

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PP Docket No. 93-253

In the Matter of)
)
Deferral of Licensing of)
MTA Commercial Broadband PCS)

To: The Commission

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REPLY TO PCS PRIMECO, L.P.'S OPPOSITION TO
EMERGENCY MOTION TO DEFER MTA PCS LICENSING

Communications One, Inc., by its attorney, hereby replies to PCS Primeco, L.P.'s (PCS Primeco) March 23, 1995 opposition to Communications One, Inc.'s Emergency Motion. In reply thereto, the following is respectfully submitted:¹

1) Communications One, Inc. filed its Emergency Motion on March 8, 1995, prior to the conclusion of the then ongoing MTA Broadband Auction. As noted in the Emergency Motion, the Emergency Motion was prompted by Telephone Electronics Corporation's filing of a petition for review of the PCS auction rules in the U.S. Court of Appeals for the D.C. Circuit. Emergency Motion, pp. 1-2. Since the filing of the Emergency Motion, the Court of Appeals has ordered the Commission not to hold the Entrepreneur Block Auction.

2) Communications One, Inc.'s fears have been realized, it appears that it will be many months before the legal issues surrounding the Entrepreneur Block Auction will be resolved and

¹ In view of the urgency of the matters raised in the Emergency Motion, and in view of the Commission's silence on the matter, Communications One, Inc. is responding to PCS Primeco's opposition within one day of receipt. Communications One, Inc. reserves the right to respond to other oppositions should additional ones be filed.

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many months before the Commission will be in a position to award the Entrepreneur Block licenses. Consequently, it is imperative that the Commission take action to protect the designated entities from a grossly unfair head start which otherwise will be conferred upon huge conglomerates such as PCS Primeco.

3) Unlike cellular radio licensing proceedings, it does not appear that the Commission has established a head start policy for PCS licensees. While the Commission's failure to establish a head start policy might not, under certain circumstances, be a problem, the Commission has made two policy decisions which render critical the Commission's failure to establish a head start policy.

4) First, the Commission opted to conduct the Entrepreneur Block auction after the MTA Blocks. We are not aware of why the Commission determined that extremely wealthy communications conglomerates, such as PCS Primeco, should be the first to market.

5) The Congress determined that the designated entities have a difficult time raising capital. Thus, the Congress ordered the Commission to provide designated entities an opportunity to participate in the PCS wireless revolution. 47 U.S.C. §309(j)-(4)(C)(ii). Rather than follow Congressional requirements, the Commission chose to provide the economic opportunity to vastly wealthy communications conglomerates, entities which are not statutorily protected.

6) Second, the Commission decided to proceed with the MTA auction despite the fact that its Entrepreneur Block auction rules had not become final owing to TEC's petition to the Court of Appeals. In fact, the Commission's September 19, 1994 Public Notice, Report No. AUC-94-04, announced that the MTA auction would

begin on December 5, 1995 while the Commission was still drafting the Entrepreneur Block auction rules. See, Fifth Memorandum Opinion and Order, FCC 94-285, released November 23, 1994.² Rather than protect the economic opportunity of designated entities as required by the Communications Act, the Commission chose instead to rush headlong with the MTA auction while it debated and delayed the designated entity auction.

7) PCS Primeco is concerned that its has paid \$221,445,200 in down payments to the Commission, a sum which does not earn interest while licensing matters are debated. In the first place, the fact that no interest is paid is part of the Commission's rules and is not a surprise.

8) Second, PCS Primeco is a sophisticated company which understands that licensing snags can develop at any stage of the licensing process. Indeed, PCS Primeco's application, currently scheduled to be filed on April 5, 1995, must be placed on a 30 public notice during which time it will be subject to petitions to deny. 47 C.F.R. §§24.827, 24.830.³ Thus, there is nothing in the rules that assures PCS Primeco that the payment of its deposit or

² It is our understanding that it is this order which is a issue in TEC's petition for review with the U.S. Court of Appeals.

³ We note that the Commission's March 22, 1995 Public Notice which established April 5, 1995 as the application filing deadline incorrectly states that "the winning bidders and the licenses each winning bidder has won are listed in Attachment A" Of course, no entity "won" a license. The winning bidders "won" the right to file an application which must be reviewed and approved before a license may be issued.

the lack of interest paid upon deposited monies entitles it any particular decision from the Commission.⁴

9) As a final matter, PCS Primeco's claim that "unnecessary delay is obviously detrimental to winning bidders who have deposited vast down payment sums with the Commission . . ." is meritless and disturbing. First, Communications One, Inc. has raised a serious question as to whether the Commission has failed to follow statutory requirements by failing to protect an economic group as required by Congress. Thus, any delay caused by the Emergency Motion is not "unnecessary" as suggested by PCS Primeco, but is essential to the fulfillment of the Commission's statutory objectives.

10) Second, PCS Primeco's argument that because it has "deposited vast down payment sums with the Commission" it is entitled to a favorable decision gives new meaning to the phrase "political favor." Not only is PCS Primeco's assertion offensive to basic notions of justice and fairness, the Commission is statutorily precluded from considering monies raised in making public interest determinations. 47 U.S.C. §309(j)(7)(A).

11) Whether the MTA licensing process should be delayed until designated entities are properly protected does not at all hinge on the fact PCS Primeco has deposited non-interest garnering money with the government. The Commission must make a politically

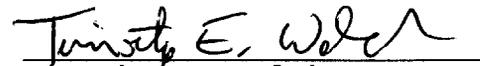
⁴ That being said, Communications One, Inc. would not object to the down payment money being refunded to each auction winner pending a determination on how the licensing proceeding may be modified to comply with the requirements of the Communications Act.

difficult, but statutorily required, decision to protect the economic opportunity for designated entities.⁵

12) The simple fact is that the Commission has failed to consider, in contravention of the Communications Act, the severe, adverse economic consequences which will flow from the huge head start the Commission has granted to the "vastly" wealthy communications conglomerates. The time is ripe for the Commission to demonstrate that it does not make public policy decisions based upon cash contributions.

WHEREFORE, in view of the information presented herein and in the Emergency Motion, it is respectfully requested that the issuance of the MTA Broadband licenses be deferred.

Respectfully submitted,
COMMUNICATIONS ONE, INC.


Timothy E. Welch

Hill & Welch
Suite #113
1330 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 775-0070
March 24, 1995

Its Attorney

⁵ It is our understanding that TEC's petition for review in the U.S. Court of Appeals seeks to have the minority/-female preferences ruled unconstitutional. We do not believe that the small business/rural telephone company preferences are under attack. We think it is settled that under the Commerce Clause of the U.S. Constitution the Congress has the authority to promote the advancement of certain entities based upon purely economic classifications. Thus, regardless of what the U.S. Supreme Court may decide this term concerning affirmative action, and regardless of what the U.S. Court of Appeals decides in the TEC case, it appears that protections afforded to small businesses and rural telephone companies by 47 U.S.C. §309(j)(4)(C)(ii) would remain in place.

CERTIFICATION

I hereby certify that I have this 24th day of March 1995 sent a copy of the foregoing pleading, by first class United States mail, postage prepaid, to the following:

George F. Schmitt
AirTouch Communications
1818 N Street, N.W. #800
Washington, D.C. 20036



Timothy E. Welch