

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Implementation of Competitive Bidding	)	WT Docket No. 01-32
Rule to License Certain	)	FM-8897
Rural Service Areas	)	

To: The Commission

**JOINT COMMENTS OF RANGER CELLULAR  
AND  
MILLER COMMUNICATIONS, INC.**

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## SUMMARY

The Balanced Budget Act of 1997, as interpreted by the DC Circuit, limits the pool of eligible participants in the proposed auction to pre-July, 1997 applicants. That being the case, only those applicants for these markets who still have pending applications can lawfully be permitted to participate in the auction.

Even without regard to the application of the BBA, the various equitable grounds which the Commission has applied in the past lead compellingly to restricting the auction participants to the original applicant pool: the applications have been pending for many years through no fault of the applicants; the applicant pool is small; the licenses at issue are identical to the licenses originally applied for; the opening up of the pool will lead to additional litigation and delay; there was no notice at the time the applications were filed that the Commission might use auctions instead of lotteries; the Commission is not refunding the applicants' filing fees.

The only reason to open the pool to new filers is to increase the potential revenue to the Federal treasury, but under 309(j)(7) of the Act that is not a valid basis for rulemaking. Auctions are to be used to simply to decide rationally among mutually exclusive filers – not to expand the pool of mutually exclusive filers.

The Commission should maintain the integrity of its original RSA definitions and build-out procedures. In addition, the Commission should permit pre-auction settlements among the original applicants in the hope that an auction could be avoided altogether, thus bringing an even swifter end to these already protracted proceedings.

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Miller Communications, Inc. ("Miller") and Ranger Cellular ("Ranger") hereby submit these comments in response to the Commission's February 12, 2001 Notice of Proposed Rulemaking in the captioned Docket ("NPRM"). Miller and Ranger are presently applicants for the RSA markets which will be the subject of the auctions discussed in the NPRM. These comments will focus in large part on the Commission's tentative decision to open eligibility for the proposed auction to all persons without regard to the vested rights of existing applicants. In addition, Miller and Ranger will address several other proposed features of the auction.

**I. Background**

Ranger and Miller originally submitted their applications for the markets to be covered by the auctions in 1988 and 1989. Both of them invested the time and money necessary to

prepare the engineering for their RSA applications, secure sites, prepare and microfiche the applications, file the documents with the Commission and pay the appropriate filing fees. The Commission's rules at that time required applicants to submit their cellular RSA applications no later than the date specified by the FCC for particular regions of the country pursuant to Public Notices which were issued periodically. See 47 C.F. R. Section 22.6 (1989). Any applications filed after the prescribed dates were deemed late-filed and were dismissed. Ranger and Miller's applications were timely filed and have been pending ever since.

By two Orders issued in April, 1999, the Commission dismissed their applications, along with hundreds of others, on the grounds that the change from a lottery system to a competitive bidding system required the dismissal. See April 2, 1999 Order at Paragraph 5. Ranger and Miller timely requested reconsideration of that action, arguing, *inter alia*, that the Commission should have sought comment on the question of whether the dismissal was really required. In addition, Ranger and Miller argued that the applications timely filed under the procedures established by the Commission should constitute the universe of applicants who could participate in the competitive bidding process. On March 2, 2001, the Deputy Chief of the Wireless Bureau issued an Order denying reconsideration of the April, 1999 actions. In effect, the Bureau's April 1999 and March 2, 2001, orders prejudged the precise eligibility issue theoretically under consideration in this NPRM.

Ranger and Miller intend to appeal the Bureau's decision to the full Commission and to the Court of Appeals, if necessary. Under the provisions of Section 1.65 of the Commission's

rules, Ranger and Miller's applications are pending now and will remain pending until the dismissal of their applications is finally resolved. Thus, the premise of the Commission's NPRM at Paragraph 6 - that all pending RSA lottery applications have been dismissed – is true but incomplete. Ranger and Miller will explain in greater detail in their application for review why the Bureau erred in dismissing their applications, but suffice it to say that, if successful, the universe of applicants for these RSA's would be limited to Ranger, Miller, and any other applicants who timely preserve the pendency of their applications.<sup>1</sup> As will be set forth below, this definition of the applicant pool is not only required by statute, but is equitable and consistent with the Commission's actions in other services.

## **II. The Balanced Budget Act of 1997 Limits Participation in the Auction to Pre-1997 Filers**

The Balanced Budget Act of 1997, 111 Stat. 251 (1997) ("BBA") enacted an amendment to the Communications Act which applies directly to the situation at hand. Section (l) of the Act, now codified as 47 U.S.C. §309(l) provides as follows:

**APPLICABILITY OF COMPETITIVE BIDDING TO PENDING COMPARATIVE LICENSING CASES** – With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall –

- (1) have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit; [and]
- (2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding ....

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<sup>1</sup>There appear to be a maximum of nine applicants who could seek reconsideration or appellate review of the denial of their applications.

The applicability of that section to this situation is clear. First, cellular radio is defined as a “commercial mobile radio service”, 47 C.F.R. Section 20.9. By definition, therefore, it is a subset of the larger class of "commercial radio" stations alluded to in 309(l). Second, the mutually exclusive RSA applications are “competing applications for initial licenses.” Third, the Ranger and Miller applications were filed before July 1, 1997. It follows that the Commission is obligated by the Act to limit the pool of applicants for this auction to those still-pending applications which were filed prior to July 1, 1997.

Interestingly, the District of Columbia Court of Appeals has recently confirmed this interpretation. In Bachow Communications, Inc. v. FCC, No. 99-1346 (DC Cir., Feb. 6, 2001), the Court was presented with the issue of whether 39 GHz applications which had been filed under a non-auction regime could be dismissed when the Commission shifted to an auction licensing scheme. The court ruled, on grounds distinguishable from the present case, that the Commission could dismiss the applications at issue. However, it noted the language of the BBA quoted above and observed that application of this language “would not affect our analysis because appellants have not alleged that the Commission has permitted entities who did not apply before July 1, 1997 to bid for licenses.” Bachow, supra, at fnnt 5. We can only conclude that the Court’s analysis *would* have been affected if there had been such an allegation. The Court was clearly of the opinion that the BBA restriction to pre-1997 filers

would have applied to the 39 GHz applications in that case. If a 39 GHz common carrier microwave system constitutes a "commercial radio" station, a cellular RSA system obviously does as well.

The Court's observation is highly significant because some observers had assumed that Section I of the BBA, *supra*, applied only to broadcast licensing proceedings. On closer examination, though, nothing in the language of the BBA so restricts its application. On the contrary, the actual language of the BBA specifically refers to "commercial radio" stations without limitation. Thus, the Court of Appeals would agree with Ranger and Miller that the BBA language applies outside the broadcast context to all "comparative licensing proceedings." The upshot of this interpretation by the Court is that the Commission is statutorily precluded from treating anyone but pre-July, 1997 filers as eligible for the licenses at issue. At this point, only Ranger, Miller, and any other applicants who may have preserved the vitality of their applications remain among the extant filers. *See Competitive Bidding in the Broadcast Service*, 13 FCC Rcd. 15920 (1998) where the Commission correctly limited the pool of prospective auction participants to applicants with pending pre-July, 1997 applications. The Commission must heed the Court's reading of the BBA and similarly limit the applicant pool here.

### **III. Other Equities Compel the Restriction of the Applicant Pool**

The Bachow case is instructive in another regard. The Court noted the various factors that the Commission must take into account in deciding whether to limit the applicant pool to

pre-existing filers or open the pool to all comers.<sup>2</sup> The Court noted that under Maxcell Telecom Plus, Inc. v. FCC, 815 F. 2d 1551, 1554 (DC Cir. 1987), the Commission must undertake a cost benefit analysis to determine whether “the ill effect of the retroactive application of the rule outweighs the mischief of frustrating the interests the rule promotes.” (Internal quotes omitted) In other words, if the equities favoring retention of the existing applicants outweigh the reasons for opening up a new filing window, the Commission must retain the existing applicant pool.

The FCC has been confronted with this situation several times in the past. The two services most directly on point are the MDS service and the broadcast service.<sup>3</sup> In the MDS proceeding, Filing Procedures in the MDS and ITFS Services, 10 FCC Rcd 9589, 9631 (1995), the Commission (with the Court’s approbation) relied on the fact that there were only a handful of old applicants (less than 100) as a basis for restricting eligibility to the original filing pool. Here we have a maximum of nine potential applicants in each market. The Commission also noted that dismissal of the original applicants and opening up of a new filing window would engender reconsiderations and appeals by the original applicants which would ultimately delay service. That is, of course, exactly what has happened here and what would be avoided by going with the existing applicants. In addition, we need only look to the much delayed Auction 37 to see how the opening of auctions to new filers can result in frustrating and interminable

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<sup>2</sup> This exercise of discretion only comes into play, of course, in circumstances where the July, 1997 restriction is not in effect. Nevertheless, these factors offer additional support for limitation of the pool to original filers.

<sup>3</sup>The Commission also limited the pool of eligible auction participants to the original filers in the Digital Audio Radio Service, but in that case there appeared to be unique technical considerations not here relevant. Digital Audio Radio

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Satellite Service, 12 FCC Rcd. 574 (1997).

delays in the conduct of an auction.<sup>4</sup> By contrast, Auction 25, which was limited to the original pool of broadcast applicants, went off on time with no delays whatsoever. Most importantly, however, the Commission pointed to equitable considerations which argued compellingly against throwing out the original applicants: the applications had been pending for four years due to processing delays which were not the fault of the applicants. “Particularly given this lengthy delay, we believe it would be unfair to require these previously filed applicants to refile their applications and participate in an auction for the BTA service areas.” Here the applications have been pending for *thirteen* years through no fault of the applicants! They have lost the use of their application preparation costs and filing fees for all those years. Under the principles approved by the Court, the equities against throwing out their applications and letting new applicants in are surely overwhelming.<sup>5</sup>

Similar considerations applied to the Commission's decision not to open the pool of eligibles for the first broadcast auction to applicants outside the original broadcast filers. Competitive Bidding in the Broadcast Services, 13 FCC Rcd 15920, 15959 (1998). The Commission's analysis there is strikingly pertinent here. Referring to broadcast applications which did not fall into the special pre-July, 1997 category, the Commission noted:

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<sup>4</sup> This auction was originally scheduled for February, 2001, then May, 2001, and has now been pushed back to December, 2001 for reasons of “administrative convenience.”

<sup>5</sup>We must also note that it was the Commission's extraordinary dilatoriness in processing these applications that permitted nine years to transpire between the filing of the applications and the adoption of the BBA in 1997. But for the Commission's delays, the applications would have gone through a second lottery and this entire issue would be moot.

These pending applicants timely filed completed long-form applications pursuant to our procedures then in place, with the reasonable expectation that that their only competitors would be persons who similarly timely filed applications within the Commission's designated filing period. The reopening of filing windows would certainly not expedite the disposition of the pending applications or the commencement of service to the public, but could produce further delays. Moreover, unlike situations where we have declined to hold an auction limited to pending applicants but preferred to permit the filing of applications by additional parties, the auction procedures adopted here make no substantial changes in the nature of the broadcast services or the rights and responsibilities of broadcast licensees.

This is precisely the situation presented here. As noted above, the opening of new windows will inevitably result in further delays and appeals, while the use of the existing pool could result in an auction in a matter of months. In addition, the adoption of auction procedures as proposed in the NPRM make no substantial changes in the nature of the RSA services, territories, or the rights and responsibilities of the RSA licenses. If the Commission follows its own precedents, as it must, it must limit the pool of applicants here to those who still have applications in a pending status.

We further note that, in the case of the Nowata, OK, RSA, petitioner Miller was instrumental in demonstrating the lack of qualifications of the original selectee, Alee Cellular Communications. Miller and several other petitioners, acting as "private attorneys general" successfully demonstrated to the Commission that Alee was unqualified to hold a Commission license. Algreg Cellular Engineering, 12 FCC Rcd. 8148 (1999), recon. den., 18 CR 301 (1999), aff'd. sub. nom. Alee Cellular Communications v. FCC, slip. op. released Jan. 2001 (D.C. Cir.). The Commission specifically acknowledged with approbation the substantial contribution of Miller and the other petitioners in this effort. Algreg, at 8184. While Miller

takes no position here with respect to Alee's continued qualifications, the fact that Miller expended enormous sums in a nine-year effort to see that the RSA application pool was

untainted should weigh in favor of restricting the pool to Miller and other pending applicants. But for their efforts in the public interest, this license would not even be available.

From a purely ministerial standpoint, the Wireless Bureau seems to believe that there would need to be a “cumbersome amendment and review process” with respect to the pending applications. *March 2 Order* at Para. 6. To the contrary, the Commission could do exactly what it did in *Broadcast Auction 25*: simply require those pending applicants wishing to participate in the auction to file a short form application. The only applicants who would have to submit a long form for review would be the ones who won the auctions. Not only would such a process not be "cumbersome," but it would be substantially speedier than processing hundreds or thousands of new short form applications from speculators who had no original interest in the market.

To summarize, the equities in favor of restricting eligibility for this auction to the pending applicants include:

- The applications have been pending for 13 years through no fault of the applicants
- There are only a handful of applications at stake in each market (between two and nine, depending on who seeks review of the *March 2 Order*)
- The applicants paid their fees and invested money in their applications years ago with no return on that investment
- Based on actual experience in other services, restriction of the application pool will permit a speedier and more efficient auction without the litigation delays which will be certainly caused by opening the pool. The people who currently have applications pending are the only ones with the standing or the incentive to challenge the abrogation of their rights in court. Someone who

does not have a current application pending would have no significant interest in urging that the eligible pool be expanded.

- The auctioned spectrum blocks will be for the same blocks originally applied for by the applicants.
- The applicants here were not on notice in 1988 and 1989 that their applications might be decided by means other than lottery. Taking as a given that lotteries are no longer available as an option, the least the Commission can do is give the original applicants the option of now participating in an auction without having to compete with late filers who had no original interest in the market.
- The Commission has determined that the applicants are not entitled to a refund of their filing fees. This necessarily implies that the applications have continuing vitality.
- One of the potential applicants was instrumental in demonstrating to the Commission that the original selectee was unqualified.

Quite simply, the circumstances here are indistinguishable from the circumstances in the broadcast and MDS services cited above where the Commission decided to limit the pool of eligible applicants to those with long-pending applications. It may not deviate from that policy here.

#### **IV. The Commission May Not Use Revenue Enhancement as A Basis for Establishing the Auction Ground Rules**

As against all these reasons for limiting the eligible pool to the existing applicants, the sole reason offered by the Commission for opening the eligible pool to new applicants was that competitive bidding “award[s] each license to the applicant who values it most highly, as determined by the marketplace, and who is therefore most likely to offer valued service to the public.” NPRM at paragraph 8.

The Commission seems to have misapprehended the purpose of competitive bidding. The process is not intended to seek out the person in the world who will put the license to its highest use; rather, it is a process for deciding among applicants whose applications are mutually exclusive as a result of the opening of filing windows. In other words, auctions are a means of resolving mutually exclusive applications on a rational basis, not a method for allocating spectrum to society at large. As among the pending applicants, Ranger and Miller have no objection to the use of auctions as means of resolving the mutual exclusivity. In the context of late-filed applications, the Commission has consistently and uniformly *rejected* the rationale that the public benefits by simply having the greatest number of bidders in auctions. *See, e.g., Interactive Capital Group*, 11 FCC Rcd. 1134 (1996). Yet its rationale here is precisely that argument: that the potential bidding pool should be as large as possible regardless of the equitable rights and interests of applicants who timely filed applications.

Nor is the auction process intended to be a means to enhance the Federal coffers. In giving the Commission authority to award licenses by competitive bidding, Congress specifically forbade the Commission from basing regulatory decisions on the revenue enhancement which might result from competitive bidding:

[I]n prescribing regulations pursuant to Paragraph 4(A) of this subsection, the Commission may not base a finding of public interest, convenience and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

47 U.S.C. 309 (j)(7). Opening this auction to outside bidders would almost certainly generate more funds for the Treasury. Given the enormous equities and precedents in favor of limiting

the applicant pool to the long-pending applicants, revenue enhancement is the real reason the Commission is proposing to widen the applicant pool, but that may not lawfully be a consideration of the Commission in adopting a rule here. The clear intent of Congress was that auctions be used to decide among applicants who are otherwise eligible, not that auctions be a reason in themselves to expand the number of applicants.

#### **V. Other Aspects of the Proposed Auction**

Ranger and Miller generally agree with the procedures proposed by the Commission for the auction itself. We specifically support the processing of the RSA applications on an RSA-wide basis and the use of small business discounts to encourage small businesses to bid on and win cellular licenses. Ranger and Miller also recommend that the Commission follow the same procedure it employed under like circumstances in Auction 25, the Closed Broadcast Auction. There the Commission permitted existing applicants to enter into settlement agreements which would obviate the need for the auction or reduce the number of participants. As the Maxcell court noted, the stimulation of settlements among the small applicant pool there ended up speeding service to the public. Maxcell, supra, at 1556. Given the relatively small applicant pool which would be eligible if the Commission applies the principles enunciated above, there is an increased likelihood that the remaining applicants could reach a full market settlement which would obviate the need for an auction altogether and speed service to the public by months or even a year.

**VI. The Original Filing Deadline for the Pending Applications Cut Off Any Later Filed Applications**

Although the Bachow case strongly supports Ranger and Miller's contentions here in most respects, it also presents an important gloss on the lesson of McElroy Electronics Corp. v. FCC, 86 F.3d 248 (DC Cir. 1996) In McElroy, the Court ruled that the Commission was precluded from opening up a filing opportunity to new filers once a set of applications had been filed and cut-off under the cellular fill-in rules in existence at the time. Until Bachow, one would have assumed under McElroy that because Ranger and Miller timely filed their applications prior to the 1988-1989 deadlines established by the Commission, the Commission was automatically foreclosed from opening the same licenses up to new filers. In Bachow, however, the Court rejected the claim of the appellant applicants that their cut-off applications should not be dismissed and should be protected from any late-filed additions, despite the fact that the selection process had changed to competitive bidding in the interim. "McElroy holds only that if the Commission decides to process timely applications, it generally may not also process competing applications filed out of time." Bachow, *supra*.

Bachow thus contemplates a two-step process. First, the Commission must determine whether to process existing applications on the equitable grounds established by past precedent and outlined above. Once a decision is made to process the original applicant pool, operation of the cut-off rules precludes the acceptance of later-filed applications. As demonstrated in Section III, *supra*, consideration of all the equitable grounds historically applied by the Commission unquestionably leads to retaining the original applications as participants in the auction process. Application of McElroy then leads to the cutting off of any new applicants. Of

course, in this case, unlike Bachow, Section 309(l) serves to make the limitation on the applicant pool mandatory rather than discretionary.

## **VII. Conclusion**

For the reasons set forth above, Ranger and Miller respectfully suggest that the Commission is foreclosed by Section 309(l) of the Act from treating any applicants as eligible for the proposed auction other than those whose timely filed applications are still in a pending status. In addition, all of the reasons which in the past have supported limitation of the applicant pool to filers under an earlier filing regime are compelling here. The only reason offered by the Commission to expand the pool of eligibles is an invalid application of the auction authority.

Respectfully submitted,  
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