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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matters of)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253 ✓
of the Communications Act -)	
Competitive Bidding)	
)	
Amendment of the Commission's Rules)	Gen. Docket 90-314
To Establish New Personal)	
Communications Services)	
)	
Review of the Pioneer's)	ET Docket No. 93-266
Preference Rules)	

TO: The Commission

FURTHER COMMENTS ON SPECTRUM BLOCKS FOR
COMPETITIVE BIDDING AND SCOPE OF PREFERENCE AWARD

American Personal Communications ("APC")^{1/} supports the Commission's June 9, 1994 decision to convert to 30 MHz the third major PCS license, the one especially designed for designated entities.^{2/} However, the Commission should

^{1/} American PCS, L.P., d/b/a American Personal Communications, a partnership in which APC, Inc. is the general managing partner and The Washington Post Company is an investor/limited partner.

^{2/} See Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, FCC 94-144 (adopted June 9, 1994; released June 13, 1994) ("Reconsideration Order").

APC repeatedly urged this step on recommendation. See, e.g., APC Comments on PCS En Banc Hearing, pp. 3-4 (Gen. Docket 90-314, April 22, 1994); APC Reply to En Banc Hearing Comments, pp. 1-2 (Gen. Docket 90-314, May 19, 1994); Letter from Wayne N. Schelle to Hon. Reed E. Hundt and Hon. Rachelle B. Chong, May 31, 1994, p. 3 (Gen. Docket 90-314); Letter from Wayne N. Schelle to Hon. James H. Quello, Andrew C. Barrett and Susan P. Ness, May 31, 1994, p. 3 (Gen. Docket 90-314).

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maintain pioneer preferences in Block A (MTAs), rather than Block C (BTAs).

I.

We understand that some have proposed legislatively to require preference awardees -- even those, like broadband PCS pioneers, to whom the statute would apply retroactively -- to make payments equal to 80% of the winning bid for the other 30 MHz MTA license (Block B) in the same market. (Legislation would be necessary to accomplish this result because the Commission does not have the statutory authority to require payments from pioneers,^{3/} or give bidding credits rather than

^{3/} The Commission's competitive bidding authority applies only "[i]f mutually exclusive applications are accepted for filing." 47 U.S.C. § 309(j)(1). The Commission has determined, however, that a pioneer preference "will provide that the preference applicant's application . . . will not be subject to mutually exclusive applications." 47 C.F.R. § 1.402(d). Accordingly, Section 309(j) provides no basis for the Commission to charge a pioneer a fee for a license.

No other statute provides authority for the Commission to charge pioneers. The Independent Offices Appropriation Act ("IOAA"), 31 U.S.C. § 9107, does not authorize the FCC to charge pioneers a fee because (1) the IOAA permits agencies only to charge fees that cover "direct and indirect costs of the government to the licensing process," not "the ultimate value to the recipient, *i.e.*, the profits made possible by the license," Yosemite Park and Curry Co. v. United States, 686 F.2d 925, 931 (Ct. Cl. 1982); see also National Ass'n of Broadcasters v. F.C.C., 554 F.2d 118, 1129 n.28 (D.C. Cir. 1976), and (2) the Communications Act contains a more specific statutory authorization for FCC fees that trumps the IOAA. See 47 U.S.C. §§ 158, 159 (1993); see also H.R. Conf. Rep. No. 453, 99th Cong., 1st Sess. 423, 433 (1985) (making clear that the fee provisions in the Communications Act "supersede any authority the FCC would otherwise have under § 9701 of Title 31 to impose additional fees over and above those provided for" in those provisions).

Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), provides no independent authority to take an action that would otherwise exceed the Communications Act (as would

an assurance of a license to pioneers.^{4/})

- It is quite likely that the result produced by such a plan would be that pioneers would have to pay more for their licenses than if no preferences had been awarded because the Block B winning bid will include significantly more than a 20% premium reflecting the fact that it would be the only 30 MHz MTA license available in the market.

- Even without such a premium, the 20% "benefit" probably would not even cover APC's costs which it began to incur in 1989 when many thought that PCS couldn't be effectively rolled out for 10 to 15 years, if at all, because of the microwave incumbency problem that APC then solved with its pioneering technological and other breakthroughs.

- Designated entities, even those who may first become interested in PCS over the next four or five months, apparently will receive the benefit of installment payments, below-market interest rates, and bidding discounts -- a package of benefits that will far exceed the "benefits" conferred on pioneers by the 80/20 proposal. Yet acting in

charging a fee to pioneers). Section 4(i) provides only that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Id. (emphasis added).

^{4/} The statute makes it clear that "bidding preferences" may be made available for "small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309 (j) (4) (D). The Commission was not given authority to adopt bidding credits for pioneers. See 47 U.S.C. § 309 (j) (4) (A) and (j) (3) (B).

reliance on the government's having held out the pioneer preference policy on nine different occasions over the past three years, the pioneers have expended large, high-risk financial resources and incalculable human resources and spread the results on the public record for all to benefit from. Not the least of the beneficiaries is the federal government whose auction revenue yield will be many times greater on account of the pioneers' efforts.

Under any plan remotely resembling the unintentionally punitive 80/20 plan, the pioneers will have to reconsider whether the game is worth the candle. But to force them into the special isolation of the Block C BTA band -- an isolation which other Block C licenses would not share because they would be eligible to bid for other Block C licenses -- would flat out prevent the pioneers from playing any sort of leadership role in PCS; bare survival would be the highest goal to which they could aspire.

II.

In finalizing pioneer preference awards six months ago, the Commission determined that 30 MHz MTAs would be the appropriate award for broadband PCS pioneers.^{5/} The Commission doubted that "a 20 MHz BTA grant would be adequate, given the nature of the systems proposed."^{6/} Each of the broadband PCS pioneers had planned and advocated wide-area

^{5/} See Third Report, 9 F.C.C. Rcd. at 1349.

^{6/} Id.

systems that would compete immediately with cellular and ESMR licensees that cover broad geographic areas. The Commission determined that it would be in the public interest for the pioneers to have license grants that would permit them to continue in the vanguard rather than licenses that will slow their development and neuter their competitive impact.

As the Commission correctly pointed out, the pioneers did, in fact, premise their experimental research and proposals upon wide-area markets. As to APC, our market research demonstrated compellingly that PCS licensees will fail if they cannot provide coverage that will compete with cellular's regional reach. That reality influenced our regulatory proposals, to be sure -- in fact, APC was the first party to suggest using MTA licensing for PCS, and we proposed methods for including designated entities in MTA-size license areas^{2/} -- but it guided our technological developments as well. APC's FAST technology was designed to permit effective spectrum-sharing both with high-speed vehicular usage, relatively high-power rural usage and relatively low-power pedestrian/in-building/in-home microcell usage for that very reason.

Moreover, rural areas are unlikely to obtain effective, inexpensive and state-of-the-art PCS service unless they are served by systems that share certain facilities and

^{2/} See APC, Supplement to Petition for Rule Making (May 4, 1991).

other resources with the central city systems. With the grant of Block A preference awards, pioneers would be able to speed cost-effective and full-featured PCS services to rural areas, thus enabling those areas to have access to telecommunications systems as efficient as those enjoyed by urban America.

If pioneers are forced into BTA-sized licenses, they will be stymied in their efforts to compete against cellular carriers and local exchange companies. Cellular carriers currently enjoy broad, regional coverage comparable to MTAs, with nine companies covering 90 percent of the population of the United States.^{8/} ESMR coverage -- particularly that of Nextel -- is virtually continental in scope.^{9/} Pioneers can subject these entrenched companies to immediate and effective competition, but only if they are granted licenses of sufficient scope to permit them to compete. If PCS pioneers are granted licenses that cannot compete on geographic coverage, they will be held back in the market and will be unable to compete until they have aggregated existing regional groups of BTA licenses, and that may be too late given the wide-reach of their cellular, ESMR, and MTA PCS competitors.

Over time, and at considerable expense and with the cost of operational and technical inefficiencies, pioneers

^{8/} See APC, Comments, pp. 21-38 (Gen. Docket 90-314, Nov. 9, 1992); APC, Reply Comments, pp. 14-26 (Gen. Docket 90-314, Jan 8, 1993).

^{9/} In addition to aggregating SMR licenses covering the majority of the continental United States, Nextel is arranging interoperability with ESMR systems in Canada and Mexico.

could in theory aggregate sufficient BTA licenses to compete with cellular. But placing pioneers in Block C -- which almost certainly will be (and, we believe, should be) treated as a block in which restrictions on eligibility will apply to facilitate the participation of designated entities -- would isolate pioneers. If an entrepreneurial block is established in Block C, Block C licenses likely will be available for bidding only by companies with annual revenues of less than \$100 million (counting attributable affiliates), and after-market purchases of those systems will be deterred by anti-trafficking rules. Although APC is, to be sure, a small business,^{10/} it has a single investor whose revenues likely would be attributable to APC. If APC received a single Block C BTA, it could not bid for other BTAs in the Washington/Baltimore MTA. As a result, its operations would be stranded in near-permanent inferiority vis-a-vis its two cellular competitors, Nextel and its two 30 MHz PCS competitors.

Because Block C licenses will be for 492 BTAs, nationwide service by Block C licensees is likely to commence, if at all, significantly later than that of Block A and Block B licensees. Roaming agreements and interoperability arrangements may require years to negotiate. Gaps in national and even regional coverage will be inevitable. Some Block C licensees likely will attempt "niche" PCS services and thus be

^{10/} APC began in 1989 as a two-person company. Over the intervening four and one-half years, it has expanded in size to 40 employees, most of whom are part owners of the company.

unavailable for interoperability and roaming. Others will be unavailable because out-of-region cellular carriers will obtain near-majority interests in them to fill gaps in their regional or national coverage.^{11/}

Block C licensees also will be forced to contend with up to 492 decisions on basic technology rather than 51 choices for either Block A or B. Additionally, it is possible that Block C actually will be auctioned after Blocks A and B (a result that is counter to the public interest, given that Block C licensees will require more lead time to market rather than less), thus artificially delaying Block C licensees and, if pioneers receive Block C licenses, the very pioneers that have led the industry to this point. Granting pioneers Block C licenses would convert them from leaders into laggards.

III.

Granting Block C licenses to pioneers in Washington/Baltimore, New York, and San Diego/Los Angeles would deny designated entities the ability to bid for licenses in three markets in which numerous minority- and woman-owned enterprises are located. These firms would have an excellent chance of success if an entrepreneurial band (or a set-aside band) were adopted by the Commission and they could bid for

^{11/} Under the Reconsideration Order, for example, Bell Atlantic will be permitted to invest up to 49.9 percent in a woman- or minority-owned designated entity bidder for Block C in the New York BTA because it owns only 26 percent of the cellular licensee for the New York MSA. A similar result could occur in many markets because of the liberalized attribution rules for non-controlling cellular carriers.

licenses in these three markets on favorable terms. Denying designated entities the ability to bid for licenses in these markets would be, in a word, unfair.

IV.

Basing preference awards on Block C licenses flies in the face of the reality that keeping certain BTAs separate would artificially cleave naturally integrated markets. In particular, while a BTA might be sufficient for metropolitan Chicago or other major cities, Washington and Baltimore should not be licensed as separate BTAs to APC as a pioneer with an aggressive and expansive plan of action for what PCS can bring to the American public. The case supporting the Commission's grant of Washington/Baltimore as a single market is compelling:

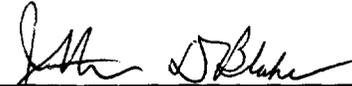
- APC's experimental license is for Washington/Baltimore and APC has, in fact, conducted extensive experiments in both BTAs, and now has CDMA PCS systems operating in both Washington and Baltimore;
- APC's pioneer preference request, filed in July 1991, was for Washington/Baltimore;
- the Washington, D.C./Baltimore, Maryland area now is and always has been treated as a single market by cellular providers;
- the Census Bureau has recognized Washington/Baltimore as a single market by creating a single

Washington/Baltimore Consolidated Metropolitan
Statistical Area ("CMSA");

- the Federal government treats Washington/Baltimore as a single area for various purposes, including employee compensation; and
- APC's market research demonstrates that consumers treat the Washington/Baltimore area as a single market for purposes of wireless telecommunications.^{12/}

Respectfully submitted,

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^{12/} APC conducted extensive quantitative research in the summer of 1993 in Washington/Baltimore to ascertain local consumer service area demand. Study participants completed computer-driven adaptive conjoint analysis and conjoint value analysis exercises that were designed to measure their preferences for different types of telecommunications services. Consumer reaction to coverage areas indicated that a PCS service that did not include coverage to Baltimore would be perceived as a limited service (like CT-2) because of its partial coverage of the market. Consumers consistently rejected limited PCS services in favor of wide-area coverage services like broad-vision PCS and cellular.

CERTIFICATE OF SERVICE

I, Kurt A. Wimmer, hereby certify that a copy of the foregoing pleading has been sent by U.S. mail, first class postage prepaid and correctly addressed, to the following parties, who have filed or responded to petitions for reconsideration of the Third Report in Gen. Docket 90-314 or filed a petition for reconsideration of the First Report in ET Docket 93-266, on this 22nd day of June, 1994:

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