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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY



August 16, 2001

Ms. Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street S.W., TW-A325
Washington, D.C. 20554

Re: *Ex Parte* Presentations:

**In re Principles for Promoting the Efficient Use
of Spectrum by Encouraging the Development of
Secondary Markets, WT Docket No. 00-230**

**Amendment of Part 1 of the Commission's Rules
– *Competitive Bidding Procedures*, WT Docket
No. 97-82**

Dear: Ms. Salas:

Pursuant to Section 1.1206 (b) of the rules and regulations of the Federal Communications Commission, enclosed for filing are four copies of a written *ex parte* presentation to Commissioner Michael J. Copps on August 15, 2001 concerning the above-captioned proceeding. If you have any questions regarding this matter, please communicate with the undersigned.

Sincerely,

A handwritten signature in black ink that reads "Jill Canfield (RIB)". The signature is written in a cursive style.

Jill Canfield
Regulatory Counsel

Attachments

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

August 15, 2001

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W., Room 8A-302
Washington, DC 20554

**Attention: Lauren Van Wazer,
Interim Legal Adviser**

**Re: Rural Telephone Company Deployment of
Spectrum-Based Services**

Ex Parte Presentations:

**In re Principles for Promoting the Efficient Use
of Spectrum by Encouraging the Development of
Secondary Markets, WT Docket No. 00-230**

**Amendment of Part 1 of the Commission's Rules
- Competitive Bidding Procedures, WT Docket
No. 97-82**

Dear Commissioner Copps:

On June 22nd, John Prendergast of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, Greg Whiteaker, with the law firm Bennet & Bennet, PLLC and the Rural Telecommunications Group, and Jill Canfield with the National Telephone Cooperative Association (NTCA) met with Lauren Van Wazer to discuss rural local exchange carriers and their quest for wireless spectrum. At the conclusion of that meeting, Ms. Van Wazer suggested that we provide you with an *ex parte* letter outlining the rural carriers' concerns. Ms. Van Wazer specifically requested our written reaction to the Commission's Sixth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services (*Competition Report*). The Federal Communications Commission (Commission) recently made the text of the *Competition Report* available, and having had an opportunity to evaluate the document we offer our comments as per Ms. Van Wazer's request. We also provide you with an overview of our general concerns with the Commission's past spectrum management policies (with a

Commissioner Michael J. Copps
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focus on auction and service rules) and their negative impact on the deployment of spectrum-based services in rural communities.

Background

The National Telephone Cooperative Association (NTCA) is a national association comprised of more than 500 rural incumbent local exchange carriers. All of NTCA's members are "rural telephone companies" as that term is defined in 47 U.S.C. § 153(47). One half of NTCA member companies have less than 2,500 wireline subscribers. Eighty percent serve between 500 and 10,000 subscribers. In addition to wireline and Internet services, most of NTCA's members also provide wireless services in the communities they serve.

Both Mr. Prendergast and Mr. Whiteaker represent NTCA members before the Commission. In addition, Mr. Whiteaker represents the Rural Telecommunications Group (RTG), which is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country.

Sixth Annual Competition Report

In a June Press Release, the Commission trumpeted the news that 91 percent of the U.S. population has access to three or more mobile telephony operators. An examination of the full *Competition Report* paints a far less glowing picture overall and reveals that rural America's true access to mobile wireless telephones (cellular, PCS, and SMR)—arguably the most ubiquitous of wireless services—is far less encouraging.

First, the *Competition Report* admitted that it overstates mobile wireless telephone coverage both in terms of geographic areas and populations covered. The Commission noted that it counted a county as "covered," and counted the entire population and square mileage of the county as "covered," if a wireless provider offered service in any portion of the county.¹ Even where the Commission concluded that multiple providers served a county, it did not mean that they were offering service to the same portion of the county.

We are concerned that this extraordinarily optimistic view of mobile wireless telephone coverage will be used to justify spectrum policies that fail to put spectrum to work in large swaths of the country.² The Commission, however, should not base future public spectrum policy on a distorted view of service availability in this country. While we

¹ *Competition Report* at App. C-5.

² We are equally concerned that the Commission may try to use the flawed measurement tool utilized in the *Competition Report* as a basis to justify spectrum policies for the many other auctioned wireless services, such as fixed wireless services.

understand that the Commission's analysis was constrained by the current parameters of its Local Competition Reporting Program, measuring theoretical access to service by county is simply not a useful tool. The Commission should either conduct its own coverage survey or look to privately-conducted studies to provide Congress with a more realistic picture of mobile telephone coverage.

Second, even the Commission's overly optimistic view of mobile wireless telephone coverage indicates that there is substantially less deployment in less-populated areas outside of the nation's urban areas. We have re-printed the Quartile Coverage chart from Appendix C-5 of the *Competition Report* below.

County Quartiles with Estimated Rollout by at least 3 Mobile Telephone Providers

County Quartile Based on Population	Total Number of Counties (2)	Number of Counties with at least 3 Providers	Percent of Counties in Quartile with at least 3 Providers	POPs in Those Counties (1)	Percent of Quartile POPs with at least 3 Providers
1st Quartile	805	750	93.2%	229,657,015	97.9%
2nd Quartile	805	530	65.8%	21,118,979	67.2%
3rd Quartile	805	387	48.1%	7,099,963	50.2%
4th Quartile	804	145	18.0%	1,132,791	22.6%

Source: Federal Communications Commission estimates based on publicly available information.

Notes:

- (1) POPs from the 2000 Census.
- (2) United States and Puerto Rico

Assuming that a county is covered by a provider if the provider operates anywhere in the county, the Commission's 91 percent number masks a coverage problem in all but the most-populated counties. For example, only 44 percent of the country's 2,414 least-populated counties are even theoretically covered by multiple wireless telephony providers. Approximately 39% of the population of the least populated counties do not have even theoretical coverage from multiple providers, much less actual coverage.

Accordingly, even using the overly optimistic theoretical coverage estimates, the *Competition Report* reveals that residents of rural areas have significantly less access to mobile wireless services—and the benefits of competition among providers of those services—than residents in urban areas. The dichotomy between rural and urban coverage would be even greater if the Commission utilized meaningful rather than theoretical coverage measurements. As discussed below, the Commission should revise

its spectrum policy, including revising its auction and build out rules to bring real wireless choice to rural America.

RURAL AMERICA AND SECTION 309(j)

The Communications Act directs the Commission to consider the needs of rural America as it develops its spectrum rules and policies. Section 309(j)(3)(A) states that for every class of licenses to be granted through the auction process, the Commission should protect the public interest and promote the development and rapid deployment of new technologies and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.

In recognition that rural telephone companies are most likely to provide service in those high cost rural areas, Congress, in Section 309(j)(4), directed the Commission to prescribe area designations and bandwidth assignments that promote economic opportunity for a wide variety of applicants, including small businesses and rural telephone companies. We are particularly disappointed that despite the clear directive of Section 309(j)(4)(D) to treat rural telephone companies as designated entities qualified for auction benefits, previous Commissions have failed to do so.

Recent auction trends block rural telephone companies in their pursuit of spectrum, contrary to the mandates of Section 309(j). Specifically, rules licensing spectrum in huge geographic service areas with lenient build-out requirements stand in the way of small and rural companies obtaining spectrum. Further, the Commission's reliance on partitioning and disaggregation has proven ineffective as a means of getting spectrum into the hands of small and rural carriers. The Commission's financial attribution rules have also crippled rural cooperative's ability to participate in auctions.

Rural carriers are struggling in their efforts to obtain spectrum, and the Commission appears to have a fundamental misunderstanding of the realities of rural America and the critical role that rural telephone companies play. By honoring the language and intent of Section 309(j), and ensuring that rural telephone companies have a meaningful opportunity to participate in spectrum-based services, the Commission could significantly further the deployment of such services to rural areas.

Licensing According to Large Geographic Service Areas

The Commission always has a choice about how it will define the boundaries of the geographic license areas to be used in licensing spectrum. It may decide to license spectrum according to MSAs/RSAs, of which there are 734, Economic Area Groupings,

of which there are six, or anything in between. This one decision determines what entities will bid for spectrum and what communities will ultimately receive these valuable services. Bigger is not better.

The obvious trend in license areas has been toward the larger geographic service areas. This approach has some utility as it serves the goals of nationwide providers with significant resources for build out. Yet the companies with regional and nationwide coverage plans for either mobile or fixed networks can and will ignore the smaller pockets of populations across the country. This approach to licensing has hurt rural telephone companies in their quest for spectrum and leaves rural customers starved for new wireless services.

Rural telephone companies are generally interested in acquiring spectrum covering their rural service territories. Large carriers are generally interested in acquiring spectrum covering profitable metropolitan areas. When the two areas are grouped together into one geographic service area for auction purposes, the rural carrier and the large carrier are forced to compete at auction despite the fact that they are actually interested in serving different populations. Large carriers have greater resources than small carriers and rural telephone companies. The large carriers win at auction and ignore service to large geographic swaths of their license areas. Spectrum is limited and expensive and as the license territory grows, so does the price tag for it. Rural and small carriers simply cannot afford to purchase the rights to large areas in a bidding war against large carriers.

Since the large carrier is primarily interested in recouping its investment and the urban areas are most profitable, system build-out is concentrated in urban areas. The rural customer is left behind as the country's cities move toward a wireless future.

Liberal Build Out Requirements

The trend to huge geographic license areas might serve the public interest if the Commission required that geographic area and populations within a license area actually receive new wireless services. Unfortunately, the Commission's build out requirements ensure that purchasers of gigantic licenses can ignore the least profitable populations within them. In Section 309(j)(4)(B), Congress anticipated the need for performance requirements that ensure service to rural areas but the Commission's approach pays little head to this direction.

For example, the Commission has adopted rules that allow a PCS licensee to retain a license by covering as little as one-fourth of the population of the service area. These same rules provide a wireless license renewal expectancy based on the provision of

“substantial service.” What constitutes “substantial service” is generally not defined. It is entirely possible, in fact likely, that a carrier will ignore large portions of its geographic service territory and at the end of a license period retain the exclusive right to serve the territory for another entire license period. The areas that are likely to go unserved under this licensing scheme are the high cost, low density, less profitable, rural areas. There are simply no economic or regulatory incentives for larger carriers to serve these areas.

The use of smaller license areas would go a long way toward resolving this dilemma, by giving the larger carriers an opportunity to acquire the larger urban and suburban areas that they desire to serve, while giving rural telephone companies a fighting chance to obtain licenses for rural areas, and provide service to these communities as envisioned by Section 309(j) of the Communications Act. Rural telephone cooperatives are in most cases the *only* entities with an incentive to bring service to rural areas, because they are owned and governed by the citizens who live in those areas. These carriers have an established track record of bringing telecommunications services to areas that have been deemed “unprofitable” by the rest of the industry.

Partitioning and Disaggregation

The Commission has attempted to avoid some of the obstacles small carriers and rural consumers face due to large service areas and lenient build out requirements by permitting partitioning and disaggregation. Partitioning and disaggregation are potentially valuable tools for rural carriers, but have been ineffective thus far because they are purely voluntary activities. If a carrier chooses to hold on to its license in full, there is no risk or penalty. The license will be renewed if the carrier can make the case that it is providing “substantial service.”

There is little incentive for a carrier to part with any portion of its service territory or spectrum block. If a carrier can afford to do so, it makes sense to hold onto the entire license. An intact license is more valuable in a future sale. Also, a carrier may decide to keep the entire license in preparation for future population growth or speculation over the future use of the spectrum. Moreover, there is little reward for larger carriers to expend resources negotiating such deals with rural cooperatives at a time when their transaction personnel are bogged down with much larger deals. The opportunity to reduce the population of the licensed service area by a few thousand, or even one hundred thousand, makes little difference when the incumbent licensee can serve millions by merely covering the urban area in the center of its licensed territory.

Whatever the reason, partitioning and disaggregation have not been the small carrier solution the Commission envisioned. RTG estimates that less than 1/10th of 1% of wireless licenses have been partitioned or disaggregated.

Secondary Markets Initiative

The Commission is now contemplating a comprehensive leasing policy that may provide opportunities for small companies and rural telephone companies to gain access to spectrum in the secondary market. However, the Commission contemplates spectrum leasing as a voluntary decision by a spectrum licensee. There is no guarantee that large carriers will be willing to part with spectrum on even a temporary basis. The Commission's proposed requirement that the licensee remain responsible for the actions of spectrum lessees makes it even less likely that large carriers will undertake the risk of leasing isolated areas of small intrinsic value to them. Moreover, it will be difficult for rural cooperatives to justify the high costs of a rural build out if they do not have the certainty of holding the license.

The Commission simply cannot view secondary market transactions as a substitute for primary spectrum opportunities for rural telephone companies. As long as the Commission licenses spectrum through auctions, the Commission has a statutory obligation to create auction opportunities for small businesses and rural telephone companies and to adopt auction policies that will bring wireless services to rural America.

Bidding Credits and Attribution Rules

In a fundamental misreading of Section 309(j), the Commission refuses to give rural telephone companies bidding advantages unless they also qualify as small businesses. As discussed below, however, the Commission's overly broad attribution rules have made this task very difficult.

It appears that the prior Commission misunderstood the way a small rural telephone cooperative is structured. A telephone cooperative is owned entirely by its subscribers, who live in small, rural communities and had to form their own telephone company when neither the Bell Operating Company nor any independent saw enough profit to provide service. These cooperatives have been furthering the goal of providing telecommunications services to all Americans, even before Congress mandated this by Section 309 of the Act.

The subscribers of a cooperative must elect officers and directors to oversee the cooperative and hire the manager who runs the company. By the very nature of their circumstances, however, these cooperatives have a limited choice of potential candidates for these positions, and must generally try to recruit the best and brightest of persons in the local business community. These officers and directors often serve on the cooperative without pay. The member-subscribers (including the officers and directors) do not "invest" in the cooperative and accordingly, do not receive a return on investment. Significantly, a cooperative does not borrow against the assets of its subscribers, including its officers and directors. In other words, the resources of the farms, ranches, banks and other businesses run by these citizens are not available to the cooperative for use in an auction.

Unfortunately, last year the Commission adopted a broad "controlling interest" standard for determining whether to attribute to an applicant the gross revenues of its investors and affiliates in assessing whether the business qualifies as a small business entitled to a bidding credit. Under this standard, the Commission said that it will attribute to the applicant the gross revenues of its controlling interests and their affiliates. The rule provides that the officers and directors of any applicant, including rural telephone cooperatives, will be considered to have a controlling interest in the applicant. These rules thus attribute to rural telephone cooperatives the gross revenues of the outside business interests of their officers and directors.

RTG sought reconsideration of the order adopting the new attribution rules, and NTCA filed supporting comments. NTCA and RTG pointed out that cooperatives have a unique organizational structure and the outside business interests of officers or directors of a board are not resources available to a telephone cooperative.

The Wireless Telecommunications Bureau's recent determination in *PVT Networks, Inc.*³ that a cooperative director's status as an officer and director alone does not indicate that the director controls the cooperative (and therefore that the officer need not be affiliated for revenue purposes under the attribution rules effective before August of 2000) suggests that there may be some greater understanding of the reality of cooperative governance and financing.

The *PVT* decision, however, was not based on the current attribution rule that expressly affiliates a cooperative's officers and directors for revenue calculation purposes. While the Bureau's decision is a step in the right direction, as of today, the rules automatically attributing directors' and officers' businesses to cooperatives still stand.

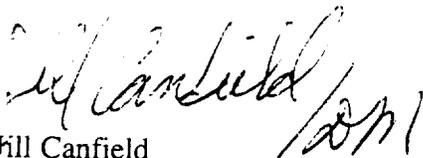
³ Mimeo No. DA01-1574, released July 5, 2001.

Future Spectrum Policy

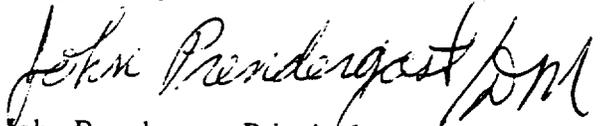
Rural telephone companies are on the front line of bringing telecommunications services to rural America, and wish to give the new Commission the benefit of their experience under the current spectrum policies. The Commission has accomplished much in the eight years since the creation of its auction authority, and has had to overcome many obstacles that were not foreseen in 1993. Like all complicated regulatory schemes, however, the current spectrum rules and policies are in need of certain improvements.

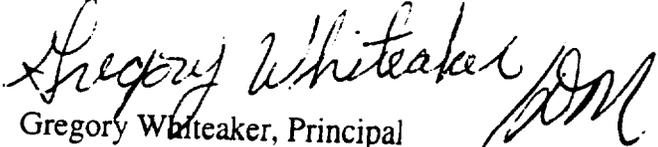
Without drastically altering the current rules, the Commission can and, pursuant to Section 309(j), should implement measures to allow rural telephone companies a meaningful opportunity to participate in the provision of advanced services to rural America. In particular, the Commission should (1) use smaller license areas for most auctions, preferably on an MSA/RSA basis; (2) create bidding advantages for rural telephone companies regardless of their gross revenue attribution, or at a minimum, modify the attribution rules so that financial resources of the officers and directors of a cooperative will not count against it; (3) modify its construction requirements and partitioning and disaggregation rules in a way that will facilitate successful transfers of spectrum to rural cooperatives (whether by mandatory requirements or greater incentives); and (4) recognize the valuable information that rural telephone industry surveys provide when formulating spectrum licensing policies.

Thank you for this opportunity to express the views of the rural telephone industry on these important issues.


Bill Canfield
Regulatory Counsel
National Telephone Cooperative
Association

Respectfully Submitted,


John Prendergast, Principal
Blooston, Mordkofsky, Dickens
Duffy & Prendergast


Gregory Whiteaker, Principal
Bennet & Bennet, PLLC,
Counsel to the
Rural Telecommunications Group

cc: Commissioner Gloria Tristani
Commissioner Kathleen Q. Abernathy
Commissioner Kevin J. Martin