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FEDERAL COMMUNICATIONS COMMISSION

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93-253

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June 22, 1994

Honorable Howard L. Berman
U.S. House of Representatives
2201 Rayburn House Office Building
Washington, DC 20515-0526

Dear Congressman Berman:

This letter is in response to the May 20, 1994 letter written by you addressing section 309(j) of the Communications Act of 1934, which was added by section 6002 of the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 (1993). Your letter addresses the Commission's pending consideration of how to structure the competitive award of licenses for the use of the electromagnetic spectrum by emerging services so as to ensure that small businesses, rural telephone companies, and businesses owned by minorities and women will have a meaningful opportunity to participate in providing those services. The Commission is moving toward completing its consideration of the issues involved. Set forth below is a summary of its efforts.

Section 309(j) delineates the parameters within which the Commission is to structure a competitive process for allocating the spectrum for emerging wireless technologies such as personal communications services (PCS). The Commission has, for several years, worked diligently to foster the development and deployment of such technologies and services, fully aware of the promise they hold for economic growth, job creation, and competition in the telecommunications industry. It is now working to formulate the service by service rules that will govern the competitive bidding process created by Congress last August. The Commission approaches this effort driven by the knowledge that telecommunications is on the brink of a new era. The viable and visible participation of small businesses, rural telephone companies, and businesses owned by minorities and women is a critical goal in this new era, and one clearly recognized by Congress in its statutory design.

Structuring the competitive process to foster such participation is as significant and complex as any other issue in the Commission's PCS proceedings. In order to examine thoroughly this and other matters not subject to easy solution, the Commission established a special PCS Task Force comprised of senior officials of the Commission, including the Chief of the Private Radio Bureau, the Chief of the Office of Plans and Policy and the Chief Engineer of the Agency. The Task Force was charged with committing whatever expertise and resources that were necessary to explore various means of implementing Congressional intent. One of the primary tools used by the Task Force was to solicit and consider as many views from interested parties as possible. We think that the process, while often bringing forth conflicting perspectives, has served to heighten the focus of the issues at stake and will result in a fair and competitive framework being established.

The Commission, for example, has received views from over 100 members of Congress as to how best to ensure the participation of small businesses, rural telephone companies, and businesses owned by minorities and women in the provision of emerging

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services. These views have been circulated to each of the Commissioners. There have been over 500 comments submitted to the Commission relating to this issue, each of which has been individually analyzed. The Commission's staff has met with over 100 individuals or groups, representing the wide range of small businesses, minority businesses, women owned businesses and rural telephone companies. I personally have met with numerous individuals and groups, again representing the extensive interests involved.. The other Commissioners have undertaken similar efforts. The Commission staff has examined carefully the record of recent Congressional hearings. They have met with, and received the views of, recognized experts, as well as those government agencies with expertise in the subject areas involved.

We sincerely believe that this open and fluid process, while difficult and time consuming in this era of limited resources, is well worth the effort and will greatly enrich the ultimate decision. Our perspective is buttressed by the Commission's experience with regard to the spectrum allocation, service definitions and technical rules for broadband PCS that were finalized in the Commission's order adopted on June 9, 1994. Not unlike the pending matter, these issues initially engendered substantial debate and generated a range of views, yet, through a similar process, a decision commended by virtually all for its fairness and insight was reached.

The Commission's review and the foundation against which all views have been measured is the statute itself. In addition to referring to section 1 of the Communications Act of 1934, section 309(j)(3)(B), states that the objectives of the competitive process are:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resources made available for public use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and

(D) efficient and intensive use of electromagnetic spectrum.

The objectives stated in section 309((j)(3) are reiterated in section 309(j)(4), which addresses the content of the Commission's regulations. Section 309(j)(4)(A) urges consideration of "alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, ... , and combinations of such schedules and methods (.)" Section 309(j)(4)(D) urges that the Commission consider "the use of tax certificates, bidding preferences, and other procedures" to carry out the law. Section 309(j)(4) conveys the need to include performance requirements and provisions that inhibit unjust enrichment by those obtaining licenses through the competitive process.

As is the case with respect to any law, none of the provisions of section 309(j) can be read alone. Rather, all of its sections are intertwined and must be read together to reflect the law's symmetry. This is the Commission's fundamental responsibility. The provisions are applicable not only with regard to how the Commission establishes eligibility criteria and bidding methodologies, but also how it prescribes area designations and bandwidth requirements. Providing an impetus for the rapid deployment of technology, avoiding excessive concentration of licenses, and affording a genuine chance for small businesses, rural telephone companies, and businesses owned by minorities and women to

participate requires a delicate balance of what can be competing, if not at times inconsistent objectives.

An essential part of the balance is that the entities Congress has enumerated not only have genuine opportunities initially when licenses are competitively awarded, but also that they remain viable and pervasive participants in the actual provision of telecommunications services to industry and the public. After the competitive process is complete, we think that Congress intended a lasting environment of competition, opportunity and participation and not a return to the status quo. The opportunities structured should enable a variety of entrepreneurs to make a long term commitment to the provision of wireless services and reflect a diversity of offerings that increase customer choice and promote competition to all segments of the Nation. Providing meaningful opportunity to participate and broadening access by the public must be converging objectives. Notably, the House Report states that "to the extent that the Commission is attempting to achieve a justifiable social policy goal..., licensees should not be permitted to frustrate that goal by selling their license in the aftermarket." H.R. Rep. 103-111 at 257.

On March 8, 1994, the Commission adopted general guidelines for the competitive process envisioned by section 309(j). Its order included a broad menu of possible preferences from which the Commission would choose as it structured each service. Included in that order are installment payments, bidding credits, spectrum set-asides, and tax certificates. In designing the structure of each specific service, and deciding which, if any, preference or preferences to accord with respect to that service, the Commission must examine a range of factors that impact participation by potential competitors, particularly those Congress enumerated. These factors include the range of competitors, license size, the scope of services that can be offered, construction and equipment costs and the level of capital required. Analyzing these factors within the framework of the particular business involved is a critical facet of designing a response consistent with the law's objective.

A particular preference must be narrowly tailored to address specific barriers and not merely be used to circumvent the other objectives of the law. For example, installment payments are an effective means to address an inability to obtain financing and enable an entity to compete more effectively. Their use should be limited, however, to situations where financing is a barrier. To the degree that installment payments are utilized in a particular service, they should be confined to small businesses, including those owned by minorities and women, which are in fact "small" businesses and not entities with established revenue streams. See H.Rep. 103-111 at 255. Similarly, the structuring of rural telephone company participation must be done with a view towards the need of rural areas, i.e., the promotion of investment in, and rapid deployment of, new technologies and services in rural areas. The Commission must provide an incentive for rural telephone companies without unduly favoring these entities in markets where there is no compelling reason to do so. Any preference for rural telephone companies should be tied to their commitments to bring a range of new technologies to their rural telephone [redacted]ny service areas.

The task before the Commission is substantial. The issues are complex and important. The Commission must establish a structure that allows market forces to promote expeditious delivery of services, preclude unjust enrichment by those who would exploit the process, and afford meaningful opportunity for participation by small businesses, rural telephone companies, and businesses owned by minorities and women. The Commission has moved expeditiously to implement section 309(j) since its enactment in August 1993. Beyond its March 8, 1994 order establishing general guidelines for the competitive process, the Commission, on April 20, 1994, adopted specific procedures for the auction of the narrowband spectrum, which is scheduled for late July 1994. On June 9, 1994, it established the bandwidth requirements and area designations for broadband services. As noted, the open process the Commission has engaged in at each of these stages has been both demanding and rigorous. More importantly, it has resulted in the structuring of rules we believe balance an array of sometimes seemingly conflicting, but nonetheless

individually important, factors. In moving to establish the auction process for broadband PCS, we think that the proper balance will once more be reached by the extensive analysis the Commission has undertaken of both the law and the environment in which its purposes must be carried out.

We greatly appreciate receiving your letter. It has contributed significantly to our effort by affording us an opportunity to better evaluate the issues at stake.

Sincerely,

Reed E. Hundt

PRB
Auctions
PV
POH

Congress of the United States
House of Representatives
Washington, DC 20515

May 20, 1994

The Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W. Room 814
Washington, D.C. 20554

Dear Chairman Hundt:

We are concerned with recent indications that the Federal Communications Commission (FCC) may not be fully implementing Section 309(j) of the Communications Act passed by Congress in August 1993, granting the Commission authority to conduct auctions for licensing radio spectrum for the emerging Personal Communications Services (PCS) industry.

Congress specifically designed subsection 4(D) of Section 309(j) to ensure that women and minority owned firms, small businesses, and rural telephone companies are given an equal opportunity to participate in the PCS bidding process. As you know, PCS will create a massive new telecommunications market representing an historic opportunity to expand the ownership and control of our telecommunications industry to include all citizens.

Given the estimated costs of establishing a PCS network and purchasing licenses, it is our belief that the Commission must implement four essential mechanisms so minority and women owned firms (having at least 50.1 percent equity ownership and 50.1 percent controlling interest) and small businesses, including rural telephone companies, have access to the necessary capital to compete in the PCS market. These mechanisms are: frequency set-asides; installment payments; tax certificates; and bidding credits. Anything short of these devices, particularly set-asides, would fail to properly and fully implement the provisions of Section 309 (j)(4)(D) of the Communications Act and would have the likely effect of barring minority, women, and small business entry into the PCS market.

While the March 8, 1994 FCC regulations on competitive bidding for narrowband radio spectrum included some provisions for women, small businesses, and minority participation, the Commission did not treat these entities in a balanced manner, and failed to address rural telephone companies specifically. By failing to categorically and uniformly adopt spectrum set-asides on an MTA basis, tax

certificates, installment payments and bidding credits, the Commission falls short of complying with its congressional mandate to ensure fair opportunities for small business, including rural telephone companies, minorities and women in this new form of communication.

Compliance with Congressional intent is critical to ensure that the designated entities have access to participate in this emerging industry. We trust that you will look into this matter and address our concerns before the promulgation of auction rules for broadband PCS. We would also welcome your assurance that the Commission will pursue a strategy to suitably improve the problems we have raised.

Thank you for your attention to this matter. We look forward to your response.

Sincerely,

Bill Richardson, M.C.

Patricia Schroeder, M.C.

José Serrano, M.C.

Major Owens, M.C.

Melvin Watt, M.C.

Ileana Ros-Lehtinen, M.C.

Eddie Bernice Johnson, M.C.

Robert Torricelli, M.C.

Lincoln Diaz-Balart, M.C.

Nancy Johnson, M.C.

Carlos Romero-Barcelo, M.C.

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Robert Menendez, M.C.

Peter Deutsch, M.C.

Marjorie Margolies-Mezvinsky, M.C.

Timothy Penny, M.C.

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Congress of the United States
House of Representatives
Washington, DC 20515-3103

May 27, 1994

The Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W. Room 814
Washington, D.C. 20554

Dear Chairman Hundt:

I am enclosing the signatures of 44 additional members of Congress who would like to add their names to the letter regarding Personal Communications Services auction rules for the designated entities which I, along with 18 members, sent to you on May 20. A copy of the original letter is also attached.

I apologize for the hasty presentation of the additional signatures, but I believe that Congressional support for the strategy outlined in the attached letter is clear. Please contact me if I can provide you further information.

With warm regards,

Bill

Bill Richardson
Chief Deputy Majority Whip

BR/mm

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