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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

To: The Commission

COMMENTS OF GTE

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SUMMARY

With the enactment of the competitive bidding legislation came a host of questions for which there are no easy answers. The Notice responds to these challenges by adopting tentative conclusions and inviting comment on a myriad of options or alternatives. After reviewing the Notice, GTE has the following basic comments concerning the process and rules whereby competitive bidding will be introduced.

First, the Commission should closely track the enabling legislation when determining the applicability of competitive bidding to a particular license. Mutually exclusive applications for initial licenses or construction permits should be subject to auctions while applications for modifications and renewals should be exempt. In particular, GTE believes that the Notice's proposal to auction intermediate link licenses is inconsistent with the provisions and purposes of the Budget Act.

Second, oral sequential bidding will promote informed, rational decisionmaking and ensure that licenses are awarded to bidders who assign the highest economic value to the spectrum. In contrast, the Commission's tentative proposal to allow combinatorial bidding, and hence de facto national licensing, is inconsistent with Congress' objective of ensuring entry opportunities for a broad array of participants as well as the Commission's goals of diversity of services and competitive delivery. Consequently, combinatorial bidding will not serve the public interest.

Third, the Commission's licensing policies should facilitate the rapid provision of new services by limiting bidders to serious, qualified applicants. In this regard, GTE supports strict financial criteria and upfront deposits.

Furthermore, the Commission should ensure that the ownership of qualified bidders is publicly disclosed prior to the auction.

Fourth, GTE believes that the Commission's policy toward designated entities must be carefully crafted to promote diversity and competition in services while preventing abuse. Specifically, designated entities must be clearly defined to maximize Congressional objectives and to prevent shams or deceptions. As a corollary, GTE believes that the Commission must implement antispeculation and performance requirements specifically tailored to eliminating such abuses.

Finally, GTE believes that private radio licenses involving mutual exclusivity and service to subscribers for profit meet the statutory test for competitive bidding. As such, these services should be subject to auctions.

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GTE Service Corporation on behalf of its domestic telephone, equipment and service companies hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking on Competitive Bidding.¹ The Notice is replete with questions concerning implementation of spectrum auctions authorized by the Omnibus Budget Reconciliation Act of 1993 ("Budget Act").² GTE's recommendations, detailed below, are designed to facilitate the rapid provision of new services and maximize competition consistent with Congress' and the Commission's enumerated goals.

¹ Implementation of Section 309(j) of the Communications Act Competitive Bidding, FCC 93-455 (Oct. 12, 1993) ("Notice").

² See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-97 ("Budget Act").

I. APPLICABILITY OF COMPETITIVE BIDDING

A. The Notice's Proposals For Determining Whether A License Should Be Auctioned Are Generally Consistent With The Legislation

On August 10, 1993, Congress amended the Communications Act of 1934 to permit the Commission to use a system of competitive bidding to issue licenses for the use of radio spectrum. Specifically, Title VI of the Budget Act authorizes the FCC to employ competitive bidding procedures in cases where mutually exclusive applications are filed for an initial license or construction permit.³ The authority is limited, however, to services that principally involve, or are reasonably likely to involve, the receipt of compensation from subscribers.

The Notice appropriately proposes to "incorporate [these] standard[s] into [the] rules" by conducting auctions only if mutual exclusivity exists among applications for initial licenses or construction permits.⁴ The Commission correctly concludes that Congress' explicit use of the terms "initial licenses or construction permits" evidences an intent to exempt renewal and modification applications from the competitive bidding rules. The statute specifically excludes such applications. Accordingly, GTE supports the Notice's proposal to closely track the legislation. Such a course of action is entirely consistent with the principles of statutory construction.

³ Id., 107 Stat. at 388.

⁴ Notice ¶ 22.

B. Intermediate Links Should Not Be Subject To Competitive Bidding

The Notice further proposes to auction microwave licenses used in services as intermediate links presumably because such links are "an integral part of an end-to-end service offering enabling paying subscribers either to transmit directly or receive communications signals utilizing frequencies on which the licensee . . . operate[s]."⁵ GTE submits that subjecting microwave links to auctions is inconsistent with the provisions and purposes of the Budget Act.⁶ Moreover, GTE believes that this proposal, if adopted, will have significant negative ramifications.

As an initial matter, the Notice's depiction of intermediate links as an integral part of service to subscribers for compensation is exaggerated. The principal use of these licenses is more analogous to satisfying internal or private needs than an external private offering. Consistent with the legislation then, intermediate link licenses warrant the same treatment as private operational fixed service ("POFS") licenses and should be exempt from the FCC's competitive bidding rules.

Furthermore, point-to-point microwave licenses are subject to frequency coordination before filing. Potentially affected licensees are identified and notified in advance of a carrier's intent to file such an application. Barring

⁵ Id. ¶ 29.

⁶ Cellular carriers and local exchange telephone companies use microwave links at 2 GHz, 4 GHz, 6 GHz, 11 GHz, 18 GHz, 23 GHz, 32 GHz and 38 GHz as a means of transmitting subscriber traffic between cell sites and the Mobile Telephone Switching Office or between local exchanges.

objection, the application is then filed and most likely granted. Given these circumstances, it is not surprising that mutually exclusive applications are rare.⁷

The Commission's proposal to auction licenses for intermediate links, however, may have the unintended and undesirable effect of encouraging speculative filings. For example, carriers lacking concrete knowledge of their future frequency requirements may be tempted to bid on licenses for multiple frequencies. Consequently, licenses may be awarded to carriers without immediate requirement for the spectrum and warehousing may occur. Such a result would thwart the Commission's goal of facilitating the rapid provision of new services to the public, and ignore Congress' directive to "avoid mutual exclusivity in application and licensing proceedings."⁸ Thus, GTE believes that intermediate link licenses should not be auctioned.

II. IMPLEMENTATION OF COMPETITIVE BIDDING

The Notice seeks comment on a myriad of difficult questions pertaining to the implementation of auctions, ranging from alternative bidding and payment methods to treatment of designated entities and necessary antitrafficking restrictions and performance requirements. Given the Congressional deadline of March 8, 1994, GTE recommends that the Commission adhere to the simple principle that competitive bidding policies should encourage the participation of serious, qualified applicants in an open and informed process.

⁷ In some circumstances, such as at 38 GHz, the FCC regards the spectrum as shared, not exclusive, and permits multiple licensees if there is no problem with interference.

⁸ Budget Act § 6002(a)(6)(E), 107 Stat. at 390; see also H.R. Rep. No. 213, 103d Cong., 1st Sess. 481 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1170.

**A. Competitive Bidding Goals Are Best Served
By Oral Sequential Bidding**

The Notice tentatively concludes that the basic auction method should be oral sequential bidding.⁹ Oral bidding was deemed the method most "likely to award licenses to the parties that value them the most and facilitate efficient aggregation of licenses when non-homogeneous licenses are offered individually."¹⁰ GTE believes that the Commission's policy reasons for selecting oral sequential bidding are well founded.

By assigning the license directly to the user who values it the most, oral bidding results in assignments based upon sound economic principles. In contrast to sealed bidding where participants may shade their bids below the maximum amount they are willing to spend in order to avoid paying more than necessary to win the license, oral sequential auctions allow each competitor to judge whether or not to continue in the auction. Thus, the party most willing to pay for the spectrum would ultimately win the license by outbidding all other applicants. Such a result serves the public interest as "the parties that value licenses the most should generally . . . make rapid and efficient use of the spectrum."¹¹

In particular, sequential bidding will promote informed, rational decisionmaking if the Commission starts with licenses of the highest potential value to bidders and proceeds to lower valued authorizations. For example, with

⁹ Notice ¶ 46.

¹⁰ Id.

¹¹ Notice ¶ 34.

respect to PCS, all 30 MHz blocks across the country could be auctioned, then the 20 MHz block, followed by the 10 MHz blocks. Similarly, the Commission should start with the largest service areas based upon population within a given spectrum block and proceed down to the smallest service areas. In this regard, GTE believes that all geographic regions within a spectrum block should be auctioned before proceeding to the next spectrum block.

As the Commission correctly observes,

[T]he value of a small market adjacent to a large market is more dependent (in percentage terms) on whether one also holds the large market than the converse. Thus, it would seem more useful to most bidders to know which big markets they had won before bidding on smaller markets.¹²

Likewise, the value of a 10 MHz block in a particular region is dependent on who holds the 20 or 30 MHz block in that area. Accordingly, Commission adoption of the approach outlined above will facilitate economically efficient issuance of licenses.

B. The Commission's Tentative Proposal To Allow Combinatorial Bidding Will Not Serve The Public Interest

The PCS proceeding witnessed widespread opposition to nationwide 2 GHz PCS licenses. Accordingly, the Commission's recent PCS Report and Order adopted service areas based on Rand McNally Major Trading Areas

¹² Id. ¶ 53.

("MTAs") and Basic Trading Areas ("BTAs").¹³ Yet, the Notice's proposals to allow combinatorial bidding whereby bids are accepted for both 2 GHz PCS licenses individually and for all the 2 GHz PCS licenses in a block potentially could result in back door national licensing.

For example, the Notice proposes to allow the 51 MTA licenses to be bid for in aggregate as nationwide licenses in the following manner. Sealed bids would first be tendered for all 51 MTAs on a given spectrum block. Oral sequential auctions would then be conducted for the individual MTA licenses on that block. Upon completion of the oral bidding, the sealed bids would be opened and the "[l]icenses would be awarded as a group if a bid for [that] license . . . exceeded the sum of the highest bids for the licenses individually."¹⁴

Given the preclusionary effects of the national license territories on entry opportunities, the proposed combinatorial bidding scheme is ill-suited to fulfilling the Commission's legislative obligation to ensure participation by a broad range of service providers.¹⁵ Indeed, it has the potential to restrict participation to just two nationwide service providers in the 30 MHz allocation instead of offering the 102 entry opportunities possible without combinatorial bidding.¹⁶

¹³ Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 93-451, ¶ 73 (Oct. 22, 1993) (Report and Order).

¹⁴ Notice ¶ 57.

¹⁵ *Id.* ¶ 13.

¹⁶ While any attempt to create nationwide PCS licenses would severely restrict diversity of service in contravention of both Congress' and the Commission's goals, the effect of combinatorial bidding for assembling BTA licenses into regional systems would not be as preclusive on the overall number of PCS competitors.

Nor does the combinatorial bidding approach promote the Commission's regulatory policies of diversity of services and competitive delivery.¹⁷ By licensing only two national PCS providers, the Commission's proposal would produce at most two different basic PCS approaches. This is inconsistent with FCC acknowledgment that "a greater diversity and degree of technical and service innovation" will emerge from a broad range of providers serving smaller areas than "would be expected from a few large firms."¹⁸

Furthermore, by limiting PCS to two national service providers, combinatorial bidding runs the risk of turning PCS into a commodity business with few significant distinctions. Instead, the FCC should adopt policies designed to maximize the number of PCS service providers, and allow market forces to produce as many diverse services as consumers require.

Finally, national licensing would likely result in delayed service to less populated and rural areas. Under the Notice's combinatorial bidding proposal, there may be no more than two licensees nationally, and given the obvious incentives of winning bidders to concentrate resources on larger populated areas, rural areas would be the last priority and last to receive service. In contrast, rural areas would benefit from service providers licensed on an BTA or MTA basis whose incentives are to focus on unique local needs, and to introduce service quickly. Accordingly, GTE opposes combinatorial bidding for MTA licenses as plainly contrary to the public interest.

¹⁷ Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 5676, 5679 (1992).

¹⁸ *Id.* at 5700.

**C. Competitive Bidding Licensing Policies
Should Facilitate The Rapid Provision
Of New Services By Limiting Participation
To Serious, Qualified Bidders**

GTE shares the Commission's desire to adopt efficient, expeditious licensing procedures. GTE believes that the surest way to guarantee timely introduction of new services is to encourage bidding by qualified, experienced applicants. In drafting its competitive bidding policies then, the Commission will need strong, effective qualification requirements and other measures to prevent - to the extent possible -- speculation by opportunists exploiting the licensing system. GTE thus supports adoption of strict financial requirements, such as lump sum payments and upfront deposits, as well as public disclosure of qualified bidders' ownership information.

**1. Winning bidders should be afforded a
reasonable amount of time to tender
lump sum payments**

In evaluating alternative payment methods, the Notice proposes to require full payment in lump sum upon issuance of a license for all bidders other than the entities designated in the Act as deserving special consideration.¹⁹ GTE concurs that this method offers ease of administration and appropriately places the burden of financing on the private sector. By requiring bidders to tender such significant sums shortly after the auction, the Commission will ensure that all bidders have obtained adequate private financing.

¹⁹ Notice ¶ 68.

However, GTE believes that winning bidders should be afforded a reasonable time period after being declared licensees to tender the payments. Moreover, if combinatorial bidding is used, no award is final until the sealed bid is opened. Bidders should not be required to submit the lump sum payment until the auction is properly concluded and the final winner definitively named.

2. Upfront deposits operate as an effective financial qualification

The Commission is appropriately concerned with weeding out ineligible or unqualified bidders. To deter frivolous bids, the Notice thus proposes to require each participant in an oral or sealed bid auction to tender in advance to the Commission a substantial deposit or "upfront payment."²⁰ Such a deposit would operate as an effective financial qualification, particularly given the Notice's proposal to retain the upfront sum "in the event that an auction winner subsequently is found ineligible or unqualified or is unable to pay the balance of its bid at the appropriate time."²¹

GTE supports the Notice's proposal to calculate the deposit based on the amount of spectrum and population. Bandwidth and the subscriber market size are factors reflecting license value. In such respects, the payment per spectrum per population should be set sufficiently high to deter speculators or unqualified bidders.

Additionally, in situations where the upfront payment is less than twenty percent of the high bid, the Notice proposes to require the winning bidder to pay

²⁰ Id. ¶ 102.

²¹ Id. ¶ 109.

the difference promptly. In this manner, the license may be quickly reauctoned if the high bidder cannot tender the necessary deposit.

3. Public disclosure of qualified bidders ownership is necessary

The Notice proposes to require all applicants interested in participating in bidding to file both short-form and long-form applications. Only the short-form application, however, would be reviewed prior to the auction to determine acceptability for filing. Given its past experiences, it is somewhat surprising that the Commission tentatively proposes to require only the applicant's name, the identity of the person making the bid, and a certification that the applicant satisfies the Commission's rules in the short-form application.

GTE submits that mere name identification will not provide the FCC with enough information to adequately evaluate the bidder's qualifications. One need only look at the cellular applications filed for rural service areas ("RSAs") to see that often the applicant's name provides little or no indication as to its true identity, and consequently, its financing capability. Unless the potential bidder's actual ownership is publicly disclosed, the Commission may end up in exactly the situation it seeks to avoid -- with an auction winner that is unqualified or ineligible to receive a license. Moreover, full disclosure of bidder ownership is crucial to avoiding the potential abuses discussed in Section II D, infra, that may arise with respect to designated entities.

Radio spectrum is a scarce resource whose allocation is of national importance. Therefore, there can be no valid reason for legitimate bidders to hide their ownership. Likewise, GTE believes that an open and informative process calls for disclosure of the bidder's agents. Accordingly, GTE

recommends that the Commission require potential bidders to publicly reveal the identity of their ownership and their bidding agents in the applications and that such information be a matter of public record prior to the bidding process.

D. The Commission's Policy Toward Designated Entities Must Be Carefully Crafted To Prevent Abuses

The Budget Act directs the Commission to ensure that licenses are disseminated among a wide variety of applicants, including rural telephone companies, small businesses and businesses owned by women and minorities ("designated entities").²² To ensure their economic opportunity, the Notice proposes to allow the designated entities to utilize installment payments with interest. Moreover, for broadband 2 GHz PCS, the Notice contemplates setting aside two blocks of spectrum nationwide -- the 20 MHz license and one 10 MHz license -- for the exclusive bidding purposes of the designated entities.²³

Competitive bidding preferences raise a number of thorny eligibility issues. Given the tremendous advantage to being classified as a designated entity, it is likely that the Commission will be deluged by applicants claiming entitlement to a preference. As such, the definitions for designated entities must be clearly delineated and strictly enforced to avoid embroiling the Commission in endless eligibility questions and to deter potential abuses.

²² See H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 581.

²³ Notice ¶ 77.

1. Rural telephone companies should be properly defined as those carriers serving ten thousand subscribers or less

GTE believes that rural telephone companies ("rural telcos") should be defined as those carriers providing telephone exchange service by wire: (1) in an area having no incorporated place of 10,000 or more inhabitants and no territory included within a Census Bureau defined "urbanized area"; (2) to less than 10,000 subscribers; or (3) whose income accrues to a state or political subdivision thereof.

A rural local exchange carrier, receptive to local concerns and responsible for providing service to areas that are inherently less economical and attractive to serve, warrants a preference in those areas where it is certified as a wireline carrier. Moreover, the Commission should clarify that eligibility is not affected by the rural telco's relationship to a parent or holding company.

2. Past experience demonstrates that strict qualification criteria should be applied to prevent abuses of preferences for women, minorities and small businesses

GTE believes that the Commission's past experience with "integration" preferences in the broadcast context offers compelling support for a requirement that businesses be 50.1% owned by women or minority applicants in order to qualify for preferential treatment. Indeed, during the years that integration preferences were provided to prospective minority or female owners of broadcast facilities, the FCC witnessed many cases where once the license was acquired, the real owners who exercised practical control over the station would emerge from the background. The Commission cannot allow individuals with

putative stock interests to circumvent Congress' objective by establishing corporate fictions. To prevent such abuse, GTE supports the 50.1% ownership standard.²⁴

**3. The SBA definition of small business
is appropriate**

In addition, GTE believes that Commission adoption of the Small Business Administration's ("SBA") definition of small business is appropriate. That standard -- a net worth not in excess of six million dollars with average net income after Federal income taxes for the two preceding years not in excess of two million dollars²⁵ -- is well recognized in the business community. Moreover, it satisfies the Commission's objective of ease of administration.

However, GTE stresses the need to look beyond the entity claiming entitlement to a small business preference to the applicant's ultimate ownership or affiliation in order to avoid the potential abuses described above. The Commission cannot allow large, well established corporations to make a mockery of Congress' goals by establishing small business "fronts."

²⁴ GTE also believes that revocation should occur where sham applicants are identified and that a finder's preference should be awarded to parties identifying abuses of the designated entity rules. The preference could be expressed by offering the finder a dollar or percentage credit in the bidding process.

²⁵ Notice ¶ 77 n.51.

E. Antitrafficking And Performance Requirements Should Be Tailored To Recognize Differences Between Designated And Non-Designated Bidders

As discussed above, speculative parties may be tempted to manipulate the Commission's preference policy for designated entities in order to gain a license, even though they have no intention or qualification to provide service. Thus, the Notice appropriately recognizes that safeguards must be implemented to prevent unjust enrichment resulting from the trafficking of licenses awarded to designated entities.²⁶ As the Notice states, unjust enrichment is likely to pose a problem only where designated entities participate.²⁷ Therefore, GTE suggests that safeguards, such as strict performance requirements and antitrafficking rules, be implemented for designated bidders to protect against such risks.

Designated entities should be required to comply with threshold technical and financial requirements as a mandatory part of their initial application filing. Absent such standards, the Commission will be unable to remove unqualified applicants or to stop the flood of applications from speculators who cannot or will not provide services to the public. In the past, speculative applicants have seriously delayed the introduction of new services to the public and have imposed great costs on the Commission and other applicants. In particular, any applicant bidding as a designated entity should be able to demonstrate:

- that it has access to the necessary technology, sites, and resources to make its services operational;

²⁶ Id. ¶ 84.

²⁷ Id. ¶ 83.

- that its proposed service is feasible and will not interfere with the services of others, and support such assertions with appropriate technical documentation; and
- that it has the technical and engineering capabilities to deliver the proposed service to the public within the timeframe proposed in its application.

Applicants should also be required to certify, under penalty of perjury, that they have not filed the application for speculative purposes and that they intend to construct and operate the system proposed.

In addition to the above performance requirements, the Commission should implement build-out requirements to prevent the trafficking of licenses. In the case of PCS, for example, designated entity licensees should be required to serve one-third of the population in the market within five years, two-thirds of the population in the market within seven years, and ninety percent of the population in the market within ten years. The Commission will only avoid the "regulatory morass" that delayed the introduction of mobile services in recent years by adopting the most stringent qualification criteria and strict antitrafficking restrictions.

Notwithstanding the need for safeguards outlined above, resale of licenses obtained by non-designated entities does not pose a threat of unjust enrichment. GTE concurs with the Notice recognition that when the bidding process is open and competitive, the license winner is likely to have paid market price and therefore resale would not involve any unjust enrichment.²⁸ Therefore, the strict antitrafficking rules should not apply to non-designated bidders. Unnecessary requirements are likely to cause delay, added expense to bidders and frustrate Congress' intent to speed new services to the public.

²⁸

Id.

III. COMPETITIVE BIDDING PROPOSALS FOR SPECIFIC SERVICES

The Notice solicits comment on the applicability of competitive bidding to mutually exclusive applications for private radio services provided to subscribers for compensation.²⁹ As discussed in Section I above, the Budget Act authorizes the FCC to employ competitive bidding procedures where mutually exclusive applications are filed for initial licenses or construction permits. In addition, the service must be principally provided to subscribers for compensation. Congress thus intended to auction private radio service licenses to the extent that they satisfy these requirements. Given these circumstances, GTE believes that the Commission should implement competitive bidding for mutually exclusive applications for private radio licenses involving service for profit to subscribers.

IV. CONCLUSION

GTE believes that the rapid and successful implementation of competitive bidding will require sound regulatory decisions reflecting great foresight on how best to deploy auctions. In such respects, GTE generally supports the Notice's proposal to closely track the legislation when determining whether a license should be subject to competitive bidding. In addition, GTE supports oral sequential bidding. However, the Commission's proposal to allow combinatorial bidding, and hence de facto national licensing, is inconsistent with Congressional objectives and should be revisited.

²⁹ Id. ¶¶ 131-46.

In order to prevent abuses, GTE supports measures such as strict financial criteria, upfront deposits, and public disclosure of bidders' ownership information. GTE also suggests that the Commission's policy toward designated entities be carefully crafted to prevent deceptions or shams. Finally, when adopting competitive bidding proposals for specific services, the Commission should ensure that all private radio services meeting the statutory test for competitive bidding are auctioned.

Respectfully submitted,

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