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Office of the Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC, 20554

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93-253

Commissioners:

It is in great anticipation of a technologically and economically sterling wireless communications infrastructure, and in all seriousness, that I offer these comments on the Federal Communication Commission's NOTICE OF PROPOSED RULE MAKING (Notice).<sup>1</sup> In consideration of the Notice I seek to address areas where the attainment of the Commission's noble efforts to assist "designated entities" (DE's) may be expedited or facilitated.

**Provision for Designated Entity Licensees to Exit the PCS Market.**

Just as important for a DE to be given assistance in entry into the PCS arena, so too it is important to provide for exit when it is in the best interests of the DE, its subscribers, and of course the Commission. Encouraging and assisting DE's to enter this market without a provision for their exit save the forfeiture of; their license, and the entirety if their investment is analogous to the ancient sirens luring sailors onto the rocks. It is proposed that the Commission consider the adoption of a "Bail Out Provision" (BOP). Given the nascent/developmental stage and capital intensive nature of the PCS market it is foreseeable that the very mechanisms which afford a DE entry into the industry might cause it at the same time to, "get in over its head".

The adoption of a BOP serves the goals of the Commission in several ways. First, it is conducive to the speedy and efficient aggregation across both spectrum and geographic region. There is greater incentive for undercapitalized or undersized (inefficient economies of scale and scope) DE licensees to transfer their license to entities more capable of

<sup>1</sup> GEN Docket No. 93-253 (September 23, 1993)

providing responsive deployment of high quality services at the lowest cost. The Commission incurs only the cost of reviewing the transfer and not the compound costs of re-auctioning the license as well as the lack of performance of that portion of the spectrum during the time necessary for re-auction. Second, petition for a Commission approved BOP would serve as a "red flag" regulatory device (of which there are none in the present Notice) for entities not wishing or able to develop licenses.

#### **Automatic Conditions of Installment Payment Plans.**

The Commission is urged to forego the automatic forfeiture of license and retain flexibility and discretion in the event a DE is unable to make installment payments in a timely manner.<sup>2</sup> It is far from unforeseeable that the cost of re-auctioning spectrum would run in excess of that to rehabilitate the existing licensees.

#### **Hardware and Backhaul Link Availability.**

Due to the wave of demand that will be crashing on the suppliers of hardware necessary to meet the mandated buildout schedule<sup>3</sup> and the low-volume and niche nature of DE involvement it is conceivable hardware and backhaul infrastructure access will not be available at economically feasible levels if at all to a DE PCS provider. The overwhelming economic incentive to a licensee to satisfy at least the first two buildout performance requirements as soon as possible is more compelling than any incentive constructed by the Commission. Failure to attain these minimum requirements would indicate significant market impediments to do so. The allowance of petitions for relief from buildout schedules would, like BOP's, serve as a "red flag" indicating a licensee unable or willing to provide service or possibly anticompetitive attempts by equipment suppliers and LECs.

#### **Set-Asides.**

It is extremely important to DEs the Commission end debate as soon as possible on the use of set-asides.<sup>4</sup> Absent the implementation of set-asides entry into the top markets will surely be thwarted by DEs inability to compete for capital with major corporations, local cellular carriers and LECs.

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<sup>2</sup> Id. pp. 41, n116.

<sup>3</sup> Id. para. 134.

<sup>4</sup> Second Report and Order, GEN Docket No. 90-314 (September 23, 1993) (Commissioner Barrett, Dissenting Statement) at pp. 4, n4.

### **Spectrum Valuation Estimates.**

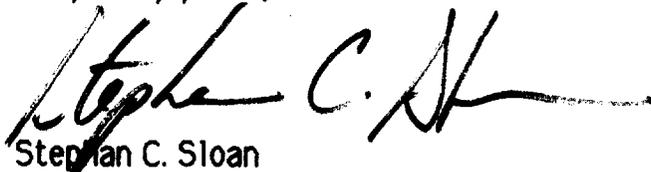
While any yardstick is valuable in an emerging and largely undefined market<sup>5</sup> the Congressional Budget Office's (CBO's) estimating scheme for PCS designated spectrum fails to address two important factors. First, the difficulties of interoperability across bands above and below 2 GHz.<sup>6</sup> Second, the CBO ignores the existence of incumbent fixed microwave services operating on auctioned spectrum; the cost and time-table for their relocation.<sup>7</sup>

### **Notice of Intention to Bid and Applicable Fees.**

If paragraph 168 of the Notice is interpreted to require payment of all applicable fees<sup>8</sup> at least 60 days prior to the auction date I must vehemently object. The economic distress encumbering such capital for the proposed period of time will most seriously challenge, if not preclude, DEs from bidding in the larger and more desirable markets. Furthermore, as it is the Commission's intention not to pay interest on returned application fees the cost of applying for bidder status may be significantly increased. It is suggested the Commission adopt a system similar to the FDIC's real estate auctions in which bidders tender applicable fees upon arrival at the auction.<sup>9</sup>

It is my sincerest hope that the letter of the regulations adopted for attainment and operation of PCS licenses will serve the noble spirit and intention of the Committee.

Very truly yours,



Stephen C. Sloan

<sup>5</sup> GEN Docket No. 93-2153 (September 23, 1993) para. 103, n98.

<sup>6</sup> Interoperability may be necessary for the delivery of a viable PCS service utilizing 10 MHz BTA allocations above 2 GHz. See: Second Report and Order, GEN Docket No. 90-314 (September 23, 1993) (Commissioner Barrett, Dissenting Statement) at pp. 8, n11.

<sup>7</sup> Id. pp. 10, n17.

<sup>8</sup> 2 cents per pop per megahertz. See GEN Docket No. 93-253 (September 23, 1993) pp. 35, n98.

<sup>9</sup> See Attachment A, FDIC '93, (Terms and Conditions) para. 2.

**ATTACHMENT A**



'93

# Terms and Conditions

This catalog generally describes the auction (the "Auction") of real properties (the "Properties" or, singly, a "Property") owned by the FEDERAL DEPOSIT INSURANCE CORPORATION, in its various capacities ("Seller" or the "FDIC"), that will be coordinated and conducted by LARRY LATHAM AUCTIONEERS, INC. ("Auctioneer") and CUSHMAN & WAKEFIELD, INC. and its various subcontractors (collectively, "Listing Broker"), on December 14 and 15, 1993, at John B. Hynes Veterans Memorial Convention Center in Boston, Massachusetts, and various other satellite locations (collectively, the "Site"). The Auction will be conducted pursuant to the terms and conditions set forth immediately below.

1. To purchase a Property at the Auction, an eligible bidder must first be acknowledged to be a successful bidder by Auctioneer. By virtue of making a bid, the successful bidder is bound by all of the terms and provisions of the Purchase and Sale Agreement and exhibits (the "P & S") prepared for the Property on which it had bid, and shall immediately sign such P & S. The P & S and certain other information regarding each Property will be made available to potential bidders in advance of the Auction in "Property Information Packages." These packages can be ordered through the Listing Broker and the Property-specific agents of Listing Broker identified in this catalog (the "Agents" or, singly, an "Agent"). Prospective bidders should note that the terms and provisions of the P & S will control the sale and purchase of each Property and that the same will supersede this catalog's terms and conditions. Prospective bidders and, if possible, their legal counsel are strongly advised to thoroughly review a Property's P & S before bidding on the Property at the Auction. Such P & S shall not be subject to negotiation by the successful bidder.
2. Only eligible bidders will be allowed to enter bids for Properties at the Auction. To be eligible to bid, a prospective bidder must register with Auctioneer prior to the Auction. To register, a prospective bidder must simultaneously deliver to Auctioneer: (a) a signed "Bidding Eligibility Agreement" (as supplied in the Property Information Package), which agreement will require the prospective bidder to provide various representations, agreements and certifications, including his or her full name, address and telephone number; (b) a conditionally returnable fee (a "Fee") of fifty thousand dollars (\$50,000.00), in the form of a certified or cashier's check made payable to the Federal Deposit Insurance Corporation, for each Property the prospective bidder intends to purchase (e.g., if bidder wishes to bid on four (4) properties, four (4) separate checks, each in the amount of \$50,000, totalling \$200,000 must be delivered); and (c) a signed Purchaser Eligibility Certification in the form set out in the Property Information Package. A successful bidder's Fee will immediately be delivered to Seller by Auctioneer and applied toward the Earnest Money Deposit required under the terms of the subject Property's P & S. If a successful bidder subsequently refuses to execute a P & S or defaults under the terms of an executed P & S, the greater of the Fee or the Earnest Money Deposit, as applicable, will be retained by Seller as liquidated damages. All unsuccessful bidders' Fees will be refunded in full at any time during the Auction.
3. Upon completion of registration, the Auctioneer will assign and deliver a numbered bidding paddle (a "Paddle") to each eligible bidder at the Site and will only acknowledge bids entered by a Paddle's bearer.

Prospective bidders should note that, for purposes of the Auction generally, the bearer of a Paddle will be presumed to have the authority to enter bids and, if successful, to execute and deliver a P & S on behalf of the bidder the subject Paddle was assigned to.

4. Announcements made by Auctioneer on the dates of the Auction will take precedence over all prior oral or written Auction-related terms or conditions. Seller and Auctioneer reserve the right to withdraw and/or sell any Property before or during the Auction, postpone or cancel the Auction, rearrange the order of the Properties during the Auction, modify the Auction's terms and conditions, reject any or all bids or other offers for Properties made at the Auction and to advance the bidding. In the event of a dispute among bidders, Auctioneer will have the sole right and power to decide whether to accept the last bid entered or to reoffer and resell the subject Property.
5. All Properties are offered for sale at the Auction subject to a reserve price, which is a confidential minimum price that was agreed upon between Auctioneer and Seller prior to the Auction ("Seller's Reserve").
6. Upon the fall of Auctioneer's hammer, Auctioneer will announce whether the subject Property has been sold and acknowledge the successful bidder. If Auctioneer announces that the subject Property has been sold or has been sold "subject to confirmation," the successful bidder will be required to: (a) promptly and shortly after the fall of the Auctioneer's hammer, execute and deliver to Auctioneer a P & S for the subject Property; (b) timely pay a portion of the "Purchase Price" specified in the subject P & S as the Earnest Money Deposit; and (c) comply with such other terms and conditions of the subject Property's sale as may be applicable. In order to encourage "all cash" purchases, a discount of eight percent (8%) of the successful bid will be given at closing of the sale to successful bidders who execute and timely close on P & S without Seller-financing.

The Seller and Auctioneer may choose to offer some Properties for bid on the basis of a cash sale only without the availability of Seller-financing, in which case there will be no cash discount, and the bid price shall be the purchase price.

If the successful bidder will be purchasing for cash or providing its own financing, the subject P & S will require an Earnest Money Deposit equal to the greater of ten percent (10%) of the successful bid or fifty thousand dollars (\$50,000.00). If the successful bidder will be seeking financing from Seller, the subject P & S will require an Earnest Money Deposit equal to the greater of twenty percent (20%) of the successful bid or fifty thousand dollars (\$50,000.00). In any event, the Earnest Money Deposit will be due in full to Seller by 5:00 p.m. on the second business day following Seller's execution of the P & S according to instructions provided at the Auction. Prospective bidders should note again that the Fee paid at Auction will be credited toward the required Earnest Money Deposit. The balance of the "Purchase Price" will be due to Seller pursuant to the terms of the subject P & S (which may be as soon as thirty (30) days after the Seller's execution of the P & S). If a successful bidder fails to comply with any of the foregoing, the Seller may deem the sale of the subject Property to be cancelled and, if cancelled, Seller will be entitled to retain the greater of the Fee or the Earnest Money Deposit as liquidated damages. If any sale is so cancelled prior to

the completion of the Auction, the subject Property may, at Auctioneer's or Seller's discretion, be reoffered and resold.

7. Prospective bidders should note that this catalog contains information that is summary in nature and may be incomplete. In addition to the aforementioned "Property Information Packages," Auctioneer and/or Listing Broker will conduct "How to Buy" seminars so that prospective bidders can obtain more information about the Auction and/or the Properties. Inspections of the Properties may also be scheduled by contacting the appropriate Agent at telephone number listed in this catalog.
8. Neither Seller, Listing Broker, Agents nor Auctioneer have made any representations or warranties as to the accuracy or completeness of any information contained in this catalog, the aforementioned "Property Information Packages" or any literature to be distributed at the aforementioned "How to Buy" seminars.

By virtue of registering to bid, a prospective bidder will acknowledge and agree to the following matters:

(A) Prospective bidder acknowledges that Seller has acquired the Property due solely to the failure of a financial institution for which Seller has the responsibility for liquidation, and consequently has little or no knowledge of the condition of the Property and the surrounding areas. ACCORDINGLY, PROSPECTIVE BIDDER ACKNOWLEDGES AND AGREES THAT PROSPECTIVE BIDDER IS PURCHASING THE PROPERTY "AS-IS", "WHERE-IS", AND "WITH ALL FAULTS". PROSPECTIVE BIDDER ACCEPTS THE PROPERTY "AS-IS", "WHERE-IS" AND "WITH ALL FAULTS," AND PROSPECTIVE BIDDER FURTHER ACKNOWLEDGES AND AGREES THAT SELLER HEREBY EXPRESSLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES CONCERNING THE CONDITION OF THE PROPERTY AND ANY PORTIONS THEREOF, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

(B) Prospective bidder acknowledges and agrees that prospective bidder will not rely upon any representations or warranties (oral or written) made by or purportedly on behalf of Seller unless expressly set forth in the P & S and will not rely upon any documents or other information (oral or written) supplied by or purportedly on behalf of Seller.

(1) PROSPECTIVE BIDDER UNDERSTANDS AND AGREES THAT ANY DOCUMENTS OR INFORMATION PROVIDED TO PROSPECTIVE BIDDER BY SELLER OR ON SELLER'S BEHALF HAVE BEEN OBTAINED FROM A VARIETY OF SOURCES, HAVE NOT BEEN INDEPENDENTLY INVESTIGATED OR VERIFIED BY SELLER, AND ARE NOT TO BE RELIED UPON BY PROSPECTIVE BIDDER IN PURCHASING THE PROPERTY. SELLER MAKES NO EXPRESS REPRESENTATIONS OR WARRANTIES, AND DISCLAIMS ANY AND ALL IMPLIED WARRANTIES, CONCERNING THE TRUTH, ACCURACY AND COMPLETENESS OF ANY DOCUMENTS OR INFORMATION INCLUDING, WITHOUT LIMITATION, ANY AUCTION BROCHURE, CATALOG OR PROPERTY INFORMATION PACKAGE SUPPLIED TO PROSPECTIVE BIDDER BY SELLER OR ANYONE ACTING OR PURPORTING TO ACT ON SELLER'S BEHALF.

**Larry Latham Auctioneers  
Cushman & Wakefield**