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LAW OFFICES OF  
WILLIAM J. FRANKLIN,  
CHARTERED

1919 PENNSYLVANIA AVENUE, N.W.  
SUITE 300  
WASHINGTON, D.C. 20006-3404

(202) 736-2233  
TELECOPIER (202) 452-8757  
AND (202) 223-6739

June 23, 1994

Via Messenger

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

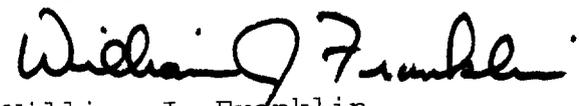
Re: **PP Docket No. 93-253**  
**Implementation of Section 309(j) of the**  
**Communications Act - Competitive Bidding**

Dear Mr. Caton:

Submitted herewith on behalf of the Association of Independent Designated Entities ("AIDE") are an original plus four (4) copies of its Petition for Reconsideration in the above-captioned matter.

Please direct any questions or comments concerning this submission to my office.

Respectfully submitted,



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

Encs.  
cc: Assoc. of Independent  
Designated Entities

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

In the Matter of )  
 )  
Implementation of Section 309(j) )  
of the Communications Act )  
 )  
Competitive Bidding )

PP Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION  
OF THE ASSOCIATION OF  
INDEPENDENT DESIGNATED ENTITIES  
OF THE THIRD REPORT AND ORDER

William J. Franklin, Esq.  
WILLIAM J. FRANKLIN, CHARTERED  
1919 Pennsylvania Avenue, N.W.  
Suite 300  
Washington, D.C. 20006-3404  
(202) 736-2233  
(202) 452-8757 Telecopier

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## SUMMARY OF ARGUMENT

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 cannot use the Second Report and Order, adopting generic auction rules, as a shield to prevent reconsideration and appellate review of the Third Report and Order, which applied those tentative conclusions to narrowband PCS.

### II

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 narrowband PCS licenses.

Nevertheless, the Commission has adopted narrowband PCS 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.

### III

The Commission failed to explain why it limited bidding credits for minority and women-owned businesses to certain

narrowband PCS licenses. The Commission's explanation why it excluded small businesses generally and rural telephone companies from bidding credits. Both limitations is arbitrary and capricious.

#### IV

The Commission adopted a policy which prevents Designated Entities from using installment payments for nationwide narrowband PCS licenses. The Commission admits that it adopted this policy to maximize auction revenue, a violation of Section 309(j) (7) (A) & (B). 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.

#### V

The Commission 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.

Virtually no party commented on the filing and processing rules. The Commission adopted some of these rules without explanation, thus violating the Administrative Procedure Act.

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

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Before the  
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In the Matter of

Implementation of Section 309(j)  
of the Communications Act

PP Docket No. 93-253

Competitive Bidding

To: The Commission

PETITION FOR RECONSIDERATION  
OF THE ASSOCIATION OF  
INDEPENDENT DESIGNATED ENTITIES  
OF THE THIRD REPORT AND ORDER

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 Third Report and Order in the above-captioned proceeding.<sup>1/</sup> 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 Report and Order in this proceeding as "Designated Entities").<sup>2/</sup>

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<sup>1/</sup> 9 FCC Rcd \_\_\_\_ (FCC 94-98, released May 10, 1994) ("Third R&O"). A summary of the Third R&O was published in the Federal Register on May 24, 1994 (59 FR 26741). Pursuant to Section 1.4 of the Commission's Rules, this Petition is timely filed.

<sup>2/</sup> See Second Report and Order, 9 FCC Rcd \_\_\_\_ (FCC 94-61, released April 20, 1994) (¶227) ("Second R&O"). Because of the scope of the Third R&O, this Petition cannot discuss every issue presented by the Third R&O. AIDE's silence on other issues regarding the Third 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.

## 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....<sup>3/</sup>

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....<sup>4/</sup>

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.<sup>5/</sup> Various AIDE members have extensive legal, technical, financial, and communications backgrounds. Many have owned or managed small businesses, and

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<sup>3/</sup> Section 309(j) (3) (B), partially quoted in Third R&O, ¶66.

<sup>4/</sup> Section 309(j) (4) (D), partially quoted in Third R&O, ¶66.

<sup>5/</sup> See Declaration of David Meredith Under Penalty of Perjury, Attachment A hereto.

understand the special needs and problems of small and start-up businesses. Accordingly, AIDE has a special expertise to present the position of the Designated Entities to the Commission.

#### ARGUMENT

**I. ALL ISSUES DECIDED IN THE THIRD REPORT AND ORDER ARE SUBJECT TO RECONSIDERATION AND APPELLATE REVIEW AT THIS TIME.**

As a preliminary matter, the Commission cannot use the Second R&O adopting generic auction rules, as a shield to prevent reconsideration and appellate review of the Third R&O, which applied those tentative conclusions to narrowband PCS. For example, in the Second R&O the Commission wrote:

The five sections of this Report and Order summarized above establish general rules and regulations for competitive bidding that will apply to a variety of spectrum-based services licensed by the Commission. In the future, specific rules within the scope of these general rules will be adopted in a Report and Order for each service subject to competitive bidding.<sup>6/</sup>

Thus, in the case of auction methodology for each service, the Commission wrote:

We intend to tailor the auction design to fit the characteristics of the licenses to be awarded. Given the diverse characteristics of the various services that may be subject to auctions, simultaneous multiple round auctions may not be appropriate for all licenses. \* \* \*

In future Reports and Orders where we establish service-specific auction rules we will indicate a preferred auction design method for each particular service and specify any alternative design methods that we may test in auctioning licenses within that particular service.<sup>7/</sup>

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<sup>6/</sup> Second R&O, supra, ¶10.

<sup>7/</sup> Second R&O, supra, ¶¶112, 115. In the Second R&O, the Commission reserved a similar flexibility with respect minimum  
(continued...)

Thus, the Second R&O did not resolve auction issues so much as specify a framework in which subsequent decisions, including the Third R&O, would resolve them. Further, even where the Second R&O resolved issues generically, the application of those policies to narrowband PCS (in the context of narrowband PCS-specific rules adopted in the Third R&O) can require reconsideration of all related issues in the Third R&O.

Under these circumstances, the Administrative Procedure Act requires that AIDE -- and others seeking reconsideration of the Third R&O -- not be precluded as to any issue resolved therein (even if resolved by reference to the Second R&O) by their decision not to seek reconsideration of the generic auction rules.

In fact, AIDE did file a Petition for Reconsideration of the Second R&O on June 3, 1994 (the "Second R&O Petition"). AIDE hereby incorporates that Petition by reference<sup>8/</sup> to the extent that certain of the issues raised generically in the Second R&O

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<sup>2/</sup>(...continued)  
bids (id., ¶126), stopping rules (id., ¶132), activity rules (id., ¶144), upfront payments (id., ¶¶171-72 & n.132, 178, 180), license eligibility for installment payments (id., ¶237), eligibility for bidding credits (id., ¶242), spectrum set-asides (id., ¶247), the definition of "small business" (id., ¶271), and other fundamental auction-design decisions.

<sup>8/</sup> AIDE also adopts the arguments made by the National Association of Business and Educational Radio, Inc. (NABER) in its Petition for Reconsideration of both the Second R&O and the Third R&O (filed June 3, 1994) that the Commission violated the Administrative Procedure Act by reserving too much discretion to change its auction rules and procedures by Public Notice.

Petition (and as-yet not resolved) now may be applied specifically to the Third R&O:

Issue Raised in the <u>Second R&amp;O</u> Petition	Relevant Sections of <u>Third R&amp;O</u>
Should the Commission impose bidding activity rules on Designated Entities? Argument III, pages 12-13.	Part III.D.4, ¶¶36-40
How does the Commission intend its simultaneous bidding limits to work? Argument III, pages 13-14.	Part IV.B, ¶45
Should the Commission collect the 3% default penalty when a windfall will result? Argument III, pages 14-15.	Part IV.C, ¶49
How should the Commission determine and treat excess upfront payments? Argument III, pages 15-16.	Part IV.C. ¶48 & n.24
Can the Commission lawfully recapture "unjust enrichments" resulting from bidding credits when no "enrichment" occurs? Argument IV, pages 16-18.	Part VI.A.1, ¶80
Can the Commission lawfully impose the same upfront payments on Designated Entities that it imposes on larger companies? Argument V, pages 18-20.	Part IV.B., ¶¶45-46

Resolution of these arguments jointly in the context of the Second R&O and the Third R&O will serve the public interest.

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

The Commission has a well-established policy favoring settlements between applicants filing mutually exclusive applications. Any attempt to hinder that policy or to prevent full

settlements between mutually exclusive applicants for auctionable licenses violates specific provisions of Section 309(j).

**A. Both The Communications Act and The Commission Have A Well-Established Policy Favoring Full Settlements of Mutually Exclusive Applications.**

The Communications Act explicitly recognizes the Commission's settlement policy. Sections 311(c) and (d) permit the Commission to approve settlements between mutually exclusive broadcast applicants whenever it can find that the settlement serves the public interest and that no party to the agreement filed its application for the purposes of settlement. The Commission has found that Section 311(c) indicates a Congressional determination that:

[S]ettlement agreements "generally serve the public interest because they often avoid lengthy hearing appeals, thus expediting the start of the new broadcast service...."<sup>2/</sup>

Although this policy developed in a broadcast context, the Commission has applied it to services having auctionable licenses as well.

Thus, in amending Part 22 of the Commission's Rules to permit settlements between common-carrier land-mobile applicants, the Commission reasoned:

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<sup>2/</sup> Broadcast Settlement Agreements, 6 FCC Rcd 85 (1990) (¶2), modified, 6 FCC Rcd 2901 (1991), quoting H.R. Rep. No. 765, 97th Cong. 2nd Sess. 50 (1982) (Conference Report). Although this proceeding limited settlement payments to challengers, it also reasoned that this policy "should not be applied in such a manner to preclude or unduly hinder legitimate merger transactions involving competing applicants." The Commission has also found that "settlements ... can be an efficient way to resolve comparative licensing proceedings...." Broadcast Renewals, 4 FCC Rcd 4780 (1989) (¶32).

Congress recently amended Sections 311(c) and (d) of the Communications Act, liberalizing previous [settlement] standards....

Section 311 of the Act does not explicitly apply to the Public Mobile Services. \* \* \* We believe that the regulatory concerns embodied in our old [settlement] rule are no longer relevant in the public mobile services. \* \* \* In light of the policy embodied in the Congressional amendments to the Communications Act, ... we believe it is in the public interest to eliminate the prior approval requirement and adopt the [settlement] rule as proposed.<sup>10/</sup>

The Commission's Part 22 settlement rule, now codified in Section 22.29 of the Rules, tracks the requirements of Section 311(c) and (d) and permits settlements between mutually exclusive applicants without prior Commission approval.

In the cellular context, the Commission's settlement policy developed with the Commission's acceptance of full-market wireline settlements in the Chicago and Los Angeles MSAs in 1983.<sup>11/</sup> 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.<sup>12/</sup>

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<sup>10/</sup> Revision of Part 22, 95 FCC 2d 769 (1983) (¶¶88-89).

<sup>11/</sup> Advanced Mobile Phone Service, Inc., 91 FCC 2d 512 (1983) (Chicago); Advanced Mobile Phone Service, Inc., 93 FCC 2d 683 (1983) (Los Angeles).

<sup>12/</sup> Los Angeles, supra (Fogarty, Separate Statement).

In applying the lottery process to cellular applications, the Commission explicitly retained its policy favoring full-market settlements.<sup>13/</sup>

Although mutual exclusivity (and the need for settlements) traditionally has been rare in the private radio services, Section 90.621(b)(5) of the Rules permits 800 MHz SMR applicants to file short-spaced applications within the consent of co-channel applicants. In adopting this rule, the Commission reasoned:

[Adopting this rule] will further the public interest in several significant respects. First, codification of our consensual short-spacing procedures will make arrangements of this type more accessible to applicants, which in turn will encourage more efficient use of the radio spectrum and enhance competition....<sup>14/</sup>

The Commission consistently has followed a similar policy permitting, if not encouraging, settlements with respect to other radio services as well.<sup>15/</sup>

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<sup>13/</sup> 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).

<sup>14/</sup> SMR Short-Spacing, 6 FCC Rcd 4929 (1991) (¶3).

<sup>15/</sup> See, e.g., Section 21.29 (settlements permitted in the Digital Electronic Message Service, Point-to-Point Microwave Service, and Local Television Transmission Service); Section (continued...)

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.

**B. In Adopting The Auction Provisions of Section 309(j), Congress Required The Commission to Apply Its Existing Settlement Policies to Auctionable Applications.**

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):

[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.<sup>16/</sup>

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<sup>15/</sup> (...continued)  
94.63(d)(4) (settlements permitted in 928-930 MHz Multiple Address Service).

<sup>16/</sup> Conference Report to the Budget Act, H.R. Rep. 103-213, 103rd Cong. 1st Sess, 103 Cong. Rec. H5792, H5915 (August 4, (continued...))

These two provisions in Section 309(j)(6) clearly indicate that Congress intended the Commission to carry forward its existing settlement policies.<sup>17/</sup> 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.

**C. The Commission Erred In Adopting Narrowband PCS Auction Rules Which Preclude Full-Market Settlements.**

The Commission's narrowband PCS 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

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<sup>16/</sup> (...continued)  
1993) (provision of House bill adopted in final Budget Act) ("Conference Report").

<sup>17/</sup> 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 mutually exclusivity only a prerequisite to holding an auction, and not the triggering event for a mandatory auction against the wishes of settling applicants.

or changes in the identification of parties to bidding consortia."<sup>18/</sup> Similarly, the Commission states that:

After the short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short form application.<sup>19/</sup>

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.<sup>20/</sup>

Thus, the Third R&O appears to have prohibited settlements between applicants for narrowband PCS licenses in a market by preventing the formation of post-filing joint ventures or similar arrangements between all the mutually exclusive applicants.<sup>21/</sup>

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<sup>18/</sup> Third R&O, ¶43.

<sup>19/</sup> Third R&O, ¶64 (emphasis added). See also Second R&O, supra, ¶225.

<sup>20/</sup> See Third R&O, ¶¶43-44.

<sup>21/</sup> 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 collusion between bidders and not the negotiation of full settlements which eliminate the need for an auction. Obviously,  
(continued...)

Tellingly, the Commission never 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.

Tellingly, the Commission's only mention of the word "settlement" in the Third R&O appears in Section 24.429(b) of its newly adopted rules, which adopts the following policy for narrowband PCS applications:

Policy: Parties to contested proceedings are encouraged to settle their disputes among themselves. Parties which, under a settlement agreement, apply to the Commission for ownership changes or for the amendment or dismissal of either pleadings or applications, shall at the time of filing notify the Commission that such filing is the result of an agreement or understanding.<sup>22/</sup>

Section 24.429, however, is subject to Section 1.2105 of the Rules, which was adopted by the Second R&O.<sup>23/</sup> Thus, having adopted its "policy" favoring settlements, the Commission made

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<sup>21/</sup> (...continued)  
in the case of a full settlement, no auction need be held and, strictly speaking, no bidders exist. If the Commission so intends, it should clarify its language.

<sup>22/</sup> Section 24.429(b) (emphasis added).

<sup>23/</sup> Section 1.2105(c) prohibits potential bidders for an auction from discussing "the substance of their bids or bidding strategies" with other bidders (not disclosed as part of a bidding consortium) after filing the short-form application.

the policy subject to a rule which could well be read as prohibiting settlement discussions.

The Commission's prohibition against settlements 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:

(7) Consideration of revenues in public interest determinations.-

(A) Consideration prohibited.-In making a decision pursuant to Section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited.-In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.

(Emphasis added.) The prohibition against settlements also 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 narrowband PCS auction rules to specify that full

settlements are permissible between mutually exclusive applications for auctionable licenses.

**III. THE COMMISSION'S UNEXPLAINED LIMITATION OF BIDDING CREDITS FOR WOMEN AND MINORITIES ONLY TO SELECTED NARROWBAND PCS LICENSES, AND ITS DENIAL OF BIDDING CREDITS TO SMALL BUSINESSES OR RURAL TELEPHONE COMPANIES, BOTH ARE ARBITRARY AND CAPRICIOUS.**

Section VI.A.1 of the Third R&O takes almost 6 pages of printed text, 9 lengthy numbered paragraphs, and 17 footnotes to explain procedures, statutory goals, and constitutionality of allowing minority and women-owned businesses to apply a 25% bidding credit to narrowband PCS. Specifically, the Commission found a Congressional intent "to assure that minority and women-owned businesses have the ability to participate" in auctioned services (§73), that minority-owned businesses promote other societal goals (§74), that minority and women-owned businesses are severely underrepresented in telecommunications (§75), that bidding credits are "the best way" to end such underrepresentation (§76), that "even comparatively large businesses owned by minorities and women face discriminatory lending practices and other discriminatory barriers to entry" (§77), that Congress intended that bidding credits go to minority and women-owned businesses "independent of their status as small businesses" (§78), and that a 25% bidding credit is an appropriate discount (§79).

Having established a general policy, the Commission then proceeded to a series of arbitrary limitations on that policy.

First, without explanation, the Third R&O (¶72) limited the bidding credits available to women and minorities to a small fraction of the available narrowband PCS licenses. Specifically, bidding credits are available for:

- One (1) of the five (5) paired 50 kHz channels licensed on a national basis.<sup>24/</sup>
- One (1) of the three (3) 50 kHz channels paired with a 12.5 kHz channel and licensed on a national basis.<sup>25/</sup>
- One (1) of the three (3) unpaired 50 kHz channels licensed on a national basis.<sup>26/</sup>
- One (1) of the two (2) paired 50 kHz channels licensed on a regional basis.<sup>27/</sup>
- One (1) of the four (4) 50 kHz channels paired with a 12.5 kHz channel and licensed on a regional basis.<sup>28/</sup>
- One (1) of the two (2) paired 50 kHz channels licensed on a MTA basis.<sup>29/</sup>
- One (1) of the three (3) 50 kHz channels paired with a 12.5 kHz channel and licensed on a MTA basis.<sup>30/</sup>
- One (1) of the two (2) unpaired 50 kHz channels licensed on a MTA basis.<sup>31/</sup>

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<sup>24/</sup> Section 24.129(a)(1).

<sup>25/</sup> Section 24.129(a)(2).

<sup>26/</sup> Section 24.129(a)(3). Mobile Telecommunications Technologies, Inc. ("MTel") holds a pioneer's preference for one of these channels also.

<sup>27/</sup> Section 24.129(b)(1).

<sup>28/</sup> Section 24.129(b)(2).

<sup>29/</sup> Section 24.129(c)(1).

<sup>30/</sup> Section 24.129(c)(2).

<sup>31/</sup> Section 24.129(c)(3).

- One (1) of the two (2) 50 kHz channels paired with a 12.5 kHz channel and licensed on a BTA basis.<sup>32/</sup>

Obviously, the Commission decided to make bidding credits available for only one (1) channel of each type and licensing area. The Commission did not explain any facet of this decision. For example, the Third R&O does not explain why exactly one channel -- and not two channels, or all channels, or even no channels of some types -- were made eligible for bidding credits.

Second, the Commission decided that small businesses generally (i.e., not owned by women or minorities) were ineligible for bidding credits:

[W]e do not believe that bidding credits for small businesses are appropriate for narrowband PCS auctions. As a practical matter, due the substantial capital necessary to construct a nationwide narrowband PCS system, most small businesses do not have the wherewithal to construct and operate the proposed systems. Accordingly, provisions designed to encourage participation by small entities in nationwide narrowband PCS would be unlikely to result in the expeditious provision of new service to the public.... Moreover, as to regional, MTA, and BTA licenses, small businesses will be entitled to installment payments, which we believe will be sufficient to ensure their participation.<sup>33/</sup>

The Commission's logic is faulty and should be reconsidered. As its primary justification (lack of financial resources), the Commission incorrectly generalized that the high anticipated cost

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<sup>32/</sup> Section 24.129(d).

<sup>33/</sup> Third R&O, ¶78 n.51 (emphasis added).

of nationwide narrowband PCS should preclude small businesses from bidding credits for all narrowband PCS licenses.<sup>34/</sup>

Similarly, its remaining analysis of the bidding-credit limitations is self-contradictory. The Third R&O also explained that installment payments are a "sufficient substitute" for bidding credits for small businesses; if this is so, why do women and minorities need bidding credits? Further, after finding that women and minorities "face discriminatory lending practices" (§77), the Commission qualified that women-owned and minority-owned small businesses for bidding credits, but not (under its own findings) other small businesses who have relatively better access to lenders. Thus, after expressing concerns about financial resources, the Commission paradoxically allowed bidding credits for the very groups (women- and minority-owned small businesses) which it found to be the least qualified.<sup>35/</sup>

In other words, the Commission's limitation on bidding credits for minority, women-owned, and small businesses for

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<sup>34/</sup> The Third R&O (§69 n.40) found that the cost of constructing narrowband PCS facilities would be approximately \$50,000 for BTA systems, in the \$100,000-\$1.25 million range for MTA systems, in the \$1.0-2.5 million range for regional systems, and in the \$1.7-12.5 million range for nationwide coverage.

The Third R&O (§71) also denied bidding credits to rural telephone companies, finding they likely would have the lowest cost structure to construct and operate narrowband PCS systems. And yet, it disqualified small businesses from bidding credit because they lacked financial resources, a result which contradicts the Commission's findings regarding the rural telcos.

<sup>35/</sup> It must be emphasized that AIDE is not attacking the bidding credits for women and minorities; the point here is that all small businesses should have been treated equally.

narrowband PCS licenses per market is substantially unexplained, arbitrary, and capricious. Upon reconsideration the Commission should make bidding credits available to all designated entities for all narrowband PCS licenses.

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

The Third R&O (¶87) states the Commission's limitation on the availability of installment payments for Designated Entities to the smaller narrowband PCS licenses:

[W]e have decided to limit installment payments to those small businesses bidding on smaller spectrum blocks, specifically the BTA, MTA, and regional licenses. This will deter potential abuse of the installment payment option by large firms and ensure that the public receives maximum value of the use of the spectrum. BTA, MTA, and regional narrowband licenses are appropriately sized for development by bona fide small businesses. We estimate that the cost to build-out these licenses to meet the minimum population coverage requirements will be between \$50,000 and \$1 million. See [Third R&O] n.40. By contrast the nationwide narrowband licenses will require capital commitments that are more suitable to large firms. Accordingly, we believe that application of installment payments to bidding on nationwide narrowband licenses is inappropriate to promote economic opportunity for small businesses. Installment payments for licenses of this magnitude may create incentives for large firms to create small business "fronts" to take advantage of low cost government financing or may result in payment defaults, which would prevent recovery for the public of the value of the spectrum and would hinder the rapid deployment of service to the public.

(Emphasis added.) The emphasized text clearly articulates the Commission's goal -- prohibited by Section 309(j)(7)(A)&(B), as

quoted above -- to maximize revenue from the narrowband PCS auctions.<sup>36/</sup>

This limitation on installment payments is inconsistent with the statutory intent of Section 309(j)'s preferences for Designated Entities<sup>37/</sup> and of its requirement that the Commission not consider potential revenue in its decision-making, and must be deleted upon reconsideration. Accordingly, the Commission must make installment payments available to Designated Entities for every auctionable license.

**V. THE COMMISSION ADOPTED NARROWBAND PCS APPLICATION-PROCESSING RULES WITHOUT ADEQUATE NOTICE OR EXPLANATION, BOTH OF WHICH ARE LEGALLY INSUFFICIENT FOR A RULEMAKING PROCEEDING.**

Although this rulemaking is limited to implementation of the competitive bidding requirements of Section 309(j) of the Communications Act<sup>38/</sup> (NPRM, ¶¶1-10), in a brief reference the Commission proposed substantive PCS application-processing rules:

In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R. §§ 22.3-22.45, 22.917(f), and

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<sup>36/</sup> The Commission's concern that default in an installment payment would prevent the public from recovering the value of the spectrum is clearly makeweight. Quite aside from whatever payments are made prior to default, upon default the spectrum will revert to the Commission (and unlike repossessed cars, always in an undamaged condition) for re-auction at the same (or likely higher) prices.

<sup>37/</sup> See Section 309(j)(3)(B) and 309(j)(4)(D) of the Communications Act. AIDE's Second R&O Petition (Argument II, pages 8-12) presents additional argument on this point, and is incorporated herein by reference.

<sup>38/</sup> Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7635-36 (1993) ("NPRM").

22.918-22.945. For those PCS applicants who file on Form 574, we believe that Sections 90.113-90.159 of our rules, 47 C.F.R. §§ 90.113-159, could be used to process those applications with appropriate modifications.<sup>39/</sup>

This rulemaking topic is improper, being not within the scope of the NPRM.

Accordingly, AIDE's Comments (at 16-18) argued that this proposal is legally insufficient to constitute a valid notice of proposed rules.<sup>40/</sup> Indeed, the cited Part 22 and Part 90 Rules have no immediate applicability to PCS service, being limited to other radio services and frequency bands. Moreover, the substance of PCS regulation differs dramatically from PLMS, DPCRTS, and PLMRS regulation.<sup>41/</sup> Thus, many of the cited rule sections

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<sup>39/</sup> NPRM, supra, 8 FCC Rcd at 7656 (¶128).

<sup>40/</sup> Section 1.413(c) of the Commission's Rules requires that every Notice of Proposed Rule Making include "Either the terms or substance of the proposed rule or a description of the subjects and issues involved." The NPRM's PCS "proposal," such as it is, is insufficient under this standard.

Clearly, the NPRM does not state "the terms ... of the proposed rule or a description of the subjects and issues involved." The NPRM contains no proposed rules and no description of the "subjects and issues." Similarly, the NPRM does not provide sufficient notice of the "substance" of the proposed PCS rules. The "appropriate modifications" which the Commission recognized are necessary are not specified.

<sup>41/</sup> The three existing services license transmitters on a site-by-site basis; the PCS regulations prohibit site-by-site licensing. See Section 99.11(b) of the Commission's Rules. PCS has a ten-year license term with renewal expectancy; PLMRS, a five-year term without renewal expectancy. DPCRTS requires detailed coverage maps; PCS apparently does not. PLMS and DPCRTS both require detailed engineering calculations as part of the application; PCS does not.