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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act -)
Competitive Bidding)
Narrowband PCS)

To: The Commission

REPLY COMMENTS OF

BLOOSTON, MORDKOFKY, JACKSON & DICKENS

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SUMMARY

Blooston, Mordkofsky, Jackson & Dickens (BMJ&D) is a telecommunications law firm which represents paging providers, cellular carriers and rural telephone companies that are interested in providing narrowband personal communications services (PCS).

BMJ&D opposes the Commission's proposal to redesignate the Basic Trading Area (BTA) blocks as nationwide or regional licenses, and therefore agrees with PCIA, Mtel, Women of WirelessSM and Lieto. Redesignation of the BTA blocks at this point in the auction cycle would be unfair to the auction participants. It also could result in the elimination of narrowband PCS in rural areas, and effectively preclude many designated entities from participating in the auctions.

BMJ&D also requests that if entrepreneurs' blocks are adopted, only one to two Major Trading Area (MTA) blocks should be reserved for the entrepreneurs' blocks and at most one BTA block, so several MTAs and one BTA would be available for incumbent mobile services carriers to use to over-build their existing service areas.

Additionally, BMJ&D requests that the response channels be kept available for all incumbent paging providers, and therefore agrees with Mtel, PCIA, PageNet and PageMart on this issue.

Finally, BMJ&D supports the request of API to use some of the 1 MHz of reserved spectrum to create more response channels for use by existing paging providers.

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Blooston, Mordkofsky, Jackson & Dickens (BMJ&D) respectfully submits these Reply Comments in response to comments filed concerning the Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 94-219, released Aug. 17, 1994 [hereinafter Third MO&O and FNPRM], in the above-captioned proceeding.¹

BMJ&D is a telecommunications law firm which represents a number of existing paging providers, cellular carriers and rural telephone companies that are interested in providing narrowband personal communications services (PCS).

BMJ&D opposes the Commission's proposal to redesignate the Basic Trading Area (BTA) blocks as nationwide or regional

¹ These Reply Comments respond to comments filed by: American Paging, Inc. (API), Association of Independent Designated Entities (AIDE), David J. Lieto (Lieto), Mobile Telecommunication Technologies Corp. (Mtel), PageMart, Inc., Paging Network, Inc. (PageNet), Personal Communications Industry Association (PCIA), Puerto Rico Telephone Company (PRTC), San Juan Pacific Management, Inc. (SJPM), and Women of WirelessSM.

licenses. BMJ&D therefore agrees with PCIA, Mtel, Women of WirelessSM and Lieto.² Redesignation of the BTA blocks after the auction has already been held for nationwide licenses, and has begun for regional licenses, would unfairly prejudice the participants in those auctions as well as those parties who have decided not to participate in those auctions, and would cast a shroud of uncertainty on future auctions. The elimination of BTAs also could result in the elimination of narrowband PCS service to rural areas, and effectively preclude many designated entities from participating in the auctions.

BMJ&D also requests that if the Commission adopts an entrepreneurs' blocks approach for narrowband PCS, only one to two Major Trading Area (MTA) blocks should be reserved for the entrepreneurs' blocks, and at most one BTA block. This would leave several MTAs and one BTA for incumbent mobile services carriers to use to piece together service areas in order to be able to over-build their existing service areas and capitalize on existing infrastructure. BMJ&D therefore opposes AIDE's request to reserve even more blocks for entrepreneurs.³

Additionally, BMJ&D opposes the Commission's proposal to reserve the response channels for the entrepreneurs' blocks. BMJ&D therefore agrees with Mtel, PCIA, PageNet and PageMart.

² PCIA Comments at 7; Mtel Comments at 6-7, 10-11; Women of WirelessSM Comments at 1-4; Lieto Comments at 1-5.

³ AIDE Comments at 3.

The response channels should be kept available for all incumbent paging providers -- as they were originally intended.

Finally, BMJ&D supports the request of API to channelize and license some of the 1 MHz of reserved spectrum in order to provide increased opportunities for existing paging providers to upgrade their systems through the use of response channels.⁴

These points are discussed in turn below.

I. THE COMMISSION SHOULD NOT ELIMINATE THE BTA BLOCKS

The Commission proposes to redesignate the two BTA blocks as regional or nationwide licenses.⁵ BMJ&D opposes this proposal, and therefore agrees with PCIA, Mtel, Women of WirelessSM and Lieto,⁶ and opposes suggestions of PageMart.⁷ The BTAs should not be redesignated as nationwide or regional licenses.

As stated by PCIA and Mtel,⁸ the bidders in the nationwide auction relied upon the existing allocation plan to determine the expected value of the nationwide licenses. The Commission stated that it would sequence the auctions so that value interdependent

⁴ API Comments at 2-5.

⁵ FNPRM, para. 122.

⁶ PCIA Comments at 7; Mtel Comments at 6-7, 10-11; Women of WirelessSM Comments at 1-4; Lieto Comments at 1-5.

⁷ PageMart Comments at 7 (opposing the retention of BTAs for non-entrepreneurs).

⁸ PCIA Comments at 7 (creating new nationwide licenses "would be fundamentally inequitable and potentially illegal given the reliance of the winning nationwide bidders on the established allocation plan"); Mtel Comments at 2-11.

licenses would be auctioned together.⁹ BMJ&D submits that the Commission planned the auction sequence for narrowband PCS in this way to facilitate the reliance of bidders on the allocation plan. Adding another nationwide license now would be inconsistent with the Commission's sequencing policy¹⁰ and could decrease the value of the licenses already auctioned.¹¹

Not only would such action be unfair to the nationwide license winners and their investors, but it could set a precedent for the Commission to similarly create other licenses post-auction, thereby adding uncertainty to the auction process itself. As a result, if future potential bidders could not be certain what the post-auction market would be, they may make lower bids or be discouraged from participating in the auctions altogether.¹²

Similarly, because the regional auctions are underway, BMJ&D submits that it is too late to alter the number of regional licenses without unfairly prejudicing those entities who have

⁹ Second Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 9 FCC Rcd. 2348, 2368 (1994).

¹⁰ See also Mtel Comments at 10-11 (holding a separate auction for a narrowband license could result in the spectrum being awarded to a bidder other than the one who would value it the most).

¹¹ Id. at 4.

¹² See also PCIA Comments at 7 (retroactively changing the allocation plan would "undermine the Commission's credibility"); Mtel Comments at 6-7 (if the public does not believe there is an acceptable level of stability in the auction rules, investment will be lower to reflect the inherent risk).

already filed applications to participate in the regional auctions and made financial plans accordingly, and to those entities who have decided not to participate based on the announced allocation plan. As discussed in Section II, *infra*, some carriers have planned to over-build their existing cellular or paging service areas, thereby taking advantage of economies of scale, by bidding on the corresponding BTA licenses. To change the allocation now would prejudice these carriers.

Additionally, eliminating BTAs could result in eliminating narrowband PCS service to rural areas.¹³ Because the Commission requires only 75% coverage of service areas,¹⁴ an MTA, regional or nationwide licensee could readily meet that requirement while not providing service to rural areas within the MTA, region or nation. Thus, BTAs must be retained in order to satisfy the Congressional mandate that the Commission ensure that service is provided to rural areas.¹⁵

Finally, as stated by the Small Business Administration (SBA), Women of WirelessSM and Lieto,¹⁶ designated entities may

¹³ See SJPM Comments at 2-3 (eliminating BTAs could result in no service to Puerto Rico).

¹⁴ 47 C.F.R. § 99.103.

¹⁵ 47 U.S.C. § 309(j)(3)(A).

¹⁶ SBA Chief Counsel of Advocacy Comments, filed Nov. 10, 1993, at 10 (the \$40 million revenue cap for small businesses will allow participation by firms that will have sufficient resources to meet demands of small markets and some medium size markets); Women of WirelessSM Comments at 1-4; Lieto Comments at 1-5; see also Third MO&O, para. 45 (citing SBA for support for raising the revenue cap to \$40 million for small businesses).

not be able to afford licenses larger than BTAs with their associated build-out requirements. Eliminating BTAs could mean prohibiting many designated entities from participating in the auction. Thus, BTAs must be retained in order to meet the Congressional mandate that the Commission ensure that small businesses, businesses owned by minorities and/or women, and rural telephone companies have meaningful opportunities to participate in the auctions.¹⁷

In sum, BTAs should be retained so that the Commission may satisfy the dual Congressional mandates that service be provided to rural areas and that the designated entities have opportunities to participate in the auctions. BTAs also should not be redesignated as nationwide or regional licenses because it would cast a shroud of uncertainty on future auctions and unfairly penalize entities that have already participated in the nationwide and regional auctions, as well as those who decided not to participate.

II. THE ENTREPRENEURS' BLOCKS, IF ADOPTED, SHOULD INCLUDE AT MOST ONE BTA

Along with retaining the BTAs, the Commission should ensure that BTA blocks are available to entrepreneurs and non-entrepreneurs alike.

¹⁷ 47 U.S.C. § 309(j)(4)(D).

The Commission proposes to create entrepreneurs' blocks, similar to those developed for broadband PCS.¹⁸ The proposed entrepreneurs' blocks would consist of four MTA blocks and both BTA blocks. BMJ&D respectfully suggests that only one or two MTAs, and at most one BTA, be reserved for entrepreneurs.¹⁹ In this way, non-entrepreneurs would be able to obtain BTA or MTA licenses to complement their MTA or regional licenses. BMJ&D therefore opposes AIDE's request that even more blocks be reserved for designated entities,²⁰ and PageMart's suggestion that non-entrepreneurs' BTA blocks should be eliminated.²¹

Keeping one BTA block, and several MTA blocks, available for bidding by non-entrepreneurs would benefit existing cellular or paging carriers who may want to capitalize on their existing infrastructure by over-building their existing systems.²² Cellular service areas do not conform to the five regional boundaries. Nor does paging coverage. To provide narrowband PCS in the same service area, an existing carrier may need to patch

¹⁸ FNPRM, paras. 64-119.

¹⁹ Contra PCIA Comments at 6-7 (proposing that no BTAs be reserved for entrepreneurs).

²⁰ AIDE Comments at 3.

²¹ PageMart Comments at 7.

²² See PRTC Comments at 2 (urging Commission "not to limit unduly opportunities for larger telecommunications providers in creating opportunities for entrepreneurs' block entities").

together BTAs and/or MTAs.²³ If the Commission were to reserve all of the BTAs for entrepreneurs, for example, existing non-entrepreneurial carriers would not be able to obtain narrowband PCS licenses that approximate their service areas and would be precluded from realizing the efficiencies that could otherwise be obtained from over-building their existing service areas.

Additionally, reserving one BTA block, and several MTA blocks, for all bidders would support the Commission's goal of making "sufficient opportunity available to businesses that would qualify for the entrepreneurs' blocks and to those that would not."²⁴

III. THE COMMISSION SHOULD KEEP THE RESPONSE CHANNELS AVAILABLE TO ALL INCUMBENT PAGING PROVIDERS

Just as the Commission should not reserve all of the BTAs for entrepreneurs, the Commission should not reserve the response channels for entrepreneurs.²⁵ BMJ&D agrees with Mtel, PCIA, PageNet and PageMart²⁶ -- the response channels should remain

²³ The Commission therefore must reject PageMart's assertion that non-entrepreneurs will not be interested in BTA or MTA licenses and that even if such entities exist, they could provide service to BTAs or MTAs through resale. PageMart Comments at 7-8 & n.10. Resale is not an adequate substitute.

²⁴ FNPRM, para. 84 (emphasis added).

²⁵ Id. para. 122.

²⁶ Mtel Comments at 12; PCIA Comments at 7 (response channels have no stand alone value); PageNet Comments at 2-4; PageMart Comments at 12-15.

available to all incumbent paging providers, and only incumbent paging providers.

The whole purpose of creating response channels was to permit incumbent paging providers to upgrade their systems to provide acknowledgement and messaging capability.²⁷ The response channels therefore need to remain available to all such incumbent paging providers. While it is not clear whether the Commission proposes to make the response channels available to all entrepreneurs or to only entrepreneurial incumbent paging providers, neither proposal should be adopted. If the response channels were available to all entrepreneurs, the response channels would be available to entrepreneurs who are not incumbent paging providers and arguably have no use for them. Such a decision also would be inconsistent with the Commission's decision to reserve response channels for incumbent paging providers.²⁸ If the response channels were available only to entrepreneurial incumbent paging providers, those incumbent paging providers would have preferential treatment, which incumbent providers arguably do not need.²⁹ Both proposals also would be inconsistent with the Commission's statement that the

²⁷ First Report and Order (Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services), 8 FCC Rcd. 7162, 7165 (1993).

²⁸ Id.

²⁹ PageNet Comments at 4; see also Mtel Comments at 12 (when Mtel planned for the nationwide auction, it did so with an understanding that it would also be eligible for response channels).

creation of entrepreneurs' blocks would still leave the response channels available to non-entrepreneurial incumbent paging providers.³⁰ Existing carriers may have allowed the nationwide and regional auction filing window to pass because they intend to upgrade their existing systems, rather than starting over again. It would not be fair to change the rules after the fact.

BMJ&D therefore respectfully requests the Commission to allow all incumbent paging providers, and only incumbent paging providers, to bid on the response channels. No commenter disagrees this request, and the Commission has not provided any support for changing the allocation.

IV. THE COMMISSION SHOULD MAKE MORE SPECTRUM AVAILABLE FOR RESPONSE CHANNELS

API suggests that the Commission channelize and license the 1 MHz of reserved spectrum.³¹ BMJ&D supports the channelization and licensing of some of the reserved spectrum for use as unpaired response channels. The increased channelization could provide more opportunities for existing paging providers to upgrade their systems through the use of response channels. As noted by API, the eight unpaired response channels are "clearly

³⁰ FNPRM, n.121.

³¹ API Comments at 2-5.

dwarfed" by the number of paging carriers on VHF, UHF, 929 MHz and 931 MHz in each market.³²

However, the Commission should still reserve some of the spectrum for later channelization and licensing, if needed, as narrowband PCS services develop.

CONCLUSION

For the foregoing reasons, BMJ&D respectfully requests the Commission to: (a) retain the existing BTA blocks; (b) if the Commission is going to make any changes at all concerning entrepreneurs, allocate at most one or two MTA blocks and at most one BTA block as entrepreneurs' blocks; (c) retain the response channels for only incumbent paging providers (whether entrepreneurs or not); and (d) channelize and license some of the reserved 1 MHz of spectrum for use as unpaired response channels.

Respectfully submitted,
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³² Id. at 3; see also PageNet Comments at 3-4 (there are approximately 175 frequencies available to paging carriers but only 8 response channels per geographic location).

CERTIFICATE OF SERVICE

I, Christa L. Sanden, hereby certify that I am an employee of Blooston, Mordkofsky, Jackson & Dickens, and that on this 3d day of October, 1994, I caused to be sent by U.S. mail, postage pre-paid a copy of the foregoing "Reply Comments of Blooston, Mordkofsky, Jackson & Dickens" to the following:

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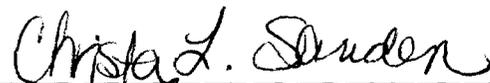
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