DOCKET FILE COPY ORIGINAL

ORIGINAL

RECEIVED

NOV 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act	)	
Competitive Bidding	)	

To: The Commission

COMMENTS OF THE MINORITY PCS COALITION

MINORITY PCS COALITION

By: David J. Kaufman
Lorretta K. Tobin

Its Attorneys
Brown Nietert & Kaufman, Chtd.
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(202) 887-0600

November 10, 1993

No. of Copies rec'd 0+9
List ABCDE

TABLE OF CONTENTS

Page

SUMMARY i

COMMENTS OF THE MINORITY PCS COALITION 1

INTRODUCTION 1

COMMENTS 2

I. THE COMMISSION SHOULD ESTABLISH NARROW QUALIFICATIONS FOR APPLICANTS SEEKING PREFERENCES AS DESIGNATED ENTITIES UNDER THE NEW RULES 2

II. THE COMMISSION SHOULD PROVIDE FOR PREFERENTIAL TREATMENT FOR DESIGNATED ENTITIES 5

A. The Proposal For Preferential Treatment Is Constitutionally Permissible 5

B. Preferences Should Include Frequency Set-Asides, Preferential Payment Terms and Tax Certificates . . . 7

1. Frequency Set-Asides 7

2. Preferential Payment Terms 9

3. Reduced Penalty for Post-Auction Disqualification 12

4. Tax Certificates 13

III. THE COMMISSION SHOULD PERMIT SOME LIMITED "EARLY" TRANSFERS OF LICENSES BY MINORITY AUCTION WINNERS 13

IV. AGGREGATION OF SPECTRUM 14

CONCLUSION 15

SUMMARY

The Minority PCS Coalition ("MPC"), a coalition of minority-owned, non-broadcast communications businesses and entrepreneurs, supports the Commission's general proposal to provide for certain preferences under the new competitive bidding rules for small businesses, rural telephone companies and businesses owned by women and minorities (the "Designated Entities"), especially with respect to broadband personal communications services ("PCS"). However, the Commission should establish narrow qualifications for certain Designated Entities, specifically net worth/income size and control/equity standards for small businesses and no dichotomy between voting control and beneficial ownership respecting businesses owned by women and minorities. Additionally, the Commission should allow eligible minority-controlled entities to combine into a consortium.

The Commission's proposal to provide for preferential treatment for the Designated Entities is constitutionally permissible and the Commission should provide for channel set-asides, preferential payment terms and tax certificates for minority-controlled entities. The Commission should auction broadband PCS spectrum by frequency blocks and should set aside a 20-channel block (Block C) solely for minority-controlled entities. Also, the Commission should allow sealed combinatorial bids for MTAs and oral bids for BTAs, but should not permit nationwide bidding. Minority-controlled entities should be permitted to use an installment payment plan comprised of an up-front deposit and

payments over a ten-year period. There should also be a reduced penalty for post-auction disqualification of a minority auction winner. Additionally, the Commission should apply its current tax certificate provisions to PCS. Finally, the Commission should permit limited transfers of licenses or equity by minority auction winners in certain circumstances and the aggregation of up to 60 MHz of spectrum by minority auction winners.

DOCKET FILE COPY ORIGINAL

RECEIVED

NOV 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act	)	
Competitive Bidding	)	

To: The Commission

COMMENTS OF THE MINORITY PCS COALITION

The Minority PCS Coalition ("MPC"), by its attorneys and pursuant to Section 1.419 of the Commission's Rules, hereby submits its comments regarding certain proposals concerning Personal Communications Services ("PCS") set forth in the Notice of Proposed Rule Making, FCC 93-455, released October 12, 1993 (hereinafter "NRPM"). MPC's comments herein focus specifically on broadband PCS and certain aspects of the Commission's proposed rules which will directly impact upon minority-owned businesses.

INTRODUCTION

The MPC is a coalition of minority-owned non-broadcast communications businesses and entrepreneurs, all of whom have a history of providing service to the public as Commission licensees, and all of whom are planning to bid on, construct and operate PCS systems. The members of MPC are Transworld Telecommunications, Inc. ("TTI"), Progressive Communications, Inc. ("Progressive"), Carl and Gale Davis ("Davis"), and John B. Washington ("Washington"). As discussed below, the members of MPC have been active in cellular, MDS, SMR and paging, each of which is a predecessor of PCS.

TTI is a publicly-traded communications company, majority-owned and controlled by F. Lorenzo Crutchfield, Jr., an African-American. TTI is in the wireless cable television business. TTI's Tampa system has approximately 5,000 subscribers. TTI also operates a cable television system elsewhere in Florida, and is in the process of developing a wireless cable system in Park City, Utah.

Progressive is a closely-held company majority-owned and -controlled by Henry Riggins, an African-American. Through Progressive, Mr. Riggins is a MMDS licensee in Dayton, Ohio, and formerly was a licensee in both the cellular and SMR industries as well. Mr. Riggins is a well-known lecturer on telecommunications issues, and sits on this Commission's Small Business Advisory Committee ("SBAC").

Mr. and Mrs. Davis, both African-Americans, are former long-time licensees in SMR and cellular, and are developing a new Private Carrier Paging facility in California at the present time. Mr. Washington, also an African-American, was the Davis' partner in cellular.

COMMENTS

I. THE COMMISSION SHOULD ESTABLISH NARROW QUALIFICATIONS FOR APPLICANTS SEEKING PREFERENCES AS DESIGNATED ENTITIES UNDER THE NEW RULES

MPC agrees with the proposal to afford certain preferences, under the new competitive bidding rules, to minorities, small businesses, rural telephone companies, and businesses owned by women (hereinafter collectively, the "Designated Entities"). See

NPRM, supra, at ¶¶74 & 75. However, the Commission should establish very narrow qualifications for small businesses and entities owned by minorities and women seeking preferential treatment under the new PCS and competitive bidding rules. Specifically, "small businesses" should be defined based on both the net worth/income size standard proposed in the SBAC's Report, see NPRM, supra, at n.51[1], and the control/equity structure of the entity. Regarding the latter criteria, the chain of control should be traceable to one or more individuals, and the individual(s) exercising voting control over the entity should also hold 100% of the beneficial ownership of the entity.

If the chain of control is traceable to another business entity (*i.e.*, a parent company or affiliate), then this controlling principal must itself qualify as a small business and must hold 100% of the beneficial ownership of the entity. If the chain of control is traceable to two or more business entities, then to qualify for any preferences each entity must itself qualify as a small business and the aggregate net worth and income size of these controlling entities must not exceed the SBAC's net worth/income size standards. Also, the controlling principals must hold 100% of the beneficial ownership of the entity.

Regarding businesses owned by women or minorities, with one exception (publicly-traded companies) there should not be any

---

[1] The SBAC proposes that an entity qualifies as a small business if its net worth does not exceed $6.0 million and its average net income after taxes for the preceding two years did not exceed $2.0 million.

dichotomy between the voting control and beneficial ownership of these entities. That is, except for public companies, the minority or female principals of these entities should hold a minimum of 51% of the voting control *and* a minimum of 51% of the beneficial ownership of the entity in question.[2] To demonstrate that they meet this minimum control/equity standard, each applicant should be required to submit a sworn statement with its application setting forth the ownership and control structures of the entity.

This stringent and easy-to-police control/equity standard will avoid the problems faced by the Commission in the broadcast arena, where applicants set up female and minority fronts in an effort to garner comparative preferences. Such behavior resulted in numerous challenges by competing applicants, which resulted in protracted comparative proceedings. By applying the control/equity standards set forth above, the Commission can reduce the number of potential petitions to deny that are filed against minority and female owned entities seeking preferential treatment under the new competitive bidding rules.

---

[2] An exception should be made to this control/equity standard for publicly-traded companies where the controlling principal of the company qualifies for the minority or female preference, although the controlling principal may not hold 51% of the beneficial ownership of the company. This exception is necessary to encourage publicly-traded telecommunications companies to recruit and retain minority chief executives.

In order to prevent abuse, the Commission should define "publicly-traded company" much more narrowly than the Commission did in the unserved area cellular arena. Specifically, "publicly-traded company" should be limited to companies listed on the New York or American Stock Exchanges, or listed by NASDAQ. As discussed in the text, infra, the Commission needs rules that are easy to police to prevent abuses, and thinly-traded "pink-sheet" companies are too easily used as a vehicle to evade Commission rules and policies.

Finally, the Commission should allow eligible Designated Entities to combine into consortia to bid, so long as each member of the consortium is separately qualified as a Designated Entity in the involved preference group.[3] Thus, for example, the members of the MPC, each of whom separately qualify as minorities, could join together to increase their financial strength and bid as a consortium.[4]

II. THE COMMISSION SHOULD PROVIDE FOR PREFERENTIAL TREATMENT FOR DESIGNATED ENTITIES

A. The Proposal For Preferential Treatment Is Constitutionally Permissible

The Commission's concerns, NPRM, supra, at ¶73, regarding the constitutionality of providing some preferences for Designated Entities under the new rules are unwarranted. Indeed, Congress has explicitly directed the Commission to promulgate rules providing preferential treatment for the Designated Entities. See new §309(j)(3)(A),(3)(B)&(4)(C) of the Act.[5] The Commission is obligated to give effect to Congress' intent and directives. See Metro Broadcasting Inc. v. FCC, 497 U.S. 547 (1990) Beach Communications v. FCC, 959 F.2d 975, 980 (D.C.Cir., 1992), reversed on other grounds, 61 U.S.L.W. 45323 (U.S., June 1, 1993).

---

[3] As discussed in Part II.B.1, infra, MPC is proposing separate PCS setasides for different Designated Entities, including a separate "minorities-only" block.

[4] The Commission's fears of collusion are unfounded, at least in the context of minority applicants.

[5] See 47 U.S.C. 309, as amended by Title VI, §6002(a) of the 1993 Budget Act.

Moreover, the Commission's proposals for channel set-asides, tax certificates, and preferential payment terms are rationally related to the legitimate objectives of Congress and are therefore permissible. See Metro Broadcasting, supra, 497 U.S. at 560-63; Beach Communications, supra, 959 F.2d at 986. The express objectives of Congress are to promote the participation of the Designated Entities in the competitive bidding process, thereby ensuring an equitable dissemination of licenses among a *wide variety* of applicants, and to promote economic opportunity for the Designated Entities and competition through the entry of new companies into the telecommunications marketplace. See new §309(j)(3)(B),(4)(C)& (12)(D)(4).[6]

Channel set-asides will afford the Designated Entities equal access to the remaining available spectrum, licenses which they would not be able to acquire through direct bidding competition with larger, more capitalized entities and their concomitant greater access to financing. Additionally, preferential payment terms and tax certificates will provide the Designated Entities with the incentive and the ability to obtain financing which will allow them to participate in the competitive bidding process. Indeed, small businesses and rural telcos, by virtue of their small net worth and income size, and businesses owned by women and minorities face many barriers to the acquisition of financing, including undercapitalization and concentration of ownership, as

---

[6] See 47 U.S.C. 309, as amended by Title VI, §6002(a) of the 1993 Budget Act.

noted the SBAC's Report. Flexible payment terms and, in appropriate cases, the use of tax certificates will afford greater incentive for financial institutions to provide Designated Entities with the necessary financing to participate in the competitive bidding process.

B. Preferences Should Include Frequency Set-Asides, Preferential Payment Terms and Tax Certificates

1. Frequency Set-Asides

MPC agrees with the Commission's proposals to define most broadband PCS markets by Basic Trading Areas ("BTA") and to auction PCS spectrum by frequency blocks rather that by BTA. Auctioning spectrum by frequency blocks will maximize revenues to the government and will allow applicants to aggregate markets as opposed to aggregating spectrum. The aggregation of markets will ensure the development of viable PCS systems. When auctioning BTA markets, the Commission should begin with the largest MTA (based upon population) and the largest BTA within that MTA and continue in descending order of BTAs within that MTA. The Commission should follow this procedure with each MTA, progressing in descending order of MTAs.

While the Commission should set aside blocks of spectrum for all Designated Entities with respect to broadband PCS, minorities deserve their own separate block (we recommend Block C), distinct from the blocks for rural telcos, women or small businesses, as follows:

30 MHz	(Block A)	for all bidders except cellular licensees, with no preferences (MTA licenses)
30 MHz	(Block B)	for all bidders except cellular licensees, with no preferences (MTA licenses)
20 MHz	(Block C)	for minority owned businesses (BTA)
20 MHz	(Block D)	for rural telcos (BTA)
10 MHz	(Block E)	for small businesses and businesses owned by women (BTA)
10 MHz	(Block F)	for all bidders, including cellular licensees, with no preferences (BTA)

The minority setaside block should be auctioned by oral bidding for individual BTA markets and by sealed bids for MTAs (combinatorial bidding). There should be no nationwide bidding for spectrum set aside for minorities. Nationwide bidding would concentrate all of the available setaside spectrum in the hands of a single entity, leaving no spectrum for other qualified applicants, a result antithetical to Congressional objectives.

Specifically, the Commission should accept combinatorial bids for the entire group of minority setaside licenses within an MTA via sealed bids accompanied by the requisite up-front deposit. (See discussion of preferential payment terms below.) Two days later, the Commission should conduct oral auctions for the individual minority block licenses in each BTA within that same MTA. No additional up-front deposits would be required from an applicant that previously submitted an up-front deposit with a sealed combinatorial bid for that MTA. Upon conclusion of the oral bidding, the Commission would add up all of the individual BTA winning bids for that block within the MTA, and then open the sealed bids and find the winning combinatorial bid. If the winning sealed MTA bid is higher than the aggregate of the individual winning BTA bids, the Commission would award the license to the

sealed bid MTA winner. If the sum of the individual BTA bids is higher, then the Commission would award licenses to each of the individual oral auction BTA winners.

2. Preferential Payment Terms

MPC also agrees with the Commission's proposal to require a lump sum payment from all bidders with the exception of Designated Entities. Designated Entities should be allowed to use installment payment plans for payment of bids within their respective set-aside blocks. See NPRM, supra, at ¶121. In this regard, Designated Entities should be required to pay an up-front deposit, either in cash or in the form of a letter of credit, and upon winning a bid should pay the bid price through installment payments with interest.[7] For combinatorial bidding in the minority setaside block, minority-owned businesses should pay a deposit of $10 million up front. (This deposit should allow an entity to bid on all minority setaside licenses until the deposit is exhausted.) The up-front deposit for an individual market should be the lesser of one cent per pop per MHz, or $500,000. If a minority applicant intends to apply for more than one market, then it should pay an up-front deposit as follows:

No. of BTA Markets		Up-Front Deposit
1 to 5 markets	--	$2.5 million
6 to 10 markets	--	$5 million
11 or more	--	$10 million

[7] MPC concurs with the Commission's proposal, at n.57 of the NPRM, to assess interest at the prime rate (as published in the Wall Street Journal) plus one percent.

The up-front deposit should continue to be applied and the bidder allowed to continue bidding until the bidder has won the maximum number of markets for the total amount of the up-front deposit, at which time the bidder must then make an additional deposit if it intends to bid for additional spectrum. Also, if the amount of up-front deposits paid by a minority applicant exceeds the number of markets actually won by that applicant, the Commission should not refund the excess deposits, but, rather, should apply those funds to the installment payments due for the markets that the minority applicant did win.

The installment payment plan should be based on payments over a ten year period, as follows. The winning bidder pays five percent (5%) of the balance of the bid price (*i.e.*, the bid price less the amount of the deposit) at the end of the third year following issuance of a license to the winning bidder, ten percent (10%) of the balance at the end of each of years four through nine following issuance of a license, and the remaining thirty-five percent (35%) of the balance at the end of year ten following issuance of a license. Such a payment plan will afford a minority entity or other Designated Entity sufficient financial flexibility to construct and place a system into operation before having to make payments to the Commission.

The requirement of an up-front deposit will ensure that only sincere, qualified applicants (as opposed to speculators) will compete in the bidding process for the setaside spectrum. Permitting the use of a letter of credit for payment of the up-

front deposit will afford minority applicants more financial flexibility. Additionally, letters of credit could ease the burdens currently imposed by the Commission's present refund methods.[8] Because of the lower volume of cash flow of smaller businesses and the difficulties historically faced by minority-owned businesses in acquiring financing, a delay in the refund of deposits could detrimentally affect minority applicants' ability to participate in future spectrum auctions, not to mention their business operations in general. The use of letters of credit would allow minority applicants to get their funds back immediately, simply by not renewing their letters of credit if their bid was not successful.[9]

To afford the Commission some protection from the risk of default by minority auction winners respecting installment payments, each minority auction winner should be required to provide the Commission with notice of the name, address and telephone number of the financial institution or other lender (if any) providing the minority auction winner with the funds used to bid for spectrum or to construct the system. If the minority auction

---

[8] The Commission does not have a strong refund track record. For instance, the Commission has failed to date to refund the excess filing fees of the IVDS applicants for the first nine IVDS markets. The Commission has kept this money for well over a year now, even though the Commission admits that the fees collected exceeded the statutory maximum by $1,365.00 per application.

[9] The Commission should be required to hold letters of credit submitted by winning bidders, as opposed to cashing them in, until such time as the winning bidder is issued a license, thereby affording the winning bidder the possibility of an immediate refund, via non-renewal of its letter of credit, should its application be dismissed post-auction.

winner failed to pay an installment to the government, the Commission could notify the lender and provide the lender an opportunity to cure the default by making the overdue payment. If the lender chooses not to pay the installment due, then the license is forfeit. This procedure will not only benefit the Commission by potentially eliminating the need to conduct new auctions, but will provide lenders with the ability to protect their investments, thereby providing lenders with additional incentive to loan money to minority-owned businesses.

3. Reduced Penalty for Post-Auction Disqualification

While there should be some monetary forfeiture imposed on minority auction winners whose applications are subsequently disqualified as a means of deterring frivolous or unqualified bidders, the penalty proposed by the Commission (20% of the high bid), see NPRM, supra, at ¶104 and ¶113, is excessive with regard to Designated Entities such as minority owned businesses. A more rational approach would be for a disqualified minority auction winner to forfeit one percent of its up-front deposit. Indeed, the proposed up-front deposit for minority applicants is, in and of itself, a significant deterrent to speculators and unqualified or insincere applicants. Moreover, a sincere, qualified applicant could ultimately be disqualified for nothing more than a mere oversight with respect to its application for which it should not be unduly penalized. The fact that the Commission will retain one percent of a minority applicant's deposit if the auction winner is subsequently disqualified is a significant enough amount of money

to serve as an incentive to such an applicant to ensure that there are no oversights or mistakes in its application. Therefore, MPC proposes that the Commission return all funds paid by a minority auction winner upon disqualification, less one percent of the up-front deposit to be retained by the Commission, within five (5) business days after issuance of a final order dismissing or denying the minority auction winner's application.

4. Tax Certificates

The Commission's tax certificate provisions applicable to other communications services should also be applied to the PCS. By making tax certificates available, minority-owned businesses will be able to attract investors and thus capital to the entity. Additionally, any current user of spectrum reallocated to PCS who migrates to another spectrum band should receive a tax certificate if that current user actually has any taxable gain from the move (*e.g.*, compensation from the PCS licensee, sale of equipment for more than depreciated basis).

III. THE COMMISSION SHOULD PERMIT SOME LIMITED "EARLY" TRANSFERS OF LICENSES BY MINORITY AUCTION WINNERS

In the NPRM, supra, at ¶¶83-84, the Commission raises some antitrafficking concerns regarding the "early" transfers of licenses awarded to Designated Entities. The crux of the Commission's concern is the potential for unjust enrichment that does not exist in an unlimited bidding environment. However, the Commission noted, and MPC concurs, that an outright prohibition on transfers even for one year could detrimentally affect the ability

of Designated Entities to conduct market transactions needed to attract capital, reduce costs, or attract owners to the entity who are capable of providing service to the public expeditiously. Id. MPC proposes the following safeguards which the Commission could employ to prevent any such unjust enrichment from a premature sale of a license.

The Commission could restrict, for a period of one to two years from the date of grant, transfers of 51% or more of a license (or licensee) to transfers from one setaside-eligible entity to another setaside-eligible entity. Additionally, the transferor could be restricted to receiving compensation in an amount equivalent to the transferor's actual expenses in acquiring the license and any costs of construction expended by the transferor. The Commission, however, should permit a Designated Entity to freely transfer up to 49% of the license or the equity in itself to non-eligibles for the purpose of raising capital. Also, with respect to minority owned businesses, if the minority entity makes a transfer to another Designated Entity, the tax certificate provisions should apply. See discussion of tax certificates, section II.B.4., supra.

IV. AGGREGATION OF SPECTRUM

MPC proposes that the Commission permit Designated Entities that are auction winners to aggregate up to 60 MHz of spectrum in a market through joint ventures or other similar transactions with auction winners for other frequency blocks in the same market. In many instances, such aggregation could ensure the competitive

viability of a Designated Entity vis-a-vis a larger PCS operator in the same market. Such a proposal does not contravene the Commission's goal of preventing a single company from acquiring all of the spectrum bandwidth in a single market. Indeed, setting a total aggregation limit of 60 MHz allows for at least one additional operator on the remaining 60 MHz of spectrum in the market, if not more, as well as cellular, ESMR and landline competition.

CONCLUSION

The MPC, a coalition of minority licensees and former licensees in the areas particularly similar to PCS -- *i.e.*, cellular, paging, SMR and MMDS -- supports the allocation of 120 MHz to licensed PCS spectrum and the establishment of a preference system to ensure that minority-owned bidders obtain a fair share of the PCS spectrum. The Commission must set aside a separate 20 MHz block for minority bidders only, if the Commission is to comply with Congressional intent. Except for publicly-traded companies listed on the NYSE, Amex or NASDAQ, minority-controlled bidders must also be at least 51% beneficially owned by eligible minorities to qualify for the minority setaside frequency block. Independently eligible minority-controlled entities should be allowed to combine into a consortium to enhance their financial wherewithal.

The Commission should require minority bidders to establish their bona fides in their pre-auction filings, and should require six-, seven- or eight-figure deposits, depending upon the number

of PCS markets for which an entity desires to bid. Combinatorial bidding should be allowed for MTA blocks of minority setaside spectrum, but not for a nationwide license.

Successful minority-block bidders should be allowed to pay their winning bids over time in installments with interest. Tax certificate treatment should be afforded to investors (minority or non-minority) in minority-controlled bidders, as well as to incumbent non-PCS licensees who migrate off the newly-reallocated spectrum.

Respectfully submitted,

MINORITY PCS COALITION

By: David J. Kaufman

By: Lorretta K. Tobin

November 10, 1993

Its Attorneys
Brown Nietert & Kaufman, Chtd.
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(202) 887-0600

A:\AUCT-PCS.COM