

suckers. The avalanche of requests which rained down on the Commission created backlogs and processing nightmares. The byproduct of this spectrum land rush created a need for legitimate licensees also to apply for channels which would otherwise be unavailable if left unclaimed, thereby reducing licensees' ability to grow in an orderly way in the future. The combination was a barrage of applications, waiver requests, real party in interest problems, and the associated regulatory problems which come from dealing with literally thousands of disappointed members of the public that could not be equally satisfied under those conditions.

Adding to the problem were the mass filings by Dial Call, Inc.; Nextel, Inc.; OneComm, Inc.; and other financial powerhouse wannabes. At first the applications were excessive, but at least were supported by some attempt to abide by the Commission's Rules to demonstrate that operation of the proposed facilities would not be harmful to existing licensees. Later, that single consideration was abandoned as even the largest operators eschewed their responsibility.

That the Commission could not logically negotiate the sea of applications that poured upon it is unfortunate. However, that circumstance and the lingering harm which the Commission suffers daily do not provide justification for the Bureau's Plan. Legitimate licensees should not be made to pay, in the form of forever lost business opportunities, for the agency's inability to enforce fidelity to its own processes. That the Commission was unable to enforce its Rules against the very entities which stand to gain the most from the Bureau's Plan is, at least, ironic and most appropriately unconscionable.

### The Free Market Solution

The Commission's Notice of Proposed Rule Making in this proceeding requested commenters to suggest "a plan" to satisfy the competing concerns of licensees. Some commenters suggested one scheme or another which was directed at giving the appearance of compromise or reasonableness. Each of these "plans" appeared to be focused on mollifying the largest operators or throwing a meaningless bone to smaller, independent entrepreneurs. All these suggested plans were based on theories and strategies which had little, if any basis, in law, logic, fundamental fairness, and the basic rights of legitimate businesses. Few of these schemes touched on the obligations of the agency to promote the true competition which presently exists. And even fewer answered the question of what, if anything, would be best for the rights of all participants, including the public to be served.

The public has been well served by the present regulatory regime. Hundreds of thousands of dispatch customers are receiving good, cost effective service from hundreds of competing operators. Any changes in the equilibrium of the market has occurred naturally, by merger, acquisition and competition. The big got bigger, one acquisition at a time. The small maintained some level of opportunity, based on its initiative and resources. And competition flourished based on the primary market factors of price and service. In sum, a natural evolution occurred that resulted in a vibrant market, providing radio service to the public as an achievement of the Commission.

Now, the Commission is seeking to impose an unnatural regulatory regime on this healthy industry. One must ask, why? Under the present regulations, an entity can become a wide area licensee simply by applying for channels or purchasing same from its neighbor. In fact, the wide area licensee's system is not confined by arbitrary borders, such as a BEA or confinement within channel blocks. And that same ambitious licensee can amass as many or as few frequencies as it believes are required. It need not obtain more spectrum than necessary and is not prevented from obtaining less. In sum, it's been up to the licensee and the market and should continue to be so. There is no evidence that the marketplace has failed or will fail to bring forth naturally wide advanced area SMR systems of its own accord, at reasonable cost to the public. No intervention by the agency is necessary or desirable to serve these legitimate ends.

If a wide area licensee wishes to employ a new technology to benefit its competitive position, it may request authority to do so, without demanding accommodation from its competitors. If the same licensee requires additional time to construct a larger, integrated system, they may simply request waiver of the Commission's construction deadlines. The Commission has the authority to grant such requests. Again, the licensee possesses control of its destiny. The licensee has the ability to succeed without assistance from the Commission which includes removal, by legislative fiat, of its competition's ability to grow in the marketplace.

Presently, small operators have the ability to grow into medium sized operators and even larger, enjoying the natural evolution of business. The agency does not require that small operators demonstrate that they have grown overnight by requiring payment at auction at terms that can only be satisfied by the largest entities. The Bureau's Plan would require a small operator to spend likely millions of dollars to obtain a wide area license, just to maintain the opportunities which the small operator enjoys today. Can such an investment, even if possible, be wise for that operator? More importantly, what would that investment prove?

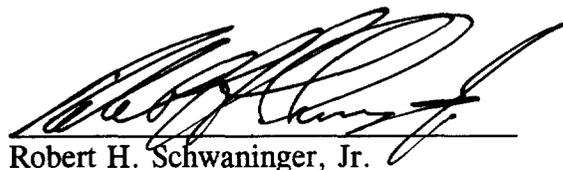
One of the justifications articulated in the creation of auction authority for the Commission was to determine a method of assessing the applicant's willingness to invest in the provision of service to the public. The Parties submit that a small operator's willingness to invest its own, personal fortune in his business is a much better indicator of good intent, than a corporate officer's willingness to invest stockholders' money.

The Parties, therefore, respectfully submit that they have a plan to put forward. One which has a proven track record of success. One which has demonstrated for decades that it will result in provision of valuable services to the public. One which has aided in the introduction of new trunking technologies and a host of other legitimate services for which demand remains constant and strong and growing. The Parties respectfully request that the Commission do nothing and leave well enough alone.

Conclusion

In accord with the foregoing reasons, the Parties respectfully request that the Commission take regulatory action consistent with the statements and suggestions made herein.

Respectfully submitted,



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Dated: 9/29/95

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## **THE AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION IN ACCORD WITH 47 U.S.C. §309(j)(3)**

In accord with the clear language of the Communications Act of 1934, the use of competitive bidding may only be employed following satisfaction of the mandated objectives and caveats contained within The Act. Relevant portions of the statutory language shown below are underlined for emphasis.

As a condition precedent to the Commission's use of competitive bidding as a method of selection among competing applicants, the requirements created by 47 U.S.C. §309(j)(3) must be satisfied, see, 47 U.S.C. §309(j)(1) which states, "...the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection." Accordingly, the Commission's inability to meet the requirements of the subsection would negate the Commission's authority to employ competitive bidding. It should be further noted that Congress did not provide any discretion to the Commission to select among the requirements and employ any balancing test, giving greater priority to satisfaction of one requirement over another. In contrast, the clear language of the statute states that all of the requirements must be met.

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas. without administrative or judicial delays;

Comment: The Bureau's Plan will not result in the offering to the public of new technologies which, but for the adoption of the Plan, would not be offered to the public. All technologies to be introduced shall be made available to the public via cellular and PCS operations. As stated *supra*, the Plan will result in fewer offerings of competitive services to rural areas. Finally, the tremendous upheaval in the Commission's licensing of SMR facilities, which would naturally occur as a result of adoption and the concurrent litigation arising therefrom, would create administrative and judicial delays.

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minority groups and women;

Comment: As stated in the attached comments, economic opportunity and competition will be reduced by the Bureau's Plan. It is beyond doubt that the Bureau's Plan to employ competitive bidding would not avoid concentration of licenses into the hands of few companies and certainly would not serve to create any opportunity for small businesses. In fact, the contrary is true.

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

Comment: The Bureau's intention to recommend competitive bidding for authority to extinguish the value of private business interests and reasonable expectations, to reward, in the main, a single entity, Nextel, Inc., to the detriment of hundreds of adversely affected operators, by creation of a single-bidder auction for most of the channel blocks which would be sold, will not accomplish the goal of thwarting unjust enrichment. Instead, it would enable a small group of publicly traded entities to exacerbate the level of their unjust enrichment by producing a vehicle for greater unjust enrichment.

The aforementioned portions of the relevant statute fully considered by the commenting Parties, it is apparent that the Commission cannot meet the requirements which are clearly contained in the Communications Act and must, therefore, accept the limitation on its authority to engage in competitive bidding, concluding that such authority does not exist for the purposes to be served by the Bureau's Plan.

Finally, the commenting Parties note that the Bureau's anticipated use of competitive bidding is, at the very least, wholly premature. The Act requires that such procedures be employed only to determine the entity to receive authority as among competing, mutually exclusive applications. Since there has been no evidence presented to the Commission that mutually exclusive applicants exist or would exist, the Commission does not possess the authority to demand competitive bidding. The Act clearly requires evidence of the existence of the applicants and their mutually exclusive applications prior to the Commission employing competitive bidding procedures. Accordingly, the Commission must necessarily reject the Bureau's recommended course of action as being without legal foundation arising out of a reasoned determination that mutually exclusive applicants and applications exist or would exist for the purpose of holding an auction. Absent a clear showing of mutual exclusivity to be resolved by auction, any proposal to employ competitive bidding is highly speculative, improper, arbitrary and capricious.

## CERTIFICATE OF SERVICE

I hereby certify that on this twenty-ninth day of September, 1995, I served a copy of the foregoing Futher Comments on the following by placing a copy in the United States Mail, first class postage prepaid:

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