

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

SEP 16 1994

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)
Rules to Establish New Narrowband) GEN Docket No. 90-314/
Personal Communication Services) ET Docket No. 92-100

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COMMENTS OF
MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.

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SUMMARY

To date, the Commission's experience with narrowband nationwide auctions has been tremendously successful. The amounts bid were significantly higher than expected and every high bidder has made all payments and filings required as of this date. As such, the Commission's experience with nationwide narrowband auctions has been considerably more positive than that associated with IVDS. Under such circumstances, the Commission should appreciate the contribution of the high bidders, and it would be particularly unfortunate were the Commission to change its rules and thus undermine the value of the spectrum that they have agreed to acquire.

The Further Notice seeks comment on two possible added nationwide narrowband PCS allocations. In the event additional spectrum are allocated for nationwide narrowband PCS, such an allocation would have a material adverse affect to Mtel and other high bidders. The adverse impact would affect not only the principals of the high bidders, but all investors, both public and private. All of these parties have acted in reliance upon Commission rules and related pronouncements and would find the value of their spectrum undermined appreciably. Such a result would be blatantly inequitable.

Proposals to allocate additional spectrum for nationwide narrowband PCS make no sense for yet another reason: There has been no showing, of any kind, that there is a service-based need for an additional allocation. When the Commission allocates spectrum properly it must first assess a need for that spectrum, and then determine what class of carriers should be eligible to utilize it. If the proposals at issue were to be adopted, the Commission would be improperly side-stepping the first critical stage in any proper allocation determination. As a result, such actions would be contrary to established law as well as sound public policy.

The Commission has already determined that there is a specific use for the response channels that would be reallocated and reserved for entrepreneurs. After arriving at a proper determination with respect to the use at which response channels would be put, the Commission legitimately determined that eligibility for these channels should extend to existing paging companies. There is no basis for changing either the use to which these channels should be put, or the eligibility for such spectrum, at this time.

For all of these reasons, Mtel urges the Commission to give no further consideration to proposals to add to the spectrum allocated for nationwide narrowband PCS or to change the eligibility criteria for response channels.

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**COMMENTS OF
MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.**

Mobile Telecommunication Technologies Corp. ("Mtel")^{1/}, by its attorneys and pursuant to Section 1.415 of the Commission's rules, respectfully submits its comments in response to the Commission's Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking ("Further Notice") in the captioned proceeding.^{2/}

^{1/} Mtel and its subsidiaries, including SkyTel Corp. ("SkyTel") and Destineer Corp. ("Destineer"), are Commission licensees providing a wide range of high technology wireless communications services. SkyTel Corp. holds a common carrier nationwide paging license and numerous common carrier non-network paging licenses. Destineer Corp. was awarded a Pioneer's Preference to operate an advanced nationwide wireless network in the narrowband Personal Communication Service ("PCS") and was the high bidder for two other nationwide narrowband PCS authorizations at the Commission's July 25, 1994, auction. Accordingly, Mtel is well positioned to provide the Commission with informed comment in this proceeding.

^{2/} Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, in PP Docket No. 93-253, Gen. Docket No. 90-314, and ET Docket No. 92-100, 59 Fed. Reg. 440558 (August 26, 1994). In the Further Notice, the Commission requested that comments be filed by September 16, 1994, and that reply (continued...)

I. INTRODUCTORY STATEMENT AND OVERVIEW

By these comments, Mtel presents comments in opposition to two possible reallocations of narrowband PCS spectrum upon which the commission invited comment in its Further Notice.^{3/}

At this time, any reallocation that increases the amount of narrowband spectrum assigned on a nationwide basis, either directly or through an enhanced opportunity for combinatorial bidding, would be totally inappropriate, unjustified and illegal. It would constitute a fundamental breach of the Commission's obligations to high bidders such as like Mtel, who, in reliance upon the Commission's rules, committed huge amounts of money to acquire rights to spectrum at a fixed price. For high bidders such as Mtel, an increase in the amount of spectrum allocated for nationwide narrowband PCS could have a material adverse impact on the company itself, as well as its investors, both public and private.

^{2/}(...continued)

comments be filed by October 3, 1994. Accordingly, these comments are timely filed.

^{3/} For the most part, the rule changes adopted in the Further Notice go a long way towards bringing the Commission's narrowband PCS rules involving designated entities into harmony with its broadband PCS rules and should facilitate the licensing of designated entities as envisioned by the Congress -- and Mtel supports them. Two possible further changes in the narrowband rules involve reallocations of spectrum that increase the spectrum allocated for nationwide narrowband PCS. Mtel submits that these would not serve the public interest and should therefore be given no further attention.

Mtel also opposes the proposal to redesignate certain BTA response channels as larger license areas, to the extent that bidding would be limited only to those entities eligible to bid for entrepreneurs' block licenses, for these same reasons.

II. THE COMMISSION SHOULD NOT ALLOCATE ADDITIONAL SPECTRUM FOR NATIONWIDE NARROWBAND PCS

In its Further Notice, the Commission proposed to redesignate two BTA licenses as regional licenses available only for entrepreneurs. Further Notice at para. 122. It also sought comment on other means to achieve larger geographic license sizes, such as designating the BTA licenses as nationwide licenses or by maintaining the BTA designation, but allowing combinatorial bidding for the designated regions. Id.

For the reasons set forth below, Mtel respectfully submits that the public interest would not be served by the Commission adopting either of these proposals, and that adoption of either of these changes could materially adversely effect entities such as Mtel who have already placed binding bids on nationwide narrowband PCS spectrum.

A. An Additional Allocation for Nationwide Narrowband PCS Would Be Fundamentally Unfair

It is axiomatic that, in making equitable decisions, the Commission must consider the interests of all affected parties, as

well as the public.^{4/} Here, a substantive change in the allocation for nationwide narrowband PCS spectrum, after the auction for such spectrum has been held and before any licenses have yet been issued, would be fundamentally unfair to high bidders at the nationwide narrowband PCS meeting, including Mtel. In reliance upon Commission rules and pronouncements, they have committed to expend over \$600,000,000 on such spectrum. Most significantly, the material adverse impact that could be attached to an added nationwide narrowband allocation would extend beyond the principals of the companies themselves and reach both public and private investors who have themselves acted in reliance of Commission actions.

Among other things, an increase in nationwide narrowband spectrum at this time would reduce the value of the spectrum for which Mtel just bid and committed to acquire. When Mtel (and, presumably, other high bidders) assessed the value of nationwide PCS spectrum in preparation for the auction, it naturally considered the available supply of spectrum set forth in the Commission's rules. Elementary economics provides that, other things being equal, an increase in the supply of spectrum (or any other commodity) decreases the value of that spectrum. Thus, it is clear that were the government now to increase the supply of

^{4/} See, e.g., Memorandum Opinion and Order on Remand in ET Docket No. 93-266; Gen. Docket No. 90-314; and PP-6, PP-52, and PP-58; FCC 94-209, _____ FCC Rcd _____ (1994) ("Order on Remand"), at para. 16, where the Commission acknowledges its obligations in this regard and cites, with approval, McElroy Elec. Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993) for the same proposition.

spectrum, it would decrease the value of spectrum just auctioned. Such decrease, immediately after Mtel has agreed to a specific price that it will pay for nationwide narrowband PCS spectrum, would be wholly inequitable.

An increase in the amount spectrum allocated for nationwide narrowband PCS would also violate the effective agreement that exists between the Commission and the high bidders at the auction. Under that agreement, the Commission can expect high bidders to adhere to applicable rules and to pay the monies bid at the auction.^{5/} By the same token, high bidders can legitimately expect the government to apply its rules^{6/} and not immediately change the

^{5/} See, e.g., the Commission's Order in GN Docket No. 94-96, FCC 94-222, ___ FCC Rcd ___ (released August 25, 1994), where the Commission commenced a special investigation looking into possible abuse of its auction rules governing the Interactive Video and Data Service ("IVDS"), and failure of IVDS high bidders to make timely post auction down payments. Mtel supports the Commission's efforts to assure that IVDS high bidders keep their bargain with the Commission, and urges the Commission to keep its bargain with high bidders such as Mtel.

^{6/} See, e.g., Reuters Ltd. v. FCC, 781 F.2d 946, 950-951 (D.C. Cir. 1986) where Judge Starr reminded the Commission that

[I]t is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned [citation omitted], for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules and fidelity to the rules which have been properly promulgated, consistent

(continued...)

rules in order to add nationwide narrowband spectrum, thereby undermining the value of the very spectrum it has just put on auction.^{1/}

Throughout its auction proceeding, the Commission has strived to establish a fair and rational auction process. That desire emanated in considerable part from a recognition that stability and predictability in the administrative process are necessary in order to maximize private investment. Were the Commission to change the nationwide narrowband PCS allocation rules so soon after the auction--indeed before any licenses are issued--the public and the investment community would likely wonder what additional changes may follow future auctions. Unless the public believes that there is an acceptable level of stability in the Commission's auction

^{6/}(...continued)

with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.

Although it appears that the Commission would, technically, "change" its rules rather than simply not comply with them (as was the case in Reuters) if additional nationwide allocations were made, Judge Starr's comments seem as applicable here as they were nearly a decade ago.

^{1/} Such a change, after the auction, would also be retroactive in character. As the Commission is well aware, retroactive application of rule or statute is generally frowned upon, especially where, as is the case here, there is no overriding need for it. See Landgraf v. U.S.I. Film Products, 114 S.Ct. 1483 (1994); Rivers v. Roadway Express, Inc., 114 S.Ct. 1510 (1994); Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) (effectively creating a presumption against retroactive rulemaking); and 1 K. Davis & R. Pierce, Administrative Law Treatise § 6.6 at 257-60 (3d ed. 1994).

process, investment will undoubtedly be discounted to reflect the risk inherent in instability.

Any addition to the spectrum allocated for nationwide narrowband PCS would also disrupt carefully crafted business plans of successful high bidders, including Mtel. Those plans include not only reasoned assessments of the value of the spectrum, based upon fundamental supply and demand theories, but also determinations regarding the types of spectrum upon which they would bid and the funding and other resources to be invested in the service.

In a related proceeding, the Commission has recognized that abrupt changes in its policies disrupt the business plans of applicants who have relied on existing rules and that the Commission has a responsibility to minimize such disruptions and the associated costs.^{8/} Application of this fundamental principle in this proceeding provides an additional reason not to change the nationwide narrowband allocation at this time, for it would be most difficult to accurately calculate how to compensate higher bidders for this type of disruption of their auction plans.

**B. No Showing Has Been Presented that
There is a Need for Additional
Nationwide Narrowband PCS Spectrum**

It is axiomatic that before the Commission can allocate spectrum for a new use, or reallocate it from one use to another, it must first address whether spectrum is needed for a given

^{8/} See, e.g., Order on Remand, at para. 20.

purpose.^{9/} It must then consider how the need for spectrum in one service compares with that in another service and ultimately make a service-based decision as to where the spectrum is most needed. Id. In the captioned proceeding, the Commission has, prior to the Further Notice, balanced the need for PCS and other services; for broadband and narrowband PCS; and, within narrowband PCS, the need for BTA, MTA, regional, and nationwide authorizations. While there, quite naturally, may not be universal agreement on every aspect of so complicated an allocation scheme, there is no genuine dispute that, up to this point, the Commission has undertaken the required public interest analyses on all spectrum allocation matters.

The possibility of reallocating spectrum for additional nationwide use, as discussed in the Further Notice, is markedly different from prior determinations made in this proceeding to date, and from other allocation decisions. The driving force behind this proposal, rather than being based upon a perceived need for additional nationwide spectrum--either in some absolute sense or relative to BTA, MTA, or regional use--appears to be a desire to license the spectrum to certain groups of applicants. While increasing the presence of designated entities may be a laudable goal, it is one that involves eligibility for a given allocation

^{9/} See, e.g., the Commission's Tentative Decision and Memorandum Opinion Report and Order in the captioned docket, 7 FCC Rcd 7794 (1992). See also Cellular Communications System, 86 FCC 2d 469, recon. 89 FCC 2d 58 (1982) (further listing omitted) where the Commission applied this required process.

and should be pursued only after appropriate allocations have been made. In other words, rather than establish an allocation in order to permit certain groups to be licensed therein, allocation determinations should be made first, with eligibility established later. In this instance, no showing has been made that there is a need for the allocation at issue.

C. The Record Is Not Sufficient to Justify a Reallocation

In the mere few months since the Commission last ruled on the issue of nationwide PCS allocations, only one development of any significance to that issue has transpired: the nationwide narrowband PCS auction was conducted. While the Commission not infrequently changes its position on matters, it seldom (if ever) makes fundamental changes almost immediately, or based upon a single intervening event.^{10/} Moreover, it would be particularly premature for the Commission to base rule changes on an event as unique and complex as the auction. For example, there is nothing in the record to explain whether the results of the nationwide auction reflect the inherent value of nationwide spectrum or whether they reflect only a situation where the number of carriers who believed they needed a nationwide frequency exceeded the number of nationwide authorizations available, thus driving up bids. Similarly, those who were surprised by the level of the high bids

^{10/} Compare Order on Remand, at para. 20, where the Commission stressed that its change in position regarding an obligation to pay for authorizations awarded pursuant to Pioneer Preferences stemmed from a host of factors.

at the nationwide auction could be as surprised (or even more surprised) by the level of high bids in subsequent auctions, thus undermining any theory that more spectrum is needed for nationwide and less for other market sizes. Finally, it appears as though there may be no advantage to designated entities by adoption of either proposal, since it would serve only to reduce drastically the number of discrete authorizations for which designated entities would otherwise be eligible, and increase dramatically the construction and operating costs associated with the authorizations.

For all of the above reasons, Mtel urges the Commission not to allocate additional spectrum for nationwide narrowband PCS, or to take other action, such as permitting combinatorial bidding, that would have the same effect.

D. An Additional Allocation of Nationwide Narrowband PCS Spectrum Would Disrupt the Commission's Carefully Designed Auction Processes

When, earlier this year, the Commission established general rules for auctions, the Commission determined that, where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous, multiple-round auctions would best achieve the Commission's competitive bidding goals and assure that the spectrum is awarded to the entity that values it most.^{11/} Subsequently, the Commission determined to apply that policy to

^{11/} Competitive Bidding Second Report and Order, 9 FCC Rcd 2348, 2367 (1994).

narrowband PCS auctions and held that all nationwide narrowband PCS authorizations are interdependent.^{12/} Based upon these determinations, the Commission scheduled and conducted a simultaneous, multiple-round auction for all nationwide narrowband PCS authorizations during the week of July 25, 1994.^{13/}

In view of the fact that the auction for all currently allocated nationwide narrowband PCS spectrum has already been held, it would be impossible for the Commission now to conduct the single simultaneous, multiple-round auction for which its rules provide. As a result, the Commission's goals for competitive bidding will not be best achieved, and the spectrum may not be awarded to bidders who value it most.

**III. THE COMMISSION SHOULD NOT CHANGE
BASIC ELIGIBILITY CRITERIA FOR
RESPONSE CHANNELS AT THIS LATE DATE**

Throughout the narrowband PCS proceeding, certain provisions regarding response channels have remained consistent, while others have been subject to change. From the proceeding's inception, spectrum has been earmarked for response channels to be used by existing paging licensees. Memorandum Opinion and Order in GEN. Docket No. 90-314, 9 FCC Rcd 1309 (1994). At the same time, there have been changes in the market sizes associated with their

^{12/} Third Report and Order, 9 FCC Rcd 2941.

^{13/} Public Notice (announcing auction) Report No. AUC-94-01, Auction No. 1 May 23, 1994) and Public Notice (announcing auction results) Mimeo No. 44177 (August 2, 1994).

allocation. Id. Based upon the treatment of response channels throughout the proceeding to date--and the fact that no response channels have yet been auctioned--Mtel does not object to redefinition of response channel market boundaries. Such redefinition would bring response channels--which currently are the only component of the narrowband allocation without any nationwide character--into harmony with the remainder of the allocation.

Mtel does, however, oppose any fundamental change in the eligibility criteria for response channels at this eleventh hour. After full notice and comment, the Commission allocated response channels for a specific purpose and established eligibility criteria accordingly. The purpose for which response channels are to be used is unique among various PCS allocations, in that they are intended to be used by existing paging systems with two-way capability. See Second Memorandum Opinion and Order, in GEN Docket No. 90-14, FCC 94-218, ___ FCC Rcd ___ (August 25, 1994). It reflects a recognized need of existing carriers for this spectrum. Nothing has occurred that warrants such a well-conceived policy being "second-guessed" at this time.^{14/} This is particularly the case in view of the fact that when entities such as Mtel planned for the nationwide auction they did so with an understanding that they would also be eligible for response channels. Accordingly,

^{14/} As discussion in Section IIB, supra, no showing has been made than another need exists for this spectrum.

Mtel urges the Commission to abandon any further consideration of this proposal.

IV. CONCLUSION

To date, the Commission's experience with narrowband nationwide auctions has been tremendously successful. The amounts bid were significantly higher than expected^{15/} and every high bidder has made all payments and filings required as of this date.^{16/} As such, the Commission's experience with nationwide narrowband auctions has been considerably more positive than that associated with IVDS. Under such circumstances, the Commission should appreciate the contribution of the high bidders, and it would be particularly unfortunate were the Commission to change its rules and thus undermine the value of the spectrum that they have agreed to acquire.

In the event additional spectrum are allocated for nationwide narrowband PCS, such an allocation would have a material adverse affect to Mtel and other high bidders. The adverse impact would affect not only the principals of the high bidders, but all investors, both public and private. All of these parties have acted in reliance upon Commission rules and related pronouncements

^{15/} Order on Remand, at n.54.

^{16/} Public Notice, Report No. PCS-NB-94-1 (Aug. 17, 1994), Mimeo, listing the applications of all high bidders as having been accepted for filing.

and would find the value of their spectrum undermined appreciably. Such a result would be blatantly inequitable.

Proposals to allocate additional spectrum for nationwide narrowband PCS make no sense for yet another reason: There has been no showing, of any kind, that there is a service-based need for an additional allocation. When the Commission allocates spectrum properly it must first assess a need for that spectrum, and then determine what class of carriers should be eligible to utilize it. If the proposals at issue were to be adopted, the Commission would be improperly side-stepping the first critical stage in any proper allocation determination. As a result, such actions would be contrary to established law as well as sound public policy.

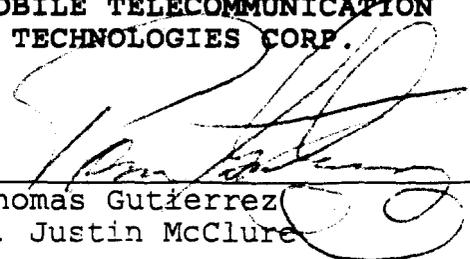
The Commission has already determined that there is a specific use for the response channels that would be reallocated and reserved for entrepreneurs. After arriving at a proper determination with respect to the use at which response channels would be put, the Commission has legitimately determined that eligibility for these channels should extend to existing paging companies. There is no basis for changing either the use to which these channels should be put, or the eligibility for such spectrum, at this time.

For all of these reasons, Mtel urges the Commission to give no further consideration to proposals to add to the spectrum allocated

for nationwide narrowband PCS or to change the eligibility criteria for response channels.

Respectfully submitted,

**MOBILE TELECOMMUNICATION
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September 16, 1994

CERTIFICATE OF SERVICE

I, Catherine M. Seymour, a secretary in the law firm of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 16th day of September, 1994, sent by first class U.S. mail copies of the foregoing "COMMENTS OF MOBILE TELECOMMUNICATION TECHNOLOGIES CORP." to the following:

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