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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

OPPOSITION TO APPLICATIONS FOR REVIEW

Pursuant to Section 1.115(d) of the Commission's rules,[1] WirelessCo, L.P. ("WirelessCo") and PhillieCo, L.P. ("PhillieCo") hereby oppose in the above-captioned proceeding: (1) the Application for Review filed by the National Association of Black Owned Broadcasters, Inc., Percy E. Sutton, Individually, and the National Association for the Advancement of Colored People (the "Minority Petitioners' Application") and (2) the Petition for Reconsideration By the Full Commission of Denial of Emergency Motion to Defer MTA PCS Licensing filed by Communications One, Inc. ("Comm One") and GO Communications

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1 47 C.F.R. § 1.115(d). Oppositions to an Application for Review must be filed within 15 days after the Application for Review is filed. The Application for Review at issue here were filed on May 12, 1995, and severed on WirelessCo and PhillieCo by first class mail, providing an additional three days for filing oppositions. The WirelessCo and PhillieCo Opposition is thus due to be filed with the Commission on May 30, 1995.

Corp. ("GO") (the "Comm One Application") (collectively, the "Applications").[2]

PROCEDURAL HISTORY

On March 8, 1995, Comm One filed an "Emergency Motion to Defer MTA PCS Licensing" ("Emergency Motion") requesting that the licensing of the A and B blocks for Personal Communications Services ("PCS") be delayed pending resolution of court proceedings staying the C block PCS auction.[3] The C block PCS auction and the entrepreneur's block auction had been scheduled to begin on April 17, 1995 and would have been the second in a series of auctions for PCS licenses across the nation. On delegated authority, the Wireless Telecommunications Bureau ("Wireless Bureau") denied Comm One's Emergency Motion on April 12, 1995 and, in so doing, rejected most of the arguments raised in these Applications.[4] Comm One and the Minority Petitioners now

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2 Although the Comm One pleading is styled a "Petition for Reconsideration by the Full Commission," its substance makes it clear that it is, in fact, an Application for the full Commission to review the Wireless Telecommunications Bureau's denial of Comm One's earlier motion to defer. See Comm One Application at 5, n. 8. Should the Commission consider the Comm One Application a Petition for Reconsideration, rather than an Application for Review, WirelessCo respectfully requests leave to file this Opposition outside the time established by 47 C.F.R. § 1.115(d). See also 47 C.F.R. § 1.46.

3 See Order, Telephone Electronics Corp. v. FCC, No. 95-1015 (D.C. Cir. March 15, 1995).

4 Matter of Deferral of Licensing of MTA Commercial Broadband PCS, 1995 FCC LEXIS 2541 (April 12, 1995) ("Comm

(Footnote 4 Continued)

seek to appeal denial of the Emergency Motion to the full Commission, in a further attempt to delay unnecessarily the licensing of the A and B blocks of PCS frequencies.

DISCUSSION

I. The Applications Merely Restate Arguments Previously Addressed and Properly Rejected by the Wireless Bureau.

WirelessCo and PhillieCo have addressed the arguments raised by the Applications in two previous Oppositions to briefs filed by the Minority Petitioners in connection with their Petitions to Deny and Requests to Stay WirelessCo's license grants.[5] Despite its rhetoric to the contrary, the Comm One Application adds nothing new to the arguments previously raised by the Minority Petitioners, but merely raises them in a different context.[6] Rather than

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(Footnote 4 Continued)
One Order") (Wireless Bureau rejected Comm One's motion to stay A and B block PCS licensing as contrary to public interest in prompt PCS licensing).

5 See WirelessCo's Opposition to Request for Stay (May 19, 1995); WirelessCo's Opposition to Petition to Deny and Request for Stay (May 25, 1995) (collectively the "WirelessCo Oppositions" or "Oppositions"). Unless otherwise specified, WirelessCo will be used to refer to both WirelessCo and PhillieCo.

6 The Comm One Applications arise in the context of designated entities other than those owned by racial minorities. Small businesses and minority owned businesses are "designated entities," eligible for preferences in the Commission's Block C PCS auction. See, e.g., 47 U.S.C. §309(j); Implementation of Section 309(j), Final Rule, 1994 FCC LEXIS 4959 (July 22, 1994).

repeat its earlier arguments, WirelessCo merely notes that its Oppositions fully addressed all the Minority Petitioners' arguments regarding delay of A and B block licensing.[7] Instead, WirelessCo specifically addresses two arguments that Comm One asserts justify Commission review of the Wireless Bureau's decision to proceed with licensing of the A and B blocks.

II. The "New" Arguments Suggested by Comm One Do Not Justify Full Commission Review.

The Comm One Application suggests that it has raised "novel questions of law" and "changed circumstances" which justify reconsideration or review by the full Commission.[8] In fact, however, neither changed circumstances nor novel legal issues exist which justify reversal of the

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7 Comm One's Application suffers the same procedural and substantive defects as those affecting the Minority Petitioners' Application and identified in previous WirelessCo Oppositions. Like the Minority Petitioners, Comm One's Application improperly combines a stay request with other requests for relief and is an untimely request for reconsideration of previously heard arguments. In addition, Comm One's proposed stay fails to satisfy the four-prong test for grant of a stay established by the courts. A stay is particularly unjustified because no C Block applicant, will suffer irreparable harm during a stay. To the contrary, the Commission calculated that a delay in holding the C Block auction would benefit designated entities by helping them identify and attract partners and investors. See Comm One Order at *3-*4; Implementation of Section 309(j), Final Rule, 1994 FCC LEXIS 4959 at ¶39 (July 22, 1994). On the other hand, the public and winners of A and B Block PCS spectrum will be harmed by a delay in public access to, and choice of, personal communications services.

8 Comm One Application at 5-11.

Wireless Bureau's decision not to stay the A and B block PCS licensing.

A. No "Changed Circumstances" Have Occurred.

Comm One argues that the Commission should review the Wireless Bureau's rejection of its earlier Emergency Motion because of "changed circumstances" -- specifically, the delay of the C block auctions. However, Comm One previously raised this argument with the Wireless Bureau which rejected the argument on the following grounds:

> We find that [Comm One'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 [Comm One's] suggestion that the possibility of a delay of the C block auction presents a new circumstance that the Commission did not previously consider.[9]

The Commission also considered and rejected the related argument that A and B Block licensing should be delayed because of the possible "head start" that PCS auction winners in the A and B block auctions might receive (compared with the future C and F block auction winners).[10] The Commission determined that its PCS procedures were necessary to produce inter-service competition between PCS

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9 Comm One Order at *5.

10 See Fourth Memorandum Opinion and Order, Implementation of Section 309(j) - Competitive Bidding, 9 FCC Rcd 6858, 6863-64 (1994) ("Fourth Memorandum Opinion and Order").

and cellular services. Thus, Comm One's concern that A and B Block PCS providers will have an unfair head start is offset by the fact that those PCS providers are, in fact, catching up with incumbent cellular service providers whose "head start" was much larger than the few months about which the Minority Petitioners and Comm One complain. Because the Commission found the possibility of a head start insignificant -- regardless whether the delay in future auctions was 75 days or a few months -- the possibility of further delays based on litigation is insufficient to justify a stay of the auction results.

B. No "Novel" Antitrust Issues Justify Reversal of the Wireless Bureau's Decision.

In addition, Comm One suggests that "novel" issues of antitrust law justify full Commission review of their Emergency Motion to stay licensing of the A and B PCS blocks.[11] However, the decision of the Wireless Bureau is pro-competitive and consistent with the Commission's statutory mandate because it maximizes competition

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11 Comm One Application at 6-11. Comm One's arguments on the competition issue are versions of the same arguments WirelessCo has addressed in response to the Minority Petitioners' Application. E.g., Opposition to Request for Stay at 3, 6. Comm One, however, has cloaked its arguments in antitrust language, in the form of a declaration from economist Daniel Kelley.

throughout the field of commercial mobile radio services and promptly provides new services to the public.[12]

When the Commission created its PCS auction rules, it was aware that not all companies would make the infrastructure and other investments necessary to win A and B blocks of frequency. Nonetheless, it allowed for a limited number of frequency blocks to be licensed for PCS because of the great need to "promptly" establish PCS to compete with cellular services.[13] As the Wireless Bureau noted in rejecting Comm One's Emergency Motion:

> Prompt licensing of the A and B blocks furthers this Congressional mandate [of competition] 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.[14]

Thus, as the Wireless Bureau found, the balance of competitive interests favors prompt licensing of at least

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12 See 47 U.S.C. § 309(j)(3)(statutory mandate requires "rapid deployment of new technologies, products and services for the benefit of the public... without administrative or judicial delays" and promotion of competition).

13 Fourth Memorandum Opinion and Order, 9 FCC Rcd at 6863-64.

14 See Comm One Order at *6-*7.

some PCS providers to establish competition with cellular services.

Second, Comm One's Application selectively quotes from the Justice Department's Merger Guidelines and the legislative history of the competitive bidding statute to wrongly suggest that the A and B block PCS auction resulted in excessive concentration. For example, Comm One's Application inaccurately states that the Department of Justice generally "will not permit companies ... to merge" where the Herfindahl-Hirschman Index of market power ("HHI") in that industry is greater than 1,800.[15] To the contrary, while the Department of Justice uses the 1,800 figure as a guideline, it often permits mergers which result in a higher concentration because it can be pro-competitive to reduce the number of firms in a market so as to produce greater economies of scale or other efficiencies.[16]

In fact, the PCS market is not nearly as concentrated as Comm One suggests. Comm One focuses on the largest auction winners, but a total of 16 companies or consortia were winning bidders in the Commission's auction for A and B block PCS frequencies. Furthermore, Comm One ignores the dilution of this concentration that will result

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15 Comm One Application at 8.

16 DOJ/FTC Merger Guidelines, 1992 FTC LEXIS 176 at *35-36 (1992).

from the C block auction and other future auctions.[17] On both a nationwide basis and in each geographic market, entry of new, smaller firms will increase the number of PCS service providers, consistent with Section 309(j). Finally, Comm One does not raise any facts suggesting a flaw in the Commission's careful anti-collusion rules such that PCS providers would collude about price or otherwise harm PCS consumers -- precisely the harms which inquiries into market concentration are designed to avoid.[18]

In sum, even the supposedly novel arguments raised by Comm One's Applications to justify full Commission review have been previously addressed and rejected by the Commission. The Applications thus provide no basis for reconsideration of the Commission's decision not to defer licensing in the A and B Blocks of PCS spectrum.

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17 In fact, the Kelley Declaration concedes that once the C band licenses are included, the HHI drops to 929, which the Department of Justice classifies as "unconcentrated." Kelley Declaration, attached to Comm One's Application, at 5, ¶11.

18 See Fourth Memorandum Opinion and Order, at ¶59 (reaffirming applicability of anti-collusion rules to PCS auction).

CONCLUSION

For the foregoing reasons and those given in the previous Oppositions filed by WirelessCo and PhillieCo, the Minority Petitioners' Application and the Comm One Application should be dismissed or denied in their entirety. The Commission should proceed promptly to award PCS licenses to the winning bidders in its auction for A and B frequency blocks.

Respectfully submitted,

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Dated: May 30, 1995

CERTIFICATE OF SERVICE

I, Eric N. Richardson, do hereby certify that copies of the foregoing **OPPOSITION TO APPLICATIONS FOR REVIEW** were mailed first-class, postage prepaid to the following on this 30th day of May, 1995.

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