> [I]t was never the intent of Congress for auctions to replace the Commission's responsibilities to make decisions that are in the public interest. Rather, the competitive bidding authority was always intended to address those situations where the Commission could not either narrow the field of applicants or select between applicants based upon substantive policy considerations . . . auctions are not a substitute for reasoned decisionmaking.[143/]

Thus, it is evident that congressional mandate itself requires the Commission to set fundamental policies with respect to the MSS Above 1 GHz service, i.e., technical and service rules, before resort to alternative measures such as auctions may be considered.

Indeed, the entire thrust and substance of the legislation authorizing the Commission to use auctions to assign licenses is geared toward Personal Communications Services ("PCS"), which are domestic, terrestrial mobile services for which thousands of licenses will be available in hundreds of different markets.[144/] By contrast, the inherently domestic considerations that motivated Congress to enact the competitive bidding legislation, and that also characterize the Commission's initial proposals for auction mechanisms, simply do not apply to a non-local, indeed

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143/ Dingell Letter at 2 (emphasis added).

144/ See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services (Second Report and Order), 8 FCC Rcd 7700 (1993) (reconsideration pending).

inherently global, international satellite service such as the MSS Above 1 GHz, where there are currently no more than six applicants.

Against this backdrop, the Commission notes in the NPRM that it is explicitly required by the spectrum auction legislation to "prescribe area designations and bandwidth assignments that promote . . . ," inter alia, "equitable distribution of licenses . . . [and] economic opportunity for a wide variety of applicants."[145/] The Commission further requests comment in the NPRM "on the manner in which this statutory obligation can be taken into account in auctions for these types of services."[146/] The goals and obligations addressed, however, simply cannot be attained through auctions in the MSS above 1 GHz service because "equitable distribution of licenses" and accommodation of "a wide variety of applicants" cannot be achieved through such procedures when so few applicants can be licensed -- perhaps as few as two under the Commission's suggested auction methodology.[147/]

Moreover, as a very practical matter, in the current processing group -- from which all of the near-term providers of MSS Above 1 GHz are likely to come -- there are no representatives of the identified "designated entities," i.e., small businesses, businesses controlled by minorities and women, and rural telephone

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145/ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 1993 U.S.C.C.A.N. (107 Stat.) 312, 389 (to be codified at 47 U.S.C. § 309(j)(4)(C)) ("OBRA"); and NPRM, 9 FCC Rcd at 1117 (¶ 43).

146/ NPRM, 9 FCC Rcd at 1117 (¶ 43).

147/ Id. at 1118 (¶ 45).

companies, for which the auction legislation suggests preferential treatment in order to secure the economic opportunity for a wide variety of applicants that the legislation mandates. In fact, because huge amounts of up-front capital will be required to establish MSS Above 1 GHz systems, it is virtually impossible that a company that meets the definition established by the Commission for a "small business" could even raise the funds necessary to begin construction of the necessary satellites, let alone implement service.[148/] In addition, even if there were applicants in the current processing group that were eligible for a designated entity preference, it would indeed be a daunting task to formulate any system of set-asides that would be viable for the preference recipient to actually establish service, without dramatically reducing the ability of the other applicants to implement service. Neither the Commission nor any party to this proceeding has even attempted to tackle this task.

148/ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, (Second Report and Order), FCC 94-61, slip. op. at ¶ 271 (released April 20, 1994) ("Second Competitive Bidding Order") (to qualify as a "small business," an entity must show that, together with its affiliates, it has no more than a $6 million net worth, and did not have in excess of $2 million in after tax profits).

b. Because The MSS Above 1 GHz Service Is Inherently Global In Scope, The International Ramifications Of Assigning Licenses By Auction Must Be Carefully Considered.

The Commission also noted in the NPRM that implementing auctions for MSS Above 1 GHz "might have unintended consequences internationally."[149/] In particular, the Commission noted that other nations might follow the lead of the United States "in imposing licensing costs on MSS Above 1 GHz systems."[150/]

TRW concurs with this insightful assessment. The use of auctions in the United States to assign spectrum to MSS Above 1 GHz systems would indeed have substantial, and plainly adverse, consequences abroad. Domestic bidding for licenses would not only expose U.S. licensees to possible high entry charges in other countries but, perhaps as significantly, it would risk violating long-established International Telecommunication Union policies against treating the orbit/spectrum resource as a commodity. The United States would very likely be perceived as behaving no differently from countries that have recently sought to manipulate international processes by attempting to secure scarce orbital slots and spectrum for the sole apparent purpose of exploiting these resources for pecuniary gain.[151/]

149/ NPRM, 9 FCC Rcd at 1117 (¶ 44).

150/ Id.

151/ See also Comments of TRW, PP Docket No. 93-253, at 17 (filed November 10, 1993).

And as noted above, MSS Above 1 GHz licensees clearly would be disadvantaged in the global market if potential competing systems licensed by other countries are permitted entry in their domestic markets without paying for spectrum. As the Commission itself noted in the NPRM, Germany, Tonga, Canada, France and INMARSAT have each advance-published the use of the same spectrum which the U.S.-based MSS Above 1 GHz applicants plan to use.[152/] Potential U.S. MSS providers could be particularly disadvantaged by competition from INMARSAT because it is conceivable that the INMARSAT Convention and the Communications Satellite Act may be construed to require that Comsat be permitted to access INMARSAT capacity from the United States without making any payment for U.S. spectrum at all.[153/]

Of course, the United States could still impose competitive bidding procedures for entry into the U.S. market on potential foreign-based international MSS providers other than INMARSAT. However, if the FCC proceeds to charge for spectrum access in the United States, it is a virtual certainty that other countries will follow suit around the world -- thus producing additional cost burdens and perhaps

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152/ See NPRM, 9 FCC Rcd at 1114-1115 (¶ 40) & n.72. See also Motorola/Loral Joint Comments at 24-25 and n.41 (filed October 7, 1993) (observing that auctions would likely undermine the economic viability of the MSS Above 1 GHz service by exposing service providers to excessive cost burdens).

153/ See Convention on the International Maritime Satellite Organization, September 3, 1976, reprinted in INMARSAT Basic Documents (4th ed. 1989). See also 47 U.S.C. § 751 et seq. (1991).

raising the investment requirement for these new and innovative services to a level that renders them economically inviable. As then-Chairman Quello wrote this past summer to various members of Congress, "requiring use of competitive bidding for low Earth orbiting satellite system licenses in this country might subject those licensees to exorbitant payment requirements for access to spectrum in other countries."[154/]

Competitive bidding would thus result in substantially increased costs for all system operators, where foreign competitors may not face such up-front obstacles. The burden on U.S. operators would inevitably lead to higher consumer charges that could jeopardize the economic viability of some or even all service applications, particularly those serving less-populated areas. Indeed, it could make the MSS Above 1 GHz a proposition so fraught with risk as to deter most potential entrants, resulting in a non-competitive market, or worse, no market at all. In short, the disadvantages and dangers of adoption of the competitive bidding procedures for MSS Above 1 GHz decisively outweigh any possible benefits. See Section 3(d), infra.

154/ Letter from James H. Quello, Chairman, FCC, to various members of Congress, dated June 23, 1993.

c. Were The Commission To Attempt Auctions For The MSS Above 1 GHz service, Several Initial Limits On Such An Auction Are Known.

TRW strongly believes that an auction would likely be the worst mechanism for assigning spectrum to MSS Above 1 GHz systems. At the very least, if the Commission were to pursue this benighted option further, the Commission would need to limit such an auction in certain ways that it appears not to have considered fully in its NPRM.

i. The Commission Cannot Auction Discrete Spectrum Blocks For Which Applications Are Not Mutually Exclusive.

The Commission observes in the NPRM that "there are certain portions of the spectrum [i.e., 2483.5-2500 MHz] in which sharing may be possible among all applicants seeking to use those particular frequencies."[155/] However, the Commission then incorrectly posits that these frequencies "cannot be separated from the rest of the MSS frequencies in determining whether mutual exclusivity exists and whether auctions may be employed."[156/] Thus, the Commission ignores the differences among the applicants' spectrum proposals and arbitrarily concludes that it may "auction the total spectrum allocated for the MSS Above 1 GHz service."[157/]

155/ NPRM, 9 FCC Rcd at 1117 (¶ 45) & n.81.

156/ Id.

157/ Id.

TRW believes that the Commission's analysis is seriously flawed. Absent mutually exclusive applications seeking particular spectrum, there is not only no justification to assign such spectrum via competitive bidding, there is simply no authority to do so under the statute, which requires mutual exclusivity as a prerequisite to consideration of auctions.[158/] Although the statute and legislative history discuss mutual exclusivity in terms of "applicants" or "applications," the concept cannot be divorced from access to spectrum; it is the limitations on spectrum usage that create mutually exclusive situations in the first instance.

More particularly, the Commission's initial generic auction rules, as well as its proposals for competitive bidding in the MSS Above 1 GHz service, are solely spectrum based, i.e., they are premised on bidding for discrete frequency blocks within bands for which there are multiple applications, and in which not all applicants can be accommodated. This paradigm dissolves, however, where there is no barrier to all applicants sharing a particular band, leaving no basis for an auction in such circumstances. Only if the Commission arbitrarily decided to permit particular users, i.e., high bidders, to obtain the exclusive use of spectrum blocks in frequency bands that could otherwise be shared could such a procedure be implemented. However, such a step would not only be wholly spectrum-inefficient, it would be manifestly contrary to the auction legislation.

158/ See OBRA at (107 Stat.) 388 (to be codified at 47 U.S.C. § 309(j)(1)).

For example, the only applicants that have sought to use the S-band MSS frequencies propose to employ CDMA access technology, which is consistent with full-band sharing. One or all of these applicants can therefore be accommodated in this spectrum, and the use of auctions -- the only purpose of which would be the assignment of exclusive spectrum blocks -- could not in any way enhance the efficiency of the assignment process. Thus, because, as the Commission itself observed, all current applicants seeking to use the S-band spectrum allocated for MSS Above 1 GHz propose CDMA systems, and these same applicants are the only ones seeking the lower six megahertz of L-band spectrum, neither of these bands can lawfully be subject to auction. There simply is no mutual exclusivity among the applicants for these spectrum "blocks," as the Commission itself recognizes.[159/] Thus, the only portion of the 1.6 GHz MSS spectrum that might require competitive bidding is the 1616-1626.5 MHz, the portion of the MSS Above 1 GHz spectrum allotment that cannot be shared among all current applicants.

159/ See NPRM, 9 FCC Rcd at 1117 n.81 ("We recognize that there are certain portions of the spectrum in which sharing may be possible among all applicants seeking to use those particular frequencies" -- specifically naming the 1610-1616 and 2483.5-2500 MHz bands) (emphasis added). The spectrum auction legislation clearly forbids the use of auctions in such instances. See OBRA at (107 Stat.) 388, 389-390 (to be codified at 47 U.S.C. § 309(j)(1) and (6)).

ii. Any Auction Scheme Adopted For The Current MSS Above 1 GHz Processing Group Cannot Provide For Auctioning Feeder Link Spectrum.

Regardless of what action the Commission might otherwise take with respect to competitive bidding for MSS Above 1 GHz, under no circumstances may MSS feeder link spectrum, which is generally non-adjacent to service uplink and downlink bands, be subject to separate bidding. This is so because the MSS Above 1 GHz applicants have proposed specific feeder link bands, and no proposal by any applicant is mutually exclusive with another's proposal.[160/] As discussed in the preceding section, the legislation approving spectrum auctions precludes the Commission from subjecting applicants to competitive bidding where their proposals are not mutually exclusive proposals to provide the same service. The Congressional spectrum auction scheme is thus limited to intraservice competitive bidding.

The auction legislation specifically contemplates that spectrum allocation decisions will be made as they presently are,[161/] and it is in allocation decisions where the Commission determines the ability of two or more services to share a frequency band (and on what conditions, etc.). Indeed, in its recent adoption of

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160/ TRW, for example, has proposed feeder link frequencies in the Ka-Band (at 19.7-20.2 GHz and 29.5-30.0 GHz). Motorola has stated that it will require approximately 200 MHz for feeder links at different frequencies within the Ka-Band. Other applicants have proposed establishing feeder links in the 5150-5250 MHz and 6484-6591 MHz bands.

161/ See OBRA at (107 Stat.) 389 (to be codified at 47 U.S.C. § 309(j)(6)(A)).

general competitive bidding procedures, the Commission acknowledged that it is required to both determine that mutual exclusivity exists, and that auctions would serve the public interest objectives set forth in the auction legislation,[162/] before utilizing competitive bidding to assign spectrum.[163/]

The Commission also observed that mutual exclusivity is very rare where intermediate links are concerned, because prior coordination usually removes any conflict in spectrum use.[164/] It then expressed concern that auctioning such links "might lead to significant delays in the provision of services thus hindering the development and rapid deployment of new technologies, products and services for the benefit of the public," in addition to imposing "significant" costs on both licensees and the Commission.[165/] Thus, the Commission concluded that intermediate links, including MSS feeder links would not be subject to auctions.[166/]

Accordingly, any right to operate an MSS system in primary uplink and downlink frequencies must carry with it the authority to use a sufficient amount of additional spectrum for required feeder links. The Commission should specifically allocate spectrum for this purpose. Following such allocation of spectrum for MSS

162/ See OBRA at (107 Stat.) 388 (to be codified at 47 U.S.C. §§ 309(j)(3)(A)-(D).

163/ See Second Competitive Bidding Order, FCC 94-61, slip. op. at ¶ 43.

164/ See id.

165/ Id.

166/ Id.

Above 1 GHz feeder links, so long as no mutually exclusive requests exist for such allotments among the current applicants, this spectrum can be assigned to the MSS Above 1 GHz licensees without resort to an auction.

d. Were The Commission To Attempt Auctions For The MSS Above 1 GHz service, Several Guidelines And Restrictions Should Be Adopted Or Imposed.

i. Implementation Of Auctions Would Necessitate The Resolution Of Several Thorny Threshold Issues.

Although auctions are inappropriate for the MSS Above 1 GHz service for the reasons identified above, any decision to adopt competitive bidding for assignment of MSS Above 1 GHz licenses could not be made until the Commission addresses a number of troublesome threshold questions, including the basic question of which applicants would be permitted to bid and whether a review of each applicant's financial and technical qualifications should be undertaken prior to bidding. On one hand, it might seem prudent to ascertain the basic eligibility of applicants prior to conducting an auction, in order to ensure that all those participating have the capability to proceed with construction upon award of a license. On the other hand, the very exercise of reviewing financial and coverage data prior to bidding could

become bogged down in procedural wrangling and litigation, particularly if there are close questions as to whether an applicant meets the standard.

It might therefore be prudent to defer any consideration of such basic qualification until after the bidding is completed and putative winners have been selected. The Commission could then solicit comments on whether the high bidders are technically and financially qualified to proceed with construction. This mechanism would have the added advantage of permitting some applicants, which might not be able to meet the dual financial demands of securing spectrum and moving forward to implement a system, to enter into bidding consortia (see below) that would help defray the spectrum costs by spreading them over multiple service providers. Indeed, the process of making an initial up-front payment followed by a substantial deposit upon completion of bidding may in itself be sufficient qualification to avoid the need for a separate post-auction inquiry into the financial wherewithal of a winning bidder.

Of course, a Commission decision not to inquire into an auction winner's capability to go forward with construction, launch and operation, absent other controls (i.e., anti-trafficking regulations), could encourage speculators or simply could lure applicants with shaky financial backing into an endeavor that is doomed to fail. These conflicting considerations only serve to illustrate that the conduct of any auction for the MSS Above 1 GHz service is fraught with difficult procedural questions. The immense amounts of money likely to be involved in actually implementing the service

make the issues here considerably more troublesome than they would be in services that will involve less substantial outlays, and where estimations of spectrum value are likely to be much easier to make.

In the NPRM, the Commission itself raises the important question whether it should "permit successful bidders to agree among themselves to implement co-frequency systems?"[167/] TRW believes that if the FCC were to attempt auctions, such cooperative efforts should not only be permitted, but encouraged. This query introduces an important concept for auctions where several, but not all, applicants would be able to share spectrum, i.e., that the Commission must take care that its efforts to avoid "collusion" in an auction do not at the same time discourage spectrum efficient combinations that would better serve the public interest.[168/]

Moreover, TRW believes that the ability to collaborate should not be limited to the post-auction stage. Instead, multiple applicants should be permitted to agree prior to bidding that, because their system designs will enable them to operate simultaneously within the same frequencies, they will pool their resources in order to obtain the necessary spectrum to operate such co-frequency systems. Based, for example, on the model proposed by the Commission, where a single applicant would be permitted to secure up to four 2.0625 MHz frequency blocks in each direction

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167/ NPRM, 9 FCC Rcd at 1118 (¶ 45) (emphasis added).

168/ See Second Competitive Bidding Order, FCC 94-61, slip op. at ¶ 221.

through auction, a combination of two (or more) applicants capable of sharing the same spectrum should be permitted to secure up to eight blocks in each direction. However, as this would absorb the entire allocation for MSS Above 1 GHz at issue in this proceeding, this consortium approach should be strictly limited to applicant consortia that can share with multiple entrants across all of the spectrum bands secured in this fashion.

By proceeding in this way, the Commission can promote the maximum number of entrants in the spectrum now available for MSS. The ability of systems capable of spectrum sharing to submit joint bids is manifestly pro-competitive, as it would permit several competing systems to co-exist in the same spectrum blocks. Conversely, it would be counterproductive to restrict cooperation among such applicants, particularly where one of the significant legislative goals in authorizing auctions was promoting competition and avoiding excessive concentration of market power.[169/]

On the other hand, permitting a single applicant to bid on scattered spectrum bands could very well promote anti-competitive conduct. For example, a bidder should not be permitted to bid on a single spectrum block that is not contiguous to other blocks it has secured. The absence of such a restriction could conceivably permit an applicant to disrupt potential operations by other applicants by strategically

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169/ See OBRA at (107 Stat.) 388 (to be codified at 47 U.S.C. § 309(j)(3)(B)).

bidding on particular blocks in order to deny other applicants significant contiguous spectrum in which to operate. Thus, in any MSS Above 1 GHz auction, restrictions should be adopted to prohibit an applicant from bidding upon non-adjacent spectrum blocks.

ii. Payment Methods Should Take Into Account The Novelty Of The Technology That Will Be Used To Offer MSS Above 1 GHz Service, And The Risk Associated With Its Implementation.

In its recent adoption of generic competitive bidding rules, the Commission set forth a variety of means of easing the payment burden upon designated entities, including installment payments, bidding credits, and reduced upfront payments.[170/] These are highly appropriate means of both easing the payment burdens on entrepreneurs and facilitating new opportunities for entities traditionally underrepresented in the telecommunications field.

However, in addition to assisting small and minority- and women-owned businesses in establishing bidding procedures, when appropriate, the Commission also should take into account the riskiness of the service to be offered in adopting payment mechanisms. Unlike those seeking opportunities to build communications systems where markets are established, technologies have been tested, and most risks are known, applicants to provide new or innovative services face a broader range of both

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170/ See, e.g., Second Competitive Bidding Order, FCC 94-61, slip op. at ¶¶ 231-244.

uncertainties and start-up expenses, from pre-application research and development to launch insurance payments that are likely to be very high.

For these reasons, if auctions are chosen to assign MSS Above 1 GHz spectrum, the Commission should adopt mechanisms to ease the initial out of pocket costs, and facilitate the rapid implementation of this new service (i.e., by avoiding large immediate payments for successful bidders). Those willing to risk substantial capital to provide beneficial services to the public should be encouraged to do so with flexible payment options, including the leveraging of possibly distant future revenue streams. Some of the same kinds of enhancement mechanisms used for designated entities can and should be used to facilitate the introduction of new technology.

For example, if the Commission seeks to implement auctions for the MSS Above 1 GHz service, it should adopt upfront payment policies that are lower in percentage terms than those for conventional services and, even more importantly, provide greater flexibility in the timing of such payments.[171/] Unreasonably restrictive "performance requirements" would only undermine Congress's directive in its auction authorization legislation "to promote investment in . . . new technologies and services."[172/]

171/ For example, a winning bidder should not be required to deposit twenty percent of the bid immediately upon winning an auction, as provided for in the recently adopted auction rules (see Second Competitive Bidding Order, FCC 94-61, slip op. at ¶ 192), but should instead be given adequate time to arrange payment from financial backers.

172/ OBRA at (107 Stat.) 389 (to be codified at 47 U.S.C. § 309(j)(4)(B)).

Indeed, in its initial consideration of auction procedures, the Commission indicated that it saw some advantages to accepting payment for auction bids in the form of future royalties "[i]f the FCC is licensing a highly risky service."[173/] If successful in obtaining a license by auction, high risk ventures also should be permitted greater flexibility in meeting payment deadlines. This latitude should include the use of both letters of credit (as permitted when the AMSC consortium was established) and the ability to rely on royalty payments. While such methods may be difficult to apply, they are indispensable when commercially untested technology is involved. Without such methods, competitive bidding procedures would likely freeze out innovators and competition.

3. Lotteries Should Be Used To Assign Spectrum For The MSS Above 1 GHz Service Only As A Last Resort, If Band Sharing And Hearings Are Both Found Unworkable.

In the NPRM, the Commission suggested that it might assign spectrum for MSS Above 1 GHz licensees via a lottery, pursuant to section 309(i) of the Communications Act.[174/] However, while the statute endows the Commission with broad authority to choose licensees through random selection, such authority is

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173/ See Implementation of Section 309(j) of the Communications Act, Competitive Bidding, (Notice of Proposed Rule Making), 8 FCC Rcd 7635, 7645 (1993) ("Competitive Bidding NPRM").

174/ See 47 U.S.C. § 309(i); NPRM, 9 FCC Rcd at 1118 (¶ 46).

not unlimited. The use of random selection procedures to select licensees in the new MSS Above 1 GHz service, however, would conflict with the language and legislative history of Section 309(i), and the Commission's prior application of its rulemaking powers to impose lotteries thereunder.

a. There Is No Established System Providing For The Use Of Lotteries To Assign Satellite Authorizations.

To date, the Commission has implemented random selection procedures for the licensing only of certain common carrier services, which are enumerated in Section 1.821 of the Commission's Rules.[175/] The Commission has never implemented random selection procedures for satellite services (which are licensed under Part 25 of the Commission's rules). The consideration of the Commission's proposal to extend such procedures to satellite services would necessarily be governed by the statute and its legislative history, and by the Commission's prior actions adopting lotteries pursuant to Section 309(i).

175/ See 47 C.F.R. § 1.821 (1992). The legislation mandating that the Commission adopt competitive bidding procedures will ultimately result in the modification of this rule. Henceforth, those private and common carrier services that involve licensee compensation from subscribers will be subject to auctions, not lotteries. See OBRA at (107 Stat.) 388 (to be codified at 47 U.S.C.§ 309(j)(2)). Because the pending MSS/RDSS applications were on file before the adoption of auction legislation, however, the Commission theoretically may still consider use of lotteries for that service. See Competitive Bidding NPRM, 8 FCC Rcd at 7661.

Beginning with the adoption of lottery procedures for the Public Land Mobile Service in the original Lottery Order,[176] and in all subsequent extensions of such procedures to new common carrier services, the Commission adhered strictly to the criteria set forth in the legislative history of the lottery statute to determine whether the use of random selection in a new service is in the public interest. In the Conference Report relating to the bill, Congress set forth the following criteria for the Commission's consideration in determining whether a lottery would serve the public interest:

> [1] whether there is a large number of licenses available in the particular service under consideration; [2] whether there is a large number of mutually exclusive applications for each license, for example, when a new service is initiated; [3] whether there is a significant back-log of applications; [4] whether employing a lottery would significantly speed up the process of getting service to the public; and [5] whether selection of the licensee will significantly improve the level [of] diversity of information available in the community versus the use of the traditional comparative hearing process. The Commission, in making this public interest assessment when deciding whether to utilize a lottery in a particular instance, should consider all of these factors.[177]

176/ Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 93 F.C.C.2d 952 (1983) ("Lottery Order").

177/ H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 37 (1982), reprinted in 1982 U.S.C.C.A.N. 2261, 2281 ("Conference Report").

In every instance where the Commission has adopted lottery procedures for a service, its decision has been firmly based upon careful application of these criteria.[178/]

The MSS Above 1 GHz service does not meet these criteria. First, depending upon the technical specifications ultimately adopted, at most, only a few licenses will be available. Second, there are only a small number of applicants vying for these licenses.[179/] Third, because this is the only group of applications eligible for processing at this time, there is no back-log in processing applications.[180/] Finally, it is unlikely that choosing an applicant by random selection would speed

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178/ See Lottery Order, 93 F.C.C.2d at 953, 992; Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 F.C.C.2d 175, 180-82 (1984) ("Cellular Lottery Order"); Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation To the Instructional Television Fixed Service, the Multipoint Distribution Service and The Private Operational-Fixed Microwave Service, 57 R.R.2d 943, 945-46 (1985) ("MMDS Lottery Order"); Amendment of Parts 1 and 21 of the Commission's Rules to Establish Procedures for Processing Mutually Exclusive Applications for Digital Termination Systems in the Digital Electronic Message Service, 59 R.R.2d 151, 153-156 (1985) ("DEMS Lottery Order").

179/ To illustrate the marked contrast with other services where lotteries were instituted, in the Cellular Lottery Order the Commission noted that "[i]n markets 31-60, we have an average of 11 mutually exclusive nonwireline applications per market. Only three markets have five or fewer nonwireline applications; most have 12 or more mutually exclusive applications." See 98 F.C.C.2d at 181. See also DEMS Lottery Order, 59 R.R.2d at 155 ("there are approximately 77 service areas in which there are some 301 situations involving 845 applications"); MMDS Lottery Order, 57 R.R.2d at 946 ("approximately 1,000 MMDS licenses are available . . . there is a backlog of about 16,000 pending MMDS applications.").

180/ The initial MSS Above 1 GHz licenses will be for inherently national, indeed international, systems, and the Commission has the discretion to determine when and whether additional applications will be allowed.

service to the public because the applicant so chosen might not have the technical capability to move quickly to implement service. Thus, none of the elements that Congress enumerated to make the requisite public interest finding are present in the instant case.

b. The Commission Previously Has Soundly And Prudently Rejected Lotteries For Assignment Of MSS Licenses.

Any Commission consideration of the use of random selection for the MSS Above 1 GHz service must take into account the fact that lotteries have never before been used to award satellite licenses of any type, even in cases such as the domestic fixed satellite service, there was more homogeneity among proposals than is extant among the current MSS applicants. In contrast, all applicants in this proceeding have developed technologically distinct proposals on which some have spent millions of dollars for research and development. These expenditures were based on the applicants' faith in the particular technical proposals, and could be severely compromised if a licensee is chosen by an arbitrary lottery mechanism. The application of a random selection procedure to a service such as the MSS Above 1 GHz could thus discourage planning and innovation and encourage speculation by promoting uncertainty concerning how new technologies will be licensed.

Moreover, use of lotteries to select MSS licensees has been explicitly rejected in the past. In 1987, the Commission considered the use of lotteries to select a domestic MSS licensee, and concluded that random selection was inappropriate.[181/] The Commission specifically questioned whether the statutory requirements for using lotteries could be met in the situation where twelve applications had been filed but only one license was to be awarded.[182/] It also suggested that the use of a lottery could actually result in a delay in the implementation of service:

> The determination of qualifications [after selection of a tentative licensee] could significantly delay the award of a license and, consequently, service to the public. If the authorization were awarded to an unqualified entity, the entire process would need to be repeated. Thus, lotteries do not appear to be an acceptable processing alternative.[183/]

Upon remand of its decision to impose a mandatory consortium in the domestic MSS proceeding (and ultimately to license the American Mobile Satellite Corporation), the Commission revisited the issue of the propriety of lotteries in the MSS proceeding. In completing this judicially-mandated task, the Commission was guided by the stern directive of the U.S. Court of Appeals for the District of Columbia Circuit that the Commission determine whether it has "the statutory

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181/ See LMSS Report and Order, 2 FCC Rcd 485.

182/ See id. at 487.

183/ Id.

authority to impose a consortium requirement in lieu of holding comparative hearings with respect to mutually exclusive license applications. This would appear to be a dubious suggestion . . . ."[184/]

Faced with the mandate of the U.S. Court of Appeals for the D.C. Circuit to justify its earlier decision not to assign the single domestic MSS license it was to award through the comparative hearing process, the Commission backpedaled from its prior determination concerning the non-applicability of lotteries. In announcing its Tentative Decision to affirm its consortium requirement, the Commission wanly stated, in dicta buried within a footnote, that "further reflection" had resulted in the conclusion that a lottery would have been permitted in those circumstances "[u]nder the relevant factors mentioned in the legislative history of the lottery statute . . . ."[185/] The Commission, however, did not provide any analysis of the criteria laid out in the legislative history of Section 309(i) or its own prior cases, nor did it make any attempt to explain why the analysis it performed in its 1987 decision, rejecting the availability of lotteries for the domestic MSS service, had become invalid in the interim. In subsequently making its tentative judgment final, the Commission provided no additional meaningful explanation. It merely opined, again

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184/ Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 453 (D.C. Cir. 1991).

185/ AMSC Tentative Decision, 6 FCC Rcd at 4905 n.56.

in dicta, that a lottery "would speed the authorization process" as a possible justification for conducting a lottery to select an MSS licensee.[186/]

The Commission's suggestion in the NPRM that lotteries may be used to assign MSS Above 1 GHz licenses contradicts the finding made by the Commission at the time it initially rejected lottery procedures for MSS. The more recent retreat from this view, in addition to having no bearing on the outcome of the case, was completely unsubstantiated -- whereas the 1987 decision was both substantive and substantiated.[187/] Thus, the use of lotteries in this proceeding would require the full justification and record support that was lacking in the Commission's post-appeal reconsideration of the procedures used to establish AMSC.

186/ Final AMSC Licensing Decision, 7 FCC Rcd at 269 & 276 n.48 sub nom. Aeronautical Radio, Inc. v. FCC, 983 F.2d 275 (D.C. Cir. 1993) (the court affirmed the Commission's refusal to reinstate the application of petitioner Omninet, and declined to review all other aspects of the decision on the ground that no party had standing to seek review).

187/ See LMSS Report and Order, 2 FCC Rcd at 487. Although the Commission also correctly observed in its 1987 action that it was not absolutely bound by the criteria contained in the legislative history, it has, nevertheless, consistently relied upon a consideration of the factors listed in the Conference Report to determine whether to use lotteries. See decisions cited in Footnote 168, supra. Obviously, any departure from the analysis undertaken in these decisions must be accompanied by reasoned explanations.