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BEFORE THE

Federal Communications Commission FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 TIME WARNER TELECOMMUNICATIONS

Time Warner Telecommunications ("TWT"),¹ by its attorneys, herein submits its comments in response to the Commission's Notice of Proposed Rule Making on the implementation of Section 309(j) of the Communications Act of 1934, as amended, which authorizes the Commission to use competitive bidding as a method of selecting radio licensees.² As discussed below, TWT supports the use of competitive bidding, specifically as the means of selecting licensees in the Personal Communications Services

¹ TWT is a division of Time Warner Entertainment Company, L.P., a Delaware limited partnership ultimately controlled by Time Warner Inc. ("Time Warner"). Time Warner is a world leader in the fields of media, information, and entertainment, notably magazine publishing, motion pictures, television series production, records, books and cable television. TWT participates with its affiliates, in conducting PCS experiments pursuant to PCS experimental licenses in New York City, NY, Columbus, OH, Cincinnati, OH and St. Petersburg, FL.

² Implementation of Section 309(j) of the Communications Act, Competitive Bidding, Notice of Proposed Rulemaking in PP Docket No. 93-253, FCC 93-455 (released October 12, 1993) ("Notice").

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("PCS"). TWT believes that, generally speaking, auctions provide the best opportunity for getting PCS to the commercial marketplace quickly and efficiently. As such, TWT urges the Commission to continue its aggressive push to license PCS systems quickly -- both to provide exciting new services to consumers domestically, and to retain a competitive position globally.

I. The Implementation of Competitive Bidding Procedure Is Necessary and Appropriate.

TWT strongly supports the Commission's initiative to implement competitive bidding procedures. TWT commends the Commission for doing a good job of identifying the issues and presenting the options available for the implementation of competitive bidding procedures.³ It has been clear for some time that neither of the existing licensing processes - comparative hearings or random selection - have adequately served the public interest. As has often been recognized, comparative hearings result in long delays in getting services to the public and significant costs to the applicants, all without reasonable assurance that the successful applicant is any more qualified than the unsuccessful ones. The random selection procedures have spawned a generation of speculators many of whom have demonstrated no interest in providing the services for which they have been licensed. The Commission's efforts to discourage such

³See Evan Kwerel and Alex D. Felker, Using Auctions to Select FCC Licensees, Federal Communications Commission, Office of Plans and Policy, Working Paper Series No. 16, May 1985; Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676, 5762 (Appendix D: Analysis of Alternative Licensing Procedures) n.118 (1992).

speculation by tightening both front-end and back-end requirements have been largely unsuccessful. In addition, the large numbers of applicants attracted by the prospect of winning a valuable license which they could then immediately sell have resulted in lengthy licensing delays.

While not a panacea for the Commission's licensing ills, competitive bidding will be a dramatic improvement over existing licensing methods. Competitive bidding offers a speedier and more efficient licensing process. Auctions also serve the public interest by getting licenses in the hands of those that will construct and operate the licensed facilities and provide services to the public much faster than other licensing methods. Moreover, an indirect effect of auctions is to substitute the federal government for the speculators as the recipients of the market cash value of the licenses. In so doing, auctions serve the public interest by allowing each block of public spectrum to be valued by marketplace demand with the cash payment of that value going to the federal government as a contribution towards the reduction of the budget deficit.

Congress has made clear that competitive bidding is the appropriate licensing mechanism for PCS. TWT believes that the legislative and regulatory commitment to deliver PCS to the American consumer in an expeditious and efficient manner, coupled with the legacy of delays, costs and speculation left by the past use of comparative hearings and random selection procedures, strongly support the use of competitive bidding for the PCS licensee selection process.

II. The Use of Competitive Bidding Procedures Makes Anti-Trafficking Restrictions Unnecessary and Counterproductive.

TWT urges the Commission not to impose any anti-trafficking requirements in connection with the use of competitive bidding for the licensing of PCS. The legislative history of Section 309(j) recognizes that "in a system of open competitive bidding, trafficking in licenses should be minimal, since the winning bidder would have paid a market price for the license."⁴ This is certainly the case for spectrum blocks not reserved for bidding by designated entities.

Under the competitive bidding system, it is highly unlikely that a bidder will be willing to pay market price for a license if its intention is to immediately conduct a private auction and sell the license to the highest bidder. Given the implementation of a system that inherently reduces the benefit of speculation, post-auction transactions can be expected to be driven by legitimate business considerations. TWT suggests that it would be poor public policy to create disincentives to spectral or service area consolidation which, for any number of reasons, did not occur during the auction process itself but ultimately inure to the benefit of the public. Post-auction efforts to aggregate spectrum or consolidate regional service areas are often responses to competitive pressures not apparent until after the competitive bidding is over. The Commission should not

⁴H.R. Rep. No. 103-111 at 257.

discourage these consolidations which, by virtue of their economies of scale, will ultimately benefit the consumer.

Anti-trafficking restrictions would also place the Commission in the untenable position of having to make judgments as to what constitutes "unjust enrichment" or when a transfer would be considered premature. The Commission would have two equally unpalatable choices - establish a rigid standard which by definition or presumption would require the denial of some if not many legitimate transfers, or proceed to evaluate transfers on an ad hoc basis which would infuse an unacceptable and uncomfortable degree of subjectivity into the process. The nature of competitive bidding itself makes it unnecessary for the Commission to make this Hobson's Choice. Having selected a licensing procedure that makes speculative participation in the auctions unlikely, the Commission should not attempt to second guess post-auction legitimate business decisions that enhance the efficient delivery of PCS to the public. In sum, the Commission's competitive bidding procedures should be accompanied by back-end flexibility and TWT recommends that the Commission not adopt its proposal to impose anti-trafficking requirements, including transfer fees, in connection with the licensing of at least the non-designated PCS spectrum blocks.

III. The Licensing of Intermediate Links Should Not Be Subjected to Competitive Bidding Procedures.

TWT also disagrees with the Commission's proposal to apply competitive bidding procedures to "intermediate links."⁵ That proposal is based, in part, on the statutory directive that competitive bidding should be used for those subscription services which: "(i) enable[] those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or (ii) enable[] those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate."⁶ The Commission has interpreted this statutory language to mean that competitive bidding must be used for every frequency-based component of "an end-to-end service offering enabling paying subscribers either to transmit directly or receive communications signals utilizing frequencies on which the licensee is licensed to operate."⁷ TWT believes that by looking to the "end-to-end" nature of a service, the Commission's interpretation of its statutory directive is unnecessarily broad.

There is little logic to the notion that competitive bidding procedures should apply to licenses for communications facilities that are to be used to connect internal components of a communications system. For example, point-to-point microwave facilities that are used to connect base stations to a switch in

⁵Notice at ¶¶ 4-5.

⁶47 U.S.C. § 309(j)(2)(A)(i) and (ii) (1993).

⁷Notice at ¶ 29.

the case of a cellular system are clearly internal components. Insofar as the implementation of competitive bidding is intended to address the rampant speculation and large windfall profits that characterized the use of random selection procedures, these concerns are not associated with the licensing of "intermediate" links.

Viewed in this light, TWT submits that the Commission should interpret the statutory language as applying only to radio spectrum that actually delivers a communications service directly to subscribers instead of to all internal spectral components of an "end-to-end" service. In the case of cellular service, competitive bidding procedures would apply to the licensing of cellular systems because subscribers directly access cellular radio frequencies for direct transmission and reception purposes. However, such procedures would not apply to the microwave links needed to connect the various internal components of the system because they are not directly accessible by the subscribers. To apply competitive bidding procedures to licenses for these internal facilities would result in the system licensee being subject to multiple auctions simply to complete its system. The fact that a cellular system may provide services that meet the test of whether spectrum should be subject to competitive bidding does not mean that every internal component of a cellular system should be subject to competitive bidding.⁸

⁸A similar situation exists with respect to frequencies assigned to the Cable Television Relay Service ("CARS") which are used by cable television systems to relay off-air television broadcast or satellite-delivered signals from the receiving

Equally important, the purpose of implementing competitive bidding as a licensee selection method - to remedy the failings of the comparative hearing and the random selection processes - is not furthered by applying it to intermediate links. As the Commission is aware, instances of mutual exclusivity with respect to intermediate links have been extremely rare. The current method of requiring frequency coordination and encouraging private resolution of interference problems has worked very well.⁹ The 1986 Office of Plans and Policy working paper, Private Frequency Coordination In The Common Carrier Point To Point Microwave Service, confirmed the viability of the spectrum regime in that service where the basic approach is cooperative management of the spectrum resource.¹⁰ Likewise, as in the case of Common Carrier Point-to-Point Microwave Service facilities,

source to various points within the cable system. As such, CARS facilities are internal components of a cable television network. See Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service, 59 FCC 2d 723, 37 RR2d 495, 501 (1976) ("CARS stations are said to be an internal and passive part of cable television service, usually owned by the cable operator."). Indeed, absent CARS, cable television systems do not utilize the radio spectrum to distribute their programming and thus would not otherwise be subject to competitive bidding procedures.

⁹See 47 C.F.R. § 21.100(d); Revision of Part 21 of the Commission's Rules, 63 RR 2d 1344, 1353 ("By requiring prior coordination, the Commission has reduced the number of mutually exclusive or contested applications and promoted spectrum efficiency. This is especially true in the Point-to-Point Microwave Radio service. The continued success of the prior coordination process, then, is extremely important.").

¹⁰Williams, John R., OPP Working Series: Private Frequency Coordination in the Common Carrier Point To Point Microwave Service, Federal Communications Commission, September, 1986.

frequency coordination requirements and private resolution of potential interference concerns in the CARS have satisfactorily addressed the few mutual exclusivity situations that have arisen.

In sum, the licensing of intermediate links is not associated with the problems of the random selection process commonly used for other services that have given rise to the need for a competitive bidding procedure. TWT submits that the Commission should not introduce the concept of an auction and, in so doing, risk upsetting the efficient balance developed under the current private frequency coordination and interference resolution processes.

IV. Conclusion.

As discussed above, TWT fully supports the Commission's initiative to implement competitive bidding procedures. TWT, however, does urge that the Commission not adopt anti-trafficking requirements in connection with competitive bidding procedures or apply such procedures to the licensing of "intermediate" links.

Respectfully submitted,

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Date: November 10, 1993