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PP-93-253

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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

JUN 3 1994

FCC MAIL ROOM

To: The Secretary

EX PARTE PRESENTATION

MasTec, Inc. submits an original plus one copy of this memo and attached letter (hand-delivered ex-parte to Commissioners James Quello, Rachelle Chong, Susan Ness, and Byron Marchant, Senior Legal Advisor to Commissioner Andrew C. Barrett) for inclusion in the record of the above-referenced rule making proceeding.

Respectfully submitted,

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May 31, 1994

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May 31, 1994

VIA HAND DELIVERY

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Re: Minority set-asides by the FCC in the licensing of Personal Communications Services

Gentlemen:

You have asked for opinion as to the constitutionality of the minority set-aside program being contemplated by the Federal Communications Commission with respect to the licensing of Personal Communications Services (PCS) under section 309(j) of the Communications Act of 1934, as amended. We understand that you intend to apply for a PCS license in an auction which is limited to minority applicants, and before doing so

you would like our opinion that the proposed bidding process is not constitutionally defective.

You have advised that you may submit our opinion to the Commission, in response to its request for comment on proposed licensing rules and procedures. To assist the Commission in evaluating our analysis, we have attached to this letter an abbreviated resume of Arthur England, the member of our law firm primarily responsible for this opinion.

Background Regarding Proposed PCS Licensing

In the Omnibus Budget Reconciliation Act of 1993, Public Law 103-66, Title VI, section 6002, 107 Stat. 312, 387-91 (hereafter called the Budget Act), Congress added a new subsection (j) to section 309 of the Communications Act of 1934. That new subsection authorized the Commission to utilize competitive bidding for permits to use the electromagnetic spectrum. In various places in the authorization -- subsections 309(j)(3)(B) and 309(j)(4)(C) and (D) -- Congress directed that small businesses, rural telephone companies, and businesses owned by women and minorities (so-called Designated Entities") are to be given an opportunity to participate in providing spectrum-based services. Set-asides are not specifically mentioned as a mechanism for achieving minority participation under these provisions.

Since the enactment of the Budget Act on August 10, 1993, the Commission has on several occasions considered and requested comment regarding its licensing responsibilities under the subsection 309(j). On September 23, 1993, the Commission adopted and on October 12 released a Notice of Proposed Rule Making. A portion of the Notice was directed to the treatment of Designated Entities, and discusses the various means being considered by the Commission for carrying out the perceived intention of Congress in providing economic opportunities for Designated Entities. That section of the Notice also contains an abbreviated discussion of the legislative history of the Budget Act. (See Notice at ¶¶ 72-76).

On March 8, 1994, the Commission adopted and on April 20 released a Second Report and Order which set forth proposed principles for determining whether license may be auctioned. Constitutional issues concerning minority set-asides were specifically identified and discussed in a section of the Report dealing with the treatment of Designated Entities. (See Report ¶¶ 289-97). The Commission adopted strict eligibility requirements for minority preferences, in order to assure that the preferences actually accorded are neither over-inclusive nor too narrowly tailored to fulfill the statutory

objective of ensuring economic opportunity for minorities. (See Second Report at ¶¶ 274-78, 297). The Commission's eligibility criteria appear to us to parallel those discussed with approval in the United States Supreme Court's decision in *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990).

On April 20 the FCC adopted and on May 10 released a Fourth Report and Order, which again touched on the treatment of Designated Entities. (Fourth Report ¶¶ 34-53).

The Commission has received extensive commentary on its proposed rulemaking, including a limited amount of discussion regarding the constitutional issue of set-asides. We will not here repeat the points made in those several submissions. In particular, we have no comment to make on the points made by some commentators regarding (i) the Commission's responsibility to consider or not to consider constitutional questions, (ii) the addition of exemption and waiver rules to bolster the constitutional stature of proposed rules, or (iii) the ambiguous nature of congressional rejection of an identifiable set-aside program for rural telephone companies.

Analysis

We understand that, in the context of section 309(j), the term "set-asides" means the Commission's awarding in auction of designated electromagnetic spectrum blocks as to which bidding will be open only to applicants who are "small businesses, rural telephone companies and businesses owned by minority groups and women." We confine our analysis to "minority" set-asides, as programs for other Designated Entities may involve a different analysis. *See Lamprecht v. Federal Communications Comm'n*, 958 F.2d 382 (D.C. Cir. 1992).

Our analysis of the constitutionality of a minority set-aside program for PCS under section 309(j) is abbreviated in that we have not included all of the background and analysis leading to the conclusions which we have reached. In the interest of brevity we will not here repeat the comments and analytical framework set out by the Commission in its public releases regarding the licensing of PCS to Designated Entities.

As we view the matter, there are basically two issues that need to be addressed. The first is whether a minority set-aside program is contemplated by the Budget Act at all. The second is whether the creation of such a program denies non-minorities the equal protection of the law. We address these separately. We start by noting that the

minority set-asides being considered by the Commission here are "benign," as that term is used in an equal protection analysis.

1. Does a set-aside for minorities fall within the ambit of the Budget Act?

As earlier noted, subsection 309(j) contains three, separate declarations by Congress of its intention to promote economic opportunity for Designated Entities, including minorities, through the competitive bidding processes established by the addition of subsection (j) to the Communications Act of 1934. In describing the design of systems for bidding, Congress directed the Commission to promulgate regulations which "shall" seek to promote

> "economic opportunity . . . by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minority groups and women."

Section 309(j(3)(B).

In addressing regulations which the Commission should adopt, Congress said that the Commission "shall" prescribe area designations and bandwidth assignments that promote economic opportunities for precisely the same designated entities and groups. Section 309(j)(4)(C). Additionally, in prescribing that evaluations be performed by the Commission after 3 years of operation under the new subsection (j), Congress directed the Commission to report whether and to what extent the Designated Entities, again including minority groups, were able to participate successfully in the competitive bidding process. Section 309(j)(12).

There is, obviously, a strong emphasis in the 1993 legislation on providing economic opportunity to minority groups through the competitive bidding process for electromagnetic spectrums. This emphasis convinces us that Congress meant to endow the Commission with the authority to carry out that broad objective in alternate, appropriate ways, as the Commission deems necessary and appropriate. We do not view the absence of set-asides in subsection 309(j)(4)(D) as excluding them from the acceptable range of measures toward the end which Congress directed the Commission to consider. Congress used the catch-all phrase "and other procedures" after listing two specifically-named considerations. That phraseology is consistent with Congress' authority to delegate broad powers to administrative agencies, unconstricted by narrowed standards or tailored means. *See Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Yates v. United States*, 321 U.S. 414 (1944).

We conclude, therefore, that a program of minority set-asides is within the ambit of the authority delegated to the Commission by the Budget Act.

2. Are minority set-asides constitutional?

The constitutional concern that has surrounded minority set-asides is whether non-minorities are denied equal protection of the law under the Fifth Amendment to the United States Constitution. The leading precedent on that question is the *Metro Broadcasting* decision. That decision holds that the standard for judicial review of a congressionally-mandated program which creates a benign racial classification is not "strict scrutiny," but rather the two-pronged test of (i) whether the classification serves an important governmental objective and (ii) whether the program used is substantially related to the achievement of that objective. The *Metro Broadcasting* decision upheld two initiatives adopted by the Commission to promote minority participation in the broadcast industry, finding that broadcast diversity is an important governmental objective and that the two initiatives, both founded on minority ownership, are substantially related to achieving minority participation.

One aspect of the *Metro Broadcasting* decision warrants mention here. The Court specifically found on the facts of *Metro Broadcasting* that there was no undue burden on non-minorities by reason of the Commission's two initiatives, because there was no "settled expectation" or right to a license for electromagnetic frequencies. That principle has force where, as here, the Commission is offering multiple spectrums at auction, so that non-minorities are given multiple opportunities for spectrums even though they are not given access to a particular spectrum that has been set aside for Designated Entity bidders only.

The Commission has duly noted in its public releases regarding section 309(j) that subsequent case law has applied the standard of review and the principles of the *Metro Broadcasting* decision. We have found no deviation from its principles, and no subsequent, limiting decisions of the Supreme Court itself.

Aside from the standard of review and analysis provided by the *Metro Broadcasting* decision, we have considered the following matters as bearing on our equal protection analysis.

1. The Commission's proposed program for set-asides would limit the applicants for certain spectrums to persons or groups who are Designated Entities, as opposed to allowing open competition within those

spectrums and then recognizing minorities' lack of access to capital by permitting credits or installment payments. A set-aside methodology is uniquely appropriate to provide economic opportunity for minorities where, as here, it is estimated that a very large dollar amount is expected to be derived from the auctions. The expected level of return for the government reflects the immense importance of PCS to entities already in the communications business, which in turn suggests that the ability of minority groups to compete head-to-head will in all probability be more difficult than under less competitive circumstances.

2. The focus of Congress was clearly on economic opportunity. The Commission has both the authority and administrative expertise to assess the likelihood that minorities will not have a fair chance to prevail in any spectrum auction without one or more spectrum set-asides in which they are not forced into open, head-to-head bidding with non-minorities. The Commission has obviously made that assessment in proposing a more level playing field as to some spectrums, through set-asides. The clarity of congressional directive brings the Commission's proposal comfortably within its discretionary authority to implement the legislation.

3. An equal protection analysis does not require that all spectrums to be auctioned for PCS be equally accessible for bidding to everyone. An across-the-board equality would not seem to be essential where opportunities abound within multiple, separate aspects of the process. The array of spectrums being auctioned provides adequate opportunity for all bidders, including non-minority bidders, to participate and compete over the course of the entire auction process.

Conclusion

Based on our review of the Budget Act and the constitutional issues regarding minority set-asides, we believe that the Commission is within its authority, and the intendment of the enabling legislation, in attempting to use a minority set-aside mechanism for issuing some of the licenses to be awarded for PCS. We also believe that

the Commission's set-aside program under section 309(j) would be sustained in the face of an equal protection challenge.

Very truly yours,

GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.

By: Arthur J. England Jr.

AJE/ct

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ARTHUR J. ENGLAND, JR.

Mr. England is engaged in the practice of law in Miami, Florida with Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., where he devotes his principal attention to appellate work, commercial litigation, administrative law and constitutional matters. He is a graduate of the Wharton School of Finance and Commerce of the University of Pennsylvania (B.S. 1955), the University of Pennsylvania Law School (LL.B. magna cum laude, 1961), and the University of Miami Law School (LL.M. in Taxation, 1972). He served as a Justice of the Supreme Court of Florida from 1975-81, including a term as Chief Justice from 1978-80. Prior to his service on the Court, Mr. England has served as Consumer Advisor and Special Counsel to the Governor of Florida (1972-73), and as special tax counsel to the Florida House of Representatives (1971-72). He was an associate with Dewey Ballantine Bushby Palmer & Wood in New York City (1961-64), and thereafter a partner or shareholder with Miami-based law firms. He has been listed in *The Best Lawyers in America* for the past two years.

Mr. England has served as President (1990-92) of the American Academy of Appellate Lawyers; Chairman (1989-90) and member (1986-90) of the American Bar Association's Commission on IOLTA; Chairman of the Advisory Board of the National IOLTA Clearinghouse (1983-86); and Deputy Chairman (1979-80) and member of the Executive Council (1980-81) of the National Conference of Chief Justices. He was draftsman for the Florida Income Tax Code (1971), the Florida Deceptive and Unfair Trade Practices Law (1973) and the Florida Administrative Procedure Act (1974). He has written and lectured extensively, including co-authorship of Florida practice manuals on appellate practice and administrative law. Mr. England has been the recipient of the Florida Bar Foundation's Medal of Honor (1983), the American Judicature Society's Herbert Harley Award (1986), the American Bar Association's Pro Bono Publico Award (1988), and the Anti-Defamation League's Jurisprudence Award (1991).