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September 2[illegible], 1995

DOCKET FILE COPY ORIGINAL

William F. Caton, Acting Secretary
Federal Communications Commission
Washington, DC 20554

Re: PR Docket No. 89-552
(RM-8506)
GN Docket No. 93-252
PP Docket No. 93-253

Dear Mr. Caton:

Transmitted herewith on behalf of PLMRS Narrowband Corp. are an original and nine (9) copies of Comments submitted in response to the Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, Mimeo 95-312 (released August 28, 1995) in the above-referenced docket proceedings. An original and nine (9) copies are being filed so that each Commissioner may receive a personal copy of the enclosed Comments.

Should any questions arise with respect to this matter, please communicate directly with this office.

Respectfully submitted,

Richard Becker

Richard S. Becker
Attorney for PLMRS Narrowband Corp.

Enclosures

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

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services	)	PR Docket No. 89-552 RM-8506
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
Regulatory Treatment of Mobile Services	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz	)	PP Docket No. 93-253

COMMENTS

Respectfully submitted,

PLMRS NARROWBAND CORP.

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SUMMARY

PLMRS Narrowband Corp. ("PNC") hereby submits these Comments pursuant to the Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, PR Docket No. 89-552 (RM-8506), GN Docket No. 93-252, PP Docket No. 93-253, Mimeo 95-312 (August 28, 1995) (hereafter "TNPRM") in favor of the use of lotteries to select among pending mutually exclusive ("MX") noncommercial, nationwide 220-222 MHz applications ("Phase II Nationwide Applications"). Entities who have submitted Phase II Nationwide Applications are referred to herein as "Phase II Nationwide Applicants." PNC has two (2) pending Phase II Nationwide Applications before the Commission. In the TNPRM, the Commission sought comment, inter alia, as to method by which Phase II Licenses will be awarded from among the currently pending Phase II Nationwide Applications. The Commission sought comment as to whether such selection should be conducted by: (1) lottery; (2) comparative hearing; or (3) returning the applications, eliminating the current distinction between "commercial" and "noncommercial" usage, and assigning the 30 available noncommercial channel pairs via the competitive bidding process.

As demonstrated in the Comments, although the Commission may implement competitive bidding procedures if the objectives and the statutory requirements of 47 U.S.C. §309(j) are satisfied, lottery procedures may be implemented to select among those pending Phase II Nationwide Applications filed prior to July 26, 1993. In 1992, in PR Docket No. 89-552 ("Prior 220 MHz Rulemaking Proceeding"), the Commission concluded that the public interest would be best served through the implementation of lotteries to select among pending 220-222 MHz applications. These Comments demonstrate that the adoption of auction procedures at this late date would unfairly prejudice Phase II Nationwide Applicants with currently pending Phase II Nationwide Applications.

In the six (6) year period covering the Prior 220 MHz Rulemaking Proceeding, PNC expended substantial time, resources and expense filing and prosecuting its Applications and participating as a commenter or petitioner in nearly every aspect of the rulemaking proceeding. PNC committed additional resources in connection with the 220-222 MHz licensing process when, on September 21, 1992, it filed a Petition For Review ("Petition") in the United States Court of Appeals for the District of Columbia Circuit (Case No. 92-1432) with respect to the rule modifications ("Modifications") adopted in the Memorandum Opinion and Order, 7 FCC Rcd 4484 (1992), as part of the Prior 220 MHz Rulemaking Proceeding. Notwithstanding such expenditures, Phase II Nationwide Applicants such as PNC are now being asked to further demonstrate their "commitment" by spending millions of dollars in auctions instead of utilizing their valuable resources to promptly establish the best and most efficient nationwide 220-222 MHz systems possible.

These Comments demonstrate that the Commission should follow its 1994 decision in the cellular arena with respect to initial applications submitted for unserved areas of cellular markets. In that context, due to the fact that: (1) the Commission had adopted sufficiently stringent construction and operation regulations to prevent speculation; and (2) the Commission determined that the adoption of auction procedures would improperly prejudice those applicants who had prosecuted applications under Rules providing for selection by lottery, the Commission retained its lottery selection methods. These same factors apply to the instant proceeding and a departure from this precedent must be considered a violation of the Commission's Rules and arbitrary and capricious.

In addition, the Comments demonstrate that the adoption of auction procedures would delay the provision of 220-222 MHz service to the public, in violation of 47 U.S.C. §309(j)(3)(A),(D). In the Prior 220 MHz Rulemaking Proceeding, the Commission substantially tightened its Rules in connection with the entry, construction and operation requirements applicable to noncommercial nationwide 220-222 MHz systems in an effort to expedite 220-222 MHz service to the public. In addition, lotteries may commence immediately after the Commission permits the amendment of the pending Phase II Nationwide Applications. Lotteries, therefore, would significantly speed the provision of 220-222 MHz service to the public as compared to the time necessary to permit: (1) the dismissal of the pending Phase II Nationwide Applications; (2) the acceptance of new auction-based applications; and (3) auctions to be conducted under the Commission's proposals in the TNPRM.

PNC also demonstrates that the comparative hearing process is not the appropriate method by which licensees should be selected to operate 220-222 MHz systems. As it did in the Prior 220 MHz Rulemaking Proceeding, the Commission should once again reject comparative hearings due to the fact that: (1) such hearings would not result in the selection of more qualified licensees; and (2) the implementation of comparative hearings would result in unnecessary costs to the Commission and the public as well as extensive delay in the provision of 220-222 MHz service.

Finally, with respect to the licensing of the 30 available "noncommercial" channel pairs in the event the Commission chooses to retain its lottery processes, PNC respectfully submits that the Commission should: (1) retain its allocation scheme for these frequencies, i.e., two (2) ten-channel blocks and two (2) five-channel blocks; (2) proceed immediately with award of these licenses by lottery; and (3) consistent with its proposal in the auction context, eliminate the noncommercial/commercial distinction for these licenses. This approach will enable the Commission to license the remaining 220-222 MHz nationwide systems as quickly, efficiently and fairly as possible, while still achieving the flexibility arising from elimination of the noncommercial/commercial distinction.

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

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services	)	PR Docket No. 89-552 RM-8506
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
Regulatory Treatment of Mobile Services	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz	)	PP Docket No. 93-253

To: The Commission

COMMENTS

PLMRS Narrowband Corp. ("PNC"), by its attorneys and pursuant to the Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking in the above-captioned proceeding released on August 28, 1995,[1] hereby submits the following Comments in favor of the use of lotteries to select among pending mutually exclusive ("MX") noncommercial, nationwide 220-222 MHz applications.[2] In

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[1] Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, PR Docket No. 89-552 (RM-8506), GN Docket No. 93-252, PP Docket No. 93-253, Mimeo 95-312 (August 28, 1995) (hereafter "TNPRM"). A "Separate Statement Of Commissioner James H. Quello" was appended to the TNPRM and will be referred to herein as the "Quello Statement."

[2] The Commission has defined those 220-222 MHz licenses which will be granted pursuant to the rules proposed in the TNPRM as "Phase II Licenses." See TNPRM at ¶1, n.1. Therefore, for the purposes of these Comments, currently pending MX applications for noncommercial, nationwide 220-222 MHz licenses will be referred to herein as "Phase II Nationwide Applications." Entities who have

support of these Comments, the following is respectfully shown:

I. Introduction

1. In its TNPRM, the Commission proposed new regulations to govern operation and licensing in the 220-222 MHz band, including, but not limited to, regulations regarding the procedures by which the Commission will award Phase II Licenses from among the existing pool of Phase II Nationwide Applicants. The Commission sought comment as to "whether to resolve ... [MX Phase II Nationwide Applications] by lottery, comparative hearing, or to return the applications and adopt a new licensing scheme...."[3] Under this last scenario (return of applications), the Commission proposed to offer these noncommercial frequencies on a nationwide basis for all applicants, i.e., to eliminate the current distinction between "commercial" and "noncommercial" usage, and to assign the 30 available noncommercial channel pairs[4] via the competitive bidding

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submitted Phase II Nationwide Applications will be referred to herein as "Phase II Nationwide Applicants."

[3] TNPRM at ¶12.

[4] In the Commission's 1991 Report and Order in PR Docket 89-552, thirty (30) channel pairs in the 220-222 MHz band were designated for noncommercial, nationwide use to be assigned as two (2) ten-channel blocks and two (2) five-channel blocks. Report and Order, 6 FCC Rcd 2356, 2361 (1991) ("R&O"); Further Notice of Proposed Rulemaking, 7 FCC Rcd 898 (1992) ("FNPRM"); recon. granted in part and denied in part, Memorandum Opinion and Order, 7 FCC Rcd 4484 (1992) ("MO&O"), Erratum, DA 92-117 (August 28, 1992), Second Erratum, 7 FCC Rcd 6297 (1992), recon. granted in part and denied in part, Order, 8 FCC Rcd 4161 (1993) ("Order"), appeal dismissed, Evans v. FCC, Case No. 92-137 (D.C. Cir. 1994), This Rulemaking proceeding, which, inter alia, confirmed the Commission's decision to use lotteries to select among Phase II Nationwide Applications, will be referred to herein as the "Prior 220 MHz Rulemaking Proceeding." The Rules adopted in the Prior 220 MHz Rulemaking Proceeding, which currently govern the licensing and usage of 220

process.[5]

2. In 1991, PNC filed applications for both nationwide commercial and noncommercial licenses in the 220-222 MHz band.[6] As demonstrated in PNC's applications, PNC is a wholly-owned subsidiary of Vanguard Cellular Operating Corp., which is in turn wholly owned by Vanguard Cellular Systems Inc. ("Vanguard"). Vanguard is one of the largest purely nonwireline cellular telephone operator in the nation and has been a publicly owned company since 1988 with substantial credit backing and a record of fast paced growth. Vanguard's stock tracks under the symbol "VCELA" on the NASDAQ National Market System.

3. As a long-term Commission licensee and a substantial cellular carrier with operating systems in many states, PNC and its parent Vanguard are eminently qualified to comment on the impact of Commission regulations on the development of emerging technologies, including the impact of those regulations proposed in the instant

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MHz systems, will be referred to herein as the "Existing 220 MHz Rules."

[5] It should be noted that PNC supports the Commission's proposal to eliminate the formal distinction between commercial and noncommercial usage of the 220-222 MHz spectrum. See paragraph 23 infra. Notwithstanding PNC's approval of this proposal, PNC believes, as set forth below, that the Commission should use lotteries to select among Phase II Nationwide Applications, regardless of the "commercial" or "noncommercial" nature of the proposed use of the 220-222 MHz spectrum.

[6] Although PNC's nationwide commercial application was not selected in the Commission's 1993 lottery, PNC's two (2) Phase II Nationwide Applications [for a five (5) channel noncommercial license and for a ten (10) channel noncommercial license] ("Applications") remain pending and will be subject to the Rule changes adopted in this proceeding.

proceeding. Therefore, for the following reasons, PNC submits these Comments in support of the adoption of lottery procedures, and in opposition to Commission's adoption of comparative hearing or auction procedures, with respect to the selection of 220-222 MHz licensees among the currently pending Phase II Nationwide Applications.

II. The Commission's Proposal To Use Auctions To Choose Among Pending Phase II Nationwide Applications Is Not In The Public Interest And Therefore Should Be Rejected In Favor Of Lotteries

4. The Commission may choose to exercise its authority to implement competitive bidding procedures to select among Phase II Nationwide Applications[7] if the Commission determines that such procedures satisfy the policy objectives and the particular statutory requirements of Section 309(j) of the Communications Act of 1934, as amended (the "Act").[8] However, it is equally clear that the Commission has the discretion to implement lottery procedures to select among pending MX applications filed prior to July 26, 1993,[9] including the Phase II Nationwide Applications. In fact, in the Prior 220 MHz Rulemaking Proceeding, the Commission already concluded that "the public interest will be served most effectively by the use of lotteries in the context of both the

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[7] See 47 U.S.C. §309(j); Second Report and Order, 9 FCC Rcd 2348, 2349-2354.

[8] 47 U.S.C. §309(j).

[9] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(e) ("Budget Act"); Memorandum Opinion and Order, 9 FCC Rcd 7387, 7398 (1994) ("Cellular Unserved Areas").

nationwide commercial and noncommercial [220 MHz] licenses."[10] As set forth below, a reversal of the Existing 220 MHz Rules mandating lotteries and the retroactive imposition of competitive bidding procedures to select among the currently pending Phase II Nationwide Applications would not fulfill the policy objectives of the Act. As a result, PNC respectfully submits that the implementation of competitive bidding processes would be contrary to the public interest. Therefore, the Commission must retain the lottery procedures currently in place under the Existing 220 MHz Rules.

A. The Adoption Of Auction Procedures At This Late Date Would Unfairly Prejudice Phase II Nationwide Applicants

5. When choosing the methodology by which initial licenses for new services are to be awarded, factors "including considerations of equity and administrative cost and efficiency" must be analyzed by the Commission in each specific case.[11] In this regard, the Commission has clearly indicated that, in the context of analyzing the merits of lotteries versus the benefits of competitive bidding, it is of primary importance that the costs to both the public and the Commission be evaluated.[12] As demonstrated herein, PNC respectfully submits that the imposition of competitive

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[10] MO&O, 7 FCC Rcd at 4489.

[11] Cellular Unserved Areas, 9 FCC Rcd at 7391. See also Quello Statement at unnumbered ¶2 ("[the Commission is required to] exercise discretion to weigh the equities on a service by service basis rather than to reflexively use auctions in each and every case.")

[12] Cellular Unserved Areas, 9 FCC Rcd at 7392.

bidding procedures in the instant proceeding would significantly prejudice those Phase II Nationwide Applicants who have already invested substantial resources in the Commission's licensing and rulemaking processes.

6. The Commission and the public have already invested six (6) years[13] and countless thousands of dollars in legal fees and management time in connection with the Prior 220 MHz Rulemaking Proceeding. In 1991, PNC expended substantial time, resources and expense both in preparing its Applications and in paying the total $49,000.00 in FCC-imposed filing fees that were required to be submitted with the Applications. In addition, PNC has incurred substantial legal fees as a result of its active participation in nearly every aspect of the lengthy and complex Prior 220 MHz Rulemaking Proceeding.[14]

7. Further, PNC committed additional resources in connection with the 220-222 MHz licensing process when, on September 21, 1992, it filed a Petition For Review ("Petition") in the United States Court of Appeals for the District of Columbia Circuit[15] with respect to the rule modifications ("Modifications") adopted in the

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[13] The Prior 220 MHz Rulemaking Proceeding began in 1989 with the issuance of a Notice of Proposed Rulemaking, 4 FCC Rcd 8593 (1989) ("NPRM").

[14] See PNC's Comments, filed March 2, 1992 ("First Comments"), Reply Comments, filed March 23, 1992, Opposition To Petition For Reconsideration, filed October 15, 1992, Petition For Reconsideration And Clarification, filed August 6, 1993, Reply To Opposition To Petitions For Reconsideration/Clarification, filed September 22, 1993.

[15] Case No. 92-1432.

MO&O.[16] Although the Modifications were adopted ostensibly to deter speculation by applicants and the warehousing of 220-222 MHz channels by licensees,[17] PNC's Petition demonstrated that such restrictions were unnecessary in the context of the licensing of noncommercial nationwide channels. Indeed, of the 59,000 applications filed for 220-222 MHz licenses, only thirty-four (34) Phase II Nationwide Applications were filed.[18] Instead, PNC demonstrated that the Modifications had been adopted by the Commission in order enhance the chances of certain Phase II Nationwide Applicants to obtain Phase II Nationwide Licenses and, as such, adoption of the Modifications exceeded the Commission's authority and was arbitrary and capricious.[19]

8. Based on this substantial commitment of resources, there can be no doubt that PNC has demonstrated its belief in the

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[16] As set forth at ¶12 infra, in the MO&O, the Commission substantially tightened its Rules in connection with the entry, construction and operation requirements applicable to noncommercial nationwide 220-222 MHz systems by shortening the construction and operation benchmarks for such systems, strengthening assignment and transfer prohibitions and further restricting the ability of noncommercial licensees to lease excess capacity on these systems. MO&O, 7 FCC Rcd at 4489-4491.

[17] Id. at 4489.

[18] Petition at 3, n.1; TNPRM at ¶¶5, 28. In this regard, the criteria adopted in the R&O fulfilled the Commission's mission "to deter speculative applications." R&O, 6 FCC Rcd at 2363.

[19] Petition at p. 4; 5 U.S.C. §§551 et seq. PNC's Petition remains held in abeyance pending the resolution of the issues in the Prior 220 MHz Rulemaking Proceeding. In this regard, although the Petition may be rendered moot in the event the Commission adopts the auction procedures proposed in the TNPRM, it should be noted that the TNPRM did not in any way address PNC's pending Petition.

viability of the proposed 220-222 MHz nationwide systems and its determination to obtain a nationwide authorization pursuant to the Existing 220 MHz Rules. PNC is chagrined, therefore, that the Commission is now demonstrating such an eagerness to significantly alter its course at this late date. In the TNPRM, the Commission proposed to return all thirty-three (33) of the pending Phase II Nationwide Applications and implement new auction application and selection procedures.[20] Although the Commission proposed various compensatory measures to distract Phase II Nationwide Applicants from focusing on their losses associated with the apparent abandonment of the lotteries,[21] such remedial measures cannot turn back the clock. Adding insult to injury, Phase II Nationwide Applicants such as PNC are now being asked to further demonstrate their "commitment" by spending millions of dollars in auctions instead of utilizing their valuable resources to promptly establish the best and most efficient nationwide 220-222 MHz systems possible.

9. In the cellular arena, the Commission evaluated these costs to the public and the Commission when it decided to retain its lottery selection methods with respect to initial applications submitted for unserved areas of cellular markets. In a factual setting nearly identical to the instant proceeding, all but two of

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[20] TNPRM at ¶11, ¶¶108-180. The Commission noted that one (1) of the thirty-four (34) originally filed Phase II Nationwide Applications was withdrawn, leaving thirty-three (33) pending Phase II Nationwide Applications. Id. at note 35.

[21] See TNPRM at ¶30 (return of filing fees), ¶¶161-165 (bidding credits), ¶¶166-169 (installment payments).

the cellular unserved area applications were filed prior to July 26, 1993, under Rules authorizing the selection of unserved area licensees pursuant to the random selection process.[22] However, upon passage of the Budget Act and in light of the new auction authority granted to the Commission therein, the Commission reexamined its initial decision to utilize lotteries. In its analysis, the Commission found that sufficiently stringent construction and operation regulations had been adopted to prevent speculation in unserved area licenses,[23] and, therefore, auctions could not be justified solely under this rationale. In addition, the Commission held that the adoption of auction procedures would improperly prejudice those applicants who had developed financial strategies and prosecuted applications under the expectation that such applications would be chosen through the random selection process. Specifically, the Commission found that cellular "applicants' business plans did not take into account the additional expenditures that they would incur if licenses were to be awarded by competitive bidding."[24] These same factors apply to the instant proceeding and the Commission cannot permit the allure of auction-based revenue to prejudice applicants who long ago filed applications under Rules providing for the granting of Phase II Licenses by lottery.[25] Should the Commission ignore the lessons

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[22] Cellular Unserved Areas, 9 FCC Rcd at 7388.

[23] Id. at 7391.

[24] Id.

[25] R&O, 6 FCC Rcd at 2364-2365.

learned in the analogous cellular unserved area context and simply depart from this applicable precedent in order to fill the Government's coffers and to ensure the award of Phase II Licenses to select companies,[26] such action must be considered a violation of the Commission's Rules and arbitrary and capricious under the Administrative Procedure Act.[27]

10. It has been several years since the Commission processed the applications that had been submitted for nationwide commercial 220-222 MHz systems, conducted lotteries and awarded four (4) licenses for these systems.[28] In the meantime, however, the Commission has permitted the pending Phase II Nationwide Applications to languish unprocessed while the Commission ostensibly attempts to more efficiently award Phase II Licenses and expeditiously provide 220-222 MHz service to the public. For this reason the Commission must reject the proposal to institute auction procedures at this late date. With the release of every new proposal in connection with the selection among Phase II Nationwide Applications and the concomitant delay resulting therefrom, the above-described burdens on Phase II Nationwide Applicants become even more injurious and further delay justice to these entities. In the instant case, justice delayed is justice denied to the Phase II Nationwide Applicants.[29]

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[26] See paragraph 7 supra.

[27] 5 U.S.C. §§551 et seq.

[28] TNPRM at ¶5.

[29] Cf. Ashbacker Radio Co. v. F.C.C., 326 U.S. 327 (1945).

B. The Adoption Of Auction Procedures Would Delay The Provision Of 220-222 MHz Service To The Public

11. PNC must also emphasize that the Commission may not institute competitive bidding procedures to select among pending Phase II Nationwide Applications if, inter alia, such procedures hinder: (1) "the development and rapid deployment of [220 MHz services as a result of] ... administrative or judicial delays"[30]; or (2) "the efficient and intensive use of the electromagnetic spectrum."[31] As demonstrated herein, PNC respectfully submits that the imposition of competitive bidding procedures in the instant proceeding would in fact delay the provision of 220 MHz service to the public and would therefore violate the above-described mandates of the Act.

12. A conversion to the auction process would serve only to delay the provision of 220-222 MHz service to the public. In the Prior 220 MHz Rulemaking Proceeding, the Commission took dramatic steps to ensure expedited 220-222 MHz service to the public. In an effort to encourage the swift deployment of these services, the Commission, in its Prior 220 MHz Rulemaking Proceeding, substantially tightened its Rules in connection with the entry, construction and operation requirements applicable to noncommercial nationwide 220-222 MHz systems.[32] Furthermore, the Phase II

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[30] 47 U.S.C. §309(j)(3)(A).

[31] 47 U.S.C. §309(j)(3)(D).

[32] In the MO&O, the Commission: (1) required noncommercial nationwide licensees to construct and place in operation at least one base station in a minimum of 70 markets within five rather than

Nationwide Applications need only to be amended to reflect the changes adopted in the Prior 220 MHz Rulemaking Proceeding before lotteries may commence.[33]

13. However, if the Commission chooses to utilize competitive bidding to award Phase II Nationwide Licenses, "the whole application process must begin anew at a considerable cost to the [Phase II Nationwide] [A]pplicants and to the Commission."[34] As in the context of the above-described cellular unserved area proceeding where the Commission chose to implement lottery procedures in order to expedite cellular service to the public in unserved areas and to avoid a lengthy and expensive conversion to

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ten years of licensing; (2) prohibited the transfer or assignment of nationwide noncommercial licenses during the entire first ten-year license term rather than after 40 percent of the licensee's system is constructed; and (3) prohibited the leasing of excess capacity during the first five years of the license term rather than permitting excess capacity leasing after 40 percent of the system is constructed. MO&O, 7 FCC Rcd at 4489-4491. In the Order, the Commission further strengthened an entry requirement for 220-222 MHz systems by requiring noncommercial nationwide applicants to demonstrate an "actual presence" in the 70 or more markets identified in their applications. Order, 8 FCC Rcd at 4163. It should be noted that, although these modifications may indeed prove to more effectively promote the rapid deployment of 220 MHz services, PNC believes that the changes will have the effect of excluding many legitimate, medium and large-size companies in favor of a select group of extremely large noncommercial nationwide applicants. As set forth at paragraph 7 supra, it is for primarily this reason that PNC, on September 21, 1992, filed its Petition with respect to the rule modifications adopted in the MO&O.

[33] Due to the various ongoing rulemaking proceedings associated with the 220-222 MHz services, the Commission has not yet required applicants for Phase II Licenses to amend their applications. TNPRM at p.18.

[34] Cellular Unserved Areas, 9 FCC Rcd at 7392 (parenthetical supplied).

the competitive bidding process,[35] the Commission has, in the TNPRM, failed to provide any support for its claim that auctions will speed the provision of 220-222 MHz services to the public:

> Indeed, no assurance even exists that using auctions for these particular applications would expedite the deployment of service to the public, a principal objective of the auction law. It has been estimated that it may take 60 days or longer to complete an auction that to complete a lottery. [The Commission] believe[s] that such estimates must take into account other possible factors creating administrative confusion and attendant delays, such as the time that may be needed to ... allow current applications to be returned and refunds issued, and the time for current applicants to refile their applications under the auction process.[36]

In point of fact, it has become eminently clear that the auction process can be exceedingly slow and plagued by repeated and extensive delays.[37] On the other hand, if the Phase II Nationwide Applications were permitted to be amended and the lotteries were to be held tomorrow, this would significantly speed the provision of 220-222 MHz service to the public as compared to the time necessary to permit: (1) the dismissal of the pending Phase II Nationwide Applications; (2) the acceptance of new auction-based applications; and (3) auctions to be conducted under the Commission's proposals

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[35] Id. at 7390.

[36] Id.

[37] See, e.g., Public Notice, "FCC Postpones Short-Form Filing Date For 493 BTA Licenses Located In The C Block For Personal Communications Services In The 2 GHz Band In Response To Court Stay" (released July 27, 1995); Public Notice, "FCC Postpones August 29, 1995 Auction Date For 493 BTA Licenses Located In The C Block For Personal Communications Services In The 2 GHz Band (released August 9, 1995).

in the TNPRM.

14. Based on the foregoing reasons, PNC respectfully submits that the Commission should reject the proposal to implement competitive bidding and should instead retain the lottery procedures currently in place under the Existing 220 MHz Rules.

III. The Commission Should Once Again Reject Comparative Hearings As The Method To Choose Among Pending Phase II Nationwide Applications

A. Comparative Hearings Would Not Assist The Commission In Selecting The Most Qualified Phase II Nationwide Applicant

15. As set forth below, the Commission has consistently held that the random selection process, as opposed to the comparative hearing process, is the appropriate method by which licensees should be selected to operate 220-222 MHz systems. For this reason, PNC is puzzled as to why the Commission has revisited this issue once again in the TNPRM. Nevertheless, PNC hereby submits its Comments in favor of the use of lotteries and in opposition to the comparative hearing process.

16. In the original R&O adopting licensing procedures for the 220-222 MHz frequencies, the Commission specifically rejected the implementation of comparative hearings in favor of lotteries with regard to the selection among MX 220-222 MHz applications. Specifically, the Commission stated that:

> We have chosen lottery proceedings over comparative hearings to resolve mutually exclusive applications because we do not believe that comparative criteria could be developed that would draw meaningful distinctions between competing applicants. Comparative criteria for "spectrum efficiency" or "need" would be difficult if not impossible

> to qualify, especially for a new technology. Furthermore, the time and expense associated with comparative hearings in this context are not likely to produce a result more enlightened or more in the public interest than would a lottery selection process.[38]

Should the Commission conduct comparative hearings in this context, PNC respectfully submits that, at most, the Commission would conclude that the Phase II Nationwide Applicants are large corporations or communications companies who, like PNC, are legitimate entities with a need for the proposed systems and an intent to implement the systems. This conclusion, however, clearly does not justify the onerous expenditure of resources associated with such hearings.

17. The conclusion reached by the Commission in its 1991 R&O was thoroughly consistent with the Commission's prior decision in the cellular context when the comparative hearing process was discarded in favor of lotteries.[39] In specifically rejecting commenters' contentions that the comparative process would demonstrate many significant differences among applicants, the Commission concluded that any such differences would likely be in "degree and not in kind."[40] The Commission further held that:

> [T]he comparative process sometimes results in less than ideal analyses because there are divergent approaches to cellular system

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[38] R&O, 6 FCC Rcd at 2365 (emphasis added).

[39] See Report and Order, 98 FCC2d 175, 179 (1984) ("Cellular Lottery Selection"), modified, 101 FCC2d 577, further modified, 59 RR2d 407 (1985), aff'd in part and rev'd in part, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987).

[40] Cellular Lottery Selection, 98 FCC2d at 185.

> design, and the expedited comparative hearing process is ill-suited for comparing these alternatives. Cellular design involves a complex set of trade-offs among engineering, marketing and financial decisions. These factors are essentially business judgments that a cellular company must make in response to the demands of its customers, and a comparison of these business plans bears little relation to public interest objectives.
>
> Id. at 186.

18. As in the cellular arena, it is reasonable to expect that there will be differences between the 220-222 MHz systems proposed by each of the Phase II Nationwide Applicants depending on the nature and extent of the each applicant's business as well as marketplace forces. These differences will not, however, reflect on the qualifications of the licensee to hold a Phase II license. In point of fact, this is exactly the reason that the Commission has traditionally refrained from instituting comparative hearings in the Private Radio area.[41] The Commission has already taken adequate steps to ensure that the nationwide spectrum will be utilized. The Commission should not attempt to substitute its regulatory determinations for the extensive engineering, marketing and financial decisions that each commercial licensee must make in the course of establishing its system.

19. Despite the sound conclusions reached in the 1991 R&O, the Commission sought further comment from the public in 1992 in order to re-evaluate the merits of comparative hearings vis-a-vis

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[41] See FNPRM, 7 FCC Rcd at 898.

lotteries for the selection of 220-222 MHz licensees.[42] The overwhelming majority of commenters supported the retention of the lottery process and, accordingly, the Commission stated that:

> [W]e remain convinced that the public interest will be served most effectively by the use of lotteries in the context of both the nationwide commercial and noncommercial licenses ... [T]here is no evidence that the use of properly implemented lotteries will result in either the selection of unqualified applicants or the delivery of inferior service.[43]

This reasoning remains true today, especially in light of the Commission's strengthening of its Rules governing the entry, construction and operation of noncommercial nationwide 220-222 MHz systems, as described at paragraph 12 supra.

B. The Implementation Of Comparative Hearings Would Result In Unnecessary Costs To The Commission And The Public As Well As Extensive Delay In The Provision Of 220-222 MHz Service

20. The Act requires the Commission to distribute the radio spectrum in a "fair, efficient, and equitable" manner.[44] In this regard, the Commission, in the Prior 220 MHz Rulemaking, acknowledged that its 220-222 MHz Rules were designed to "promote[] early licensing and implementation" of 220-222 MHz systems.[45] Judged under these standards alone, the proposal to use comparative hearings to select among Phase II Nationwide Applications must be

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[42] See generally FNPRM, 7 FCC Rcd 898.

[43] MO&O, 7 FCC Rcd at 4489.

[44] 47 U.SC. §307(c).

[45] R&O, 6 FCC Rcd at 2365.

rejected.

21. In 1992, the Commission faced this issue head-on when it declared that:

> [S]everal infirmities inherent in the comparative hearing process counsel against the use of comparative selection procedures here. For example, the cost of conducting comparative hearings is exorbitant in terms of time and financial resources consumed. Indeed, one of the primary reasons we were initially disinclined to employ comparative hearings to select 220-222 MHz applicants is because the amount of time characteristically involved is directly antithetical to the public interest in the expeditious development of narrowband service.
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> MO&O, 7 FCC Rcd at 4489.

These statements remain as valid today as when they were initially penned. With thirty-three (33) pending Phase II Nationwide Applications before the Commission, such comparative proceedings would be mammoth in scope, involving not only the Commission's Office of Administrative Law Judges, but also the Commercial Wireless Division, which would act as a party to the hearing. After all of the time and effort expended in the Prior 220 MHz Rulemaking to reach the conclusion that comparative hearings are a flagrant waste of the Commission's already scarce resources, the Commission should not at this late date carelessly fling the licensing of 220-222 MHz services into this Pandora's box given the weight of the evidence counseling against it.

22. Aside from the extravagant waste of Commission resources that would result from conducting comparative hearings, the Commission must also consider the extensive burden that comparative

hearings would place on Phase II Nationwide Applicants. Having already expended substantial sums in application preparation and FCC-imposed filing fee charges, applicants in a comparative hearing would be faced with tens (and perhaps hundreds) of thousands of dollars in legal fees in prosecuting a comparative hearing. It is obvious that these assets and the other resources that would be devoted to a comparative hearing could be utilized much more efficiently and economically in building and operating nationwide 220-222 MHz systems. PNC respectfully submits that selection of Phase II Licenses by comparative hearing would likely delay the implementation of systems on the 220-222 MHz band by one, two or possibly three or more years. Such a result is patently contrary to the public interest and, as a result, the Commission should retain its random selection processes instead of turning its back on years of reasoned analysis.

IV. The Commission Should Eliminate The Noncommercial/Commercial Distinction Even In A Lottery Context

23. As set forth above, the Commission in the TNPRM specifically proposed that, in the event that Phase II Licenses are to be awarded via the competitive bidding process, the Commission would return all pending Phase II Nationwide Applications and would thereafter accept new nationwide applications without requiring distinctions to be made as to the intended "commercial" or "noncommercial" usage of the frequencies sought.[46] However, no proposals were made by the Commission with respect to the licensing

[46] TNPRM at ¶¶12, 34.

of the 30 available "noncommercial" channel pairs in the event the Commission chooses to retain its lottery processes. In this regard, PNC respectfully submits that the Commission should: (1) retain its allocation scheme for these frequencies, i.e., two (2) ten-channel blocks and two (2) five-channel blocks; (2) proceed immediately with award of these licenses by lottery; and (3) consistent with its proposal in the auction context, eliminate the noncommercial/commercial distinction for these licenses. This approach will enable the Commission to license the remaining 220-222 MHz nationwide systems as quickly, efficiently and fairly as possible, while still achieving the flexibility arising from elimination of the noncommercial/commercial distinction. Moreover, PNC must emphasize that after lottery of the currently pending Phase II Nationwide Applications, the Commission can proceed with establishment of wide-area 220-222 MHz licenses and assignment of those licenses by auction. As set forth herein, however, the Commission cannot and should not change course at this late date and assign and process the Phase II Nationwide Applications by auction rather than lottery.

V. Conclusion

24. For the foregoing reasons, PNC supports the use of lottery procedures in awarding Phase II Licenses to Phase II Nationwide Applicants with long-pending Phase II Nationwide Applications. PNC has demonstrated that the public interest mandates of the Act counsel against the use of auctions and comparative hearings in this context. The adoption of either of