

28. **Safeguards to Prevent Speculation.** The Notice discusses several possible safeguards that the Commission has under consideration to assure that only *bona fide* applicants participate in and win lotteries.<sup>64/</sup> As a general rule, the Joint Commenters believe that the auction process itself, coupled with the construction requirements contained in the narrowband rules,<sup>65/</sup> will suffice to weed out speculators for narrowband PCS licenses. Further safeguards are not required.

29. Detailed long form applications should not be filed by every narrowband PCS applicant. Since licensees will receive broad geographic authority without requirements to file for individual sites, it does not serve the public interest to require all auction participants to prepare and file FCC Form 401 applications.<sup>67/</sup> While creating procedural obstacles of this

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<sup>64/</sup>(...continued)

Commenters believe that such a death penalty will ensure prompt payment of all amounts due.

<sup>65/</sup> Notice, ¶¶82-94.

<sup>66/</sup> See Narrowband Order, ¶¶ 36 -37 (establishing minimum construction requirements for nationwide, MTA and BTA licensees.) Failure to meet the construction deadlines results in the so-called "death penalty" (*i.e.*, the complete forfeiture of the license).

<sup>67/</sup> For the sake of this discussion, the Joint Commenters are assuming that narrowband PCS will be classified as a Commercial Mobile Service, making the common carrier FCC Form 401 the appropriate application form. Since licensees will not be required to ask for specific authority when constructing facilities within the geographic area encompassed by the license, engineering information is not necessary. Therefore, the Joint Commenters recommend that the Commission adopt a new form to be used for Narrowband PCS services which would essentially be a Form 401 without any engineering showing.

nature may have been wise when random selection criteria were utilized, they are no longer appropriate now that winners will be paying for the spectrum they receive.<sup>68/</sup>

30. The Joint Commenters also strenuously oppose the imposition of any restrictions on the free alienation of narrowband PCS licenses. In the context of a new developing service, it is critical for marketplace forces to be allowed to operate after the auctions to fine tune (or radically alter) the initial results in response to changing market conditions.<sup>69/</sup> Only by making narrowband PCS licenses freely transferable can the Commission be sure that this dynamic correction process will work.<sup>70/</sup>

31. The Commission must be cautious as well not to adopt overly broad anti-collusion rules that might chill

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<sup>68/</sup> This is especially true given the number of narrowband PCS licenses that are being made available and the number of potentially interested parties. The Commission would truly be opening the floodgates if every applicant was required to submit complete FCC Forms 401 for the minimum number of sites necessary to meet narrowband construction requirements.

<sup>69/</sup> Accord Notice, ¶ 84. Indeed, Commissioner Duggan suggested in his concurring statement accompanying the Broadband PCS Order that such a process was in the public interest.

<sup>70/</sup> The Joint Commenters agree with the Commission that there is no likelihood of "unjust enrichment" in circumstances where an auction winner has paid the highest bid price for spectrum in an open bidding context. Notice, ¶ 83. This view is limited, however, to Narrowband PCS where there are no bidding preferences or set-asides. If such preferences were given to some applicants, those applicants should have some penalty on transfers, perhaps the amount paid by the purchaser over the auction price.

legitimate business transactions.<sup>71/</sup> The wide-area paging business is characterized by a broad array of cooperative agreements by which licensees exchange traffic between their respective systems in adjoining territories in order to accord subscribers a greater range of service.<sup>72/</sup> The desire of an increasing segment of the population for nationwide paging services also has fostered joint ventures between regional carriers to permit them to compete more effectively on a nationwide level. The Joint Commenters envision that similar arrangements will be necessary and appropriate in some instances to foster the prompt and full development of narrowband PCS systems.<sup>73/</sup> The Commission must not adopt anti-collusion rules that prohibit or inhibit applicants from discussing *bona fide*

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<sup>71/</sup> To the extent that speculators will exist in the Narrowband PCS licensing process, the Joint Commenters believe that any possible benefit offered by anti-trafficking rules is outweighed by the delay of service to the public that results from a delay in transfer of the license from a speculator to a serious operator.

<sup>72/</sup> This should include arrangements where licensees are able to subdivide their license both geographically and spectrally to meet market demands. For example, an MTA licensee may have no interest in serving a particular BTA within the MTA, so it should be free to divide its license and allow another licensee to offer service in that area. This would permit the market to redefine the licensing areas, where appropriate, to match the market demand.

<sup>73/</sup> This will be especially true in the nationwide arena where the price for a single license may range into the millions, and the construction cost of a system into the tens of millions.

transactions of this nature. A broad ban on "sharing information" with other potential bidders would go too far.<sup>74/</sup>

32. The Joint Commenters recommend instead that the Commission only ban collaborative behavior that would violate the antitrust laws or Federal bid rigging statutes. This will serve to prohibit territorial divisions of markets, and conspiratorial behavior designed to reduce bid totals, without outlawing legitimate discourse among and between potential bidders.<sup>75/</sup>

33. One safeguard the Joint Petitioners would retain is a post-auction petition to deny process.<sup>76/</sup> The Commission does not have the resources to thoroughly screen all auction winners, and should rely upon disappointed bidders to alert the agency of material and substantial questions which affect the basic licensee qualifications of the winner. Placing limits on settlement payments would suffice as an effective deterrent to

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<sup>74/</sup> Arguably, perfect information among and between potential bidders regarding the value each places on particular licenses will result in an optimal assignment of spectrum and eliminate the winner's curse.

<sup>75/</sup> For example, a carrier who principally serves the Western U.S. and a carrier who principally serves the Eastern U.S. may have a legitimate interest in discussing a joint venture to establish a nationwide PCS system. Meaningful discussions can only occur if they are able to discuss the amounts they would be willing to pay for such a license and their financial ability to pay their pro-rata share.

<sup>76/</sup> Section 309(j) appears to require the Commission to entertain petitions to deny to the extent that auctioned spectrum fails under existing petition procedures. See Notice, ¶ 110.

strike petitions,<sup>71/</sup> and thus should mitigate the Commission's concern that auction losers will "gang up" on winners.

34. **Specific Frequency Assignments.** The narrowband PCS auction process must include a mechanism to maximize the assignment of a common frequency or frequencies to a single licensee who wins in multiple geographic areas.<sup>72/</sup> As it does in the licensing of 900 MHz paging channels, the Commission should reserve to itself the ability to make specific frequency assignments from among blocks of fungible channels. In exercising this authority, the Commission would not make specific frequency assignments until the entire block of fungible channels was auctioned of for all geographic areas. Then, specific frequency selections should be made to maximize the assignment of a common channel in multiple territories, starting with the applicant who paid the highest aggregate bid price.

35. After the conclusion of this initial frequency assignment process, the Commission should allow the successful bidders to negotiate among themselves to swap frequencies if they so desire.<sup>73/</sup> These procedures would ensure that efficient wide area systems can develop.

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<sup>71/</sup> See, e.g., 47 C. F. R. § 22.927.

<sup>72/</sup> Of course, if the licensee wins different licenses (50-50 and 50-12.5) in the two areas, the Commission should not grant these on the same frequency.

<sup>73/</sup> The Commission should allow the successful bidders to make payments among themselves to effectuate this scheme without any limitation on the amount paid.

**IV. Preferences For Designated Entities are Not  
Required In the Narrowband PCS Services**

36. New subsection 4(D) of Section 309(j) of the Communications Act directs the Commission to adopt licensing procedures to ensure that small business, rural telephone companies, and businesses owned by women and minorities (collectively, "Designated Entities") are given "the opportunity to participate" in the provision of spectrum-based services. In the case of narrowband PCS, the Commission has achieved this worthy objective by adopting an allocation plan calling for the issuance of a large number of licenses in a variety of bandwidths and geographic areas, thereby creating a wealth of opportunities.<sup>80/</sup> Further preferences in the form of set-asides or preferred payment options are not necessary, or appropriate.<sup>81/</sup>

37. The number of available narrowband PCS licenses, coupled with limits on the amount of spectrum one entity can control,<sup>82/</sup> effectively precludes the possibility that a small number of existing carriers will garner all the spectrum to the

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<sup>80/</sup> For instance, a Designated Entity could currently apply for a 931 MHz license and only go through an auction for the 12.5 kHz return channel.

<sup>81/</sup> Indeed, the Commission designed the current licensing structure to maximize the opportunities for Designated Entities to participate. Furthermore, Narrowband PCS requires substantially less investment than wideband PCS, so special preferences are not required.

<sup>82/</sup> The Narrowband Order limits each licensee to three 50 kHz channels, paired or unpaired, in a particular area.

exclusion of Designated Entities. And, as the Commission notes, the upfront payment requirements that must be met to participate in narrowband PCS are, in many instances, extremely modest.<sup>33/</sup> Most important, because the bandwidths available in the narrowband PCS service are quite limited, the aggregate purchase price will also be limited.<sup>34/</sup> The result is an allocation that creates meaningful opportunities for Designated Entities without special preferences.

38. It would, in the Joint Petitioners' view, be unfair to accord Designated Entities special concessions in the form of tax certificates and/or installment payment options. The wide-area paging business is an extremely competitive, low-margin business.<sup>35/</sup> The Joint Commenters expect narrowband PCS to be

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<sup>33/</sup> The Notice indicates, for example, that the payment could be as low as \$200 for some narrowband channels in markets with a population of 1,000,000. Notice, ¶ 103. The Joint Commenters suggest that the minimum bid for Narrowband PCS should be \$25,000 for MTA licenses and \$2,500 for BTA licenses. These amounts were derived from the application fees used for 220 MHz licensing where it is believed that the higher nationwide fee of over \$20,000 deterred significant speculation.

<sup>34/</sup> Ultimately, commercial mobile service spectrum is valued based upon the subscriber load it can carry and the amount that each subscriber is willing to pay for the information provided. The amount of information that can be delivered, and hence the value of the service to the subscriber is a function of the bandwidth. Thus, narrower bandwidths are inherently less valuable than wider bandwidths.

<sup>35/</sup> For instance, since 1988, the price for digital display paging service has fallen approximately 32.4%, or from about \$15.69 average revenue per unit to \$10.60 average revenue per unit. See Paging Leadership Association, Inc., Paging Industry Benchmark Ratio Study (Phase Nine Report, March 1993).

the same. According financial benefits to one category of competitors and not others can adversely affect the market in a low-margin business of this nature. Indeed, such a preference could severely impact competition by allowing one competitor to enjoy lower costs which would in turn lead to imperfect price competition. Since the legislative objective of creating meaningful licensing opportunities for Designated Entities has been met, the Commission should stop short financial incentives that could skew the competitive mix.

**CONCLUSION**

The foregoing premises having been duly considered, the Joint Commenters respectfully request that the Commission adopt rules governing competitive bidding that are consistent with the foregoing comments.

Respectfully Submitted,

**PACTEL PAGING**

**MIDCONTINENT MEDIA**

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November 10, 1993

**CERTIFICATE OF SERVICE**

I, Tana Christine Maples, hereby certify that I have this 10th day of November, 1993, caused copies of the foregoing Joint Comments in Response to Notice of Proposed Rulemaking to be delivered by hand, courier charges prepaid, to the following:

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