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

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. 183 RM-8553; PP Docket No. 93-253

REPLY COMMENTS OF THE PCS FUND

The PCS Fund,[1] through its undersigned counsel hereby submits Reply Comments in the above-captioned proceeding. In its initial Comments filed on March 4, 1996, The PCS Fund supported the proposed auction rules for the 37.0 - 40.0 GHz bands. However, we expressed some concern regarding the potential for the rules as proposed to hinder the ability of small businesses and other designated entities to effectively compete in the auction. Specifically, The PCS Fund argues that the up-front payment formula is prohibitively high.[2] We also argue that the proposed bidding credit of ten percent (10%) for small businesses is unreasonably

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[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] See Comments of The PCS Fund in ET Docket No. 183; RM-8553; PP Docket No. 93-253, filed March 4, 1996.

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low in light of the larger credits the Commission has adopted in other services, and because that credit simply would be ineffective if applied to all small businesses equally.[3]

The Commission has often stated its commitment that small businesses and other designated entities "are given the opportunity to participate in the provision of spectrum-based services".[4] In that regard, we propose here a tiered up-front payment formula for small businesses and also a tiered bid credit system whereby smaller businesses would receive a higher credit than other businesses which are larger, but nonetheless are defined as "small businesses." Finally, we propose a waiver of the financial cap to accommodate joint ventures wherein a large company has a non-controlling minority interest in a smaller company.

TIERED UP-FRONT PAYMENT FORMULA

Consistent with the procedure in other spectrum auctions, the Commission proposes to require all auction participants to deposit a substantial payment as a pre-condition of bidding.[5] That payment is assessed "to ensure that only serious, qualified bidders participate in auctions and to ensure payment of an additional

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[3] Id. at 9.

[4] 47 U.S.C. section 309(j)(4)(D).

[5] 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 - 38.6 GHz and 38.6 - 40.0 GHz ("NPRM") at para. 54.

assessment for withdrawal or default."[6] The Commission also explains that the up-front payment will "provide bidders with the flexibility to change their strategy during an auction".[7]

The Commission proposes to utilize the standard up-front payment formula articulated in the Competitive Bidding Second Report and Order. That formula requires a bidder to deposit $2,500 or $ 0.02 per pop per MHz for the largest combination of MHz-pops, whichever is greater. That formula, however, does not consider the difficulty experienced by small businesses in raising capital. Both Congress and the Commission agree that small businesses are higher risk credit applicants, and experience lack of access to meaningful capital as one of the most significant barriers to their entry into the marketplace.[8]

The lesson in the C-Block Personal Communications Service (PCS) auction illustrates our concern. Of the $700 million dollars deposited up-front, only a fraction represented deposits from small

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[6] Id.

[7] Id. Bid strategy is linked directly to the up-front payment calculation because that calculation defines the maximum of MHz-pops on which a bidder may bid in a particular round. Bidders calculate that amount to determine the maximum MHz-pops from any combination of licenses on which they wish to bid in a given round. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order at p. 171.

[8] Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a)(3), Pub. Law 102-366, Sept. 4, 1992; see Tlecommunications Act of 1996, sec. 714 "The Telecommunications Development Fund", Pub. Law 104-104, Feb. 8, 1996.

businesses.[9] Although the C-Block itself was designed to allow "small businesses" with less than $40 million dollars to compete with licensees in the A and B Blocks, that entrepreneurs' block has developed into anything but a small business auction. The high bid for the New York Basic Trading Area is over $ 1.3 billion dollars. There is no possible way that true small businesses could ever compete with such bids. The steadily escalating bid amounts, even in markets with less than 250,000 pops, threatens to force small businesses out of the auction altogether. Thus, not only must they overcome the prohibitive up-front payment, small businesses must secure post auction financing sources to be able to bid competitively.

The Commission has recognized the potential for the 37 GHz licensing experience to mirror that of PCS.[10] The lack of ability of "true" small businesses to compete in the C-Block, therefore, is destined to be similarly manifest in the 37 GHz auction. That fact is particularly true since the latter auction is not restricted just to small businesses. We propose to require small businesses with average gross annual revenues of $6 million or less to deposit only $500 per MHz per pop. Similarly, small

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[9] The Commission initially defined a small business as having an average gross income of $ 6 million. Competitive Bidding Second Report and Order at pp. 267-271. Upon considering the capital requirements and other characteristics of the Broadband PCS auction and the proposed auction of 37 GHz spectrum, the Commission modified that threshold to $ 40 million. Id. at pp. 176-180.

[10] "We believe that it is likely that 37 GHz licenses will be sought by broadband PCS licensees for its use as backhaul and backbone communications links." NPRM at para. 88.

businesses with revenues between $6 million and $15 million should pay $750 per MHz per pop. Finally, small businesses with revenues between $15 million and $40 million would pay $1,000 per pop per MHz up-front. The tiered up-front payment formula would be:

SIZE	**UP-FRONT PAYMENT**
GROSS REVENUES < $6 MILLION	$500 x Population x Block Size
GROSS REVENUES $6 - $15 MILLION	$750 X Popolation x Block Size
GROSS REVENUES $15 - $40 MILLION	$1000 X Population x Block Size

That formula would allow a greater number of small businesses to raise the necessary capital more quickly, thereby fostering increased competition. Small businesses would also be better positioned to raise money to meet the restrictive and prohibitive buildout requirements.

TIERED BIDDING CREDITS

The NPRM proposes a ten percent (10%) bidding credit for **all** small businesses, whereby a successful bidder will receive a payment discount on the amount of its winning bid.[11] Comment is sought as to whether small businesses bidding for 37 GHz licenses should receive a larger bidding credit, such as 25 percent. However, generic bidding credits alone won't create a level playing field, for, all "small businesses" are not created equal. For example, a business with average gross revenues of $6 million dollars may find a 10 percent or 25 percent discount still

[11] NPRM at para. 78.

inadequate to help it meet its buildout and payment obligations. The default provisions of the proposed auction rules would virtually force a financially strained small business to lose its license.[12] A larger business, however can better afford to make higher bids in more valuable markets and can successfully make the required installment payments.

We therefore propose a tiered bidding credit formula directly linked to the NPRM's suggested definition of small business. A lower tier small business would receive a greater discount than a higher tier small business. For example:

LEVEL	SIZE	BID CREDIT
TIER 1	GROSS REVENUES < $6 MILLION	40%
TIER 2	GROSS REVENUES $6 - $15 MILLION	35%
TIER 3	GROSS REVENUES $15 - $40 MILLION	30%

The Commission suggests, however, that "in view of other proposals which will benefit DEs, including relatively small geographic licensing areas and the availability of installment payments" a ten percent across the board discount for all small businesses is reasonable and equitable.[13] We continue to disagree. The proposed ten percent credit is smaller than that adopted in nearly all other services. The C-Block fiasco clearly demonstrates that even a larger bid credit would be insufficient to

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[12] See NPRM at paras. 56 - 60.

[13] NPRM at para. 79.

ensure the participation of designated entities in spectrum based services, as Congress intended. Furthermore, designated entities are accorded a forty percent (40%) discount on payments for narrowband PCS licenses. Thus, we suggest granting the same 40% bid credit to Tier 1 small businesses. The proposed tiered bidding credit formula would more effectively carry out the intent of the Telecommunications Act.

ACCOMMODATION OF JOINT VENTURES

The Commission proposes to apply the same affiliation and attribution rules for calculating gross revenues as those adopted for broadband PCS.[14] Under those rules, applicants are allowed to select one of two equity "control group" structures[15] such that the gross revenues and total assets of those holding interests in an applicant will not be considered. The Commission seeks comment on whether the revenues of all investors in the small business entity, its affiliates, as well as the revenues of all investors in the small business and their affiliates should be counted for purposes of determining eligibility.

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[14] NPRM at para. 88.

[15] Under the two control group options, the gross revenues and total assets of certain investors are not attributed to the applicant provided the applicant has a control group consisting of one or more individuals or entities that have de jure and de facto control of the applicant. The gross revenues and total assets of each member of the control group (with the exception of certain control group investors) aggregated and counted toward the financial caps. Competitive Bidding Sixth Report and Order at para. 13 n38.

All investors in a small business applicant should not be attributable. As seen in the previous FCC auctions, bids escalate extremely quickly. Without the ability to seek out minority investors or to enter into joint venture agreements with larger companies holding less than 50% of the voting stock of the small business, those and other designated entities may be unable to successfully finance their bids. Traditional sources of capitalization such as banks or credit corporations are largely unavailable to the perceived "high risk" businesses. Therefore, small businesses must be allowed to create other financing options within FCC rules.

CONCLUSION

Congress and the Commission both have recognized the severe disadvantage faced by small businesses competing in the race to provide spectrum-based services. Without adequate rules eliminating the barriers to their entry, the Commission will not be effectuating the intent of the Act to ensure the participation of small, minority and women owned telecommunications concerns.

Accordingly, we recommend lowering the prohibitively high up-front payment and establishing a tiered up-front payment system; establishing a tiered bidding credit system; and allowing certain minority-interest joint ventures.

Respectfully submitted,

Thomas A. Hart, Jr.
GINSBURG, FELDMAN & BRESS
1250 Connecticut Ave., N.W.
7th Floor
Washington, D.C. 20036

(202) 637-9000

Attorneys for The PCS Fund