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Federal Communications Commission
Office of Secretary

November 25, 1996

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: RM-8897

Dear Mr. Caton:

Herewith transmitted, on behalf of Telephone and Data Systems, Inc., are an original and four copies of its Comments in the above-referenced proceeding.

The necessary three microfiche copies of the Comments will be filed shortly.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,

Peter M. Connolly

Peter M. Connolly

Enclosures

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

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NOV 25 1996

Federal Communications Commission
Office of Secretary

In The Matter of	)	
	)	
Cellular Communications of	)	
Puerto Rico, Inc. Petition	)	
For Declaratory Ruling On	)	
Rulemaking To Determine	)	RM - 8897
Whether Competitive Bidding	)	
Procedures Should Be Used To	)	
License Certain Cellular	)	
Rural Service Areas	)	

COMMENTS OF TELEPHONE AND DATA SYSTEMS, INC.

Telephone and Data Systems, Inc. ("TDS") hereby files its comments in the above-captioned proceeding. TDS is a diversified telecommunications company with cellular telephone, local telephone, radio paging and personal communications services (PCS) operations. TDS provides cellular telephone service through its 80.8% owned subsidiary United States Cellular Corporation ("USCC"). USCC owns, controls and/or operates cellular systems in over one hundred thirty MSAs and RSAs, serving in aggregate, over one million customers. Though neither TDS nor USCC nor any of their subsidiaries have pending any remaining RSA applications, TDS wishes, in the interest of fairness, to express its strong belief that the remaining RSAs should be licensed as previous RSAs were, that is, by lottery.

I. Fundamental Fairness Requires That The Remaining RSAs Be Licensed By Lottery

At the outset, it should be noted that the RSA applications potentially affected by a change in the FCC's method of selecting licensees were filed in 1988 and January 1989, that is, eight years ago. They were filed pursuant to a federal statute and under FCC rules which provided that RSA licenses would be granted by lottery.

Since that time, some of the original 1989 lottery winners in certain RSAs have been subject to petitions to deny and ultimately had their applications dismissed. The remaining applicants in those markets have waited for their chance to participate in re-lotteries. Certain of those re-lotteries were held in 1992.[1] In other markets, re-lotteries were not scheduled until 1996 and in others, the final status of the original lottery winner has still not been resolved.

During this period, RSA applicants in markets in which there has been no final disposition of the license have been obliged to maintain counsel to advise them concerning the status of their

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[1] See Public Notice, Common Carrier Mobile Services Information. Results of Cellular Lottery Report No. CL-92-16, released April 19, 1992.

applications and to take all legal steps necessary to maintain their applicant entities in good legal standing. And they have done so in the reasonable understanding that in markets in which the initial lottery winner's application was dismissed that its successor would be chosen by lottery.

This understanding concerning the selection method for original RSA applications was undisturbed until September, 1996, when the FCC canceled a September 18, 1996 re-lottery for six RSA markets which had been scheduled in July, 1996.[2]

Until September, 1996 the FCC was proceeding to hold re-lotteries in the relevant RSA markets despite the action of Congress in 1993 in authorizing the FCC to allocate cellular licenses among mutually exclusive original applicants by competitive bidding. See Section 309(j)(2)(A) of the Communications Act, 47 U.S.C. Section 309(j)(2)(A).

At the time Congress amended the Communications Act to permit, and in some cases, require the use of auctions, Congress also expressly permitted, through a provision in the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), the FCC to continue to use

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[2] See Public Notice, "Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas," Mimeo No. 65051 (September 10, 1996).

random selection for mutually exclusive applications filed before July 26, 1993.[3]

After the adoption of the 1993 Communications Act amendments, the FCC moved rapidly to implement auctions as the selection method for mutually exclusive CMRS applications filed after July 26, 1993. See, e.g. Second Report and Order in P.P. Docket No. 93-253, 9 FCC Rcd 2348, 2358-2359 (1994). And, as the Commission noted in 1994, its decision to adopt auctions to choose among such post-July, 1993 applications was uncontroversial. Ibid.

In a separate proceeding, however, over a strong dissent from Chairman Hundt, the FCC voted to maintain lotteries as the selection method for the approximately 10,000 unserved area cellular applications filed from March to May, 1993. See Memorandum Opinion and Order in P.P. Docket No. 93-253, 9 FCC Rcd

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[3] Section 6002(e) of the OBRA reads as follows:

> "(e) SPECIAL RULE. - The Federal Communications Commission shall not issue any license or permit pursuant to Section 309(I) of the Communications Act of 1934 47 U.S.C. 309(I) [section providing for grants by random selection] after the date of enactment of this Act unless: (1) the Commission has made the determination required by paragraph (1)(B) of such section (as added by this section); or (2) one or more applications for such license were accepted for filing by the Commission before July 26, 1993."

7387 (1994). The Commission did so despite the fact that in 1991, when adopting lotteries as the selection method for mutually exclusive unserved area applicants, the FCC had explicitly stated that it would revisit its decision to use lotteries if it received congressional authorization to conduct competitive bidding for such authorizations.[4] Despite the early warning to unserved area applicants of the possibility of auctions, the FCC concluded it was not:

> "persuaded that either Congress's intentions or the public interest support the administrative upheaval and dislocation in business plans that would result from a use of auctions in these circumstances."

9 FCC Rcd, at 7392

It is telling that in the 1994 unserved area order neither the Commission nor Chairman Hundt even mentioned the 1988 and 1989 original RSA applications as auction possibilities. Though at the time the Commission acted, the RSA "risk sharing" proceeding was ongoing, for example, and the FCC was obviously aware of the possibility that it might have to designate new "tentative selectees" in many of the twenty-three RSAs involved in that

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[4] First Report and Order and Memorandum Opinion and Order or Reconsideration in C.C. Docket 90-6, 6 FCC Rcd 6185, 6217 (1991).

proceeding.[5] Evidently, however, it was simply assumed that equity and fairness dictated that lotteries would be the selection method employed to choose among the remaining original applicants in such markets if the lottery winners' ungranted applications were ultimately denied by final order.

The point was confirmed by the FCC's discussion of pre-July 26, 1993 applications in the Multipoint Distribution Service in the 1993 Notice of Proposed Rulemaking through which the FCC began the implementation of its new auction authority.[6] The FCC then stated that it would better serve the public interest to hold lotteries to choose among mutually exclusive pre-July 26, 1993 MDS applications than to hold auctions, as the applications had already incurred substantial delays in processing, and new rules would have to be developed to hold auctions for those applications, which would result in further delays.

Thus, in 1993 and 1994 it was assumed by the FCC and by applicants that, with the possible exception of cellular unserved area applications, that all pre-July 26, 1993 mutually exclusive

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[5] See Algreg Cellular Engineering, 7 FCC Rcd 8686 (I.D. 1992), aff'd 9 FCC Rcd 5098 (Rev. Bd. 1994).

[6] Notice of Proposed Rulemaking in P.P. Docket No. 93-283, 8 FCC Rcd 7635, 7661 (1993).

applications in all services which had previously been subject to lotteries would remain so.

Nothing has changed since 1993 to suggest that auctions have become an appropriate selection method for these applications. If anything, the argument for lotteries has become stronger. The original RSA applicants have now waited eight, rather than six, years for a fair chance in a lottery in the six markets at issue here. Precisely the same type of delays to which the Commission alluded in 1993 in the MDS context have existed for RSA cellular applicants and will now be exacerbated as a consequence of this auction proposal. A lottery was supposed to have been held in September 18, 1996 for the six RSAs included in the July 12, 1996 public notice. Had it been held, those markets would now finally be on their way to having non-wireline licensees. As it is, those markets must instead await the conclusion of this proceeding and then the development of specific auction rules. This process could easily mean another year or more of delay, perhaps to be followed by litigation by RSA applicants who may assert rights to be considered under the original rules.

We ask that the FCC not implement auctions and that instead it reschedule the lottery and go forward expeditiously with the licensing of these markets and any remaining RSAs on the same basis as previous RSAs.

We do not here assert that the FCC lacks the statutory and/or constitutional authority to institute auctions, though the issue is not entirely free from doubt. We do maintain that for the FCC to disturb a selection method which has been in effect for applications of this type since 1988 and has been repeatedly reaffirmed, including as recently as last July, would be inequitable and unfair. It is axiomatic that in a democratic and just society, citizens should understand what their government expects of them and should, for example, know in advance the rules under which federal agencies will grant operating licenses in particular fields of endeavor.

The FCC's evident desire to realize increased auction revenues for the federal treasury from these applicants is not, in our view, a sufficient reason to overturn such settled and reasonable expectations.

TDS wishes to stress that it is not opposed to auctions in all circumstances. Indeed, through its American Portable Telecommunications, Inc. subsidiary, TDS won six broadband PCS MTA auctions and has contributed many millions of dollars to the federal treasury, on time and without complaint. However, the PCS auctions were announced in advance of applications being filed and all participants understood the rules from the beginning. That, in our view, makes all the difference.

Once again, we ask that the FCC allow licensees in the remaining RSAs to be chosen as their predecessors have been, by lottery. In these circumstances that would be the fairest and best result.

Conclusion

For the foregoing reasons, we urge the FCC to reschedule the lottery for the six RSAs discussed in the July 12, 1996 public notice and not to proceed with plans to hold auctions to determine the initial licensees for any RSAs.

Respectfully submitted,

TELEPHONE AND DATA SYSTEMS, INC.

By: _____
Peter M. Connolly

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November 25, 1996

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