DUPLICATE

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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APR 24 1995

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services; and	)	GEN Docket No. 90-314 RM-7140, RM-7175, RM-7618
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket 93-253

REQUEST FOR STAY

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Summary

Radiofone, Inc. (Radiofone), respectfully requests the Commission to stay the conduct of PCS auctions as adopted in its *Fifth Report and Order* and *Fifth Memorandum Opinion and Order* pending the outcome of its Petition for Review of the Commission's *Third Memorandum Opinion and Order* in Gen. Docket 90-314 (*Third MO&O*) which, *inter alia*, establishes restrictions on the eligibility of entities with cellular interests to be Personal Communications Service licensees.

Radiofone's request meets the established requirements for the grant of a stay. It is likely that Radiofone will be successful in its appeal of the *Third MO&O*. As demonstrated herein, the Commission adopted the cellular/PCS cross-ownership restriction without adequate basis in the record contravening its obligations under the Administrative Procedures Act. As such, the cross-ownership rule will very likely be found by the Sixth Circuit to be arbitrary and capricious.

Without a stay of the auction process, Radiofone will suffer irreparable harm. The upcoming entrepreneur's block auction is Radiofone's only realistic opportunity to successfully bid on a 30 MHz broadband PCS license. Further, the stay will cause only a temporary delay, impacting all interested parties equally. A grant of the stay is in the public interest. Weighing the inconvenience of a short delay in the auction process with the high cost of rescinding licenses and re-auctioning the entrepreneur's block (in the likely event the court rules favorably on Radiofone's petition), it is clear that the public interest is best served by a grant of the stay.

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REQUEST FOR STAY

Radiofone, Inc. (Radiofone), by its attorney and pursuant to Sections 1.43 and 1.44(e) of the Commission's Rules, respectfully requests that the Commission stay the effectiveness of its spectrum auction rules as adopted in its *Fifth Report and Order*[1] and *Fifth Memorandum Opinion and Order*[2] *in PP Docket 93-253*, and the *Third Memorandum Opinion and Order*[3] in Gen Docket 90-314 concerning the competitive bidding process as these orders relate to cellular carrier eligibility in the broadband PCS auction process. Radiofone has sought judicial review of the *Third MO&O* at the United States Court of Appeals for the Sixth Circuit.[4]

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[1]*Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994)(*Competitive Bidding Order*).

[2]*Fifth Memorandum Opinion and Order*, PP Docket 93-253, FCC 94-285, released November 23, 1994 (*Fifth MO&O*).

[3]*Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Memorandum Opinion and Order*, 9 FCC Rcd. 6908 (1994)(*Third MO&O*).

[4]*See Radiofone, Inc. v. Federal Communications Commission and the United States of America*, No. 95-3238 (6th Cir. docketed

The *Third MO&O, inter alia*, establishes restrictions on the eligibility of cellular carriers to be Personal Communications Service licensees. The *Competitive Bidding Order* and the *Fifth MO&O* established rules for auctions to proceed, without a resolution of Radiofone's challenge. Pending the outcome of its Petition for Review of the *Third MO&O,* Radiofone requests the stay to temporarily postpone all PCS auctions until the Sixth Circuit has ruled on Radiofone's Petition for Review.

I. Introduction

Radiofone is a radio common carrier that provides a variety of mobile services to the public, including wide-area paging and cellular. Radiofone entered the telecommunications industry as a small, family owned telephone answering service. While it has grown substantially, it remains a family-owned business, even though it competes with a number of other, larger companies in the provision of advanced communications services to the public. Despite competition from larger publicly-held companies (principally BellSouth Mobility), Radiofone has been able to

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Mar. 7, 1995) (transferred from the D.C. Circuit), has been consolidated with *Cincinnati Bell v. FCC*, No. 94-3701 (6th Cir. filed July 1, 1994). Radiofone, Inc. also is an intervenor in *Bell Atlantic Personal Communications, Inc. v. FCC*, No. 94-4112 (6th Cir.), and *BellSouth Corporation v. FCC*, No. 94-4113 (6th Cir.), both of which seek review of the FCC's *Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services)*, 9 FCC Rcd. 4957 (1994). These two cases also have been consolidated with *Cincinnati Bell v. FCC*.

maintain a viable business in its cellular markets, through the efficient construction and operation of its systems, provision of reliable cellular service, and aggressive marketing designed to make the public aware of the benefits of cellular.

Radiofone is eager to continue providing cutting-edge technologies to its customers, including the introduction of many new services made possible by broadband PCS. Radiofone wishes to apply its wireless engineering, service and marketing expertise to PCS, so as to develop this service and encourage its public acceptance. However, the Commission's restrictions on the licensing of PCS spectrum to existing cellular carriers jeopardizes this goal, to the detriment of Radiofone's customers and the public in general. As the owner of cellular operations serving more than ten (10) percent of the population in the in the New Orleans/Baton Rouge Major Trading Area (MTA), Radiofone is prohibited from obtaining more than one 10 MHz Basic Trading Area (BTA) license and is ineligible for any thirty (30) MHz MTA licenses in its cellular territory.[5] Based on Radiofone's expertise in wireless matters and its experience in the wireless marketplace, the 10 MHz licenses will not provide adequate spectrum to compete effectively with cellular, enhanced specialized mobile radio service (ESMR), and the 30 MHz PCS licensees. Instead, 10 MHz operations will likely be confined to "niche" services. A 30 MHz operation will be needed to provide a viable, competitive service.

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[5] 47 C.F.R. § 24.204.

In the *Third MO&O*, the Commission denied Radiofone's petition for reconsideration of the cellular eligibility rules. Consequently, Radiofone has filed a petition for review of this decision in the United States Court of Appeals for the Sixth Circuit.[6] Although this appeal has been docketed by the Court, the appeal is not likely to be decided by the time the Commission resumes the auction process. In the likely event the Court rules favorably on the Radiofone's Petition for Review, the judgment would be frustrated if the Commission had proceeded with PCS auctions. Accordingly, Radiofone seeks stay of the cellular eligibility restriction and the auction rules to the extent necessary to postpone the PCS auction process until such time as the Sixth Circuit Court has rendered judgment on Radiofone's Petition for Review.

II. Standard For Grant of Stay

Radiofone satisfies the test for grant of a stay as set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*[7] and *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*[8] The test requires four factors to be evaluated: (1) the likelihood of the requesting party's success

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[6]*See* fn. 4, *supra*.

[7]259 F.2d 921, 925 (D.C. Cir. 1958 ("*Virginia Petroleum Jobbers*")

[8]559 F.2d 841 (D.C. Cir 1977) ("Holiday Tours").

on the merits; (2) the likelihood that irreparable harm to the requesting party will result in the absence of a stay; (3) the absence of harm to other interested parties in the event that the stay is granted, and (4) the extent to which the stay serves the public interest.[9]

The U.S. Court of Appeals clarified the weight to be accorded the above factors in *Holiday Tours*. There the Court stated as follows:

> The Court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to the movants' view of the merits. The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors.[10]

Therefore, a "balance of equities" shown by a consideration of the last three factors can be controlling regardless of the "probable success" factor; and the Court rejected the "exceedingly precise, technical sense" of "probable" as meaning a greater than 50 percent chance.[11]

Thus, a party seeking a stay is not required to demonstrate that it will probably succeed on the merits, rather, where it will suffer serious harm, it need only show that it has a substantial possibility of success. Review of the four *Virginia Petroleum Jobbers* criteria below demonstrates that, indeed,

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[9]*Virginia Petroleum Jobbers*, at 925.

[10]*Holiday Tours*, at 843.

[11]*Id.*

Radiofone will suffer serious hardship absent a stay and that, further, serious questions concerning the lawfulness of the cellular eligibility restriction have been raised. Accordingly, the stay requested herein should be granted.

A. Radiofone is Likely To Be Successful On Appeal

As discussed above, Radiofone is adversely affected by the cellular eligibility rules. In its appeal of the cellular eligibility restriction, Radiofone has demonstrated that the restriction is arbitrary and capricious because it does not serve the purpose for which it was designed, and because it lacks a rational basis in the record.

As discussed below, in this proceeding the Commission has failed in its obligation under the Administrative Procedure Act (APA)[12] and well settled notions of administrative law which require agencies to make reasoned decisions based on the facts in the record. When it promulgates a rule, the Commission must explain its reasons.[13] The Commission must also examine the available data and articulate a satisfactory explanation for its action, including a rational connection between the facts in the record and the policy choice made.[14] The Commission has

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[12]*See e.g.*, 5 U.S.C. § 706(2)(A).

[13]5 U.S.C. § 553(c); *see Western Coal Traffic League v. United States*, 677 F.2d 915, 927 (D.C. Cir 1982).

[14]*Motor Vehicles Mfr's Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) *quoting Burlington Truck Lines, Inc. v. United States*, 371

neglected its obligation under the APA, thereby raising serious questions concerning the lawfulness of the cellular eligibility restrictions.

Throughout the proceedings in Gen. Docket 90-314, the Commission has ignored the valuable contribution that cellular licensees can make concerning the level of competition for PCS services within the wireless market. As the Commission has acknowledged, the cellular industry has much to offer the emerging PCS industry.[15] Cellular operators have the resources to quickly deploy PCS service upon authorization, and have the experience and expertise useful in bringing PCS to is fullest potential, both within and outside of the cellular operators' service area. Moreover, cellular operators have the infrastructure in place to bring faster and more efficient (and therefore lower priced) PCS service to their cellular service areas. However, the Commission's PCS/cellular cross-ownership restriction prohibits cellular operators from obtaining sufficient bandwidth to provide advanced PCS service within their markets, ignoring the benefits offered by such operations.

The Commission justifies its cellular/PCS cross-ownership restriction as a means of ensuring that cellular operators do not

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U.S. 168 (1962); *See also Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992).

[15]*Second Report and Order*, at para. 104.

exert undue market power.[16] The Commission accordingly purported to "strike a balance" between broad participation by cellular carriers and the potential for anticompetitive conduct by limiting cellular carriers to 10 MHz within an MTA or BTA which overlaps the population of their cellular service area by as little as 10 percent. As demonstrated below, the record contains no justification for the Commission's concerns about undue market power, and, moreover, the restriction does not promote PCS market competition, the Commission's intended end result, to its fullest potential.

In conceiving the cellular restriction, the Commission assumed that cellular and PCS licensees serving the same area would be offering similar services and would compete on the price and quality of these services.[17] This assumption is badly flawed. While PCS may offer a number of services in common with cellular systems, the Commission and the industry clearly contemplate PCS being a digital platform from which to provide a number of new and innovative services. These innovations include video and data capabilities which are not currently available over a cellular systems and may not become available in the foreseeable future. This is particularly true in major markets where systems are loaded with analog users, which will prevent the rapid cut-over to digital technology permitting more advanced services.

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[16] *Id.*, at para. 108.

[17] *Second Report and Order* at para. 97.

In contrast, broadly-defined PCS is envisioned to include new services that go far beyond the capabilities of cellular systems. Thus, from the start, PCS licensees will enter the market with services that will distinguish themselves from cellular licensees in order to persuade potential customers to purchase new subscriber equipment and services. These services will eventually be mass-marketed as having capabilities surpassing cellular and possibly, wireline services. Indeed, PCS is designed to allow low-powered, and therefore, low-cost subscriber equipment and service, which may replace traditional telephone service.

Because their spectrum is already at or near capacity, cellular carriers will be limited in their ability to respond to changes in the marketplace created by PCS. Therefore, even in its early stages, PCS is likely to be viewed as more of a complement to cellular service rather than a competitor. Cellular carriers wishing to keep pace with market demand for new services will find it necessary to become PCS licensees themselves, destroying any incentive for cellular licensees to use their PCS license for anticompetitive purposes. Instead, PCS would be a means for cellular operators to remain viable in the long run as a competitor in the newly created PCS marketplace.

The Commission, however, authorizes a watered-down version of cellular participation by allowing cellular carriers to bid on only 10 MHz of PCS spectrum within its market area. As Commissioner Barrett noted, the record in Docket 90-314 is

without any showing that 10 MHz of spectrum will allow the provision of advanced services that can be furnished on larger PCS allocations.[18] And while Commissioner Barrett notes that many licensees will overcome this barrier by aggregating multiple spectrum blocks into a larger allocation, this option will not be available to cellular carriers under the Commission's adopted restrictions. Significantly, cellular carriers will not be able to achieve a *de facto* aggregation of spectrum by combining the 10 MHz block with their existing cellular allocation, because PCS spectrum is in a much higher band, making it economically incompatible with existing cellular systems.

(1) The Record Does Not Support the Commission's Assertion That Cellular Carriers Will Have or Exert "Undue Market Power"

Throughout this proceeding, the Commission has repeatedly expressed concerns about carriers exerting "undue market power." The Commission, however, has not quantified or defined what market activities would constitute an exertion of undue market power; nor has it defined the term itself. Moreover, the Commission would be hard pressed under any reasonable definition to find that cellular carriers exercise market power.[19]

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[18] *See Second Report and Order, supra,* (Dissenting Statement of Commissioner Andrew C. Barrett at pp. 7-8).

[19] *Metro Mobile CTS, Inc. v. NewVector Communications, Inc.*, 661 F. Supp. 1504 (D. Ariz. 1987) (a Federal District Court in Arizona determined that a wireline cellular carrier was unable to exercise market power while operating without any facilities-based cellular competition). After the introduction of non-

Antitrust law precepts define market power as the power to exclude competition or to raise prices.[20] The Commission has not performed even the elementary steps of estimating the market power of various wireless market participants (*e.g.*, PCS, Cellular, SMR). It has not specified any relevant market within the amorphous PCS family of services, nor has it shown what portion of that market cellular service would occupy. Therefore, claims that cellular carriers can exert undue market power therefore lack a rational basis in fact, and are unsupported by the record.

Indeed, no such market power exists. To the extent that PCS will compete with cellular, there are simply too many potential service providers for a cellular carrier to impact the competitive environment by warehousing a PCS license. Upon licensing of PCS, there will be two cellular carriers and up to seven PCS providers in each market. In addition, the Commission is on the verge of modifying its rules governing the Specialized Mobile Radio Service (SMR) to make both 800 MHz and 900 MHz SMR licensees direct competitors to cellular service.[21] Once these rules are adopted, certain SMR providers in each MTA will have

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wireline cellular competition the potential to exercise market power has been even further mitigated.

[20]*See e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-392(1956); *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).

[21]*See Notice of Proposed Rulemaking*, PR Dkt. No. 93-144, 8 FCC Rcd. 3950 (1993); *Second Report and Order and Further Notice of Proposed Rulemaking*, PR Dkt No. 89-553, 8 FCC Rcd. 1469 (1993).

sufficient spectrum and service area to market their service as another form of cellular. These changes will introduce several ESMR competitors into each market. Indeed, large SMR licensees (such as Nextel) have already begun implementing these new services pursuant to Commission-granted rule waivers. Finally, the Commission has laid the groundwork for mobile satellite licensees to provide cellular-like services.

Therefore, in any given geographic area, there will soon be approximately ten to fifteen providers of advanced mobile radio services. The Commission implies that granting a license to a cellular carrier will allow this carrier to warehouse the spectrum, thereby preventing its use to provide radio services that would compete with its cellular system. However, given the number of competitors from the various services described above, even if the stated assumption were true, this cellular licensee would be successful in suppressing only one-tenth to one-fifteenth of the potential competition. Given the large sums which will be paid at auction for broadband PCS licenses, it would be illogical and extremely unlikely that a cellular carrier will spend millions of dollars to have such negligible impact on competition.

Moreover, the Commission has already adopted adequate measures designed specifically to prevent the very warehousing which it professes to fear. In particular, the Commission has adopted strict performance requirements for PCS licensees, requiring that coverage be extended to one-third of the

population of the PCS service area within five years; two-thirds of the population in by the end of the ten year license period.[22] Under this requirement, a cellular licensee seeking to warehouse a PCS grant would lose its spectrum (and its substantial monetary bid) in five years, at which time a new competitor would be licensed. If the cellular carrier meets the construction benchmarks, the expense of constructing a PCS system would far outweigh the value of excluding only one of several competitors, since construction of such a system is expected to involve tens or hundreds of millions of dollars.

In this regard, the Commission has observed that "as long as transfer of licenses is permitted, valuable spectrum licenses are unlikely to be warehoused, that is, held out of use even though it would be profitable for a firm without market power to provide service using that spectrum."[23] The Commission correctly observes that the cost of paying for the license at auction, combined with the opportunity cost of not either using the license or selling it, will prevent anticompetitive practices.[24] The Commission has offered no justification in this proceeding for deviating from its stated intention to let the market forces brought into play by auctions deter the mythical threat of warehousing. And there is certainly no evidence in the record

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[22]*See* 47 C.F.R. § 24.203(a).

[23]*See Notice of Proposed Rulemaking*, PP Dkt No. 93-253, FCC 93-455 (released October 12, 1993) at para.91.

[24]*Id.*

that the value to cellular licensees of hindering a fraction of the competition will surpass the extraordinary expense involved in acquiring and constructing a PCS license. If the Commission wishes to let the marketplace assign the highest value to spectrum, it must be prepared to let these market forces operate. The entity that places the highest value on the spectrum will not be able to squander the license, if these forces are allowed to work.

In sum, the Commission's failure to explain its reasons for concluding that cellular carriers can exert undue market power violates the APA and well settled principles of administrative law. The Commission has failed to articulate a satisfactory explanation for excluding cellular carriers from full participation in the provision of PCS within their cellular market. The justification given, *i.e.*, that cellular carriers may exert undue market power, is without basis in the record in this proceeding. Consequently, the Commission is unable to identify a rational connection between the record and its concerns about anticompetitive behavior. Its rules preventing cellular carrier participation are seriously flawed and are very likely to be overturned on appeal.

(2) The Ten Percent Population Coverage and Twenty Percent Ownership Standards Do Not Reasonably Accomplish The Commission's Stated Goal

While the objective of preventing the exercise of undue

market power by cellular licensees lacks a rational basis in fact and support in the record, so too does the method of determining which carriers have such power. The Commission established two criteria for identifying cellular carriers to whom the PCS ownership restriction will apply, but did not provide any support for these criteria. First, the Commission stated that the restrictions on cellular licensees having PCS licenses in their cellular service areas would apply when the overlap of the PCS service area and cellular service area is a mere 10% or more of the PCS MTA/BTA. The Commission arbitrarily stated that an overlap of less than 10% would present only a slight potential for use of undue market power, without explaining what basis it used to establish this threshold.

Second, the Commission stated that the restriction will apply to all parties with 20% or more ownership in a cellular system servicing the PCS license area. Again, the Commission stated the restrictions were based on its concerns about undue market power, but the Commission never explained what basis it used for establishing 20% as the threshold.

The Commission arbitrarily decides that a less than 10% overlap is permissible but a 10% overlap is not, without citing any facts to support such a conclusion. It arbitrarily decides that less than 20% ownership is permissible but 20% ownership is not, without citing any facts to support such a conclusion. In sum, there is no rational basis given for the cellular licensing restrictions. Thus, the *Second Report and Order* violates the

APA.

B. Absent a Stay Radiofone Will Suffer Irreparable Harm

Absent a stay of the cellular restriction and the conduct of the PCS auction process, Radiofone will suffer irreparable harm by being unlawfully excluded from participation in the upcoming entrepreneurs' block auctions. The entrepreneur's block auction is Radiofone's only realistic opportunity to successfully bid on a 30 MHz broadband PCS license, since the entrepreneurs' band rules will facilitate participation by smaller, family owned businesses such as Radiofone. This auction thus represents Radiofone's best chance to gain sufficient broadband radio capacity to provide competitive services for the future communications needs of existing customers as well as provide services for a new untapped market of advanced PCS services.

The United States Court of Appeals for the District of Columbia Circuit recently granted a request for stay of the entrepreneurs' block auction filed by Telephone Electronics Corporation's (TEC) which has temporarily stopped the auction process. TEC sought a stay of, *inter alia*, the *Competitive Bidding Order* as it relates to the conduct of the entrepreneurs' block auction pending the outcome of TEC's Petition for Review of that order. The Commission has sought comment on a related Petition for Waiver of the entrepreneurs' block eligibility rules on an expedited basis. *See Public Notice*, DA 95-651, released

has set for comments it is apparent that resuming the Block C auction process is a high priority and has been placed on a very fast track. Thus, it is unlikely that the Sixth Circuit will act on Radiofone's Petition for Review prior to the commencement of the entrepreneurs' block auction.

Once the entrepreneurs' block auction commences it will be difficult if not impossible for the Commission to restore the *status quo ante*, should Radiofone succeed on its appeal. Such an action would require the invalidation of the entire auction, and recision of all licenses awarded. The Commission would be forced to conduct a second auction. The second auction, however, would be flawed because each participant would have exposed its strategy during the course of the first auction. Further, cancellation and re-auction would create significant problems with respect to administration of the auction, *e.g.*, the collection of up-front payments and down payments and would greatly inconvenience all participants.

C. Other Interested Parties Will Not Be Harmed If the Stay Is Granted

No other parties will be harmed should the Commission grant Radiofone's request. A stay of the auction would impact each participant equally. While a temporary postponement of the auction may cause a minor inconvenience, it is far preferable to the substantial harm that would result from the invalidation of the auction and the delays associated with the re-auctioning

the substantial harm that would result from the invalidation of the auction and the delays associated with the re-auctioning process.

D. The Public Interest Favors the Granting of a Stay

The public interest is best served by the requested stay. Granting the stay would provide each participant a level of certainty with regard to the finality of the auction that is otherwise unattainable while Radiofone's Petition for Review is pending at the Sixth Circuit. Moreover, a stay will allow the Courts and the Commission to review the merits of Radiofone's appeal, and to ensure that the Commission's goal of competition and a level playing field is met without undue constraints on an otherwise qualified company like Radiofone. It would harm the public interest to have the Commission and the auction participants expend their time and scarce resources on a flawed auction rather than awaiting resolution of the important issues raised on appeal.

Conclusion

For the foregoing reasons, Radiofone respectfully requests that the Commission stay the conduct of PCS auctions as adopted in its *Fifth Report and Order* and *Fifth Memorandum Opinion and Order* until such time as the Sixth Circuit has ruled on Radiofone's Petition for Review of the *Third MO&O*.

Respectfully submitted,

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