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93-253

Honorable Blanche Lambert
U. S. House of Representatives
1204 Longworth House Office Building
Washington, D.C. 20515-0401

Dear Congresswoman Lambert:

This letter is in response to your May 26, 1994 correspondence signed by nine other members of Congress which addresses section 309(j) of the Communications Act of 1934. Section 309(j) 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 our 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

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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 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's 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 increases customer choice and promotes 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 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 appreciate receiving the views of you and the other Members. It affords us an opportunity to better evaluate the issues involved.

Sincerely,

Reed E. Hundt
Chairman

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Congress of the United States
Washington, DC 20515

May 26, 1994

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

Dear Chairman Hundt:

It is our understanding that the Federal Communications Commission will soon be adopting competitive bidding rules for broadband Personal Communications Services ("PCS"). We believe that the proper treatment of small businesses, businesses owned by minorities and women, and rural telephone companies (the "designated entities") in these rules is critical to achieving Congress' intent in the 1993 Budget Act.

Congress, in the Act, explicitly sought to foster economic growth in regions of the country and among segments of the population which historically have not benefitted fully or fairly from technological innovation. Congress also directed the FCC to disseminate PCS licenses to a wide variety of potential providers without consideration of the expectation of increased Federal revenues and in a manner that safeguards against excessive ownership concentration in the telecommunications industry.

In light of these objectives, we believe the only sure way to fulfill Congress' intent is for the FCC to specify frequencies in the lower PCS spectrum band for exclusive auctioning among designated entities in a competitive allocation plan. Such an action will guarantee that designated entities will be awarded PCS licenses. That status of licenses will lower financing barriers which historically have prevented them from small businesses and businesses owned by women and minorities to participate in the PCS industry and rural telephone companies to continue leading the deployment of advanced telecommunications services to rural areas.

We also are concerned that the FCC not adopt unduly restrictive rules concerning the definitions of designated entities and the business and financial arrangements which the designated entities may enter to enable them to bid for, own and operate PCS systems. While the FCC must ensure that its preferences for designated entities, including set-asides and installment payments, are not subject to abuse, the rules also must not hamper or preclude designated entities from raising the requisite amount of capital to build out and operate a PCS system. Designated entities cannot be placed in the position where they may forfeit their status in order to acquire the financial strength to become viable PCS businesses.

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More generally, the FCC needs to adopt clear and concise rules for broadband PCS quickly. Delay in issuing these rules undermines investor confidence and makes venture capital more scarce. Not only will designated entities find it harder to gain market share as existing wireless communications providers offer PCS-like services, but consumers of existing wireless services will not receive the full benefits of a competitive marketplace.

Finally, in determining the size of the parcels of spectrum that will be auctioned specific care should be given in making sure that preferences for designated entities are included in all of the various categories offered. Designated entities should be encouraged to participate in any and all auctions held (including major and basic trading areas) regardless of the size of the parcel of spectrum to be offered.

We look forward to your bold leadership in fashioning competitive bidding rules for broadband PCS which will create genuine economic opportunity for designated entities and promote economic growth.

Sincerely,

Cardiss Collins
Rep. Cardiss Collins

Mike Synar

John Byst

Marjorie Margolis

Sherrill Brown

Jim Cooper

Bill Richardson

Blanche M. Lambert

Dennis DeConcini

Rip Bowyer