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

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services Narrowband PCS	)	**GEN Docket No. 90-314**
	)	**ET Docket No. 92-100**
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding Narrowband PCS	)	**PP Docket No. 93-253**

To: The Commission

COMMENTS OF
THE RURAL TELECOMMUNICATIONS GROUP

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TABLE OF CONTENTS

SUMMARY iii

STATEMENT OF INTEREST 2

DISCUSSION 2

A. THE COMMISSION MUST CRAFT SPECIFIC PROVISIONS DESIGNED TO PROVIDE RURAL TELEPHONE COMPANIES AN OPPORTUNITY TO PROVIDE NARROWBAND PCS 2

B THE COMMISSION SHOULD NOT RECONFIGURE THE SERVICE AREA SIZE FOR NARROWBAND PCS 5

1. BTA-Based Service Areas Are Large Enough to Provide A Viable Narrowband Service 6

2. Licensees Should be Allowed to Create Innovative Narrowband PCS Services . . 7

3. Past Experience Indicates That Designated Entities Will Not Be Able to Compete for Large Narrowband PCS License Areas 8

4. The Commission and Designated Entities Relied on the Current MTA/BTA Licensing Plan 9

5. Partitioning Alone Will Not Provide Designated Entities with Meaningful Opportunity to Provide Narrowband PCS 10

6. The Commission's Reallocation Proposal Is Unfair to Existing Designated Entity Licensees 11

C. THE COMMISSION SHOULD IMPOSE MEANINGFUL PERFORMANCE REQUIREMENTS ON NARROWBAND PCS LICENSEES AS REQUIRED BY SECTION 309(j) 12

1. The Commission Should Not Adopt the "Substantial Service" Standard for Narrowband PCS 12

2. The Commission Should Maintain and Strengthen Its Population/Geographic Coverage Requirements 16

D. THE COMMISSION SHOULD ALLOW RURAL TELEPHONE COMPANIES AND SMALL BUSINESSES MEANINGFUL BIDDING CREDITS AND INSTALLMENT PAYMENTS 17

1. The Proposed Bidding Credits Are Insufficient to Allow Designated Entities to Compete for Large Area Licenses 17

2. The Commission Should Not Charge an Interest Rate in Excess of the Treasury Note Rate 19

3. The Commission Should Not Impose a Late Payment Penalty on Designated Entities 20

E. THE COMMISSION SHOULD CHANNELIZE, LICENSE AND AUCTION ALL REMAINING NARROWBAND PCS SPECTRUM IN ONE SIMULTANEOUS MULTIPLE ROUND AUCTION AND SHOULD PROVIDE DESIGNATED ENTITY BENEFITS FOR RURAL TELEPHONE COMPANIES 20

F. THE COMMISSION SHOULD ALLOW FLEXIBLE PARTITIONING BUT SHOULD REQUIRE ALL LICENSEES TO MEET PERFORMANCE REQUIREMENTS 21

CONCLUSION 23

SUMMARY

The Rural Telecommunications Group ("RTG") requests that the Commission award rural telephone companies reasonable bidding credits so that they can compete with large company's and other existing licensees of spectrum-based services. The Commission's current proposal fails to consider or address the needs of rural telephone companies for designated entity benefits.

RTG opposes the Commission's plan to consolidate MTA/BTA-based licenses into larger geographic area licenses. This plan will hinder the participation of small businesses and other designated entities because it will vastly reduce the total number of auctioned licenses and it will vastly increase the capital necessary to acquire and construct a narrowband PCS system. The Commission's own experience in prior narrowband PCS auctions demonstrates that without substantial bidding credits (40% or greater) and installment payments, designated entities will not be able to compete for narrowband PCS licenses. BTA-based licenses are ideally suited to encourage designated entity participation and to foster the development and deployment of innovative services. There is simply no basis for the Commission to conclude that BTAs are "too small" to support a viable narrowband PCS system.

RTG also requests that the Commission impose meaningful performance requirements on narrowband PCS licensees in order to ensure the rapid deployment of these services to all parts of the country and to encourage participation by designated entities. The Commission should not adopt "substantial service" as an alternative performance requirement.

The Commission should award designated entities more meaningful bidding credits, especially if the Commission creates large geographic license areas. Finally, the Commission should not charge designated entities a rate of interest in excess of the U.S. Treasury note rate.

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The Rural Telecommunications Group ("RTG"), by its attorneys, respectfully submits these comments in response to the *Further Notice of Proposed Rulemaking ("FNPRM")* accompanying the Report and Order ("*R&O*") released by the Federal Communications Commission ("FCC" or "Commission") on April 23, 1997, in GEN Docket No. 90-314, ET Docket No. 92-100, and PP Docket No. 93-253. RTG primarily directs its comments to changes in the proposed rules which would hinder the participation of designated entities in the provision of narrowband personal communications services ("narrowband PCS"). RTG vehemently objects to the lack of provisions designed to ensure the participation of rural telephone companies, one class of designated entity, in narrowband PCS. RTG also: (1) opposes the consolidation of licenses into large license areas; (2) requests the adoption of clear, meaningful performance requirements; (3) requests the adoption of meaningful bidding credits; (4) opposes the use of interest rates above the U.S. Treasury note rate for installment payments; and, (5)

supports the simultaneous auction of all remaining narrowband PCS spectrum. RTG also addresses various issues relating to partitioning and unjust enrichment.

I. STATEMENT OF INTEREST

RTG is a group of concerned rural telephone companies who have joined together to promote the efforts of its member rural telephone companies to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and underserved sections of the country. Along this line, RTG's members seek to provide narrowband PCS to their rural communities.

II. DISCUSSION

A. THE COMMISSION MUST CRAFT SPECIFIC PROVISIONS DESIGNED TO PROVIDE RURAL TELEPHONE COMPANIES AN OPPORTUNITY TO PROVIDE NARROWBAND PCS

Section 309(j) of the Communications Act of 1934, as amended ("the Act"), requires the Commission to award certain classes of licenses on the basis of competitive bidding, and, for that purpose, to design and test various auction methodologies that promote the general purposes of the Act and specific enumerated objectives. Congress specifically directed the Commission to:

> (A) [promote] the development and rapid deployment of new technologies, products, and services for the benefit of the public, **including those residing in rural areas** . . .; [and]
>
> (B) ensur[e] 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 members of

minority groups and women.[1]

Most significantly, in prescribing regulations to implement competitive bidding systems that meet Congress's objectives, Section 309(j)(4)(D) of the Act requires the Commission to:

> ensure that small businesses, **rural telephone companies**, and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum-based services.[2]

Sections 309(j)(3) and (4) of the Communications Act impose on the Commission an affirmative obligation to design auction procedures that provide rural telephone companies a meaningful opportunity to participate in new spectrum-based services like narrowband PCS. Despite this obligation, the *FNPRM* is devoid even of the mention of rural telephone companies. The Commission utterly fails to consider rural telephone companies or to provide them opportunities to participate in the provision of narrowband PCS. Such lack of consideration violates Section 309(j) of the Act.

In the *Competitive Bidding Third MO&O*,[3] the Commission predicted that it was not necessary to provide rural telephone companies with any designated entity benefits in order to ensure their participation in narrowband PCS or to ensure the rapid deployment of narrowband PCS to rural areas.[4] The Commission reasoned that rural telephone companies did not face

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[1] 47 U.S.C. § 309(j)(3)(A) and (B) (emphasis added).

[2] 47 U.S.C. § 309(j)(4)(D) (emphasis added).

[3] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, and Amendment of the Commission's Rules to Establish New Narrowband PCS, GEN Docket 90-314, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175 (1994) ("*Competitive Bidding Third MO&O*").

[4] *Id.* at ¶ 60 (no assistance to rural telephone companies that are not small businesses).

problems accessing capital, and that ordinary profit incentives will ensure the provision of narrowband PCS to outlying areas.[5] These conclusions by the Commission are completely insupportable.

Numerous factors dictate that the Commission reevaluate and modify its treatment of rural telephone companies in the provision of narrowband PCS. First, the Commission now has three years of experience conducting auctions and can, and should, specifically assess the relative success or failure of rural telephone companies to participate in narrowband PCS. Second, the Commission declined to create an entrepreneur's block for narrowband PCS.[6] Rural telephone companies which might have benefited from the creation of an entrepreneur's block must now compete with much larger entities for narrowband PCS licenses. Third, as discussed below, the Commission now proposes to reallocate smaller Basic Trading Area ("BTA")-based and Major Trading Area ("MTA")-based licenses into regional and nationwide licenses.[7] Rural telephone companies that might have successfully competed for BTA-based licenses will have little hope of successfully winning regional and nationwide licenses. Fourth, the Commission now proposes licensing one megahertz of previously reserved narrowband PCS spectrum and expanding the eligibility for licenses for response paging channels.[8] Licensing the last of the narrowband PCS spectrum warrants a careful evaluation of the participation of designated entities in narrowband

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[5] *Id.* at ¶¶ 60-61 (special provisions for rural telephone companies not needed to encourage service to rural America).

[6] *R&O* at ¶ 19.

[7] *FNPRM* at ¶ 31.

[8] *Id.* at ¶¶ 34, 40.

PCS.

In light of these changed circumstances and new licensing proposals, the Commission should reevaluate its decision not to provide opportunities for rural telephone companies to participate in the provision of narrowband PCS. The *FNPRM* should have, but failed to, address these issues. When the Commission conducts its required Section 309(j) analysis, it will discover that rural telephone companies have not had adequate opportunity to participate in narrowband PCS and accordingly should be afforded designated entity benefits.

In order to satisfy its Section 309(j) obligations, the Commission should provide all rural telephone companies with a 20 % bidding credit for BTA-based licenses, a 30% credit for MTA-based licenses, and a 40% credit for regional and nationwide licenses, so that rural telephone companies can effectively compete with large companies and companies currently holding licenses for advanced spectrum-based services. Rural telephone companies that also qualify as small businesses or very small businesses should be entitled to the benefits specifically designed for those entities. A rural telephone company would be entitled to the most favorable benefits for which it qualified, but the benefits would not be cumulative.

B. THE COMMISSION SHOULD NOT RECONFIGURE THE SERVICE AREA SIZE FOR NARROWBAND PCS

The Commission proposes redesignating the two BTA-based 50 kHz paired channels as nationwide channels; combining the five MTA-based 50/12.5 kHz channel pairs into one nationwide and three regional channel pairs, and converting the four BTA-based 12.5 kHz

unpaired response channels to regional channels.[9] This will leave only one MTA-based paired channel.

This proposal neither assists rural telephone companies, small businesses and other designated entities, nor is it equitable to existing narrowband PCS licensees. Instead, the Commission's proposal will limit opportunities for entry and competition by rural telephone companies and small businesses. It is axiomatic that the fewer licenses there are, the fewer opportunities designated entities will have to acquire them. BTA channel blocks afford rural telephone companies and other small companies a meaningful opportunity to participate in the provision of PCS that larger area licenses do not.

1. BTA-Based Service Areas Are Large Enough to Provide A Viable Narrowband Service

The Commission bases its consolidation proposal on its concern "that the BTA service areas in particular are too small to provide a viable narrowband service."[10] The record in this proceeding does not justify this conclusion. As the Commission itself notes, the comments are mixed on this proposal.[11] The FCC states that its "experience with similar services suggests" the need to increase the size of the licensee area.[12] The FCC cites 929 MHz and 931 MHz paging as an example of a service which is likely to be directly competitive with narrowband PCS and which demonstrates that narrowband PCS is better suited to larger service areas. The 929 MHz

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[9] *Id.* at ¶ 31.

[10] *Id.* at ¶ 29.

[11] *Id.* at ¶ 27.

[12] *Id.* at ¶ 29.

and 931 MHz paging service is MTA-based.[13] Yet the Commission proposes to license only one MTA-based narrowband PCS system. If the Commission is really interested in competitive parity, then the Commission should license all remaining narrowband PCS systems on an MTA-basis, and not on a regional or nationwide basis. Moreover, the 929 MHz and 931 MHz paging auction has not yet been held and the Commission has no "experience" to indicate that narrowband PCS or paging licenses must be based on geographic areas larger than MTAs.[14] Until the recent adoption of the *Paging Second R&O,* paging was licensed on a site-by-site basis.[15] Accordingly, it is erroneous for the FCC to assert that larger areas are needed in order to have a competitive narrowband service.

2. Licensees Should Be Allowed to Create Innovative Narrowband PCS Services

RTG also notes that the Commission's reallocation proposal conflicts with its flexible allocation policy under which licensees determine what the best use of spectrum is. RTG's members envision small competitive systems designed to meet local needs. Small systems enable entrepreneurs to develop innovative systems with low capital requirements. There is simply no basis for concluding that large service areas are required for a competitive service and

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[13] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems/Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-18, PP Docket No. 93-253, FCC 97-59 at ¶ 16 (rel. Feb. 24, 1997) ("*Paging Second R&O*").

[14] *See generally, id.* at ¶ 16. To the contrary, the Commission selected MTAs for 929 MHz and 931 MHz paging because MTAs are "economically-defined regions that appear to best mirror the size and development of existing paging systems." *Id.*

[15] *Id.* at ¶ 7.

ample evidence that large areas will stifle designated entity participation.

3. Past Experience Indicates That Designated Entities Will Not Be Able to Compete for Large Narrowband PCS License Areas

The Commission's own experience in the first nationwide narrowband PCS auction demonstrates the difficulty which designated entities have in competing for large area licenses. No designated entities won licenses.[16] Even a bidding credit of 25 % was not sufficient to provide designated entities with a meaningful opportunity to participate in the nationwide auction.[17]

Designated entities were more successful in the regional narrowband PCS auctions only because the Commission offered a 40% bidding credit and installment payment plans.[18] The Commission however, proposes no such reasonable bidding credits for the upcoming narrowband PCS auction. In this respect, RTG notes that license area size and designated entity provisions, such as installment payments and bidding credits, are interrelated and can not be considered in isolation. Accordingly, as discussed *infra,* if the Commission reallocates the BTA-based license into larger licenses, experience demonstrates that the Commission should award designated entities more realistic bidding credits than the paltry 10% and 15% proposed in the *FNPRM.*[19]

The Commission cites to the 900 MHz Specialized Mobile Radio ("SMR") auction as an example of how services can be licensed based on large geographic areas without "compromising

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[16] *See FNPRM* at ¶ 59.

[17] *See id.* at ¶ 59; *Competitive Bidding Third MO&O* at ¶ 58.

[18] *See FNPRM* at ¶ 59; *Competitive Bidding Third MO&O* at ¶ 58.

[19] *See FNPRM* at ¶ 74.

the goal of ensuring entry for small businesses."[20] The 900 MHz SMR auction, however, was MTA-based offering a total of 1,020 licenses.[21] For narrowband PCS, the Commission proposes licensing only one channel pair on an MTA-basis. This single MTA license in any one geographic area -- totaling only 51 licenses for paired channels -- provides designated entities little opportunity to enter narrowband PCS. Moreover, for the 900 MHz SMR auction, the Commission awarded bidding credits of 25% for very small businesses and 15% for small businesses, significantly higher than what the Commission proposes for narrowband PCS.[22]

4. The Commission and Designated Entities Relied on the Current MTA/BTA Licensing Plan

In declining to create an entrepreneur's block for the narrowband PCS auction, the Commission relied in part on small businesses' ability to secure the capital for smaller license areas, "particularly for MTAs."[23] Yet, as noted above, the *FNPRM* proposes combining all but one MTA-based paired channel into larger license areas. Having declined to adopt an entrepreneur's block on the basis of the current licensing plan, it would be inequitable and an abuse of discretion to combine the "less capital intensive" small license areas into capital

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[20] *Id.* at ¶ 29.

[21] *See* 47 C.F.R. § 90.661; *see* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside of the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding; Implementation of Sections 3(n) and 322 of the Communications Act, PR Docket No. 89-553, PP Docket No. 93-253, GN Docket No. 93-252, Second Order On Reconsideration and Seventh Report and Order, FCC 95-395, (1995) ("*900 MHz SMR Order*").

[22] *Id.* At ¶ 164.

[23] *R&O* at ¶ 20.

intensive larger areas.

In addition to the Commission's own reliance on its existing narrowband PCS licensing plan, many designated entities relied on the Commission's existing plan and sat out the nationwide and regional auctions in anticipation of the BTA/MTA-based narrowband PCS auction. The Commission's redesignation plan, rather than providing them with opportunities, will in fact frustrate their business plans, denying them the opportunity to participate in narrowband PCS. If these designated entities had desired to serve larger than BTA or MTA sized areas, as the Commission suggests,[24] they would have participated in the nationwide or regional auctions.

5. Partitioning Alone Will Not Provide Designated Entities with Meaningful Opportunity to Provide Narrowband PCS

The Commission seeks comment on whether partitioning narrowband PCS licenses into smaller areas will provide an opportunity for designated entities to provide narrowband PCS. *FNPRM* at ¶ 31. The answer is no. There are severe limits on the effectiveness of partitioning as a means of providing designated entities with an opportunity to provide narrowband PCS. As RTG has previously and repeatedly warned the Commission, many licensees are unwilling to partition because they ultimately intend to sell their systems to a larger operator and do not want to carve up the license area.[25] RTG's members have found licensees in other services, such as

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[24] *FNPRM* at ¶ 9.

[25] *See,* RTG's Comments and Reply Comments in response to Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees; Implementation of Section 257 of the Communications Act--Elimination of Market Entry Barriers, *Notice of Proposed Rulemaking,* WT Docket 96-148, GN Docket No. 96-113 (*"PCS Partitioning NPRM"*); RTG's Reply Comments (filed May 6, 1997) in response to Rulemaking to Amend Parts 1, 2, 21,

broadband Personal Communications Services ("broadband PCS") and Multipoint Distribution Services ("MDS"), generally uninterested in consummating partitioning deals. In fact, off the record, more than a dozen major wireless companies have reported to RTG a lack of interest in partitioning arrangements.

The Commission's logic regarding partitioning is embarrassingly circular. If, as the Commission believes, large service areas are necessary in order for a narrowband PCS system to be viable, then how would partitioning out a small area provide a designated entity with a meaningful opportunity to provide PCS? Conversely, if partitioning a small area is a viable entry opportunity for designated entities, then the Commission's "lack of viability" argument is not a legitimate justification for reallocating the BTA-based and MTA-based service areas into regional and nationwide license areas.

6. The Commission's Reallocation Proposal Is Unfair to Existing Designated Entity Licensees

Finally, the Commission's redesignation proposal is unfair to existing licensees, especially designated entities who based their business plans on a certain number of regional and nationwide competitors. While it is not necessarily the Commission's job to preserve the value of a licensee's spectrum, neither is it the Commission's job to undermine it without justification. It is the Commission's job to provide regulatory consistency so that companies and financial

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and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking,* CC Docket No. 92-297, FCC 97-82 at ¶¶ 266, 270 (rel. March 13, 1997)*("LMDS Second R&O")* (20% coverage for point-to-multipoint services).

institutions can make competitive business plans. By devaluing a company's assets, the Commission actually harms competition and places a chill on the marketplace. The Commission's current plan will in fact harm existing designated entity licensees in violation of Section 309(j) of the Act and is not in the public interest.

Accordingly, the Commission should not redesignate the remaining narrowband PCS licenses into large areas. If however, the Commission does combine some licenses, it should not create license areas larger than MTAs.

C. THE COMMISSION SHOULD IMPOSE MEANINGFUL PERFORMANCE REQUIREMENTS ON NARROWBAND PCS LICENSEES AS REQUIRED BY SECTION 309(j)

1. The Commission Should Not Adopt the "Substantial Service" Standard for Narrowband PCS

The Commission proposes to modify the performance requirements for PCS licensees by allowing them to demonstrate "substantial service" as an alternative to meeting the population coverage standards currently required by the rules.[26] RTG vigorously opposes this proposal. Adoption of the "substantial service" criteria introduces needless uncertainty into the licensing process, and effectively amounts to an elimination of performance requirements in violation of Section 309(j) of the Act.

Licensees, investors, financial markets and the public need regulatory certainty in order to function efficiency. The substantial service criteria provide no guidance and no certainty to licensees. The ambiguous "substantial service" standard may needlessly tie-up licenses and public resources for years while licensees and competing parties argue over the definition of

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[26] *See FNPRM* at ¶ 44. *See* 47 C.F.R. § 24.103.

"substantial service." The Commission should not abdicate its responsibility to provide clear and unambiguous performance standards as required by the Act.

In practice, however, the "substantial service" criteria will amount to no performance requirement at all. In the Wireless Communications Service ("WCS") and in the Local Multipoint Distribution Service ("LMDS"), the Commission defined "substantial service" as providing service to 20% of the population of the license area within 10 years.[27] Why would a licensee strive to meet the current performance requirements for narrowband PCS -- 25% of the population within five years and 75% within ten years for MTA licenses[28] -- if all the licensee need provide is service to 20% of the population within five years with no additional coverage requirement? As discussed below, such a standard utterly fails to satisfy the obligation of Section 309(j).

Section 309(j)(4)(B) of the Act requires the Commission to prescribe:

> performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure *prompt delivery of service to rural areas*, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.[29]

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[27] Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Report and Order*, FCC 97-50 at ¶¶ 111-114 (rel. Feb. 19, 1997) ("*WCS Order*") (20% coverage for mobile services); Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking,* CC Docket No. 92-297, FCC 97-82 at ¶¶ 266, 270 (rel. March 13, 1997)(*"LMDS Second R&O"*) (20% coverage for point-to-multipoint services).

[28] 47 C.F.R. § 24.103.

[29] 47 U.S.C § 309(j)(4)(B) (emphasis added).

When Congress adopted Section 309(j), Congress was well aware of the Commission's existing practice of imposing build-out requirements on new licensees.[30] Contrary to the assertion in the *FNPRM,* Section 309(j) does require the Commission to impose meaningful build-out requirements on new licensees.

The Act requires the Commission to ensure the rapid deployment to rural areas and to prevent the warehousing of spectrum. The Commission's meaningless "substantial service" standard, however, provides no incentive to licensees to provide service to rural America. A licensee can easily meet the performance requirements by providing service only to the most densely populated city within its license area.

The substantial service criteria was first adopted for WCS[31] and is entirely inappropriate for narrowband PCS. WCS presented a unique and unfortunate service which Congress required the Commission to license and auction under an unreasonably expedited schedule.[32] No equipment exists for WCS, and no one is even sure what service will constitute WCS.[33] With its back against the wall, the Commission was forced to license WCS under very nebulous terms with little guidance to licensees and no construction requirements to speak off. The Commission stated, "[C]onsidering the *unique circumstances* in which WCS licenses are being awarded and the strict technical requirements necessary to prevent interference, we will adopt very flexible

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[30] Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, § 6002, 107 Stat. 312, 388 (codified as amended at 47 U.S.C. § 309(j) (1996).

[31] *See WCS Order* at ¶ 112.

[32] *Id.* at ¶ 10. The Commission's failure to raise even a pittance during the WCS auction demonstrates the fundamental problems with the licensing of WCS.

[33] *Id.* at ¶ 112.

build-out requirements for WCS."[34]

Narrowband PCS, by contrast, is an existing service for which equipment already exists. There are no unique circumstances analogous to the WCS licensing scheme. Narrowband PCS licensees can and should begin providing some form of service on a rapid basis. As RTG argued before the FCC in the WCS proceeding, WCS should be treated as a white elephant, and not as blue print for the licensing additional spectrum-based services such as narrowband PCS.[35]

The Commission proposes altering its narrowband PCS performance requirements in order to treat narrowband PCS and paging similarly by adopting a "substantial service" standard for both services.[36] Such a change is unnecessary. As RTG noted above, "substantial service" is not an appropriate performance standard for either narrowband PCS or paging. With respect to the existing population/geographic based standards, the slight differences in the construction requirements for the two services reflects differences in the maturity of the services. Standardization is not necessary. If, however, the Commission wants to change its performance requirements to treat narrowband PCS and 900 MHz paging licensees identically, then it should standardize the population/geographic area coverage requirements for the two services, not adopt a meaningless standard for both services.

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[34] *Id.* at ¶ 111 (emphasis added).

[35] The Commission's adoption of a substantial service requirement for other services is ill-conceived. *See* RTG Petition for Reconsideration of the *LMDS Second R&O* (filed May 29, 1997) (seeking reconsideration of the "substantial service" criteria for LMDS).

[36] *See FNPRM* at ¶ 44.

2. The Commission Should Maintain and Strengthen Its Population/Geographic Coverage Requirements

Amazingly, the Commission seeks comment on whether it "should eliminate all coverage requirements for narrowband PCS."[37] The Commission argues that construction requirements "may actually slow the development of service to rural areas" because "they can have the unintended consequence of causing licensees to build first in urban areas where the mandatory benchmarks could be met most cheaply...."[38] This argument is entirely without support and demonstrates a frightening degree of naivete.

RTG agrees that the licensees can satisfy the Commission's current almost non-existent build-out requirements merely by constructing in dense, urban markets. This is, however, a reflection of the Commission's failure to adopt meaningful performance requirements and not, as the Commission suggests, a fundamental flaw of performance requirements. The Commission's suggestion, that in the absence of build-out requirements, a licensee might first build in high cost low density areas, is utterly incorrect. Licensees build first in dense urban areas because that is where they can serve the greatest number of people for the least capital outlay. Congress requires the Commission to impose performance requirements on those licensee to ensure that they also rapidly deploy those new technologies to less populated regions of the country. Regretfully, the Commission has failed to effectuate Congress's intention.

Accordingly, rather than eliminating coverage requirements altogether, in violation of Section 309(j), the Commission should actually adopt stricter, more meaningful requirements. In

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[37] *Id.* at ¶ 46.

[38] *Id.* at ¶ 47.

order to satisfy the mandate of Section 309(j) of the Act, the Commission should adopt "unserved area" rules for narrowband PCS similar to those adopted for the cellular radio service.[39] Such "use it or lose it" provisions would encourage licensees either to provide service themselves, or to partition licenses to smaller companies who desire to serve less populated areas. Bidders would be on notice of these provisions and would fashion their business plans accordingly.

D. THE COMMISSION SHOULD ALLOW RURAL TELEPHONE COMPANIES AND SMALL BUSINESSES MEANINGFUL BIDDING CREDITS AND INSTALLMENT PAYMENTS

1. The Proposed Bidding Credits Are Insufficient to Allow Designated Entities to Compete for Large Area Licenses

The Commission proposes to define a small business as any firm, together with its affiliates and certain investors, with average gross revenues for the three preceding years of less than $40 million.[40] The Commission also proposes defining very small businesses based on a $15 million threshold.[41] The Commission proposes allowing small business a 10% bidding credit and very small businesses a 15% bidding credit.[42]

While these credits are appropriate to allow designated entities to compete for BTA-based licenses, they are not sufficient to provide designated entities a meaningful opportunity to provide narrowband PCS if the Commission combines the BTA/MTA licenses into regional and

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[39] *See* 47 C.F.R. § 22.949.

[40] *FNPRM* at ¶ 66.

[41] *Id.*

[42] *Id.* at ¶ 74.

nationwide licenses with only one MTA-based license remaining. The Commission's past experience demonstrates that even a 25% bidding credit is not sufficient to provide designated entities an opportunity to compete for nationwide licenses.[43] In addition, in declining to adopt an entrepreneur's block for narrowband PCS, the Commission relied on its experience in the regional narrowband PCS auction concluding:

> the results of the narrowband regional auction demonstrate that bidding credits and installment payments alone can facilitate participation by designated entities in the competitive bidding process....[44]

In the regional auction, however, the Commission awarded designated entities a 40% bidding credit.[45] Having relied on this previous experience as a basis for denying designated entities the opportunity to participate in an entrepreneur's block, it would be inequitable and an abuse of discretion to now award designated entities far smaller bidding credits for nationwide or regional auctions.

Noting that it had previously awarded bidding credits of 40% in the regional auction, the Commission states, "We believe that a lower bidding credit, combined with the installment payments...will provide sufficient opportunities for small businesses to compete for some licenses."[46] This conclusion is contrary to the Commission's past experience and is completely

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[43] *See id.* at ¶76.

[44] *R&O* at ¶ 19.

[45] *See FNPRM* at ¶ 59; *Competitive Bidding Third MO&O* at ¶ 58. In the *Competitive Bidding Third MO&O* the Commission recognized that its experience with nationwide narrowband PCS auctions suggested the necessity for a 40% bidding credit to overcome the disadvantages designated entities face in bidding for licenses representing large populations and large geographic areas. *Id.*

[46] *FNPRM* at ¶ 76.

unsupported in the record. The Commission's conclusory statement certainly does not rise to the level of reasoned decision making required by *Cincinnati Bell Telephone Co. v. FCC.*[47]

Accordingly, based on the successful use of 40% bidding credits in the regional narrowband PCS auction, if the Commission adopts larger license areas, it should award small businesses a 40% bidding credit for nationwide and regional licenses and a 30% credit for MTA licenses. The Commission should award very small businesses a 50% bidding credit for nationwide and regional licenses and a 40% credit for MTA licenses. As noted above, the Commission should award rural telephone companies a 30% bidding credit for MTA-based licenses, and a 40% credit for regional and nationwide licenses.

2. The Commission Should Not Charge an Interest Rate in Excess of the Treasury Note Rate

The Commission also proposes to allow small business to make interest only payments for the first two years of the license term at the U.S. Treasury note rate plus 2.5% and proposes to allow very small businesses to make interest only payments for the first two years at the Treasury note rate plus 1.5%.[48] RTG supports the use of installment payments and interest only payments but opposes the use of an interest rate above the U.S. Treasury note rate. There is simply no reason for the Commission to charge a rate of interest above the U.S. Treasury note rate, the rate of interest at which the government borrows money. The FCC does not need to borrow the money from capital markets to finance auction installment payments. Any percentage over the U.S. Treasury note rate is pure profit to the government. This surcharge creates an added and

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[47] 69 F. 3d 752 (6th Cir. 1995).

[48] *FNPRM* at ¶ 80.

unnecessary barrier to participation by designated entities. The more the Commission's installment payment rate approaches the private financial market's, the less the Commission benefits designated entities.

3. The Commission Should Not Impose a Late Payment Penalty on Designated Entities

The Commission also proposes to impose a late payment fee on any installment payment that is overdue.[49] Given the Commission's power to revoke a license for lack of payment, such a late payment is utterly unnecessary to insure prompt payment. A late payment fee will make it that much more difficult for a designated entity to regain its financial footing if it has encountered a temporary setback. Accordingly, the Commission should not impose a late payment penalty on designated entity licensees.

E. THE COMMISSION SHOULD CHANNELIZE, LICENSE, AND AUCTION ALL REMAINING NARROWBAND PCS SPECTRUM IN ONE SIMULTANEOUS MULTIPLE ROUND AUCTION AND SHOULD PROVIDE DESIGNATED ENTITY BENEFITS FOR RURAL TELEPHONE COMPANIES

In the *FNPRM*, the Commission proposes channelizing and licensing the one megahertz of reserved narrowband PCS spectrum.[50] RTG supports this proposal. The Commission also proposes to eliminate the current restrictions limiting eligibility for the paging response channels.[51] RTG also supports this proposal.

RTG encourages the Commission to auction the reserved spectrum and the response

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[49] *Id.* at ¶ 81.

[50] *Id.* at ¶ 34.

[51] *Id.* at ¶ 40.

channels in one simultaneous auction along with the rest of the narrowband PCS spectrum. Conducting one auction of all remaining narrowband PCS spectrum will encourage the participation of small businesses and other designated entities because it reduces the overhead of participating in an auction. For small businesses, the legal fees and additional staffing requirements during an auction represent a substantial expense. The FCC's excessive phone charges are also an additional and unfortunate expense. By conducting one auction for all remaining narrowband PCS spectrum, the Commission can help designated entities keep ancillary expenses to a minimum. The Commission will also promote competitive neutrality and regulatory parity by issuing all remaining narrowband PCS licenses within the same time frame. No new licensee will get the jump on another.

The Commission should license the reserved spectrum on an MTA/BTA-basis and should provide benefits to designated entities. The Commission should apply the small business bidding credits and installment payments described in Section II(D) above to the auction of all remaining narrowband PCS spectrum. In addition, pursuant to Section 309(j) of the Act, the Commission should award rural telephone companies the bidding credits proposed in Section II(A) above.

F. THE COMMISSION SHOULD ALLOW FLEXIBLE PARTITIONING BUT SHOULD REQUIRE ALL LICENSEES TO MEET PERFORMANCE REQUIREMENTS

The Commission proposes to allow geographic partitioning similar to that adopted for broadband PCS.[52] RTG generally supports this proposal. For partitioned licenses the Commission proposes two options for meeting the applicable construction requirements. A

[52] *Id.* at ¶ 89.