ORIGINAL

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

DOCKET FILE COPY ORIGINAL

RECEIVED

JUL 2 9 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of	)	
	)	
Review of the Pioneer's Preference Rules	)	ET Dkt 93-266
	)	
	)	
Amendment of the Commission's Rules To Establish New Personal Communications Services	)	Gen Dkt 90-314
	)	

COMMENTS OF COX ENTERPRISES, INC. ON AMERICAN PERSONAL COMMUNICATIONS EMERGENCY REQUEST FOR ORAL ARGUMENT

Werner K. Hartenberger
Laura H. Phillips
Robin H. Sangston

DOW, LOHNES & ALBERTSON
1255 23RD Street, N.W.
Washington, D.C. 20037
(202) 857-2500

July 29, 1994

No. of Copies rec'd 0+9
List A B C D E

SUMMARY

Cox Enterprises, Inc. files these comments for the Commission's consideration in the remanded PCS Pioneer's Preference case. The Commission apparently has seized on the notion that there are "competitive implications" if a pioneer preference licensee receives its license without payment while competitors pay significant amounts for their licenses through the auction process. Adoption of this unfounded notion as a basis for imposing a payment requirement on PCS pioneers will not withstand judicial scrutiny.

There is no economic support for imposing payment obligations to address perceived competitive imbalances in the preference and auction programs. Economic theory teaches that the amount paid for a license is a fixed cost. The payment or non-payment for a license by a pioneer will not affect its actions in the competitive marketplace and therefore cannot adversely impact PCS competition. Because the amount paid by a preference holder for its license is irrelevant to competition, the amounts bidders will be willing to pay for their licenses will not be affected by the presence or lack of a pioneer payment.

If "competitive implications" is to become a fixture of the Commission's jurisprudence, the Commission must be prepared to answer complaints from incumbent licensees about competitive unfairness whenever the Commission allocates licenses and whenever one party acquires a license and, thereby, incurs greater or lesser capital investment costs than those incurred by existing competitors. If the mere fact that one party has lower capital investment costs

constitutes a competitive advantage that requires the handicapping of competitors, application of the theory will invite competitor challenges and requests for relief.

It is absurd for the Commission to consider "competitive implications" in the Southern California MTA because Cox earned its license as a pioneer. PacBell intends to bid on and obtain the other 30 MHz MTA license to be made available in the Southern California MTA. Analysts expect PacBell to out spend all its rivals to win both Northern and Southern California PCS licenses at all costs. The competitor the Commission seems so intent on protecting from competitive disadvantage had $8.89 billion in revenues and employed 54,844 people in 1993. PacBell has monopoly landline telephone operations throughout California and in parts of Nevada that are unrivaled in their size and ubiquity. PacBell also has unmatched PCS marketing access to every telephone customer and unmatched cost advantages. The assumption that PacBell will be competitively disadvantaged if Cox receives its license without payment approaches the surreal. At least in Southern California, the Commission's "competitive implications" theory will have the perverse effect of handicapping the new PCS competitor and benefitting the incumbent LEC.

The Commission has conceded that it lacks authority under the 1993 Budget Act to condition the pioneers' licenses on the payment of a substantial fee. The Commission's conclusion in the narrowband PCS preference case that it has authority under its general grant of rulemaking authority in section 4(i) is unprecedented. The Commission can identify no authority suggesting that section

4(i) authorizes the Commission to charge a licensee a fee for its license on the order of magnitude apparently contemplated by the Commission.

In conferring limited auction authority on the Commission pursuant to section 309(j), Congress was aware of the Commission's tentative award of PCS preferences to three pioneers and could easily have made the awards subject to the auction authority or otherwise required the pioneers to pay for their licenses. Yet Congress chose not to confer specific authority on the Commission to subject the pioneers to the auction process or to charge them for their licenses. There is no principled basis for requiring the pioneers to pay for their licenses in the absence of a specific statutory grant of authority.

Aside from the fact that the Commission is attempting improperly to use section 4(i) as a free-standing source of statutory authority, the Commission cannot demonstrate that such fees are "necessary in the execution of its functions". There is simply no evidence that the action proposed -- a requirement that the pioneers pay for their licenses -- is necessary to further the interests the Commission has identified. There is no evidentiary support for the Commission's underlying premise that, without conditioning the award of a license to the PCS pioneers on the payment of substantial fees, the entities who are required to bid on the remaining licenses in the preference markets will be competitively disadvantaged.

Even if the Commission had substantiated this hypothetical harm, an action to condition preference licenses would still fail to satisfy the requirements

of section 4(i) because the Commission has made no showing that the "remedy" proposed is "necessary." There has been no determination based on the particular characteristics of each preference market of the amount of fees that would be necessary to remedy the hypothetical competitive disadvantage. Therefore, the Commission cannot demonstrate that any particular amount is "necessary" to execute its functions. As Commissioner Quello fears, the Commission's "aggressive" use of section 4(i) as a basis to condition the grant of broadband PCS pioneer preference licenses on some payment will not withstand judicial review.

TABLE OF CONTENTS

PAGE

I. THE COMMISSION'S PREMISE IS UNWORKABLE, UNSUPPORTABLE AND MISGUIDED 2

A. The FCC Is Not in the Business of Handicapping Competition. 7

B. Competitive Implications Cannot Be Considered in a Vacuum 10

C. Application of a Payment Policy Here Would Be Inequitable. 12

II. THE COMMISSION LACKS AUTHORITY TO REQUIRE THE PCS PIONEERS TO PAY FOR THEIR LICENSES. 15

A. The Commission's Reliance on Section 4(i) Represents an Unjustified Departure From Its Prior Interpretations of Section 4(i). 15

B. The Commission's Interpretation of Section 4(i) Oversteps Its Limits 20

C. The Payment of Fees by PCS Preference Holders Is Unrelated to "Necessary" Commission Functions 25

III. CONCLUSION 27

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

In the Matters of	)	
	)	
Review of the Pioneer's Preference Rules	)	ET Dkt 93-266
	)	
	)	
Amendment of the Commission's Rules To Establish New Personal Communications Services	)	Gen Dkt 90-314

COMMENTS OF COX ENTERPRISES, INC.
ON AMERICAN PERSONAL COMMUNICATIONS
EMERGENCY REQUEST FOR ORAL ARGUMENT

Cox Enterprises, Inc. ("Cox") hereby files these comments in response to an Emergency Request for Oral Argument filed with the Commission on July 21, 1994 by American Personal Communications ("APC") ("APC Request"). The APC Request was prompted by the Commission's Emergency Motion for Remand ("Remand Motion") filed with the United States Court of Appeals for the District of Columbia Circuit on July 8, 1994.[1/] The Commission requested a remand because its "understanding of the PCS marketplace and the auction process has developed as it has resolved various issues" and "the Commission now has a fuller understanding of the competitive implications of one licensee receiving its license without payment while its competitors, under an auction process, must pay significant amounts for their licenses."

1/ See Pacific Bell v. FCC, No. 94-1148 (D.C. Cir. July 26, 1994). By order filed July 26, 1994, the Court remanded the case to the FCC for further consideration.

The prospect that the Commission would attempt to impose a "rough justice" equalization payment on the pioneers, requiring them to pay potentially hundreds of millions of dollars for their licenses to remedy a perceived "competitive implication," represents an unprecedented departure from decades of Commission licensing policy. More important than the novelty of the Commission's reliance on "competitive implications," however, is the fact that the premise of the Commission's theory is unsupportable.[2/] In addition, the Commission lacks statutory authority to condition the issuance of licenses to the pioneers on a substantial payment.

I. THE COMMISSION'S PREMISE IS UNWORKABLE, UNSUPPORTABLE AND MISGUIDED

The apparent premise of the Commission's "competitive implications" theory is that a party receiving its license without payment does so with a "lower

---

2/ The Commission proceeded to use its "competitive implications" policy announced in its Remand Motion to condition the narrowband PCS license awarded to Mtel on its payment of either 90% or $3 million less than the lowest priced narrowband license awarded through the auction, whichever is less. See Nationwide Wireless Network, File No. 22888-CD-P/L-94 (released July 13, 1994 (hereinafter the "Mtel Decision").

capital investment"[3/] and, therefore, gains a "competitive advantage"[4/] over those parties who have paid for their license. That premise, if implemented pursuant to the Commission's "competitive implications" theory, will lead to unworkable results and unintended consequences.

An analysis of the Commission's "competitive implications" theory makes its unworkability obvious. To begin with, if such a "competitive implication" exists, it is irrelevant whether payment is made to the government as a result of the auctioning of spectrum or whether the payment is made to a private party pursuant to a negotiated agreement for the purchase and sale of the license. The presumed injury about which the Commission seems concerned is that competition in the marketplace is harmed if one party has a "lower capital investment" because it receives its license without payment. If competition in fact is harmed because one or more licensees have made higher capital investments because they have paid for their licenses, the harm is no less apparent if the payment is made to private parties selling licenses. There obviously is no harm to competition merely because the federal treasury is not fattened.

Moreover, if competition in fact is harmed because one party has lower capital investment costs than other competitors, it must be the disparity in capital investment that concerns the Commission. Whether one party received its license

---

3/ Mtel Decision at 15.

4/ Id.

for "free" is meaningless.[5/] The Commission's "competitive implications" theory could hardly recognize harm to the development of marketplace competition if one party receives its license without payment and another party pays $200. In order to avoid logical nonsense, the Commission's "competitive implications" theory cannot be understood unless it is the substantial disparity among parties' capital investment that is significant, rather than the fact that one party receives its license for "free." Because it must be the disparity in capital investment that concerns the Commission, the consequences of its "competitive implications" theory cannot rationally be limited to circumstances in which one party receives its license without payment. Nor can the consequences of its "competitive implications" theory be limited only to the allocation of PCS licenses.

If in fact harm to competition results from a disparity among competitors' capital investments, the Commission will be obliged to remedy that problem whenever it arises. If "competitive implications" is to become a fixture of the Commission's jurisprudence, the Commission must be prepared to answer complaints from incumbent licensees about competitive unfairness whenever the Commission hereafter allocates licenses in whatever service they remain available to applicants; and also whenever one party acquires a license and, thereby, incurs

---

5/ The Commission cannot uncritically accept Pacific Bell's assertions in its Brief before the Court that the preference licenses are conferred "for free." The preference licenses were earned at considerable cost and after substantial and successful efforts by Cox and other pioneers in reliance on the Commission's promises.

greater or lesser capital investment costs than those incurred by market competitors. If the mere fact that one party has lower capital investment costs constitutes a competitive advantage that requires the Commission to engage in the economic or non-economic handicapping of competitors, the Commission will be inviting other market competitor challenges and requests for relief that logically flow from its "competitive implications" theory in connection with its treatment of pioneer preference holders. If competition is harmed whenever one licensee makes a greater investment in its license than a market competitor, the Commission's "competitive implication" theory would require it to regulate the price at which licenses may be transferred.

Since the measure of the Commission's concern depends on the magnitude of parties' capital investments, the logical extension of the Commission's theory is that competition in the provision of communications services is harmed whenever one party has greater financial resources than do its competitors, and that the Commission is required to remedy that harm by equalizing the war chests of competitors. That is a hopeless and woefully misguided policy objective.

An understanding of the Commission's "competitive implications" theory demonstrates that it is limitless as to its implications, unworkable and misguided. The theory also is unsupportable because its premise is faulty. The Commission's public interest mandate to promote competition has never considered the relative

magnitude of a party's capital investment costs in acquiring a license. It always has been irrelevant to the Commission's public interest determination whether a licensee paid more or less than its competitor or obtained the license without any payment. It is of no legal significance or legitimate public policy concern that one licensee paid more or less (or nothing) for its license.

It would come as a profound and total surprise for television broadcasters to learn that the Commission would be concerned about "competitive implications" if they paid more or less than their market competitors for a license. It would be equally astounding to wireline set-aside cellular operators or any other Commission licensee. Their surprise would be justifiable because the underlying premise that a licensee with lower capital investment costs has an unwarranted competitive advantage is unsupportable as a matter of economic analysis.

As APC's Supplemental Comments on Remand demonstrates, there is no economic support for imposing payment obligations to address competitive imbalances in the preference and auction programs. Economic theory teaches that the amount paid for a license is a fixed cost. The payment or non-payment for a license by a pioneer will not affect its actions in the competitive marketplace and therefore cannot adversely impact PCS competition. Because the amount paid by a preference holder for its license is irrelevant to competition, the

amounts bidders will be willing to pay for their licenses will not be affected by the presence or lack of a pioneer payment.

A. The FCC Is Not in the Business of Handicapping Competition.

As the APC Request observes, consideration of "competitive implications" surrounding the disparities among the television stations that received their license for free and others that paid high purchase prices have never troubled the Commission. That the Commission might attempt to collect some portion of the $717 million paid by Gannett for WUSA, Channel 9 Washington D.C. and KVUE-TV Austin, Texas, from NBC, the original owner of WRC-TV in Washington, D.C., to address the "competitive implications" of Gannett's payment and NBC's non-payment would strike any rational observer as ludicrous.

Similarly, the fact that wireline cellular operators received set-aside cellular licenses for free and their competitors in the vast preponderance of cases paid for their licenses did not affect competition in the cellular market, nor has the imbalance of capital investment costs ever concerned the Commission.[6/] For example, Bell Atlantic received the wireline cellular licenses in its five state telephone service area without charge. Virtually all the non-wireline licenses in

6/ In fact, as the APC Request observed, very substantial sums were exchanged for non-wireline cellular licenses and there is no evidence of a skewed marketplace or unwillingness by prospective cellular license purchasers to pay large sums for cellular licenses in competition with wireline operators.

this region have changed hands, and, at each stage, the new licensee paid a high value for these cellular licenses. In 1991, Comcast reportedly paid approximately $1.1 billion dollars to acquire control of the Philadelphia non-wireline license and minority interests in nearby New Jersey non-wireline licenses.[7/] These license purchase prices, however, have not handicapped Comcast in competing with Bell Atlantic in the cellular market. If the Commission's "competitive implications" theory has any merit, Comcast or other non-wireline cellular licensees could invoke the Commission's policy to force Bell Atlantic to pay a fee related to the purchase price of the competing licensee.

The Commission has declined to consider the competitive disparities between cellular operators and PCS licensees created by assigning PCS licenses by auction, with microwave encumbered spectrum and the concomitant costs of incumbent relocation. As the APC Request observes, the Commission did not consider these relative burdens relevant to the development of competition.

It is inconsistent and judicially infirm for the Commission to attempt to equalize war chests in order to address "competitive implications" that it has never before considered, premised on the wholly unproven theory that disparate capital investment costs harm competition. The only distinction the Commission can point to in an attempt to distinguish PCS from these other services is that the U.S. Treasury, rather than private party sellers in the marketplace, will be the

---

7/ See Cellular Investor, Vol. No. 39, May 14, 1991 at 1-3.

beneficiary of the payment. That difference, however, is entirely irrelevant to the "competitive implication" of a payment or lack of payment. In short, although the marketplace in the provision of communications services is replete with instances where some competitors paid for their licenses and others did not, there is good reason why the Commission has never before suggested that competition was harmed: the premise that there is a "competitive implication" that the Commission must address by the imposition of a payment requirement on licensees with "lower capital investment" is utterly without foundation in economics.

As APC's Supplemental Comments on Remand demonstrates, the amount paid by any PCS licensee for its license will be irrelevant to the licensee's future economic behavior.[8/] As a result, charging or not charging a pioneer for its license will have no impact on competition in the PCS market. APC also demonstrates that the behavior of bidders for other licenses will not be distorted or affected by a pioneer's payment or non-payment for its license.[9/] The Commission cannot rationally impose a payment requirement based on faulty economic analysis.

8/ APC Supplement at 3-6.

9/ APC Supplemental Comments at 5. As APC observes, the lack of distortion of bidding behavior based on the payment or non-payment of preference holders is an entirely different issue than whether there will be a premium price paid for the remaining 30 MHz MTA license in the preference markets.

B. Competitive Implications Cannot Be Considered in a Vacuum.

Since there is no sound economic analysis that supports an assertion that competition is harmed if one party receives its license without payment, what then are the "complex competitive issues"[10/] that lead the Commission to conclude that competition will be harmed in the three pioneer preference markets in the absence of a payment by the pioneers. It is becoming quite clear who will be Cox's PCS competitor. Pacific Bell ("PacBell") intends to bid on and obtain the other 30 MHz MTA license in the Southern California MTA. In anticipation of the auction, PacBell spun off to its shareholders its cellular telephone business from its core local telephone operations in order to qualify to bid on the 30 MHz MTA spectrum. A. Adelson, "Pacific Bell In Cellular Strategy," New York Times, July 16, 1994 (attached). This move was viewed by analysts as "'a very intentional signal meant to intimidate' potential competitors." Id. (quoting William Deatherage, analyst, S.G. Warburg & Company). It also has led "[a]nalysts . . . [to] expect[] Pacific Bell, whose parent is the Pacific Telesis Group, to outspend all its rivals to win several licenses to be auctioned for both Northern and Southern California by the Federal Communications Commission for new wireless frequencies."[11/]

10/ Mtel Decision at 15.

11/ It is telling that PacBell already has filed a series of backhaul microwave applications for 38 GHz frequencies for use by its future PCS business.

It is absurd for the Commission to consider, and disingenuous for PacBell to complain about, "competitive implications" in the Southern California MTA because Cox earned its license as a pioneer. The competitor the Commission seems so intent on protecting from competitive disadvantage had $8.89 billion in revenues and employed 54,844 people in 1993.[12/] On the 1993 Forbes 500 list of companies, its parent (Pacific Telesis Group) ranked number 27 in market value, number 94 in assets, number 100 in sales and number 278 in net profits.[13/] PacBell has monopoly landline telephone operations throughout California and in parts of Nevada that are unrivaled in their size and ubiquity. PacBell also has unmatched PCS marketing access to every telephone customer. Given PacBell's obvious competitive muscle, it is no surprise that the New York Times reported that "Pacific Bell can outbid any competitor for the new [PCS] licenses and remain competitive because its nine million California customers and huge infrastructure will provide significant cost advantages . . . ."

The assumption that PacBell will be competitively disadvantaged if Cox receives its license without payment approaches the surreal. If anything, Cox has far more to fear in the competitive arena from PacBell because Cox will be dependent upon PacBell to offer Cox's PCS operations both interstate and

---

12/ See Standard & Poor's Register of Corporations, Directors and Executives, Vol. 1 (1994).

13/ Forbes, Apr. 25, 1994, at 286.

intrastate interconnection at terms that are fair and reasonable. PacBell will be both the landline telephone monopoly and a PCS provider, and will have a strong incentive not to position its PCS service as a LEC replacement. Consequently, high PCS interconnection costs can be expected. Even if PacBell's PCS interconnection rates are non-discriminatory, they will have a direct impact on the viability of PCS as competition to the LEC. It would be ironic if the Commission considers the unproven and unsupported "competitive implications" in the allocation of PCS licenses but ignores the frequently recognized competitive advantages of the LECs and their demonstrated pattern of stifling competition. At least in Southern California, the Commission's "competitive implications" theory will have the perverse effect of handicapping the new PCS competitor and benefitting the incumbent LEC. The Commission is in danger of losing sight of its PCS objective to introduce competition in the local exchange.

C. Application of a Payment Policy Here Would Be Inequitable.

The Commission's curious change of heart on the pioneer payment issue is represented as a rebalancing of "equities" and a "fuller understanding" of the impact of "free" licenses on the auction process. These unsupportably weak explanations are all the more inexplicable in light of the Commission's Memorandum Opinion and Order on the use of lotteries to allocate licenses in

cellular unserved areas, which was released just one day after the Mtel Decision.[14/] In that order, the Commission expressly determined that it would be inequitable to license spectrum for underserved cellular markets when the applicants had proceeded on the understanding that licenses would be awarded by lottery.

In the Cellular Lottery Order, the Commission determined that, despite the onset of auctions, it would be inequitable for unserved area cellular applicants who had filed applications in reliance on the Commission's existing lottery procedures to have their expectations upset by the imposition of competitive bidding procedures. The order cites administrative upheaval and dislocation of business plans that would result from a decision at this stage to apply auction rules to parties that had anticipated processing under lottery rules.[15/] The order also observes that the public interest is served by remaining faithful to the Commission's original processing intention which will create "new competitors" and "expedite service to the public."[16/]

The Commission has a duty to explain why it has determined that in the Cellular Lottery Order it would be inequitable to impose a change in processing rules, thereby upsetting settled expectations, while in the context of PCS pioneers

---

14/ Implementation of Section 309(j) of the Communications Act-Competitive Bidding, PP Docket No. 93-253, FCC 94-123 ("Cellular Lottery Order").

15/ Cellular Lottery Order at ¶ 16.

16/ Id. ¶¶ 17, 19.

a change at this late stage coming without a record or even an opportunity for briefing is equitable.[17/] The competitive bidding statute expressly retained for the Commission the discretion to treat PCS pioneers under the existing rules,[18/] and the Commission in its First Report and Order determined in fact to apply existing rules as a matter of equity.[19/] To now reverse itself on the equities for the pioneers, while at the same time finding there are equities favoring the retention of lotteries for unserved area cellular applicants, is a paradigm of inconsistency that cannot withstand judicial review.[20/]

17/ It is ironic that the Commission takes comfort in the "Special Rule" contained in the 1993 Budget Act that left to the Commission's discretion the treatment of mutually exclusive applications on file prior to July 26, 1993 but overlooks its discretion conferred under the same statute to retain the benefits of the PCS preference program for the pioneers.

18/ 47 U.S.C. § 309(j)(6)(G) (1994 Supp.).

19/ See Review of the Pioneer Preference Rules, 9 FCC Rcd 605, 610 (1994).

20/ The only obvious difference between cellular applicants and PCS licenses, apparently, is that the Commission anticipates receiving high auction prices for PCS licenses and relatively less for unserved area cellular licenses. This expectation and inducement of revenue, however, runs counter to the Act's admonishment that the FCC not use the income generating ability of its competitive bidding authorization to the detriment of other public interest considerations, including the fostering of new technology in the preference program.

II. THE COMMISSION LACKS AUTHORITY TO REQUIRE THE PCS PIONEERS TO PAY FOR THEIR LICENSES.

A. The Commission's Reliance on Section 4(i) Represents an Unjustified Departure From Its Prior Interpretations of Section 4(i).

In its recent Memorandum Opinion and Order in the narrowband PCS proceeding, the Commission conceded that it lacks authority under the competitive bidding statute to condition the pioneers' licenses on the payment of a substantial fee. Mtel Decision at 17. However, the Commission concluded that it has authority to do so under its general grant of rulemaking authority in section 4(i) of the Communications Act, 47 U.S.C. § 154(i) (1991).[21/] The Commission's reliance on section 4(i) is unprecedented; the Commission can identify no authority which even arguably suggests that section 4(i) authorizes the Commission to charge a licensee a fee for its license on the order of magnitude apparently contemplated by the Commission in this proceeding.

It is plain that the Commission is grasping at straws in invoking section 4(i) of the Act. The Commission has never before interpreted its authority under

---

21/ Section 4(i) of the Communications Act is found under subchapter I, which is headed "General Provisions." It provides:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

47 U.S.C. § 154(i) (1988).

section 4(i) this broadly. Indeed, it repeatedly has concluded that an express grant of statutory authority is necessary before it could charge licensees fees. For example, prior to the enactment of 47 U.S.C. §§ 158, 159,[22/] the Commission did not invoke section 4(i) to charge licensees the administrative and regulatory fees expressly authorized by sections 158 and 159. If the Commission needed express Congressional authorization to charge these relatively modest administrative and regulatory fees, it is difficult to conceive the Commission's justification for its conclusion in the Mtel Decision that it can use section 4(i) to charge millions of dollars for spectrum which historically has been allocated for free.[23/]

The Commission's repeated assertions that it lacked auction authority also undercut the Commission's new-found reliance on section 4(i). For years, the Commission discussed the possibility of auctioning spectrum but concluded that it

---

22/ Section 158 confers authority upon the Commission to assess and collect administrative charges for licenses, license renewals, transfers of control, license modifications, etc. These charges are by and large modest. The charge for a new construction permit for a commercial television station, for example, is $2,535. The largest charge authorized by the statutory schedule is $210,000 for an application to launch a low earth orbit satellite system. Section 159 authorizes the Commission to assess and collect regulatory fees to recover the costs of the Commission's regulatory activities, including enforcement activities, policy and rulemaking activities, user information services, and international activities. These fees, which are to be assessed licensees on an annual basis, range from $6.00 to $90,000 for a low-earth orbit space station.

23/ Indeed, Commissioner Quello has since expressed his concern that the reliance on section 4(i) "entails what may best be described as an aggressive interpretation of Section 4(i) ...." See Concurring Statement of Commissioner James H. Quello, FCC News (released July 29, 1994).

lacked the authority to do so until expressly authorized by Congress. See, e.g., In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking and Tentative Decision, GEN Docket No. 90-314, 7 FCC Rcd 5676, 5710 (1992) ("Although the Commission does not currently have competitive bidding authority, legislation is pending that would grant the Commission limited authority."); "Spectrum Licensing in the '90s: Can We Find A Way?" Remarks of Ervin S. Duggan, Commissioner, FCC, before the American Mobile Telecommunications Association, 1992 FCC LEXIS 3479 (June 24, 1992) ("The necessary authority to change the FCC's licensing procedures, as you know, must come from Congress. So I'm intrigued by the recent draft bipartisan amendment proposed by Senators Inouye and Stevens to allow a trial of competitive bidding, or auctions . . . ."). The Commission waited until Congress passed the 1993 Budget Act specifically authorizing auctions before adopting regulations implementing spectrum auctions. If the Commission concluded that it lacked authority to auction spectrum, it is disingenuous for the Commission to assert now that section 4(i) gives it the requisite authority to charge the PCS pioneers fees that are a substitute for auctions without express Congressional authorization.

The Commission's assertion that section 4(i) confers authority upon it to order the payment of substantial fees by licensees reflects an unexplained change of position from its prior decisions that section 4(i) does not confer such authority. For example, the Commission has long held that it cannot rely on section 4(i) to

order the payment of attorneys' fees. See, e.g., In re Complaint of Georgia Power Project, 53 FCC 2d 907, 908 (1975) (the Commission needs a far clearer congressional mandate than section 4(i) to order the payment of costs and attorneys' fees); In re Radio Station WSNT, Inc., 45 FCC 2d 377, 382-83 (1974) (Section 4(i) "may not be interpreted in a way that ignores deliberate and careful limitations on our power to require payment of money. We believe that a specific congressional mandate would be required to justify [an] order" awarding attorneys' fees), aff'd, Turner v. FCC, 514 F.2d 1354, 1355 (D.C. Cir. 1975) (agency lacked grant of "clear statutory power by Congress" to assess attorneys' fees).

The Commission's conclusion that it lacked authority under section 4(i) in those cases, in part, turned on the fact that Congress was aware of the use of specific statutory grants of authority to enable agencies to assess attorneys' fees and yet did not specifically confer such authority on the Commission. Thus, in WSNT, Inc., the Commission stated that "fee shifting was well known to Congress when the Act was adopted; and Congress did not choose to number it specifically among the Commission's regulatory tools." 45 FCC 2d at 381. In light of the "strict limitations on the Commission's powers under the Act to require broadcast licensees to pay out money,"[24/] and "the fact that Congress has not hesitated in

---

24/ In WSNT, Inc., the Commission acknowledged that Congress had carefully limited the Commission's power to require the payment of money to two situations:

> Our sole explicit power under the Act to require broadcasters to pay out money is the forfeiture power, which is subject to a ceiling of $10,000 and

(continued...)

other circumstances to authorize fee awards explicitly when it has determined such authorization to be warranted," the Commission concluded that it required an explicit grant of statutory authority and could not rely on section 4(i). Id. at 381-82.

In conferring limited auction authority on the Commission pursuant to section 309(j), Congress was aware of the Commission's tentative award of PCS preferences to the pioneers and could easily have made the awards subject to the auction authority or otherwise required the pioneers to pay for their licenses. See 47 U.S.C. § 309(j)(6)(G); see H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. at 485 (1993) (Section 309(j)(6) "concern[s] the so-called 'Pioneer's Preference'"). Yet Congress chose not to confer specific authority on the Commission to subject the pioneers to the auction process or to charge them for their licenses. Indeed, Congress expressly stated that it was remaining "neutral" on the matter of pioneer preferences. H.R. Rep. No. 111, 103d Cong., 1st Sess. 256, 257 (1993).[25/] If the Commission was unwilling to require the payment of attorneys' fees by licensees in the absence of express statutory authority, there is no principled basis for

---

24/ (...continued)
a one-year statute of limitations. 47 U.S.C. 503(b). . . . The Commission also collects fees from licensees under the command of legislation directing federal agencies to help support themselves by assessing the enterprises they regulate. 31 U.S.C. 483a.

45 FCC 2d at 382 & n.8.

25/ The fact that Congressman Dingell has proposed legislation that would require the PCS pioneers to pay for their licenses is further evidence that section 309(j), as enacted, does not give the Commission authority to do so.