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November 9, 1993

Mr. William F. Caton
Assistant Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PP Docket No. 93-253

Dear Mr. Caton:

Enclosed for filing are an original and eight (8) copies of Citizens Utilities Company **Comments of Citizens Utilities Company** in the above proceeding.

Please provide a stamped-in copy in the enclosed prepaid postage envelope.

Very truly yours,

Ellen S. Deutsch
Senior Counsel

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

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

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PP Docket No. 93-253

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To: the Commission

COMMENTS OF CITIZENS UTILITIES COMPANY

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November 9, 1993

SUMMARY

Citizens Utilities Company generally supports the Commission's efforts to implement competitive bidding in a manner that ensures an equitable distribution of radio licenses and services to citizens in all geographic areas and economic opportunity for entities designated by Congress, including rural telephone companies. In implementing competitive bidding, the Commission must preserve the principles of universal service and ensure that new services, including PCS, are deployed in all markets.

Citizens specifically addresses two main issues in its Comments. First, Citizens urges the Commission to clarify the definition used to determine "rural telco" eligibility for preferential bidding. Congress intended that special procedures apply only to rural telcos that serve primarily rural and small communities. In connection with competitive bidding for PCS licenses, the Commission must tie "rural telco" eligibility to the PCS market in which a carrier seeks a PCS license.

Second, Citizens objects to the Commission's proposal to award BETRS licenses by competitive bidding. The BETRS radio service enables telephone companies to connect customers in rural and isolated areas with a wireless link. BETRS service should not be subject to competitive bidding because it does not involve mutually exclusive applications and BETRS licensees' primary use of spectrum is not receiving compensation from subscribers. Moreover, because it promotes universal service, subjecting BETRS service to competitive bidding would be contrary to the public interest.

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To: the Commission

COMMENTS OF CITIZENS UTILITIES COMPANY

Citizens Utilities Company ("Citizens"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. 1.415, hereby submits its Comments in response to the above-captioned Notice of Proposed Rule Making ("NPRM") regarding use of competitive bidding to award radio licenses.¹

I. BACKGROUND

Citizens is a local exchange carrier currently providing service to approximately 150,000 access lines in rural and suburban areas in Arizona, California and Pennsylvania. Citizens is in the process of acquiring from GTE Corp. approximately 500,000 access lines located primarily in rural areas in nine states. Citizens is committed to providing high quality, technically sophisticated service to its present and new customers.

¹ Notice of Proposed Rule Making, FCC 93-455, PP Docket No. 93-253, released October 12, 1993.

II. DISCUSSION

Citizens generally supports the Commission's efforts to implement the new Section 309(j) of the Communications Act, which authorizes the FCC to award radio licenses through competitive bidding, or spectrum auctions. In particular, Citizens supports the objective, as stated in Section 309(j), that the Commission implement competitive bidding in a manner that ensures an equitable distribution of radio licenses and services, economic opportunity for a wide variety of applicants, including rural telephone companies ("telcos"), and accessibility of innovative services to citizens in all geographic areas. NPRM at paras. 12-13. In addition, these Comments address two specific issues in the NPRM that directly affect Citizens, its ratepayers and the quality of service in its service areas: (1) the proposal to provide special procedures for rural telcos that bid for radio licenses, and (2) the proposal that licenses for Basic Exchange Telephone Radio Systems ("BETRS") should be subject to competitive bidding.

A. The Rural Telco Eligibility Criteria Should Be Clarified To Ensure That Telcos Serving Rural and Small Markets Can Compete for New Radio Licenses.

The Commission has proposed that certain designated entities, including small businesses, rural telcos and businesses owned by women and minorities, be given special opportunities to participate in provision of radio-based services. NPRM at paras. 72-81. Proposals include setting aside certain spectrum blocks to be open for bidding only by designated eligibles, bidding preferences,

preferential payment terms such as delayed or extended installment payments, and use of tax certificates. NPRM at para. 73.

The Commission has proposed that a rural telco would be eligible for special procedures if it meets the definition of a carrier that is exempt from the telco-cable cross-ownership restriction under Section 63.58 of the Commission's Rules. NPRM at para. 77. Section 63.58 states the following:

- (a) A telephone common carrier shall be exempt [from cable-telco rules] if the proposed service area contains none of the following:
 - (1) Any incorporated place of 2,500 inhabitants or more, or any part thereof;
 - (2) Any unincorporated place of 2,500 inhabitants or more, or any part thereof; or
 - (3) Any other territory, incorporated or unincorporated, included in an urbanized area.
- (b) All population statistics and definitions used in qualifying for this exemption shall be the most recent available from the U.S. Department of Commerce, Bureau of the Census. . . .

NOTE: The Census Bureau has defined some incorporated places of 2,500 inhabitants or more as "extended cities." Such cities consist of an urban part and a rural part. If the proposed service area includes a rural part of an extended city, but otherwise includes no territory described in paragraph (a)(1), (2) or (3) of this section, an exemption shall apply.

47 C.F.R. 63.58. The Commission seeks comment on this definition for eligibility, noting that it has pending a request to modify the definition of rural telco to those serving markets of 10,000 or less. NPRM at para. 77 n. 54. In addition, the Commission seeks

comment on the scope of treatment that should be afforded rural telcos, e.g., should a rural telco be afforded preferential measures only when the license it seeks covers a service area encompassing all or some significant portion of its telephone service area, OR should a rural telco obtain a preference in any market where it seeks a license? NPRM at para. 77.

In addition to these proposals that would apply to all spectrum auctions, the Commission has proposed specific procedures for designated entities in connection with award of licenses for personal communications services ("PCS"). The Commission has proposed setting aside two PCS spectrum blocks nationwide -- one 20 MHz block (Block C) and one 10 MHz block (Block D), which would be reserved for bidding only by designated entities. NPRM at para. 121. A designated entity awarded a license for a set-aside spectrum block would be able to pay its winning bid on an installment plan with interest rather than in an upfront lump sum. The Commission seeks comment on whether installment payment plans also should be available to designated entities when they bid for non-set-aside PCS spectrum blocks (Blocks A, B, E, F and G). In addition, the Commission asks whether tax certificates should be provided to designated entities that bid either within or without the set-aside spectrum blocks.

Citizens believes that the Commission's proposed definition of "rural telco" is confusing and problematic in the context of competitive bidding for PCS licenses. As applied to PCS, Rule Section 63.58 could be read to mean that any local exchange carrier

("LEC") that serves at least one market with a population of 2,500 or less would be eligible to bid on set-aside PCS spectrum blocks. Thus, many LECs, including some of the largest, could qualify for bidding preferences by pointing to a single community in their exchange service areas with a population of 2,500 or less.² This result would be contrary to the Commission's tradition of affording special treatment to rural telcos that serve primarily rural and small communities.

Because of this problem, Citizens believes it is essential that "rural telco" eligibility for preferential bidding be tied to the particular PCS service area for which the rural telco seeks a license. To be considered a "rural telco," a LEC should have some connection to rural communities in the PCS service area for which it seeks a license. In addition, the primary business of a LEC seeking "rural telco" eligibility should be provision of local exchange service in rural and small communities. Telcos that meet these standards are the entities that Congress had in mind when it directed the Commission to promote economic opportunity for rural telcos and other designated entities. Moreover, because they

² The Commission asks whether a rural telco should be afforded preferential measures only when the license it seeks covers a service area encompassing all or some significant portion of its telephone service area OR should obtain a preference in any market where it seeks a license? Under the first scenario, any LEC that serves at least one community of 2,500 or less that is within a PCS service area would be eligible for preferential bidding for that PCS service area, regardless of whether the LEC also serves major metropolitan markets within the PCS service area. Under the second scenario, any LEC that serves at least one community of 2,500 or less anywhere presumably would be eligible for preferential bidding for any PCS service area.

already serve rural and small communities (rather than the generally more lucrative urban markets), these are the entities most likely to fulfill the objective of rapid deployment of new radio-based services to rural areas. See Section 309(j)(3).

Citizens proposes a two-part test for determining whether a LEC is a "rural telco" eligible for bidding on the two PCS spectrum blocks set aside for designated entities. A LEC that seeks to bid on Spectrum Block C or D, both designated for a BTA service area, must (1) provide local exchange service to at least one community of 2,500 or less that is completely within the BTA,³ AND (2) provide local exchange service to no more than some specified percentage of the total population within the BTA. The Commission should establish this percentage to ensure that an eligible "rural telco" is not the majority service provider within the BTA.

Any "rural telco" that qualifies under this definition to bid on the set-aside PCS spectrum blocks also should be eligible to pay a winning bid on an installment plan and be eligible for any tax certificate benefits. In addition, installment payment, tax certificates and other special procedures should be available to a LEC bidding for non-set-aside PCS spectrum blocks if the LEC qualifies as a "rural telco" in that particular PCS service area, e.g., (1) provides local exchange service to at least one community of 2,500 or less that is completely within the MTA or BTA being licensed, AND (2) provides local exchange service to no more than

³ The Commission may consider granting a waiver to a LEC when the community of 2,500 or less is almost completely within the BTA if such a waiver would serve the public interest.

some specified percentage of the total population within the MTA or BTA.⁴

B. BETRS Licenses Promote Universal Service and Should Not Be Subject to Competitive Bidding.

The Commission has proposed that BETRS licenses be awarded through competitive bidding. NPRM at paras. 147 and 165. The Commission has tentatively concluded that the BETRS service meets the criteria set forth in the new Section 309(j) for determining when a radio service should be subject to competitive bidding. Section 309(j) permits the FCC to award licenses through competitive bidding only if (1) there are mutually exclusive applications for a license; (2) the applications are for an initial license or construction permit; and (3) the principal use of the spectrum involves the licensee receiving compensation from subscribers.

Citizens strongly objects to subjecting BETRS to competitive bidding. Many LECs that serve rural communities, including Citizens, use BETRS facilities to connect customers to the public switched telephone network ("PSTN"). Essentially, BETRS provides a radio link as the last segment of the local loop between the

⁴ The Commission also asks whether consortia that include designated entities as members should be eligible for preferential measures. Citizens is uncertain what general rules apply to consortia and submits no comment on this issue at this time. Citizens preliminarily notes, however, that it would oppose any procedures that permit applicants to use consortia to gain unfair advantages over the designated entities that Congress intended should benefit from special procedures.

network and a customer in an isolated area. In many cases, BETRS facilities connect customers in areas where it is physically impossible or prohibitively expensive to string wire or cable.

When the Commission established BETRS as a radio service classification, it explicitly recognized its function as an extension of the basic local exchange network. Report and Order, Basic Exchange Telecommunications Radio Service, 3 FCC Rcd 214, 64 R.R. 2d 368, 373 (1988). The service was not established to permit any provider to serve new customers with wireless facilities and charge them for air time. In fact, the Commission required that any applicant for a BETRS license be certified by a state as an eligible provider of local exchange service.

BETRS is provided so that radio loops can take the place of (expensive) wire or cable to remote areas. It is intended to be an extension of intrastate basic exchange service. Because BETRS is provided as an extension of basic exchange service, we will require that a service provider be a State certified local exchange carrier, or, if not a certified LEC, have some form of permission from the State to provide basic exchange radio service.

Id.

Given these features of BETRS, Citizens believes that it does not meet the criteria in the new Section 309(j) that determine when a service should be subject to competitive bidding. BETRS does not meet the first requirement that competitive bidding be used only when there are mutually exclusive applications. As the Commission itself noted, BETRS does not involve mutually exclusive applications. NPRM at para. 165 n. 174. Only a state-certified LEC is eligible to apply for a BETRS license to extend service to new customers in remote areas. By definition, only one carrier

would ever be seeking a BETRS license in a particular area.

The Commission states that there may be license applications that are mutually exclusive with BETRS applications because the spectrum allocated to BETRS is shared with paging services. Id. Thus, according to the Commission, mutually exclusive applications would exist even though the applicants would be seeking to use the spectrum for distinct radio services. This interpretation undermines the intent of Congress that competitive bidding be used only for assignment of radio licenses and not spectrum allocation.⁵ Requiring BETRS applicants to bid against paging license applicants for spectrum would result in a spectrum auction determining how spectrum is used, not merely by whom.

In contrast to its decision regarding BETRS, the Commission decided not to use competitive bidding in other instances where spectrum is allocated to more than one service category on a shared basis. For example, 800 MHz "General Category" channels available for use by Specialized Mobile Radio ("SMR") licensees and private radio services should not be subject to competitive bidding, the Commission decided. NPRM at paras. 139-140. In support of its decision, the Commission pointed to the provision of Section 309(j) that directs it to protect the public interest when identifying classes of licenses that should be subject to competitive bidding.

⁵ Section 309(j) authorizes the Commission to use competitive bidding only for license assignment. Subsection 309(j)(6) explicitly states that the new law does not alter the spectrum allocation criteria in the Communications Act. Section 303 of the Communications Act requires that allocation decisions be based on a finding of "public convenience, interest, or necessity". 47 U.S.C. 303.

It would be contrary to the public interest, the Commission argued, to see police departments bidding against SMRs for access to frequencies.

Citizens believes that this analysis also applies to BETRS. It clearly would be against the public interest to have a rural telco, which has state and federal common carrier obligations, bidding against a largely unregulated paging company for access to spectrum that provides the only means to connect isolated citizens to the PSTN. The policy of promoting universal service is enshrined in the Communications Act and is an integral part of any public interest analysis under the Act. Thus, in furtherance of Section 309(j)'s directive to protect the public interest, the Commission should exempt BETRS from competitive bidding.

Citizens believes that BETRS also fails to meet the third criterion under Section 309(j) for competitive bidding -- that the primary use of the spectrum involves the licensee receiving compensation from subscribers for transmitting and receiving signals. While LEC customers that are connected to the network by BETRS facilities do pay for telephone service, they are ratepayers just like any other LEC ratepayer except that their last-mile connection is by radio rather than wire. Such LEC ratepayers differ markedly from the subscribers to competitive services that Congress intended should be subject to competitive bidding. Moreover, the primary use of spectrum by BETRS licensees is to connect isolated customers, not generate compensation from customers. LECs' rates are regulated -- they cannot charge a

premium for connecting customers by BETRS facilities. In fact, LECs' current averaged rates do not even fully compensate for the cost of BETRS facilities. Thus, it would be unfair and detrimental to universal service to burden LECs with the added cost of bidding for spectrum for BETRS licenses.

III. CONCLUSION

As the Commission rushes to implement spectrum auctions in the coming months, it should not abandon the bedrock principles of the Communications Act regarding universal service and rapid deployment of new services and technologies for citizens in all geographic areas. Citizens urges the Commission to clarify the "rural telco" eligibility to ensure that preferential policies apply only to those entities that actually serve rural and small communities. In addition, Citizens urges the Commission to recognize the importance of BETRS facilities to universal service and not award BETRS licenses by competitive bidding.

Respectfully submitted,



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