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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In Re	)	
	)	GN Docket No. 93-253
Licensing of Block A and B MTA	)	ET Docket No. 92-100
Commercial Broadband PCS	)	

To: The Commission

DOCKET FILE COPY ORIGINAL

OPPOSITION TO APPLICATION FOR REVIEW AND REQUEST FOR STAY

Western PCS Corporation ("Western"), by its attorneys and in accordance with the Commission's Rules, hereby opposes the Application for Review and Request for Stay (the "Application") filed on May 12, 1995 by each of the National Association of Black Owned Broadcasters, Inc., the National Association for the Advancement of Colored People and Percy E. Sutton (collectively, the "Petitioners"). The Application (i) seeks Commission review of the Wireless Telecommunications Bureau's Order, GN Docket No. 93-253 (rel. April 12, 1995) (the "April Order"), which denied the Emergency Motion to Defer MTA PCS Licensing (the "Emergency Motion") filed on March 9, 1995 by Communications One, Inc. ("COI"), and (ii) requests a stay of licensing of the applications of the eighteen winners of the 99 broadband PCS licenses for the A and B block MTA frequencies.

I. INTRODUCTION

The Application is virtually identical in form and content to the Petitioners' Petition to Deny and Request for Stay (the "Petition"), also filed on May 12, 1995, except for the fact that the Application seeks review of the April Order, while the Petition

seeks denial of the 99 broadband block A and B PCS licenses. Both request a stay of the A and B block licensing. Both the Application and the Petition rely on the exact same arguments, chiefly the allegation that granting the A and B block PCS auction winners their licenses now will give them a "headstart" that will place the C block winners in a competitively disadvantaged position.

Western filed an Opposition of Western PCS Corporation to Petition to Deny and Request for Stay on May 25, 1995 (the "Petition Opposition"). Because the Application is virtually a verbatim reiteration of the Petition, and in order to conserve scarce Commission resources, Western elects not to restate all of the arguments raised in the Petition Opposition here. Rather, Western attaches the Petition Opposition hereto and incorporates herein its arguments. For continuity, brief summaries of the arguments set forth in the Petition Opposition are set forth in the relevant sections below.

II. ARGUMENT

A. Petitioners Have Failed to Meet the Requirements for an Application for Review

The issue before the Commission is whether the Wireless Telecommunications Bureau acted properly in rejecting COI's Emergency Motion. Section 1.115(b)(2) of the Commission's Rules, 47 C.F.R. Section 1.115(b)(2), provides that applications for review shall:

> specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

> (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
>
> (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
>
> (iii) The action involves application of a precedent or policy which should be overturned or revised.
>
> (iv) An erroneous finding as to an important or material question of fact.
>
> (v) Prejudicial procedural error.

It is not at all clear from the Application which of the above factors are alleged to warrant Commission reconsideration of the Bureau's decision. The Application makes no reference to Section 1.115 of the Commission's Rules, the standards for applications for review set forth therein, or any of the decisional precedents thereunder. Rather, the Application merely: recites the statutory obligations of Section 309(j) of the Communications Act of 1934, as amended (the "Act"), Petition at 3-6; speculates as to the alleged likelihood of a further delay in the block C auction schedule, Id. at 6-9; reiterates the purported ill effects of the "headstart" that will result from awarding the A and B block licenses prior to the licensing of the C block frequencies, Id. at 10-11; and alleges unlawful "territorial allocation" of the A and B block licenses among certain dominant carriers (not including Western), Id. at 11-15.[1] These allegations, speculations and recitations in no way

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[1]The remainder of the Application attempts to support Petitioners' request for stay, which is addressed below.

constitute the particularized statement of the basis for the requested review of the Bureau's action that is required by Section 1.115(b)(2) of the Rules.

To the extent that Petitioners' make any substantive arguments at all, the Commission has already considered headstart arguments that are identical to Petitioners' on at least two prior occasions. In the reasonable exercise of its discretion, the Commission has determined that, on balance, the several objectives of Section 309(j) would be promoted best by proceeding with the first phase of PCS licensing before subsequent auctions were conducted or even scheduled. See Fourth Memorandum Opinion and Order, PP Docket No. 93-253, 9 FCC Rcd 6858 (1994) (the "Fourth Order") and the April Order. The Commission also rejected a similar "headstart" argument in declining to delay licensing of wireline cellular carriers pending the selection of non-wireline licensees. See April Order at 2 n.9. Petitioners have not even begun to carry their burden of showing that the Bureau acted improperly in rejecting these same arguments in the April Order, or that the facts and circumstances have changed to such a degree that the issue merits reexamination now.[2] Because the Application merely restates allegations previously raised in the April Order and twice addressed and rejected by the Commission, and presents no new facts or circumstances that the Bureau did not have before it when it issued the April Order, the application for review set forth in the Application must be rejected.

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[2]See Petition Opposition at 3-6.

A case directly on point is Chapman S. Root Revocable Trust, 8 FCC Rcd 4223 (1993). There, Commission staff had granted Trust licensee's assignment applications for several AM and FM radio licenses, in the process denying petitions to deny that had been filed by the NAACP. Prior to the grant of the assignment applications, the subject licenses had been renewed, and the NAACP had filed petitions for reconsideration of the renewals, which petitions were denied. The NAACP filed an application for review of the grant of the assignment, and the Commission found that the NAACP's application "was procedurally defective and subject to dismissal," because:

> NAACP fails to identify any of the foregoing factors [i.e., Section 1.115(b)(2)(i) through (iv)] as the basis for its Application for Review. Moreover, the Application for Review does not even implicitly rely on any of the requisite factors as justification for seeking Commission relief.

8 FCC Rcd at 4224. The Commission found as "one final independent basis for rejecting NAACP's Application for Review" that "NAACP is doing nothing more than attempting to relitigate the same matters which we heretofore considered and rejected in License Renewal Applications. It is well established in this regard that the Commission will not grant rehearing 'merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken.'" Id. (cites omitted). See also Anthony R. Martin-Trigona, 54 RR2d (P&F) 715, 716 (1983).

B. The Application Is Untimely, Because the Arguments Made Therein Were the Proper Subject of a Petition for Reconsideration of the Fourth Order

Because the exact same headstart arguments were addressed in the Fourth Order, the Petitioners were required to advocate these claims in a petition for reconsideration of the Fourth Order. They failed to file such a petition for reconsideration, and it is untimely for them to raise the headstart arguments now.[3]

C. Petitioners Have Failed to Meet the Standards Necessary for the Grant of the Requested Stay

Even if the Application were timely--which it manifestly is not--the Commission must deny the request for stay because Petitioners have not met the standards necessary for grant of the requested relief. As set forth in Washington Metropolitan Area Transit Comm's v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977), Petitioners must demonstrate, in order to be awarded a stay, that: (1) it is likely they will prevail on the merits; (2) they will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors grant of a stay. Petitioners fail to meet these tests. They have not shown that they will be irreparably harmed by prompt granting of the A and B block licenses, or that a stay of the A and B block licensing is in the public interest.[4]

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[3]See Petition Opposition at 6-7.

[4]See Petition Opposition at 8-9.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in the attached Petition Opposition, the undersigned requests that the Commission deny the Application and grant the A and B Block auction winners' broadband PCS licenses as expeditiously as possible.

Respectfully submitted,

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May 30, 1995

Before the
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Washington, D.C. 20554

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In Re	)	
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Applications of	)	
	)	
WESTERN PCS CORPORATION	)	
	)	
Portland (Mkt. #30A)	)	File No. 00056-CW-L-95
	)	
Des Moines-Quad Cities (Mkt. #32A)	)	File No. 00060-CW-L-95
	)	
Salt Lake City (Mkt. #36A)	)	File No. 00068-CW-L-95
	)	
El Paso-Albuquerque (Mkt. #39A)	)	File No. 00074-CW-L-95
	)	
Oklahoma City (Mkt. #41A)	)	File No. 00078-CW-L-95
	)	
Honolulu (Mkt. #47A)	)	File No. 00090-CW-L-95
	)	
For Broadband PCS Licenses	)	

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To: The Commission

OPPOSITION OF WESTERN PCS CORPORATION
TO PETITION TO DENY AND REQUEST FOR STAY

Western PCS Corporation ("Western"), by its attorneys and in accordance with the Commission's Rules, hereby opposes the Petition to Deny and Request for Stay (the "Petition") filed on May 12, 1995 by each of the National Association of Black Owned Broadcasters, Inc., the National Association for the Advancement of Colored People and Percy E. Sutton (collectively, the "Petitioners"). The Petition seeks denial, and requests a stay of licensing, of the captioned applications and the other applications of the eighteen winners of the ninety-nine broadband PCS licenses for the A and B block MTA frequencies.

I. INTRODUCTION

The Commission has recently concluded the broadband PCS A and B block auction, and the eighteen auction winners stand poised to initiate a new service that, by all accounts, promises to deploy

new technologies, products and services for the benefit of the public and to promote competition for the established cellular, wireline and other existing service providers. The Commission has painstakingly proposed, adopted and revised a set of complex rules that are designed to promote all of the objectives of Section 309(j) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. Section 309(j), including the rapid deployment of new technologies, the promotion of competition and economic opportunity among a wide variety of applicants, recovery for the public of a portion of the value of the public spectrum resource made available for commercial use, and efficient and intensive use of the electromagnetic spectrum. The Commission has carefully considered the arguments of a wide range of interested parties, each of which has advocated most strenuously those objectives set forth in Section 309(j) that are closest to its own particular interests. Unfortunately, as in any complex rulemaking process where many disparate interests are affected, no end result can be obtained that represents the precise blend of interests and compromises that fully realizes the partisan goals all of the participants.

Accordingly, it perhaps comes as no surprise that now, on the eve of the grant of the first group of broadband PCS licenses, certain persons who helped mold the PCS structure would come forward and make a last effort to advocate their particular rendition of the "ideal" PCS framework. The Petitioners advocate a PCS structure where the interest in rapid introduction of PCS to the public is compromised by their fears that the A and B block winners, if granted their licenses now, will enjoy a "headstart"

that will place the C block winners in a competitively disadvantaged position. These headstart arguments, however, are not new. The Commission has considered these claims on at least two prior occasions and, in the reasonable exercise of its discretion, has determined that, on balance, the several objectives of Section 309(j) would be promoted best by proceeding with the first phase of PCS licensing before subsequent auctions were conducted or even scheduled. The time for seeking reconsideration of the Commission's action has passed. Furthermore, the Petitioners have not adduced any evidence to show that the Commission's prior consideration of these same arguments was defective, that the facts and circumstances have changed to the degree that these issues must be revisited, or that they have met their burden for the issuance of a stay. Finally, the Petition fails because it does not contain specific allegations of fact, supported by affidavit of a person with personal knowledge thereof, sufficient to show that the petitioners are parties in interest and that grant of the applications should be denied.

II. ARGUMENT

A. Petitioners' "Headstart" Arguments Have Already Been Raised, Considered and Rejected

The thrust of the Petition is that future entrepreneurs' block auction winners will suffer a competitive disadvantage because the companies that prevailed in the A and B block auctions will have a headstart over disadvantaged market participants.[1/] To eliminate

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[1/] "Each day that the A and B block licenses are granted ahead of the C block licenses will reduce the value of the C block licenses." Petition at 9. "If the Commission's C block auctions are delayed and the licensing of the A and B block

this alleged disadvantage, Petitioners propose 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.

On two prior occasions, the Commission has heard and expressly rejected the exact arguments raised by Petitioners, and Petitioners have not adduced any facts to show that a change in circumstances requires that the Commission reach a different conclusion now. In the Fourth Memorandum Opinion and Order, PP Docket No. 93-253, 9 FCC Rcd 6858 (1994) (the "Fourth Order"), the Commission affirmed its decision to use a sequence of auctions to license broadband PCS. In the Fourth Order, the Commission 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.[2/] The Commission concluded that it would not delay finalizing the award of A and B block licenses in light of the

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frequencies continues without being stayed, the A and B block licensees will gain such a tremendous headstart that they will preempt the market from prospective C block licenses." Id. at 10.

2/ The arguments made at that time, and adequately addressed by the Commission then, were identical to those that Petitioners make now:

> Several parties advocate that the entrepreneurs' block licenses (on blocks C and F) be auctioned before, or at approximately the same time as, the MTA block licenses. These petitioners allege that this approach is needed to ensure that the block A and B licensees do not gain a competitive advantage through a head start to the market.

Fourth Order, 9 FCC Rcd at 6863 para. 27 (footnotes omitted).

overriding public interest in the rapid introduction of service to the public. Id. at 6864 para. 32.

In the Order, GN Docket No. 93-253 (rel. April 12, 1995) (the "April Order"), the Commission addressed the "headstart" argument a second time, in response to an Emergency Motion to Defer MTA Licensing filed on March 8, 1995 by Communications One, Inc. ("COI"). In that Motion, COI argued that "every day of headstart given to the MTA auction winners will cost the Entrepreneur Block 'millions of dollars and countless opportunities,'" Motion at 2 para. 4, and that to "remedy the unfair headstart advantage, the Commission must defer licensing the MTA auction winners until after the Entrepreneur Block auction has been conducted," Id. at 3 para. 7.[3/] COI also asserted that the headstart was exacerbated by the fact that the Commission intended to delay the entrepreneurs' block auction pending the outcome of the Telephone Electronics Corporation ("TEC") litigation, Id. at 2 para. 3, mirroring the Petitioners' argument that the actual and potential delays in the block C auction will aggravate the headstart advantage.

In the April Order, the Commission's Wireless Telecommunications Bureau found that COI had 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

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[3/] Western PCS Corporation opposed COI's Emergency Motion. See Western PCS Corporation's Opposition to Communication One, Inc.'s "Emergency Motion to Defer MTA PCS Licensing" filed with the Commission on March 29, 1995 in PP Docket No. 93-253 and ET Docket No. 92-100.

> Commission affirmed its decision to use a sequence of auctions to license broadband PCS. 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.

April Order at 2 para. 4 (footnotes omitted). The Bureau reiterated its statements originally made in the Fourth Order 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. It thus again 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." Id. (footnote omitted). Finally, the Bureau stated that the Commission had rejected a similar "headstart" argument in declining to delay licensing of wireline cellular carriers pending the selection of non-wireline licensees. Id. at 2 n.9.

B. The Petition to Deny is Untimely, Because the Arguments Made Therein Were the Proper Subject of a Petition for Reconsideration of the Fourth Order

Because the exact same headstart arguments were addressed in the Fourth Order, the Petitioners were required to advocate these claims in a petition for reconsideration of the Fourth Order. Petitioners failed to file such a petition for reconsideration, and it is untimely for them to raise the headstart arguments now. It is directly on point that in rejecting COI's claims of unfair headstart, the Bureau reasoned that COI's efforts to raise the headstart issues in an emergency motion amounted to an untimely

petition for reconsideration of the Commission's prior decision. Id. at 3 para. 5. At that time, the Bureau rejected COI's claim that the possibility of a delay of the C block auction presented a "new circumstance that the Commission did not previously consider" when it originally rejected the unfair headstart arguments in the Fourth Order. April Order at 3 para. 5. Equally unfounded is any suggestion by Petitioners that the actual delay in the C block auction date and the current "cloud" on that date present a new circumstance requiring the Commission's consideration. Petition at 9. Accordingly, the Commission should now reject the unfair headstart arguments for the third time.[4/]

C. Petitioners Have Failed to Meet the Standards Necessary for the Grant of the Requested Stay

Even if the Petition were timely--which it manifestly is not--the Commission must deny the request for stay because Petitioners have not met the standards necessary for grant of the requested relief. As set forth in the Petition, Petitioners must demonstrate, in order to be awarded a stay, that: (1) it is likely they will prevail on the merits; (2) they will suffer irreparable harm if a stay is not granted; (3) other interested parties will

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4/ Any real or imagined delay in the block C auction is insignificant when put in proper context, and hardly undermines the continuing validity of the Commission's earlier rejection of the headstart arguments. Because the 2 GHz microwave incumbents have a period of up to three years during which they have absolutely no obligation even to negotiate to relocate their microwave channels, and an additional period of up to two years for good faith negotiations before any involuntary relocation, it is quite possible that any foreseeable headstart will be wholly meaningless. See Second Memorandum Opinion and Order, ET Docket No. 92-9, FCC 94-303 (rel. Dec. 2, 1994); Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589 (1993).

not be harmed if the stay is granted; and (4) the public interest favors grant of a stay. See Washington Metropolitan Area Transit Comm's v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). Petitioners fail to meet these tests.

For the same reasons set forth in the April Order as pertaining to COI, Petitioners have failed to show that they will be irreparably harmed by prompt granting of the A and B block licenses. Even if the A and B block licensees obtain some benefit from being licensed before other PCS providers, numerous competitive opportunities remain open to subsequent blocks because the bidders in these blocks will be able to evaluate the business strategies and initial performance of the A and B block licensees in making their own strategic business decisions. Furthermore, even assuming for the sake of argument 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, the C block bidders are free to discount their bids in the C block auction accordingly. See April Order at 3 para. 6.

Furthermore, Petitioners have failed to show that a stay of the A and B block licensing 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. See Section 309(j) of the Act. Prompt licensing of the A and B blocks will further rather than frustrate this goal. As the Commission stated in the April Order, 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.

D. The Petition Fails to Provide the Specific Allegations of Fact, Supported by Affidavits, Required by Section 309(d) of the Act

In addition to its other infirmities, the Petition's prayer for denial of the subject applications must also fail because the Petition does not contain specific allegations of fact, supported by affidavits of persons with personal knowledge thereof, sufficient to show that each Petitioner is a party in interest and that the grant of the applications would be prima facie inconsistent with service of the public interest, convenience, and necessity. See Section 309(d) of the Act and Section 24.430(a)(3) of the Rules. The Commission has stressed that in assessing the merits of a petition to deny, the first test is whether a prima facie case has been raised based upon specific allegations of facts of which the Commission can take official notice or that are supported by an affidavit of a person with first-hand knowledge of the facts alleged. See Texas RSA 1 Limited Partnership, 7 FCC Rcd 6584, 6585 (1992); Mutual Radio of New York, Inc., 1 FCC Rcd 384 (1986).

The Petition is replete with conclusory allegations, unsupported by specific facts, that the alleged headstart advantage will result in an "'excessive concentration of licenses' in the hands of the large A and B block winners," no "'dissemination' of licenses to businesses owned by members of minority groups," and failure to "'promote economic opportunity' for businesses owned by members of minority groups." Such regurgitation of the language of

Section 309(j) of the Act hardly constitutes the specific allegations of fact required by Section 309(d). Attached to the Petition are three declarations, each of which in the same manner blandly recites that the declarant has reviewed the Petition, has personal knowledge of the facts contained therein and asserts, under penalty of perjury, that the facts contained therein are true and correct to the best of his knowledge. Absolutely no effort is made to support the proffered conclusions. Accordingly, in the absence of the required specific allegations of fact supported by affidavits demonstrating personal knowledge of the facts alleged, the Petition must be rejected and the subject applications must be granted.

III. CONCLUSION

For the foregoing reasons, the undersigned requests that the Commission deny the Petition to Deny and Request for Stay and grant the captioned licenses as expeditiously as possible.

Respectfully submitted,

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May 25, 1995

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I, Jamie C. Whitney, a secretary in the law offices of Gurman, Blask & Freedman, Chartered, do hereby certify that I have on this 25th day of May, 1995, had copies of the foregoing "OPPOSITION OF WESTERN PCS CORPORATION TO PETITION TO DENY AND REQUEST FOR STAY" mailed by U.S. first class mail, postage prepaid, to the following:

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I, Lilly A. Whitney, a secretary in the law offices of Gurman, Blask and Freedman, Chartered, do hereby certify that I have on this 30th day of May, 1995, had copies of the foregoing "OPPOSITION TO APPLICATION FOR REVIEW AND REQUEST FOR STAY" mailed by U.S. first class mail, postage prepaid, to the following:

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Attachment A

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