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PACIFIC TELESIS
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

August 16, 1995

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Re: *MM Docket No. 94-131 - Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service; PP Docket No. 93-253 - Implementation of Section 309 (j) of the Communications Act - Competitive Bidding*

On behalf of Pacific Telesis Enterprise Group and Cross Country Wireless Inc., please find enclosed an original and six copies of their *"Petition for Reconsideration and Clarification"* in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Enclosure

cc: Rudy Baca
Sharon Bertelsen
Jackie Chorney
Julius Genachowski
Kathleen Ham
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the Matter of	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service	)	MM Docket No. 94-131
	)	
and	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253

PETITION FOR RECONSIDERATION AND CLARIFICATION

Pacific Telesis Enterprise Group and Cross Country Wireless Inc. ("PTE and Cross Country") hereby petition for reconsideration and clarification of certain aspects of the Report and Order, adopted on June 15, 1995, in the above-captioned proceedings (the "Report and Order"). PTE and Cross Country commend the Commission for its comprehensive and effective resolution of numerous issues relating to the Multipoint Distribution Service ("MDS")[1/] and the Instructional Fixed Television Service ("ITFS"). The rules adopted in the Report and Order (a) build upon the FCC's monumental efforts to process the backlog of pending MDS and ITFS applications, (b) will enable the fair and efficient

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[1/] For purposes of this pleading, MDS refers to both single channel MDS stations and multichannel multipoint distribution services stations ("MMDS").

auctioning of MDS spectrum, and (c) will facilitate the ability of the wireless cable industry to provide promising new services and competition in the video marketplace, while at the same time fostering the educational goals of the ITFS service -- all in the public interest.

Although PTE and Cross Country support the overall Basic Trading Area ("BTA") licensing structure, they believe that the Commission should reconsider granting BTA authorization holders the right to match the final offers of other potential ITFS excess capacity lessees. They also urge the Commission to put on public notice all pending MDS and ITFS applications at least several weeks prior to the auction and process as many of them as possible prior to the auction, thereby enabling bidders to ascertain the amount of unencumbered spectrum in the BTAs. Finally, the Commission should modify certain aspects of the bidding procedures to guard against insincere applicants and to better achieve the goals of its designated entity policies. These refinements and clarifications will further improve the well-balanced MDS competitive bidding approach set forth in the Report and Order.

PTE recently acquired all of the stock of Cross Country. Operating under Cross Country's excess capacity leases, PTE plans to offer over 100 channels of programming in Southern California by the end of 1996. Using digital transmission and compression technology, it will carry a wide

selection of broadcast and cable network programming, premium services, pay-per-view movies and events, and educational programming. In keeping with their commitment to education in California, PTE and Cross Country will work with their ITFS lessors to ensure that they have the necessary distribution facilities to transmit their programming over the wireless system. They also expect to increase the number of homes capable of receiving this educational material.

I. THE COMMISSION SHOULD RECONSIDER GRANTING BTA AUTHORIZATION HOLDERS A RIGHT OF FIRST REFUSAL FOR NEW ITFS LEASE AGREEMENTS.

With one significant refinement, PTE and Cross Country support the Commission's competitive bidding approach of auctioning MDS spectrum on a BTA basis and providing for protected service areas that are coterminous with the BTA boundary, subject to the exclusion of the 35 mile protected service areas of incumbent MDS stations and of registered receive sites of incumbent ITFS stations.[2/] Report and Order at ¶ 58. This approach will maximize service to the public by fostering coordination among co- and adjacent-channel licensees. It will replace the current balkanized ITFS and MDS licensing procedures with a mechanism for developing compatible technical facilities, while, at the same time,

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[2/] The Commission defines MDS incumbents as those stations that are authorized or proposed prior to September 15. See 47 C.F.R. § 21.2. This definition does not apply to ITFS. However, the BTA authorization holder must protect the registered receive sites of authorized or previously proposed ITFS stations.

preserving existing service. This approach also will minimize the potential for mutually-exclusive applications and reduce the Commission's processing burdens, thereby speeding the delivery of new competitive services to the public.

In addition, the Report and Order will provide potential bidders with an effective mechanism for rationally valuing the BTAs. The MDS auction rules provide that the protected service areas of the incumbent MDS stations will be fixed on September 15 or on the effective date of the Second Order on Reconsideration in Gen. Docket Nos. 90-54 and 80-113, adopted on June 15, 1995.[3/] With these protected service areas having been fixed, the potential bidders can ascertain the extent to which the MDS spectrum is encumbered and better place an appropriate market value on the BTA.[4/] Potential

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[3/] Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing the Use of Frequencies in the 2-1 and 2-5 GHz Band Affecting Private Operational Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distributions Serve and Instructional Television Fixed Service and Cable Antenna Relay Service. Second Order on Reconsideration, Gen. Docket No. 90-54 and 80-113, adopted on June 15, 1995 and released on June 21, 1995.

[4/] This assumes that the potential bidder can analyze all existing and proposed ITFS and MDS stations, including ITFS applications filed prior to the commencement of the auction and MDS applications filed prior to the September deadline. See, infra, at II. This valuation process would be undercut if the MDS or ITFS incumbent licensees could file modification applications after the BTA authorization holder had bid for the BTA in the auction. This would create substantial uncertainty in the value of the BTA. It also would lead to competing applications, thereby substantially delaying the licensing process and the inauguration of new services to the public particularly in lightly service or unserved portions of the BTAs.

bidders will, as a consequence, then have confidence in their valuations because incumbent licensees would be precluded from modifying their facilities in a way that would significantly alter the value of the unencumbered frequencies within the BTA in question.[5/]

This approach is part of a fair and balanced accommodation of the interests of existing licensees and of those who will have to bid for the right to serve areas within BTAs that up to now have not received wireless cable service (MDS or ITFS) or have received less than full service. Thus, in the same time frame that the Commission adopted the protected service area concept for the BTAs,[6/] it also (a) expanded the protected service areas of incumbent licensees to 35 miles, thereby quintupling the area of these protected service areas, and (b) provided them with the opportunity to modify existing facilities and, in the case of ITFS, to propose new facilities.

[5/] The Commission should resist efforts to dilute the principle adopted in the Report and Order that both ITFS and MDS incumbents, to the extent they operate on co- or adjacent-channel frequencies, must provide interference protection to the protected service areas of the BTA authorization holders.

[6/] This is not a radical concept. The incumbents' ability to change their facilities in the future would still have been limited by their obligation to protect the facilities and service areas of new licensees under the old licensing regime. The only difference under the new regime is that this protection is required as to the rest of the BTA. And that principle follows from the fact that the new licensees will have bid for and will be authorized to serve the whole BTA, not just to build a particular set of facilities.

The Commission, under Congressional guidance, adopted a similar, but less generous, strategy in the case of PCS by freezing the facilities of incumbent microwave users. In the advanced television proceeding, the Commission and even public broadcast organizations have recognized that vacant public television channels should not stand in the way of providing the public with new digital TV services. Here, minor accommodations of incumbents that in the future discover they need to modify their facilities can be handled on a case-by-case basis between the parties involved within a framework of sensible Commission regulation.[7/] Thus, the overall balance achieved by the various steps taken in the Report and Order effectively serves the public interest.

In one particular, however, the Commission should adjust this balance in favor of incumbents. PTE and Cross Country believe that BTA authorization holders should not have the right to match the final offer of other potential ITFS excess capacity lessees. Report and Order at ¶ 41. This right of first refusal provision could deny educators the right to enter into contracts with the parties of their choice. While it is in the public interest for BTA authorization holders to aggregate channels, this does not

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[7/] We understand the Wireless Cable Association International Inc. intends to file various recommendations for fine tuning and clarifying this process of accommodation. In general, we welcome such suggestions.

warrant restricting the contractual rights of these educational institutions.[8]

II. PRIOR TO THE AUCTION THE COMMISSION SHOULD PUT ON PUBLIC NOTICE AND PROCESS AS MANY ITFS AND MDS APPLICATIONS AS POSSIBLE.

The value of each BTA will substantially depend on the location and technical facilities of existing co- and adjacent-channel stations and of those that have already been proposed or that will be applied for in accordance with the Commission's recently-announced filing deadlines. While it is very important that the MDS auction remains on a fast track in order to expedite the inauguration and expansion of new services, potential bidders must have the information necessary to analyze to what extent the BTA spectrum is encumbered. Since the BTA authorization holder must protect existing and proposed co- and adjacent-channel stations, analyzing pending applications will be a critical part of this process.

Accordingly, the Commission should allow potential bidders to review the ITFS applications that are filed on or before the September 15 deadline[9] and during the October 16-20 filing window, as well as MDS applications filed by

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[8] However, if this right were combined with the right to substantially change facilities after the auction and invade the service areas for which BTA auction winners had bid, the fairness of, and rationale for, the entire BTA licensing process would be undercut.

[9] See FCC Public Notice, Report Number 23564A, released August 3, 1995.

September 15, 1995.[10] Specifically, the Commission should commence the auction several weeks after these applications have been placed on public notice and their interference analyses have been made available for public inspection. This will provide bidders with tight but adequate due diligence time. In the meantime, the Commission should continue to process currently-pending ITFS and MDS applications as quickly as possible.

III. THE COMMISSION SHOULD TAKE EFFECTIVE STEPS TO MINIMIZE THE RISK OF SPECULATION AND INSINCERE APPLICATIONS AND SHOULD OTHERWISE FINE-TUNE ITS APPLICATION PROCEDURES.

Unfortunately, speculation and even application scams have characterized the Commission's launching of various new services. They have delayed roll-out of those services, triggered burdensome litigation, frustrated legitimate service providers and bilked and misled the public.

The most important remedy, albeit partial, is for the Commission to establish substantial up-front payment requirements in connection with the auction process. The Report and Order suggests a payment requirement equal to 5% of the BTA's value, as estimated by the Mass Media Bureau. But a 20% requirement would more effectively avoid repetition of the IVDS experience when a high proportion of winning bidders defaulted on their post-auction payment requirements. In

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[10] The FCC will be accepting ITFS modification applications and new station applications during this filing window. See FCC Public Notice, Report Number 23565A, released August 4, 1995.

cooperation with the FTC and other agencies combatting consumer fraud, the Commission should also repudiate and police extravagant claims by auction promoters about the worth of MDS BTA authorizations.

Another refinement of bidder qualification requirements that the Commission should consider pertains to designated entities. The Report and Order makes clear that the value (and, concomitantly, the capital requirements) of the MDS BTAs will be quite modest -- far smaller than for the PCS BTA authorizations. (We estimate $20 per pop for PCS infrastructure costs compared with $2-3 per pop for MDS infrastructure costs.) Yet, the Report and Order adopts the same financial benchmarks for MDS designated entities as for PCS designated entities. PTE and Cross Country recognize and respect the delicate balancing of numerous policy considerations that has gone into the PCS designated entity rules, but a simple downward reduction in the financial qualifications for MDS designated entities would not jeopardize that balance and would comport, far better, with the more limited financial scope of the service. The benchmarks used for IVDS designated entities were, on the basis of similar reasoning, far lower than in the case of PCS.

* * *

Wireless cable is entering a new era of much more effective service to the public, technological breakthroughs, meaningful competition to other media and enhanced educational

programming. These public benefits would not be possible without the Commission's careful balancing of incumbent and bidder interests and its ambitious but sensible licensing plan reflected in the Report and Order. All that is urged here is fine tuning and clarification, designed to realize even more effectively the public policy objectives that animate that document.

Respectfully, submitted,

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August 16, 1995