

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

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In the Matter of)	
)	
Auction of Flexible-Use Service)	
Licenses in the 2.5 GHz Band for)	
Next-Generation Wireless Services;)	AU Docket No. 20-429
Comment Sought on Competitive)	
Bidding Procedures for Auction 108)	
_____)	

**COMMENTS OF NORTH AMERICAN CATHOLIC EDUCATIONAL
PROGRAMMING FOUNDATION, INC. (NACEPF) AND MOBILE BEACON**

May 3, 2021

Table of Contents

Introduction and Summary	1
I. The Commission’s proposed approach to setting minimum bids will exclude new entrants and sharply tilt the playing field in favor of the dominant 2.5 GHz operator.....	3
II. The Commission should adopt a single-round auction format and reject one-size-fits-all proposals to use a traditional SMR format for this unique band.	5
III. The Commission should open a window to review and challenge the proposed license inventory.	8
Conclusion	9

Introduction and Summary

NACEPF and Mobile Beacon appreciate the opportunity to comment on the Commission’s procedures for the 2.5 GHz band auction. In its 2019 Report and Order *Transforming the 2.5 GHz Band*,¹ the Commission chose to auction available 2.5 GHz spectrum to advance its goals of expanding connectivity and maintaining the nation’s 5G leadership. In so doing, it made clear that the 2.5 GHz auction is not—and should not be—simply a mechanism to assign spectrum to a single incumbent. Rather, the Commission reasoned that it could only effectively achieve these goals by ensuring that as wide a range as possible of potential licensees can participate in the 2.5 GHz auction. This is especially true in rural areas, where the Commission has recognized the importance of allowing “rural service providers to compete for spectrum licenses at auction” in the 2.5 GHz band and that doing so “will increase the availability of 5G service in rural areas.”²

These are not just good ideas. They are statutory mandates. The Telecommunications Act requires the Commission to adopt a system of competitive bidding that “disseminat[es] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.”³ Similarly, it must avoid “unjust enrichment through the methods employed to award uses of [spectrum],”⁴ “avoid[] excessive concentration of licenses,”⁵ and facilitate “rapid deployment of . . . services

¹ *Transforming the 2.5 GHz Band*, Report and Order, 34 FCC Rcd. 5446 (2019) (“2.5 GHz Order”).

² *Id.* ¶ 90.

³ 47 U.S.C. § 309(j)(3)(B).

⁴ *Id.* § 309(j)(3)(C).

⁵ *Id.* § 309(j)(3)(B).

for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.”⁶

An auction design that favors a single dominant wireless carrier at the expense of any other potential bidder would plainly contravene these statutory duties and undermine the Commission’s goals. But that is exactly what could happen in the 2.5 GHz band where, as the Commission has noted,⁷ a single carrier already leases the lion’s share of the available spectrum and could enjoy systematic and decisive advantages when this spectrum is auctioned. The Commission’s public notice on 2.5 GHz auction procedures rightly recognizes these risks. However, it also discusses certain auction procedures that would magnify the advantages for today’s dominant 2.5 GHz lessee, increasing the risk that this carrier will be able to permanently lock in its 2.5 GHz dominance even as other carriers and new entrants are desperate to acquire mid-band spectrum.

First, the public notice proposes to set minimum bids based on the bandwidth and population included within a license area, irrespective of the degree of encumbrance. However, virtually all 2.5 GHz licenses near urban areas will be heavily encumbered, and the encumbrance will likely affect the most heavily populated portions of the license areas. Thus, the Commission’s proposal will greatly inflate minimum bids relative to the true economic value for all prospective bidders except one: the existing lessee of that “underlay” spectrum.

Second, the public notice seeks comment on whether to use a simultaneous multi-round (“SMR”) or a single-round, sealed-bid auction format. Given the unique situation in the 2.5 GHz

⁶ *Id.* § 309(j)(3)(A).

⁷ 2.5 GHz Order ¶ 79.

band, the use of an SMR auction format would deter rather than foster participation by a “wide variety of applicants.”⁸ The fact that the Commission has used SMR auctions in other bands in the past is no justification for using this format here, in a band where very different conditions apply.

Finally, the Commission should ensure that its auction procedures reflect the decision in the 2.5 GHz Order not to auction fully encumbered spectrum. As some parties have observed, some of the licenses the Commission apparently intends to auction are, in fact, fully encumbered. At the same time, it has omitted some licenses that should be available for auction. Encumbrances in the 2.5 GHz band are very complicated, so it is not surprising that an iterative process is required to properly identify the spectrum available for auction. Existing 2.5 GHz licensees in particular have a strong interest in ensuring that their existing rights are accurately captured. Accordingly, the Commission should provide a window for parties to review and, if necessary, challenge the inventory of licenses it proposes to include in the auction to reduce the risk of disputes during and after the auction.

I. The Commission’s proposed approach to setting minimum bids will exclude new entrants and sharply tilt the playing field in favor of the dominant 2.5 GHz operator.

The Public Notice proposes to set minimum bids “using the total potential MHz-pops of each license offered in the auction, rather than on available white space in each block.”⁹ In other

⁸ 47 U.S.C. § 309(j)(3)(B).

⁹ *Auction of Flexible-Use Service Licenses in the 2.5 GHz Band for Next-Generation Wireless Services; Comment Sought on Competitive Bidding Procedures for Auction 108*, Public Notice, 36 FCC Rcd. 645, ¶ 47 (2021) (“2.5 GHz Auction PN”). See also 2.5 GHz Order ¶ 79.

words, minimum bids for licenses will be set as though any encumbrances within the license area did not exist.

As a result, minimum bids will often be drastically out of proportion to the true value of the licenses. In southern Florida, for example, NACEPF has previously highlighted the fact that, on many channels, Miami, Ft. Lauderdale, Tampa, St. Petersburg, and every other urban area is completely covered by existing licensees.¹⁰ Bidders will not be able to acquire direct access to this spectrum at auction. Rather, the licenses made available at auction will, on the frequencies where encumbrances exist, allow a licensee to offer service in the Everglades and other relatively unpopulated areas of south-central Florida. The Commission's proposed rules for setting minimum bids would ignore this and set minimum prices as though the licenses covered downtown Miami and other urban cores. Such inflated minimum bids will deter bidders, and particularly new entrants, from participating in the auction.

Worse still, for each license there is likely a single bidder that is *not* disadvantaged by this approach to setting minimum bids: the existing user of the underlay spectrum. Uniquely among all bidders, this user will already have access to encumbered spectrum. Therefore, the Commission's proposed approach to calculating minimum bids may offer a realistic proxy for the value of the spectrum for this one bidder—but not any other participant in the auction. As a result, in addition to suppressing auction participation, including encumbered spectrum in the calculation of minimum bids will also tend to concentrate spectrum in the hands of today's

¹⁰ See Letter from Katherine Messier, Director of Development, NACEPF; Stephanie Weiner, Counsel to NACEPF; and Paul Caritj, Counsel to NACEPF, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-120, at fig. 4 (filed Apr. 25, 2019).

dominant user of that spectrum by compounding the advantages that it already enjoys due to its unique position in the band.

The Commission has seen the error of this approach in past auctions and modified its rules accordingly. Auction 86, the BRS auction, offers the closest analogue, where a different swath of 2.5 GHz spectrum was auctioned with similar patterns of encumbrance. There, the Wireless Bureau noted that Commission precedent required it to “consider the amount of spectrum being auctioned, *levels of incumbency*, the availability of technology to provide service, the size of the geographic service areas, the extent of interference with other spectrum bands, and any other relevant factors that could have an impact on the spectrum being auctioned.”¹¹ As a result, although it had initially proposed to account for encumbrances using a blanket discount applicable to all licenses (already more than the Commission proposes to do here), the bureau ultimately “recognize[d] the concerns expressed regarding relative incumbency of the licenses” and, as a result, recalculated minimum bids “on a license-by-license basis using formulas based on bandwidth, license area population, and the encumbrance data.”¹² The Commission should follow an equally rational approach here where encumbrance is, if anything, a more significant issue than in Auction 86.

II. The Commission should adopt a single-round auction format and reject one-size-fits-all proposals to use a traditional SMR format for this unique band.

As the Commission notes, the 2.5 GHz band is highly unusual in (at least) two ways. First, the vast majority of the licenses to be auctioned are heavily encumbered by existing

¹¹ *Auction of Broadband Radio Service (BRS) Licenses Scheduled For October 27, 2009; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd. 8277, ¶ 172 (2009) (emphasis added).

¹² *Id.* ¶ 177.

licensees. In many cases, while license areas nominally track county lines, only small amount of unused “white space” within those counties will actually be available for bidders to acquire at auction. Existing licensees will remain in place and will be entitled to protection from harmful interference, barring bidders from using those portions of the new 2.5 GHz license areas unless a deal can be struck on the secondary market—or unless the bidder also happens to be the incumbent licensee or lessee. This ensures that 2.5 GHz licenses, including those that cover the same geographic location, may wildly differ in value and, therefore, will not be fungible.¹³

Second, the 2.5 GHz band is currently dominated by a single large wireless carrier that has leased the vast majority of 2.5 GHz licenses and holds the vast majority of overlapping 2.5 GHz BRS spectrum. These 2.5 GHz leases will survive the auction and restrain licensees’ ability to sell their licenses on the secondary market. This unusual situation will give a single bidder several important advantages in participating in the auction, including significant access to capital and a trove of economically useful information about existing use of the band, increasing the risk that this single carrier will permanently cement its dominant position in the band, even as other operators are clamoring for mid-band spectrum. These major differences warrant careful consideration and should lead the Commission to reject the idea that it should simply adopt the same auction rules it has used in different bands. Instead, it should adopt a single-round sealed bid with pay-as-bid pricing.

This bidding approach is the best way to achieve the Commission’s goals of encouraging auction participation and increasing competition in the 2.5 GHz band to drive 5G deployments. First, the single-round, sealed-bid format will encourage new entrants to participate in the

¹³ See 2.5 GHz Auction PN ¶ 35.

auction. Because the 2.5 GHz band is currently dominated by a single large carrier with deep pockets and a sophisticated understanding of the market for 2.5 GHz spectrum, new entrants may reasonably worry that they are doomed to be outbid if the Commission adopts a dynamic auction format like SMR that allows participants to observe and react to others' bidding activity. In a single-round, sealed-bid format, by contrast, all bidders will have less information about the likely bids of others and, therefore, are more likely to focus on their own planned use, the economic potential of their own business plans, and the level of investment in spectrum that this business plan would support. That shift of focus away from the bids placed by others and potential competitive rivalries and toward the concrete utility of the spectrum will increase the chances that new entrants serving underserved markets or other niches may be able to prevail in the auction.

The use of a single-round, sealed-bid auction format would also address the other unusual feature of the 2.5 GHz band: non-fungible licenses. Because they are not fungible, the Commission has observed that it will be required to individually auction each of the approximately 8,300 licenses it intends to make available.¹⁴ With a dynamic auction format such as SMR, this will be time consuming and challenging for the Commission. But, perhaps more importantly, it will be time consuming and challenging for prospective bidders, and will likely reduce auction participation. The single-round format would address this by ensuring that the auction is resolved quickly, with little ongoing burdens for bidders. In a single-round, sealed-bid auction, a bidder must only formulate a single bid or package of bids and submit them, rather

¹⁴ *Id.* ¶ 35.

than repeating the bidding process, perhaps for months, until the auction is finally resolved, as in an SMR auction.

Finally, if the Commission adopts a single-round, sealed-bid format, it should adhere to its proposal to adopt pay-as-bid pricing. Bidding credits aside, this logical approach would simply require bidders to pay the total amount of their winning bids in the auction. The Commission should reject more exotic proposals to adopt alternate pricing rules, such as Vickery pricing. Vickery pricing would allow a winning bidder to only pay the amount bid by the second-highest bidder. In theory, this approach could allow a bidder to insulate itself from the risk that it might place a winning bid far above the bid necessary to outbid its competitors. But, in the 2.5 GHz auction, the Commission is faced with exactly the opposite problem: how to ensure that bids remain aligned with the true utility of the licenses and are not distorted due to the highly unusual patterns of incumbency in the band, to the detriment of new entrants. An auction like this one, where bidding could be dominated by a single large entity, presents the risk that the dominant carrier could take advantage of the Vickery pricing rule to place extremely aggressive maximum bids knowing that they will only have to pay the far smaller maximum bids of their less-well-capitalized competitors—effectively freezing out new entrants without bearing any costs for doing so. The Commission should avoid this or other proposed auction rules that could tilt the playing field further in favor of the dominant incumbent carrier.

III. The Commission should open a window to review and challenge the proposed license inventory.

In its 2.5 GHz Order, the Commission decided to auction overlay licenses “in those markets where white spaces (i.e., spectrum that is not associated with an active license) exist.”¹⁵

¹⁵ 2.5 GHz Order ¶ 77.

However, parties have pointed out that the Commission’s proposed inventory of licenses made available in the 2.5 GHz auction appears to include areas where *no* white spaces exist on the channels being offered.¹⁶ Presumably, because the Commission has not reconsidered its prior decision to only auction spectrum in areas with white spaces, this was simply a technical oversight.

To ensure that such issues do not affect the auction itself, the Commission should publish a revised inventory of licenses to be made available during the auction and open a public comment period so interested parties can review and, if necessary, challenge the Commission’s determination. Given the complexity of 2.5 GHz encumbrances, this simple step is likely the most reliable way for the Commission to ensure that its inventory is correct and not subject to further challenges once the auction is underway or already completed. Because this process could be conducted in parallel with other pre-auction activities, the Commission could easily offer such a comment period without materially delaying the beginning of the auction.

Conclusion

Auctioning 2.5 GHz spectrum presents special challenges with respect to the Commission’s goals—and statutory duties—to promote deployment by assigning licenses to a wide variety of applicants, especially in rural areas. The fact that one entity has access to the vast majority of the available underlay spectrum in nearly every area where EBS white space is available represents a severe market distortion which, if the Commission does not take care, will only reinforce itself through the spectrum auction process.

¹⁶ *See, e.g.*, Letter from James B. Goldstein, Director, Technology and Engineering Policy, Government Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, AU Docket No. 20-429, at 1 (filed Feb. 16, 2021).

Using an SMR auction format and setting minimum bids as though encumbrances do not exist will exacerbate these distortions by deterring widespread participation in the auction and freezing out new entrants. The use of a single-round, sealed-bid format, with minimum bids set according to the value of the available white space (i.e., taking the degree of encumbrance into account), will help to address these inequities and promote participation by new entrants.

Finally, the Commission should open a brief window to allow interested parties to provide feedback on the spectrum it intends to make available at auction to ensure that technical errors do not lead it to contravene previous Commission decisions about the spectrum to be auctioned. The Commission should take the time needed and ensure its spectrum maps are correct before moving forward with the auction. As the 2.5 GHz proceeding has demonstrated, a wide variety of new entrants are eager to acquire and use 2.5 GHz spectrum. Indeed, new entrants have waited decades for the opportunity to license 2.5 GHz spectrum. Now that the Commission is finally preparing to assign this spectrum, it should ensure that its auction rules treat these prospective applicants fairly.

Respectfully submitted,

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