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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of _____
Implementation of Section 309(j)
of the Communications Act Relating
to Competitive Bidding _____

PP Docket No. 93-253

Initial Comments Of Vanguard Cellular Systems, Inc.

VANGUARD CELLULAR SYSTEMS, INC. ("Vanguard" or "Company"), acting through counsel and in accordance with the Commission's Notice of Proposed Rulemaking, FCC 93-455, released October 12, 1993, hereby files its Initial Comments in this proceeding.

I. Introduction

Vanguard was formed in 1984 by three entrepreneurial individuals seeking licenses to construct and operate non-wireline cellular telephone systems. These founding individuals were enterprising businessmen who saw a bright future in mobile communications and were willing to invest their time and financial resources to pursue an emerging opportunity.

From that beginning, these individuals have led the Company to become a provider of non-wireline telephone cellular telephone services in 22 markets east of the Mississippi, with over 120,000 subscribers. During this period of growth, Vanguard has continued to demonstrate the same technologically innovative philosophy that was the seeds of its origin. For example, it has made creative use of point-to-point microwave facilities in developing its cellular systems.

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Vanguard would expect selectively to apply its established technical skills and talents to acquire and develop PCS licenses and services, so long as the competitive bidding process established by the Commission provides a fair opportunity for it to do so. The Commission would be ill-advised to permit a competitive bidding scenario which on the one hand bars companies like Vanguard from bidding on Blocks C and D of the PCS spectrum while the same companies are effectively precluded from competing against other applicants many times their size. The Commission must consider this factor in establishing the qualifications for all bidders, including the scope of any preferred categories.

**II. The Definition Of Small Business Should
Not Be Unduly Restrictive.**

In the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66) ("Budget Act") the Congress directed that the FCC regulations implementing competitive bidding authority ensure licensing opportunities for small businesses, rural telephone companies and businesses owned by women and minorities. 47 U.S.C. § 309(j)(4)(C). However, the Congress did not expressly define the term "small business" and certainly did not require that it be narrowly construed.^{1/}

The Commission has sought comment on whether it should merely apply the definition of "small business" already established by

^{1/} The House of Representatives indicated that it did not "intend that the Commission apply any particular...test in order to avoid concentration of licenses, but rather should apply a common sense approach." H. Rep. No. 111, 103rd Cong., 1st. Sess. (1993) at 254.

the Small Business Administration ("SBA"). For a number of reasons, Vanguard believes it should not do so.

The SBA itself has recognized that the financial criteria under existing small business standards are "probably too low for an industry that will be as capital intensive as PCS."^{2/} Specifically, the SBA notes that the FCC's service area and bandwidth selections for PCS "would not be effective if the [small business] classification excludes independently owned and non-dominant firms with the wherewithal to construct PCS facilities that may cost from \$50-\$100 million."^{3/} Vanguard is just such a firm.

If the Commission defines small business eligibility too narrowly, it could forfeit the experience and resources of many companies like Vanguard. Despite its growth from an idea on a drawing board to an established cellular provider, Vanguard and other companies like it could be relegated to the sidelines for PCS and other emerging technologies if not considered small businesses.^{4/}

^{2/} Report of Small Business Advisory Committee to FCC Regarding General Docket 90-314 (September 15, 1993), at page 21 ("SBAC Report"). As noted therein, the existing standards were not tailored to implement the economic opportunity provisions of the Budget Act. Id., at paragraph 20.

^{3/} Id.

^{4/} Vanguard's annual gross revenues are nowhere near, for example, those of the Regional Bell Operating Companies ("RBOC") or major interexchange carriers such as AT&T, MCI or Sprint. For example, Vanguard's gross revenues for 1992 are less than one-half of one percent of AT&T's.

Although many of these companies are financially substantial, they would not be able to compete in a bidding contest with the massive resources of the RBOCs, major interexchange telephone carriers (e.g., AT&T), television networks, cable television companies and media conglomerates such as Time-Warner. As a result, when the dust from the bidding battles settled, a restrictive definition of "small business" could deprive the PCS marketplace of proven innovative thinking and achievement. Clearly, such a result would neither be in the public interest nor consistent with the Congressional intent embodied in the Budget Act. Therefore, the Commission must define "small business" to include companies like Vanguard.

More specifically, Vanguard proposes that the Commission include as a "small business", eligible to file for PCS blocks C and D, any company with positive net income for three calendar years so long as, for the most recent calendar year, said net income is not more than \$15,000,000 and the company has no more than 1,500 employees.

***III. The Commission Must Be Vigilant Against Abuses Of
Set-Aside Or Other Bidder Preferences***

Vanguard fully supports the Congressional mandate that the FCC ensure widespread dissemination of licenses subject to competitive bidding. In that vein, the devices proposed by the FCC to promote that goal (e.g., set asides, bidding preferences, delayed payment schedules) are all worthy of the Commission's consideration. However, the Commission must protect against potential abuses of

these advantages. See, Remarks of Commissioner Ervin S. Duggan before the Telestrategies Spectrum Auctions Conference, November 1, 1993, at 7.

No less authority than the Supreme Court has cautioned that only *bona fide* applicants should be allowed to benefit from such preferences in Commission licensing criteria. Metro Broadcasting, Inc. v. F.C.C., ___ U.S. ___, 110 S.Ct. 2997 (1990). The Commission should learn from the past and adopt appropriate mechanisms so that those who potentially qualify for special treatment must demonstrate their eligibility in advance.^{5/}

To that end, the Commission first should put all applicants on notice that it will take a "hard look" at the applications of all successful bidders for potential abuses. No doubt should be left in any applicant's mind.

Second, the Commission should adopt protective measures, including: (1) provision of complete ownership information with the application, such as corporate, partnership or other appropriate formation documents that demonstrate control of the applicant by the female, minority or rural telephone ownership group eligible for the licensing preference; (2) reasonable financial showings in the application, see, e.g., Report and Order

^{5/} For example, the Commission has had experience in the licensing of broadcast stations of minority and women recruited for the sole purpose of gaining advantage in the licensing process without any real or intended role in the enterprise. See, e.g., Garden State Broadcasting Limited Partnership v. F.C.C., No. 91-1043 (D.C. Cir. Jun. 29, 1993), Poughkeepsie Broadcasting Limited, 6 FCC Rcd 2497 (1991); Progressive Communications, Inc., 5 FCC Rcd 7058 (1990), recon. den., 6 FCC Rcd 1383 (1991).

on Revision of FCC Form 301, 4 FCC Rcd 3853, 3859 (¶¶ 42-46) (1989) (applicants required to identify costs of construction and operation, as well as sources of committed funding); 47 C.F.R. § 22.917(d) (cellular applicants required to identify costs of construction and sources of committed funding); and (3) stringent rules regarding disqualification of those who seek to circumvent these requirements or proffer sham applicants. The Budget Act itself requires that the Commission adopt antitrafficking provisions to prevent unjust enrichment. 47 U.S.C. § 309(j)(4)(E).

The Commission can also protect against such abuses by requiring construction schedules as it has done in other services and license holding periods for those who receive licenses as a result of preferential bidding positions. The Commission has increasingly recognized these as potentially effective tools against abusive applicants. See, e.g., Cellular Unserved Areas, 6 FCC Rcd 6185 (1991).^{6/}

IV. Conclusion

Vanguard strongly urges the Commission to craft a competitive bidding framework that will not lock out valuable expertise. To do so through a restrictive definition of "small business" could deprive the PCS marketplace of the resources and talents of a number of companies that already have demonstrated their success

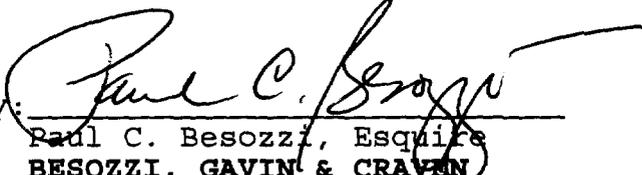
^{6/} The Commission should also adopt a scheme comparable to that in place for broadcasting and cellular licensees regarding payments for dismissing any petitions against the qualifications of a winning bidder. See, e.g., 47 C.F.R. § 22.927 (1993) (cellular rule).

in bringing new mobile technologies to the public. Such a result would be inconsistent with the terms of the Budget Act as well as the public interest.

At the same time, the Commission must avoid leaving loopholes that could be exploited by those seeking only to take advantage of licensing opportunities for themselves. To do this the Commission should establish construction and license holding periods for bidders that obtain licenses pursuant to special treatment for small businesses, rural telephone companies, women and minorities.

Respectfully submitted,

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