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September 6, 1994

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Via Messenger

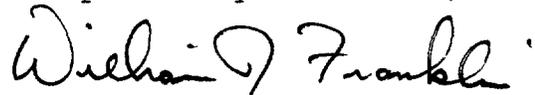
Re: **GEN Docket No. 93-253**  
Implementation of Section 309(j)  
of the Communications Act

Dear Mr. Caton:

Submitted herewith on behalf of the Association of Independent Designated Entities ("AIDE") are an original plus eleven (11) copies of its Opposition to Petitions for Reconsideration in the above-referenced docket.

Please contact my office directly with any questions or comments concerning the attached.

Respectfully submitted,



William J. Franklin  
Attorney for the Association  
of Independent Designated  
Entities

Encs.

cc: Association of Independent  
Designated Entities

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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

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**OPPOSITION OF THE  
ASSOCIATION OF INDEPENDENT DESIGNATED ENTITIES  
TO PETITIONS FOR RECONSIDERATION  
OF THE FIFTH REPORT AND ORDER**

The Association of Independent Designated Entities ("AIDE"), by its attorney and pursuant to Section 1.429 of the Commission's Rules, hereby opposes certain of the Petitions for Reconsideration filed by others with respect to the Commission's Fifth Report and Order in the above-captioned proceeding.<sup>1/</sup>

**I. SEVERAL OTHER PETITIONERS REITERATED AIDE'S ARGUMENT THAT THE COMMISSION MUST REDUCE THE MAXIMUM SIZE FOR ELIGIBLE "ENTREPRENEURS."**

In its Petition (at 13-16), AIDE demonstrated that the Commission exceeded its statutory authority under Section 309(j) of the Communications Act by giving preferences to non-Designated Entities in the "entrepreneurs blocks" (broadband PCS frequency bands C and F). For example, the United States Interactive & Microwave Television Association ("USIMTA") and the United States

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<sup>1/</sup> 9 FCC Rcd \_\_\_\_\_ (FCC 94-178, released July 15, 1994) ("Fifth R&O"). AIDE's silence with respect to any other Petition (or specific issue raised therein) and not discussed herein does not indicate AIDE's acquiescence or tacit support to such Petition or issue.

Independent Personal Communications Association ("USIPCA") jointly requested (Petition at 5-8) that the Commission lower the maximum eligibility size for Entrepreneurs' Block bidders to the original \$6 million limit, rather than the much larger entities and their consortia permitted by the Fifth R&O.<sup>2/</sup> Similarly, the National Paging and Personal Communications Association ("NPPCA") argued (Petition at 6-7) that the Commission should limit eligibility to the Entrepreneurs' Block licenses to companies with \$75 million in gross revenues or \$250 million in total assets.

Additionally, the Small Business PCS Association ("SBPCS") correctly recognized the problem but failed to identify the correct solution. SBPCS asserted (Petition at 5-6) that the Commission should not permit installment payments for companies between \$75 and \$125 million that purchase Entrepreneurs' Block licenses in the top 50 BTAs. This misses the real problem: It is inequitable -- if not unlawful -- for the Commission to permit smaller, true Designated Entities and much larger, non-Designated Entity "entrepreneurs" to bid against each other.

A number of Petitioners made separate suggestions that the Commission further relax the size and control-group limitations

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<sup>2/</sup> USIMTA and USIPCA (Petition at 3-5) also paralleled AIDE's argument (Petition at 16-17) that the Commission should make Designated-Entity preferences available in more broadband PCS frequency blocks.

for all or some (typically minority) PCS applicants.<sup>3/</sup> Those proposals should not be adopted, for the reasons set forth on pages 13-15 of AIDE's Petition. While each Petitioner discussed in footnote 3 seeks to advance its own interests, i.e., make its own business plans fit within the Commission's preferences for Designated Entities, the cumulative effect of all proposals is to highlight the political and regulatory dilemma in which the Commission finds itself.

On the one hand, the Commission seeks to defuse the political criticism which resulted when no Designated Entity won any nationwide narrowband PCS license. This goal drives the Commission's various proposals to expand the eligibility for Designated Entity-like entities with numerous ad hoc concepts

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<sup>3/</sup> See Petitions of the National Association of Black Owned Broadcasters, Inc. ("NABOB") (no size limit for any aggregation of minority businesses); MasTec, Inc. (substantially enlarged gross revenue/asset limits for minority controlled "entrepreneurs"); BET Holdings, Inc. ("BHI") (give maximum bidding credit to all minority and women-controlled businesses, regardless of size); Columbia PCS, Inc. ("Columbia PCS") (Designated Entity "control group" should be permitted wealthier, non-attributable outside investors); Telephone Electronics Corporation (small business and its corporate affiliates should be permitted \$30 million net worth and total assets of \$300 million); Pacific Telecom Cellular, Inc. (increased attribution maximum and increased or eliminated net-worth maximum for outside investors in Designated Entities); Omnipoint Communications, Inc. ("Omnipoint") (substantially more outside investments permitted in Designated Entities); EATELCORP, Inc. (permitted control group for women- and minority-owned Designated Entities should only require majority ownership and control); GTE Service Corporation (Designated Entities permitted to "pair up" with "significant investors" without loss of bidding eligibility); Pacific Bell Mobile Services ("Pacific Bell") (passive investors permitted to hold 25% of total equity in Designated Entities); Cellular Telecommunications Industry Association ("CTIA") (same); and Lehman Brothers (same; further post-auction dilution of control group equity permitted).

(e.g., "entrepreneurs", "consortia of small businesses", "passive investors" and the like).<sup>4/</sup> On the other hand, the Commission has decided that no auction decision will threaten its unstated, albeit obvious, goal of maximizing auction revenues. This decision prevents the Commission from doing the obvious: providing sufficient incentives so that legitimate Designated Entities can actually acquire Commission licenses. Thus, as the various cited Petitions illustrate, once the Commission departs from the specific standards of Section 309(j), it lacks any principled way of deciding the various requests for special relief which the cited Petitioners each made.

For this reason, AIDE supports those Petitioners who seek (as does AIDE itself) to have the Commission carefully circumscribe the eligible bidders for the Entrepreneurs' Block PCS frequencies.

## **II. AIDE SUPPORTS THE REQUESTS OF OTHER PETITIONERS WHO PROPERLY SEEK EQUITY FOR DESIGNATED ENTITIES IN THE PCS BIDDING AND LICENSING PROCESS.**

Several other Petitioners proposed various ways in which the Commission could provide more equitable relief for Designated Entities in the broadband PCS bidding and licensing process.

- SBPCS asserts (Petition at 2-3) that the Commission should eliminate interest on installment payments or, at the mini-

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<sup>4/</sup> Carrying this concept to its logical extreme, the Commission might simply declare that any company which was not in the Fortune Top 50 was a "small business", thus assuring that many very big "small businesses" would win PCS licenses. The absurdity of this result highlights the implicit Congressional limits on the Commission's ability to define who is a Designated Entity.

mum, reduce the payments to levels intended to support Designated Entities (2-to-3% range).

- SBPCS (Petition at 3-4) and NPPCA (Petition at 7-8) seek various improvements in the scheduling of various MTA or BTA licenses, with special emphasis on those in the Entrepreneurs' Blocks.
- SBPCS (Petition at 4) also seeks to recast the limit on a single entity holding Entrepreneurs' Block licenses to 10% of the population, not 10% of the licenses.
- Roland A. Hernandez (Petition at 4-5) and Omnipoint (Petition at 1-8) both caution that the Commission should not stifle or artificially limit the growth of Designated Entities who receive PCS licenses.<sup>5/</sup>
- CTIA (Petition at 10-11) suggests that the Commission provide well-defined test periods for measuring small business financial eligibility tests.

AIDE finds the reasoning set forth in each portion of the cited Petition persuasive, and urges that the Commission adopt these proposals.

### **III. PETITIONERS ADDRESSING THE ISSUE UNANIMOUSLY SUPPORTED RAISING THE BIDDING CREDITS FOR DESIGNATED ENTITIES.**

All Petitioners who addressed the issue supported raising the bidding credit for designated entities:

- USIMTA and USIPCA (Petition at 6-7) support a Designated Entity bidding credit of 40%.
- NPPCA (Petition at 4-6) urges a 50% bidding credit.

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<sup>5/</sup> However, Mr. Hernandez (Petition at 5) seeks to open a can of regulatory worms by requiring that Designated Entities somehow pre-qualify to pay the "entire down payment" and "installment payment plan" before qualifying to bid. Mr. Hernandez does not explain who a Designated Entity can demonstrate financial qualifications for a pre-auction, unknown amount (its potential winning bids) to be paid in installments partially out of anticipated profits from pre-auction, unknown markets.

- Mr. Hernandez (Petition at 3-4) also supports a 50% bidding credit, but asserts further than a minimum 45% bidding credit is required to insure capital access.
- BHI (Petition at 9-12) suggests a 40% bidding credit for minority- and women-owned businesses.

This clear weight of relevant comment supports a substantial increase in the bidding credits available to Designated Entities.

**IV. McCaw's PROPOSAL TO PERMIT MID-AUCTION PARTIAL SETTLEMENTS IS THE WRONG STEP IN THE RIGHT DIRECTION.**

McCaw Cellular Communications, Inc. ("McCaw") proposes (Petition at 6-11) that the Commission liberalize its broadband PCS anti-collusion rules by permitting:

[B]idders to form, during the course of an ongoing auction, consortia with other bidders that have affirmatively indicated that they have dropped out of the bidding for a particular license or group of licenses.

McCaw envisions that this proposal "would allow bidders who lack resources to win a license to pool their capital and other resources...." However, McCaw proposes:

To prevent any possible anticompetitive conduct, the Commission could continue to forbid bidders from communicating with other bidders vying for the same license until the [withdrawing] bidder has filed a notice with the Commission.... Once there is no overlap of eligibility with another bidder for a license, the active bidder and the withdrawing bidder should be allowed to communicate with each other and to enter into consortium arrangements regarding that license.

This proposal, if adopted, would likely be a virtual invitation to auction abuses.

To appreciate the flaws in McCaw's proposal, the Commission should consider what would happen under a McCaw scenario. McCaw would have the Commission believe that a bidder would withdraw

from an auction unilaterally and then, having lost all negotiating leverage with other bidders, start negotiating to form a bidding consortium. This conduct is contrary to human nature and prudent business practices, and is most unlikely.

The far more likely scenario is that a bidder would establish (by secret prior arrangement, "old boy network", existing course of reciprocal dealing, "wink and a nod" during the action, or other methods) a tacit understanding that another bidder would welcome its resources. Only once that understanding was in place would a bidder actually withdraw and go through the post-withdrawal "negotiation" of the bidding consortia. It is difficult to envision a practice more conducive to secret deals, or one more corrosive to public faith in the auction system.

Despite its substantial flaws, however, the McCaw proposal recognizes the major shortcoming in the Commission's auction system, i.e., the Commission's inexplicable failure to implement the clear public policy requiring settlements of auctionable applications.<sup>6/</sup> Thus, AIDE respectfully requests that the Commission reject McCaw's specific proposal, but recognize that McCaw has advanced substantial arguments supporting such settlements.

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<sup>6/</sup> See AIDE's Petition for Reconsideration at 5-13.

**V. PACIFIC BELL, COLUMBIA PCS, AND NABOB CORRECTLY IDENTIFIED THE LACK OF STANDARDS FOR PCS MANAGEMENT CONTRACTS AS A REGULATORY PROBLEM NEEDING SOLUTION AT THIS TIME.**

In their respective Petitions, Pacific Bell (at 9-12), Columbia PCS (at 5-6), and NABOB (at 7-8) each correctly identified the lack of standards for PCS management contracts as a regulatory problem needing solution at this time.<sup>2/</sup> AIDE concurs in this evaluation.

AIDE is well aware that the Commission has solicited comments on this issue in its Second Further Notice of Proposed Rulemaking in GN Docket No. 93-252 (Regulatory Treatment of Mobile Services). However, as these cited Petitions illustrate, the Commission should delay acceptance of applications for broadband PCS auctions until issues regarding the proper standards and effect of the PCS management contracts have been resolved. This resolution is a necessary prerequisite to potential PCS bidders determining their eligibility for specific licenses and forming appropriate business arrangements within which to bid for these licenses.

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<sup>2/</sup> Columbia PCS proposed extremely stringent standards for PCS management contracts, NABOB proposed to relax the Intermountain Microwave standards, and Pacific Bell took no substantive position. In order to assist Designated Entities, the Commission should adopt NABOB's position.

**VI. AMERICAN PERSONAL COMMUNICATIONS AND BHI BOTH CORRECTLY IDENTIFIED EXAMPLES IN WHICH THE COMMISSION VIOLATED THE "NOTICE AND COMMENT" RULEMAKING REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.**

In its Petition (at 19-22), AIDE demonstrated that the Commission had violated the Administrative Procedure Act by adopting the broadband PCS application processing and licensing rules with sufficient public notice and comment. Two Petitioners provided additional specific examples of such violations.

American Personal Communications ("APC") documented (Petition at 1-4) that the Commission adopted Section 24.816 of its broadband PCS rules without any notice, comment, or support in the record.

Similarly, BHI documented (Petition at 19-22) that the Commission adopted the extremely complex definitions of "affiliates" as used by the Small Business Administration without proper notice and comment. Indeed, the Commission's last-minute need to define who is an "affiliate" is yet another manifestation of its need to have some pseudo-Designated Entity win a broadband PCS license. Although the "affiliate" rules are likely to be misapplied prior to the broadband PCS auction and litigated in post-auction petitions, the record here is silent regarding the need for, or effect of, the SBA rules.

Those specific examples illustrates the haste with which the Commission has promulgated arbitrary, potentially pernicious, and not-well-understood broadband PCS rules. For all the reasons set forth in AIDE's Petition, the Commission must issue a Further Notice of Proposed Rulemaking to adopt such rules lawfully.

**CONCLUSION**

Accordingly, as set forth herein and in its Petition for Reconsideration, the Association of Independent Designated Entities respectfully requests that the Commission reconsider the Fifth Report and Order.

Respectfully Submitted,

**ASSOCIATION OF INDEPENDENT  
DESIGNATED ENTITIES**

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