

Set-asides suffer innumerable problems. Importantly, the legislative history indicates that Congress has rejected this approach to spectrum allocation. For example, in drafting Section 309(j)(4), the Conferees considered and rejected a Senate provision that would have "establish[ed] at least one license per market as a 'rural program license.'" ^{28/} The Conferees instead adopted the House provision with the present language permitting tax certificates, bidding preferences and other such procedures.

The House's approach to the issue of favoring certain groups is also telling. The House Report of the Committee on the Budget indicated a strong distaste for set-asides in any context:

During the Committee's consideration of "The Licensing Improvement Act of 1993", the Committee rejected, by a vote of 36-8, an amendment that would have mandated that the Commission license certain rural telephone companies for certain services. The Committee has never dictated -- by statute -- that the Commission issue specific licenses to specific individuals or companies since it first approved legislation creating the FCC fifty-nine years ago. While the Committee has gone to great lengths to protect the interests of rural residents, it has refused to single out any service provider for special treatment. ^{30/}

Congress' clear rejection of the use of a set-aside for rural telephone companies is quite significant. It demonstrates convincingly that set-asides were not the intended method to effectuate congressional objectives with respect to any of the designated groups. Congress was aware that set-asides and quotas require

^{28/} H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 483 (1993).

^{30/} H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 257 (1993) (emphasis added).

specific statements of purpose and congressional findings, ^{31/} and yet provided none. ^{32/}

Moreover, setting aside spectrum to guarantee one class of bidders a license by definition excludes other classes. ^{33/} Such an exclusion will likely result in costly and time consuming administrative and judicial proceedings. This is directly contrary to the express statutory mandate in Section 309(j)(3)(A) that regulations create increased economic opportunities and ensure rapid and diverse service deployment for such groups without such delays.

^{31/} It is of "overriding significance" that the FCC must have specific authority to engage in practices tantamount to awarding racial preferences. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563 (1990). Among the potential methods of racial preference, set-asides and quotas have been consistently considered by the Supreme Court to be the most difficult to justify. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (holding that a quota in awarding construction contracts carried a "danger of stigmatic harm. Unless [such programs] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (finding a set-aside for minority students to be inequitable and stigmatic). But see Metro Broadcasting, 497 U.S. at 599 (upholding a "distress sale policy" which favored minorities, but noting that "[t]he distress sale policy is not a quota or fixed quantity set-aside" (emphasis added)).

^{32/} The Commission itself recognizes that the proposal to set aside a 20 MHz frequency block (Block C) and a 10 MHz block (Block D) to favor businesses owned by minority groups and women is not authorized or supported by any specific language in the statute. (See Notice at n.48.)

^{33/} Preferences based on race or gender invariably run up against Equal Protection principles in the United States Constitution. Any governmental use of set-asides must be factually supported by a record that is both comprehensive and convincing in demonstrating that the preferential measures are substantially related to the goal the government hopes to attain. Metro Broadcasting, 497 U.S. at 560-63; Lamprecht v. FCC, 958 F.2d 382, 399-408 (D.C. Cir. 1992); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Fullilove v. Klutznick, 448 U.S. 448 (1980). No such support exists here. Ironically, the House Report was most concerned "to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process." H.R. Rep. No. 103-111, at 255 (emphasis added).

Apart from the legal hurdles, the proposed PCS set-aside has other disadvantages. First, it focuses all of the designated entities on the set-aside blocks, which, as Commissioner Barrett has recognized, are smaller, in less desirable portions of the band, and limited in market size to BTAs. In essence, the benefit of granting the set-aside preference is voided since the designated entities are not competing on an equal footing for the same licensing opportunities. ³⁴

By relegating designated entities to certain bands, the manufacturing community will have less incentive to respond to such licensees' requirements. A second class status of system providers is created from the outset. Instead, preferences should be focused on meaningful methods to allow all eligible entities, large and small, entrepreneurial and institutional, to gain access to all auctioned licenses. In this way, service providers of different size and market strength will appropriately be spread among all parts of the band. Providers and manufacturers will then be equally interested in full development of the entire spectrum allocation.

Moreover, it is not clear that the targeted designated entities would have the opportunity to actually provide the services for which licenses in the set-aside are granted. As the legislative history notes, the use of set-asides in which only a limited group of entities may bid often results in bidding levels below the "market value". In turn, such an approach necessarily encourages speculation in

³⁴ The problem is particularly acute in the case of the Broadband PCS set-aside in that the designated spectrum is split between two portions of the band which are not obviously compatible. The larger of the two blocks is in a portion of the band which the Commission recognizes to be heavily crowded with existing Fixed Microwave licensees, and is thus not as immediately attractive as the other blocks.

licenses by those who hope to create the opportunity for unjust enrichment. It allows them to gain licenses below market value and sell those licenses to serious operators in the aftermarket.

If set-asides are imposed an entire body of regulations dealing with trafficking, construction requirements and profiteering will thus be needed to protect against the creation of unjust enrichment/windfall profits. Moreover, these undesirable incentives clearly frustrate the objective of participation by the preferred entities in service provision. If relief is focused on a leveling of the economic opportunity to participate in every auction, many of these problems are avoided and the Congressional objectives are clearly served.

B. Installment Payment Alternatives Should be the Primary Preference Vehicle Available to Designated Entities

Providing a reasonable installment payment opportunity for designated entities to use in funding their license purchases will effectively promote economic opportunity and wide license dissemination among the various classes of designated entities. It should be the primary preference made available to designated entities. ^{35/}

Installment payments for designated entities provides a meaningful "preference" which will not unduly open the auction process to speculating and/or otherwise unqualified applicants. In essence, the federal government becomes the source of the senior financing necessary to purchase the license. However, the winning licensee is still required to justify its bona fides to the financial community to the extent necessary to fund the construction and operation of the

^{36/} All others should be required to submit the balance of the winning bid by lump sum payment upon issuance of the license.

services offered with the awarded spectrum. ^{36/} Since designated entities will have to justify through sound business analysis the price paid for a license, auction prices should not be unduly skewed by the presence of the preferred entity and its government-sponsored capital.

Moreover, unlike lotteried radio services of the past, the "free" license will no longer be available to collateralize construction and operating capital. Thus, all bidding parties will be forced to consider in advance of their bids their reasonable ability to capitalize the operation of systems using any licenses awarded. Given the need to pay a "market" price for the license, and the added need to meet installment payments and construct a viable radio service, there should be little room for the unjust enrichment/windfall profits that have attracted speculators in the past. ^{37/}

Allowing for installment payments by designated bidders should be relatively simple to implement. Upon being granted its license the winner would sign a promissory note, supply any necessary guarantees, ^{38/} and make an appropriate initial payment. Failure to meet these requirements would constitute an immediate default.

^{36/} Whether or not the Commission provides a fair economic opportunity for designated entities to participate in the licensing process, these companies will still have to create capital, either debt or equity, to construct and operate viable PCS systems.

^{37/} This provides a substantial advantage over such methods as bid credits, in which some part of the bid is never paid, thus creating some level of "free ride" for designated entities.

^{38/} Requiring personal guarantees from principals will be another mechanism for assuring that this approach is utilized by only serious operators. The Commission should also scrutinize guarantors carefully to assure that they are not mere shells, incapable of meeting any guarantees or likely to allow defaults in case the operations of the license do not succeed.

The Commission should also adopt rules specifying the terms of any permissible installment payment plan. BellSouth recommends that any installment plan for PCS be designed to recoup the value of the license within a term of no more than five years. ^{39/} BellSouth also suggests that the Commission consider adoption of a graduated payment schedule calling for interest payments with increasing principal payments starting after a fixed number of payments, at a fixed or floating interest rate. ^{40/} Finally, a standard security agreement should be developed. This agreement should assure, at a minimum, that no other party could obtain a security interest in the license and that the remaining balance would be accelerated and due in full upon the sale of a controlling interest in the radio system operating pursuant to the license. ^{41/}

Other economic solutions are not as simple to administer or effective in resolving the primary problem of capital formation. For example, as recognized by the Commission (Notice at ¶ 70), a royalty approach has several difficulties. Royalties are difficult to implement and costly to administer, they would tend to lower federal revenues from auctions in both the short and long term, and they

^{39/} This is consistent with Congress' desire that the competitive bidding program have a five year focus, and is not unlike the terms that have typically been available from equipment vendors in the cellular industry, where the primary collateral for the financing was, in reality, the FCC license.

^{40/} The graduated schedule would be particularly advantageous to businesses that are not highly capitalized. It would minimize the amount of payments required during the initial years of the license, when the licensee will have substantial negative cash flow due to construction of the system, and would impose the highest payments after the system has had some time to build a subscriber base and income stream. Graduated terms are also typical of the financing schemes used in the cellular industry.

^{41/} See discussion infra at 32-33.

would give licensees an incentive to defer expansion of service capacity until after the royalty period to avoid paying royalties. Determining an appropriate royalty would also be difficult. Moreover, it would be difficult to establish a bidding mechanism that fairly evaluates the royalty proposal of one bidder vis-à-vis another. BellSouth is therefore opposed to the use of royalty payments by designated entities.

C. Upfront Payment and Deposit Requirement Alternatives Should Also Be Available to Designated Entities

Appropriate relief for designated entities should also be provided in meeting any upfront payment and deposit requirements for auction. The inability of designated entities to even get into the auctions presents concerns. On the other hand, allowing open entry would create incentives for speculating bidders to abuse the process. ^{42/}

To meet upfront payment requirements, designated entities should be required only to obtain a firm financial commitment, similar to the commitment required of RSA lottery winners. This would demonstrate that a recognized financial institution had considered its business plan and was willing to provide funding for at least the amount of the upfront payment. Further, deposit requirements for designated entities should properly be met with letters of credit or similar proof of independent financial analysis, rather than with liquid funds. Moreover, as recommended by the SBAC, non-traditional financial entities, such

^{42/} Specifically, speculators could use the government's credit to obtain licenses and only then develop realistic business proposals for their use. Until a business proposal exists, it will be impossible for an auction winner to raise the substantial capital likely to be required to participate in the capital intensive emerging technologies industries.

as SSBICs and MSBICs should be recognized as adequate to meet these financial certification requirements.

D. Eligibility Requirements for Designated Entities Should Be Unambiguous and Fair

As a general comment, BellSouth believes it is essential that eligibility criteria for the designated/preferred entities be unambiguous and fair. Opportunities for abuse are likely to result in administrative and judicial proceedings in arbitrating eligibility disputes. This will severely impair the rollout of emerging technologies and services.⁴³ Thus, the criteria established must truly limit the available relief to those whose participation in an auction would otherwise be impaired by the lack of equal economic opportunity. In this regard, preferences should be focused on the problems of small businesses generally, including as appropriate, minority and female controlled businesses.

The Commission can curb the opportunity to abuse eligibility criteria if it limits the preference to benefits needed to level the economic opportunity in the bidding process.⁴⁴ Providing a set-aside will have the opposite effect.

⁴³ Ambiguity encourages insincere, speculative bidders through the availability of any benefits available to preferred groups. Ambiguity also gives rise to the possibility that benefits will be available to those who do not need them and who will use them to skew the auction process. The Commission has spent substantial resources over the years in efforts to police its gender and race-conscious preferences in the mass media field. Complex ownership schemes using preferred entities as fronts have often been used to obtain licenses in the broadcast services. In such circumstances, the real economic value of any awarded licenses inure to non-preferred parties, while the designated entities obtain little benefit.

⁴⁴ The price a designated entity then bids should be at least as high, if not higher than the price that any non-preferred bidder would be willing to pay. The existence of credit may induce some to invest in designated entities as their method of participating in the auction process. However, since each license will be available to preferred and non-preferred entities at the same price, there is less potential for abuse.

Parties will be incented to utilize designated entities as fronts for their operations in order to become eligible for set-aside blocks. Moreover, since set-asides limit bidder eligibility it is possible that set-aside licenses will be auctioned at lower prices than those bid in the general eligibility pools. This possibility will create a substantial speculation opportunity, especially where government credit to finance the license purchase is made available. In turn, the opportunities for abuse will require the Commission to police subsequent transfers of licenses simply to protect against the use of the preference benefits for unjust enrichment/windfall gains.

The Commission must target individual eligibility standards to the needs of the designated entities. For example, in focusing on benefits for rural telephone companies, Congress appeared to have two particular interests in mind: assuring that rural consumers get the benefit of technology advancements and assuring the participation of rural telephone companies in wireless industries that may supplement (and replace) their landline facilities. Therefore, the criteria used to determine eligibility must meet those concerns. The preference should be limited to auctions for radio licenses for the BTAs that cover the rural telephone company service area. This will meet congressional objectives and avoid unduly favoring rural telephone companies in markets where there is no compelling reason for their participation. ^{46/}

^{46/} In this regard, however, the Commission must consider the impact of its eligibility limitations for cellular carriers on the rural telephone industry. Rural telephone companies have been able to participate in the cellular industry, and their interests have generally fallen within the MSA or RSA in which they operate. However, given the FCC's attribution rules for cellular entities, it is likely that the companies eligible for the rural telephone preference will be precluded from all but one BTA license under
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The Commission's past problems in providing gender and racial preferences in the mass media field also provide a strong basis for carefully crafting any preferences for designated entities. ^{46/} Preferences should be limited to privately held entities of limited ownership ^{47/} where the designated entities own at least 50.1% of the equity and voting interests in the enterprise. This limitation will give eligible entities substantial flexibility to raise the investor-provided capital needed to construct and operate systems from conventional markets. It will also provide these designated entities with the opportunity to

^{46/}(...continued)

the cellular eligibility restriction. They may not even be eligible for the set-aside that the Notice proposes to establish. BellSouth urges the Commission to reassess its eligibility criteria to assure that benefits granted to allow rural telephone companies economic opportunities do not become meaningless.

^{46/} While the interests of the Communications Act in achieving media diversity and information access may provide the basis for gender or race-conscious preferences in the mass media context, providing such preferences toward the ownership or operation of carrier facilities which have no content control would not advance these interests. See, e.g., Metro Broadcasting, 497 U.S. at 567-68, 599 (finding broadcasting diversity to be a constitutionally permissible goal, but noting that the Commission's "policy is not a quota or fixed quantity set-aside"). In this regard, the House Report on the Budget Act recognizes that most services subject to competitive bidding will be services where the race or gender of the licensee will not affect service delivery. H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 255 (1993).

^{47/} There is no evidence that publicly held companies controlled by females or minorities have suffered the same lack of economic opportunity or inability to achieve adequate capital that are described by the SBAC and Congress as the basis for the preferences. These companies should not be eligible for the preferences.

participate in a meaningful control fashion ^{48/} using the government's credit in the auctions.

This level of participation by eligible parties will still provide a reasonable incentive to non-eligibles to support designated entities in certain markets. As recognized by the SBAC, experienced telecommunications entities and others could materially assist minorities and women in participating in spectrum services. ^{49/} Legitimate joint ventures and consortia should be encouraged.

IV. RESTRICTIONS ON TRANSFERS AND ASSIGNMENTS OF LICENSES OR SPECTRUM AFTER AUCTION

BellSouth opposes the imposition of any restriction on the transfer or assignment of licenses granted after competitive bidding. If the competitive bidding appropriately achieves a fair market valuation for the license then subsequent transfers should not give rise to unjust enrichment concerns. Moreover, and as the Notice recognizes, the imposition of trafficking restrictions can impact the provision of service to the public; if the restrictions are too severe,

^{48/} This approach also responds to concerns recently voiced by some who question the basis for granting preferences to companies just because they have women shareholders, directors or officers, without regard to the company's size. By insisting that eligible parties maintain both ownership and voting control, the preferences can be appropriately limited to those companies in which the eligible minority or female parties have a truly meaningful opportunity to benefit.

^{49/} By allowing such consortia when the eligible parties retain control of the venture, non-eligible parties will have a reasonable investment choice -- participate in the auction entirely on the strength of their own capital, or participate through a designated entity controlled by an eligible parties, using the government's credit to fund the license purchase.

efficient market transactions needed to attract capital and expedite the introduction of diverse services could be adversely impacted.

License trafficking and the potential for unjust enrichment are most problematic when the initial licensee can materially profit from the transfer of a license in a manner unrelated to its investment. ^{50/} In that sense, the competitive bidding process generally reduces the potential for abuse by requiring each bidder to pay a market-like value for the license. There is no obvious after-market for the licensee whose sole purpose in bidding was resale to another. ^{51/}

Under these circumstances, there are no incentives created by the licensing process to engage in "trafficking" or similar activities. A licensee will be obliged to use the license (i.e., comply with construction and build-out requirements in each service) in order to maintain its value; having done so, any profits obtained in the later transfer will be appropriately rewarding the licensee's efforts increasing the license value. Indeed, the Commission should encourage transfers that allow the licensee to use its spectrum in new and creative ways. Thus, if a licensee can efficiently meet its service buildout/performance requirements using less spectrum than it purchased, such spectrum utilization efficiencies should be

^{50/} Congress was concerned with unjust enrichment "as a result of the methods employed to issue licenses." Budget Act, sec. 6002(a), § 309(j)(4)(E), 107 Stat. at 389 (to be codified at 47 U.S.C. § 309(j)(4)(E)). This problem has been particularly acute in the context of lottery awards, where the licensee invests very little to obtain the license, yet has the opportunity to attract windfall profits on the sale of the license to an entity who is directly interested in using it to operate a system or provide a service.

^{51/} If preferences provided to designated entities are limited to benefits intended to level the bidding process, through credit or capital formation, preferred entities will also be paying the "market" rate for any licenses they are awarded. The opportunity to sell the license for an immediate windfall profit on the aftermarket is thus eliminated.

rewarded by allowing the licensee to market the "excess" spectrum to another. This "partitioning" of the license would reward innovation and intensive/efficient spectrum use and would also further expand the services (and service providers) made available to the public. ^{52/}

The introduction of new technologies, unanticipated competitive conditions, or other market conditions may impact license value or spectrum requirements after an initial grant. Another entity may come to value the license (or a portion of the license spectrum) more highly than the licensee. Or a licensee's own financial condition or business plans may change after making the highest bid and obtaining the award of a license. The Commission's rules should permit the marketplace to function and allow for the transfer or assignment to any entity that is qualified pursuant to 47 U.S.C. § 310(d). ^{53/}

The one opportunity for windfall profits that must be addressed relates to the use by designated entities of preferred credit facilitation in the

^{52/} If a licensee decides to "partition" a portion of its spectrum for sale to another party, it still should remain responsible for any build-out requirements imposed under the initial license. Without such a requirement, licensees might "cherry-pick" the most attractive service area and sell the remainder of the license -- thus thwarting the Commission's build-out requirements. Moreover, the initial licensee should be required to seek Commission consent to any proposed partition. If the proposed purchaser is found legally, technically, and financially qualified to be a Commission licensee, it should be separately licensed for the spectrum in question (based on the license term imposed on the initial licensee). This would facilitate licensing administration and avoid a situation where service providers are not subject to regulatory jurisdiction and oversight.

^{53/} If a set-aside is imposed, detailed rules addressing unjust enrichment/trafficking concerns will be necessary. Set-asides will establish a condition in which the winner of an auction may not establish a real market value for the license. In such a case, compounded by the winner's use of the government's credit, unjust enrichment may be available on resale of the "bare license" to a non-eligible party who values it higher.

payment for an awarded license. In this case, it would be possible for a designated entity to bid on the basis of the government's credit and to sell the license to a non-preferred entity. Even if the sale was priced at the price bid for the license, the designated entity could pocket the present value difference based on the benefit of the credit. But the remedy for such problems is relatively simple; on the sale or assignment of the license the designated entity should suffer the acceleration of the balance of the purchase price then remaining. ⁵⁴ Such acceleration would assure that the designated entity did not achieve a windfall and that non-designated entities did not benefit from the preference credit either. ⁵⁵

V. COMPETITIVE BIDDING PERFORMANCE/ WAREHOUSING RESTRICTIONS

Congress required the Commission to consider the inclusion of performance requirements in its competitive bidding regulations to prevent stockpiling or warehousing of auctioned spectrum. However, there is no need for the Commission to regulate the warehousing of spectrum in the context of the competitive bidding process. Performance requirements deemed necessary to the

⁵⁴ If the sale was made to another designated entity, there is no reason to deny the transferee the benefit of the installment payment preference. Other financial enhancements (easing upfront and deposit payment requirements) do not add to the value of the license. As such, none of these preferences should impact the value on resale of the license or otherwise inure to the benefit of the assignee/transferee. No unjust enrichment concerns appear significant.

⁵⁵ It is noteworthy that such terms are typical of financing transactions in the cellular industry. This is particularly true when the financing entity is the system equipment vendor, who often extends credit principally to facilitate the sale of the system and is therefore unwilling to continue the credit to a license buyer.

development of a particular service should instead be imposed as part of the particular rules for such service. ^{56/}

The winning bidder who wants to warehouse a license will have outbid those others who would use it to create income, and then not use it for income creation. That is a very high premium to pay if the primary purpose of the bid is the deterrence of competition, or the investment hedge on future increases in bare license value. In the auction context, such a result is unlikely, and it does not warrant the development of regulations to combat.

In fact, such regulations could become an impediment to the efficient utilization of spectrum, and thus antithetical to the congressional purposes outlined in the Budget Act. By such rules, the Commission may interfere with a licensee's ability to appropriately plan for future growth and/or the introduction of technology advances. Licensees who have gone through the bidding process should be given the flexibility to use the spectrum as they believe it will provide them the greatest return.

VI. THE MECHANICS OF THE APPLICATION PROCESS

The Notice properly focuses on assuring that access to the auction is limited to those entities who are serious bidders and qualified to hold the license. BellSouth supports many of the Commission's tentative decisions but urges the Commission to make certain important revisions so that qualified bidders are not

^{56/} Thus, for example, the Commission has imposed a build-out requirement for Broadband PCS systems; failure to timely complete such construction will result in license forfeiture. There is no need to impose a separate and potentially distinct requirement merely because a license was awarded through the competitive bidding process.

unnecessarily excluded from the competitive bidding process. BellSouth also urges the Commission to adopt procedures to facilitate administrative processing requirements. Such procedures will conserve administrative resources, assist the public, and promote Budget Act objectives by helping to ensure rapid service deployment without needless administrative delay.

A. Application Requirements Should Facilitate Participation by Qualified Bidders

To establish each bidder's initial qualifications, the Commission proposes to require each applicant to file a short form application, with appropriate fees. Additionally, each applicant would contemporaneously file the appropriate long form application for the service in question. All of the short form applications would be reviewed for acceptability. However, only the long form application of the winning bidder would be reviewed. Since the Commission has no intention of reviewing the long form application of any entity other than an auction winner, it should dispose of this filing requirement for applicants generally. It can simply require the expeditious filing of the long form by the winning bidder soon after the auction is completed. ^{57/}

The Notice also tentatively concludes that short form applications should be reviewed on the basis of a letter perfect standard. BellSouth opposes this approach. There is no reason to hold applicants for an auctioned license to a letter perfect standard on the short form application. If other entry barriers appropriately limit participation to serious service providers, the public interest

^{57/} In at least one context, the filings for Interactive Video and Data Services, the Commission recognized the benefit of requiring short form applications from all applicants but limiting the filing of the long-form solely to the lottery winner.

cannot be served by disqualifying a bidder because of a technical omission in its short form application. Any administrative delays associated with curing minor application defects will be minimal, and certainly less significant than the loss of a potential serious bidder. ^{58/}

The Commission has also asked whether it should put all applicants on public notice, thus subject to petitions to deny, or just the winning bidder. While the former approach might serve to discourage the filing of frivolous petitions, it could also lead to lengthy pleading processes as to applicants that will not be winning bidders. It is more efficient to limit public notice and the opportunity for petitions to deny to the long form application of the winning bidder.

In addition, the Commission questions whether it can deny without hearing an applicant that it believes is not qualified and as to which there is no material issue of fact. BellSouth believes the answer should be no.

Only the winning bidder's application will be reviewed, and there is simply no reason to deny the winning bidder every opportunity to cure any problems with its application. The most expeditious road to the provision of service will be to grant the winning bidder's application. Thus, auction winners should be allowed to file all curative minor amendments to the long form, right up to the point of grant (or denial) of the license, as are necessary to meet issues of law or fact relating to its application. So long as amendments do not involve

^{58/} While the use of such a letter perfect standard may have made some sense in the context of lotteries, where winning applicants added nothing to the public interest unless they built and operated a system, winning auction bidders add funds to the Treasury.

major ownership changes, ^{56/} it does not appear that any legislative objectives will be served by disqualifying a winning bidder after the auction has been held by reason of either a "letter perfect" or "no amendment" standard.

Adopting a liberal amendment policy is particularly appropriate if the Commission adopts its proposal to require a non-refundable deposit from the winning bidder. A non-refundable deposit should reasonably deter non-qualified or frivolous bidders from the auction. But such a penalty upon the denial of the application strongly argues for a rational approach to review of the long form application. Applicants should be given the opportunity to file curative amendments to fix defects in their qualifications, or at least to present evidence in a hearing before such forfeitures occur.

If there are material and substantial issues of fact concerning the winning bidder's qualifications and an auction winner is found unqualified, the Commission should, as it proposes, hold a new auction. Some may argue that the most expedient approach would be simply to go back to the earlier auction results and look to the next highest bidder. BellSouth disagrees. Time and intervening events may well change the economic conditions surrounding bidding, and the next highest bidder may not be the party then willing or able to pay the highest price. (Indeed, the next highest bidder may no longer be willing or able to pay the price bid at the initial auction.)

^{56/} Major amendments must be limited in order to assure that speculators do not enter the auction without financial backing and then sell majority interests in the applicant in the aftermarket for a windfall. Bidders should be capable of meeting financial requirements on the basis of the principal owners at the time of application. Some post-bidding investment may be appropriate, given market and other reasonably anticipated changes. However, wholesale ownership changes constituting a major amendment should not be permitted.

In any re-auction, those applicants already on file should be given prompt public notice of the denial of the winning bidder and the opportunity to participate. Because intervening events may have created interest in new applicants, public notice should also allow an expedited opportunity for new applicants to participate in the auction. Such reopening of the process may add some new players, and thus a modest delay while their applications are reviewed. But this will also recognize the impact of time, and will assure that serious interested bidders participate in the auction. In the absence of such opportunity to participate in the re-auction, interested parties would instead be forced to participate in the private aftermarket created by their exclusion. In turn, this would create administrative delays, delay the provision of service, and deny spectrum value to the federal government.

B. The Commission Should Adopt Other Procedures to Ease the Auction Processing Burden

In licensing spectrum services, the Commission has regularly found itself "drowning in paper" -- despite efforts to minimize the administrative burdens associated with its licensing task. Years ago it developed a microfiche requirement in the mobile services to eliminate some of the bulk of applications. Yet the number and size of filings continues to increase. It is clear that the competitive bidding scheme holds the specter of significant additional burdens -- for both the Commission and the bidding public. The Commission should therefore take particular steps to minimize the processing burden.

As a general matter, BellSouth urges the Commission to consider ways to use computer technologies to facilitate auction processing. For example, the Commission should explore the feasibility of using electronic application filing

procedures and funds transfer arrangements (for payments of upfront fees and deposits). Appropriate technology is readily available in the public domain and its use would provide tangible benefits to both the Commission and potential bidders.

The Commission should also consider other ways to ease the application filing burden. For example, with PCS, applicants should be allowed to file consolidated applications covering several MTA/BTA markets in one filing (perhaps based on the markets to be auctioned in one day's auction or, alternatively, based on the BTAs or MTAs in a particular geographic area). There is no reason for the Commission to require individual market filings in all instances. Allowing consolidated filings would clearly reduce the administrative processing burden and concomitant delay.

As noted above, only the winning bidder should be required to submit the long-form application. Moreover, the Commission should require winning bidders to submit only appropriate legal qualifications information on the long-form application. The winning bid (and the specter of substantial deposit forfeiture) provide adequate proof of a bidder's financial qualifications. And for most emerging services, it is neither feasible nor necessary for applicants to submit detailed engineering information in their long-form applications. Such a requirement will impede the development of diverse and innovative services by diverting costly resources to creation of "theoretical" systems unrelated to what may actually be developed. ^{60/}

^{60/} For example, with PCS the Commission has purposely declined to define the particulars of the service which must be provided. As such, applicants should not be required to define with precision the technical parameters of
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Specific service build-out/performance requirements can ensure that a wide variety of innovative services will be provided to the public on a timely basis. The proposed forfeiture requirement in the auction regulations further ensures that only serious technically qualified bidders with the wherewithal to develop technically advanced services will participate in the process. Under the circumstances, there is no need for the Commission to require the submission of detailed (and typically theoretical) engineering service proposals by the winning bidders.

C. Upfront Payment Amounts Should Be Set At Levels That Will Discourage Speculation But Not Unduly Burden Serious Bidders

In the Notice, the Commission proposes that each bidder should bring to the auction a refundable "upfront" entry fee. The imposition of this fee is viewed as an effective mechanism for establishing the seriousness and qualifications of the bidder. The Commission proposes to calculate the refundable upfront fee on the basis of a set amount (tentatively \$.02), which will then be multiplied by the product achieved by multiplying the population of the geographic service area covered by the license by the number of megahertz awarded with the license.

The use of an upfront fee will certainly impact those bidders whose bona fide interest in providing service to the public is questionable. Use of such

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their service proposal at the time a winning bid is submitted. The imposition of such a requirement would frustrate the flexibility and innovation the Congress and the Commission have tried so hard to achieve. Moreover, the success at auction of a bidder's aggregation strategy will clearly impact on its service plans. It is simply not realistic to require an immediate engineering analysis as part of the long-form application submitted by a winning bidder.

fees will require all participants to put effort into capital formation before they appear to bid on a license. ^{61/}

However, BellSouth believes that the Commission's proposal to make the upfront deposit a number based on the relative "value" of the license has certain problems. First, the formula has the potential for creating a fee that is so low as to be of little use in obtaining the objectives for which it was established -- rooting out non-serious bidders. As the Notice points out, some Narrowband PCS licenses would require only a \$200 fee, hardly a challenge for parties looking for license "bargains" rather than serious service opportunities. To avoid such situations, BellSouth urges the Commission to adopt a minimum amount, perhaps \$100,000, for qualification to participate in the auction for any particular license. ^{62/}

At the other end of the scale, the formula creates the real possibility of fees so high in many instances that they could inhibit otherwise qualified and serious bidders from participation. Fees which are too high may require parties to tie up substantial amounts of capital just to show up at the auction. For example, even at \$.02, for the larger 30 MHz PCS blocks bidders intent on

^{61/} By making the upfront payment needed to participate in the auction consistent with the capital intensity of the radio service being established, the incentives to speculate should be substantially reduced, and applicants generally limited to serious service providers. To do otherwise creates the possibility of widespread participation not unlike that which occurred in the cellular and 220 MHz lotteries, where the cost of the lottery ticket was quite small in comparison to the potential returns from a lottery victory.

^{62/} As the Commission develops more experience with auctions, this minimum amount could be adjusted to reflect different expected valuations in different services, or perhaps to reflect different service area configurations (e.g., MTAs and BTAs), so that it would not be so high as to exceed the typical bidding range for the licenses at auction, and thus discourage even serious bidders from participation.

winning more than one auction being held on a given day might have to bring several cashiers checks well in excess of \$10 million with them to the auction. ^{63/}

To avoid the "high-end" problem, BellSouth proposes that a bidder be permitted to qualify for each day's auction by submitting a single cashiers' check for the highest fee associated with any one license the bidder wants to bid on for that day. Payment of the single upfront fee would serve as a "ticket" or "pass" for entry to that day's auction, and would allow the bidder to bid on any "lesser" licenses auctioned as well. ^{64/}

Any concerns that bidders would abuse this system by bidding on licenses in excess of their ability to pay can be easily addressed by imposing appropriate regulatory sanctions. The upfront payment would be immediately taken on the bidder's first auction victory, but the bidder could continue to bid on other licenses auctioned that day. If a winning bidder for a particular license defaults on its deposit/payment obligation for any license for which it was the high bidder on that day, it would forfeit all license awards for that day and lose its upfront payment as well. As a further curb on any potential abuse, the

^{63/} Cashier's checks represent the deposit of real wealth from the bidder's account, and even for short periods of time will create considerable and unnecessary expense for bidders, even institutional ones. Tying up these amounts for even a day or two may make entry into the auction for larger license blocks virtually impossible for venture entrepreneurs, a hurdle unrelated to their ability to bid fairly and meet their bid obligations promptly.

^{64/} Thus, for example, if a bidder has made application for a number of MTAs and BTAs which will be auctioned at one time, in order to qualify for entry the bidder would be required to submit an upfront payment calculated on the basis of the largest MTA subject to auction for that day.

Commission could disqualify the bidder and its principals ^{66/} from participating in any spectrum license auctions for a prescribed period of time, e.g., one year.

This proposed approach should not overly burden the cash flow of serious bidders intent on bidding for several licenses in the same day's auctions. It will, however, discourage participation by unqualified bidders. Further, the sanctions would drastically reduce the likelihood of defaults. This will speed license deployment and minimize the circumstances where re-auctions would be required.

Finally, this approach should not adversely impact bona fide designated entities, if they are given a reasonable chance to meet the requirement in a fashion more appropriate to their circumstances. As previously noted, designated entities could be allowed to meet this requirement with a firm commitment letter from financial institutions or credit facilities. This would serve Congress' desire to increase participation by these groups. Appropriate sanctions against future auction participation should reduce the possibility of default. ^{67/}

D. The Timing/Amount of the Additional Deposit Payment Should Maximize Serious Participation

The Commission proposes that the winning bidder for each license be required to deposit 20% of the winning bid as a non-refundable fee. BellSouth supports the concept of a substantial non-refundable deposit. Imposing such a

^{66/} Principals would include those parties deemed "controlling" parties of the applicant.

^{67/} Congress wanted to assure that designated entities have a fair opportunity to participate in the auction license process. But there is no evidence in the legislation that Congress intended to give such entities a "free ride." Just as a requirement for a substantial upfront payment can weed out non-serious bidders generally, requiring designated entities to establish some level of independent creditworthiness can serve the same purpose.

requirement will be a very effective method of assuring that bidders take seriously their need to satisfy their obligations, including their need to be qualified to hold the license if it is granted. The sanctions outlined above for parties who fail to meet their deposit obligations should minimize the circumstances where a winning bidder defaults on its deposit payment.

The Commission also proposes to require the payment of this sum immediately upon the winning bidder's being certified as the high bid. Its primary focus appears to be concern that if the deposit is not be made until after parties have dispersed, the auction will need to be reconvened if a bidder is financially disqualified.

BellSouth shares this concern. Bidder certainty will be extremely important in developing service strategies. Bidders will need to know as auctions progress exactly what is available. If winning bidders are given time to "raise the deposit", the possibility of defaults, and the need for re-auctions, will increase. Bidders should be prepared to meet deposit obligations as soon as they make their bid. Any lesser requirement will invite speculative bidding and reduce bidder certainty in the entire process.

VII. MISCELLANEOUS ISSUES

A. Competitive Bidding Should be Utilized for Unserved Area Cellular Applications

BellSouth supports the Commission's tentative decision to auction mutually exclusive accepted applications for unserved areas in the cellular service. As recognized by the Commission, the auction process will speed deployment of service and minimize the abuses posed by participation in the process by insincere applicants who only seek to profit by the license award.