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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

NOV 30 1993

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

REPLY COMMENTS
OF THE
UTILITIES TELECOMMUNICATIONS COUNCIL

Pursuant to Section 1.415 of the Commission's Rules,
the Utilities Telecommunications Council (UTC) hereby
replies to the comments filed in response to the Notice of
Proposed Rule Making, FCC 93-455, released October 12,
1993, in the above-captioned proceeding.^{1/}

Competitive Bidding Should Not Be Applied
to "Private" or "Mixed-Use" Services

In its Comments, UTC emphasized the need to proceed
cautiously in applying competitive bidding to "mixed use"
bands; that is, frequency bands or services that are
available for either "private," internal use operations or
commercial or subscriber services. UTC noted that mixed
use bands were allocated with the understanding that any

^{1/} By Order, DA 93-1426, released November 23, 1993,
the deadline for filing Reply Comments was extended to
November 30, 1993.

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mutually-exclusive situations would be handled through lottery, in which each applicant, whether commercial or private, would have an equal opportunity to secure licensing. Unrestricted use of competitive bidding, even in mixed use bands that are used "principally" for commercial services, would jeopardize private users' ability to secure access to spectrum, and would thereby alter the underlying mixed-use allocation.

Other commenters are in agreement that bands that are used for private, internal use systems should not be subject to competitive bidding. Motorola points out that because private radio users do not offer commercial service to subscribers, private users are unlikely to be able to compete with commercial mobile services in auctions for spectrum.^{2/} Motorola specifically supports the FCC's proposal to exempt 800 MHz General Category channels and channels obtained through intercategory sharing from competitive bidding measures. Motorola aptly summarizes the cost-benefit analysis in applying auctions to mixed-use bands:

The limited possibility of these frequencies being used for for-profit commercial service does not outweigh the detriment to private users that auctions would cause in terms of

^{2/} Motorola, p. 4.

regulatory uncertainties and potentially, reduced spectrum availability.^{3/}

Similarly, the American Automobile Association, Inc. (AAA) and the Association of American Railroads (AAR) urge the Commission not to apply auctions to spectrum used principally for internal communications.^{4/} AAA correctly notes that both the language of Section 309(j) and its legislative history instruct the Commission to apply competitive bidding in only limited circumstances; namely, when licensees are engaged in reselling the use of spectrum to subscribers for a fee. UTC agrees with AAA that Section 309(j) grants authority to engage in competitive bidding contingent upon the "principal use" by the licensee, not by the service into which the licensee is classified.^{5/}

In future allocation decisions, the Commission will have the opportunity to set eligibility and operational restrictions that will clarify whether a service is intended to be primarily "commercial" or "private," and will be able to apply auctioning authority, if appropriate, to all applicants in that service. However, Section 309(j) does not compel the agency to apply competitive bidding to services or bands that are currently available for mixed-

^{3/} Motorola, p. 4.

^{4/} AAA, pp. 4-5; AAR, pp. 3-6

^{5/} AAA, p. 4.

use. As noted by Citizens Utilities, requiring distinct classes of radio users to compete against each other in competitive bidding will affect how the spectrum is used, and not merely by whom. This would undermine the intent of Congress that competitive bidding be used only for assignment of radio licenses and not spectrum allocations.^{6/}

Competitive Bidding Should Not Be Applied To Pending 220-222 MHz Applications

Subsequent to the date set for the filing of Comments in this proceeding, the Commission dismissed the application of one of the tentative selectees for a Nationwide Commercial license in the 220-222 MHz band.^{7/} This action now raises in a concrete fashion an issue first suggested in the NPRM in this docket; namely, the procedures to be followed in selecting another applicant for a 220 MHz authorization that is not granted or which is canceled.^{8/}

UTC agrees with the Commission's proposal to proceed as expeditiously as possible with the licensing of 220 MHz

^{6/} Citizens Utilities, p. 9.

^{7/} Comtech, Inc., DA 93-1383, released November 22, 1993.

^{8/} See NPRM at para. 132 and n.122.

facilities, and supports the proposal to rely on the use of lotteries to make selections from among the applications that were filed prior to the July 26, 1993, deadline established in Section 6002(e) of the Budget Act.^{9/} Section 1.972(c) of the Commission's Rules currently provides that in the event a Private Radio tentative selectee is found to be unqualified for a license, "another tentative selectee chosen from among the same applicant pool during the same random selection will be designated until a qualified applicant is determined." Thus, the Commission already has procedures in place to equitably select from among the remaining applicants for this nationwide 220 MHz authorization.

Given the fact that all remaining applications for this authorization were filed prior to July 26, 1993, the Commission is not required by the Budget Act to apply competitive bidding to these applications. Further, use of a lottery to select from among the existing applicants will expedite the initiation of this service.^{10/} UTC therefore

^{9/} NPRM at para. 135.

^{10/} Nothing in the Budget Act or the current Rules on lottery procedures would require the Commission to accept additional applications for this authorization. With over 120 applications still pending for this authorization, it is virtually certain that at least one fully-qualified applicant can be selected from this pool.

(continued...)

urges the Commission to promptly announce a new lottery date for this nationwide authorization.

Competitive Bidding Should Not Be Applied to Intermediate Links

Other parties agree with UTC's assessment that the Commission is not required to, nor should it, apply competitive bidding to "intermediate links." First, it is widely acknowledged that applications for fixed microwave links are rarely subject to mutual exclusivity problems, due to highly effective frequency coordination procedures.^{11/} Second, the commenters agree that intermediate links generally are not used to provide direct service to subscribers.^{12/} Thus, intermediate links should not be subject to competitive bidding.

^{10/}(...continued)

In its Comments in this proceeding, UTC recommended that additional applications be accepted if the tentative selectee in competitive bidding is found to be unqualified. (UTC Comments, at p. 21). This was recommended to help ensure that the results of the first auction do not skew the results of the second auction. These concerns do not apply in the case of lotteries, since the results are based solely on chance and cannot be influenced by the applicants themselves.

^{11/} BellSouth Corporation, p. 45; Alcatel Network Systems, pp. 2-3; and California Microwave, Inc., pp. 4-5.

^{12/} BellSouth, p. 46; California Microwave, pp. 3-4; and Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), p. 11.

Conclusion

Comments filed by traditional "private" radio user groups and others emphasize the need for the Commission to ensure that licensees who use spectrum primarily as a "tool," and not for direct commercial gain, should not be required to participate in competitive bidding. Application of competitive bidding to frequency bands or services which are currently available for "mixed use" would effectively reallocate this spectrum for commercial use only, and would be inconsistent with the requirements of Section 309(j). UTC therefore urges the Commission not to apply competitive bidding to mixed-use bands or services.

The Commission should retain the use of lotteries to select from among mutually-exclusive applications in the 220-222 MHz band, and should not apply competitive bidding to "intermediate links," such as private or common carrier point-to-point microwave facilities.

WHEREFORE, THE PREMISES CONSIDERED, the Utilities Telecommunications Council respectfully requests the

Commission to take action in this docket consistent with
the views expressed herein.

Respectfully submitted,

**UTILITIES TELECOMMUNICATIONS
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Dated: November 30, 1993