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

JUN 2 1994

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

**SUPPLEMENTAL COMMENTS**

The Coalition for Equity in Licensing (the "Coalition") <sup>1/</sup>, by its attorneys, hereby supplements its comments in this proceeding by submitting four new matters<sup>2/</sup> for Commission consideration, all of which lend further support to the Coalition's argument that it would be neither proper nor equitable to subject cellular applications filed before July 26, 1993, to licensing via auction.<sup>3/</sup>

<sup>1/</sup> The Coalition is an unincorporated association composed solely of applicants having pending before the Commission cellular applications, either for Rural Service Areas ("RSAs") or for unserved areas. Its membership is a matter of record, having been provided to the Commission in conjunction with comments previously filed in this proceeding.

<sup>2/</sup> Each of these involves developments that have transpired since the filing date for comments and reply comments in this proceeding. Thus, good cause exists for this supplemental filing.

<sup>3/</sup> As the Coalition has previously advised the Commission, the core problem that would be present were the Commission to apply auctions to pre-July 26, 1993 applications, including RSA applications filed nearly six years earlier, is that which is generally present in cases of retroactive applications of new laws and rules: fundamental inequity. The Supreme Court, in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), effectively created a presumption against retroactive rulemaking. See 1 K. Davis & R. Pierce Administrative Law Treatise § 6.6 at 257-60 (3d ed. 1994). The fact that the law so clearly disfavors retroactive rules, see Bowen, 488 U.S. at (continued...)

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I

The Coalition urges the Commission to act in accordance with the Commission's decision in ET Docket No. 93-266 not to apply competitive bidding rules retroactively to cases where tentative pioneer's preferences have been awarded. There, the Commission concluded that "it would be inequitable to apply any changes in our rules to pending proceedings in which Tentative Decisions have been issued." First Report and Order in ET Docket No. 93-266, 9 FCC Rcd 605, 610 (1994). Most significantly, the Commission reasoned that "parties have expended not inconsiderable resources . . . . Had the rules been different, these applicants might have structured their requests differently." Id.<sup>4/</sup> Consistency requires that the Commission act with the same concern for equity in this proceeding as it did with respect to the pioneer's preference rules. Therefore, the Commission should not change at this late date the "rules of the game" (from lottery to auction) governing cellular applications filed before July 26, 1993.

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<sup>3/</sup> (...continued)

208, should itself cause the Commission not to apply auction rules retroactively to mutually exclusive cellular applications filed before July 26, 1993. Recent Supreme Court cases serve only to bolster this position. See, e.g., Landgraf v. U.S.I. Film Products, 114 S.Ct. 1483 (1994) and and Rivers v. Roadway Express, Inc., 114 S.Ct. 1510 (1994).

<sup>4/</sup> The Commission had previously decided that it would be inequitable to apply competitive bidding rules to pioneer's preferences awarded for narrowband PCS services. See Notice of Proposed Rulemaking in ET Docket No. 93-266, 8 FCC Rcd 7692, 7694-95 & n.19 (1993).

## II

The Commission has recognized that it may employ competitive bidding for spectrum, pursuant to the Omnibus Budget Reconciliation Act of 1993, 47 U.S.C. § 309(i)(1)(B) (the "Budget Act"), only after assessing whether auctions constitute the licensing mechanism most likely to achieve the goals set forth in the Budget Act, i.e., (a) to promote economic opportunity and competition by, inter alia, avoiding excessive concentrations of licensees, and (b) to develop and deploy rapidly new technologies and services. Only where the Budget Act left comparative hearings as the "sole alternative" have auctions been deemed to be appropriate. See Second Report and Order in PP Docket No. 93-253, 75 RR 2d 1, 17 (1994). Such is not the case with respect to the mutually exclusive cellular applications filed before July 23, 1993, because the Congress has specifically left open the option of licensing via lotteries, 47 U.S.C. § 309(i). In such instances, the Commission must consider whether lotteries are a more viable licensing alternative and, if so, may not use auctions. For reasons previously presented to the Commission, the Coalition submits that lotteries present a far more viable means of attaining Congressional goals.<sup>5/</sup>

## III

Congressional concern over the problem of retroactivity led to the enactment of the special rule permitting the Commission to use

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<sup>5/</sup> See Coalition comments, at 11-17, where the Coalition made clear that a reasoned analysis would demonstrate that licensing by lottery would permit the Commission to better attain Congressional goals.

lotteries to select among the competing applications filed before July 26, 1993. Senator Hollings recently confirmed that one of the reasons for the rule was "concern that a retroactive application of auction rules would be inequitable to applicants who filed before the date the Budget Act was enacted."<sup>6/</sup> He made it clear that lotteries could be used to select among competing applications filed before July 26, 1993.<sup>7/</sup>

#### IV

The new disclosure rule applicable to all voluntary transfers or assignments of cellular licenses acquired by lotteries, see 47 C.F.R. § 22.39(d), became effective on May 26, 1994. See First Report and Order in PP Docket No. 93-253, 74 RR 2d 700, 702 (1994). The new rule provides an additional protection against unjust enrichment from cellular lotteries. With that new safeguard in place, the Commission can exercise its discretion to lottery the relatively few remaining pre-Budget Act cellular applications without substantial fear of unjust enrichment.

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<sup>6/</sup> 140 Cong. Rec. S3667 (daily ed. Mar. 24, 1994). A copy of the statement of Senator Hollings is attached hereto.

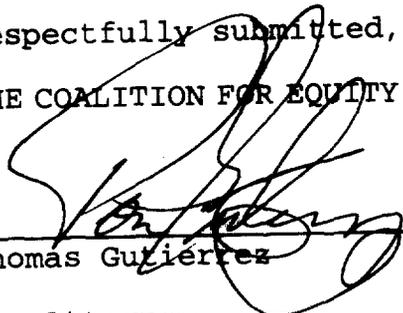
<sup>7/</sup> See id.

The Coalition respectfully requests that the Commission accept and consider these supplemental points and authorities, and that it protect long-pending cellular applicants from the prejudice that will result from the retroactive application of the new auction rules.

Respectfully submitted,

THE COALITION FOR EQUITY IN LICENSING

By

  
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June 2, 1994

**STATEMENT OF SENATOR ERNEST F. HOLLINGS**

**CONGRESSIONAL RECORD**

**MARCH 24, 1994**

and the House of Representatives for their continued bipartisan support for this important program.

Discretionary programs have come under a great deal of pressure in the past few years and they continue to do so this year as we struggle to reduce the budget deficit.

I strongly support efforts to bring down the deficit. But I also know that an ounce of prevention is indeed worth a pound of cure, and that full funding for WIC is an important part of controlling health care costs and the deficit.

The House and Senate Budget Committees recognize the wisdom of that saying and have made a point of increasing funding for WIC even in this time of discretionary cutbacks.

I applaud their vision and their courage in including the President's full WIC request in this year's budget resolution, and I hope to work closely with my fellow appropriators to provide this level of WIC funding.

Mr. SASSER. Mr. President, I share the distinguished chairman of the Agriculture Committee's enthusiasm for the WIC Program. I would point out that the budget resolution as reported by the Budget Committee included \$3.6 billion for this program, an 11 percent increase over last year's levels. This level of funding would keep this program on track for full funding in fiscal year 1996. Senator BOXER's amendment that we adopted yesterday added \$100 million, bringing the total level of funding to \$3.7 billion or 14 percent over last year's level.

WIC, which has now been in existence for 20 years, is certainly one of the most successful of all Federal programs. Providing nutritious food and vital services to at-risk low-income women and children invests not only in their future, but also reduces the potential for costly health problems.

I commend my colleague from Vermont for his strong leadership on the WIC Program and child nutrition in general.

#### PROVISION TO TERMINATE THE UNIFORMED SERVICES UNIVERSITY OF THE HEALTH SCIENCES

Mr. FEINGOLD. Mr. President, the Budget Committee is to be congratulated for their excellent work, and in particular for continuing the critical work to reduce our deficit by requiring an additional \$26 billion in cuts over the next 5 years. It is vital that we continue to make headway in this area, and build on the deficit reduction work begun by President Clinton in his landmark deficit reduction program.

Though their overall effort is to be applauded, Mr. President, I take exception to some language included in the committee's report accompanying the concurrent resolution on the budget. In particular, the report language supporting the continued funding of the Uniformed Services University of the Health Sciences (USUHS) is inconsistent with the overall intent of this resolution.

Of course the language has no binding effect, but I feel the issue merits a response.

Put most clearly, Mr. President, USUHS is not as cost effective as alternative sources of military physicians.

The Department of Defense obtains almost all of their physicians from three sources—about 70 percent through the medical scholarship programs, about 20 percent from physicians who volunteer directly, and about 10 percent from USUHS. Of all of those sources, though, USUHS is the least cost effective.

Mr. President, this is not only the conclusion of the nonpartisan Congressional Budget Office and the Office of Management and Budget, it is the finding of the Department of Defense, the agency that runs USUHS.

Responding to an Inspector General's review of USUHS, the Secretary of Defense—in May of 1990, directed the Assistant Secretary of Defense—program analysis and evaluation—to conduct a study of USUHS. That study found that the acquisition costs of USUHS-trained physicians are much higher than the costs of acquiring physicians from any other source, more than four times as high.

The Congressional Budget Office findings were even worse, noting, as of 1991, that at \$562,000 per person USUHS was the most expensive source of physicians for the military, providing physicians at more than 5 times the \$111,000 per person from the military's medical scholarship program, and more than 10 times the cost of obtaining physician volunteers.

Of course, acquisition expenses are not the only cost of a physician to the military. Salaries and retirement benefits make up a substantial portion of the total cost. Here again, USUHS-trained physicians tend to be more expensive.

In fact, because of their higher retention rates, average salaries and pensions are so much higher for USUHS-trained physicians that the Department of Defense found that even if they could acquire a USUHS-trained physician for free, instead of the \$562,000 estimated by the Congressional Budget Office, USUHS would still be the most expensive source for military physicians.

The bottom line is, as the Department of Defense noted in its own study, "the Uniformed Services University of the Health Sciences is a significantly more expensive provider of physicians to the Department of Defense" than any other source.

It will take time to phase down USUHS operations, and we will not realize full savings until it is closed. But even as we start that process, the Congressional Budget Office estimates that we can save \$190 million over the next 5 years.

Mr. President, with the overall downsizing of our force structure, and the continued pressure put on the entire Federal budget by our deficit, it

does not make good economic sense to keep funding USUHS, and I will work to ensure that the President's provision phasing down the Pentagon's medical school is included in the 1995 budget.

Mr. DOMENICI. Mr. President, I ask unanimous consent that I be permitted to proceed for up to 10 minutes as if in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The remarks of Mr. DOMENICI pertaining to the introduction of Senate Joint Resolution 178 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. CONRAD. I note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. CONRAD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### MORNING BUSINESS

Mr. CONRAD. Mr. President, I ask unanimous consent that we now have a period of morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### FEDERAL COMMUNICATIONS COMMISSION AUCTIONS FOR SPECTRUM LICENSES

Mr. HOLLINGS. Mr. President, last summer under the Budget Reconciliation Act of 1993, Congress revised the assignment process by which the Federal Communications Commission awards licenses. In particular, section 6002(E)(2) of title VI creates a special rule which provides that the Commission may not issue a license by lottery after the date of enactment unless one or more applications for such licenses were accepted for filing by the FCC before July 26, 1993. Thus, under the legislation, the FCC may use a lottery to award any licenses license for which an application was filed prior to July 26, 1993.

While not every authorization for which applications were filed before July 26, 1993 must be awarded by lottery, the conferees specifically provided the Commission with the opportunity to award licenses applied for before that date by lottery for a number of reasons. Among them was the concern that a retroactive application of auction rules would be inequitable to applicants who filed before the date the Budget Act was enacted. Thus, under the legislation, the FCC may use a lottery to award any license for which an application was filed prior to July 26, 1993.

JESSICA MATHEWS' WASHINGTON POST  
EDITORIAL

Mr. HOLLINGS. Mr. President, an editorial by Jessica Mathews, entitled