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

MAY 30 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Deferral of Licensing of MTA)	GN Docket No. <u>93-253</u>
Commercial Broadband PCS)	ET Docket No. 92-100

To: The Commission

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**OPPOSITION TO PETITION FOR RECONSIDERATION,
APPLICATION FOR REVIEW AND REQUEST FOR STAY**

AT&T Wireless PCS Inc. ("AT&T"), by its attorneys hereby opposes the Petition for Reconsideration filed by Communications One, Inc. ("COI") and GO Communications Corporation ("GO") on May 12, 1995, and the Application for Review and Request for Stay filed by the National Association of Black Owned Broadcasters, Inc. ("NABOB"), Percy E. Sutton ("Sutton"), and the National Association for the Advancement of Colored People Washington Bureau ("NAACP") on May 12, 1995, in the above-captioned proceeding.^{1/}

^{1/} COI, GO, NABOB, Sutton, and the NAACP are collectively referred to as the "Petitioners" and the Petitioners' Petition for Reconsideration and Application for Review and Request for Stay are collectively referred to as the "Petitions." Although the GO and COI pleading is entitled a Petition for Reconsideration, the petitioners request immediate reconsideration by the full Commission. COI/GO Petition for Reconsideration at n.8. Accordingly, AT&T has complied with the filing dates specific to oppositions to applications for review. See 47 C.F.R. § 1.115(d). In addition, the Request for Stay filed by NABOB, Sutton, and the NAACP should be dismissed pursuant to Section 1.44(e) of the Commission's rules, which requires stay requests to be filed in a separate pleading. 47 C.F.R. § 1.44(e).

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I. Introduction

In denying COI's Emergency Motion to Defer MTA PCS Licensing ("Emergency Motion"), the Bureau properly determined that prompt licensing of the A and B blocks would serve the congressional mandate of promoting "the development and rapid deployment of new technologies, products, and services for the benefit of the public ... without administrative or judicial delays."^{2/} The Bureau also reasonably determined that accomplishing this public interest objective outweighs any possible competitive harm that might result from licensing the A and B block applicants before auction winners in other PCS blocks.^{3/} The Petitioners have not presented any new evidence or changed circumstances that would warrant setting aside the COI Order.

II. The Petitioners Present No Evidence That Would Warrant Deferral of A and B Block Licensing

The Bureau concluded that COI failed to meet the standards necessary for grant of a stay of A and B block licensing and denied the Emergency Motion.^{4/} The Petitions, likewise, should

^{2/} See Deferral of Licensing of MTA Commercial Broadband PCS, Order, GN Docket No. 93-253, ET Docket No. 92-100 (released April 12, 1995) ("COI Order"), citing the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), 47 U.S.C. § 309(j)(3).

^{3/} COI Order at ¶ 7.

^{4/} COI Order at ¶¶ 6-8. The Bureau initially found that COI's Emergency Motion amounted to an untimely petition for reconsideration of the Commission's prior decision to proceed with the first phase of PCS licensing before subsequent auctions were conducted or even scheduled. Id. at ¶ 5. For this reason, AT&T believes that the Emergency Motion should have been

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be denied, as they also do not satisfy the applicable stay criteria. Specifically, a party seeking a stay must show that it has a strong likelihood of succeeding on the merits, it will suffer irreparable harm absent the grant of a stay, interested parties will not be harmed if the stay is granted, and the public interest favors the requested relief.^{5/} The Petitioners fail on all counts.

The Petitioners rest their case on the Commission's supposed failure to live up to the congressional mandates regarding designated entities embodied in the Budget Act. The Petitioners have failed to demonstrate that a court would find this argument persuasive. The Commission adopted the entrepreneurs' block framework after carefully considering the hundreds of pages of comments submitted by interested parties during months of rulemaking proceedings. On this record, the FCC reasonably determined that reserving almost one half of the available broadband PCS licenses for smaller entities would fully meet the requirements of Section 309(j)(3)(C). 47 U.S.C. § 309(j)(3)(C). Moreover, the Commission properly determined that, in the context

^{4/} (...continued)

dismissed as procedurally defective, as should the instant Petitions. Nevertheless, because the Bureau proceeded to consider the merits of COI's pleading under the standards applicable to a request for a stay, AT&T will address the Petitioners' arguments on that basis as well.

^{5/} Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985); Washington Metro. Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Assn v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

of broadband PCS, a set-aside of this sort would be more effective than incorporating a system of bidding credits and installment payments into one general auction, as had been done in the earlier auctions in other services. Many potential broadband PCS bidders strongly advocated such a spectrum reservation, arguing that "establishment of entrepreneurs' blocks 'provides a good balance between Congress's clear mandate to provide opportunities for designated entities and avoid undue concentration of PCS licenses on the one hand with the goal of capturing the value of allocated spectrum for the American public on the other.' "^{6/}

In addition, the Commission reasonably determined that a sequence of broadband PCS auctions, with the A and B blocks auctioned first, would strike the proper balance in fulfilling the many objectives of the Budget Act. In particular, the FCC stated that auctioning licenses in the entrepreneurs' blocks after those in the MTA blocks would assist designated entities in attracting partners among unsuccessful bidders of the large unrestricted blocks and would produce valuable price information for designated entities.^{7/} The Commission also declined to delay

^{6/} Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 4957, ¶ 122, citing Ex Parte filing of Columbia PCS, June 2, 1994. Notably, Columbia PCS was the name previously used by GO.

^{7/} See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858 ¶¶ 28-30 (1994). Parties were given more than sufficient time to submit comments on this issue and some, such as BET Holdings, Inc. urged the Commission to retain the PCS auction sequence, arguing that any market

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finalizing the award of A and B block winners "because of the overriding public interest in rapid introduction of service to the public."^{8/}

Contrary to Petitioners' contentions, the slightly longer than anticipated gap between the A and B block auction and the C block auction caused by a judicial stay of the latter, does not change this analysis. In particular, the Petitioners have presented no evidence to back their contention that this several-month interval will impair the ability of designated entities to participate successfully in the auction or to compete in the marketplace.

Indeed, with regard to successful participation in the auction, the Petitioners' arguments suggest that the Commission was correct in allowing designated entities more, rather than less, time to re-attract financing that may have disappeared in the wake of the uncertainty created by the court-imposed stay. For example, COI and GO quote several investors and potential C block bidders for the proposition that the delay "caused some companies that provided operating capital for designated entities

^{7/}(...continued)
advantage afforded A and B block licensees would be more than offset by the availability of price information and the accessibility of capital from frustrated early bidders. Id. at ¶ 27.

^{8/} Id. at ¶ 32. Not surprisingly, the Petitioners read the Budget Act selectively and fail to mention the very first objective set forth by Congress: to ensure "the development and rapid deployment of new technologies, products, and services for the benefit of the public." 47 U.S.C. § 309(j)(3)(A).

to either postpone their decisions or walk away."^{9/} To the extent GO and COI are correct that "various DE groups will not be able to participate in the auction" because of the lack of financial backing, it is not clear how deferral of the A and B block licensing would remedy this situation.^{10/} Rather, under this line of reasoning, it appears that a longer postponement of the C block auction would be the proper response.^{11/}

Similarly, the Petitioners' argument that designated entities will suffer a competitive disadvantage in the PCS business if the A and B block winners are licensed now is mere speculation. If anything, history demonstrates that the Commission properly concluded that "numerous competitive opportunities remain open to subsequent PCS entrants."^{12/} For example, in 1991, the FCC eliminated its "headstart" policy for

^{9/} COI/GO Petition for Reconsideration at 12, citing Experts See Entrepreneurs' Block Auction Delay Drying Up Financing Options, COMM. DAILY, April 10, 1995, at 1.

^{10/} See COI/GO Petition for Reconsideration at n.22.

^{11/} Significantly, when the Commission announced that short form applications for the C block auction would be due on February 28, 1995, there was an enormous outcry from the designated entity community, including some of the Petitioners in this proceeding. FCC Extends Short Form and Auction Dates for 493 BTA Licenses, Public Notice (released February 10, 1995) (referring to a letter from, among others, Rubin, Winston, Diercks, Harris & Cooke, dated February 2, 1995). These parties argued that, under this timetable, potential C block participants would be unable to complete business plans, raise financing, and negotiate with bidders in the A and B blocks because that auction was not complete. Id. Accordingly, to accommodate these requests, the Commission pushed back the short-form deadline and the auction date.

^{12/} COI Order at ¶ 6.

cellular licensees, which allowed nonwireline competitors to ask for a six-month deferral in the initiation of wireline service because of the wireline operator's early entry into the market.^{13/} The Commission noted that during the nine-year existence of the policy, no nonwireline carrier had been able to demonstrate that a moratorium was in the public interest.^{14/} It stated that "it is not at all clear that early entry into a cellular market provides a wireline carrier with an anticompetitive advantage over a nonwireline carrier," adding that it had "not received any concrete evidence that late entry by a nonwireline carrier has hampered its ability to compete."^{15/}

Moreover, not only is the harm to designated entities theoretical, but it appears that C block licensees actually "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."^{16/}

Finally, deferral of the A and B block licensing would be directly contrary to the public interest. The Commission has taken a number of steps to fulfill the explicit congressional

^{13/} 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, ¶ 97 (1991).

^{14/} Id. at ¶ 99.

^{15/} Id. at ¶ 100.

^{16/} COI Order at ¶ 6.

mandate to promote the development and rapid deployment of PCS without administrative and judicial delay and has consistently denied requests to slow down the entry of new wireless competitors. Granting a stay at this point would undermine those pro-competitive efforts, resulting in harm to both consumers and the A and B block winners.

III. Conclusion

The record in the proceedings adopting auction rules and policies demonstrates that the Commission has struck a proper balance among the various objectives set forth in the Budget Act. In contrast, the Petitioners have failed to demonstrate that they are likely to prevail on the merits of their case or that they will be irreparably harmed by issuance of the A and B block

licenses. Accordingly, for the foregoing reasons, AT&T respectfully requests the Commission to deny the Petitions and promptly grant AT&T's pending PCS applications.

Respectfully submitted,

AT&T WIRELESS PCS INC.

Cathleen A. Massey ^{by} SFS
Cathleen A. Massey
Vice President, External Affairs
Douglas Brandon
Regulatory and Antitrust Counsel
McCaw Cellular Communications, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036

May 30, 1995

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CERTIFICATE OF SERVICE

I, James Waddy, hereby certify that on this 30th day of May, 1995, I caused copies of the foregoing OPPOSITION TO PETITION FOR RECONSIDERATION, APPLICATION FOR REVIEW AND REQUEST FOR STAY to be sent by First Class mail, postage prepaid, or to be delivered by messenger (*) to the following:

Regina Keeney, Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554

Rosalind K. Allen, Chief*
Commercial Radio Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5202
Washington, DC 20554

Larry Atlas, Associate Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554

Jackie Chorney*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554

Bill Kennard*
General Counsel
Federal Communications Commission
1919 M Street, NW, Room 614
Washington, DC 20554

Don Gips, Deputy Chief*
Office of Plans and Policy
Federal Communications Commission
1919 M Street, NW, Room 822
Washington, DC 20554

Kathleen Ham*
Commercial Radio Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5202
Washington, DC 20554

ITS*
Federal Communications Commission
1919 M Street, NW, Room 246
Washington, DC 20554

Jay C. Keithley
Wirelessco
1850 M Street, N.W., Suite 1100
Washington, D.C. 20036

James L. Wurtz
Pacific Bell Mobile Services
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Kathleen Q. Abernathy
PCS Primeco, LP
1818 N Street, N.W., Suite 800
Washington, D.C. 20036

R. Michael Senkowski
GTE Macro Communications Corporation
Weiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Poka Lambro Telephone Cooperative, Inc.
11.5 Miles North of Tahoka, TX on U.S. 87
P.O. Box 1340
Tahoka, TX 79373-7234

South Seas Satellite Communications Corporation
c/o 25 Stonington Road
South Laguna, CA 92677

Southwestern Bell Mobile Systems, Inc.
Attn: Steve Portnoy
17330 Preston Road, Suite 100A
Dallas, TX 75252

Western PCS Corporation
Attn: John W. Stanton
330 120th Avenue, N.E., Suite 200
Bellevue, WA 98005

American Portable Telecommunications, Inc.
Attn: Rudolph H. Hornacek
30 North LaSalle Street, Suite 4000
Chicago, IL 60602

BellSouth Personal Communications, Inc.
Attn: Rebecca A. Jackson
3353 Peachtree Road, Suite 400
North Tower
Atlanta, GA 30326

Communications International Corporation
Attn: Neil S. McKay
717 West Sprague Avenue, Suite 1600
Spokane, WA 99204-0466

Richard Rubin
Counsel for Centennial Cellular Corporation
Fleischman & Walsh, LLP
1400 16th Street, N.W., Suite 600
Washington, D.C. 20036

Ameritech Wireless Communications, Inc.
Attn: Evan B. Richards
30 South Wacker Drive
Chicago, IL 60606

GCI Communications Corporation
Attn: Richard P. Dewling
2550 Denali Street, Suite 1000
Anchorage, AK 99503-2781

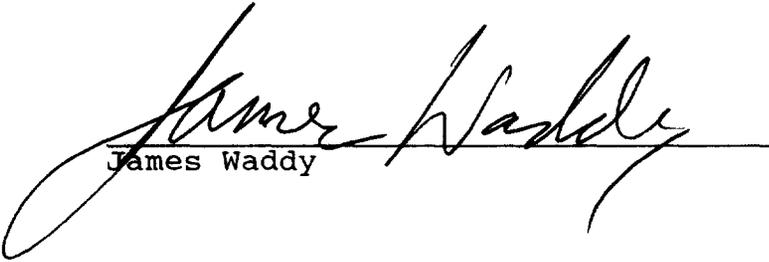
Western PCS Corporation
Attn: John W. Stanton
330 120th Avenue, NE, Suite 200
Bellevue, WA 98005

James L. Winston, Esq.
Rubin, Winston, Diercks, Harris & Cooke
Counsel for The National Association of
Black Owned Broadcasters, Inc., et al.
1333 New Hampshire Avenue, NW
Tenth Floor
Washington, DC 20036

Timothy E. Welch
Hill & Welch
Counsel for Communications One, Inc.
1330 New Hampshire Avenue, N.W.
Suite 113
Washington, D.C. 20036

John A. Malloy
General Counsel
GO Communications Corporation
201 North Union Street
Suite 410
Alexandria, VA 22314

Lawrence R. Sidman
Julia F. Kogan
Neil H. MacBride
Counsel for GO Communications Corporation
Verner, Liipfert, Bernhard, McPherson and Hand
901 Fifteenth Street, N.W.
Washington, D.C. 20005-2301


James Waddy

F1/39894.1