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December 15, 1994

**FEDERAL EXPRESS**

The Honorable Reed E. Hundt  
Chairman  
FEDERAL COMMUNICATIONS COMMISSION  
Room 814  
1919 M Street, N.W.  
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JAN 27 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: PP Docket No. 93-253

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**REQUEST TO THE FCC TO RECONSIDER,  
ON ITS OWN MOTION, CERTAIN ASPECTS  
OF THE PCS DESIGNATED ENTITY RULES**

Dear Mr. Chairman:

I write to alert you and the Commission to a pressing issue with respect to designated entities ("DE's") and PCS financing that requires your immediate attention.

**INTRODUCTION**

National Telecom, Inc. ("NatTel"), a broadband PCS DE, respectfully requests that the Commission reconsider, on its own motion pursuant to 47 C.F.R. 1.108, certain aspects of the DE rules ("Rules") recently issued in the Fifth Memorandum Opinion and Order on November 23, 1994.

As a "small business owned by minorities and/or women" which has been spending the last six months nonstop attempting to raise financing in order to bid at the Auction, NatTel can speak from actual experience and say that the Commission's DE Rules have been a tremendous help in allowing DE's to overcome barriers that have impeded our participation in the telecommunications arena, including barriers related to access to capital. In our opinion, the Rules presently satisfy such concerns with respect to the ability of DE's, such as NatTel, to raise sufficient equity capital in order to participate in the Auction.

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However, Mr. Chairman, the Rules fall short in allowing DE's to raise sufficient capital with which to construct and build-out our PCS systems as required.

**IN SUM, THE RULES HAVE BEEN A SUCCESS WITH RESPECT TO DE'S RAISING EQUITY FINANCING TO ACQUIRE LICENSES AT THE AUCTION; BUT THE RULES FALL SHORT WITH RESPECT TO ALLOWING DE'S TO RAISE THE DEBT FINANCING NECESSARY TO BUILD OUT OUR SYSTEMS AS REQUIRED!**

NatTel believes that minor Rule modifications would solve this problem.

Major lenders only really began to focus on the financing needs of DE's since the beginning of the MTA auctions on December 5th, because up until that time they were involved primarily in putting together financing packages for the MTA bidders. As such, NatTel, which has been in the private equity marketplace since late June, has only recently received concerns from the private debt marketplace within the past 10 days.

**LENDERS ARE WILLING TO FINANCE THE BUILD-OUT OF PCS SYSTEMS FOR DE'S JUST AS THEY DID FOR THE CELLULAR AND CABLE INDUSTRIES**

Unless DE's obtain debt financing, we will not be able to meet our build-out requirements, and the great strides made by the Commission in getting licenses in the hands of DE's will ultimately be for naught as substantially all of the DE's default for lack of acquiring sufficient build-out financing. (Remember, the Rules have effectively precluded DE's from raising build-out funds with equity because of the control group requirements. Thus, DE's have been forced to give up substantially all of our available equity just to get to the Auction and bid on licenses. As such, the only other way to finance build-out costs is with debt!).

An excellent example of the importance of debt is McCaw Cellular Communications, Inc. ("McCaw"), although the same holds true for most non-wireline cellular and cable companies. They generally financed their working capital needs and build-out costs with debt -- and, unlike DE's, they didn't have to pay for their licenses.

Prior to McCaw's acquisition by AT&T, McCaw had over \$5 billion in debt. For what purposes did McCaw use the debt? The answer is found in its SEC Form 10-Q for the period ended March 31, 1994:

"[McCaw] utilizes capital to ... complete the construction of and to operate and expand its communications systems, to fund start-up operating losses for its transmitting systems and to cover interest payments on its indebtedness. Moreover, as subscribers are added and usage increases, it will be necessary to make additional capital expenditures for the purchase of additional sites and operating equipment .... [McCaw] does not expect its operations to generate sufficient cash to meet its expenditure requirements for the next few years. Historically, [McCaw] has raised capital through the issuance of public indebtedness and bank borrowings."

Building out and growing a wireless business is an extremely capital intensive undertaking. Constructing and operating a wireless system, funding start-up losses, and making interest payments all require large amounts of cash. DE's, which will be in a much more competitive environment than cellular or cable companies ever faced, will have proportionately greater funding needs and must therefore also have the ability to raise debt financing.

Under the existing Rules, DE's are effectively shut out of the debt market because the Commission has not yet ruled specifically on the relationship of the debt to the Government as opposed to the debt needed to build-out and construct the system. A clear decision on this point will determine the ability of DE's to acquire build-out financing.

**Third-party lenders must be allowed to hold a senior security interest in DE's, and must also be allowed to foreclose on their collateral in the event of default. Otherwise, no prudent third-party lender will lend any money for PCS build-out to DE's and DE systems will simply not get built -- resulting in DE defaults under the Commission's construction and build-out requirements.**

As McCaw's Form 10-Q stated earlier this year:

"Substantially all [of McCaw's] assets, including its stock in subsidiaries and its ownership interests in entities holding cellular licenses, **are pledged or encumbered as security for indebtedness.**"

If McCaw had to encumber substantially all of its assets in order to raise financing to build-out its system, it is fair to say that DE's will be required to do the same. Thus, all we ask is that third-party lenders, who have money to lend to DE's to finance build-out costs, be allowed to take a senior credit position and be allowed to foreclose on their collateral, as is ordinarily done in private sector debt transactions.

Even if a third-party lender acquires a senior credit position in the stock of a DE, the Commission will continue to have a secured position in the license. However, the Commission's secured position in the license will be subordinate to the third-party lender's secured position in the stock.

## **THE COMMISSION'S INSTALLMENT PAYMENT PLAN SHOULD ACCOMMODATE THE CHARACTERISTICS OF THE PRIVATE SECTOR DEBT MARKETPLACE**

At present, the vast majority of debt deals in the private sector are structured so that the principal on the senior debt is repaid before the principal on the subordinated debt. However, under the existing Rules, DE's which qualify as small businesses owned by minorities and/or women must begin making principal payments in year 7. This is problematic because most senior debt deals have maturities ranging from 7-9 years.

In other words, if a senior lender were to finance a cellular, cable or paging operator today, the senior lender would have its debt mature within the 7-9 year range; knowing that any subordinated debt would have a balloon payment of principal in year 10. (Most subordinated debt deals also include no current-pay interest for the first several years). This type of structure allows the senior lender to recoup its principal before the subordinated lenders. This is the normal way in which dual-structure debt deals are done in the private sector; particularly for businesses (such as PCS) that do not expect to generate positive cash flow for several years.

Given this private sector reality, NatTel requests that the Commission, at least for DE's which qualify as small businesses owned by minorities and/or women, modify its Rules so that such DE's amortize their debt to the Commission with interest-only payments throughout the entire 10-year term, with a balloon payment of principal made at the end of the 10th year.

This modification will have two key advantages. First, under the current Rules, principal payments start to come due at the same time the DE is permitted to transfer the license (during the 6th year). However, this will likely result in most DE's being forced to cash out during the 6th year when it is possible that DE businesses will have yet begun to turn the corner financially. (McCaw didn't report its first quarterly profit until 1994!). This will, in turn, result in DE's being forced to sell at less than fair market value in a "fire sale" just to avoid the first principal payment to the Commission. However, by postponing principal payments until the 10th year, the Commission will give DE's who want to stay in business through the entire term of the initial license grant a viable chance to do so; without being forced by unscrupulous "vultures" and "deep pockets" to sell out at less than fair market value during the sixth year as the first principal payment looms!

The second advantage to a principal balloon payment at the end of the 10th year is that, from a government accounting standpoint, the Government should be indifferent as to when it receives its principal. Whether the Government receives principal amortized over years 7-10 or whether it receives all the principal in year 10 will not have any effect on the Government ultimately receiving the total purchase price for the license. But it will greatly enhance the ability of DE's to raise senior debt financing because the senior lenders will see that they can get their principal repaid before that of the subordinated lender (the Government) -- just as with any normal deal that is consummated in the private sector today!

## **SUGGESTED RULE MODIFICATIONS**

The underlying basis behind our suggested Rule modifications is to make sure that third-party lenders can acquire a senior credit position in DE's as well as foreclose on their collateral if a DE defaults. (Just as the Commission can foreclose on the license if a DE defaults on its installment payments). However, in suggesting these modifications we have also been mindful of the Commission's concerns regarding unjust enrichment and the risk of DE benefits ultimately accruing to non-DE's.

Ever mindful of these concerns, we believe the modifications suggested below reach a satisfactory middle ground between regulatory policy and private sector financial reality.

**FIRST**, the Commission should amend Section 24.711(b) of the Rules to clarify that installment payments owed to the Commission from DE's for license acquisition shall be subordinate to any and all debt provided to DE's from third-party lenders; provided, however, that such third-party debt is incurred by DE's to build-out and construct their PCS systems, and not for license acquisition.

**SECOND**, the Commission should amend Section 1.2110(d)(4) of the Rules in the following manner:

1. Section 1.2110(d)(4)(ii) should be amended to provide for an automatic 90-day grace period in the event of default under the installment payment plan;

2. Section 1.2110(d)(4)(iii) should be amended to provide that following the automatic grace period, if the Commission has not approved a restructured payment schedule or there is no successful resumption of payment; a third-party lender which has a valid security interest in a DE may foreclose on such collateral and assign or transfer such collateral to another DE, not later than 180 days after the end of the grace period, without being in violation of the transfer restrictions requiring a minimum three-year holding period, and without the Commission considering the license cancelled; and

3. Section 24.839(d)(2) should be amended to allow for an application for assignment or transfer of control of a license to be filed at any time by a third-party lender which has foreclosed on a DE (as long as the application is filed within 180 days after the end of the grace period); and not just after three years from the date of the initial license grant. The unjust enrichment rules would continue to apply in this case, so that if a third-party lender forecloses on a DE and assigns or transfers the collateral controlling the DE license to a DE eligible for less advantageous installment payments and/or bidding credits, the successor DE to the foreclosed license would have to satisfy the unjust enrichment requirements.

**THIRD**, the Commission should amend Section 24.711(b)(5) of the Rules to provide that installment payments shall include interest-only for the entire term of the license grant with the entire amount of principal due in a balloon payment at the end of the 10th year.

## **CONCLUSION**

These slight modifications to the Rules will make it possible for DE's to raise capital in order to finance the significant costs that will arise from constructing and building out our systems for the benefit of consumers, funding working capital needs, making the required installment payments to the Commission, and financing the acquisition of additional PCS licenses in the after-Auction market.

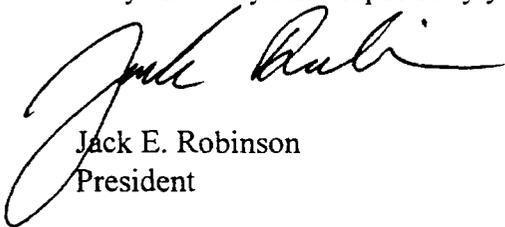
Without these Rule modifications, DE's will not be able to raise debt financing for post-Auction obligations; obligations which definitely will dwarf the cost of acquiring the licenses.

By making these modifications to the Rules, the Commission will be able to remain true to its statutory and stated administrative goals with respect to DE's. But more importantly, the Commission will ensure that DE's do not fail to implement their build-out plans for lack of financing.

As stated in the most recent issue (December 19, 1994) of Business Week (p. 24), "Banks are the major source of credit for small and medium-size businesses. And such businesses are largely responsible for the sharp pickup in job creation we've seen over the past year." The Commission's Rules should not have the effect of cutting DE's off from their "major source of credit."

NatTel therefore respectfully requests that the Commission, on its own motion, make the modifications requested as soon as possible.

Very sincerely and respectfully yours,



Jack E. Robinson  
President

cc (Via Federal Express):

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