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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)

PP Docket No. 93-253

To: The Commission

COMMENTS OF
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.

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SUMMARY

The American Mobile Telecommunications Association, Inc., ("AMTA") supports the instant proposal regarding competitive bidding procedures as generally reflective of the Congressional directive to employ an auction process in situations where there are mutually exclusive applications for new authorizations to provide commercial service to subscribers. However, the Association recommends against application of an auction process to the private land mobile services specified herein. The legislative criteria for competitive bidding do not apply to the existing or anticipated licensing situations described in the Notice.

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), pursuant to Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations¹, respectfully submits the following comments in the above-entitled proceeding². The Notice outlines a proposal to implement competitive bidding procedures as specified by Congress in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act").³ The Budget Act directs the FCC to employ competitive bidding procedures, in lieu of a random selection process or comparative hearings, when selecting among two or more mutually exclusive applications for initial licenses in services wherein spectrum is used primarily to provide service to subscribers for compensation.

AMTA believes that the instant Notice sets out a viable framework for the auction process mandated by Congress. Nonetheless, the Association urges the FCC to consider carefully whether the legislation supports the use of auctions in the assignment of all services recommended in the Notice, specifically certain private radio services.

I. INTRODUCTION.

AMTA is a nationwide, non-profit trade association

¹ 47 C.F.R. § 1.415.

² Notice of Proposed Rule Making, PP Docket No. 93-253, FCC 93-455, 8 FCC Rcd ____ (Released October 12, 1993) ("Notice").

³ Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312 (1993).

dedicated to the interests of the private carrier industry. AMTA's members include large and small 800 MHz and 900 MHz SMR operators, both trunked and conventional, urban and rural, as well as licensees of wide-area 800 MHz SMR systems and of local and nationwide 220 MHz systems.

In the past, AMTA has opposed the use of auctions as unnecessary for the administratively efficient and economically responsible assignment of spectrum. The Association has also expressed concern about the impact of competitive bidding procedures on the numerous small operators which have traditionally dominated the private land mobile industry and contributed to it a vibrant, entrepreneurial spirit. The public will not be well served if that component of the wireless community is foreclosed from future opportunities.

On the other hand, the Association recognizes that Congress' directive is unequivocal, and is grounded in a history of abuses of the random selection process. Although it is not yet possible to predict with certainty that competitive bidding will be immune from abuses, it is fair to concede that alternatives to the lottery process should be explored under carefully defined circumstances. Because the Notice contemplates a fundamental revision in the FCC's license assignment process and proposes that such competitive bidding be used to award 800 MHz, 900 MHz, and 220 MHz private land mobile spectrum, AMTA and its members have a significant

interest in the outcome of this proceeding.

II. BACKGROUND.

The Budget Act outlines in specific detail the criteria which must be met to trigger an auction process, the broad public policy objectives which must be satisfied if an auction is to be used, and certain additional considerations intended to promote the participation of small businesses, women, and minorities in the telecommunications marketplace.⁴

As defined in the legislation and promulgated in the Notice, the FCC is directed to use competitive bidding procedures when three criteria exist: (1) there must be mutually exclusive applications; (2) the applications must be for an initial license or construction permit; and (3) the license must be for a service used primarily to provide service to subscribers for compensation.⁵ Assuming those criteria are satisfied, the Commission must then determine whether the use of an auction in the particular situation will promote:

1. the development and rapid deployment of new technologies, products, and services;

⁴ AMTA recommends further analysis of the standard for qualifying as a "small business." The Association tentatively agrees with the concern expressed by the SBAC that the financial criterion used for SBA purposes will likely be too small to support implementation of the PCS systems to be licensed by the FCC. See, FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen Docket 90-314 (September 15, 1993).

⁵ See, 47 U.S.C. § 309(j)(2) and (j)(3). The adoption of an auction legislation which definitionally excludes over-the-air radio and television broadcast stations is politically predictable, but economically and legally incomprehensible.

2. the dissemination of economic opportunities and competition over a broad array of applicants;
3. the recovery for the public of the value of use of relatively rare spectrum, and, conversely, the avoidance of unjust enrichment through the lottery process; and
4. the efficient and intensive use of available spectrum.

Additionally, Congress specifically directed the FCC not to base a finding of public interest, convenience, and necessity on the likely revenues to be raised by the auction process.⁶ Finally, the FCC's authority to employ auctions is temporary. It will expire on September 30, 1998 at which time the efficacy of the process will be evaluated.

The instant Notice has several ambitious objectives. First, it proposes general principals to guide the Commission in its determinations regarding whether particular licenses should be assigned pursuant to auctions. Those principals endeavor to define in greater detail the fundamental criteria -- "mutual exclusivity," "new authorization," and "principal use" -- set out in the legislation. Second, it describes in detail various competitive bidding procedures it might employ and reserves for further proceedings a determination of which procedure would be optimal for various auction situations. Finally, it considers whether three specific classes of licenses should be included or excluded from the competitive

⁶ 47 U.S.C. § 309 (j)(7).

bidding process: personal communications services ("PCS"); certain private radio services, including 800 and 900 MHz SMR and 220 MHz; and a variety of common carrier services. Because Congress has specifically directed the FCC to commence licensing PCS by the spring of 1994, there is a greater urgency in the resolution of whether and how auctions would be used to award PCS than the other services considered.

AMTA supports generally the competitive bidding proposal outlined in the Notice. The agency's analyses of the definitional criteria contained in the legislation appears reasonable.⁷ The Association also agrees that the FCC should retain broad authority to employ a variety of auction techniques while it acquires practical experience with this license assignment method. Although the Commission has tentatively concluded that oral bidding will generally be used, it is premature to evaluate the appropriateness of that choice for all situations or to foreclose other options. Flexibility should be the hallmark of the FCC's approach in these unchartered waters.

The Association does not concur with the Commission's proposed application of its analyses to various private land mobile services. As detailed below, neither the legislative

⁷ The Association is still reviewing the FCC's tentative determination that "principal use" should apply to classes of licenses rather than individual licensee usage. As described below, that approach could result in competitive bidding between commercial SMR and public safety applicants under the FCC's 800 MHz inter-category sharing provisions. That result is clearly inconsistent with the Congressional objection.

language nor the public interest demands the use of competitive bidding procedures in the situations described below.

A. The Legislative Criteria For Competitive Bidding Do Not Apply To Existing Or Anticipated Private Land Mobile Licensing Situations.

The fundamental criterion for mandating license assignment by auction is the existence of two or more applicants requesting use of the same frequency(s) in the same geographic area within the same time period. Without mutual exclusivity, there is no legal or economic rationale for conducting an auction.

The FCC has traditionally established multi-day mutual exclusivity periods for common carrier and mass media services. Thus, the agency must routinely handle such situations in its day-to-day processing of applications in those services.

By contrast, services regulated by the Private Radio Bureau, with the exception of microwave services, have not typically employed a licensing scheme which recognizes mutual exclusivity. Frequencies in many of those services are shared, rather than assigned on an exclusive basis, so no applicant is denied a license because of spectrum unavailability.

To the extent possible, the Commission transplanted this approach to the bands above 470-512 MHz where frequencies may be assigned on an exclusive basis if specified loading

criteria are met. Many of the frequencies available in those bands require non-FCC frequency coordination. The coordinators, with only limited exceptions, "cross-coordinate" applications such that the channel is recommended for the first application received by any of them and then forwarded to the FCC. Because potential mutual exclusivity is resolved in the coordination process, the FCC normally receives only a single application for a specific frequency in a given geographic area.⁸

The Bureau has employed a similar approach in its consideration of 800 MHz applications for frequencies assigned directly by the Commission rather than by non-FCC coordinators.⁹ Those applications are processed in chronological order based first on date of receipt and then on randomly assigned file numbers within a single day. To the extent that the FCC cannot process a given application because of lack of frequency availability, the application is placed on a waiting list for recovered frequencies, again in strict

⁸ The notable exception to this equitable and efficient system is the coordination of 800 MHz General Category frequencies. The lack of cross-coordination of those frequencies may unintentionally result in some instances of mutual exclusivity.

⁹ The FCC has not accepted new applications for non-coordinated 900 MHz SMR frequencies since the initial filing windows were closed in 1987. Public Notice, FCC Document No. 0539 (November 4, 1986); Report and Order, Gen Docket No. 84-1233, 2 FCC Rcd 1825 (1986). Thus, there is no analogous situation in that band.

chronological order.¹⁰

Thus, mobile services governed by the Private Radio Bureau do not have a tradition of mutual exclusivity on a day-to-day basis. The only instances in which the FCC has been required to select from among competing applicants has been when the agency has opened "filing windows" associated with the assignment to new applicants of blocks of newly available spectrum.¹¹ Should additional spectrum be allocated to these services in the future, competitive bidding may be the appropriate, and likely will be the mandatory, process for assignment of frequencies to individual licensees. However, there is no existing or contemplated situation in the private land mobile services wherein all of the legislative criteria for auctions are satisfied.

1. Traditional 800 MHz SMR Spectrum.

As described above, the FCC does not currently recognize mutual exclusivity in the assignment of 800 MHz SMR spectrum. The Notice also describes in some detail the complex frequency assignment scheme at 800 MHz wherein commercial SMR licensees operate individual stations which may be comprised of frequencies from the SMR, the Business, the Industrial/Land Transportation and/or the General Category Pools. Since the frequencies in each of these discrete pools are available

¹⁰ See, 47 C.F.R. § 90.611(d).

¹¹ Notice of Proposed Rulemaking, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993).

under the inter-category sharing provisions for both SMR and non-commercial licensees, including Public Safety eligibles,¹² the competitive bidding procedures contemplated in the Notice would be ill-suited for this service.

The preferable approach would be a continuation of the current "one day" filing windows. Applications would not be considered mutually exclusive unless they were received by the FCC on the same day for the last remaining frequency(s) in that geographic area. To the extent that the FCC retains the 800 MHz waiting lists, there would be no change in the current procedures. Should the waiting list be eliminated, as has been proposed by the FCC,¹³ AMTA would recommend that auctions be used only if both applications are for new systems, and it has been determined that randomly assigned file numbers cannot legally be used to rank same day applicants.

2. 800 MHz Wide-Area License.

The Notice contemplates the use of auctions for the assignment of the wide-area 800 MHz SMR licenses under consideration at the FCC.¹⁴ The FCC's position is presumably based on a premise that SMR operators provide commercial

¹² 47 C.F.R. § 90.621(g).

¹³ The legislation and the Notice contemplate auctions only for new licenses or construction permits. AMTA recommends that this concept be applied also to support the selection, without auction, or an existing 800 MHz licensee seeking license modification in instances which would otherwise be considered mutually exclusive. Notice of Proposed Rule Making, PR Docket No. 93-144, 8 FCC Rcd 3950 (1993) (800 MHz NPR).

¹⁴ Id.

service to subscribers, that the wide-area licensed proposal contemplates a date certain on which multiple eligibles are likely to submit applications which involve requests for common frequencies in common geographic areas, and that the authorizations to be issued will be for new systems.

AMTA is not persuaded that the licensing of 800 MHz wide-area systems demands the use of a competitive bidding process. The Association would first note that its "Blueprint" proposal, upon which the FCC's 800 MHz NPR is largely based, offered a licensee selection approach which would have encouraged the participation of smaller operators systems without requiring either auctions or lotteries.¹⁵ AMTA urges the FCC to reconsider the approach suggested by the Association in that proposal.

Even if the Commission elects not to adopt AMTA's recommendation that the 800 MHz wide-area licensing process favor consortia which have consolidated the largest number of parties and frequencies in the area, these authorizations fail to meet one critical criterion in the auction test: the authorizations to be issued pursuant to the wide-area licensing process are not "new" licenses in the sense intended by Congress. Unlike PCS licenses which will assign virgin spectrum to parties not currently providing service in those bands, the 800 MHz proceeding will merely permit existing

¹⁵ See, AMTA Petition for Rule Making, RM-8117, filed October 26, 1992.

licensees to reuse frequencies already assigned to them in the specified geographic area at other sites within that area, subject to protecting existing co-channel licensees. The actual authorizations issued may technically be considered "new," but they reflect more accurately a reconfiguration of already licensed operators' existing frequencies in an area in which they already operate. That situation does not appear to be the one envisioned by Congress in its competitive bidding directive.¹⁶

Moreover, this reconfiguration of the existing 800 MHz licensing environment would require an extremely unwieldy auction process by comparison with services like PCS. Each PCS applicant for each block within each prescribed area will be bidding for an identical authorization with identical rights. The successful bidder will be awarded the authority to use that spectrum throughout the area under the same terms and conditions as would have been granted to any other party.

By contrast, the 800 MHz frequency landscape is extraordinarily complex. Multiple licensees already operate co-channel facilities in the area to be covered by a wide-area license. One licensee may have the frequencies in the center of the largest metropolitan area serving a very large population. A co-channel licensee may be assigned the same

¹⁶ The FCC should also confirm that the modification of existing wide-area 800 MHz licenses does not conform to any of the competitive bidding indicia, and is outside the instant proposal.

frequencies in a remote rural area with a limited customer base. The value of the right to use those frequencies throughout the as yet unserved portions of the market will vary significantly between those parties.

Similarly, licensees may be co-channel on different frequencies with a significant number of other parties. For example, A may be co-channel with B on frequencies 1-5, with C on frequencies 6-10 and with D on 11-20, while D may be co-channel with B and C on 21-25. The number of individual instances of mutual exclusivity will likely be significant and each will require individual auction resolution. The FCC has proposed a negotiation period after application receipt but before the assignment process which both the industry and the agency anticipate will produce substantial resolution of these issues without Commission involvement. Nonetheless, the level of complexity and the time which will be required to resolve the remaining situations argue against the use of auctions in the 800 MHz wide-area licensing scheme.

In the event the Commission determines that wide-area 800 MHz licensees must be issued pursuant to an auction procedure, the Association makes the following recommendations. Most critically, as noted above, applicants in this process will not be bidding on "apples versus apples." Each will have a different set of frequencies for which it is eligible to apply, and each will already be authorized to operate in a specific location within the geographic area. If the FCC's

proposed wide-area licensing scheme is to achieve the desired result, including a successful negotiation process, the FCC must consider mutual exclusivity on a frequency by frequency basis, rather than treating as mutually exclusive applicants with even a single frequency in common.

AMTA believes that its recommended approach is fully consistent with the Congressional definition of mutual exclusivity. Applications should not be so classified except as to common frequencies requested in the same area. Thus, the Commission should approve the authorization as to any frequencies which are not mutually exclusive or as to which that issue is resolved in negotiation. This will prevent the possibility of "greenmail" whereby an applicant for two frequencies can refuse to negotiate with an applicant eligible for 150 frequencies in anticipation that the delay involved in the competitive bidding process will essentially force a settlement in his favor. The public interest will not be served if the remaining frequencies, those not co-channel with any remaining applicant, may not be placed in service until the auction process is completed. Instead, the licenses for "uncontested" frequencies should be issued. The FCC may then proceed to hold individual auctions for frequencies with unresolved mutual exclusivity situations.

3. 900 MHz Wide-Area Licenses

The Notice also contemplates using competitive bidding to award the 900 MHz wide-area licenses proposed in the pending

FCC rule making proceeding on that subject.¹⁷ Instead, AMTA recommends adoption of a preference scheme as suggested by the Association and numerous other parties to the proceeding.¹⁸

Like the 800 MHz licensing environment, and unlike PCS, the 900 MHz SMR band is not virgin spectrum. Licenses have already been assigned to entities whose primary transmitter sites have been confined for half a decade to the artificially-defined Designated Filing Areas ("DFAs") in which the FCC originally accepted 900 MHz SMR applications. Those licensees have been precluded by FCC regulation from expanding their systems to accommodate the needs of the marketplace they have committed to serve. Some have implemented secondary sites beyond the DFA boundaries to satisfy the needs of their customers. They currently have no regulatory assurance that those investments will not be lost should the FCC accept 900 MHz applicants from new entities without providing an opportunity first for conversion of these sites to primary status.

In this instance, the FCC must weigh the likely benefits of auctioning this spectrum against the Congressional directive to promote effective and intensive use of the spectrum. Existing 900 MHz SMR operators are, by definition, assigned the use of the frequencies in the major metropolitan

¹⁷ Further Notice of Proposed Rule Making, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993).

¹⁸ See, e.g., Comments of AMTA, RAM Mobile Data, and PowerSpectrum, Inc.

market within the defined area. If that market becomes a discrete island of service surrounded by an unrelated party's auction-obtained license, that Congressional objective will not likely be satisfied. Thus, while public policy may support competitive bidding for the assignment of 900 MHz spectrum which was never constructed in a given DFA, with the authorization encompassing both the DFA and the rest of the prescribed area, a preferential scheme such as that suggested in the rule-making proceeding should be adopted for 900 MHz spectrum already in use.

Nonetheless, if the FCC decides to use a competitive bidding procedure to award licenses outside the DFAs for frequencies already being used within the DFA, the Association urges at least limited recognition of the investment made by those existing licensees. The Association recommends that, at a minimum, existing 900 MHz licensees be permitted to convert operational secondary sites to primary status and to reuse their already assigned frequencies at multiple sites throughout the DFA without respect to the 40-mile rule.¹⁹

Finally, AMTA recommends that 900 MHz spectrum be auctioned in the same 10-channel license blocks that were granted in the original license assignment process. It also suggests that combinatorial bidding be authorized to permit the aggregation of spectrum.

¹⁹ 47 C.F.R. § 90.627 (b).

4. 220 MHz Licenses.

The FCC has tentatively concluded that competitive bidding should not be used for the issuance of local 220 MHz licenses. As described in the Notice, it is premature to assess whether the principal use of the band will be for commercial or internal communications requirements. AMTA agrees with the Commission's decision, and recommends against the use of auctions in that service.

III. CONCLUSION.

For the reasons described herein, the Association respectfully requests that the FCC act promptly to adopt the proposals in the instant Notice, consistent with the comments contained herein.

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CERTIFICATE OF SERVICE

I, Lisa K. Jackson, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify, that I have on this 10th day of November, 1993 caused to have hand-delivered a copy of the foregoing **COMMENTS** to the following:

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