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November 30, 1993

Mr. William F. Caton
Acting Secretary,
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Via Messenger

Re: Competitive Bidding
PP Docket No. 93-253

Dear Mr. Caton:

Submitted herewith on behalf of Cellular Settlement Groups ("CSG") are an original and four (4) copies of their Reply Comments with respect to the above docket.

Kindly contact this office directly with any questions or comments concerning this submission.

Respectfully submitted,



William J. Franklin
Attorney for Cellular
Settlement Groups

Encs.

cc: Cellular Settlement Groups
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NOV 30 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

PP Docket No. 93-253

To: The Commission

REPLY COMMENTS OF CELLULAR SETTLEMENT GROUPS

Houston CUSA Settlement Group, L.C., Dallas CUSA Settlement Group, L.C., Oxnard CUSA Settlement Group, L.C., and Huntington CUSA Settlement Group, L.C., (collectively, the "Cellular Settlement Groups"), by their attorney and pursuant to Section 1.415 of the Commission's Rules, hereby reply to comments filed with respect to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.^{1/}

I. MOST COMMENTING PARTIES ADDRESSING THE ISSUE SUPPORT THE FULL-MARKET SETTLEMENT OF MUTUALLY ACCEPTABLE CELLULAR APPLICATIONS.

The Comments of the Cellular Settlement Groups (at 4-11), as well as those of most commenting parties who addressed the issue, support the Commission's continued immediate acceptance and processing of full-market settlements for contested initial cellular applications.^{2/}

^{1/} 8 FCC Rcd ____ (FCC 93-455, released October 12, 1993) ("NPRM").

^{2/} See NPRM, ¶160 & nn.168-69.

Those comments were not an academic exercise. The Cellular Settlement Groups were formed during September 1993, as a result of full-market settlements between the respective applicants for the Houston (MSA No. 10B), Dallas (MSA No. 9B), Oxnard-Simi Valley-Ventura (MSA No. 73B), and Huntington-Ashland (MSA No. 110A) cellular unserved areas^{3/}. Another full-market settlement -- involving applicants not included within the Cellular Settlement Groups -- has been reached in the Detroit (MSA No. 5B) cellular unserved area.^{4/}

Most commenting parties addressing the issue support the full-market settlement of mutually acceptable cellular applications. For example, BellSouth Corporation wrote:

The Commission should instead continue to encourage legitimate settlements and inter-applicant negotiations to expedite the licensing process.

* * *

Moreover, the Budget Act expressly requires the Commission to continue to encourage "negotiation[s]" and other means to eliminate mutual exclusivity among applicants.

* * * Negotiations among applicant to reach agreements that might, under other circumstances, have the appearance of collusion are thus expressly endorsed by Congress as a licensing efficiency to be encouraged. Legitimate settlement efforts therefore should not be thwarted. Settlements avoid administrative delay, allow for the rapid and intensive use of spectrum and recover some portion of the value of the spectrum at far less cost of public resources and time than could possibly be attained through the auction.

^{3/} Cellular Settlement Groups Comments at 1-3. Each group has complied fully with the Commission's requirements for perfecting a cellular full-market settlement, including filing signed, original settlement agreements and declarations of no consideration from all applicants in each market. Id.

^{4/} Thumb Cellular Limited Partnership Comments and Request for Immediate Processing of Cellular Unserved Area Settlement at 1-2.

Thus, settlements fully comport with Budget Act objectives.^{5/}

Bell Atlantic and others explicitly supported this analysis.^{6/} Indeed, this support extended beyond unserved-area cellular applications to international satellite licensing and to bidding consortia generally.^{7/}

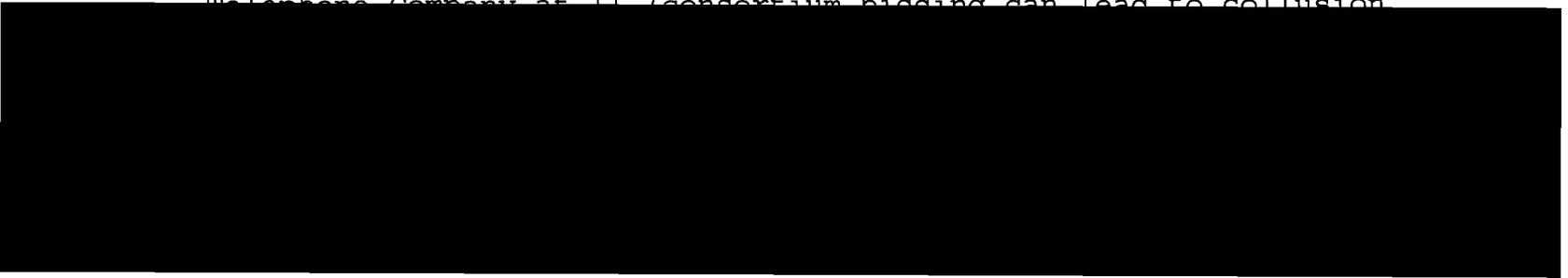
The only opposition to this near-universal support for settlements came from The Richard L. Vega Group and the Rochester Telephone Company.^{8/} Neither of those parties discussed Section 309(j)(6), or explained how the requirements of that subsection could be reconciled with their opposition to full-market settlements. Thus, their opposition to settlements lacks a rational basis.

^{5/} Comments of BellSouth Corporation at 15-16 (footnotes omitted, emphasis in original).

^{6/} See, e.g., Comments of Bell Atlantic Personal Communications, Inc. at 22-23 ("Service to these areas has been delayed for too long already. Allowing parties the chance to resolve their potentially conflicting applications without expending further resources in administrative processes can only speed deployment of cellular service to unserved areas in accordance with the Commission's goals."); Comments of Thumb Cellular, supra, at 3-5; Comments of Cellular Settlement Groups at 4-11.

^{7/} Comments of COMSAT Corporation at 6-8; Comments of Motorola, Inc. at 6-7; Comments of Motorola Satellite Communications, Inc. at 6-8; Comments of Alliance of Rural Area Telephone and Cellular Service Providers at 8 (auctions not needed when and if full-market settlements result from consortia among applicants).

^{8/} Comments of The Richard L. Vega Group at 9 (one-sentence statement of position without analysis); Comments of Rochester Telephone Company at 11 (consortium bidding can lead to collusion



Accordingly, the Commission should both permit the settlement of mutually exclusive auctionable applications and immediately process the five (5) pending full-market settlements of unserved-area cellular applications.

II. MOST COMMENTING PARTIES ADDRESSING THE ISSUE SUPPORT THE SELECTION OF MUTUALLY ACCEPTABLE CELLULAR APPLICATIONS BY LOTTERY WITHOUT THE ACCEPTANCE OF ADDITIONAL FILINGS.

Applicant-members of the Cellular Settlement Groups also filed applications for unserved cellular areas in markets for which no full-market settlements have been reached. In some markets, given the number of applicants, no full-market settlement appears reachable. As to those unsettled markets, the Cellular Settlement Groups join with the weight of the commenting parties in supporting the continuation of lotteries to select between mutually exclusive applications.^{2/}

For example, NYNEX Corporation argued (Comments at 11-12) that:

Applicants for cellular unserved areas extended substantial resources to prepare their applications in reliance on the Commission's existing procedures. The Commission, in another context, has recognized that equity requires that licenses for those areas be allocated under the licensing mechanism in effect at the time of filing. The application of competitive bidding rules to these applications would not only be unfair, but would likely further delay the introduction of cellular services to the public.

^{2/} Only four (4) deep-pocket parties supported the Commission's proposal to auction unserved-area cellular authorizations, and they did so generally without explanation of their position. See Comments of McCaw Cellular Communications, Inc. at 30-31; Comments of Southwestern Bell Corporation at 12-13; Comments of BellSouth Corporation at 44-45; Comments of Bell Atlantic Personal Communications, Inc. at 22-23. Thus, these Comments lack persuasive weight.

(Footnote omitted.) Numerous other parties echoed NYNEX's concern for the cellular applicant's reliance on unserved-area lotteries.^{10/} Several other legal and practical considerations support the continuation of lotteries for cellular authorizations.

A. The Commission's Proposal to Auction Cellular Authorizations Creates Substantial Legal Problems.

Several parties demonstrated that Congress intended that the Commission would select pre-July 26, 1993, cellular unserved-area applications by lottery.^{11/} Indeed, the Comments of the Small RSA Operators provides objective evidence of this Congressional intent; Exhibit A thereto is an October 18, 1993, letter from Senator Dianne Feinstein (D-California) stating the Senator's understanding that pre-July 26 cellular applications would be selected by lottery.

The commenting parties also argued that the Commission lacks the authority to impose auctions retroactively on previously-filed cellular fill-in applications.^{12/} Two commenting parties

^{10/} Aside from the other comments cited herein, some sixteen (16) individuals who had participated in unserved-area cellular applicant-partnerships filed letters describing their reliance on Commission's cellular lottery procedures.

^{11/} Comments of Cole, Raywid & Braverman at 2-3; Comments of Robert Lutz, et al. at 1-3; Comments of John G. Andrikopoulos, et al. at 4-8; Comments of Abraham Kye, et al. at 1-3; Comments of The Coalition for Equity in Licensing at 11-17; Comments of the Small RSA Operators at 12; Comments of The Richard L. Vega Group at 14-16; Comments of JAJ Cellular at 3-6.

^{12/} Comments of Sprint Corporation at 23; Comments of Cole, Raywid & Braverman at 2-4; Comments of Wendy C. Coleman d/b/a WCC
(continued...)

also raise important due-process and lack-of-notice concerns which would prevent adoption of a cellular auction proposal.^{13/}

B. Section 309(j) (1) of the Communications Act Does Not Give The Commission Authority to Auction Cellular Authorizations For Markets In Which An Existing Carrier Is Seeking to Expand Its System.

PacTel Corporation (Comments at 10-12) and JAJ Corporation address the Commission's proposal to auction unserved-area cellular authorizations in the context of the D.C. Circuit's McElroy decision.^{14/} Significantly, PacTel argues that the Commission cannot auction cellular unserved-area authorizations where, as in Los Angeles, new unserved-area applications (such as McElroy's and JAJ's) are mutually exclusive with modification applications of existing system operators (such as PacTel). This result flows directly from Section 309(j) (1) of the Communications Act, which limits the Commission's auction authority to only "initial licenses."

Thus, if the Commission were to decide as a general rule to auction mutually exclusive cellular unserved-area applications, Section 309(j) (1) would nevertheless require the Commission to

^{12/} (...continued)
Cellular at 5-11 (RSA licensing); Comments of Robert Lutz, et al. at 3-9; Comments of John G. Andrikopoulos, et al. at 8-16; Comments of Abraham Kye, et al. at 3-9; Comments of The Coalition for Equity in Licensing at 5-11.

^{13/} Comments of the Small RSA Operators at 9-12 (due process); Comments of The Coalition for Equity in Licensing at 17-18 (lack of notice).

^{14/} McElroy Electronics Corp. v. FCC, 990 F.2d 1151 (D.C.Cir. 1991).

hold a lottery for any market in which an existing system operator had filed to expand its system. The resulting administrative burden from this scenario suggests that the Commission's preferred course of action would be to select all cellular unserved-area licensees by lottery.

C. To Prevent Administrative Chaos, the Commission Should Not Accept Additional Applications for Previously Filed Cellular Unserved Areas.

Finally, only a single commenting party opposed the Cellular Settlement Groups' position (Comments at 11-12) that no new Phase I unserved-area applications should be accepted for previously filed markets. PNC Cellular, Inc. (Comments at 2-3) argues that the Commission should amend its cellular cross-ownership rules to permit PNC to file unserved-area applications for selection by auction. PNC's Comments thus exceed the scope of this proceeding, and should be rejected out of hand.

In contrast to PNC's parochial viewpoint, such diverse parties as BellSouth (Comments at 45), the Richard L. Vega Group (Comments at 14), John G. Andrikopoulos, et al. (Comments at 12 & n.19), and the law firm of Cole, Raywid & Braverman (Comments at 4-5) join with the Cellular Settlement Groups in opposing the acceptance of additional applications for previously filed unserved areas.

D. The Commission Will Expedite Cellular Service to Unserved Areas By Selecting Cellular Licensees By Lottery In Parallel With Its Development of the PCS Auction Procedures and Rules.

Quite aside from the persuasive legal analysis supporting the continuation of cellular lotteries, one practical reason to do so also exists: The Commission's auction plate will be quite full with PCS auctions without having also to auction cellular authorizations.

The Commission has made establishment of seamless nationwide cellular service as an important public policy objective. Anything that delays the licensing of unserved-area cellular systems -- including the development and implementation of cellular auction procedures -- is contrary to that public policy.

The Cellular Settlement Groups have demonstrated that their settlements are ready for immediate processing by Commission staff. Others have argued that the Commission could complete the initial unserved-area licensing process by mid-1994. The Commission should expedite its remaining cellular licensing -- and serve the public interest -- by continuing its cellular lottery policy.

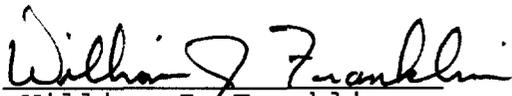
CONCLUSION

Accordingly, the Cellular Settlement Groups respectfully request the Commission to honor its existing policies which favor the full-market settlement of contested cellular applications. The Commission should immediately process the Cellular Settlement Groups' respective pending full-market applications. It should

also resolve mutually exclusive cellular applications by lottery,
without the acceptance of additional applications.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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