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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of the Commission's Rules)
Regarding the 37.0 - 38.6 GHz and)
38.6 - 40.0 GHz Bands; Implementation)
of Section 309(j) of the Communications)
Act -- Competitive Bidding, 37.0 - 38.6 GHz)
and 38.6 - 40.0 GHz)
)

ET Docket No. 189
RM-8553;
PP Docket No.
93-253

COMMENTS OF THE PCS FUND

The PCS Fund^{1/} hereby submits comments in response to the Commission's Notice of Proposed Rulemaking and Order, Amendment of the Commission's Rules Regarding the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz Band; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0 - 38. GHz and 38.6 - 40.0 GHz.

In the Notice the Commission proposes to amend Parts 1, 2, 21, and 94 of the Commission's Rules to provide a channeling plan and licensing and technical rules for fixed point-to-point microwave operations in the 37.0 - 38.6 GHz band.^{2/} The Commission also proposes a channeling plan based on 50 MHz

^{1/} The PCS Fund is comprised of small to medium sized businesses seeking advancement of new technologies. The PCS Fund has petitioned the Commission regarding rulemakings and other proceedings involving small business participants in Commission auctions. Members of the Fund include Essence Communications, Inc., DCR Communications, PCS 2000, Southern Communications, Inc. and the National Paging and Personal Communications Association (NPPCA). The PCS Fund fully supports the small business initiatives promulgated by the Commission and Congress.

^{2/} Notice of Proposed Rulemaking at 1, Released December 15, 1995.

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channel blocks, service areas based on Basic Trading Areas (BTA'S), licensing by competitive bidding, and technical rules to limit interference.^{3/}

BACKGROUND

The 37 GHz band presently is allocated to both fixed and mobile services on a co-primary basis for Government and non-Government usage.^{4/} The 39 GHz band, adjacent to the 37 GHz band, has a channeling plan consisting of fourteen 50 MHz pairs separated by 700 megahertz. Licensees to this band may subdivide and reuse their channels within their designated service areas without obtaining Commission authorization.^{5/}

On September 9, 1994, the Telecommunications Industry Association (TIA) filed a Petition for Rulemaking proposing a channeling plan and technical rules for the 37 GHz band which would make this band available for broadband PCS operators, cellular operators and other common carriers.^{6/} In the Petition, TIA proposed a channeling plan for the 37 GHz band similar to that in the 39 GHz band. TIA suggested fourteen 50 MHz channel pairs separated by 700 megahertz for point-to-point operations, and four 50 MHz channels for one-way fixed and mobile

^{3/} Id.

^{4/} Id. at 2.

^{5/}Id.

^{6/} Petition for Rulemaking filed by the Fixed Point-To-Point Microwave Section of the Telecommunications Industry Association on September 9, 1994.

operations, including broadcast and cable auxiliary operations.^{7/}

On May 4, 1995, TIA amended its Petition suggesting that 800 megahertz of the 37 GHz band be channelized into six 50 MHz channels pairs and four 50 MHz unpaired channels to be licensed using BTA's. TIA also requests that the 37 GHz band not be licensed by auction and that the six 50 MHz channel pairs be reserved for broadband PCS, cellular and specialized mobile radio (SMR).^{8/}

Believing broadband PCS will be of vital importance, the Commission intends to provide adequate spectrum to meet its developing needs. Accordingly, the Commission proposes that the 37 GHz band be made available for use in point-to-point operations such as those providing broadband PCS and cellular. The Commission seeks comment, however, on whether the 37 GHz band should be made available to other fixed services such as point-to-multipoint systems; whether and to what extent there is a requirement for mobile operations in the 37 GHz band; and whether a portion of the band should be reserved for future services.^{9/}

The Commission tentatively found that the 50 MHz plan proposed by TIA would provide efficient and effective service. The Commission proposes to adopt the TIA channeling plan, but

^{7/} TIA Petition for Rulemaking at 4.

^{8/} TIA Amendment to Petition for Rulemaking, filed March 4, 1995.

^{9/} Notice at 6.

solicits comment on whether there is a need for the four 50 MHz unpaired channel blocks. The Commission further proposes to license all the channel blocks using BTA service areas, consistent with those adopted in broadband PCS. The Commission seeks comment on whether the channel blocks should be made available for licensing over larger geographic areas.^{10/}

TIA had asserted the need for individually licensed microwave links. The Commission seeks comment on how individual links might be accommodated, and whether the Commission should reserve some channels for that purpose. The Commission also seeks comment on whether it should adopt a channeling plan with some channel pairs smaller than 50 MHz.^{11/}

The Commission further tentatively concluded contrary to TIA's Petition that licensing spectrum in the 37 GHz band through competitive bidding will likely promote the development and rapid deployment of new technologies, promote economic opportunity and competition, and ensure that new and innovative technologies are readily accessible.^{12/} Because the 37 GHz spectrum will likely be used by broadband PCS and other carriers, the Commission believes an auction for the 37 GHz band may be desirable much as the current broadband PCS auction. An auction purportedly will place licenses into the hands of those who would value them most, would recover a portion of the value of the spectrum for the

^{10/} Id.

^{11/} Id. at 11.

^{12/} Id. at 13.

public, prevent the award of licenses to speculators, and promote efficient use of spectrum.

With Congress's policy objectives in mind, the Commission has noted that awarding licenses to those bidders with the greatest willingness to pay tends to promote the development and rapid deployment of new services and the efficient use of spectrum. The Commission believes that a bidder's ability to introduce and quickly deploy valuable new services increases the value of a license to that bidder.^{13/} The Commission, thus, has determined that simultaneous multiple round auctions are appropriate for the 37 GHz band.

The proposed procedure for the auction is similar to that instituted in the licensing of broadband PCS. For example, the Commission proposes establishing minimum bid increments (relatively large at first) to ensure conclusion of the auction within a reasonable time. That minimum bid increment will be expressed as the greater of a percentage of the high bid from the previous round or a fixed dollar amount per megahertz per service area population (MHz-pops). Furthermore, similar to the broadband PCS and other spectrum auctions, the Commission will require "a substantial upfront payment" as a condition of bidding.

^{13/} Id.

I. THE UP-FRONT PAYMENT FORMULA IS PROHIBITIVELY HIGH, AND WOULD PRECLUDE MEANINGFUL PARTICIPATION BY DESIGNATED ENTITIES

The up-front payment formula proposed by the Commission is \$2,500 or \$0.02 per pop per MHz for the largest combination of MHz-pops, whichever is greater.^{14/} That excessive payment is deemed necessary "to ensure that only serious, qualified bidders participate in auctions and to ensure payment of an additional assessment for withdrawal or default."^{15/} The formula also is proposed because it would "provide bidders with the flexibility to change their strategy during an auction."^{16/} However, the "standard" up-front payment formula will be such a burden on "small businesses", that many may find it prohibitive and be unable to compete in the auction at all.

Furthermore, the unduly prohibitive up-front payment is inconsistent with the Designated Entity Provisions outlined in the Notice and the Telecommunications Act. The Act directs the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." ^{17/} Congress intended to prevent the exclusion of small businesses and to ensure that small

^{14/} Competitive Bidding Second Report and Order at p. 171

^{15/} *Id.* at para. 54.

^{16/} *Id.* at para. 54

^{17/} 47 U.S.C. section 309(j)(4)(D).

businesses would "continue to have opportunities to become licensees."^{18/} The amount required as a precondition to a bidder's eligibility not only hinders the opportunity of small businesses to compete and subsequently become licensees, but actually fosters their exclusion.

The recently enacted Telecommunications Act of 1996 further seeks to foster the development of competitive markets by removing the "barriers to entry" into the telecommunications industry and by preventing the prohibition or effective prohibition of the ability of any entity to provide any interstate or intrastate telecommunications service.^{19/} Congress has made specific findings supported by the Commission that small businesses represent higher degrees of risk and "are experiencing increased difficulties in obtaining credit."^{20/} The prohibitive up-front payment proposed by the Commission creates rather than removes the most significant barrier to entering the marketplace through the auction process -- up-front capital.

The standard up-front payment formula, requiring a small business to pay \$ 2,500 or \$ 0.02 per pop per MHz requires it to immediately access hundreds of thousands of dollars for the right to bid in most desirable markets. That task becomes even more

^{18/} House Report at p. 255

^{19/} Telecommunications Act of 1996, 47 U.S.C. section 253, "Barriers To Entry".

^{20/} Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331 (a) (3), Pub. Law 102-366, Sept. 4, 1992.

formidable when that business must face financing the auction itself and the subsequent buildout. A more reasonable formula would be based on \$ 500 to \$ 1,000 per pop per MHz. An alternative would be to remove the buildout requirement altogether, thereby freeing up designated funds for payment of the up-front fee.

II. THE DESIGNATED ENTITY PROVISIONS CREATE MEANINGFUL OPPORTUNITIES FOR SMALL BUSINESSES

The Act directs the Commission to "ensure that small businesses . . . are given the opportunity to participate in the provision of spectrum based services.^{21/} Furthermore the Commission must consider the use of tax certificates, bidding preferences, and other procedures. In implementing section 309(j), the Commission considered installment payments, spectrum set-asides, bidding credits and tax certificates in structuring the auctions process. These and similar proactive steps are vital to the entry of small businesses into the industry, particularly when utilized during the auctions process.^{22/} The electromagnetic spectrum is a public asset that must be licensed to private entities so as to encourage universal service.^{23/}

^{21/} 47 U.S.C. section 309(j) (4) (D).

^{22/} Testimony of Mateo R. Camarillo, President, Opportunities Now Enterprises, Before the Federal Communications Commission En Banc Hearing on Spectrum Assignment: Licensing Methods and Issues.

^{23/} Id.

Block licensees are by definition "big businesses". The best opportunity for small businesses to enter the PCS marketplace would have been through the C-Block auction, which was limited to "small businesses." Unfortunately, the small firms are still getting squeezed out by better financed and connected businesses.

INSTALLMENT PAYMENTS

Consistent with the Designated Entity Provisions in the auctions for other services, the Commission proposes to adopt a provision allowing licensees to pay their winning bid amount (less up-front payments) in installments over the ten year license term. We support the adoption of that installment payment provision as also fostering the entry of small businesses into the marketplace and furthering competition. Furthermore, we support the related proposed provision allowing small businesses to make installment payments only on the interest during the first two years. Finally, we also support the proposed reduction in down payments to five percent of the winning bid.

SPECTRUM RESERVE

The National Telecommunications and Information Association (NTIA) requested that the 37-38 GHz band be allocated to the space research (space-to-Earth) service for Government use. We, too believe that a spectrum reserve may also be needed for future developments into space research.

CONCLUSION

BIDDING CREDITS

The Commission proposes a ten percent bidding credit for all small businesses. Although that credit is smaller than the credits the Commission has adopted for most other services^{24/}, the Commission believes it to be reasonable and equitable in the 37 GHz auction. We disagree. Pursuant to the Commission request for comment, we suggest a larger bidding credit of at least twenty-five percent (25%). In fact, Designated Entities are accorded a forty percent (40%) bidding credit in the narrowband PCS service.^{25/} That figure will better insure that small businesses will have a meaningful opportunity to obtain 37 MHz licenses.

We believe a "tiered" bidding credit system, whereby a credit would be granted according to the size of the small business, would be even more effective than a single credit system. For example, under the "tiered" system, low-end small businesses (i.e. \$ 6 million and under) could better compete with mid to high end small businesses (up to \$ 40 million), as well as with large businesses. Further, a Designated Entity could receive a 25% bidding credit with the credit increasing to up to 40% if the firm is a low-end small business.

The results in the broadband PCS service demonstrate the necessity for an effective bidding credit figure. The A and B

^{24/} Notice at para. 79

^{25/} See Narrowband PCS Second Report and Order, 8 FCC Rcd 7700 (1995).

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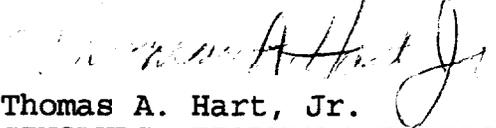
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CONCLUSION

The Commission has been charged with assuring that Designated Entities such as small business have the opportunity to enter the telecommunications marketplace. That responsibility includes the removal barriers to their entry. The Commission has found that the most significant barrier is the ability to access meaningful amounts of capital to compete. The Commission's proposed up-front payment provisions are excessive, prohibitive, and inconsistent with the Act. The Commission should, therefore, adopt a more reasonable up-front payment formula as applied to small businesses.

Finally, The PCS Fund supports as stated herein the remaining proposed auction rules for 37-39 GHz band licenses.

Respectfully submitted,


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