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

In the Matter of	)	
	)	
GCI Communications Corporation Applicant for a PCS License in Market 49, Alaska, Frequency Block B	)	File No. 00095-CW-L-95
	)	DOCKET FILE COPY ORIGINAL
Deferral of Licensing of MTA Commercial Broadband PCS	)	GN Dkt. No. 93-253 ET Dkt. No. 92-100

Motion to Dismiss, or in the Alternative Opposition to Petition to Deny and Request for Stay

Pursuant to Section 1.45 of the Commission's rules, GCI Communications Corp. (GCICC) hereby moves to dismiss or in the alternative opposes the Petition to Deny and Request for Stay filed by the National Association of Black Owned Broadcasters, Inc. (NABOB), Percy E. Sutton, Individually, and the National Association for the Advancement of Colored People (NAACP) (collectively Petitioners) with respect to the above-captioned application.

The Petitioners petition to deny and request for stay should be dismissed or alternatively denied. Petitioners request that the Commission deny the applications of all A and B Block bidders determined to have engaged in any anticompetitive activities. Petitioners do not assert a single specific allegation of fact regarding the GCICC

application.[1] GCICC has not engaged in any anticompetitive activities. Further, Petitioners have failed to comply with the Commission's rules regarding a request for stay. Alternatively, the Petitioners do not meet the standards for a grant of a stay. Therefore, the petition should be dismissed or in the alternative denied.

Introduction

The Commission was authorized in 1993 to auction personal communications service (PCS) licenses to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public."[2] After extensive comments and hearings, the Commission decided to divide the 120 Mhz of spectrum allocated to PCS into six license blocks. Licensees for blocks A and B will receive 30 MHz of spectrum each with a Metropolitan Trading Area (MTA) service area. There are 51 MTAs in the United States. The remaining licenses are of a more limited geographic area or Basic Trading Areas (BTA). There are 493 BTAs to be auctioned. One 30 MHz (Block C) and three 10 MHz (Blocks D, E, and F) licenses remain to be auctioned. The Commission adopted rules to promote participation by small

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[1]Petition to Deny and Request for Stay, pages 11 - 14. Petitioners state that AT&T combining with McCaw, several RBOCs joining with Airtouch, and Sprint, TCI, Cox and Comcast joining together will have a chilling effect on the ability of minorities to enter the PCS industry. They do not mention GCICC in their petition.

[2]47 U.S.C. Section 309(j)(3)(A).

business, rural telephone companies, women and minorities in PCS (collectively designated entities) through set-aside of certain licenses and bidding credits.

The Commission determined that all 2,071 licenses could not be auctioned at the same time. The Commission concluded that Block A and B licenses would be auctioned first because consumers would benefit from the rapid issuance of the largest licenses, the value of the revenue generated by the auction would be greater if larger licenses were sold sooner and selling the larger license first would promote partnership between large A and B Block licensees and designated entity block bidders.[3]

The auction for the licenses on Blocks A and B has concluded. All of the successful bidders have placed the required 20 percent deposit with the Commission. The remainder of the monies is due five days after the issuance of the license.

The C Block auction was originally scheduled to start on April 17, 1995. However, Telephone Electronics Corporation (TEC) challenged the constitutionality of the preferences in the United States Court of Appeals for the District of Columbia. TEC has recently withdrawn that appeal and the auction for Block C will begin on August 2, 1995.

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[3]Fifth Report and Order, 9 FCC Rcd 5532, 5547-5548 (1994).

The Petitioners now seek to have the issuance of the licenses for Blocks A and B stayed indefinitely and denied. The Petitioners assert that a stay is necessary to prevent A and B licensees from getting a head start and an unfair advantage. Petitioners also claim that the applicants engaged in anticompetitive activities. The Petitioners do not assert that GCICC was involved in such activities.

Response to the Petition to Deny

Petitioners claim that the Commission's decision to provide no incentives for minority ownership in the A and B Block auctions has resulted in a failure to comply with its statutory mandate. The Petitioners further claim that certain parties may have engaged in anticompetitive activities. The claims are erroneous and should be dismissed or alternatively denied.

The Commission's rules state that oppositions to applications must

> contain specific allegations of fact which, except for facts of which official notice may be taken, shall be supported by an affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest;[4]

[4] 47 C.F.R. Section 24.830(3).

Further, the Communications Act states

> Any party in interest may file with the Commission a petition to deny any application . . . The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a).[5]
>
> If the Commission finds on the basis of the application, the pleading filed or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the petition would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition.[6]

The Commission must evaluate the specific allegations of fact in a petition to deny an application. If the petition does not contain specific allegations of fact, the Commission must grant the application if it is consistent with the public interest.[7] In this instance, the

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[5]47 U.S.C. Section 309(d)(1).

[6]47 U.S.C. Section 309(d)(2).

[7]Section 309(a) of the Communications Act states: "Subject to the provision of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest convenience and necessity will be served by granting of such application and upon consideration of such other matters as the Commission may officially notice, shall find the public interest, convenience and necessity would be served by the granting thereof, it shall grant such application."

Petitioners have not alleged any specific facts against GCICC.

The first argument outlined by the Petitioners is related to the rules adopted by the Commission to fulfill its statutory obligation. This argument raises issues which are more appropriately addressed in a petition for reconsideration[8] of the rules, not a petition to deny.

The Petitioners argue that the Commission's decision to provide no incentives for minority ownership in the A and B Block auction has resulted in a failure to comply with its statutory mandate. The Commission considered arguments from hundreds of parties, including the Petitioner, regarding the rules to implement its statutory obligations outlined in Section 309(j) of the Communications Act. As the Petitioners point out, NABOB previously urged the Commission to adopt policies to promote participation by minorities in all frequencies. The Commission considered their arguments, but adopted a structure that set aside two frequency blocks for designated entities and gave bidding credits to small businesses, women and minorities in those frequency blocks so that participation could be ensured. Since the Commission set aside Blocks C and F for designated entities, the Commission has guaranteed the C and F block licenses will be held by a designated entity. This more than fulfills the statutory obligation of the Commission.

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[8]The time for filing such a petition has passed.

Further, Petitioners assert that the Commission's decision to provide no incentives for minority ownership in the A and B Block auctions allowed the dominant carriers to divide PCS licenses in an unlawful territorial allocation. The Petitioners state that certain parties may have engaged in anticompetitive activities when the Commission allowed potential competitors to consolidate themselves into a handful of applicants. This consolidation of major parties "has had a chilling effect on the ability of minorities to enter into the PCS industry."[9] The Petitioners specifically cite the applications of AT&T Wireless (AT&T and McCaw), PCS Primeco, L.P. (NYNEX, Bell Atlantic, US West and Air Touch) and Wireless Co., L.P. (Sprint, TCI, Cox Communications and Comcast). They do not assert that GCICC engaged in any such activities. GCICC asserts that it did not engage in any anticompetitive activities.

Therefore, the petition against GCICC should be dismissed or alternatively denied since the Petitioners do not raise specific allegations of fact against GCICC.

Response to Request for Stay

To obtain a stay of a Commission's order, the Petitioners must demonstrate a likelihood of success on the merits, that they will suffer irreparable injury if relief is withheld, no other interested party will be harmed if the stay is granted and the public interest favors a grant of a

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[9]Petition page 14.

stay.[10]

The Petitioners have not demonstrated that they will prevail on the merits. The Commission considered its statutory mandate to ensure minority participation and adopted a structure that would serve its goals. The Commission found that staggered timing of the auction would foster participation by designated entities, not hinder it. Until the licenses for Blocks A and B are awarded, the participants will not be able to make decisions regarding C block applications. Further, designated entities have been provided with very valuable information regarding the value of PCS licenses so that they can formulate their bidding strategy. The auction timing and PCS rules were adopted after hundreds of comments were filed in the proceeding. Further, the Wireless Telecommunications Bureau has already denied an identical motion to defer the licensing of the A and B block licenses.[11] The Petitioners are asking that the A and B block winners not be granted a headstart. The Commission rejected this argument in the PCS proceeding.[12]

The claims that the Petitioners will be irreparably harmed without a stay are speculative at best. Petitioners

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[10]Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841, 842 (D.C. Cir. 1977).

[11]Deferral of Licensing of MTA Commercial Broadband PCS, ET Docket 92-100, GN Docket 93-253 (April 12, 1995).

[12]Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858, 6863-4 (1994).

have not proven that they will lose access to capital, cell cites, access to distributors, or market share. In fact, the Commission has determined that a staggered auction will increase designated entities access to capital.[13] These reasons are insufficient for granting a stay.

A stay will substantially harm all the block A and B winning bidders. The winners were required to make an upfront payment on November 18, 1994 and a down payment of 20 percent on March 20, 1995. This capital is unavailable to the winning bidders. Further, the bidders have not been able to invest this capital in any other venture or to make any interest on the money.[14] Also, the public in general will be substantially harmed if the licenses are not granted. Competition with cellular incumbents will be delayed and harm consumers.

Lastly, a grant will not serve the public interest. The Commission must balance all elements of the public interest, not solely focus on the participation by minorities in the auction process. Congress has mandated that PCS be deployed rapidly for the benefit of the public.[15] Any further delay will delay the benefits of competition and the rapid deployment of new and innovative services. The stay request should be denied.

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[13] Fifth Report and order at 5547.

[14] 47 C.F.R. 1.2106(a) and 1.2107(b).

[15] 47 U.S.C. 309(j)(3)(A).

Conclusion

For the foregoing reasons, GCICC request that the Commission dismiss or alternatively deny the Petition.

Respectfully submitted,

GCI Communication Corp.

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May 25, 1995

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information and belief there is good ground to support it and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct.

Executed May 25, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 1995, the foregoing was mailed postage prepaid to the parties listed below.

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