

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Promoting Investment in the 3660-3700) GN Docket No. 17-258
MHz Band)

**COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

I. INTRODUCTION AND SUMMARY

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits these Comments in response to Federal Communications Commission’s (the “Commission’s”) request for comment on proposed changes to the rules governing Priority Access Licenses (“PALs”) that will be issued in the 3550-3700 MHz Band (“3.5 GHz Band”) and the Rulemaking’s Initial Regulatory Flexibility Analysis.² Specifically, the Commission seeks comment on changing the current rules to provide for longer license terms, renewability, larger geographic license areas, and auction methodology.

NTCA appreciates the Commission’s efforts to take a fresh look at spectrum rules to promote robust investment in network deployment. But to achieve this goal in rural areas, the

¹ NTCA represents approximately 850 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. All NTCA service provider members are full service rural local exchange carriers (“RLECs”) and broadband providers, and many provide fixed and mobile wireless, video, satellite and other competitive services in rural America as well.

² *Promoting Investment in the 3550-3700 MHz Band*, GN Docket No. 17-258, Notice of Proposed Rulemaking (Rel. Oct. 24, 2017) (“Notice”).

Commission must adopt policies that provide small carriers – those most likely to build in rural markets – a reasonable prospect to obtain 3.5 GHz spectrum. Although certain of the proposals offered would fit nicely into the business plans of the nationwide providers who requested that the Commission reopen the rules governing this band, changes with respect to license sizes, in particular, would be to the detriment of rural consumers and the smaller operators that have a proven track record of rural deployment. Thus, the Commission should ensure that any changes to the current rules will accommodate a variety of potential providers – large and small – and ensure that the spectrum can be put to its highest and best use, everywhere.

To the extent the Commission decides to expand the PAL license size, it should license a portion of the spectrum on the basis of counties and retain census tracts for the others.

Regarding license term and renewability, NTCA would support a modification to the county-sized licenses such that licensees could reasonably expect to obtain licenses for a total of ten years. The modest changes to the rules as proposed herein could accommodate a wide variety of users in the spectrum band and achieve Congressional objectives for the licensing and use of the spectrum.

II. SECTION 309(j) REQUIRES AN AUCTION DESIGN THAT ENSURES SMALL BUSINESS AND RURAL CARRIER PARTICIPATION IN THE AUCTION AND PROVISION OF SERVICE.

When prescribing regulations for awarding licenses for new services through competitive bidding, the Commission cannot ignore or sidestep the Congressional mandates articulated in Section 309(j) of the Communications Act of 1934, as amended. (“the Act”). This statute compels the Commission to adopt safeguards to protect the public interest in the use of the spectrum and to promote the purposes of the Act – which include making radio communication

service available “to *all* the people of the United States.”³ Section 309(j) further articulates certain objectives, including:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public *including those residing in rural areas*, without administrative or judicial delays; and

(B) promoting economic opportunity and competition and ensuring 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 businesses, rural telephone companies, and businesses owned by members of minority groups and women.*⁴

In Section 309(j)(4) of the Act, Congress further mandated that the Commission:

(B) include performance requirements such as appropriate deadlines and penalties for performance failures, *to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees*, and to promote investment in and rapid deployment of new technologies and services; [and]

(C) consistent with the public interest, convenience, and necessity, the purposes of this Act, and the characteristics of the proposed service, *prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small business, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services.*⁵

Any regulations for the award of new licenses through competitive bidding must expressly account for and seek to achieve these objectives.

³ 47 U.S.C. §151 (emphasis added).

⁴ 47 U.S.C. §§309(j)(3) (A)(B) (emphasis added). The Supreme Court, in its *Adarand* and subsequent *VMI* decisions, struck down preferential treatment of minorities and women. *See Adarand Constructors, Inc. V Pena*, 515 U.S. 200, 227-30 (1995) and *United States v. Virginia*, 518 U.S. 515, 531034 (1996).

⁵ 47 U.S.C. §§ 309(j)(3)(B)(C) (emphasis added).

A. PEA Sized Geographic Licenses Would Fail to Achieve the Objectives Articulated by Section 309(j)

Just over two years ago, the Commission adopted the existing rules for commercial use in the 3.5 GHz Band.⁶ The First Report and Order defined the geographic license area for each PAL as one census tract.⁷ The existing rules were specifically designed to comply with Section 309(j), and to promote investment and maximize opportunities in the band, by disseminating PALs among a wide variety of applicants, as well as ensuring the efficient and intensive use of electromagnetic spectrum.

Having failed to overcome the clear directives of Section 309(j) the first time around, CTIA and T-Mobile (“Petitioners”) filed what are in effect petitions for reconsideration, urging the Commission to open a new rulemaking and increase the geographic licensing area from census tracts to Partial Economic Areas (“PEAs”).⁸ They argue that PEAs are small enough to allow for flexible and targeted networks.⁹ However, virtually all non-nationwide providers, including those represented by NTCA, disagree.¹⁰ While NTCA is willing to engage in a dialogue (despite the procedural posture of the petitions) about whether certain changes might result in more productive use of the spectrum in question, it is clear that ratcheting the license

⁶ *Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, GN Docket No. 12-354, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959 (2015) (“First Report and Order”).

⁷ 47 CFR § 96.3.

⁸ Petition of CTIA for Rulemaking to Amend the Commission’s Rule Regarding the Citizens Broadband Radio Service in the 3550-3700 MHz Band, RM – 11788 (filed June 16, 2017) (“CTIA Petition”), Petition of T-Mobile USA, INC. for Rulemaking to Maximize Deployment of 5G Technologies in the Citizens Broadband Radio Service, RM – 11798 (filed June 19, 2017) (“T-Mobile Petition”) (together “the Petitions”).

⁹ See CTIA Petition at 9-10; T-Mobile Petition at 16-18.

¹⁰ See, e.g. Joint Comments of RWA and NTCA at 4-6; General Electric Reply at 8-13; Google at 22-26; Cantor at 3-4; City of NY at 2; DSA at 9; Sony at 1-2; Southern Linc at 8; Starry at 4-5; Telrad at 2; Vivint Wireless at 2; WISPA at 14; Amplex Internet at 1; Brendhart at 2; City of Bland, Virginia at 1; e-vergent at 1.

sizes upward to fit the business plans of a few nationwide operators alone does not promote the goals of the underlying law.

Indeed, increasing the size of the license area to PEAs will correspondingly increase the cost of the licenses to the point of unaffordability for smaller operators in many areas. Only large providers have the resources to bid on large geographic areas and the ability to monetize the spectrum via a larger build out. PEA sized license territories will preclude the ability of small businesses from participating in the provision of spectrum-based services.

Furthermore, from a public interest perspective, large license territories do not promote the provision of spectrum based services to rural consumers. Large companies with the resources to bid on large areas have an abysmal record of serving rural areas. They understandably focus their build out on the more profitable highly populated portions of license areas. Large carriers are likely to use the spectrum to relieve mobile congestion and enhance capacity where needed and enhance services in profitable areas, consistent with past practice. Conversely, small businesses are seeking inexpensive spectrum to provide niche services and to niche populations. NTCA's members are looking at the spectrum to enhance or supplement broadband service to their rural communities – the communities all too often ignored by the large providers.

Without license territories that are smaller than PEAs, many small businesses and rural carriers cannot effectively participate in the auction – flying in the face of Section 309(j). Adoption of a PEA-based licensing scheme would thus call into question whether the statutory mandates are being fulfilled and would result in clear public interest harms, including the elimination of many small businesses and rural carriers from the CBRS auction altogether and delayed deployment of broadband services to rural areas.

B. The FCC Cannot Rely on the Secondary Market to Ensure Spectrum Opportunities for Rural Carriers

The large providers argue that allowing partitioning and disaggregation will support a wide variety of deployments and mitigate concerns that larger licensing areas will result in inefficient spectrum use.¹¹ However, the Commission cannot rely on auction winners to provide rural carriers or other small businesses with access to unused spectrum through secondary market arrangements. Secondary markets are neither a reliable source of spectrum nor a solution to the lack of coverage in rural areas.¹² Relying on small and rural carrier access to spectrum via the secondary market assumes without justification or evidence that such a market will develop and a leap of faith that license holders are willing to part with spectrum at reasonable prices.

Indeed, contrary to the assertions of the large providers, in reality, the secondary market has proven to be an effective tool for large operators to *consolidate* spectrum. It is not an effective method for small and rural operators to acquire spectrum through partitioning or disaggregation. As explained a report prepared in 2014 for the 600 MHz Incentive Auction, “there are many examples of large operators acquiring spectrum from smaller players. . . [but] little recent history of the larger carriers leasing, disaggregating or partitioning large sections of spectrum where they already have service.”¹³ The secondary market cannot be relied on to

¹¹ See, T-Mobile Petition at 18-19; ATT Comments at 6; Ericsson Comments at 7; Verizon Comments at 8-9; Nokia Comments at 7.

¹² See *generally*, Federal Communications Commission, Connecting America: The National Broadband Plan (2010), noting, “While the FCC currently has rules that enable secondary markets the record is mixed” and that some public comments provide “that unused or underutilized spectrum is not being made available to smaller providers, especially in rural areas where spectrum goes unused.”

¹³ Richard Marsden, Dr. Chantale LaCasse, and Jonathan Pike, *Local and Regional Licensing for the US 600 MHz Band* (January 2014), listing dozens of recent transactions in which large providers obtained spectrum from small providers.

ensure that small businesses and rural carriers have access to spectrum or that rural areas will see the benefit of spectrum based services in the CBRS band.

III. MODEST CHANGES TO THE CBRS LICENSING SCHEME COULD ACCOMMODATE A VARIETY OF POTENTIAL LICENSEES, STRIKING AN IMPORTANT BALANCE THAT WILL PROMOTE MORE EFFECTIVE USE OF THIS BAND

To the extent nonetheless that there are good reasons to alter the current licensing scheme for CBRS, NTCA urges the Commission to fulfill its mandates to Section 309(j) through modified rules that still permit a variety of uses and accommodate a variety of users. There is a tremendous diversity of use cases and a broad range of potential 3.5 GHz PAL operators. The spectrum is currently used and has the potential for indoor WiFi replacement, relieving current congestion on networks, enabling the Internet of Things to flourish, and more. Licensing the spectrum to accommodate the business plans of the most well-financed current spectrum users would be to the detriment of the country. The Commission should look at licensing the spectrum with the same innovative eye it is expecting of the licensees.

A. A Mix of Census Tracts and County Size Licenses Will Accommodate the Most Business Plans

NTCA encourages the Commission to license the CBRS spectrum according to a mix of counties and census tracts. Retaining some spectrum licensed according to census tracts would preserve plans already in place to leverage the spectrum for innovative uses, while also creating larger license areas that better fit the business plans of other licensees, including Petitioners. More specifically, as a compromise that can accommodate many different kinds of providers while adhering more faithfully to Section 309(j), NTCA recommends licensing two (2) PAL spectrum blocks according to the current census tract plan and five (5) blocks by counties. Given the industry's and the Commission's recent experience and plans for additional complex

auctions, there should be confidence that all would overcome challenges related to the number of licenses being auctioned.

Retaining two licenses blocks for census tracts will preserve the ability of new entrepreneurs and niche businesses to obtain spectrum. It will spur quick deployment with low capital expense in very localized areas. Retaining spectrum according to census tracts would also permit those who have begun deploying based on the rules adopted in the very recent past to move forward quickly with minimal disruption.

Meanwhile, county-sized licenses would accommodate a variety of business models. Bidders with geographic build out plans could target spectrum according to their needs without concerns of losing spectrum in a strategic census tract. Rural providers would have the ability to obtain spectrum in just the rural areas they intend to serve and nothing would preclude a larger provider from aggregating county licenses for a larger business plan. Counties “nest” into larger geographic service areas and operators would have the ability to secure licenses that correspond to their current footprints.

There is tremendous interest in the CBRS spectrum and all but the largest providers have thus far opposed increasing the size of the geographic area licenses to PEAs. Although Petitioners claim that PEA licensing would be “consistent with the geographic licensing area that the Commission has already identified as best for 5G operations”¹⁴ in the Spectrum Frontiers proceeding, the Commission never declared any licensing size to be “best” for 5G. In fact, in that same Spectrum Frontiers proceeding, the Commission adopted county-based licensing for Upper Microwave Flexible Use Service licenses in the 28 GHz band, concluding that “a county-

¹⁴ T-Mobile Petition at 18 (citing *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, et. al.* GN Docket No. 14-177, *et. al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014, ¶ 82 (“Spectrum Frontiers Proceeding”)).

based license affords a licensee the flexibility to develop localized services, allows for targeted deployments based on market forces and customer demand, and facilitates access by both smaller and larger carriers.”¹⁵

Larger geographic license territories drive small businesses out of spectrum auctions, whereas nothing beyond inconvenience perhaps prevents larger providers from participating in the auction and aggregating PALs to suit their needs. A combination of census tracts and counties therefore makes sense to strike a balance between operators, large and small.

B. A Slightly Longer License Term and Renewability Should be Considered for County Sized Licenses

The current three-year license term was affirmed in the 3.5 GHz Order on Reconsideration and Second Report and Order.¹⁶ It represents a compromise between those who wanted a very short license term and the commercial wireless industry which advocated for, and continue to request, longer terms to justify the costs of deployment. Petitioners again ask that the Commission license the PALs licenses according to the widely used ten-year license term, with a renewal expectancy. This proposal when combined with their PEA geographic license size proposal would turn the CBRS spectrum into just another expensive spectrum band owned by nationwide incumbents who primarily focus upon urban and suburban populations. Nonetheless, a further compromise approach is reasonable and readily available.

Recognizing that significant investment and time to obtain siting may be necessary to deploy the spectrum, NTCA can see the wisdom of, and could support, a slightly longer license term for licenses that are auctioned according to counties. The Commission should therefore structure the license term in five-year increments, such that an auction winner could expect to

¹⁵ Spectrum Frontiers Proceeding, ¶ 35.

¹⁶ *3.5 GHz Order on Reconsideration and Second Report and Order*, GN Docket No. 12-354, 31 FCC Rcd 5011 at 5021(2016).

hold a license for a total of ten years. This would sufficiently increase the license term as compared to the current rules, and provide county wide licensees with time to allow the industry to develop and market to mature, while simultaneously offering time that may be necessary for siting approvals for the expected large number of small cells. At the end of this period, licensees will have a better understanding of their spectrum needs and additional license terms could be based on a build out requirement coupled with a renewal expectancy.

IV. CONCLUSION

There is tremendous interest in the 3.5 GHz, CBRS spectrum band and it has the potential to create a new market of innovative uses. While tweaks to the auction rules may further promote efficient use of the spectrum, NTCA urges the Commission to not license the spectrum to fit the business plans of a few large, well-financed wireless providers. The compromises described *supra* represent a reasonable plan to accommodate the widest variety of applicants and will help the Commission meet its Congressional mandate to ensure that rural telephone companies have access to spectrum and that rural consumers receive the benefit of service.

Respectfully submitted,



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