

to ensure service to rural areas within their proposed license area.

**B. Small business**

The Commission should adopt the definition of small business proposed in the NPRM, i.e., the Small Business Administration's current standard. However, in order for a consortium to qualify as a small business, eligible small businesses must hold at least 50.1 percent equity and voting power in the applicant, and must exercise actual control over the licensed operation (as that term is defined in Commission precedent and policy).

**C. Minority/Woman-owned Business**

The Western Alliance shares the Commission's constitutional concerns over a preference based solely on race or gender, and agrees that the Commission can best execute its mandate to protect minority/woman-owned businesses by granting the above described protections (see Section V, supra) to small businesses, which should include most minority and/or woman-owned businesses. The Commission can consider further implementing Congress' instructions by prioritizing the application of a woman or minority-owned small business over the application of a small business which is not owned by one of these protected groups.

**VI. Rural Telephone Companies and Other Protected Groups Should be Afforded Protections in Seeking to Aggregate One of the Available 10 MHz Spectrum Blocks.**

The protected groups identified by Congress should be able to take advantage of the preferential measures described above in Section V, when seeking to aggregate a 10 MHz block of spectrum

with the 20 MHz block set aside for these groups. Such aggregation is likely to allow the protected licensee to provide the full range of personal communications services that are available or will become available in the future.

In particular, rural telephone companies should be given a priority as against other filers in seeking an additional 10 MHz block, because of the need for rural telephone companies to meet competitive threats to universal service that may be posed by other PCS systems. Moreover, some of the advanced services that could prove more critical in rural areas than elsewhere (such as long distance learning and extended medical specialty services) may require the full 30 MHz allocation.

**VII. PCS Blocks C and D Should Not Be Available For Aggregation.**

The Commission should declare that PCS spectrum blocks C and D are not available for spectrum aggregation unless the applicant is a member of a protected group. Also, these spectrum blocks should not be available under any circumstances for geographic aggregation (i.e., to assemble an MTA license through the grant of multiple BTA licenses). If such aggregation were to be allowed, the protections mandated by Congress would become meaningless, since non-protected groups could appropriate the set-aside spectrum by submitting a combinational bid that was greater than the sum of the high bids submitted by protected groups for each BTA. This result would constitute a de facto elimination of the protections which Congress enacted as part of the Budget Act.

**VIII. Performance Requirements**

The NPRM (at p. 30) requests comment on whether the Commission should impose performance requirements to ensure the prompt delivery of service to rural areas. This issue is based on the language of the Budget Act, which is designed to prevent warehousing of valuable spectrum. It is respectfully submitted that such measures, to the extent that they are needed, should not be applied to rural telephone companies. As discussed above, these telephone carriers have a vested interest in their rural service area that prevents them from letting valuable PCS or other spectrum lie fallow, or otherwise delaying the provision of services to their customers.

As noted by the Commission, the need for warehousing protections is questionable in many instances. The non-use of one of seven PCS spectrum blocks is unlikely to have any noticeable impact on the competitive environment. And so long as the Commission allows the transfer of licenses, the cost of warehousing would be great enough to discourage any such activity. Licensees can ill afford to pay a substantial bid to obtain a license, and then not realize any benefit from either operational revenues or sale of the license.

Such warehousing protections are particularly inappropriate for rural telephone companies, which may be obtaining their license at less than market value (because of preferences) but which are generally small businesses that can ill afford to pay even a reduced bid with no return. These companies must answer

to the state regulatory authorities, as well as their shareholders and customers if they fail to implement service in a timely manner. The rural telephone companies' commitment to bringing new services to their customers is well established, and distinguishes these carriers from "fly-by-night" PCS applicants, or licensees that promise prompt service to rural areas, but concentrate their efforts instead only on the more profitable cities within their licensed service area.

An overly strict warehousing policy may penalize a rural telephone company which has a bona fide reason for implementing PCS or other services on a slower timetable than required by the Commission's rules. The high costs of bringing advanced services to sparsely populated areas, where weather and terrain conditions often confound construction and maintenance efforts, dictate that these companies be given flexibility in responding to the obstacles that arise when implementing their systems.

**IX. The Commission Should Not Apply Its Proposed Upfront Payment/Deposit Requirements to Rural Telephone Companies.**

The Commission proposes to require an "upfront payment" from each applicant bidding on PCS or other spectrum. This upfront payment would be calculated as "two percent per megahertz per pop." The applicant would multiply the population of its proposed service area by two percent, and again by the amount of spectrum that is being requested. As the NPRM demonstrates, this upfront payment can add up to hundreds of thousands or even millions of dollars. The Commission further proposes to require successful applicants to supplement this upfront payment, so that

it equals 20 percent of the winning bid. The purpose for this proposed requirement is to limit the auction to serious applicants. It is respectfully submitted that this proposal should not be applied to rural telephone companies, and should be applied to other protected groups with modifications.

As discussed above, rural telephone companies have an established commitment to bringing new services to their customers, and an established record for accomplishing the provision of these services. Their accountability to their customers, shareholders, and state regulatory authorities will serve to prevent non-serious bids by telephone carriers, just as these factors served to prevent frivolous cellular applications by telephone carriers. The imposition of the proposed upfront payment/deposit requirement could prove onerous for small rural telephone companies, thereby jeopardizing the economic opportunity which Congress has instructed the Commission to provide to rural carriers, and hindering the provision of new services to rural areas (another mandate of the Budget Act).

Also, the requirements for most telephone companies to budget for major expenditures at least a year in advance could prevent many rural telephone companies from being able to submit a substantial upfront payment in response to the fast licensing track which Congress has mandated for PCS. Because the final auction rules are likely to be adopted only weeks before the acceptance of PCS applications, telephone companies are not in a position to allocate funds for the PCS bidding process on such

short notice. Therefore, these requirements should not be applied to rural telephone companies bidding on spectrum.

For the other protected groups, the Commission could have some valid concerns that speculative applicants may become involved in the auction process, so some form of deposit may be appropriate. However, the amount of this deposit should not be so high as to preclude from the bidding process the very groups which Congress sought to protect.

**X. The Commission Should Not Apply Onerous License/Deposit Forfeiture Requirements to Rural Telephone Companies.**

The Commission proposes that a winning applicant be stripped of its license, and its upfront payment/deposit forfeited, in the event that (1) the winning applicant is not qualified for the license, (2) the application is found not to be grantable (presumably due to some error or omission), or (3) the applicant fails to pay the balance of its bid within the designated time period. It is respectfully submitted that these measures are unduly harsh, especially with regard to rural telephone licensees. While these measures may help to limit the auction process to "serious" applicants, it also creates the possibility of the forfeiture of substantial resources unnecessarily, and the delay of valuable services to the public.

The Commission's tentative proposal does not clarify what circumstances justify a finding that an application is ungrantable. Applicants must wonder whether a simple typographical error in their application, or clerical error in submitting these documents, will result in the forfeiture of

hundreds of thousands or millions of dollars. Especially where the legal and technical rules governing such new services as PCS are in their nascent stage, there is much room for good faith misinterpretation that could lead to flaws in the application. Most of these flaws could be easily remedied, especially in the case of PCS, given the exclusive service areas to be awarded. Nonetheless, the Commission's proposal would discourage potential applicants (especially rural telephone companies and small businesses) from risking a substantial upfront payment that could be forfeited for a relatively minor error or misunderstanding of the new rules.

In addition, the Commission has over the past several years created a gauntlet of procedural requirements, each of which can result in the dismissal of an application. These requirements include filing fees, the need to file through the Commission's lockbox in Pittsburgh, Pennsylvania, fee forms, Anti-Drug Abuse Act certifications and microfiche copying (a requirement which the NPRM proposes to apply to PCS and other applications that may be subject to auction). The feeable filings must include the precise box number assigned to the particular type of application, or the application can be dismissed even though it is delivered to the correct location. While it is important to abide by the Commission's filing rules, none of these ever changing procedures warrants loss of a license and forfeiture of thousands or millions of dollars if it is not followed to the letter. Unfortunately, the vague wording of the NPRM suggests

that this is a possibility. The NPRM merely indicates that the Commission will review the winning application and any petitions to deny; and "if the Commission were unable to grant the auction winner's application, the government would nonetheless retain the winner's deposit." NPRM, p. 59.

Such draconian result will only serve to discourage qualified bidders, and in particular, rural telephone companies and small businesses, from risking the competitive bidding process. Accordingly, the Commission should allow applicants to correct errors in their application, or other procedural irregularities, so long as the competitive bidding process is not in any way significantly disrupted. And in no event should the applicant's upfront payment/deposit be forfeited for a procedural error or a mistake which can be corrected by minor amendment. Indeed, where there is no disruption of the auction, it should not be necessary to apply a letter perfect standard to even the short form application, especially in the case of a rural telephone company filing. PCS and other emerging technologies are too important for the Commission to deprive a rural community of these benefits merely because of a typographical or clerical error.

Where a rural telephone company or other protected entity fails to make a timely payment of its bid amount, either as a lump sum or an installment payment, the Commission should provide a reasonable grace period, and make provision for restructuring the debt if the licensee has made bona fide efforts to implement

its proposal, and unforeseeable circumstances have created a financial problem. Certainly, service to the public should in no event be interrupted because of a late payment, especially in the case of a protected entity. If nonpayment persists, and the licensee fails to agree to an acceptable restructuring plan, then the Commission can consider requiring a distress sale to ensure continued service.

#### **XI. Auction Sequence**

The Commission should hold its auctions in a manner that allows rural telephone companies and other protected groups to attempt to bid on one of the 30 MHz MTA licenses, without jeopardizing their ability to participate in the auction for Blocks C and D if unsuccessful. The Budget Act instructs the Commission to create economic opportunity for, and encourage participation by, the protected groups. While the designation of Blocks C and D for the protected groups is an important measure which the Western Alliance applauds, these groups should not be limited to the smaller spectrum blocks.

#### **XII. The Commission Should Consider Bifurcating the Competitive Bidding Rulemaking With Regard to Non-PCS Services.**

The Commission proposes competitive bidding rules that would apply to all commercial radio services, even those existing services that are already widely licensed. Among the services which the Commission proposes to subject to competitive bidding are the Rural Radio Service (including the Basic Exchange Telecommunication Radio Service, or "BETRS") and the Point-to-Point Microwave Radio Service. These services are both vital for

ensuring the provision of universal telephone service to rural America, and the Commission should not subject them to the competitive bidding process.

Moreover, the Commission should consider bifurcating this proceeding, so as to formulate auction rules applying to PCS at this time, while postponing the formulation of rules for other services until a later date. The extremely short deadline mandated by Congress for PCS licensing should not drive decisions about the future licensing of other very distinct services, when it is not necessary to decide such rules on a hurried and incomplete record. The Commission will no doubt benefit from the experience of conducting the PCS auctions, which should allow them to formulate a better reasoned policy with regard to existing services.

**Conclusion**

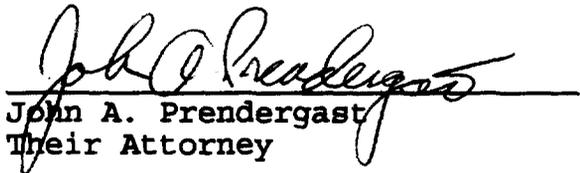
In light of the foregoing, it is respectfully requested that the Commission adopt the protections for rural telephone companies and other protected groups set forth above.

Respectfully submitted,

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