

is individually qualified, licenses covering the respective allocation could be issued to each entity, as appropriate.³⁹

Permitting subdivision of PCS licenses (and perhaps others as well) will allow the operators to implement niche service offerings or geographically limited arrangements where that is appropriate or desired. This should further promote the tailoring of diverse, competitive services, consistent with the Commission's goals. Allowing parties to "split" the spectrum will enable licensees to access only the frequencies needed, for example, for a supplemental service. The greater the flexibility allowed by the Commission in these matters, the more likely the nation will see the successful emergence of a variety of unique and useful PCS offerings.⁴⁰

³⁹ This is similar to the Commission's treatment of cellular rural service areas ("RSAs") that were the subject of settlement agreements leading to multiple separate licenses and systems within an RSA.

⁴⁰ Similarly, the Commission should permit all qualified bidders to participate in the PCS auctions, subject to the overall 40 MHz cap. See PCS Second Report and Order at ¶ 61. Winning bidders should, however, be subject to prompt divestiture requirements in order to bring their operations into compliance with the Commission's policies.

III. THERE IS BROAD-BASED AGREEMENT AMONG COMMENTING PARTIES CONCERNING APPLICABILITY OF COMPETITIVE BIDDING TO VARIOUS SPECTRUM LICENSING CIRCUMSTANCES

Virtually all the parties concur with the Commission's proposal not to apply competitive bidding to renewal and modification applications.⁴¹ This result clearly is required by the statutory language. The definition of "modification application," however, must be designed to ensure that established operators are not unreasonably barred from building out their existing facilities to enhance service to the public.⁴²

While the Commission has proposed to apply competitive bidding to intermediate links, nearly all of the parties addressing this issue oppose such action.⁴³ Many of these commenters, like McCaw, focused on point-to-point microwave links used in connection with cellular and paging

⁴¹ See Notice at ¶ 22.

⁴² See also AllCity at 1-3 (mutually exclusive paging applications may warrant comparative hearing instead of auction where an existing operator proposes to expand an existing system on a given frequency); UTC at 4.

⁴³ E.g., Ameritech at 3-4; BellSouth at 46; California Microwave at 2-4; Cox at 8; GTE at 3-4; MCI at 22; NTCA at 16; OPASTCO at 11; PacBell at 18-19; PacTel at 8; PacTel Paging at 17-19; Rochester Tel at 2, 5-7; Rural Cellular Assn. at 3-4; Louisiana Small Telcos at 3-4; SWB at 6-12; Sprint at 21-23; TDS at 4-5; Telocator at 18; Time Warner at 6-9; U.S. Intelco at 5; UTC at 7-8.

operations.⁴⁴ Awarding such licenses by means of auctions would undercut their utility and adversely affect the effective operation of cellular and paging services.⁴⁵ Applying competitive bidding to such links may also be inconsistent with the statutory mandate.⁴⁶ Accordingly, the Commission should reject this proposal.

Finally, a fair application of the competitive bidding rules should encompass private radio services that have access to spectrum on an exclusive basis and that provide for-profit services to subscribers.⁴⁷ Notwithstanding the claims of entities with SMR interests,⁴⁸ licenses for SMR frequencies that are allocated on an exclusive basis should be subject to auctions. Where provided on a for-profit basis, these services are competitive with cellular, PCS and other wireless services and should be processed under the

⁴⁴ E.g., Alcatel at 2-3; APC at 8-10 (microwave used in support of PCS); AT&T at 20-23; BellSouth at 45-46; California Microwave at 3-7; Comcast at 14-15; GTE at 3-4; PacBell at 18-19; Rochester Tel at 2, 5-6; Time Warner at 6-9.

⁴⁵ E.g., APC at 9-10 (same analysis applied to PCS); Comcast at 15; Cox at 9; California Microwave at 4-7; Rochester Tel at 2, 6; SWB at 9-11; U.S. Intelco at 6.

⁴⁶ E.g., APC at 9; Cox at 9; NYNEX at 12; PacBell at 18; PacTel at 9-10; Rochester Tel at 5; SWB at 7-8; U.S. Intelco at 5-6.

⁴⁷ See, e.g., E.F. Johnson at 7; GTE at 17; PacBell at 19; PageNet at 48; SWB at 13-14.

⁴⁸ E.g., AMTA at 9-15; Comcast at 13.

same standards. Similarly, applications for cellular unserved areas, both those currently on file as well as those that may be filed in the future, should be governed by the auction procedures.⁴⁹

IV. THE OPENING COMMENTS UNDERSCORE THE IMPORTANCE OF ADOPTING CLEAR DEFINITIONS OF "DESIGNATED ENTITIES" AND ESTABLISHING SAFEGUARDS TO ENSURE THAT ANY PREFERENCES FAVOR ONLY SUCH ENTITIES

The Commission's proposals regarding the treatment of "designated entities" have resulted in a flood of proposals. The Commission now has before it a wide variety of proposals for defining the suggested categories of designated entities.⁵⁰ In addition, commenting parties have raised a

⁴⁹ See Bell Atlantic at 22; BellSouth at 44-45; SWB at 12-13. The Commission has received a number of letters and pleadings from applicants for cellular unserved areas arguing that auctions should not be applied to the already filed applications. These entities allege that they have invested substantial sums in preparing applications in reliance on the use of lotteries, and that the Commission may not now alter the mechanism for granting the unserved area licenses. Similar arguments were rejected when the Commission changed from comparative hearings to lotteries for the selection of cellular licensees. Maxcell Telecom Plus v. FCC, 815 F.2d 1551, 1554-1556 (D.C. Cir. 1987). Moreover, if these individuals, partnerships and others were truly serious about building on their existing investment and providing service to the public, they would have a greater chance of doing so in an auction rather than in a lottery. Their true motives -- protection of their lottery ticket -- are transparently evident.

⁵⁰ E.g., Alliance of Rural Area Telephone and Cellular Service Providers at 3-4; Calcell Wireless at 8-13 ("infrastructure preference"); CTP at 2-4 ("innovator's bidding preference" for designated entities that are also PCS
(continued...)

host of varied techniques for according preferential treatment to the different categories of designated entities, however defined.⁵¹

⁵⁰(...continued)
innovators); Economics and Technology at 2-4 (list of qualifying minorities should include the handicapped and disabled); FiberSouth at 3 (the valuation of the net worth of an applicant seeking to qualify as a small business should relate back to the date of adoption of the PCS Second Report and Order -- September 23, 1993); Liberty Cellular at 4-5 (qualifying minorities and women should have a principal place of residence in proposed service area); MEBTEL at 3 (women and minority owned business should receive a preference only if the operation also can be classified as a small business or a rural telephone company); National Rural Telecom Assn. at 5 (LECs that are REA and RTB borrowers should fall within the rural telephone company definition).

⁵¹ E.g., Alliance Telecom at 2, 7-8 (specify additional deferred payment benefits for "special preference" groups where, inter alia, a member of the management team is a designated entity and thirty percent of the management team are designated entities); American Wireless Communication Corp. at 19-21 (10 percent discount on a cash bid by a designated entity, or discount linked to level of minority ownership or control); Association of Independent Designated Entities at 7-8 (125 percent bid multiplier); Chickasaw Telephone Company at 4-5 (cellular restrictions should not apply to rural telephone companies); Devsha at 5 (application of a bid multiplier for designated entities); Lightcom International at 2 (separate set-aside for minority and women-owned businesses); Murray at 10-14; Minority PCS Coalition at 7-8 (a separate frequency block should be set-aside for minorities, distinct from the blocks for rural telcos, women-owned or small business); NABOB at 10-11 (minorities should receive a bid increase factor of 25 percent); Rural Cellular Assn. at 14-17 (Block C should be set aside exclusively for rural telcos; losing rural telcos should be able to partition their telephone service area from the licensed area prior to construction by the successful bidder); Rural Cellular Corp. at 1 (Block C should be set aside for rural telephone companies by BTAs); Telmarc at 3-4 (10 percent bid reduction to be given to entities that qualify as pioneer preference applicants and as designated entities).

Regardless of what definitions the Commission adopts, the sheer magnitude of comment on these issues underscores the importance of the Commission first establishing clear definitions for each category of designated entity, and then strictly enforcing such definitions.⁵² The Commission should further require that designated entities hold at least a 50.1 percent interest (both equity and management control) in the bidder.⁵³ Similarly, any consortium seeking to take advantage of designated party status must be controlled and owned at least 50.1 percent by designated entities.⁵⁴ In addition, the Commission should clarify the definition of rural telephone company to limit extension of the preference only to small, truly rural companies.⁵⁵ Finally, any preferences for designated parties should be limited to the

⁵² E.g., AT&T at 25-26; GTE at 12.

⁵³ E.g., Alliance of Rural Area Telephone and Service Area Providers at 4; AT&T at 25; BellSouth at 29; CALL-HER at 12; Cellular Service at 8; GTE at 13-14; Minority PCS Coalition at 4; NTCA at 3; PacBell at 21; Point at 3; Telocator at 9; Windsong at 3.

⁵⁴ E.g., AT&T at 25-26; Breen at 6; Minority PCS Coalition at 5 (all members of consortium must qualify as designated entities); PacBell at 21; PMN at 17; Rural Cellular Assn. at 19; Sprint at 10 n.10; TDS at 17 ("more than 50 percent of the ownership of the consortium is in the hands of qualifying entities and . . . control is exercised exclusively by them").

⁵⁵ E.g., Telocator at 10-12.

spectrum blocks specifically allocated for designated entities.⁵⁶

These requirements, strictly applied, are necessary to ensure that the Commission's preferential treatment of designated entities is not abused by parties seeking to make money at the expense of the American public and potential telecommunications service subscribers. Accordingly, implementation of the appropriate safeguards will enhance achievement of the Congressional directive that the Commission facilitate the participation of women, minorities, small businesses, and rural telephone companies in new telecommunications technologies such as PCS.

V. CONCLUSION

Adoption of effective procedures for competitive bidding presents the Commission with unprecedented opportunities. To the greatest extent possible, the Commission should pursue straightforward methodologies. The simultaneous bidding approach suggested by McCaw in this reply effectively balances competing goals and should result in the award of licenses most consistently with the public interest. In

⁵⁶ Designated entities would still be permitted to bid in other spectrum blocks, but would not be accorded any special treatment vis-a-vis other bidders in the blocks not set-aside for designated entities.

contrast, combinatorial bidding should be rejected and given no further consideration.

Respectfully submitted,

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