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September 12, 1994

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

Via Messenger

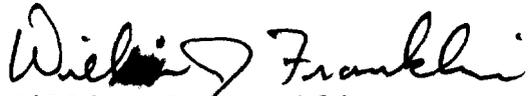
Re: **PP Docket No. 93-253** /
Implementation of Section 309(j) of the
Communications Act, and
GEN Docket No. 90-314, ET Docket No. 92-100
Amendment of the Commission's Rules to Establish
New Narrowband Personal Communications Services

Dear Mr. Caton:

Submitted herewith on behalf of the Association of Independent Designated Entities ("AIDE") are an original plus 11 copies of its Comments with respect to the above-referenced dockets.

Please contact my office directly with any questions or comments you may have with respect to this submission.

Respectfully submitted,


William J. Franklin
Attorney for Association of
Independent Designated
Entities

cc: Assoc. of Independent
Designated Entities

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

SEP 12 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act)	
)	
Competitive Bidding)	
Narrowband PCS)	
)	
and)	
)	
Amendment of the Commission's)	GEN Docket No. 90-314
Rules to Establish New)	ET Docket No. 92-100
Narrowband Personal)	
Communications Services)	

To: The Commission

**COMMENTS OF THE ASSOCIATION OF
INDEPENDENT DESIGNATED ENTITIES
OF THE THIRD MEMORANDUM OPINION AND ORDER
AND FURTHER NOTICE OF PROPOSED RULEMAKING**

The Association of Independent Designated Entities ("AIDE"), by its attorney and pursuant to Section 1.429 of the Commission's Rules, hereby comments of the Commission's Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in the above-captioned proceedings.^{1/} As set forth herein, the Commission failed to adequately protect the interests of small businesses, rural telephone companies, and businesses owned by members of minority groups and women (defined in Paragraph 227 of

^{1/} 9 FCC Rcd _____ (FCC 94-219, released August 17, 1994) ("Third MO&O/FNPRM"), reconsidering Third Report & Order, 9 FCC Rcd _____ (FCC 94-98, released May 10, 1994) ("Third R&O"). Separate summaries of proposed rules and the final rules adopted by the Third MO&O/FNPRM were published in the Federal Register on August 26, 1994 at 59 FR 44109 and 59 FR 44058, respectively. Pursuant to Section 1.4 of the Commission's Rules, this Petition is timely filed. These Comments are strictly limited to the Commission's proposed rules, 59 FR 44109-20.

the Second Report and Order in this proceeding as "Designated Entities").^{2/}

FACTUAL BACKGROUND

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

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

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

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

AIDE is an unincorporated association, with membership limited to persons and entities likely to be classified as "Designated

^{2/} 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 MO&O/FNPRM, this Petition cannot discuss every issue presented by the Third MO&O/FNPRM. AIDE's silence on other issues regarding the Third MO&O/FNPRM should not be taken to indicate any specific position thereon. AIDE specifically reserves its appellate rights with respect to the final rules adopted in the Third MO&O/FNPRM, 59 FR 44058-73.

^{3/} Section 309(j)(3)(B), partially quoted in Third R&O, ¶66.

^{4/} Section 309(j)(4)(D), partially quoted in Third R&O, ¶66.

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. Various AIDE members have extensive legal, technical, financial, and communications backgrounds. Many have owned or managed small businesses, and understand the special needs and problems of small and start-up businesses. Accordingly, AIDE has a special expertise to present the position of the Designated Entities to the Commission.

I. THE COMMISSION CORRECTLY PROPOSED TO EXPAND THE NUMBER OF INSULATED FREQUENCY BLOCKS AVAILABLE TO BIDDING BY DESIGNATED ENTITIES AND TO REGIONALIZE THE TWO BTA FREQUENCY BLOCKS.

Paragraph 84 of the Third MO&O/FNPRM proposes, in part, to designate all the existing frequency blocks eligible for bidding credits as part of the entrepreneurs' block and to expand that block by one additional MTA block and one additional BTA block. In Paragraphs 77 and 122, the Commission also proposed to redesignate the two BTA frequency blocks as regionally licensed blocks, using the same designations as Section 24.102 of the Rules. Subject to Comment II, infra, AIDE strongly supports those proposals.

The Commission's nationwide narrowband PCS auctions completely foreclosed Designated Entities from receiving national licenses. Thus, relief at the regional level is required. Similarly, to make up for the existing imbalance in narrowband licensing, the number of narrowband PCS frequency blocks reserved for Designated Entities should be expanded. Thus, the Commission

correctly has proposed to expand the scope of insulated narrowband PCS licenses.

However, the Commission's proposal (Third MO&O/FNPRM, ¶¶119-121) to limit the number of entrepreneurs' block licenses which any entity could hold to 10% of available licenses needs to be strengthened. This limitation should be that any single entity and its affiliates should be limited to narrowband PCS licenses covering 10% of the population of the country. Without this change, the proposed limitation is meaningless: it permits any single entity to "cream skim" the country and any group of affiliated entities to become licensed for the whole country.

II. THE COMMISSION EXCEEDED ITS AUTHORITY UNDER SECTION 309(j) IN GRANTING FINANCIAL INCENTIVES AND FREQUENCY SET-ASIDES TO NON-DESIGNATED ENTITIES.

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 (Third R&O, ¶73), that minority-owned businesses promote other societal goals (id., ¶74), that minority and women-owned businesses are severely underrepresented in telecommunications (id., ¶75), that bidding credits are "the best way" to end such underrepresentation (id., ¶76), that "even comparatively large businesses owned by minorities and women face discriminatory

lending practices and other discriminatory barriers to entry" (id., ¶77), and that Congress intended that bidding credits go to minority and women-owned businesses "independent of their status as small businesses" (id., ¶78).

Paragraphs 64-72 of the Third MO&O/FNPRM affirmed these general principles, finding that specific economic and bidding incentives serve the public interest by making auctionable narrowband PCS licenses available to Designated Entities.

Having found a general statutory policy favoring Designated Entities, the Commission then proposes to eviscerate that policy by throwing the Designated Entities in with some substantially larger, non-Designated Entities. By way of analogy to the games of ancient Rome, it is as if the Romans decided to feed the Christians only to smaller lions. However benevolent this policy might be in some abstract sense, the Christians will still likely be some lion's lunch.

Specifically, the Commission proposed to designate four (4) narrowband PCS MTA frequency blocks (nos. 19, 21, 22, and 24) and both BTA frequency blocks (nos. 25 and 26) as "entrepreneurs' blocks," with bidding open to all bidders with attributable, cumulative gross revenues less than \$125 million and total assets less than \$500 million.^{5/} At the same time, the Commission redefined "small business" to include any company with attribut-

^{5/} Third MO&O/FNPRM, ¶¶74, 101. The net worth of each attributable investor in an "entrepreneur" must be less than \$100 million. Id.

able, cumulative gross revenues less than \$40 million.^{6/} The Commission also proposed to permit outside investors to provide as much as 75% of the passive equity of an "entrepreneur" or "small business without the assets or gross revenue of the investor being counted as part of the applicant^{7/}

Thus, the largest small business could be forced to bid against companies with almost 3 times their gross revenues. Indeed, because the Commission provided further that consortia of small businesses remain qualified as "entrepreneurs" without regard to their aggregate size,^{8/} independent small businesses could be forced to bid against arbitrarily large consortia.^{9/}

Without doubt, the Commission's statutory authority under Section 309(j) is limited to its giving preferences to the four

^{6/} Third MO&O/FNPRM, ¶¶46, 79. The net worth of each attributable investor in an "entrepreneur" must be less than \$40 million. Id.

^{7/} Third MO&O/FNPRM, ¶¶79-80, 102-117. This limitation is either too much or too little. AIDE suggests that the Commission eliminate this exception to the various size tests. With the exemption, the Commission is not rewarding size (as Congress intended), but deal-making and company-structuring ability. Conversely, if the exemption is retained, the Commission should permit the non-attributable investor to contribute all of the passive equity, which by definition cannot transfer control of the applicant.

^{8/} Third MO&O/FNPRM, ¶¶94 n.135, 104.

^{9/} The Commission has concluded that large, incumbent firms with significant financial resources are likely to prevail over smaller, new companies in any PCS auction. See Third MO&O/FNPRM, ¶73.

(4) defined types of Designated Entities.^{10/} The Commission clearly would exceed that authority if it creates a non-statutory preference for sort-of-big-business "entrepreneurs", and made those entrepreneurs eligible to bid against qualified Designated Entities for the six narrowband PCS frequency blocks.

III. THE COMMISSION SHOULD EXPAND ITS USE OF FINANCIAL INCENTIVES BY DESIGNATED ENTITIES TO ALL NARROWBAND PCS FREQUENCY BLOCKS.

With the possible exception of Paragraph 84, the Third MO&O/FNPRM's discussion of the financial incentives available to Designated Entities (§§73-100) appears to propose that the Commission's financial incentives to Designated Entities (lower up-front payments, installment payments, bidding credits) be only available for the six narrowband PCS frequency blocks identified as "entrepreneurs' blocks."^{11/}

The Commission did not explain its reasoning behind this proposed limitation,^{12/} and the limitation should not be adopt-

^{10/} See Sections 309(j)(3)(B) and 309(j)(4)(D) of the Communications Act; Conference Report to the Budget Act, H.R. Rep. 103-213, 103rd Cong. 1st Sess, 103 Cong. Rec. H5792, H5914 (August 4, 1993) (provision of House bill adopted in final Budget Act) ("Conference Report").

^{11/} Additionally, the Commission also stated that it proposed to extend its tax certificate policies to promote the provision of narrowband PCS by women and minorities. Third MO&O/FNPRM, ¶76. However, the Third MO&O/FNPRM supplied no details of this proposal.

^{12/} In its Fifth Report and Order, 9 FCC Rcd ____ (FCC 94-178, released July 15, 1994) (¶131), the Commission explained that a similar limitation in financial benefits to Designated Entities for broadband PCS auctions was based on its belief that "the extremely capital intensive nature of narrowband PCS" would
(continued...)

ed. Instead, the Commission should adopt its apparent proposal of Paragraph 84 to "include all of those remaining [frequency] blocks" as eligible for the financial incentives available to Designated Entities.

The Commission's limitation on financial incentives is inconsistent with the statutory intent of Section 309(j)'s preferences for Designated Entities.^{13/} Accordingly, the Commission must make its financial incentives available to Designated Entities for every auctionable narrowband PCS license.

IV. THE COMMISSION MUST CORRECT TWO ASPECTS OF ITS PROPOSED FINANCIAL-PREFERENCE RECOVERY PROCEDURES.

The Commission must correct two aspects of its proposed financial-preference recovery procedures.

First, paragraphs 85 and 86 of the Third MO&O/FNPRM propose a three-year period in which licensees in the entrepreneurs' blocks cannot transfer or assign their licenses, and an additional two- to seven-year period in which they can only do so to other entrepreneurs. The Commission made this proposal assertedly to prevent unjust enrichment by the licensee and

^{12/} (...continued)
prevent Designated Entities from winning any PCS license in non-insulated frequency blocks, with or without bidding credits or other financial preferences. That reasoning begs in the question, in that the Commission's limitation could well prevent Designated Entities from prevailing in smaller markets in the non-insulated frequency blocks.

^{13/} See Section 309(j)(3)(B) and 309(j)(4)(D) of the Communications Act. Argument II (pages 8-12) of AIDE's Petition for Reconsideration of the Second Report & Order in this proceeding (9 FCC Rcd 2348) presents additional argument on this point, and is incorporated herein by reference.

undermine the Congressional intent of giving Designated Entities the ability to provide spectrum-based services.

This limitation should not be adopted. The Commission's unjust enrichment provisions (recovery of bidding credits and installment payments) eliminates one basis for this limitation. The other stated basis has no justification; once a Designated Entity receives a spectrum-based license, it has received a fair opportunity to provide spectrum-based service. The Congressional intent has been fully satisfied.

This limitation only penalizes the Designated Entities by preventing them from selling their licenses if their business plans do not work out, and they find themselves losing money. It would be a cruel perversion of the Congressional intent to deny the Designated Entities the classic escape for a money-losing business, i.e., selling the business before it reaches bankruptcy.

Second, in paragraphs 91 and 98, the Third MO&O/FNPRM proposes that the unpaid balance of any installment license bid and any excess bidding credits must be paid "as a condition of approval of the transfer" when a Designated Entity qualifying for installment payments or bidding credits transfers or assigns its license to a non-qualified entity. As proposed, this provision will work a hardship.

As the Commission well knows, many approved CMRS transfers or assignments are not consummated. However, under this proposal, the Designated Entity could well be required to repay the

financial incentive before the transfer or assignment application is granted, even if the deal then falls apart. The Commission will achieve the same financial result if the repayment is due at consummation of the transfer or assignment, not upon Commission approval thereof.

CONCLUSION

Accordingly, the Association of Independent Designated Entities respectfully requests that the Commission adopt the rules proposed in the Third Memorandum Opinion & Order and Further Notice Proposed Rulemaking subject to the Comments made herein.

Respectfully Submitted,

**ASSOCIATION OF INDEPENDENT
DESIGNATED ENTITIES**

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