

The Commission, during the 1970s, 1980s and early 1990s (a period during which hearings or lotteries were used as methods for awarding spectrum licenses), made special efforts to accommodate parties that were deploying new technologies and services. Three cases illustrate this point. In *Illinois Bell*,² the Commission was faced with the issue of whether to grant developmental authority to Illinois Bell Telephone Company to conduct a full commercial trial of cellular radiotelephone service in Chicago that would compete in the market for customers. Competing radio common carriers opposed granting Illinois Bell such authority, claiming ruinous anticompetitive effects. Stating its desire to encourage development of cellular system technology, the Commission granted developmental authority for equipment and service tests as well as commercial operations.

Similarly, in *Contemporary*,³ the Commission granted developmental authority permitting market trials with for-hire authority to provide Public Land Mobile Service in more than a dozen cities. Competitors in that case also complained, arguing that the developmental system had all the earmarks of a commercial system. The Commission rejected their arguments, citing Section 7(a) of the Act, as well as Section 303(g) that contains the agency's statutory obligation to "study new uses of radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated.

47 U.S.C. §157.

²*Illinois Bell Telephone Company, Order*, 63 FCC 2d 655 (1977) (*Illinois Bell*).

³ *Contemporary Communications Corp., Memorandum Opinion and Order*, 98 FCC 2d 1229 (1984) (*Contemporary*).

The third case is *Hye Crest*,⁴ where the applicant requested regular commercial authority (rather than developmental authority) and a rule waiver to permit it to offer competitive video service in New York City using 1,000 MHz of 28 GHz spectrum on a non-common carrier basis. The applicant needed regular authority in order to provide it with “maximum flexibility to implement its proposed video service, to stimulate technological innovation, to increase competition in the video entertainment marketplace, and to provide it additional diversity and freedom to meet the particular communications needs of its customers.” *Hye Crest* at ¶5. The applicant argued that the public interest would be served by the grant of its application “because it will transform a frequency band now lying fallow into one that is commercially useful to provide an innovative and competitive source of video programming.” *Id.* at ¶6. Challengers argued, however, that the applicant should be given developmental authority, not regular authority. In response, the applicant stated that its service was “not an experiment” and that it needed regular authority “to ensure the public continued service [...]” *Id.* at ¶13.

In resolving these issues, the Commission cited its mandate under Section 7 of the Communications Act to “‘encourage the provision of new technologies’ in communications services offered to the public.” *Id.* at ¶18. The Commission concurred with the applicant that the waiver approach “offers the most efficient and expeditious means available for accommodating Section 7 and allowing the introduction of this new communications service to New York City.” *Id.* The Commission agreed with the applicant over objections of challengers and granted the request for regular authority.

⁴*Hye Crest Management, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 332 (1991) (*Hye Crest*).

Hye Crest, a 1991 decision, is a model for the flexible approach the Commission has taken in the past to accommodate entrepreneurs and further the Commission's mandate under Section 7 of the Communications Act. Read together, the *Illinois Bell*, *Contemporary* and *Hye Crest* cases establish the policy that the Commission takes a flexible approach to accommodating requests made by new service providers and entrepreneurs based on their unique facts and circumstances -- even over the objections of competitors -- in order to fulfill that mandate.

Even when the service being provided is not necessarily "new" or "innovative," the Commission in the past has made the continuation of service to the public paramount even where a licensee has lost its regular operating license. For example, the Commission, exercising its broad powers under Section 4(i) of the Communications Act,⁵ has granted interim operating authority to permit continued operations by a party that has lost its regular license to operate.⁶ In *Liberty Cable*, the Commission permitted an operator of private operational fixed microwave service ("POFS") facilities at 15 sites in New York City to continue operating those facilities pending proceedings to determine its qualifications to be a licensee. The Commission stated, "allowing Liberty to continue to operate will promote competition, therefore encouraging and fostering the development of high quality, innovative services, at reasonable rates, to the consumer."⁷ In a footnote to that statement, the Commission cited previous orders

⁵"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. §154(i).

⁶*Liberty Cable Co.*, 11 FCC Rcd 14133 (1996); *In the Matter of Amendment of Part 97*, 4 FCC Rcd 1424 (1989)(interim secondary use of 17 meter band).

⁷*Liberty Cable* at ¶22.

where its actions were motivated by Section 1 of the Act,⁸ defining the purpose of the Act and the Commission's mission to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ."⁹ The Commission found that "denying interim operating authority would result in a loss of service to some of the customers Liberty is currently serving with the facilities operating under the STAs."¹⁰ The Commission thus found that it was "in the public interest to promote competition by allowing Liberty to continue to provide service until the questions concerning its qualifications can be resolved."¹¹ The Commission also found that granting interim operating authority was proper to avoid prejudicing the public interest by a disruption of service.¹² In other circumstances where a party who had constructed facilities later lost its regular operating authority, the Commission has invoked its Section 4(i) authority to grant interim authority "until a qualified applicant is licensed and ready to commence service."¹³

What all these cases have in common is the Commission's previous display of flexibility in accommodating the provision of new service by entrepreneurs, and to permit continued service to the public even in the absence of regular operating authority, whether

⁸47 U.S.C. §151.

⁹Further Notice of Proposed Rule Making, First Report and Order, and Second Further Notice in Inquiry in CC Docket No. 87-266, 7 FCC Rcd 300 (1991) at n. 10 (cited in *Liberty Cable* at n. 10).

¹⁰*Liberty Cable* at ¶25.

¹¹*Id.*

¹²*Id.*

¹³*Mobiltel, Inc.*, 11 FCC Rcd 19098 at ¶¶28, 35.

under developmental authority, interim authority, or special temporary authority. Using auctions to assign spectrum licenses, however, seems to have altered this attitude, to the detriment of service to the public.

For example, a licensee that constructs a system serving customers under an auctioned license will be required to terminate service to customers if it loses the license by defaulting on an auction payment, even if there is no other service provider using the same spectrum in the same market. Such a policy retards the development of auctioned spectrum, especially where commercially viable service is just beginning (e.g., the 218-219 MHz Service licensed under Part 95 of the Commission's Rules) and frustrates a public just becoming accustomed to the provision of a new service.

More fundamental, in terms of developing new and innovative services, is the question whether the auctioning of spectrum licenses undermines incentives to pursue developmental projects in the wireless telecommunications field. Certain Part 22 paging licenses were issued under developmental authority with conditions that, if met, allowed the licensee to convert the developmental license into one for regular authority. The Commission has permitted the filing of an application for regular authority after the developmental authority expired, and the licensee was allowed to continue to provide service.¹⁴ However, where the developmental authority has expired and regular licensing is unavailable because a rulemaking has not been completed (or sometimes, even commenced) for establishing how the regular license will be assigned by auction, the developmental licensee can be forced to terminate service. In other words, there is no bridge authority to permit a developmental licensee to continue to provide

¹⁴ *Pinoak Communications, Inc.*, 13 FCC Rcd 12802 (WTB 1998).

existing service pending the auction rulemaking, let alone rules or policies that award the licensee for undertaking the developmental project in the first place.

In short, the Commission's auction rules and policies – and the way they have been implemented in adjudications – undermine the developmental process and dampen entrepreneurial spirits. With these observations, the following suggestions are made in response to Question 6 of the Public Notice.

1. The Spectrum Task Force should study ways (e.g., through developmental, interim, special temporary or secondary authority) of allowing a cancelled auction licensee or a developmental licensee *that has constructed a system* to continue to provide service to the public, with limitations, until the next auction.
2. Different methods, implemented through rules and polices (and legislation, if necessary), should be considered for giving incentives to new service providers and entrepreneurs for deploying services in unserved areas for which licenses have not been auctioned and the spectrum is going totally unused. For example, licensees that obtain interim, developmental or secondary authority, build systems, and provide service to the public in a particular market, could be given a bidding credit in the next auction for that spectrum in that market. Another example would be to require the regular licensee who wins the auction to compensate the interim, developmental or secondary licensee for the cost of customers that are transferred to the regular licensee. (This approach was utilized for cellular radio telephone service where the original lottery winner was disqualified and an interim operator was authorized to provide service pending the award of a new license).
3. Ways of promoting the participation of small businesses should be explored, including the establishment of Small Business Advisory Boards in connection with Commission rule making proceedings.

Respectfully submitted,

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