start date of Auction No. 22, even if those entities did not meet the size requirements to participate in closed bidding.<sup>88</sup> Pursuant to this "grandfathering" provision of the Commission's entrepreneur rules, Dobson was eligible to participate in closed bidding in Auction No. 35. Dobson now argues that it should be permitted to bid on licenses for spectrum that it previously won in Auction No. 35, while grandfathered, but that it was not ultimately granted because of pending litigation and/or bankruptcy proceedings. As noted above, much of this spectrum is now included in the Auction No. 58 license inventory. Dobson contends that the history of the spectrum makes its situation, and that of other previously grandfathered entities, unique and that the public interest would be served by extending the expired eligibility provisions of Section 24.709(a)(5)(i) to Auction No. 58. In opposition, Council Tree argues that Dobson has shown neither that its circumstances are sufficiently unique to justify a waiver nor that the public would benefit from continuing to extend the grandfather exception to entities that have grown too large to meet the Commission's entrepreneur eligibility requirements.<sup>89</sup>

32. We agree with Council Tree that Dobson has not met either prong of the standard for waiver in Section 1.925 of the Commission's rules.<sup>90</sup> First, Dobson has not shown that the underlying purpose of the rule would not be served by application to its circumstances.<sup>91</sup> Instead, Dobson's arguments directly contravene the underlying purpose of the Commission's decision to establish the grandfathering provision for a limited period of time. When originally adopting the "grandfathering" provision, the Commission did so in contemplation of a planned auction of C block licenses.<sup>92</sup> Once it

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<sup>87</sup> Dobson Request at 4.

<sup>88</sup> See 47 C.F.R. § 24.709(a)(5)(i). Entities that had earlier returned C block spectrum to the Commission pursuant to the disaggregation, prepayment, or amnesty/prepayment restructuring options, however, were barred from bidding on that spectrum until two years after the start date of the reacquisition of that spectrum. 47 C.F.R. § 24.709(a)(5)(iv).

<sup>89</sup> Council Tree Reply Comments at 12-14.

<sup>90</sup> 47 C.F.R. § 1.925.

<sup>91</sup> 47 C.F.R. § 1.925(b)(3)(i).

<sup>92</sup> See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16436, 16448 ¶ 22 (1997) (*C/F Block Second Report and Order*) ("We will allow all entities that were eligible for and participated in the original C block auction to bid in *the reacquisition*") (emphasis added). See also 47 C.F.R. § 24.709(b)(9)(i) (1997) ("any entity that was eligible for and participated in the first auction for frequency block C, which began on December 12, 1995, will be eligible to bid in *a reacquisition* of (continued...)")

was clear that more than one subsequent auction of C and F block broadband PCS spectrum would occur, the Commission, in adopting Section 24.709(a)(5)(i), limited the extended eligibility to two years after the start date of the first reacquisition of C block spectrum, which was Auction No. 22.<sup>93</sup> In fact, the Commission specifically stated that “fairness to other future bidders” prevented grandfathered eligibility “indefinitely.”<sup>94</sup> Thus, it is clear that the Commission did not intend to permanently “grandfather” the entrepreneur eligibility of entities like Dobson but, instead, meant for the provision to sunset two years after the beginning of Auction No. 22. It did not say, as Dobson appears to argue, that the extension of eligibility would sunset once all the available spectrum was awarded to winning bidders. We believe that extending the grandfathering provisions of this rule now, more than six years after the decision to limit the provision, would frustrate rather than serve the Commission’s intentions, and we therefore find that Dobson’s waiver is not warranted on these grounds.

33. Second, Dobson has not established that the facts and circumstances it presents are so unique as to render the application of the rule to be inequitable, unduly burdensome or contrary to the public interest.<sup>95</sup> There is nothing unique about an entity, which formerly met the Commission’s entrepreneur requirements, growing beyond those eligibility thresholds. Rather, such a situation is entirely what the Commission intended and hoped it could achieve with its entrepreneur policies. Dobson’s growth beyond the Section 24.709 eligibility limits serves as a testament to its success. Given Dobson’s accomplishments, we do not believe that applying the rule to its particular circumstances is unduly burdensome or inequitable. Further, entities such as Dobson were aware that litigation surrounded Auction No. 35. And, contrary to the arguments of Dobson, the fact that the NextWave litigation has been considered to be unique in any one particular context does not mean that the Commission must grant a waiver in every instance that an applicant wishes to use the argument as a cloak to shield its own agenda. Dobson received the benefit of the grandfathering provision when it was permitted to participate in closed bidding in Auction No. 35. The fact that it was not ultimately awarded certain spectrum from Auction No. 35 is not a unique circumstance that renders the sunset of the grandfathering provisions to be inequitable, unduly burdensome, or contrary to the public interest. Had the Commission intended to allow entities such as Dobson the opportunity to participate in closed bidding until all spectrum was awarded to a winning bidder, it could have chosen to do so. It did not. Rather, the Commission established a reasonable two year period of time for which to extend a grandfathering provision, and Dobson has not presented any facts or circumstances so unique as to warrant the grant of a waiver of Section 24.709(a)(5)(i).<sup>96</sup> We therefore deny its request.

#### IV. CONCLUSION

34. We find that the public interest is served by maintaining the current entrepreneur broadband PCS C block licenses. The petition for reconsideration of the Auction No. 58 Comment Public Notice filed by Verizon Wireless is essentially an untimely petition for reconsideration of the *C/F Sixth Report and Order* and therefore dismiss it as procedurally defective. Moreover, after weighing the likely

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(...continued from previous page)

licenses for frequency block C conducted after March 31, 1998.”) (emphasis added). The Commission created the “grandfathered” eligibility in order to further the goals of “resolv[ing] the financing issues facing C block licensees and restor[ing] certainty to the marketplace” as well as the public interest considerations mandated by 47 U.S.C. § 309(j). *C/F Block Second Report and Order* at 16448 ¶¶ 21-22.

<sup>93</sup> Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd 15743, 15752 ¶ 15 (1998) (*C/F Block Fourth Report and Order*).

<sup>94</sup> *C/F Block Fourth Report and Order* at 15752 ¶ 15.

<sup>95</sup> 47 C.F.R. § 1.925(b)(3)(ii).

<sup>96</sup> 47 C.F.R. § 24.709(a)(5)(i).

costs that would result with initiating at this time another rulemaking against any benefits that might arise if we were to eventually make a wholesale change in policy, as the petitioners have requested, we deny CTIA's request to initiate a rulemaking. We also find that CTIA fails to demonstrate the criteria to waive the eligibility rules with respect to Auction No. 58. Finally, we deny the request by Dobson to extend an expired grandfathering entrepreneur eligibility provision as Dobson has failed to demonstrate unique circumstances that would support a waiver.

#### V. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED that, pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the petition for reconsideration filed by Verizon Wireless on July 19, 2004, is DISMISSED.

36. IT IS FURTHER ORDERED that, pursuant to the authority granted in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.3, 1.407, and 1.925 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.407, 1.925, the petition for rulemaking and request for waiver filed by CTIA – The Wireless Association on July 8, 2004, is DENIED.

37. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. §§ 1.3, 1.925, the request for waiver filed by Dobson Communications Corporation is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A****Comments Filed Pursuant to *Auction No. 58 Comment Public Notice (DA 04-1639)*****Comments**

1. 3G PCS, LLC (3G PCS Auction Comments)
2. Alta Communications (Alta Auction Comments)
3. American Women in Radio and Television, Inc. (AWRT Auction Comments)
4. Artic Slope Regional Corporation (ASRC Auction Comments)
5. Catalyst Investors (Catalyst Auction Comments)
6. Coloma Spectrum, LLC (Coloma Auction Comments)
7. Council Tree Communications, Inc. (Council Tree Auction Comments)
8. CTIA – The Wireless Association (CTIA Auction Comments)
9. Designated Entity Program Supporters (DE Supporters Auction Comments)
10. Dobson Communications Corp. (Dobson Auction Comments)
11. Doyon, Ltd. (Doyon Auction Comments)
12. Highland Cellular LLC (Highland Auction Comments)
13. Madison Dearborn Partners, LLC (MDP Auction Comments)
14. Maxicom PCS, LLC (Maxicom Auction Comments)
15. Media Venture Partners (MVP Auction Comments)
16. Northstar Technology, LLC (Northstar Auction Comments)\*\*
17. Rural Telecommunications Group, Inc. (RTG Auction Comments)
18. Verizon Wireless (Verizon Wireless Auction Comments)
19. Vincent D. McBride and Scott Reiter (McBride/Reiter Auction Comments)

**Reply Comments**

1. Council Tree Communications, Inc. (Council Tree Auction Reply Comments)
2. CTIA – The Wireless Association (CTIA Auction Reply Comments)
3. Designated Entity Program Supporters (DE Supporters Auction Reply Comments)
4. QUALCOMM Inc. (Qualcomm Auction Reply Comments)
5. T-Mobile USA, Inc. (T-Mobile Auction Reply Comments)

\*\* Requested that its comments be rescinded.



**APPENDIX B****Filings in Response to CTIA Petition for Rulemaking  
or in the Alternative, a Request for Waiver (RM-11019)****Comments and Oppositions**

1. 3G PCS, LLC (3G PCS Comments)
2. Alta Communications (Alta Comments)
3. Arctic Slope Regional Corporation (ASRC Comments)
4. Blooston, Mordkofsky, Dickens, Duffy, & Prendergast (Blooston Comments)
5. Catalyst Investors (Catalyst Comments)
6. Council Tree Communications, Inc. (Council Tree Comments)
7. CTIA – The Wireless Association (CTIA Comments)
8. Designated Entity Program Supporters (DE Supporters Comments)
9. Doyon, Ltd. (Doyon Comments)
10. Madison Dearborn Partners, LLC (MDP Comments)
11. Vincent McBride and Scott D. Reiter (McBride/Reiter Comments)
12. Minority Media and Telecommunications Council (MMTC Comments)
13. Motorola, Inc. (Motorola Comments)
14. National Telecommunications Cooperative Association (NTCA Comments)
15. NTCH, Inc. (NTCH Comments)
16. PC Management (PC Management Comments)
17. Rural Cellular Association (RCA Comments)
18. Rural Telecommunications Group, Inc. and Organization for the Promotion & Advancement of Small Telecommunications Companies (RTG/OPASTCO Comments)
19. Sprint Corp. (Sprint Comments)
20. T-Mobile USA, Inc./Declaration of Simon J. Wilkie (T-Mobile Comments)
21. Verizon Wireless (Verizon Wireless Comments)

**Reply Comments and Replies to Oppositions**

1. CTIA – The Wireless Association (CTIA Reply Comments)
2. Council Tree Communications, Inc. (Council Tree Reply Comments)
3. Ericsson Inc. (Ericsson Reply Comments)
4. Nokia Inc. (Nokia Reply Comments)
5. The Progress & Freedom Foundation (PF Foundation Reply Comments)
6. QUALCOMM, Inc. (Qualcomm Reply Comments)
7. T-Mobile USA, Inc. (T-Mobile Reply Comments)
8. Verizon Wireless (Verizon Wireless Reply Comments)

**Ex Partes**

1. CTIA – The Wireless Association
2. Council Tree Communications, Inc.
3. Intel Corporation
4. Minority Media and Telecommunications Council
5. Rural Cellular Association
6. T-Mobile USA, Inc.
7. Dobson Communications Corp.