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In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

)
) FEDERAL COMMUNICATIONS COMMISSION
) OFFICE OF THE SECRETARY
) PP Docket No. 93-253
)
)

To: The Commission

REPLY COMMENTS OF MCELROY ELECTRONICS CORPORATION

McElroy Electronics Corporation ("McElroy") by and through counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits Reply Comments in the above-captioned rulemaking proceeding. This rulemaking involves the proposed rules relating to the Commission's utilization of a competitive bidding procedure under Section 309(j), a recent amendment to the Communications Act.^{1/} On November 10, 1993, JAJ Cellular ("JAJ") filed comments in this proceeding concerning certain applications for cellular unserved areas, including McElroy's, which were to be reinstated pursuant to a ruling of the Court of Appeals in McElroy Electronics Corporation v. FCC, 990 F.2d 1351 (D.C. Cir. 1993)("McElroy"). JAJ demonstrated, *inter alia*, that action on these applications, which were filed over five years ago for areas which have been without competitive cellular service for over ten years, should not be further delayed and subjected to the competitive bidding process. McElroy supports JAJ's comments and urges that they be adopted and implemented.

^{1/} Title VI, Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993).

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In support the following is shown.

In McElroy, released last April, the Court determined that applications for unserved areas in cellular markets filed by McElroy, JAJ and Los Angeles SMSA Limited Partnership ("LASLP")("Appellants") in 1988 and 1989 had been improperly dismissed by the Commission and instructed the Commission to: reinstate these applications, nunc pro tunc; determine whether another application, that of Price Communications Cellular, Inc.("Price"), should also be reinstated, and; determine whether subsequently adopted rules should be applied to the reinstated applications retroactively.

After six months passed with no meaningful action by the Commission in response to the Court's decision in McElroy, McElroy was surprised to learn that action on its applications was being delayed by a new rulemaking proceeding, the instant one, initiated on October 12, 1993,^{1/} which specifically permitted the Commission to exclude applications which had been accepted for filing prior to July 26, 1993.^{2/}

In its Auction NPRM, the Commission listed its objectives, the first and foremost being as follows:

the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

Id. at ¶ 12(A). With regard to unserved area applications, the

^{1/} Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket 93-253, released October 12, 1993 (FCC 93-455) ("Auction NPRM").

^{2/} Id. at ¶ 160

Commission stated that:

Approximately 10,000 unserved area applications were filed between March 10 and May 12, 1993; of these, approximately 9,000 mutually exclusive applications were filed for 83 systems. 168/ Given the large number of applications filed prior to July 26, 1993 and the criteria described in Section 309(j), the Commission has the option of allowing these unserved area applications to be resolved by auction rather than by lottery. See Section 6002(c)(Special Rule). We believe that auctions for these pending applications would meet the statutory objectives. For example, the rapid deployment of new service, especially to rural areas, would be accomplished because insincere applicants who do not intend to build out their proposed systems but, rather, assign their authorization for profit, would be discouraged from competing in an auction. In addition, under some of the auction procedures proposed herein, auctions would provide more opportunity for a wider variety of applicants to become cellular licensees. Thus, we propose to auction, rather than lottery, unserved area applications filed prior to July 26, 1993 and seek comment on this proposal. We further propose to limit the opportunity to enter the auction for the unserved areas to those applicants who filed prior to July 26, 1993, and request comment on this approach. We also ask whether the Commission should allow full market settlements in these markets pending the decision of lottery or auction. 169/ (footnotes omitted).

Id. ¶ 160. The Special Rule referenced above reads:

The Federal Communications Commission shall not issue any license or permit pursuant to section 309(i) [the lottery authorization] of the Communications Act of 1934 (47 U.S.C. 309(i)) after the date of enactment of this Act unless -
(2) one or more applications for such license were accepted for filing by the Commission before July 26, 1993.

Section 6002(c).

There is no mention of the unserved area applications which were remanded in the McElroy decision. Rather, these applications which the Court found were timely filed over five years ago, have been lumped into a group of applications which were just filed this year and were filed subject to the McElroy

appeal. As a result, McElroy's applications, action on which has already been delayed for the completion of one rulemaking, are now again being delayed for a rulemaking which was not even a glimmer in 1988 when McElroy first filed for Los Angeles. The irony is that the areas McElroy has sought to serve have remained unserved and will continue to remain unserved for the indefinite future while the Commission conducts yet another rulemaking. How the Commission can square this with its stated goal of "the rapid deployment of new ... services for the benefit of the public, including those living in rural areas" is difficult to understand.^{1/}

As the Commission itself observes, it has the option to use a lottery for unserved area applications. NPRM, ¶ 160. Significantly, the Commission proposed a disparate treatment for Multipoint Distribution service ("MDS") applications filed prior to July 26, 1993, stating:

We tentatively conclude that it would better serve the public interest to lottery the pre-July 26, 1993, MDS applications rather than subject them to competitive bidding to avoid further delay in granting MDS licenses. Those applications have already incurred substantial delays. To auction those licenses would further delay delivery of MDS service to the public because the auction rules will not be in effect for several months.

Id. at ¶ 149 (emphasis supplied). The delays incurred by McElroy's applications have been even more substantial and action on these applications should also not be further delayed.

^{1/} See, e.g., Nader v. FCC, 520 F.2d 182, 206 (D.C. Cir. 1975), where the Court said:

There comes a point where relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all - - and the result is denial of justice.

Moreover, the rationale for applying an auction to unserved area applications in general does not apply to McElroy and the other Appellants. None of these applicants can be considered insincere since they have been seeking to serve these areas for over five years, actively prosecuting their respective applications. In Minneapolis-St. Paul, McElroy is the only applicant to be reinstated. To delay action on this application is not only illogical, but outside the limits of permissible competitive bidding procedures (the existence of mutually exclusive applications is the first prerequisite). NPRM, ¶ 2.

Finally, there is ample justification for treating these McElroy applications differently from those which were just filed beginning in March of this year.^{1/} They were timely filed five years ago, are the only applications for these areas which were accepted for filing, seek to serve areas without service for the longest period of time, and are supposed to be reinstated nunc pro tunc pursuant to the court's mandate.

Postponing action on McElroy's application is not required by Section 309(j) of the Act or its implementation and the

^{1/} Despite the pendency of McElroy's appeal, the Commission announced that it would open a filing window for new applications for these markets on March 10, 1993. Public Notice, Report No. CL-93-36, released December 23, 1992. On February 19, 1993, it stated, in denying McElroy's and JAJ's petitions for partial reconsideration of the Second Report and Order in CC Docket No. 90-6 [7 FCC Rcd 2449 (1992)] that, "In any event, any applications within the class described by JAJ and McElroy that are granted are, of course, subject to rescission if JAJ's and McElroy's applications are reinstated as a result of their pending appeals." Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 1363, 1364 (1993).

Commission's decision to further delay action is contrary to this court's holding in McElroy, prejudicial to McElroy and the other Appellants and patently inconsistent with the public interest.

McElroy is entitled to speedy action in response to the Court's remand. These applications for unserved areas were filed in 1988 and early 1989 and sought to serve areas which at that time had been unserved for at least five years. It is now over ten years. McElroy has demonstrated that the public interest will be served by reinstating these applications along with those of the other appellants and scheduling a lottery. In this way these long unserved areas can finally be provided with competitive service.

Respectfully submitted,

MCCELROY ELECTRONICS CORPORATION

By: William D. Silva

William D. Silva
Law Offices of William D. Silva
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003
(202) 362-1711

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