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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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SEP. 26 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)
Rules to Establish New Narrowband) Gen. Docket No. 90-314
Personal Communications Services) ET Docket No. 92-100

To: The Commission

REQUEST FOR CLARIFICATION AND/OR RECONSIDERATION

The law firm of Blooston, Mordkofsky, Jackson & Dickens (Blooston), pursuant to Rule Sections 1.41 and 1.429, and on behalf of its clients that are interested in narrowband personal communications service (PCS) auctions, hereby requests clarification and/or reconsideration of various aspects of the Commission's Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in PP Docket No. 93-253, 59 Fed. Reg. 44058 (August 26, 1994) (hereinafter "Third MO&O"), and the related Amendment to Public Notice, Report No. AUC 94-03, released August 26, 1994. As described below, the Commission should clarify or further amend its eligibility rule for stages II and III of the upcoming narrowband PCS auctions, so that applicants who have submitted an upfront payment equal to the MHz/pops for a 50 kHz paired with 50 kHz frequency block can switch their targeted license to a 50 kHz paired with 12.5 kHz frequency block, and switch back again, without losing their eligibility. The

Commission should also clarify that the ownership reporting requirements which the Third MO&O modified have not been changed by new language in the Commission's August 17, 1994 auction Public Notice (hereinafter "Auction Notice").

I. Applicants Should Be Able To Switch Among Available Licenses In Each Region Without Loss of Eligibility

The Commission's August 17, 1994 Auction Notice adopted the "Milgrom-Wilson" activity rule for regional narrowband PCS auctions. Pursuant to this rule, a bidder in stage II is required to be active on two-thirds of the MHz pops for which it is eligible. During stage III, the bidder was initially required to be eligible on 100 percent of the MHz pops. However, the Third MO&O revised the stage III requirement, to require that bidders remain active on 90 percent of their MHz pops. Id. at para. 13. The purpose of this adjustment was to "allow bidders greater flexibility." Id. However, it is respectfully submitted that this rule change falls short of implementing the flexibility which is appropriate for bidding on licenses that are worth millions of dollars.

The 90 percent requirement will allow bidders who have applied for multiple regions to switch among regions for the same sized license. Thus, in stage III, a bidder who has submitted an upfront payment of \$103,636 could switch from bidding on a 50 kHz/50 kHz license in Region 2 (population 51,817,584) to a 50 kHz/50 kHz license in Region 1 (population 51,670,869), and back again, without losing eligibility to bid from round to round. This rule change thus succeeds in introducing flexibility that will allow

bidders to pursue backup strategies in this fashion. However, the same bidder would not be allowed to switch between a 50 kHz/50 kHz license and a 50 kHz/12.5 kHz license, and back again. Once this applicant had bid on the 50 kHz/12.5 kHz license, its eligibility would drop to 62.5 percent of the original upfront payment.

It is respectfully submitted that the public interest will not be served by this restriction on switching bidding targets among different sized licenses in stages II and III. In the nationwide narrowband PCS auction held in July 1994, bidders demonstrated that switching among different sized licenses is a viable backup strategy. While bidders often went from bidding on a larger license to a smaller one, there were instances where the opposite occurred. This flexibility allowed the nationwide bidders to exhaust every avenue in attempting to obtain a license, while at the same time maximizing the revenues gained from the auction.

There does not seem to be any countervailing benefit to restricting applicants in stages II and III from shifting among the different sized licenses. If a license has not been bid upon for three rounds late in the auction, the Commission can end bidding on such license by announcing that the auction will end after a specified number of additional rounds. See Third MO&O at para. 15. The proposed rule change will not undo the finality which the Commission hopes to achieve with this stopping rule. Moreover, a bidder cannot overcome the harsh effect of the eligibility rule by simply submitting multiple upfront payments. While such payments would initially give the bidder a greater MHz/pops eligibility,

this eligibility would be stripped away unless the applicant continued to bid on multiple licenses. If the applicant wants only one license, regardless of its size, this is not a viable strategy.

Accordingly, the Commission should further revise the eligibility rule, to allow applicants to switch among different sized licenses. Under the current rule, an applicant who wished to change its target license from a 50 kHz/12.5 kHz to a 50 kHz/50 kHz frequency block would not be able to do so in stages II or III. Since the MHz/pops of the smaller license is only 62.5 percent of the larger one, the bidder would not maintain eligibility on the required two-thirds (i.e., 66.7 percent) of MHz/pops in stage II, and would not meet the 90 percent requirement of stage III.

II. The Commission Should Clarify Its Amendment Rules

The Auction Notice indicates (at p. 6) that "failure to submit the ownership information required [sic] Rule Section 24.413 of the FCC's Rules cannot be corrected and will cause the application to be dismissed and the applicant to be ineligible to participate in the auction." Blooston interprets this statement as applying only when an application is void of the required ownership information exhibit. There is no indication in the Third MO&O that an error or minor omission in the ownership exhibit cannot be corrected after filing, during the period allowed for minor amendments. In fact, the Third MO&O indicates that the reporting requirements are being adjusted to allow greater flexibility, rather than the opposite. See Third MO&O at para. 30. If minor errors and omissions cannot be corrected in the ownership exhibit, this would

amount to a letter perfect standard, which the Commission cannot adopt without further rulemaking.

Given the tenor of the Third MO&O, it would appear that the Auction Notice was perhaps not ideally worded, and should be clarified. In the event that the Commission intended to adopt a stricter reporting requirement, reconsideration is hereby sought. The public interest would not be served by subjecting licensees to potential loss of a multi-million dollar license, and severe monetary penalties, as a result of a minor error or omission in its application.

Respectfully submitted,

**BLOOSTON, MORDKOFKY, JACKSON
& DICKENS**

By:


John A. Prendergast

Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, NW
Suite 300
Washington, DC 20037
(202) 659-0830

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