

FCC MAIL SECTION

APR 13 4 15 PM '95

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

DA 95-806

In the Matter of)

Deferral of Licensing of MTA Commercial)
Broadband PCS)

GN Docket No. 93-253 ✓
ET Docket No. 92-100

Order

Adopted: April 12, 1995

Released: April 12, 1995

By the Chief, Wireless Telecommunications Bureau:

1. In an "Emergency Motion to Defer MTA PCS Licensing" filed on March 8, 1995, Communications One, Inc. (COI) asks the Commission to defer the licensing of the A and B blocks in the 2 GHz Personal Communications Service ("broadband PCS"). For the reasons stated below, we are denying COI's motion.

2. COI states that it is a woman-controlled communications company that intends to participate in the broadband PCS entrepreneurs' block auction.¹ COI argues that if a stay of A and B block licensing is not granted, future entrepreneurs' block auction winners will suffer a competitive disadvantage because the companies that prevailed in the A and B block auctions will have an "open-ended headstart over small, disadvantaged companies."² COI also notes that the U.S. Court of Appeals for the District of Columbia Circuit is considering a challenge to the minority and gender preferences established for the entrepreneurs' block auctions.³ To eliminate the alleged disadvantage to future entrepreneurs' block auction

¹ Motion at para. 1. COI states that it intends to participate in the BTA-based entrepreneurs' block auction. It is unclear whether COI intends to participate in the MTA-based C block auction.

² Motion at para. 6.

³ On March 15, 1995, the D.C. Circuit granted Telephone Electronics Corporation's (TEC) Emergency Motion for a Stay of the Commission's entrepreneurs' block rules and the C block auction. See *Telephone Electronics Corporation v. FCC*, No. 95-1015 (Order, March 15, 1995). The Court has scheduled oral argument on the merits for September 12, 1995. Accordingly, the C block auction, originally scheduled for April 17, 1995, cannot occur until the Court rules on the merits of TEC's petition for review or the stay is otherwise lifted.

winners, COI proposes that the Commission defer licensing of the A and B block auction winners until after the C block auction is concluded so that all 30 MHz PCS licenses in any market area would be awarded simultaneously.

3. PCS Primeco, L.P. (Primeco) has filed comments in opposition to COI's motion.⁴ Primeco is a winning bidder in eleven markets in the A and B block auction and also intends to participate in partnerships or joint ventures controlled by designated entities that intend to bid in the C block auction. Primeco argues that COI's motion is an untimely request for reconsideration of the Commission's decision to stagger the licensing of PCS blocks.⁵ Primeco also contends that delaying the licensing of the A and B block auction winners will deprive the public of significant benefits in the form of new services and increased competition among wireless service providers.⁶

4. We find that COI has failed to show good cause to delay the licensing of the A and B blocks. The argument raised by COI was expressly addressed in the *Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, in which the Commission affirmed its decision to use a sequence of auctions to license broadband PCS.⁷ In that decision, the Commission expressly rejected the argument that the PCS licensing sequence should be changed to prevent A and B block winners from gaining an unfair headstart over other PCS licensees.⁸ The Commission noted that auctioning the A and B blocks first would in fact provide designated entities with important information about the value of PCS licenses that would assist them in attracting capital and formulating bid strategies. The Commission also expressly declined to delay the final licensing of the A and B block winners, noting that the overriding public interest in rapid introduction of service outweighed the risk of A and B block winners gaining a headstart advantage.⁹

⁴ Primeco submitted a letter to Chairman Reed Hundt on March 23, 1995 and filed an opposition on March 24, 1995. Although Primeco's pleadings were late filed, we consider their arguments herein. We also consider the arguments set forth in COI's response to Primeco filed on March 27, 1995.

⁵ Primeco Opposition at 2.

⁶ *Id.* at 4-6.

⁷ Implementation of Section 309(j) of the Communications Act, Competitive Bidding, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd 6858 (1994), paras. 126-132.

⁸ *Id.*

⁹ *Id.*, para. 132. The Commission rejected a similar "headstart" argument in declining to delay licensing of wireline cellular carriers pending the selection of non-wireline licensees. Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, *Report and Order*, 86 FCC 2d 469, 491 n.57 (1981), *recon.*, 89

5. We find that COI's effort to raise these issues again in an "emergency motion" amounts to an untimely petition for reconsideration of the Commission's prior decision. We disagree with COI's suggestion that the possibility of a delay of the C block auction presents a new circumstance that the Commission did not previously consider. To the contrary, the Commission's decision to proceed with the first phase of PCS licensing before subsequent auctions were conducted or scheduled demonstrates that it considered prompt licensing of PCS to be paramount even though the timing of future auctions remained unknown.

6. Even if we were to treat COI's motion as a timely request for stay of A and B block licensing, we conclude that COI has failed to meet the standards necessary for grant of the requested relief. Among other factors, a party seeking a stay must show irreparable harm if the stay is not granted and that granting the stay will serve the public interest.¹⁰ COI has failed to show that it would be irreparably harmed by prompt granting of the A and B block licenses. We find that COI's contention that subsequent PCS licensees will be fatally hamstrung in their ability to compete against A and B block licensees is purely speculative. Even if A and B block licensees obtain some benefit from being licensed before other PCS providers, we believe that numerous competitive opportunities remain open to subsequent PCS entrants. Moreover, subsequent entrants may benefit from licensing of the A and B blocks because it will enable them to evaluate the business strategies and initial performance of the A and B block licensees in making their own strategic business decisions. Finally, even assuming *arguendo* that a significant interval between the issuance of the A and B block licenses and issuance of the C block licenses would reduce the value of the C block licenses, COI and other bidders are free to discount their bids in the C block auction accordingly.

7. We also conclude that COI has failed to show that staying licensing of the A and B auction winners is in the public interest. Congress has mandated that the Commission promote the development and rapid deployment of PCS for the benefit of the public with a

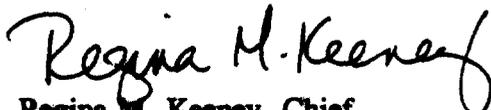
FCC 2d 58 (1982). Although the Commission agreed to consider requests for a six month moratorium on wireline licensing if a non-wireline applicant could demonstrate public interest harm, it ultimately concluded that none of the parties filing headstart requests had met the necessary burden. See Amendment of Part 22 of the Commission's Rules to Provide For Filing and Processing of Applications For Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185, 6226 (1991).

¹⁰ A party moving for a stay must show: (1) a strong likelihood of prevailing on the merits; (2) irreparable harm; (3) issuance of the stay will not harm others; and (4) that granting a stay will serve the public interest. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

minimum of administrative or judicial delay.¹¹ Prompt licensing of the A and B blocks furthers this Congressional mandate by speeding the introduction of services that will compete with cellular and other established mobile services. We believe that the public interest in rapidly providing new competitive sources of wireless services outweighs any possible competitive harm that might result from the A and B block licensees being licensed ahead of auction winners in other PCS blocks. We emphasize that it remains our intent to proceed expeditiously with the C block auction and future PCS auctions to the extent legally permissible.

8. For these reasons, and pursuant to Section 1.43 of the Commission's Rules, 47 C.F.R. §1.43, COI's Emergency Motion to Defer MTA PCS Licensing is DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Regina M. Keeney, Chief
Wireless Telecommunications Bureau

¹¹ 47 U.S.C. § 309(j)(3)(A).