EX PARTE OR LATE FILED

THE MARSHALL COMPANY

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 4, 1994

DOCKET FILE COPY ORIGINAL

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W. 20554

Re: Notification of Permitted Written Ex Parte Presentation in PP Docket No. 93-253 and GN Docket No. 93-252

Dear Mr. Caton:

The Marshall Company, pursuant to Section 1.1206(a)(1)-(a)(2) of the Commission's rules, hereby submits an original and one copy of this memorandum regarding a permitted ex parte presentation to Commission officials regarding PP Docket No. 93-253 and GN Docket No. 93-252.

Today at 2:00 p.m., Sherrie Marshall, President and CEO of the Marshall Company, met with William Kennard, General Counsel. The discussion related to the written material attached hereto regarding PCS.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,

Sherrie Marshall/JT

Sherrie Marshall

Attachments

cc: William Kennard

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August 4, 1994

Mr. William Kennard, Esquire
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

Dear Mr. Kennard:

It was a pleasure meeting with you today to discuss certain provisions within the Commission's Fifth Report and Order (the "Order") in PP Docket No. 93-253[1] that are adversely affecting the financing of women and minority-owned small businesses planning to bid on the Commission's newly created entrepreneurs' block of PCS licenses.

As we discussed, I am currently in the process of forming a wireless communications company, New Communications Services, Inc. (NEWCOM), to bid on the entrepreneurs' block of PCS licenses. I applaud the Commission's decision to create this block of PCS licenses and to assist women-owned small businesses, such as NEWCOM, in attracting the significant amounts of capital necessary to bid on and acquire those licenses. However, as described in more detail below, certain provisions of the Commission's Order are impeding the ability of such firms to attract adequate financing. Accordingly, I am requesting that the issues detailed below be resolved as soon as possible, either through the Commission's sua sponte revisions of its Order or in its scheduled September reconsideration of that Order.

Treatment of Stock Options, Warrants and Convertible Debentures

In its attribution rules for eligible entrepreneurs' block bidders the Commission has stated that "stock options, warrants and convertible debentures will generally be considered to have a present effect and will be treated as if the rights thereunder already have been fully exercised."[2] The stated purpose of this decision is to ensure that eligible bidders remain under the control of qualified entrepreneurs, women and minorities. However, it is a basic tenant of corporate law that holders of stock options, warrants and debentures do not share

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[1] Fifth Report and Order, PP Docket No. 92-253, July 15, 1994 ("Order").
[2] Id., at footnote 133.

in the control of a corporation.[3] Any power conferred by these holdings vests ***only after they have been exercised*** -- at which time they would be fully attributable ownership interests.

The Commission need not depart from its long-standing treatment of these holdings as non-attributable interests.[4] Indeed, its present departure is having the negative consequence of precluding women and minority-owned PCS bidders from using customary and usual corporate financing techniques -- ones that entail no potential loss of control of their corporations.

There are compelling reasons to treat stock options, warrants and convertible debentures in PCS designated entities just as the Commission always has under its attribution rules. Congress and the Commission both have made detailed findings documenting the under-representation of women and minorities in the communications industry. The primary cause given for this under-representation has been these groups' lack of access to capital. One need only look to the success of last week's narrowband PCS auctions (and its phenomonally high prices) to confirm that broadband PCS will be an extremely capital intensive enterprise. Given those high costs it is inconsistent with the Commission's stated goals for it to depart from its established attribution practices for stock options, warrants and convertible debentures.

Set asides and bidding credits alone will not overcome women and minority-owned businesses' difficulties in acquiring capital. We must have all the normal tools of corporate financing available to us as well. Otherwise, only wealthy individuals will be able to obtain financing as eligible bidders.

Accordingly, I respectfully request that the Commission issue a clarifying Order as soon as possible stating that stock options, warrants and convertible debentures will not be treated as attributable equity interests until they have been exercised by their holders.

The Holding Period Applicable to Bidding Credit Repayments

While the Order establishes a general five-year holding period during which entrepreneurs' block licensees may not transfer control of their licenses to non-eligible bidders[5], it appears to create a *ten year holding period* with respect to repayment of bidding credits.[6] This longer holding period seems inconsistent with the Commission's policy decision that entrepreneurs' block licenses may be freely transferred to large or small PCS service providers after five years.[7] Moreover, any holding period beyond five years will severely

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[3] See W. Klein & J. Coffee, Jr., Business Organization and Finance, "Chapter 4: Basic Corporate Investment Devices" (1990).

[4] 47 C.F.R. § 73.3555 Note 2(f).

[5] Order, at ¶ 128. See also Id. at ¶ 167.

[6] Id., at ¶ 145. See also Id. at footnote 103.

[7] Consistent with standard banking practices, the preferred interest and loan repayment status of eligible bidders is not transferrable.

restrict the ability of women and minority-owned small businesses to obtain capital infusions necessary for expansions and upgrades of their systems.

Lack of clarity on this issue is preventing eligible small businesses from presenting a coherent business plan (including possible exit strategies) to potential financiers. Further, ten years is much longer than most potential financiers and passive equity investors wish to wait before obtaining a significant return on their investment. Both are creating severe impediments to small businesses in obtaining the requisite financing for entry into the upcoming PCS entrepreneurs' block auctions. This result is directly contrary to the Commission's stated intention of "assisting designated entities in attracting the capital necessary to obtain a broadband PCS license."[8]

Accordingly, I respectfully recommend that the Commission issue a clarifying Order as soon as possible that the five-year holding period governs the bidding credit repayment penalties, and that such penalties do not apply to transfers during the remaining years (6-10) of the PCS license.

Management Contracts

In a companion Further Notice of Proposed Rulemaking to its Order[9], the Commission is seeking comment on whether management contracts between designated entities (such as eligible women and minority-owned small businesses) should be treated as attributable interests, and thus, as a practical matter, be precluded between eligible bidders and their passive investors. Such inquiry is directly contrary to the Commission's Order that, "[s]o long as the applicant [designated entity] remains under the de jure and de facto control of the control group, we shall not bar passive investors from entering into management agreements with applicants."[10]

The Commission has not considered management contracts attributable in other contexts. Indeed, they have long been allowed in the broadcasting and cellular contexts, enabling licensees to draw on needed expertise in running their businesses. Licensees, by law, remain responsible for the activities of the manager and for the ultimate control of the business. The Commission has developed criteria to determine when control has been transferred in contravention of its rules.[11]

There is no reason for the Commission to depart from its established treatment of management contracts. In fact, there are strong reasons for the Commission to reaffirm its policy decision that management contracts between designated entities and their passive investors are permissible so long as *de facto* and *de jure* control remain in the hands of the entities' control groups.

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[8] Order, at ¶13.
[9] Second Further Notice of Proposed Rulemaking, GN Docket No. 93-252, July 20, 1994.
[10] Order, at footnote 135.
[11] Intermountain Microwave, 24 RR 983 (1963).

Congress and the Commission have made long and detailed findings regarding the historic under-representation of women and minorities in the communications industry. Given this under-representation, it is fair to assume that women and minority-owned businesses will need to draw on outside expertise in order to operate successful PCS systems. Restricting their use of management contracts will only make it more difficult for these businesses to have a realistic chance of success. Further, it eliminates one more tool by which new entrants into the communications industry may assure their passive investors that their significant capital allocations are being expertly managed. Finally, the Commission already has available to it established criteria[12] it can apply to specific situations where it feels a management contract has been used to effect an unauthorized transfer of control.

The unintended consequence of this inquiry is to freeze potential financing of women and minority-owned designated entities until this issue is resolved. Accordingly, I respectfully request that the Commission immediately issue a clarifying Order that management contracts between designated entities and their passive investors continue to be permissible and are not under consideration for treatment as attributable interests.

Conclusion

Each of the issues raised in our discussion is having a significant negative effect on the ability of designated entities, particularly those owned by women and minorities, to attract the capital financing necessary to obtain a broadband PCS license. Prompt attention by the Commission to these matters is consistent with its laudable goals of increasing women and minority participation in the communications industry and will be greatly appreciated. Thank you for your continuing interest in these matters.

Sincerely,

Sherrie Marshall / JT

Sherrie Marshall

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[12] Id.