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FEDERAL COMMUNICATIONS COMMISSION
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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

COMMENTS
OF PMN, INC.

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November 10, 1993

No. of Copies rec'd 074
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SUMMARY

PMN, Inc. ("PMN") accepts the Commission's tentative conclusion that the Omnibus Budget Reconciliation Act of 1993 requires the use of auctions to award initial licenses for Personal Communications Service ("PCS").

With regard to auction design, PMN favors the Commission's tentative conclusion that minimum bids should not be established, particularly for PCS. Certain designated entities, *i.e.*, small businesses, rural telephone companies, and businesses owned by minorities and women, are to be afforded specific opportunities to participate in competitive bidding. PMN urges the Commission to extend equitable treatment to all such entities, assuming they are of similar economic viability.

The definition of rural telephone company for purposes of eligibility should focus on the size of the company, rather than the particular area being served. The purpose of extending incentives to such entities is to provide economic opportunity and avoid excessive concentration of licenses. In the case of rural telephone companies, this is best achieved by adopting a definition that reflects the overall size of the company. PMN therefore advocates that the Commission adopt its Class A/Class B definition in Part 32 of the Commission's Rules, with Class B companies qualifying for the incentives and set-aside frequencies. On the other hand, reliance on the size of the particular area served, as tentatively suggested by the Commission, would result in even the largest local exchange carriers in the nation qualifying as rural telephone companies.

Application of the incentives and set-asides to consortia should be limited to those

that have over 50% ownership interest of eligible entities as members and at least one of the eligible entities having a qualifying presence in the area for which a license is being sought by auction. Adoption of such measures would avoid any problem of extending preferential treatment to consortia beyond those areas where they have a presence.

With regard to combinational bidding, PMN advocates that the Commission first determine the groupings for combinational bidding. This should give all interested parties a concrete idea of what combinations will be bid. Also, PMN is deeply concerned over the effect of the attribution rule applicable to the eligibility of cellular interests for PCS. PMN urges the Commission to eliminate the attribution rule as it applies to rural local exchange carriers.

Reconciliation Act of 1993 ("Budget Act") that added a new Section 309(j) to the Communications Act of 1934, as amended, ("Act"). Pursuant to that provision, the Commission is given the authority to use competitive bidding to grant licenses under certain conditions. It is directed to adopt rules for implementing competitive bidding procedures that promote several objectives, including: developing and rapidly deploying new technologies, products and services for the benefit of the public, including in rural areas; promoting economic opportunity and competition; and avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants that include small businesses, rural telephone companies, and businesses owned by minorities and women. The Commission is also required to begin issuing licenses for Personal Communications Services ("PCS") by May 7, 1994.

PMN provides the following comments on the specific proposals to implement competitive bidding procedures.

I. Applicability of Auctions

The Commission proposes to apply competitive bidding only where mutually exclusive applications for licenses have been filed and for initial licenses, rather than renewal applications.² Furthermore, the Commission proposes to initially use auctions for common carrier fixed services, the new Commercial Mobile Services and some private mobile service.³

²Notice at para. 22.

³Notice at para. 26.

PMN generally agrees with the Commission's application of the auction procedures to the types of situations and services set forth above as being consistent with the provision in the Budget Act.

The Commission makes a number of recommendations concerning competitive bidding for PCS. Among the most significant is to utilize that mechanism immediately for awarding broadband PCS licenses.⁴

PMN accepts the use of auctions to grant initial broadband PCS licenses. Given the time constraints imposed on the Commission by the Budget Act for PCS and the importance of making PCS technology available to the public as soon as possible, auctions should be an effective means of awarding such licenses. The specific set-aside proposals for PCS are more specifically addressed below.

II. Auction Design

A. Bidding Procedures

The Commission raises the issue of setting minimum bid requirements or a reservation price for each auction and tentatively concludes that no such minimum should be established, since the public interest benefits of facilitating the rapid provision of new services is clear.⁵ However the Commission seeks comment on whether minimum bids should be established in those auctions where the spectrum has an established value.

PMN agrees with the Commission's tentative conclusion that no minimum bids

⁴Notice at para. 120.

⁵Notice at para. 66-67.

should be established. PMN is particularly concerned that, in the case of PCS, some of the designated areas would be less lucrative than others and that a uniform minimum bid could be set too high. Therefore, PMN advocates open bidding without minimums.

B. Treatment of Designated Entities

As the Commission notes⁶, the new Section 309(j) of the Act requires the Commission to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (hereinafter collectively referred to as "designated entities") are "given the opportunity to participate" in the provision of spectrum-based services. The Commission sets forth several possible measures to implement this provision. These include tax certificates, spectrum set-asides, bidding preferences, and preferential payment terms.⁷ In seeking comments on the appropriate measures to be afforded the designated entities, the Commission tentatively concludes that the same type of treatment need not be made available to each of the enumerated groups.⁸

Among the measures advanced, the Commission specifically proposes to allow all the designated entities to utilize installment payments with interest.⁹ It further seeks comment on how to utilize tax certificates to advance the Congressional purpose of ensuring economic

⁶Notice at para. 72.

⁷Notice at para. 73.

⁸Notice at para. 75.

⁹Notice at para. 79.

opportunity for the designated entities.¹⁰ With regard to broadband PCS, the Commission proposes to set aside two blocks of spectrum in each BTA, Block C of 20 MHz and Block D of 10 MHz, for bidding by the designated entities.¹¹ Furthermore, the Commission would allow the designated entities to use installment payment plans with interest for bids within these set-aside blocks.¹²

With regard to installment payments and tax certificates, the apparent objective is to extend economic incentives to those who otherwise could not necessarily participate to the degree that others could. Assuming that the designated entities are of similar economic viability, quantification of the economic deficiency beyond the identification of the designated entities by Congress may pose difficulties and could possibly result in artificial and unnecessarily complex regulations. Furthermore, a general assumption can logically be made that small businesses and those owned by women and minorities, and rural telephone companies, as compared to larger telephone companies, are in need of economic incentives in order to fully compete for those communications services whose licenses are to be awarded by auction.

The Commission should foster a level playing field among all those designated entities competing against each other. PMN advocates that equitable treatment be afforded to the designated entities, assuming they are of similar economic viability, in order to ensure that economic opportunity be extended to each of the designated entities, so long as they

¹⁰Id.

¹¹Notice at para. 121.

¹²Id.

comply with any consortia limitations as discussed infra.

PMN also favors the same set-aside frequency blocks for all the designated entities. Economic incentives alone could be insufficient to provide such entities the necessary full opportunity to participate in services such as PCS. By permitting the designated entities to bid only against each other, they would not have to compete against others who would have financial and other obvious advantages. Rather, they would be competing against similarly situated entities. This approach would be consistent with the Congressional objective of Section 309(j)(4)(D) of the Act. Given this, however, PMN advocates that the economic incentives be restricted to the set-aside blocks. Extension of such incentives to the designated entities beyond the set-aside blocks would be excessive and not justified by the Congressional mandate. Therefore, the set-aside blocks for PCS advanced by the Commission should be implemented and the economic incentives limited to those blocks.

C. Eligibility Criteria

1. Rural Telephone Company Definition

The Commission is provided no specific guidance in the Budget Act for determining appropriate eligibility criteria for the designated entities that are to receive preferential treatment in the auction process. The only stated guidance is the general Congressional objective to promote economic opportunity to participate in the services.¹³ The Commission proceeds to propose a definition for rural telephone companies that is tied to its telephone company-cable television cross-ownership exemption found in Section 63.58

¹³Notice at para. 72, fn. 46.

of the Commission's Rules.¹⁴ No basis for this proposal is set forth in the Notice. Adoption of this policy would result in a definition of rural telephone companies that serve areas with a population of 2,500 or less.

PMN strongly urges the Commission to adopt a less restrictive definition of rural telephone companies for the purpose of auctions. While a request to increase the number of inhabitants from 2,500 to 10,000 in Section 63.58 is pending before the Commission, there is no assurance that the Commission will adopt such a request. Furthermore, the cable television exemption was adopted in 1981 and was based on reasons totally inapposite to the question at hand in this proceeding. The entire telecommunications landscape has drastically changed in the ensuing 12 years. Also, the rural telephone company-cable television exemption was based on a concern that cable television service would likely not be available to inhabitants in areas with 2,500 or fewer people.¹⁵ The telephone company serving such areas was therefore looked upon as the only entity with the resources available to provide cable service.¹⁶ It was the recipients of cable service that were the object of concern in determining the cable television exemption. Little attention was paid to the actual size of the telephone company.

Such a basis for defining rural areas cannot be logically applied to the current auction situation. The Congressional basis for including rural telephone companies in the group to receive special treatment in the auction process is to assure that such entities have

¹⁴Notice at para. 77.

¹⁵Report and Order in CC Docket No. 80-767, Elimination of the Telephone Company-Cable Television Cross-Ownership Rules for Rural Areas, 50 RR2d 845 (1981).

¹⁶Id.

the opportunity to participate in the service for which spectrum is being auctioned. Therefore, the focus must be on the entity rather than the area being served. A definition of rural telephone companies should be based on the size of the telephone company. The Commission has other divisions of local exchange carriers that would be more appropriate for this purpose. PMN advocates the Class A/Class B delineation used by the Commission for accounting purposes found in Part 32 of the Commission's Rules, as a surrogate for this purpose. Class B companies have revenues of less than \$100,000,000, as defined in Section 32.11 of the Rules. They should be considered rural telephone companies for purposes of the auction rules. This provides a logical basis for the definition and a nexus to the purpose of the Budget Act.

In the alternative, if the Commission were to adhere to some population figure for its rural telephone company definition, PMN maintains that the 10,000 population figure is more sensible than 2,500. Such a criteria should be determined independently from any cable television exemption and should be embodied in a separate rule. PMN is nevertheless concerned that any definition based on areas served rather than the size of the telephone company would be contrary to the Congressional intent, since it would result in some of the largest telephone companies in the nation being eligible for special auction treatment.

2. Application to Consortia

A related issue concerning eligibility is how the adopted standards should apply to consortia. The Commission specifically raises the issue of whether consortia should be wholly or predominantly comprised of eligible entities in order to qualify for preferential

measures.¹⁷

PMN urges the Commission to require that eligible entities hold more than 50% ownership interest in a consortium before the consortium can qualify for preferential treatment under the auction rules. Likewise, PMN advocates that, in order to qualify for preferential treatment, at least one of the eligible entities comprising a consortium must have its qualifying presence in the applicable area. In the case of PCS, this would mean the relevant BTA. While PMN recognizes that there may be advantages in allowing entities to pool capital and expertise, the Commission must preserve the Congressional objective of promoting economic opportunity for the designated entities and not dilute that opportunity by permitting non-designated entities to control entities receiving the set-aside licenses. The opportunity of bidding for a separate frequency block should be a sufficient incentive for designated entities' participation.

Unless these two restrictions are adopted, PMN is concerned that even the largest telephone companies in the nation will be eligible for PCS licenses based on their provision of local exchange service in rural areas. All the largest telephone companies would need as a ticket for set-aside eligibility is one area in the country that is considered rural. Such a result would jeopardize the ability of the truly rural and independent local exchange companies, small businesses, and those owned by minorities and women to have the opportunity that Congress envisioned in requiring the implementation of certain measures to ensure their participation. It could also result in an unlevel playing field among those designated entities and their respective consortia competing against each other. Therefore,

¹⁷Notice at para. 78.

the Commission should adopt rules that require a majority of consortium members to be eligible entities and to have a presence in the area that will be served.

3. Combinational Bidding

In focusing on PCS auctions, the Commission seeks comment on the use of combinational bidding to group BTA service areas. One question is whether sealed bids should be accepted for all BTA licenses within an MTA and another is whether combinational bidding should be allowed for the two set-aside frequency blocks.¹⁸ While PMN does not object to combinational bidding *per se*, it perceives great administrative difficulty and inequities to the bidders if the Commission allows combinational bidding of any number and combination of BTAs and the various frequency blocks for each BTA that the bidders choose. In order to avoid such problems, the Commission should determine in advance the groupings for which it will accept combinational bids.

The Commission also asks for comment on whether consortia that include designated entities among their members should be eligible for preferential measures when they bid for spectrum generally.¹⁹ Commissioner Barrett expresses concern about the effect of consortia and combinational bidding on the designated entities and their ability to individually compete against consortia.²⁰ He is specifically concerned that the designated entities not be "effectively eliminated from the bidding process" because they are overtaken by larger groups with greater financial resources. In a related matter, Commissioner Barrett

¹⁸Notice at para. 123.

¹⁹Notice at para. 121.

²⁰Separate Statement of Commissioner Andrew C. Barrett, Notice of Proposed Rulemaking in PP Docket No. 93-253, released October 12, 1993.

seeks comment on the effect of the attribution limits of cellular carriers, as adopted by the Commission in the PCS Order²¹ for PCS licenses, on the ability to bid in group licenses or as individuals. Specifically, the Commission adopted a provision that restricts a cellular licensee's eligibility for PCS to a single 10 MHz frequency block in any PCS service area where the cellular geographic service area includes 10% or more population of the PCS service area.²² Included in this restriction is a 20% cellular attribution ownership provision that counts all ownership interests in cellular operations toward the attributable interest.²³

With regard to Commissioner Barrett's concerns about consortia, PMN believes that the eligibility for preferential measures should be restricted to those consortia that meet the majority test and the presence in the specific area test discussed above. Preferential measures should not be extended to consortia whose member entities are bidding for spectrum beyond the area where they have a presence. By implementing these criteria, the Commission will be preserving the Congressional purposes of promoting economic opportunity, avoiding excessive concentration of licenses, and disseminating licenses among a wide variety of applicants. If designated entities are eligible for preferential measures in other areas or, in the case of PCS, for frequencies outside the set-aside blocks, they could be over-extended economically. This could detract from their ability to rapidly deploy the service in their own areas. This does not mean, however, that such entities should in any way be restricted from competing for licenses in other areas on a non-preferential basis.

²¹Second Report and Order in GEN Docket No. 90-314, released October 22, 1993 ("PCS Order").

²²Section 99.204 of the new Rules. See also, PCS Order at para. 107.

²³Id.

Conversely, Commissioner Barrett's concerns about not overshadowing designated entities' participation in the new services could be met by allowing those entities to compete only among themselves and prevent others from overtaking their opportunity or any consortia they might develop.

The restrictive cellular attribution rules for PCS that Commissioner Barrett addressed are a matter of great concern to PMN.²⁴ PMN's particular experience in cellular is relevant to this issue and should provide the Commission with guidance on the negative and unexpected effects of its recently-adopted attribution PCS rule. As stated above, PMN's 19 shareholders are each independently owned local exchange carriers within the State of South Carolina. PMN is the general partner of a limited partnership which, in turn, is a 50% general partner of the wireline cellular licensees for the eight wireline RSAs in which these telephone companies' local exchange service areas are located. The other 50% general partners and managers of those RSA cellular partnerships are subsidiaries of large telephone holding companies. The formation of an entity such as PMN was the only way that these 19 small telephone companies could effectively preserve their interests when seeking the wireline cellular licenses in their service areas. By unifying their efforts and resources, these 19 small telephone companies were able to withstand the formidable pressure that larger telephone companies exerted to accept individual, minor interests in cellular entities controlled by those larger companies.

The relative success of PMN in cellular now threatens to preclude it from

²⁴PMN intends to file a separate Petition for Reconsideration in GEN Docket No. 90-314 at a later date that fully addresses this provision.

participation in PCS by virtue of the Commission's new attribution rule. PMN is, in effect, a consortium of rural local exchange carriers. Such a consortium should be eligible for the PCS set-aside frequency blocks. An entity such as PMN would be well-suited to rapidly deploy PCS, particularly in rural areas, and would assure competition in the provision of PCS. The necessity for eligible entities, including rural independent local exchange carriers, to form consortia is particularly important in light of the combinational bidding that is anticipated in PCS. It is important that the designated entities not lose the ability to compete in that situation. If the Commission adopts PMN's proposed restrictions requiring a majority of eligible entities to be members of a consortium and requiring that at least one have a presence in a specific area, the new attribution rules should contain an exemption for rural telephone companies, small businesses and businesses owned by minorities and women. In any case, qualification as a rural local exchange carrier should exempt that carrier from the cellular attribution rule for PCS.

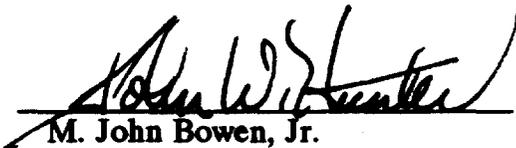
III. Conclusion

PMN accepts the Commission's proposed use of competitive bidding procedures for the initial licenses of services, particularly PCS, and opposes the use of minimum bid requirements. PMN favors the use of set-asides, installment payments and tax certificates for small businesses, rural telephone companies and businesses owned by minorities and women, and urges that such incentives be extended to all such designated entities equitably. PMN advocates that the Commission adopt a definition for rural telephone companies that reflects the size of the company rather than a particular area served. With regard to

applicability of the incentives to consortia, PMN advocates that they only be available to those consortia where designated entities comprise a majority of the members of the consortium and that at least one such entity must have a presence in the applicable area to be served. If combinational bidding is to be allowed for PCS, the Commission should first determine the groupings for such bidding. PMN also urges the Commission to rescind or modify its attribution rules for PCS with regard to rural local exchange carriers.

Respectfully submitted,

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