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June 3, 1994

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

Via Messenger

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JUN 3 1994

Re: **GEN Docket No. 93-253**
Implementation of Section 309(j)
of the Communications Act

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Dear Mr. Caton:

Submitted herewith on behalf of the Association of Independent Designated Entities ("AIDE") are an original plus eleven (11) copies of its Petition for Reconsideration in the above-referenced docket.

Please contact my office directly with any questions or comments concerning the attached.

Respectfully submitted,



William J. Franklin
Attorney for the Association
of Independent Designated
Entities

Encs.

cc: Association of Independent
Designated Entities

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JUN 3 1994

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act)
)
Competitive Bidding)

To: The Commission

PETITION FOR RECONSIDERATION
OF THE ASSOCIATION OF
INDEPENDENT DESIGNATED ENTITIES

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SUMMARY OF COMMENTS

The Association of Independent Designated Entities ("AIDE") is an unincorporated association of entities likely to qualify as "Designated Entities" for the purposes of Section 309(j).

I

The Commission has a well-established policy favoring settlements between applicants filing mutually exclusive applications. Congress was well-aware of this policy when it enacted the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). Amended Section 309(j)(6)(A)-(E) of the Communications Act and the legislative history of the Budget Act clearly show that Congress intended the Commission's settlement policies to apply to auctionable licenses.

Nevertheless, the Commission has adopted service-independent auction rules which apparently preclude full settlements between mutually exclusive auctionable applications. The Commission did this without explanation and without any discussion of its existing settlement policies.

II

The Commission adopted a policy which prevents Designated Entities from using installment payments for the "large and valuable block[s] of spectrum." This policy is inconsistent with Sections 309(j)(3)(B) and 309(j)(4)(D), which envision the Commission providing incentives to Designated Entities for all auctionable licenses.

The Commission's claimed justification for this policy is based on unsupported assumptions of "abuse." The Commission has other rules and policies to prevent each of the claimed abuses.

III

The Commission should modify its auction procedures to eliminate specific provisions which could well disadvantage designated entities. Its bidding activity rules for multi-round auctions are unneeded and hopelessly complex. Such rules should not apply to Designated Entities.

The Commission's limits on simultaneous bidding in multi-license auctions (as computed on the basis of upfront payments) are ambiguous and could needlessly hinder all bidders. Clarification of the simultaneous bidding limits is required.

The three-percent withdrawing bid penalty should not apply when the second winning bid (upon re-auction) exceeds the defaulting bid by more than three percent.

Winning bidders who prevail with low bids and thus have excess upfront payments (i.e., upfront payments above 10% or 20% of the winning bids, plus penalties) should be treated the same as losing bidders. The excess upfront payment should be immediately available for refund or application in another auction.

IV

The Commission should modify its policy to recapture the benefit accruing to a Designated Entity who sells a license received in a set-aside auction. The recapture penalty should credit the licensee's pre-sale investments in the license and

should be based on the portion of the licensee's taxable gain on the sale allocated to the license, with appropriate adjustments.

V

The Commission erred in imposing the same, substantial upfront payments upon Designated Entities that are required from the largest corporations. Because of the difference in size and financial wherewithal, much smaller penalties (in absolute dollar amounts) will punish Designated Entities the same as larger penalties for larger companies.

VI

The Commission failed to consider AIDE's Comments that financial requirements should not be applied to auctioned licenses. The Commission can rationally presume that, if the winning bidder can buy the license, it can build and operate the system.

VII

In its Comments, AIDE demonstrated that the Commission had failed to provide adequate notice of its proposed PCS "filing and processing rules." The Commission provided no information as to the substance of those rules or the regulatory purposes to be achieved thereby.

The Commission erred by assuming that AIDE was challenging the adequacy of the Commission's proposed PCS auction rules. Contrary to the Commission's assertion, virtually no party commented on the filing and processing rules.

The Commission must issue a supplemental Notice of Proposed Rulemaking before adopting PCS filing and processing rules.

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To: The Commission

PETITION FOR RECONSIDERATION
OF THE ASSOCIATION OF
INDEPENDENT DESIGNATED ENTITIES

The Association of Independent Designated Entities ("AIDE"), by its attorney and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the Commission's Second Report and Order in the above-captioned proceeding.^{1/} As set forth herein, the Commission failed to adequately protect the interests of small businesses, rural telephone companies, and businesses owned by members of minority groups and women (defined in Paragraph 227 of the Second R&O as "Designated Entities").^{2/}

^{1/} 9 FCC Rcd ____ (FCC 94-61, released April 20, 1994) ("Second R&O"). A summary of the Second R&O was published in the Federal Register on May 4, 1994 (59 FR 22980). Pursuant to Section 1.4 of the Commission's Rules, this Petition is timely filed.

^{2/} See Second R&O, ¶227. Because of the scope of the Second R&O, this Petition cannot discuss every issue presented by the Second R&O. AIDE's silence on other issues regarding the Second R&O should not be taken to indicate any specific position thereon. AIDE specifically reserves its appellate rights with respect to positions taken in its Comments and Reply Comments in this proceeding. Further, AIDE reserves its rights to challenge the "generic" auction rules of the Second R&O when applied to a specific service. See id., ¶10.

FACTUAL BACKGROUND

In adopting Section 309(j) of the Communications Act, Congress specified that an objective of competitive bidding was to:

Promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women....^{3/}

To implement this goal, Congress required the Commission, in its implementation of competitive bidding regulations, to:

Ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, bidding preferences, and other procedures....^{4/}

AIDE is an unincorporated association, with membership limited to persons and entities likely to be classified as "Designated Entities" under Section 309(j) of the Communications Act. AIDE has previously participated in this proceeding, and its qualifications are a matter of public record.^{5/} Various AIDE members have extensive legal, technical, financial, and communications backgrounds. Many have owned or managed small businesses, and understand the special needs and problems of small and start-up

^{3/} Section 309(j) (3) (B), as quoted in Second R&O, ¶227.

^{4/} Section 309(j) (4) (D), as quoted in Second R&O, ¶227.

^{5/} See Declaration of David Meredith Under Penalty of Perjury, Attachment A hereto.

businesses. Accordingly, AIDE has a special expertise to present the position of the Designated Entities to the Commission.

ARGUMENT

I. THE COMMISSION'S ADOPTION OF AUCTION RULES WHICH APPARENTLY PROHIBIT FULL SETTLEMENTS BETWEEN MUTUALLY EXCLUSIVE, AUCTIONABLE APPLICATIONS VIOLATES SECTION 309(j) OF THE COMMUNICATIONS ACT.

The Commission has a well-established policy favoring settlements between applicants filing mutually exclusive applications. In the cellular context, this policy developed with the Commission's acceptance of full-market wireline settlements in the Chicago and Los Angeles MSAs in 1983.^{6/} At that time, Commissioner Fogarty best articulated the Commission's settlement policies:

[T]his Commission has now twice determined that settlements by mutually exclusive cellular radio applicants are in the public interest, convenience and necessity and will be approved by the FCC.... We have been faithful to this paramount regulatory responsibility in encouraging cellular applicant settlements, and this particular settlement agreement -- and those settlements which I hope will follow on both the wireline and nonwireline sides of the split-frequency cellular allocation -- enjoy the full measure of the Commission's approval.^{2/}

In applying the lottery process to cellular applications, the Commission explicitly retained its policy favoring full-market

^{6/} Advanced Mobile Phone Service, Inc., 91 FCC 2d 512 (1983) (Chicago); Advanced Mobile Phone Service, Inc., 93 FCC 2d 683 (1983) (Los Angeles).

^{2/} Los Angeles, supra (Fogarty, Separate Statement).

settlements.^{2/} The Commission consistently has followed a similar policy permitting, if not encouraging, settlements with respect to all other radio services.

Thus, at the time Congress was considering the amendments to the Communications Act which were ultimately adopted as part of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), the Commission had a well-established settlement policy.

Congress explicitly affirmed the Commission's settlement policy. Specifically, amended Section 309(j)(6) of the Communications Act contains the following "Rules of Construction":

(6) Rules of Construction.- Nothing in this subsection [309(j)], or in the use of competitive bidding, shall-

(A) Alter spectrum allocation criteria and procedures established by the other provisions of this Act;

* * *

(E) Be construed to relieve the Commission of the obligation in the public interest to continue to use ... negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings....

The Conference Report accompanying the Budget Act explained that Section 309(j)(6):

^{2/} Cellular Lottery Rule Making, 101 FCC 2d 577, 582 (1984), modified, 59 RR 2d 407 (1985), aff'd in relevant part, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987). Accord, Fresno Cellular Telephone Company, 1985 LEXIS 2427, *12 ("Our policy of encouraging settlements has enabled us to expedite the processing of cellular applications and thus to bring cellular service to the public with a minimum of delay."), aff'd, Maxcell Telecom Plus, supra; Telocator Network of America, 58 RR 2d 1443 (1985) (tax certificates issued to further the Commission's policy favoring full-market settlements); First Report and Order and Memorandum Opinion and Order On Reconsideration, 6 FCC Rcd 6185, 6221 (1991), reconsidered in part, 7 FCC Rcd 7183 (1992) (cellular unserved areas).

[S]tipulates that nothing in the use of competitive bidding for the award of licenses shall limit or otherwise affect the requirements of the Communications Act that limit the rights of licensees, or require the Commission to adhere to other requirements.^{2/}

These two provisions in Section 309(j) (6) clearly indicate that Congress intended the Commission to carry forward its existing settlement policies.^{10/} The mandated "use [of] negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings" can only mean that settlements (which are the product of negotiation and which avoid mutual exclusivity) are to be permitted under competitive bidding.

The Commission's auction rules are contrary to those statutory requirements. Specifically, the Commission proposes that, once a short-form auction application is filed, auction applicants "will not be permitted to make any major modifications to their applications, including ownership changes or changes in the

^{2/} Conference Report to the Budget Act, H.R. Rep. 103-213, 103rd Cong. 1st Sess, 103 Cong. Rec. H5792, H5915 (August 4, 1993) (provision of House bill adopted in final Budget Act) ("Conference Report").

^{10/} Section 309(j) (1) states that, "If mutually exclusive applications are accepted for filing ..., then the Commission shall have the authority ... to grant such license ... through the use of system of competitive bidding that meets the requirements of this subsection." (Emphasis added.) Tellingly, Section 309(j) (1) does not require that the Commission must use competitive bidding, but only that it has the authority to do so in appropriate cases. That language, together with the incorporation of Sections 309(j) (6) (A)&(E) and 309(j) (7) (B) ("the requirements of this subsection") clearly indicates the legislative intent to make mutual exclusivity only a prerequisite to holding an auction, and not the triggering event for a mandatory auction against the wishes of settling applicants.

identification of parties to bidding consortia."^{11/} Similarly, the Commission states that:

Winning bidders will be required to attach as an exhibit to the long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must be entered into prior to the filing of the short-form application.^{12/}

In other words, the Commission proposes that, once the short-form (pre-bid) applications are filed, the parties will be prohibited from entering into joint ventures or other agreements concerning their bid. However, until the short-form applications are filed, the parties cannot enter into settlement agreements. The listing of short-form applicants tells the parties with whom they must settle, i.e., it lists all the applicants for a specific license.^{13/}

Thus, the Second R&O appears to have prohibited settlements for all services by preventing the formation of post-filing joint ventures or similar arrangements between all the mutually exclusive applicants for any auctionable license.^{14/} Tellingly, the

^{11/} Second R&O, ¶167.

^{12/} Second R&O, ¶225 (emphasis added).

^{13/} See Second R&O, ¶¶167-68.

^{14/} AIDE recognizes that the Commission's quoted language is capable of another interpretation which is consistent with Section 309(j), i.e., that the Commission intends only to prohibit major amendments and post-filing partial settlements by potential auction bidders, but not full settlements which eliminate the need for an auction. Obviously, in the case of a full
(continued...)

Commission never mentioned the word "settlement" or explained the regulatory or statutory purposes which its prohibition was intended to satisfy. As a matter of law, the Commission cannot be concerned that full settlements constitute "collusion" between auction bidders; Section 309(j)(6)(A) & (E) of the Communications Act evidence a Congressional requirement that settlements serve the public interest.

The prohibition is inconsistent with Section 309(j). Although unexplained, it appears to be motivated by revenue maximization, which is prohibited by Sections 309(j)(7)(A) & (B) of the Communications Act. It cannot be reconciled with Section 309(j)(6), as quoted above. Further, it represents poor public policy, in that potential licensees would be arbitrarily precluded from structuring rational and competitive business arrangements between themselves once the pre-bid documents had been filed.

Accordingly, upon reconsideration, the Commission must clarify its generic auction rules to specify that full settlements are permissible between mutually exclusive applications for auctionable licenses.

¹⁴/ (...continued)

settlement, no auction need be held and, strictly speaking, no "winning bidder" exists. If the Commission so intends, it should clarify its language.

II. THE COMMISSION CANNOT LIMIT ITS USE OF INSTALLMENT PAYMENTS BY DESIGNATED ENTITIES TO ARBITRARILY SELECTED AUCTIONABLE LICENSES.

The Second R&O (at 94) states the Commission's limitation on the availability of installment payments for Designated Entities to selected spectrum auctions:

[W]e believe that installment payments should not be available for all spectrum auctions. Rather, in order to match the preference with eligible recipients of the preference, installment payments will only be available for certain licenses that do not involve the largest spectrum blocks and service areas. (For example, in the context of narrowband PCS, we could adopt installment payments for small businesses in the auctions for smaller spectrum blocks.) We will limit the auctions in which this preference can be used in order to avoid the abuses that will likely result if installment payments are available for every auctioned license. Where the license being auctioned is for a large, valuable block of spectrum, for example, we do not want to create incentives for entities to create small business "fronts" enabling large businesses to become eligible for low-cost government financing. Nor do we desire to delay service to the public by encouraging under-capitalized firms to receive licenses for facilities which they clearly lack the resources adequately to finance. See 47 U.S.C. § 309(j)(3)(A). Accordingly, as a general matter, we will only allow installment payments for licenses in those smaller spectrum blocks that are most likely to match the business objectives of bona fide small businesses.

This limitation is inconsistent with the statutory intent of Section 309(j)'s preferences for Designated Entities, and must be deleted upon reconsideration.

As quoted above, Sections 309(j)(3)(B) and 309(j)(4)(D) of the Communications Act instruct the Commission to afford Designated Entities "the opportunity to participate in the provision of spectrum-based services...." As shown by the legislative history of these provisions, Congress did not instruct the Commission to do so only for some licenses, or only when the

Commission in its discretion deems Designated Entities capable to develop the spectrum.

Specifically, the Conference Report describes the legislative intent behind Section 309(j)(4)(D). In the House bill which precluded the 1993 Budget Act, Section 309(j)(4)(D) was described as follows:

Consistent with the public interest, the purposes of the Act, and the characteristics of the proposed service, the Commission is also required to prescribe area designations and bandwidth assignments that promote ... economic opportunity for a wide group of applicants, including small businesses and businesses owned by members of minority groups and women....^{15/}

However, the Conference Report itself described the preference for Designated Entities as expanded:

The Conference Agreement adopts the House provisions, with several amendments.

* * *

The Conference Agreement also modifies House provision to include a provision, based on but not identical to a Senate provision, that requires the Commission to ensure that small businesses, rural telephone companies, and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum-based services....^{16/}

Thus, the Conference Report withdrew the notion of the House bill that the Commission has authority to consider "the characteristics of the proposed service" in awarding preferences to Designated Entities.^{17/} The Commission's proposal, which explicitly

^{15/} Conference Report at H5914 (emphasis added).

^{16/} Id.

^{17/} This explanation thus limits and clarifies the intent of Section 309(j)(4)(C)(II).

proposes to consider "the characteristics of the proposed service" is thus inconsistent with the Communications Act.^{18/}

Indeed, the Commission's limitation on installment payments blatantly proposes to discriminate against Designated Entities. It proposes to deny Designated Entities the right to use installment payments in "the largest spectrum blocks and service areas" and "large, valuable block[s] of spectrum", the licenses for which installment payments would be most valuable. "Redlining" the Designated Entities to the "spectrum ghetto" is contrary to the statutory intent.

Further, the "abuses" which the Commission intends to prevent are speculative, and currently subject to other rules which prohibit their occurrence. There is virtually no record support to indicate that any "abuses" are likely. The Commission's time-honored rules for the disclosure of real-parties-in-interest, as well as its new rule (Second R&O at 106-07) to consider "affiliates" of applicants when assessing qualifications of those claiming to be designated entities, will prevent entities from creating "small business 'fronts' enabling large businesses to become eligible for low-cost government financing," as the Commission fears.

Similarly, the Commission's concern that universal availability of installment payments to Designated Entities could

^{18/} The Commission's claim that Designated Entities remain free to bid for all licenses, even if installment payments are unavailable, is the communications illustration of the old saying that "the law in its majesty equally forbids both the rich and the poor from sleeping under bridges."

result in "under-capitalized firms [receiving] licenses for facilities which they clearly lack the resources adequately to finance" is addressed by the Commission's financial-qualification rules.^{19/} Surely, the Commission is not basing its limitation on installment payments upon an unstated assumption that its real-party-in-interest and financial-qualification rules don't work properly?

Finally, the Commission's stated intention that it "will only allow installment payments for licenses in those smaller spectrum blocks that are most likely to match the business objectives of bona fide small businesses" exceeds the Commission's authority under the Communications Act and represents horrible public policy. The Commission has no statutory authority to determine the proper "business objectives" of small businesses, or of any business, for that matter. The thrust towards deregulation, both generally and in telecommunications, is driven largely by the recognition that government agencies intrinsically cannot determine business objectives as efficiently or effectively as the businesses themselves.

If the Commission's discretionary auction installment-payment rules had been effective in the late 1960's when then-infant MCI was getting its first microwave licenses, the FCC could have easily (and unknowingly) killed off what has become a driving force in telecommunications. Giving the FCC the authori-

^{19/} See Second R&O at 65 (short-form pre-lottery application includes certification that applicant is financially qualified).

ty to tilt the auction process for (or against) Designated Entities will politicize auction rulemakings, represent poor public policy, and violate Section 309(j).

Accordingly, the Commission must make installment payments available to Designated Entities for every auctionable license.

III. THE COMMISSION SHOULD MODIFY ITS AUCTION PROCEDURES TO ELIMINATE SPECIFIC PROVISIONS WHICH COULD WELL DISADVANTAGE DESIGNATED ENTITIES.

AIDE respectfully suggests that the Commission should modify certain generic auction procedures which could well disadvantage Designated Entities in specific circumstances.

Bidding Activity Rules The Second R&O (at 52-56) adopting bidding activity rules which could well limit the participation of Designated Entities seeking some licenses being auctioned as part of a multi-license group. The Commission adoption of the three-stage Milgrom-Wilson rule, with its required (and as-yet undeveloped) support software, adds an incredible level of needless complexity to its already complex multiple-round, simultaneous auction scheme.^{20/}

The Commission clearly has inherent authority to control the pace of auctions on an ad hoc basis. Adding an activity rule, which forces those who might not want a license, to continue bidding just for the sake of bidding, adds nothing but complexity and confusion. Almost by definition, Designated Entities need

^{20/} More fundamentally, why should the FCC care whether bidders participate in the entire auction, or only at the end when they might be the highest bidder?

the flexibility to bid - or refrain from bidding -- based on the current bidding. Accordingly, the Commission should withdraw its activity rules, at least as applied to Designated Entities.

Simultaneous Bidding Rules The Second R&O (at 68 n.133) illustrates its simultaneous bidding rules with a hypothetical in which a bidder has made a sufficient upfront payment to bid on 30 MHz PCS licenses covering 50 million pops. Then the Commission explains:

The bidder will not be permitted to bid (at any time) in the auction, or be permitted to win, 30 MHz PCS licenses covering 50 million pops.

This explanation is ambiguous, and needs clarification.

AIDE sees at least three possible interpretations for the Commission's example:

- Does the Commission mean that the bidder can only bid for 30 MHz licenses in specified markets (say markets A, B, D, and D) totaling less than 50 million pops, even though it is not the concurrent high bidder in markets A, B, C, and D, and might not get any or all of the markets?
- Does the Commission mean that, any given round, the bidder can only bid for 30 MHz licenses in markets totaling less than 50 million pops, even though the specific markets vary from round to round?
- Does the Commission mean that, any given round, the bidder can only bid for, or be the current high bidder for, 30 MHz licenses in markets totaling less than 50 million pops, even though the specific markets vary from round to round?

AIDE suggests that the third interpretation best serves the Commission's intentions regarding wide-spread auction participation, bidder flexibility, and application of upfront pay-

ments.^{21/} Designated entities will likely have a lesser capability to make upfront payments than other potential bidders, and thus need the ability to utilize their upfront payments flexibly.

Three Percent Defaulting Bid Penalty The Second R&O adopted (at 59 & 78) a three percent penalty to be paid by a bidder who withdraws its bid after a multiple-round auction terminates and the Commission must re-auction the license. In the case where the second auction produces a higher winning bid than the first (defaulted) auction, the penalty is three percent of the defaulting bid.

The proposal will produce a windfall to the Treasury if the second bid exceeds the defaulting bid by more than three percent. While AIDE takes no position with respect to the defaulting bidder being liable for any shortfall in the second bid, if the second bid exceeds the defaulting bid by three percent or more (i.e., the Commission will receive the penalty amount anyway), then the defaulting bidder should pay no penalty.^{22/} If the second bid exceeds the defaulting bid by less than three percent, the defaulting bidder's penalty should be the difference between the second winning bid and 103% of the defaulting bid.

^{21/} Adoption of this interpretation would require that the bidders be permitted to withdraw their high bids for some markets without penalty in order to stay under their MHz-pop ceilings in subsequent bidding for other markets in the same auction. Such withdrawal would not abuse the auction process or prejudice auction revenues; the bidder would be merely shifting its high bid in some markets for higher bids in other markets. Thus, no bid-withdrawal penalty would be necessary or appropriate.

^{22/} In professional basketball, this is called the "no harm, no foul" rule.

In other words, in the case of a post-auction default, the Commission should always collect at least 103% of the defaulting bid (from the defaulting and second bidder combined), but never more than amount of the second bid.

Refund of Excess Upfront Fees The Second R&O (at 75 n.144) states that:

[I]f the upfront payment already tendered by a winning bidder, after applying bid withdrawal penalties, amounts to 20% or more of its winning bids, no additional deposit will be required.

This policy is incorrectly stated, and in some situations can disadvantage the winning bidder.

In the case of Designated Entities eligible for installment payments, the Second R&O (at 95) reduces the required deposit from 20% to 10%. When that occurs, no additional deposit should be required when the available upfront payments, less bid withdrawal penalties, exceed only 10% of the winning bids.

More importantly, for any situation in which a winning bidder's upfront payments, less bid withdrawal penalties, exceed either 10% or 20% (as appropriate) of its winning bids, the excess upfront payment should remain available for crediting to another auction or refund to the winning bidder.

In other words, the Commission should not retain the excess upfront payments when winning bids are lower than expected. In this situation, the likelihood and adverse consequences of default by the bidder are minimized. The winning bidder should not be penalized by prevailing with a low bid.

Further, the Commission proposes (Second R&O at 73) to return upfront payments by losing bidders expeditiously or permit them to be applied against future auctions. As a matter of equal protection, the Commission should apply the same refund or credit policies to winning bidders with excess upfront payments.

IV. THE COMMISSION SHOULD MODIFY ITS RECAPTURE PROVISIONS TO CREDIT DESIGNATED ENTITIES FOR THEIR INVESTMENTS IN AUCTIONABLE LICENSES PRIOR TO SALE OR LOSS OF DESIGNATED-ENTITY STATUS.

The Second R&O adopted certain generic recapture provisions for profits allegedly accrued as a result of transfers of licenses awarded pursuant to Designated Entity set-asides:

Such a recapture provision would require that licensees seeking to transfer their licenses for profit (or to take other actions relating to ownership or control that would cause them to lose their status as designated entities) must, within a specified time remit to the government a penalty equal to a portion of the total value of the benefit conferred by the government.²⁰⁵

²⁰⁵ We might, in appropriate circumstances, waive recapture if the licensee had incurred substantial start-up costs or made significant capital investments with the intention of starting service, but due to circumstances beyond its control, was unable to provide service.^{23/}

This recapture proposal so fails to recognize the economics of constructing and operating communications businesses that it is arbitrary and capricious.

For example, suppose a Designated Entity receives a Commission license pursuant to a set-aside for \$50,000, and it is determined that the benefit of the set-aside is \$250,000. To develop this license, the Designated Entity borrows \$3 million

^{23/} Second R&O at 103-04 (footnote in original).

dollars, purchasing \$2 million in equipment and using the rest towards construction and operational expenses.^{24/} After constructing and beginning operation of its system, the Designated Entity proposes to sell the system (license, equipment, customer base, and all other assets) for \$2.5 million.

Under the Commission's hopelessly simplistic penalty, the Designated Entity would be subject to recapture of \$250,000. In reality, it would have suffered an aggregate loss upon the sale of over a half-million dollars.^{25/}

Conversely, under the same hypothetical, the Designated Entity were to sell its system (license plus all assets) for \$3.55 million, the gain from the federal benefit is not a half-million dollars. The gain from the sale must be allocated across the license, the equipment, the customer base and cash-flow from the system, goodwill, and all other conveyed assets. Only the allocation portion of the purchase price assigned to the license can be subject to recapture.

In other words, as footnote 205 contemplates, fundamental principles of equity require that the Commission's recapture penalty be based on the excess of sales price over the amounts the Designated Entity has expended in the system prior to sale,

^{24/} These amounts are representative of small-market cellular systems, and should be in the right order of magnitude for smaller PCS systems.

^{25/} The Commission's recapture calculations could be greatly simplified if the profit or loss from the sale of a license by a Designated Entity for recapture purposes would be that applied for federal income tax purposes, a calculation which the selling Designated Entity must make in any event.

with appropriate adjustments for length of time the license is held, licensee hardships, events beyond the licensee's control, and similar factors.

V. THE COMMISSION ERRED IN IMPOSING THE SAME, SUBSTANTIAL UP-FRONT PAYMENTS FROM DESIGNATED ENTITIES THAT ARE IMPOSED ON LARGER CORPORATIONS AS A PREREQUISITE FOR COMPETITIVE BIDDING ELIGIBILITY.

In its Comments, AIDE argued (at 6) that the Commission could not lawfully impose the same, substantial up-front payments upon Designated Entities that would be imposed on larger corporations as a prerequisite for competitive bidding eligibility. Because the Second R&O appeared not to address AIDE's argument,^{26/} the Commission erred.

The Commission's proposal that all bidders must make substantial up-front payments to be eligible to bid is inconsistent with its statutory obligations to favor Designated Entities. For example, under the Commission's auction rules (Second R&O at 69), a Designated Entity seeking to bid on a 20 MHz PCS license -- for which it could have a preference -- would be required to make an \$8 million up-front payment to make a bid which, if successful, could be paid on the installment plan (Second R&O at 91-96). Lawfully, the Commission cannot require a Designated Entity to make more than a nominal up-front payment in order to become an eligible bidder.

^{26/} The Second R&O (at 67 n.131) held that it had statutory authority to impose some level of upfront payments upon Designated Entities.

The Commission's proposed system of up-front payments also appears to be colored by its expectations for substantial revenue for PCS licensing. In many cases, such as common-carrier paging, and perhaps SMRs and PCPs, the winning bid is likely to be less than the required up-front payment. For all entities, the Commission should accept any level of up-front payment (assuming that up-front payments are in fact required), provided that the payment is the lesser of 20% of the bidder's highest bid or the amount otherwise required by the Commission. No deposit should be required for bids of less than some nominal amount, say \$10,000.

VI. THE COMMISSION ERRED BY FAILING TO CONSIDER AIDE'S COMMENTS THAT IT SHOULD ELIMINATE THE REVIEW OF FINANCIAL REQUIREMENTS ON SPECIFIC APPLICATIONS SUBJECT TO AUCTIONS.

In its Comments (at 9-10), AIDE opposed the Commission's proposal to pile its competitive bidding/payment requirements on top of existing financial qualification requirements. This cumulative showing of financial qualifications disadvantages Designated Entities, who have been historically constrained by difficulties in capital formation and financing.^{27/} AIDE suggested that the demonstration of financial qualifications in competitive bidding or by a documentary showing should be in the alternative.^{28/}

^{27/} Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7648 (1993) ("NPRM"), citing SBAC Report at i (Executive Summary).

^{28/} Under this procedure, a Designated Entity filing an auctionable "short-form" application would not include any
(continued...)