

this approach, the fee for a single channel^{74/} would be approximately \$130,000 to \$165,000 per region.^{75/}

64. PacTel supports either alternative, but suggests that the second approach may deter speculators more than the first because the fees will be higher.

65. This proposed two-tiered application fee approach would have multiple benefits. It holds promise for raising the level of fees to a sufficient level to deter non-serious applicants. At the same time, it reduces the risk that the fee structure will be struck down because the proposed fees bear no

^{74/} It may require more work to process applications which seek more bandwidth, as multiple transmitters on subdivided channels may be involved. The Commission should, therefore, consider requiring larger bandwidth licensees initially to pay a higher fee. For example, assuming that the smallest increment of bandwidth that is granted is 25 kHz, the application fee would reflect the multiple of 25 kHz that is granted (e.g., a 50 kHz applicant would pay two times the application fee of a 25 kHz applicant). If the applicant later built a system with only one transmitter per site using the entire amount of bandwidth, rather than multiple transmitters, the fee in excess of the 25 kHz fee could be refunded.

^{75/} PacTel calculated the fees as follows. The geographic area of the United States, including water within the territorial boundaries of the United States, is 3,622,205 square miles. A transmitter under the proposed rules would have a radius of 20 miles; thus, yielding a coverage area of 1256 square miles (using area = 3.14×20^2). Dividing the square mileage of the United States by the coverage area of a transmitter yields 2,884 transmitters. Assuming an application fee of \$230.00 per transmitter, the fee for a license for the entire United States would be \$633,320, and \$132,664 for one of five regions. Of course, in order to provide complete coverage, the transmitters would be required to overlap some. Presuming that the transmitter overlapped 20%, the regional fee would be increased to approximately \$165,957.

direct relationship to the actual processing costs.

Specifically, the two-tiered structure enables the Commission to collect greater fees from those whose applications are subject to greater processing. Finally, in times of budget deficits it will permit the Commission to collect sufficient money to cover the myriad of processing functions that will attend the PCS allocation.

D. Forfeiture.

66. In addition to the aforementioned mechanisms which the Commission can adopt to deter insincere applicants, PacTel urges the Commission to consider a further mechanism which has proved effective in the modern commercial construction industry to assure the seriousness of the capabilities and intentions of entities bidding to undertake a major construction project. Specifically, PacTel urges the Commission to consider adopting a forfeiture bond requirement in connection with the narrowband PCS application process.^{76/}

^{76/} The use of a performance bond to assure that an applicant is *bona fide* was recently adopted in the cellular renewal context. In determining the qualification standards for challenging applicants to cellular renewal applicants, the Commission adopted a rule that a challenger could establish its financial commitment by 1) an irrevocable letter of credit or performance bond covering the amount of its estimated construction and first-year operating costs or 2) placing a sufficient amount of cash in an escrow account to meet construction and initial operating costs and specifying in the application the escrow account number and the
(continued...)

67. As the regulatory agency responsible for selecting entities capable of constructing PCS facilities on a timely basis, the Commission is in a position not unlike a landowner seeking to hire a contractor to complete a construction project. In both cases, the decisionmaker is seeking a mechanism which will serve to protect against the selection of contractors whose weak capitalization, poor planning, inadequate management, outright dishonesty or other shortcomings will result in a failure to complete the proposed project in an efficient and timely manner. A common and commercially accepted procedure for doing so is to require those seeking the construction authority to purchase a surety bond, usually from a commercial surety company, which is financially capable of paying a designated penalty if the contractor fails to perform.

68. Generally, the bond will contain a specified "forfeiture amount," the maximum amount the surety company will be obliged to pay out in the event of non-performance. It would appear to be relatively simple for the Commission to establish an appropriate "forfeiture amount" with respect to a narrowband PCS surety bond. The Commission recently adopted a Policy Statement which sets forth the base amounts the Commission intends to charge Commission licensees as forfeitures for rule violations.

^{76/} (...continued)

financial institution where the escrow account is located. See Licensee Renewals in the Domestic Cellular Radio Telecommunications Service, CC Docket 90-358, Report and Order (released January 9, 1992).

Standards For Assessing Forfeitures, 6 FCC Rcd. 4695 (1991). A standard forfeiture for a common carrier who fails to file required forms or information is \$30,000 per incident, with an overall limit of \$1,000,000 for common carriers or applicants. Assuming that the Commission adopts a licensing process requiring each licensee to notify the Commission upon the completion of construction of each transmitter, and assuming that a narrowband PCS licensee fails to construct some or all of the minimum number of transmitters required to serve the requisite minimum service territory within the licensed region, the Commission would be entitled to collect from the surety company the appropriate forfeiture sum (i.e., \$30,000 per site).

69. The benefit of adopting the forfeiture bond approach to narrowband PCS licensing is twofold. First, by requiring the applicant to have the backing of a financially responsible third party willing to pay a "forfeiture amount" in the event of non-performance, an additional step will be added to the licensing process which will serve to weed out insubstantial or unqualified applicants. Applicants that have no intention of building will not want to place a forfeiture bond which may be called upon in the event they cannot sell the license in time. Second, by requiring applicants to pay an up-front premium, as is usually required to secure a surety bond, the Commission will have adopted an additional mechanism to insure that participation

will only be sought by applicants with a serious interest in providing the service.^{71/}

70. In considering this proposal, the Commission should take great comfort in the extent to which this approach has gained acceptance in other nations' licensing approaches. Most foreign countries which are granting PCS, cellular and paging licenses are requiring prospective applicants to post substantial performance bonds. This has significantly deterred speculation. For instance, for the national GSM cellular license in Germany, there was only a handful of applicants.

E. Methods of Deterring Speculation
the Commission Should Avoid.

71. The Notice mentions a few possible approaches to deterring speculation that PacTel believes should be avoided. As is set forth in greater detail below, PacTel believes these mechanisms will either be unsuccessful, have unintended consequences or both.

72. Considerable attention is devoted in the Notice to the possibility of utilizing spectrum auctions to assign PCS spectrum, including narrowband spectrum. Leaving aside all of the traditional concerns expressed by potential applicants and

^{71/} The problem with the existing lottery mechanism is that there is no downside risk to the speculator other than the minimal application fee. The forfeiture bond would ensure that any speculator that does not intend to build will run the downside risk of losing its forfeiture bond.

licensees respecting auction proposals^{78/}, PacTel harbors a fundamental concern that the use of auctions for narrowband PCS will substantially delay the licensing process.

73. At the time the Notice was issued, there were some indications that auction authority could be forthcoming from the Congress in the near term. As things have developed, no auction legislation was passed, and the issue has been put off until the next session of Congress.^{79/} In the meantime, the incumbent President has been defeated and a new administration from a different party will be taking office. There also have been significant changes in the composition of both houses of Congress. Under these circumstances, the fate of auction legislation and the likely timing thereof is completely uncertain. In PacTel's view, the Commission cannot afford to wait for this legislative process to play out. PCS licensing must proceed in order for the needs of the public to be met, and for the United States to maintain its position as a leader in the development and delivery of Personal Communications Services.

^{78/} Auctions are often criticized by potential new market entrants as creating unreasonable barriers to entry, and by existing industry participants as creating otherwise unnecessary costs to establish a proposed service.

^{79/} Both the House of Representatives and the Senate have passed versions of an "Emerging Telecommunications Technologies Act". See H. R. 531 and S. 218. Efforts in the last session of Congress to amend the pending legislation to include competitive bidding authority for the Commission did not succeed.

74. PacTel also opposes restrictions on the transferability of authorizations.^{80/} Experience establishes that such restrictions do not effectively deter speculation. History suggests that such restrictions will either be relaxed or removed over time. This undermines the credibility of any such restriction, and enables application mass marketers to assure speculative applicants that they can proceed with impunity.

75. Transferability restrictions also can be circumvented through agreements with third parties to construct and manage systems. Since third party contracts can be legitimate means to effect the construction and operation of systems by serious operators, they cannot be completely outlawed. As long as this door is left open, however, the effective ability of the Commission to discourage speculation by restricting alienation will be undermined.

76. Third, and most important, bans on transfer could end up harming entities, such as PacTel, who are legitimate and serious proponents of narrowband PCS services. It is not beyond the realm of possibility, given the vagaries of any licensing process, that PacTel could end up at the end of an initial round of application filings without an authorization. Certainly, PacTel would be interested in acquiring a channel or channels from a successful applicant in order to continue to participate

^{80/} PacTel originally proposed strict limitations on assignment. Through discussions with industry members, PacTel has been convinced that these mechanisms will not work, as they did not in cellular.

in the messaging industry as it moves into the next generation. Any severe restriction on transferability would effectively preclude PacTel from participating in the after market.

77. Similarly, a licensee who constructs and loads a narrowband PCS system may have a significant need for an additional channel which can only be secured by acquisition from another permittee/licensee if all allocated spectrum was licensed in the initial application round.^{81/} Again, legitimate industry participants of this type should not be prejudiced by an artificial restriction on the alienation of a license.

78. PacTel also opposes the adoption by the Commission of extremely short filing windows as a mechanism for weeding out insincere applicants. Again, history indicates that this approach does not work. The Commission was inundated with 220 MHz applications notwithstanding a relatively short filing window. Worse yet, this approach could advantage exactly the wrong group of applicants. Unscrupulous application preparers who are willing to sell large numbers of applications before final licensing rules are adopted may be in the best position to meet filing deadlines which are extremely short. In contrast, serious applicants who are interested in developing unique bona fide proposals tailored to the Commission's final licensing rules may be disadvantaged by too short a filing window. All in all,

^{81/} PacTel believes that this is a distinct possibility given the attention being given to PCS by the media and the industry.

the use of this technique to deter speculative applications appears unwise.

79. Finally, while PacTel believes the narrowband PCS rules should contain strictly enforced construction deadlines,^{82/} PacTel believes it is unrealistic to assume that these deadlines will act as a meaningful deterrent to speculation. Because of the cutting-edge nature of advanced narrowband PCS services, the Commission must accord licensees sufficient time to construct systems taking into consideration the fact that manufacturers are still in the process of developing equipment and technologies.^{83/} Similarly, given the broad geographic regions that PacTel proposes, the Commission must recognize the need for phased-in implementation schedules. Taking these items into consideration, the Commission must conclude that a reasonable and realistic construction schedule will not appear sufficiently onerous to deter speculation.

80. Once again, this conclusion is confirmed by the Commission's experience with 220 MHz licensing. Despite the adoption of relatively close construction time frames, the Commission was inundated with applications.

^{82/} PacTel proposes that narrowband PCS licensees be required to construct their system covering 50% of the geography and 75% of the population within 7 years of licensing. This figure has been selected by taking into consideration likely equipment delivery dates and buildout schedules.

^{83/} Some of this equipment may take a year or two to move into commercial production.

IV. Aggregation of Channels and Limits on Filings

81. The Notice requests comment on whether narrowband PCS applicants should be permitted to request multiple channels and to aggregate those channels if they need more than the minimum channel width for their systems. Notice at para. 51.

82. PacTel recognizes that different narrowband PCS proponents may have different bandwidth requirements, and has sought to accommodate this fact by proposing a channel plan with channels of different sizes. This channel plan is flexible enough to accommodate multiple system approaches without being unduly preclusionary. And, by incorporating a variety of bandwidths, applicants will have the ability to choose to file for the amount of spectrum best able to accommodate their actual service plans. Otherwise, precious spectrum will be unnecessarily preempted, and the opportunities for serious applicants, such as PacTel, to receive licenses will be reduced.

83. As envisioned by PacTel, different bandwidths will evolve into different services. Consequently, PacTel proposes that applicants be given the opportunity to file as an initial matter one application for each bandwidth in each region.^{84/} This will permit each applicant a reasonable number of

^{84/} This proposal assumes that the Commission adopts effective anti-speculation mechanisms so that applicants do not seek to warehouse spectrum.

opportunities to receive at least one license for narrowband PCS services.^{85/}

V. Common Carriage Versus Private Carriage Regulation

84. The Notice asks whether narrowband PCS services should be regulated as common carrier or private carrier services. PacTel favors common carrier regulation for a variety of reasons, but also recommends the rules be crafted in a manner which serves to mitigate the distinctions between the two services.

85. The real world distinctions between private carrier and common carrier services have diminished over time. At present, there appear to be five remaining areas of distinction which retain some vitality. First, there are statutory restrictions on the provision of purely dispatch services by common carriers. Second, common carriers are subject to state regulation, whereas private carriers are not.^{86/} Third, there are some restrictions, in theory at least, on the ability of private carriers to resell interconnection services. Fourth,

^{85/} As PacTel noted earlier, the different bandwidths will permit the licensee to offer more bits of information to the subscriber. Although a licensee could use the wider channels to make more smaller channels, that does not cause problems because they will be foreclosed from the wider bandwidth services.

^{86/} This could of course be preempted by the Commission if it found the services were primarily interstate in nature. See Notice at para. 97 and nn. 70-71.

common carriers are subject to Sections 201 and 202 of the Communications Act of 1934, as amended, regarding discrimination and preferences, while private carriers are not. Fifth, and finally, private carriers are not subject to the same foreign ownership restrictions.

86. PacTel has concluded that narrowband PCS services should be regulated as common carriage services. While the restriction on dispatch services may have a practical impact on wideband PCS, PacTel does not see dispatch as a major component of narrowband PCS offerings. Consequently, this statutory limitation appears to have no particular bearing on the licensing question.^{87/}

87. In terms of state regulation, PacTel is proposing broad geographic regions which would, in effect, create a service which is of an inherently interstate nature. Just as the Commission preempted state regulation in connection with the licensing of nationwide paging operations in the 931-932 MHz band, it should preempt state regulation as to regional narrowband PCS services.^{88/} Having done so, this distinguishing feature between common carriage and private carriage is eliminated.

^{87/} Since almost the beginning of the paging industry, paging carriers have operated answering services which encoded information to the paging subscriber. This has not been viewed as a prohibited dispatch service. This same view should apply to narrowband PCS.

^{88/} See Amendment of Parts 2 and 22 to Allocate Spectrum in the 928-941 Band, 93 FCC 2d 908 (1983).

88. By regulating narrowband PCS services as common carriage, there would be no restrictions on the resale of interconnection services. Consequently, the artifices that have grown up to circumvent this restriction can be avoided.^{89/}

89. As to the obligations of Sections 201 and 202 of the Act, PacTel submits that there are public interest benefits in requiring narrowband PCS licensees to serve all comers on a first come, first served non-discriminatory basis. Similarly, there is a body of law that has grown up regarding the manner in which carriers must handle interconnection arrangements with other common carriers, which will be beneficial to the development of the narrowband PCS industry if the status of PCS licensees as common carriers is maintained.^{90/}

90. Finally, as to foreign ownership, PacTel submits that the Commission should recognize the interest of the United States in fostering a domestic Personal Communications Services industry.^{91/} In the cellular industry, domestic carriers have enjoyed considerable success in exporting their service

^{89/} In the event the Commission adopts a private carrier status for these services, PacTel supports the Commission's view that such carriers are entitled to full interconnect with the public switched telephone network.

^{90/} Narrowband PCS licensees, however, should be permitted to offer private carrier services on their networks as well. See, e.g., Petition for Rulemaking by Telocator to Amend the Commission's Rules to Authorize Cellular Carriers to Offer Auxiliary and Non-Common Carrier Services, RM-7823, filed September 4, 1991.

^{91/} Rule 22.3(b) limits the current foreign ownership of Part 22 licensees to 20%. PacTel believes that this limit is appropriate for narrowband PCS. Other countries have similar limits for these types of services.

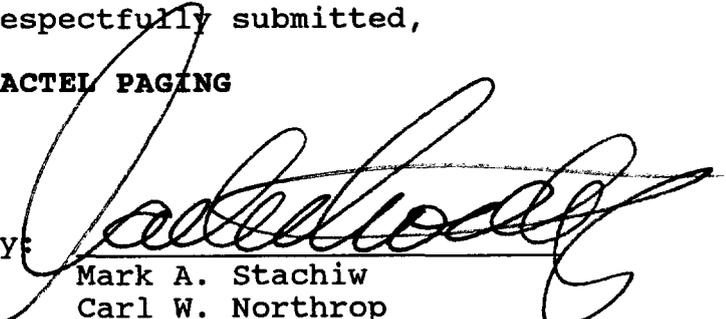
capabilities to foreign countries based upon the experience they have gained here in the United States. PacTel's affiliate, Pacific Telesis International, is actively participating in the provision of mobile communications services in Germany, Portugal, Japan, Thailand and other countries. If narrowband PCS services are provided on a private carrier basis, foreign entities will be able to participate to a larger degree than domestic carriers can participate in foreign markets.

VI. Conclusion

The foregoing premises having been duly considered, PacTel Paging respectfully requests that the Commission adopt a narrowband PCS licensing scheme consistent with the foregoing comments.

Respectfully submitted,

PACTEL PAGING

By: 

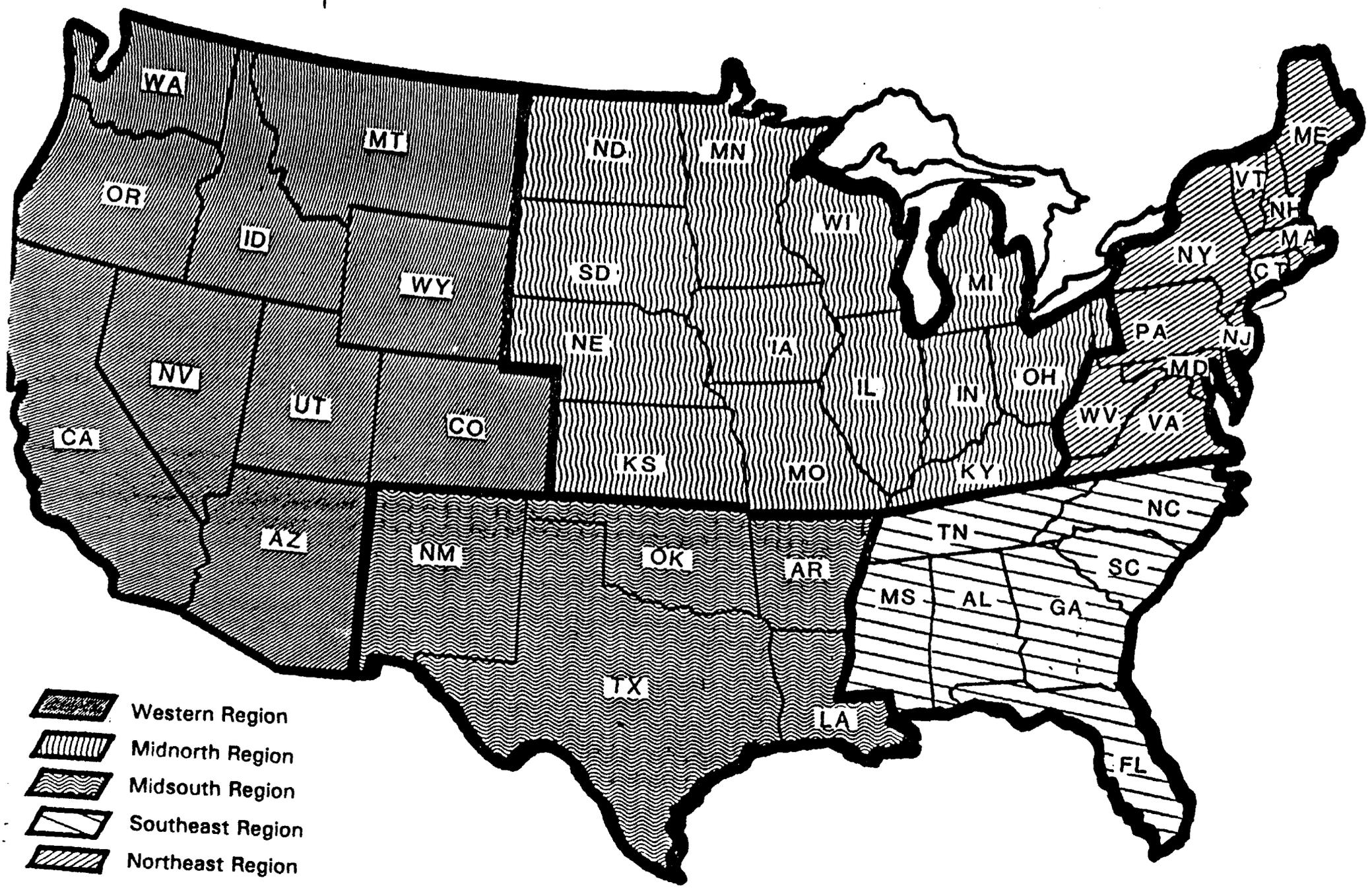
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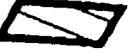
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ATTACHMENT 1



-  Western Region
-  Midnorth Region
-  Midsouth Region
-  Southeast Region
-  Northeast Region

ATTACHMENT 2

**Principles Utilized in Developing
the PacTel Paging Narrowband PCS Channel Plan**

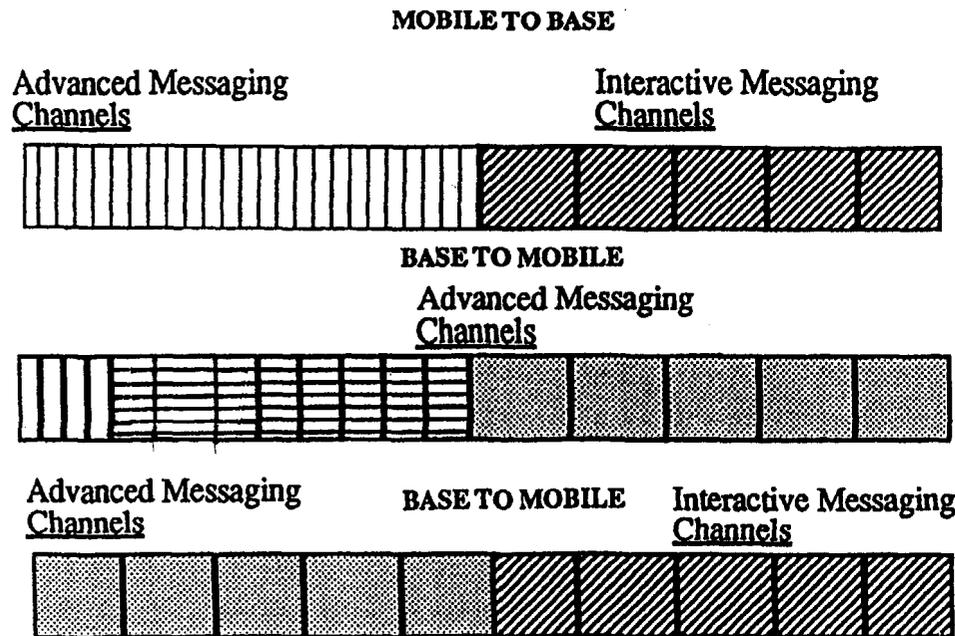
PacTel has developed its proposed channel plan for narrowband PCS utilizing the following criteria:

- The Plan must accommodate a variety of narrowband services based upon different bandwidths. The Commission clearly believes that narrowband PCS is not a single service, but rather a group of services which offer bit rates to subscribers at rates less than broadband PCS at 1.8 GHz.
- The plan must have channels for both full two-way services (such as two-way data) and limited two-way services (such as acknowledgement paging). Two-way narrowband PCS services could well be labeled emerging technologies.
- The plan must provide sufficient mobile-to-base spectrum to permit inexpensive subscriber equipment to be developed. As a general rule, the narrower the spectrum allocated for this link, the more expensive the subscriber equipment.
- The plan must provide sufficient base-to-mobile spectrum to allow for the greatest variety of services. PacTel believes that in the future with voice and video compression and increases in transmission technology, it will be possible to offer video and/or digitized voice in a 100 KHz channel. Most of the narrowband PCS services, except video, can be offered economically in 50 KHz channels, and a variety of advanced messaging services can be offered in 25 KHz channels.
- The plan must include, at a minimum, a sufficient number of channels for each service to permit robust competition and provide a reasonable number of opportunities for serious applicants to receive licenses. While PacTel believes robust competition can occur with as few as two licensees, two licenses would unduly limit the chances for serious operators to receive licenses and well may limit equipment supplier's interest and investment.

- The plan must permit established operators and new entrants, and large companies and entrepreneurs to participate. As a practical matter, this means that the licensing rules must not exclude any group from applying.
- The plan must accommodate most of the current proposals for Advanced Messaging Services.
- The plan must reserve the 901-902 MHz band for low power transmissions only, and all high power transmissions must occur in the 930-931 MHz and 940-941 MHz bands. Because of the placement of the 930-931 MHz and 940-941 MHz bands next to high power services (one-way paging bases and SMR bases), these bands are unsuitable for low cost base receivers.
- The plan must have protections against speculative abuses. It is not in the public interest to have speculators preempt the available spectrum.
- Licensees would be granted the flexibility to subchannel their spectrum in accordance with their offered service.

The channel plan on the following page satisfies these criteria.

Proposed Channel Scheme Narrow Band PCS Spectrum



901-902 MHz.

25, 20 KHz. Advanced Messaging Channels paired with base-to-mobile Advanced Messaging Channels. (Unused channels to be available to current one-way licensees.)

5, 100 KHz Interactive Messaging Channels paired with base-to-mobile Interactive Messaging Channels.

930-931 MHz.

5, 100 KHz Advanced Messaging Channels
8, 50 KHz Advanced Messaging Channels
4, 25 KHz Advanced Messaging Channels

940-941 MHz.

5, 100 KHz Advanced Messaging Channels
5, 100 KHz Interactive Messaging Channels

ATTACHMENT 3

BRYAN CAVE

FCC Authority and Standards for Imposing Application Fees

The past efforts of the Commission to discourage the filing of applications by insincere applicants for purely speculative purposes simply by adopting financial qualification standards, construction deadlines, brief application filing windows and restrictions on alienation have been largely unsuccessful. The experiences in the cellular RSA lotteries, the 220 to 222 MHz private radio filings, and the IVDS lotteries all indicate that application preparers and applicant speculators are undeterred by licensing mechanisms of this nature.

The Commission has, however, previously recognized one solution to its problem. In adopting the cellular RSA rules, the agency properly acknowledged that "[a] larger filing fee would probably reduce the number of RSA applications filed". Third Report and Order, 2 FCC Rcd 2440, 2447 n. 16 (1988). This is certainly true. Unscrupulous application mills would be less successful in hawking FCC filing opportunities as "get rich quick" schemes if investors had to lay out substantial money on the front end to participate. Also, insincere applicants with no wherewithal, and no business plan which would enable them to attract investor capital, would be less likely to participate if there was a substantial entry fee.

The PCS Notice explores several possible approaches to applications fees which could serve to set fees at a sufficiently high level to discourage insincere applicants without eliminating meaningful licensing opportunities for small businesses, entrepreneurs and new market entrants. However, in assessing these approaches, it is necessary to understand the basis and limits on the Commission's fee authority. This memorandum explores these issues.

I. Statutory Authority for Regulatory Fees

In 1985, Congress amended the Communications Act of 1934, 47 U.S.C. §§ 151, et seq. (the "Communications Act") by adding a new Section 8. Comprehensive Omnibus Budget Reconciliation Act of 1985, 100 Stat. 82, 118-21, Pub. L. 99-272, §§ 5002(e), (f) (the "1985 Budget Act"). Section 8 requires the Commission to "assess and collect charges at such rates as the Commission shall establish," and includes a "Schedule of Charges" setting fees for various functions provided in connection with communications services regulated by the Commission. See 47 U.S.C. §§ 158(a), (g). Congress authorized the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section." 47 U.S.C. § 158(f).^{1/}

The House Report noted that litigation over the Commission's authority to impose fees had caused the Commission to suspend the imposition of fees in 1977, and stated that "[i]t

^{1/} The current Schedule of Charges and related rules are contained in 47 C.F.R. §§ 1.1101-1.1117 (1991).

is the intent and understanding of Congress" that the "specific fee authority" of Section 8 "will supersede any authority the FCC would otherwise have ...to impose additional fees over and above those provided for under this Reconciliation Act." H.R. 3128, H.R. Rep. No. 453, 99th Cong., 1st Sess. 433 (1985).

Section 8 further requires the Commission to review the Schedule of Charges every two years and to make fee adjustments in accordance with a formula based upon changes in the Consumer Price Index. 47 U.S.C. § 158(b)(1). Any fee increase or decrease resulting from this review is not subject to judicial review. 47 U.S.C. § 158(b)(2).

In 1989, Congress approved increases in the Schedule of Charges. Omnibus Budget Reconciliation Act of 1989, 103 Stat. 2124, Pub. L. 101-239, § 3001 (the "1989 Budget Act"). The legislative history of the 1989 Budget Act establishes that these fees are based upon estimates of the cost to the Commission of regulating different services. H. Rep. No. 101-247, 101st Cong., 1st Sess. 3, reprinted in 1989 U.S. Code Cong. & Admin. News 1906, 2267. "[F]ees based on cost of regulatory principles are an appropriate mechanism by which a portion of the FCC's regulatory expenses may be recaptured. The Committee made an explicit decision to meet its Reconciliation obligations by retaining a fee structure that is based on the cost of regulation. In order to accomplish this objective, the Committee adopted the increases in fees which the FCC was implementing under its discretionary authority...." Id. at 2267.

II. Fee Programs Established Under Authority of Section 8 of the Communications Act

Following enactment of the 1985 Budget Act and Section 8 of the Communications Act, the Commission issued a Notice of Proposed Rule Making seeking comment on the new statutory provisions. Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 51 FR 25792 (July 16, 1986). In the NPRM, the Commission stated that the statutory schedule of charges is "based primarily on the Commission's cost of providing [regulatory] services," and that "[e]ach fee is intended to recover only those costs attributable to providing the [regulatory] service to the public." 51 FR 25792 at ¶¶ 7, 19.

With respect to fee amounts, the Commission stated that it would "not consider comments directed toward changing the dollar amount of the fees." 51 FR at 25793 ¶ 6. The Commission's rationale for this decision was that it had "worked extensively with [communications providers] and Congress prior to the passage of this legislation to ensure that the charges, to the extent possible, reflect the cost of processing authorizations to the Commission. The fees set out in the Schedule of Charges represent a congressional determination that these charges represent the best approximation of our processing costs."^{2/} Id.

^{2/} The Commission noted that Congress "had available to it FCC Staff cost analyses prepared for the Fee Refund program and (continued...)