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January 12, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

RE: Oral *Ex Parte* Presentation in
PP Docket No. 93-253
Competitive Bidding

Dear Mr. Caton:

Pursuant to Section 1.1206(a)(2) of the Commission's Rules, 47 C.F.R. § 1.1206(a)(2)(1992), this is to provide an original and one copy of a notice of oral *ex parte* presentation made in the above-referenced rulemaking proceeding by the undersigned on behalf of American Women in Radio and Television and Shelley Spencer on behalf of CALL-HER, L.L.C.

On January 11, 1994, the undersigned and Shelley Spencer met with Karen Brinkmann of Chairman Reed Hundt's office to discuss the Commission's competitive bidding proposals. We also met with Byron Marchant of Commissioner Barrett's office on the same subject. A copy of the written materials presented at these meetings are enclosed.

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Should further information be required with respect to this *ex parte* notice, please contact the undersigned at 4350 North Fairfax Drive, Suite 900, Arlington, VA 22203-1633; Tel: 703/841-0606; Fax: 703/841-2345.

Respectfully submitted,

Melodie A. Virtue
Vice President, Government Relations
American Women in Radio & Television

Enclosures (3)
cc(w/encs): Karen Brinkmann
Byron Marchant

MAV/blr

PROVIDING A REALISTIC ECONOMIC OPPORTUNITY FOR WOMEN-OWNED BUSINESSES TO PARTICIPATE IN PCS

Women-owned businesses generated only approximately 1/2 of 1% of the total revenues generated by communications establishments in the United States in 1987. Statistics on the number of women-owned businesses in the communications field generally reveal that women have effectively been excluded from ownership interests in the communications industry. The award of spectrum licenses by competitive bidding will perpetuate this exclusion unless the competitive bidding rules adopted by the FCC include specific provisions to remedy women's exclusion from the communications industry and to address the barriers that women face in raising capital.

- **Under-representation of Women-Owned Businesses in Telecommunications**

In 1987, women-owned businesses accounted for 30% of all firms in the United States and 13.9% of the gross receipts generated by all U.S. firms.[1] This figure stands in contrast to the fact that in 1987 women represented more than 51% of the population of the United States. In 1987, only 7,899 of the 4,114,787 women-owned firms were communications firms.[2] Even this statistic overstates the number of women-owned businesses involved in telecommunications. Communications firms, as defined by the Department of Commerce in its report, include women-owned television and radio broadcast firms and are not limited to telecommunications companies. Accordingly, the actual number of women-owned telecommunications companies is less than 7,899. Furthermore, even with this broad definition of "communications," sales and receipts generated by women-owned "communications" firms accounted for less than .5% of the revenues generated by all U.S. communications establishments.[3]

- **Gender Discrimination in Access to Capital**

Four years ago, in recognition of the discrimination women face in all entrepreneurial endeavors, Congress enacted the Women's Business Ownership Act of 1988 (the "Act"). Findings incorporated into the Act by Congress provide an accurate account of the discrimination that women-business owners faced in 1988 and continue to face in 1993. These findings are applicable

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[1] *Women Owned Business*, U.S. Department of Commerce (1990) (based on the 1987 economic census).

[2] *Id.*

[3] *Id.* In 1987, U.S. communications establishments generated over $201 billion in revenue. Women-owned businesses accounted for $866,330,000 of those revenues.

equally to the telecommunications industry. Congress found, in part:

> (A) women owned business has become a major contributor to the American economy by providing goods and services, revenues, and jobs;
>
> (B) over the past two decades there have been substantial gains in the social and economic status of women as they have sought economic equality and independence;
>
> **(C) despite such progress, women, as a group, are subject to discrimination in entrepreneurial endeavors due to their gender;**
>
> **(D) such discrimination takes many overt and subtle forms adversely impacting the ability to raise or secure capital, to acquire managerial talents, and to capture market opportunities;**
>
> (E) it is in the national interest to expeditiously remove discriminatory barriers to the creation and development of small business concerns owned and controlled by women;
>
> (F) the removal of such barriers is essential to provide a fair opportunity for full participation in the free enterprise system by women and to further increase the economic viability of the Nation.[1]

These findings continue to be relevant and accurate today as demonstrated by the 1992 Annual Report of the National Women's Business Council ("NWBC"). In addition to finding a general barrier to access to capital, the NWBC found that successful women-owned telecommunications companies did not overcome the obstacles for obtaining financing after they had reached a level of funding and profitability satisfactory for most other businesses:

> Women in both high technology industries and telecommunications who actually had found funding in the $6 to $18 million range told of difficulties which seemed far beyond what should be expected for companies with records of successful and profitable operation.

Furthermore, venture capitalists who testified before the NWBC stated that "women-owned businesses, even those few seeking capital at the level which might interest venture capital

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[1] 15 U.S.C. § 631(h).

sources, rarely fit the profile of the few ventures funded each year."

- **The Proposed Competitive Bidding Rules Do Not Provide A Realistic Opportunity for Women-Owned Businesses**

The Omnibus Budget Reconciliation Act of 1993 requires the FCC to structure its competitive bidding rules to provide economic opportunity for women-owned businesses in the offering of licensed spectrum services and to disseminate licenses among a broad range of applicants, including businesses owned by women. The FCC has proposed to treat women-owned businesses and businesses owned by minorities differently under the competitive bidding rules. Specifically, the FCC has suggested that it may permit small businesses and rural telephone companies to pay their bids in installments while giving women-owned and minority-owned businesses tax certificates. The experience of women-owned companies in raising capital and the difficulties they have encountered (regardless of their size) require that women-owned companies also be authorized to pay their winning bid price in installments. Without the ability to pay the bid price in installments there effectively will be no opportunity for women-owned companies to compete successfully for PCS licenses or other spectrum-based services. PCS will be a capital intensive industry that will involve millions of dollars of cost in network deployment above and beyond the costs for purchasing spectrum. Without the ability to spread the spectrum payment out over time, women-owned businesses will be unable to acquire the capital to meet these costs.

- **Gender-Based Preferences In Competitive Bidding Rules are Constitutional**

The allocation of Federal spectrum can be conditioned on practices that will not perpetuate the prevailing impaired access of women-owned business to ownership of companies operating radio-based networks licensed by the FCC. *See Fullilove v. Klutznick*, 448 U.S. 472, 475 (1980). The allocation of spectrum by the FCC is analogous to the allocation of Federal funds. Congress' remedial efforts to assure participation by minority groups excluded from the allocation of Federal resources have been upheld as constitutional. *Id.* Furthermore, promoting economic opportunity for women has been recognized by the Supreme Court as a substantial government interest that supports gender-based government policies. *See Califano v. Webster*, 430 U.S. 313, 317 (1977); *see also Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *Coral Construction Co. v. King County*, 941 F.2d 910, 932 (9th Cir. 1991). Numerous commentors have submitted evidence and legal analyses that demonstrates the constitutionality of gender-based preferences in licensing of spectrum-based services.

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FEDERAL COMM COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Implementation of Section 309(j) of the Communications Act Competitive Bidding	)	PP Docket No. 93-253

REPLY COMMENTS OF *CALL-HER*, L.L.C.

CALL-HER, L.L.C. ("*Call-Her*") hereby submits its reply comments on the Federal Communications Commission's ("FCC") Notice of Proposed Rulemaking ("NPRM") to establish competitive bidding rules for awarding radio spectrum licenses. In its initial comments *CALL-HER* addressed the implementation of the FCC's statutory mandate to provide women-owned businesses a realistic opportunity to participate in the provision of spectrum based services. *CALL-HER* urged the Commission specifically to authorize women-owned businesses to: (1) bid for spectrum set aside for designated entities; (2) pay their winning bid prices in installments, waive the requirement for an upfront payment and award tax certificates to businesses owned by women; and (3) adopt the National Women's Business Council's definition of women-owned business.

The comments submitted in response to the NPRM provide a record sufficient to withstand any constitutional challenge to preferential payments plans, spectrum set asides and specific bidding rules for women-owned businesses. Specific rule provisions are warranted both as remedial measures to address discrimination against women and as substantially related means to promote a government interest.

I. SIGNIFICANT BARRIERS TO CAPITAL EXIST FOR WOMEN-OWNED BUSINESSES.

Comments filed by other parties confirm the capital intensive demands of the telecommunications industry and the barriers that these demands present to women's participation in the ownership of telecommunications companies. Existing dominant telecommunications carriers recognize this barrier and encourage the Commission to adopt preferential payment plans. NYNEX ascribes the lack of designated entities in the telecommunications industry to "the inability of designated entities described in the legislation, to make the necessary investment commitments."[1/] Accordingly, NYNEX encourages the Commission to award designated entities a preference focused on financial opportunities. AT&T encourages the Commission to design a group of financial "enabling devices" to help designated entities overcome the capital formation difficulties historically experienced by designated entities.[2/]

The wealth of evidence submitted by American Women in Radio and Television ("AWRT"), combined with the statistics submitted

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1/ *See Comments of NYNEX* at 19.

2/ *See Comments of AT&T* at 24.

by *Call-Her*, provide a sufficient record of the exclusion of women-owned businesses from the telecommunications industry and discrimination against women in the financial markets. The Congressional Caucus on Women's Issues (the "Caucus") identifies as one of the greatest obstacles faced by women entrepreneurs the ability to obtain the necessary credit to start or expand their ventures.[3/] The Caucus cites a study by the National Foundation for Women Business Owners that found that 76% of its members had to rely at least in part on personal capital to finance their business start-ups and that 38% lacked commercial credit entirely. The Caucus attributes the difficulties women face in raising capital to the types of businesses that banks are willing to finance and *sexual discrimination in commercial lending.*[4/] The Government, by permitting women to pay the bid price in installments, can help eradicate this discrimination against women by providing financing to women-owned businesses. By authorizing women-owned businesses to pay their bid price in installments, the Federal government in essence will finance the acquisition of spectrum.[5/]

3/ *See Comments of AWRT* at Exhibit 4, p.2.

4/ *Id.*

5/ *CALL-HER* strongly opposes the suggestion by BellSouth that designated entities be required to execute personal guarantees for the bid price. *Comments of BellSouth* at n.38. The financial commitment of a corporate entity should not be measured by the principals' willingness to sacrifice their home or personal assets. Furthermore, such a requirement would require a personal sacrifice not required by other bidders.

CALL-HER has analyzed the costs of purchasing the equipment to deploy a PCS system in a metropolitan area serving an initial customer base of 5,000 and estimates that the costs would approximate $5-7.5 million, *excluding the cost of spectrum*. These capital requirements alone present a challenge for women-owned businesses. Only armed with the ability to prorate its spectrum payments over time and other favorable conditions, such as the spectrum set asides, will women-owned businesses have a realistic opportunity to participate in PCS.

II. SPECTRUM MUST BE SET ASIDE FOR BIDDING SOLELY BY DESIGNATED ENTITIES.

The Commission's proposal to set aside two channel blocks for bidding by designated entities recognizes the reality in the market -- that not all bidders are equipped with equivalent resources. The economic theory that goods are evaluated based on demand and at a price equivalent to their value does not account for the "externality" of gender discrimination. Women-owned businesses can not compete against non-designated entities for spectrum and win due to their more limited access to capital. Accordingly, a set aside of spectrum for bidding solely by designated entities is appropriate.

A spectrum set aside is authorized by the Omnibus Budget Act of 1993 (the "Budget Act"). The Budget Act does not circumscribe the Commission's authority in making bandwidth assignments or adopting procedures that ensure that businesses owned by women have an opportunity to participate in spectrum-based services. Indeed, the Budget Act vests the Commission with broad authority to fashion competitive bidding rules that fulfill the statute's mandate. Specifically, Section 309(j)(4) of the Budget Act requires the Commission to prescribe area designations and ***bandwidth assignments*** that promote

> (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women.

The FCC further is authorized to use any procedures to ensure participation by women in the provision of spectrum-based services:

> [the Commission shall] 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, and for such purposes, consider the use of tax certificates, bidding preferences ***and other procedures*** . . . .

III. COMPETITIVE BIDDING RULES THAT SET ASIDE SPECTRUM FOR BIDDING BY ALL DESIGNATED ENTITIES AND THAT PERMIT WOMEN-OWNED COMPANIES TO PAY THEIR WINNING BID IN INSTALLMENTS ARE SUBSTANTIALLY RELATED TO A SIGNIFICANT GOVERNMENT OBJECTIVE.

The promotion of economic opportunities for women in providing spectrum-based services is a legitimate government objective that can be achieved through spectrum set aside for bidding by designated entities, including women-owned businesses, and competitive bidding rules that provide for installment payments. *CALL-HER* concurs with and endorses AWRT's legal analysis of the constitutionality of gender-based preferences in a competitive bidding licensing process. As the cases cited in AWRT's comments demonstrate, promoting economic opportunity is an important government interest. *See Califano v. Webster*, 430 U.S.

313 (1977); *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *Coral Construction Co. v. King County*, 941 F.2d 910-932 (9th Cir. 1991). Competitive bidding rules that are structured to permit businesses owned by women to bid against other designated entities only and to pay their bid price in installments are substantially related to this objective.

Policies that promote participation by women-owned companies to ensure they are not shut out of spectrum licensing by competitive bidding are supported fully by the Budget Act and the policies of the Clinton Administration. In the President's Progress Report: *Technology for Economic Growth: President's Progress Report*, the Clinton Administration expressed its concurrent support for competitive bidding and for policies that support the participation of women-owned businesses in spectrum auctions:

> The Administration has pledged support for greater reliance on market principles in distributing spectrum among the widely differing wireless services that will be part of the NII. At the same time, the Administration will promote policies to ensure that entrepreneurs and small, rural, and minority- and women-owned businesses are able to participate in spectrum auctions.[6]

The policies of promoting competitive bidding while incorporating regulatory incentives to address inequalities that still exist in the marketplace are consistent and constitutional.

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[6] *Technology for Economic Growth: President's Progress Report* at 45.

IV. THE RULE PROVISIONS FOR DESIGNATED ENTITIES SHOULD NOT BE SEVERABLE FROM THE COMPETITIVE BIDDING RULES GENERALLY.

Any challenge to the competitive bidding rules' provisions for designated entities must be considered a challenge to the competitive bidding rules generally. MCI requests that the Commission specify that any set asides adopted to implement the Act's requirements for minority and women-owned companies be explicitly designated as severable from the other rules adopted for competitive bidding.[7] Severability of the rules, however, would encourage litigation of the rules validity for the mere sake of delaying these entities entrance into the industry. A declaration that the rules are severable will provide spectrum winners with an incentive to challenge this portion of the rules to minimize competition. This delay would impose an additional significant disadvantage on women-owned businesses. Accordingly, any challenge to this portion of the rules should stay implementation of the competitive bidding process generally to inhibit frivolous litigation.

V. CONCLUSION.

The Commission is on the verge of licensing a new industry that provides a wealth of opportunity for innovation, growth and economic development. These opportunities represent a unique opportunity for women-owned businesses to assume an ownership position in the telecommunications industry. The opportunity will be lost for PCS and other spectrum-based services unless the

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[7] *See Comments of MCI* at 15.

competitive bidding rules are structured to recognize the barriers to capital that women-owned businesses of all sizes face in the private financial markets. The structure of the competitive bidding rules is critical to the future of women in telecommunications ownership. The FCC should not turn a deaf ear to that need nor should it shy from gender-based preferences that are amply supported by the record and substantially related to the legitimate government interest of providing economic opportunity for women.

Respectfully submitted,

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November 24, 1993

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding	)	PP Docket No. 93-253

COMMENTS OF *CALL-HER*, L.L.C.

SUMMARY

Women-owned businesses generated only approximately 1/2 of 1% of the total revenues generated by communications establishments in the United States in 1987. Statistics on the number of women-owned businesses in the communications field generally reveal that women have effectively been excluded from ownership interests in the communications industry. The award of spectrum licenses by competitive bidding will perpetuate this exclusion unless the competitive bidding rules adopted by the FCC include specific provisions to remedy women's exclusion from the communications industry and to address the barriers that women face in raising capital. Accordingly, to implement Congress' intent in the Budget Act, the FCC's competitive bidding rules should:

(1) authorize women-owned businesses to bid for PCS licenses and licenses in other spectrum-based services as "designated entities;"

(2) adopt the definition of women-owned businesses recommended by the National Women's Business Council; and

(3) permit women-owned businesses (regardless of their size) to pay the bid price in installments, waive the requirement for an upfront payment as a condition for bidding, and grant women-owned businesses tax certificates.

Incorporation of these provisions into the competitive bidding rules will fulfill Congress' mandate that women-owned business have an opportunity to participate as owners in spectrum-based services licensed by the FCC, including PCS. Furthermore, these provisions are appropriate as remedial measures to address the discrimination against women in entrepreneurial activities and in obtaining access to capital. These provisions also are substantially related to the valid government objective of providing economic opportunity for women and promoting the dissemination of spectrum licenses to a wide range of applicants including businesses owned by women. Without these provisions, the competitive bidding rules will perpetuate the continued barriers to the entry of women-owned businesses into the telecommunications industry.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding	)	PP Docket No. 93-253

COMMENTS OF *CALL-HER*, L.L.C.

CALL-HER, L.L.C. ("*Call-Her*") hereby submits its comments on the Federal Communications Commission's ("FCC") Notice of Proposed Rulemaking ("NPRM") to establish competitive bidding rules for awarding radio spectrum licenses. *CALL-HER* is a women-owned telecommunications company headquartered in Annapolis, Maryland and dedicated to becoming a premier provider of licensed PCS. The principals of *CALL-HER* have over twelve years of combined involvement with the telecommunications industry.

I. INTRODUCTION

In the NPRM, the FCC questions what means it should employ to fulfill its Congressional mandate that it provide opportunities for participation by women-owned businesses in spectrum-based services licensed by competitive bidding. The FCC tentatively concludes that women-owned businesses and minority-owned businesses should be treated differently than small businesses and rural telephone companies under the competitive bidding rules despite the fact that each of these groups is identified in the Omnibus Budget Reconciliation Act (the "Budget Act"). Although the Budget Act does not explicitly require that the competitive bidding rules identically address small businesses, rural telephone companies and businesses owned by women and minorities ("designated entities"), the Budget Act does require that the rules be structured to give each of the "designated entities" an opportunity to participate in spectrum services licensed by competitive bidding. The FCC suggests that women-owned businesses and minority-owned businesses could only receive tax certificates. The FCC cannot, however, consistent with the Budget Act, cast women-owned businesses to the side and grant them lesser and differing preferences that do not provide a realistic opportunity. Such a "preference" and indeed, any preference short of payment of the bid price in installments, will create a "regulatory glass ceiling" and prohibit women from participating at an ownership level in licensed spectrum services.

Statistics maintained by the Department of Commerce document the under-representation of women in the telecommunications industry and the barriers they face in obtaining access to capital -- a precondition to broader participation in the capital-intensive telecommunications industry. Furthermore, the 1992 Annual Report of the National Women's Business Council ("NWBC") identifies several significant barriers to women-owned companies' full participation in the telecommunications industry. These findings justify Congress' mandate in the Budget Act as both a remedial measure to address discrimination against women and as a substantially related means of fulfilling the valid government objective of ensuring that a competitive bidding system does not perpetuate the under-representation of women-owned businesses in the telecommunications industry. This evidence further supports the prescription of competitive bidding rules by the FCC that authorize women-owned companies to pay their bids in installments and to receive tax certificates. A "lesser" preference will eliminate rather than promote the opportunity for women-owned businesses to compete successfully in auctions for PCS and other spectrum licenses.

CALL-HER's comments are limited to the issues raised by the Commission in the NPRM regarding the implementation of Congress' directive that women-owned companies have an economic opportunity in the licensing of spectrum based services, such as PCS, and that spectrum licenses be disseminated among a broad range of applicants including businesses owned by women. *CALL-HER* provides statistical evidence of the exclusion of women-owned businesses from the telecommunications industry. In addition, *CALL-HER* provides evidence of the difficulty women-owned businesses face in raising capital regardless of their size. As documented by the NWBC in its 1992 report submitted to Congress and the President, women-owned companies (regardless of their size) face significant obstacles to raising capital. Finally, *CALL-HER* urges the FCC to adopt in its competitive bidding rules the definition of women-owned business recommended for all

Federal agencies by the NWBC. This definition will ensure that women control and operate the companies that are eligible to bid as women-owned businesses.

II. THE EXCLUSION OF WOMEN-OWNED BUSINESSES FROM THE TELECOMMUNICATIONS INDUSTRY

A. Congress Has Recognized That Discrimination Against Women Bars Their Full Participation in Business Ownership

Women-owned businesses are significantly under-represented in the telecommunications industry, a fact recognized by Congress in the Budget Act and documented statistically. Congress has acknowledged the under-representation of women in the ownership of telecommunications facilities since 1982.[1/] In addition, Congress has continued to promote the entry of women into business ownership and the communications industry. Most recently, H.R. 2639, a telecommunications infrastructure bill, included as one of its purposes "to increase public broadcasting services and facilities available to, operated by, and owned by minorities and women."

Four years ago, in recognition of the discrimination women face in all entrepreneurial endeavors, Congress enacted the Women's Business Ownership Act of 1988 (the "Act"). Findings incorporated into the Act by Congress provide an accurate account of the discrimination that women-business owners faced in 1988 and continue to face in 1993. These findings are applicable equally to the telecommunications industry. Congress found, in part:

1/ *See* H.R. No. 97-765 (Conf. Rep.), 97th Cong., 2d Sess. 43, *reprinted in* 1982 U.S. Code Cong. & Adm. News, 2288-89.

(A) women owned business has become a major contributor to the American economy by providing goods and services, revenues, and jobs;

(B) over the past two decades there have been substantial gains in the social and economic status of women as they have sought economic equality and independence;

(C) despite such progress, women, as a group, are subject to discrimination in entrepreneurial endeavors due to their gender;

(D) such discrimination takes many overt and subtle forms adversely impacting the ability to raise or secure capital, to acquire managerial talents, and to capture market opportunities;

(E) it is in the national interest to expeditiously remove discriminatory barriers to the creation and development of small business concerns owned and controlled by women;

(F) the removal of such barriers is essential to provide a fair opportunity for full participation in the free enterprise system by women and to further increase the economic viability of the Nation.[2/]

These findings continue to be relevant and accurate today as demonstrated by the 1992 Annual Report of the NWBC. In addition, as the NWBC has found in its work, the discriminatory barriers against women-owned businesses are not limited to small businesses.

B. Women-Owned Businesses Are Significantly Under-Represented in the Telecommunications Industry

The identification of women-owned businesses in the Budget Act and the development of competitive bidding rules that provide for their participation does not rest on impermissible

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[2/] 15 U.S.C. § 631(h).

stereotyping[3] -- it rests on cold, hard facts. Despite the wealth of new opportunities that emerged in the telecommunications industry in the 1980s, statistics demonstrate that women-owned businesses were not able to seize this opportunity. In 1987, women-owned businesses accounted for 30% of all firms in the United States and 13.9% of the gross receipts generated by all U.S. firms.[4] This figure stands in contrast to the fact that in 1987 women represented more than 51% of the population of the United States. In 1987, only 7,899 of the 4,114,787 women-owned firms were communications firms.[5] Even this statistic overstates the number of women-owned businesses involved in telecommunications. Communications firms, as defined by the Department of Commerce in its report, include women-owned television and radio broadcast firms and are not limited to telecommunications companies. Accordingly, the actual number of women-owned telecommunications companies is less than 7,899. Furthermore, even with this broad definition of "communications," sales and receipts generated by women-owned "communications" firms accounted for less than .5% of the revenues generated by all U.S. communications establishments.[6]

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[3] *See Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3014 (1990).

[4] *Women Owned Business*, U.S. Department of Commerce (1990) (based on the 1987 economic census).

[5] *Id.*

[6] *Id.* In 1987, U.S. communications establishments generated over $201 billion in revenue. Women-owned businesses accounted for $866,330,000 of those revenues.

C. **Women-owned Businesses Face Barriers in Access To Capital Based on Their Gender and Regardless of Their Size**

One of the barriers that have prevented women's entry as owners and principals of telecommunications firms is the difficulty women-owned businesses face in raising capital. Historical discrimination against women has prohibited women-owned businesses from obtaining access to adequate capital and from entering capital-intensive industries such as telecommunications. In addition, women have only recently begun to acquire the technical and managerial expertise to successfully enter the telecommunications industry in an ownership position. These historical facts were documented in the 1992 Annual Report of the NWBC submitted to the Congress and the President. The NWBC was established by the Women's Business Ownership Act of 1988 to review the status of women business owners and make annual policy recommendations to the President and Congress.

In its 1992 Annual Report, the NWBC identified three major barriers to women-owned businesses' entry into the telecommunications industry. Based on testimony presented in 1992 at an expert roundtable convened by the NWBC on Women Entrepreneurs in Telecommunications, the NWBC identified three impediments to women's participation in telecommunications: (1) a marked lack of women with the technical and managerial expertise -- plus length of experience -- to start a successful telecommunications business; (2) a lack of information networks established for women entrepreneurs that can provide advice and support; and (3) access to capital. Significantly, the NWBC found that successful women-owned telecommunications companies did not overcome the obstacles for obtaining financing after they had reached a level of funding and profitability satisfactory for most other businesses:

> Women in both high technology industries and telecommunications who actually had found funding in the $6 to $18 million range told of difficulties which seemed far beyond what should be expected for companies with records of successful and profitable operation. At this top level of small business as well as the start-up level, women do not fit traditional, comfortable profiles, and compete less successfully for scarce expansion dollars.

Furthermore, venture capitalists who testified before the NWBC stated that "women-owned businesses, even those few seeking capital at the level which might interest venture capital sources, rarely fit the profile of the few ventures funded each year."

The impact of gender on financing demonstrates that the FCC's proposal to provide women-owned businesses opportunity through preferences provided to small businesses will not in fact provide real opportunity for women-owned businesses. As reported by the NWBC, even women-owned companies not classified as small businesses by the Small Business Administration experience difficulty in obtaining financing. Women-owned companies that do not qualify as small businesses under the SBA's definition do not have the resources necessary to successfully deploy an entire PCS network. Accordingly, opportunities for women-owned businesses should not be addressed through the same vehicle of addressing small business. The opportunities for businesses owned by women must be defined by rule provisions that address women-owned businesses specifically and address the barriers that most, if not all, women-owned companies face in raising capital.

III. THE BUDGET ACT APPROPRIATELY SEEKS TO REMEDY THE EXCLUSION OF WOMEN FROM OWNERSHIP IN TELECOMMUNICATIONS COMPANIES AND PROMOTES A VALID GOVERNMENT OBJECTIVE

The Budget Act requires the FCC to structure its competitive bidding to provide economic opportunity for women-owned businesses in the offering of licensed spectrum services and to disseminate licenses among a broad range of applicants, including businesses owned by women. The allocation of Federal spectrum can be conditioned on practices that will not perpetuate the prevailing impaired access of women-owned business to ownership of companies operating radio-based networks licensed by the FCC. See Fullilove v. Klutznick, 448 U.S. 472, 475 (1980). The allocation of spectrum by the FCC is analogous to the allocation of Federal funds. Congress' remedial efforts to assure participation by minority groups excluded from the allocation of Federal resources have been upheld as constitutional. Id.

These Congressional mandates for increasing the representation in ownership of telecommunications companies by women and in promoting the wide dissemination of licenses, are legitimate government objectives. The government objectives that are fostered by the Budget Act and that will be accomplished by appropriately structured competitive bidding rules include providing opportunities for women-owned businesses that would continue to be excluded in any meaningful way from ownership in emerging services, such as PCS, and avoiding excessive concentration of licenses. The Congressional objective of disseminating control over spectrum licenses is consistent with the underlying goals of the Communications Act of 1934, and embodies the fundamental concept of competition that the Commission has consistently promoted and seeks to promote in licensed PCS.

Competitive bidding rules that permit women-owned businesses to pay their bid price in installments and provide the opportunity for women-owned companies to participate in spectrum-based services are substantially related to these legitimate government objectives. The statistics that document the disparity between women-owned businesses and other non-women-owned businesses in the telecommunications industry provide a meaningful link, and the required nexus, between the Budget Act and competitive bidding rules that permit women-owned companies to pay their bids in installments and the legitimate government objectives of providing economic opportunities for women and disseminating licenses to a range of applicants including businesses owned by women. This hard evidence and statistical proof was not considered by the court in Lamprecht v. FCC, 958 F.2d 382, 395 (D.C. Cir. 1992).

Finally, competitive rules structured to abide by the Congressional directives concerning opportunities for women-owned companies by providing for the payment of the bid price in