

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

PP Docket No. 93-253

COMMENTS OF

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Summary

Joint Commenters are parties that filed cellular unserved area applications at the Commission during the spring of 1993, in accordance with the FCC's policy of allocating these licenses by lottery. After the initial lotteries were scheduled, Congress passed the Omnibus Budget Reconciliation Act of 1993, which, inter alia, authorizes the FCC to allocate radio spectrum through auctions. In its Notice of Proposed Rulemaking implementing auctions, the Commission proposes to use this authority to retroactively auction the unserved area licenses, rather than hold the anticipated lotteries for the prior-filed applicants.

Joint Commenters urge the Commission to reconsider its proposal and maintain lottery proceedings for those unserved area applications filed prior to July 26, 1993. Allocating these licenses by auction would be an unreasonable and unfair retroactive application of Commission policy in contravention of Congressional intent and the public interest. Congress added a Special Rule to the Budget Act allowing the FCC to hold lotteries for these prior filed applications because of its concern over retroactive use of auctions. The FCC has already used this Special Rule to hold lotteries for similarly situated prior-filed applications in the IVDS spectrum. Furthermore, the hardship from retroactive application of auction authority outweighs the public interest considerations the Commission has proffered.

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In the Matter of)
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
PP Docket No. 93-100

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(hereinafter "Joint Commenters"), by their attorney, hereby submit their comments on the Notice of Proposed Rulemaking ("Notice") in the above-referenced docket.^{1/} As discussed below, Joint Commenters object to the Commission's proposal to use an auction, rather than a lottery, to grant licenses for cellular unserved areas for which lottery applications were filed prior to July 26, 1993. Allocating these licenses by auction would be an unfair and unreasonable retroactive application of Commission policy in contravention of Congressional intent and the public interest. Joint Commenters therefore urge the Commission to reconsider its proposal and maintain lottery proceedings for those unserved area applications filed prior to July 26, 1993.

I. Background

Cellular unserved areas are those parts of cellular MSAs and RSAs that were not constructed by licensees within their five year build-out periods. The FCC opted to allocate the cellular unserved area licenses through a lottery,^{2/} and accepted lottery applications for most

^{1/} Notice of Proposed Rulemaking, Implementation of Section 309(j) of the Communications Act: Competitive Bidding, PP Docket No. 93-253 (Oct. 12, 1993).

^{2/} Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing Applications for Unserved Areas in the Cellular Service, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd. 6185, 6215-19 (1991) (hereinafter "Unserved Areas").

cellular unserved MSAs and a handful of cellular unserved RSAs between March 10 and May 12, 1993. By August 4, 1993, the FCC completed initial processing of the applications and scheduled the first lotteries for September 22 and October 13, 1993.

On August 10, 1993 (after the initial lotteries were scheduled), Congress passed the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), which, inter alia, amended the Communications Act to authorize the FCC to allocate certain radio spectrum through competitive bidding, or auctions.^{3/} On September 16, 1993, a mere six days before the first scheduled lottery (and a full month after the Budget Act became law), the FCC postponed the previously scheduled lotteries, to decide how the provisions of the Budget Act affected the prior-filed applications for cellular unserved areas.^{4/}

The Commission issued the Notice to comply with the Budget Act's mandate to promulgate auction regulations. In the Notice, the Commission proposed to allocate the unserved area applications filed prior to July 26, 1993, by auction, rather than lottery, despite the fact that a Special Rule appended to the Budget Act states that the FCC may use a lottery procedure for mutually exclusive applications

^{3/} Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993), codified at 47 U.S.C. § 309(j).

^{4/} See Lottery Notice, Mimeo No. 34917 (Sept. 16, 1993).

accepted for filing prior to July 26, 1993.^{5/} The FCC requests comments on this proposal. Notice at ¶ 160. Each of the Joint Commenters is a party that filed unserved area applications at the Commission in accordance with the FCC's prior policy of allocation by lottery.

II. Discussion

A. The Legislative History of the Budget Act Calls For Lotteries For Applications Already on File with the Commission

Joint Commenters contest the Commission's interpretation of the Budget Act as applied to their prior-filed applications. Use of an auction procedure to select these licensees rather than the promised lotteries is in contravention of legislative intent, and an unfair and unreasonable retroactive application of Commission policy.

^{5/} Id. at § 6002(e), 107 Stat. at 397. The phrase "accepted for filing" must be distinguished from "Public Notice of accepted for filing." An application is "accepted for filing" when it is tendered at the Mellon Bank in Pittsburgh, unless it is later returned as defective. On the other hand, the "Public Notice of acceptance for filing" can be issued many months or even many years after the application is "accepted for filing." Congress never used the phrase "Public Notice." Therefore, the cellular unserved area applications were clearly "accepted for filing" prior to July 26, 1993. See also H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 498-99 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1187-88 (the word "filed" is used interchangeably with the phrase "accepted for filing").

In its proposal, the Commission attempts to apply a legislative rulemaking retroactively.^{6/} Statutory grants of rulemaking authority do not encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.^{7/} In the case of the Budget Act, the statutory provisions establishing the use of auctions do not speak with the requisite clarity to justify retroactive use of auctions for applications already on file with the FCC. On the contrary, Congress expressly granted

6/ Legislative rulemaking occurs when agency rules are promulgated at Congress' behest, as compared to an administrative rulemaking (agency promulgating rules on its own with no statutory mandate) or adjudicative rulemaking (rules that arise out of an adjudication).

7/ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). But see *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 716-17 (1974) (intervening statute applies retroactively unless a contrary intention appears). Although the Supreme Court has yet to reconcile these two lines of cases, see, e.g., *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990), they can be reconciled here. Under *Bowen*, if the presumption against retroactivity is not rebutted by clear terms to the contrary -- and there is none to be found in the Budget Act -- then the statute applies only prospectively. See *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1584 (1992). Under *Bradley*, retroactivity should not be applied because a contrary intention appears in the Budget Act at Special Rule § 6002(e)(2), and the legislative history from which it arose. Therefore, under either precedent, the Budget Act does not necessarily give the FCC the option it claims it has of allowing the unserved area lottery applications to be resolved by auction. In any event, *Bowen*, the more recent case, conforms with the longest and largest line of Supreme Court decisions, is the prevailing case on the issue adopted by the D.C. Circuit, and therefore should be given the greater weight. See *Gersman v. Group Health Ass'n*, 975 F.2d 886, 897 (D.C. Cir. 1992), petition for cert. docketed, 61 U.S.L.W. 3523 (U.S. Feb. 2, 1993) (No. 92-212), carried over, 62 U.S.L.W. 3017 (U.S. July 20, 1993).

the FCC permission to conduct lotteries -- not auctions -- for applications on file prior to July 26, 1993.^{8/}

The legislative history of the Budget Act directly addressed the issue of retroactivity. At first, Congress planned to mandate retroactivity of the auction procedures for all non-exempt (i.e., broadcast or non-profit) applications already on file.^{9/} However, the Senate Amendment to this legislation (incorporated by reference into the final Conference Report) expressly stated that auctions should apply only to the granting of new spectrum licenses, and "should not . . . alter existing spectrum allocation procedures."^{10/} Ultimately, Congress added § 6002(e)(2) to the final legislation -- an express permission to continue using lotteries for prior filed applications. The incorporation of this provision weighs heavily against the FCC's auction proposal, in view of the fact that Congress considered, then backed off from, a mandate for retroactive use of the auctions.

Furthermore, in discussing the termination of use of lottery allocation, the Conference Report expressed a concern over specific retroactive applications of the auctions by expressly allowing the FCC to maintain lotteries for all applications filed prior to July 26, 1993,

8/ Budget Act Special Rule § 6002(e)(2), 107 Stat. at 397.

9/ See, e.g., H.R. Rep. No. 111, 103d Cong., 1st Sess. 253, 262-63 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580, 589-90.

10/ 139 Cong. Rec. S7986, S7995 (daily ed. June 24, 1993).

mentioning "the nine Interactive Video Data Service markets for which applications have already been accepted, and several other licenses" as examples of when lotteries are to be maintained.^{11/} Indeed, the FCC has already held lotteries for those markets for which IVDS applications were on file before July 26, 1993, and now plans to auction the remaining IVDS licenses. Similarly, the FCC should split the procedures (hold lotteries for applications on file before July 26, 1993, and auctions for the remaining licenses) for the "other licenses" mentioned by Congress -- those cellular unserved area markets for which applications were filed last spring. Joint Commenters believe the FCC must do so, to comport with the maxim that the FCC must treat similarly situated parties alike (or provide an adequate justification for disparate treatment).^{12/} This scenario would be the most fair way of meeting the concerns of all those who already filed their applications with the FCC in anticipation of a random selection procedure.

^{11/} H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 498 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1187 (emphasis added).

^{12/} See Melody Music Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965).

B. Public Policy and Fairness Compel Lotteries for Cellular Unserved Areas

In addition to the above arguments, public policy and fairness issues demand lotteries for the cellular unserved areas. As discussed below, the situation at hand is far different from the earlier occasion when the Commission changed its cellular license allocation policy. In the Cellular Lottery Rulemaking (hereinafter "Cellular Lottery"),^{13/} the FCC shifted its licensing procedure from comparative hearings to lotteries, and applied the policy to applications that were already filed for comparative hearings. Although the retroactive application of this policy change was eventually upheld in Federal Court, the public policy and fairness issues in the present proceeding call for a new analysis, and an opposite outcome.

Cellular Lottery came to its conclusion based on the five-factor test generally used to determine whether a new law or regulation developed by an agency should be applied retroactively, as set out in Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB.^{14/} This test balances the

^{13/} Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, Report and Order, 98 F.C.C.2d 175 (1984), modified, 101 F.C.C.2d 577, further modified, 59 Rad. Reg. 2d (P&F) 407 (1985), aff'd in relevant part sub nom., Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987).

^{14/} 466 F.2d 380, 390 (D.C. Cir. 1972). Joint Commenters respectfully submit that the Commission in Cellular
(continued...)

hardship from retroactive application against any public interest considerations for the following factors:

- (1) whether the particular case is one of first impression;
- (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of the law;
- (3) the extent to which the party against whom the new rule is applied relied on the former rule;
- (4) the degree of the burden which a retroactive order imposes on a party; and
- (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Unlike Cellular Lottery, 98 F.C.C.2d at 182, this is a case of first impression. In Cellular Lottery, the Commission had considered the use of lotteries for cellular licensing on several previous occasions, and had the statutory authority to do so. Therefore, in Cellular Lottery, the parties filing comparative hearing applications were on notice that the Commission had the power to, and very well might, implement a lottery for cellular licenses at any time,^{15/} and assumed the risk of the legal

14/(...continued)

Lottery (and the D.C. Circuit in Maxcell) erroneously applied this test, developed to analyze retroactive application of adjudicative rulemakings, in the context of a legislative rulemaking. Joint Commenters maintain that for that reason alone, this test does not apply in the current proceeding, particularly in light of the Bowen decision, which arose after Cellular Lottery/Maxcell. Therefore, the Supreme Court's specific law regarding retroactivity in statutory grants of rulemaking authority in Bowen should be dispositive. That notwithstanding, since the Commission may try to duplicate its previous success using this analysis, Joint Commenters address this balancing test in the following discussion.

15/ Maxcell, 815 F.2d at 1555.

consequences that would result if the FCC implemented lotteries. In comparison, this proceeding presents the first time the Commission has the authority to consider use of auctions for cellular licensing. Prior to the Budget Act, the FCC consistently rejected use of auctions because it had no Congressional authority to conduct them.^{16/} Indeed, the authority did not arise until August 10, 1993, and the parties filing unserved area lottery applications were only told that the Commission would "revisit" the decision to use lotteries if it received Congressional authority to conduct auctions^{17/} -- that is, revise the policy prospectively once authority is granted. Those who filed lottery applications were unaware of when Congress would pass the auction authorization, let alone that it would do so while their applications were in process and awaiting already scheduled lotteries. They filed their applications, then the statute changed the legal consequences of their actions. Therefore, it is grossly unfair to retroactively apply auctions to applications filed in reliance on lotteries, with no warning that the FCC would be allowed to change course midstream, thus defeating the

^{16/} See, e.g., Cellular Lottery, 98 F.C.C.2d at 222 ("We decline to use an auction because it is unclear whether we have the authority to hold an auction while the authority to conduct lotteries is explicit.").

^{17/} Unserved Areas, 6 FCC Rcd. at 6217.

applicants' expectations and the legal significance of the applicants' conduct.^{18/}

Under the second factor, the decision to use auctions represents an abrupt departure from well established practice, and the Commission must justify this change with a fully reasoned analysis. In Cellular Lottery, 98 F.C.C.2d at 182-83, the FCC justified its abrupt switch to lotteries due to its authority to adapt policies to "changed circumstances," a reflection of the backlog of undifferentiated comparative hearing applications awaiting resolution. The Commission has no such parallel reasoning in this case; rather, the Commission attempts to justify a change in policy by citing to the Budget Act's statutory objectives such as rapid deployment of the cellular service

^{18/} See Association of Accredited Cosmetology Sch. v. Alexander, 979 F.2d 859, 864 (D.C. Cir. 1992) (citing cases where courts have invalidated the application of new statutes or rules that change the legal significance of prior conduct).

Compare the current proceeding to General Tel. Co. v. United States, 449 F.2d 846, 863-64 (5th Cir. 1971), where the court found that those petitioners should not have relied on the Commission's acquiescence in their activities because the Commission had for many years hinted that it might curtail those activities. In this case, the cellular applicants had good reason to rely on their status under the rules in force. The FCC did not merely acquiesce in the applicants' activities, it invited and encouraged them. The FCC accepted approximately 10,000 unserved area applications between March 10 and May 12, 1993, and scheduled the lotteries. The lotteries remained scheduled for weeks after Congress passed the Budget Act, and were postponed only six days before the first lottery was to have occurred. Having justifiably relied on the Commission's prior policy, the applicants on file prior to July 26, 1993 are entitled to complete their lottery proceedings.

and more opportunity for a wider variety of applicants to become cellular licensees. Notice at ¶ 160. Joint Commenters do not ignore the fact that the FCC needs to find the best regulatory approach for expediting the provision of cellular technology, but none of the FCC's justifications are indicative of the "changed circumstances" that an auction would resolve as compared to lotteries. Holding an auction would not encourage rapid deployment of unserved area systems -- it would mean filing the necessary supplemental application materials to qualify for competitive bidding, and a regulatory waiting period while all of the conditions precedent to the Commission's authority to hold the auctions are satisfied. Meanwhile, the lotteries could be held, the licenses won, and construction begun on unserved area systems -- before the first auction would be held. If rapid deployment is the goal, the lotteries -- not the auctions -- will achieve that goal. Holding an auction also will not provide an opportunity for a wider variety of applicants to become cellular licensees in this case, because the Commission also proposes to limit the opportunity to enter the auction for the unserved areas to those applicants who filed prior to July 26, 1993 -- the same pool of applicants who expected an allocation by lottery.^{19/} Therefore, the Commission cannot

^{19/} To do otherwise and reopen an already closed filing window would add yet another unfairness to a change in the rules.

justify this unfair and unreasonable departure from procedure on these grounds.

The third factor to consider is the extent that a party relied on the former rule. In Cellular Lotteries, the Commission rejected the argument that applicants underwent unnecessary expenses in filing comparative hearing applications, since the holding of lotteries actually saved the applicants the financial burdens of the actual hearing process, and no applicant experienced any new or increased burdens as a result of the rule change. In the present situation, replacing lotteries with auctions makes worthless the applicants' substantial past investments incurred in reliance on the prior rule, a reliance that was reasonable and unavoidable.^{20/} In addition to paying FCC filing fees, the applicants expended considerable sums for legal and engineering support and for loan commitment fees for their firm financial commitment letters. Even if the FCC were to refund the original filing fees for the lottery applications of those applicants who choose not to participate in an auction, these other costs would be lost in the event that the FCC does not hold lotteries, thereby causing serious

^{20/} See Bowen, 488 U.S. at 220 (Scalia, J., concurring) (altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule is an example of unreasonable retroactivity); see also National Ass'n of Indep. Television Producers and Distributors v. FCC, 502 F.2d 249, 255 (2d Cir. 1974) (new Prime Time Access Rule unreasonable because it would cause serious economic harm to independents who produced access programming in reliance on old rule).

economic harm to those applicants who expended these funds in reliance on the FCC holding lotteries for unserved areas.

The fourth factor examines the imposition of new and unexpected liabilities on a party as a result of the retroactive application of a rule. In Cellular Lottery, the Commission found that switching from the more substantial showing in a comparative hearing to a less substantial showing for a lottery substantially relieved burdens on the parties in the application process. 98 F.C.C.2d at 183. In the current proceeding, however, the burden and liabilities shift the other way. By requiring auctions of these applicants, the Commission is requiring applicants to switch from a less substantial showing (i.e., money to construct and operate) to a more substantial showing (i.e., money to construct, operate, and acquire the spectrum) -- in many cases, undoing past eligibility for becoming cellular licensees -- which is clearly an unfair and unreasonable retroactive change in policy.^{21/}

Finally, and most importantly, the statutory interest in applying the new rule completely diverges from Cellular Lottery to the present proceeding. The legislative history of the Lottery Statute in Cellular Lottery indicated that Congress considered the regulatory backlog of mutually exclusive applications and clearly intended the use of a

^{21/} See Cosmetology Schools, 979 F.2d at 865 (citing Bowen; National Wildlife Fed'n v. March, 747 F.2d 616 (11th Cir. 1984) (undoing past eligibility as unreasonable retroactivity)).

lottery for applications already on file,^{22/} thereby justifying the Commission's switch from comparative hearings to lotteries. As Joint Commenters have already asserted, the statutory provisions of the Budget Act establishing the use of auctions do not speak with the requisite clarity to justify retroactive use of auctions for applications already on file with the FCC as of July 26, 1993. In fact, the opposite is true, because Congress specifically considered and rejected mandatory retroactive auctions.

Therefore, even under the hardship/public interest balancing test that the Commission used to uphold its change of policy in Cellular Lottery, the Commission cannot apply auctions retroactively to Joint Commenters' unserved area applications.

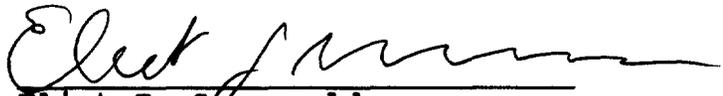
^{22/} 98 F.C.C.2d at 184 & n.27 (citing H.R. Rep. No. 765, 97th Cong., 2d Sess. 38 (1982)).

Conclusion

For the above stated reasons, Joint Commenters respectfully urge the Commission to license cellular unserved areas by lottery in instances where the applications were on file with the Commission prior to July 26, 1993.

Respectfully submitted,

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