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

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

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GTE MACRO COMMUNICATIONS CORPORATION
OPPOSITION TO APPLICATION FOR REVIEW

GTE Macro Communications Corporation

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SUMMARY

GTE Macro Communications Corporation ("GTE Macro") opposes the Application for Review filed by the NAACP, Percy Sutton, and NABOB ("Petitioners"). The Petitioners' filing seeks full Commission review of a Bureau Order denying a "Petition To Defer" originally filed by Communications One, Inc. ("COI"), an unrelated entity. COI's Petition To Defer sought, in effect, a stay of licensing for PCS Blocks A and B.

GTE Macro submits that the Petitioners' filing should be summarily dismissed for failure to meet the minimum requirements governing applications for review. Petitioners are attempting to seek review of an order denying a petition filed by an unrelated entity in a proceeding in which they did not participate. Under these circumstances, Petitioners are required to provide a statement demonstrating their interest in seeking review -- above and beyond the normal requirements for administrative standing -- as well as showing good reason for not having participated at an earlier stage. Petitioners have not even attempted either showing, which renders their filing fatally defective.

In any event, the Application for Review provides no basis for reversing the Bureau's decision to deny the COI Petition To Defer. As the Bureau correctly noted in its order disposing of the Petition To Defer, the substance of the COI Petition To Defer is no more than an untimely request for reconsideration of final rules setting forth the schedule for auctioning of PCS licenses. The Application for Review does nothing to cure this defect. The Petitioners' arguments regarding the timing of the Block C auction are moot, speculative, or were previously addressed by the Commission in its rulemaking proceeding. Moreover, Petitioners' assertion that Block A and B auction winners have engaged in a geographic market

allocation is entirely unsupported, speculative, and ignores that the Commission's policies were designed to foster regionalization by PCS licensees. Having foregone their option of contesting these rulemaking decisions at the appropriate time, Petitioners should not be permitted to raise them at the eleventh hour.

Even assuming, *arguendo*, that the COI Petition To Defer merited consideration as a request for stay, Petitioners have provided no basis for overturning the Bureau's determination that a stay was unjustified under the *Petroleum Jobbers* criteria. Petitioners have demonstrated no irreparable injury that will result from failing to issue a stay. Furthermore, Petitioners completely ignore the harm to the public that results from delaying the introduction of additional competition in the wireless marketplace and the initiation of new, and needed, services. Thus, as the Bureau correctly determined, it is not in the public interest to delay the expeditious deployment of new PCS offerings based upon the speculative and unproven arguments in the COI Petition To Defer. The Application for Review does not alter this public interest calculus.

For the foregoing reasons, GTE Macro urges the Commission to act expeditiously to dismiss or deny the Application for Review. Petitioners have offered no new evidence or legal theory that warrants revising the Bureau's decision to deny the COI Petition To Defer. Accordingly, the the Bureau's conclusion to dismiss the COI Petition should be affirmed by the Commission.

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OPPOSITION TO APPLICATION FOR REVIEW

GTE Macro Communications Corporation ("GTE Macro") herewith files its opposition to the above-captioned Application for Review of the National Association of Black Owned Broadcasters, Inc., Percy E. Sutton, and the National Association for the Advancement of Colored People Washington Bureau (jointly, "Petitioners").[1] Petitioners are seeking Commission review of a Wireless Telecommunications Bureau ("Bureau") order that denied a petition to defer PCS Block A and B licensing that was originally filed by Communications One, Inc. ("COI"), an unrelated entity.[2] As discussed below, Petitioners have provided no

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[1] Petitioners also simultaneously filed a "Petition To Deny and Request for Stay" against each of the 99 applications filed by PCS Block A and B auction winners. These petitions were placed on public notice on May 15, 1995. *See FCC Public Notice*, Report No. CW-95-3 (May 15, 1995). Although Petitioners have created some confusion by impermissibly filing their requests for a stay coupled with other pleadings, *see* 47 C.F.R. § 1.44(e) (1994), GTE Macro is filing its oppositions as if these requests were filed as separate pleadings. Accordingly, GTE Macro filed its opposition to the requests for a stay on May 19, 1995, filed its opposition to the Petitions To Deny on May 25, 1995, and is filing this opposition to the Application for Review on May 30, 1995.

[2] Deferral of Licensing of MTA Commercial Broadband PCS, GN Docket No. 92-253, DA 95-805 (Apr. 12, 1995) ("*Bureau Order*").

sound basis for reversing the *Bureau Order*. Accordingly, GTE Macro urges the Commission to act expeditiously to dismiss the Application for Review.

I. THE APPLICATION FOR REVIEW IS FATALLY DEFECTIVE BECAUSE PETITIONERS HAVE NOT DEMONSTRATED THEIR RIGHT TO SEEK COMMISSION REVIEW OF THE *BUREAU ORDER*

The Application for Review is fatally defective because Petitioners have failed to demonstrate why they should be entitled to seek review of the *Bureau Order* when they did not file the original Petition To Defer and did not participate in the proceedings below. Section 1.115 of the Commission's Rules, which governs the filing of applications for review, states, in pertinent part:

> Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.[3]

This rule imposes an affirmative requirement on a party seeking review above and beyond showing a cognizable "interest" in a proceeding.

Quite simply, Petitioners are not parties to this case. The original Petition To Defer was filed by COI, an entity unrelated to any of the Petitioners. The Application for Review asserts that "NABOB has filed numerous pleadings in this proceeding," but the mere existence

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[3] 47 C.F.R. §1.115(a).

of other filings in the rulemaking proceeding does not alter the fact that none of the Petitioners filed any comments on the COI Petition To Defer. Furthermore, Petitioners did not even attempt to provide a showing of good cause why they did not participate below. Petitioners have been active in other Commission rulemakings on designated entity issues and could have filed to apprise the FCC of their interests at the time the Petition To Defer was under consideration. Because Petitioners elected to forego their opportunity to comment during the proceedings below, they should be not now be entitled belatedly to assert them in a Application for Review.

Petitioners have also failed to include a statement "describing with particularity" why they would be aggrieved by failure to reverse the *Bureau Order*. Petitioners have provided only a brief statement in which they assert, based upon generalized public interest concerns, that they have standing to file. However, a general statement of standing is not sufficient to allow Petitioners to step into the shoes of COI to prosecute a Application for Review.

In light of Petitioners' filing of their own Request for Stay, the Application for Review is a transparent attempt by Petitioners to expedite their ability to seek judicial review of the FCC's actions by bootstrapping themselves to an unrelated filing. GTE Macro urges the Commission to foreclose Petitioners from circumventing the normal administrative process in this manner by dismissing, rather than considering, the Application for Review. Indeed, Section 1.115 of the Commission's Rules is designed precisely to avoid situations like the one at hand. In the absence of the necessary showings by Petitioners under Section 1.115, the Application for Review should be dismissed.

II. THE BUREAU PROPERLY DENIED THE COI PETITION TO DEFER

The Bureau acted properly in denying the COI Petition To Defer. Specifically, the Bureau found that the COI Petition: (i) was an untimely attempt to seek reconsideration of the FCC's rulemaking order that determined the broadband auction scheduling and, (ii) did not, in any event, meet the "irreparable harm" and "public interest" tests for judging requests for extraordinary relief set forth in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) ("*Holiday Tours*"), and *Virginia Petroleum Jobbers v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) ("*Petroleum Jobbers*"). Petitioners have provided no sound basis for reversing the Bureau's determinations on either of these grounds.

A. Petitioners Are Improperly Seeking Reconsideration of Settled Rulemaking Issues

Petitioners argue that PCS licenses for MTA Blocks A and B should be deferred because delays in the Block C auction will give Block A and B applicants a competitive headstart and because the Commission's policies have allowed a geographic allocation of markets to be implemented. As discussed below, the substance of both of these arguments was settled in notice and comment rulemaking proceedings and should not now be subject to untimely relitigation.[4] GTE Macro urges the Commission to refuse to rehear Petitioners'

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[4] *See Hispanic Information & Telecommunications Network*, 865 F.2d 1289, 1294 (D.C. Cir. 1989); *Broadcast Corp. of Georgia (WVEU-TV)*, 96 F.C.C.2d 901, 907 (1984); *F.T.C. v. Brigadier Industries Corp.*, 613 F.2d 1110, 1117 (D.C. Cir. 1979).

arguments in the context of a Application for Review of an untimely request for reconsideration.

1. Petitioners' attempt to delay PCS licensing is unsupported by law or policy

Petitioners have implicitly argued that the delay in the commencement of the Block C auctions provides a basis for deferring grant of applications for Blocks A and B. However, the sequence of the 2 GHz PCS auctions -- and therefore the timing of 2 GHz license grants -- has been firmly settled since October of 1994.[5] At that time, the Commission explicitly addressed arguments that Block A and B licensing should be delayed, stating:

> [W]e intend to hold the three broadband auctions as close together in time as possible given our administrative resources. We decline to delay finalizing the award of A and B block licenses, however, because of the overriding public interest in rapid introduction of service to the public.

Notably, while this order was modified, in part, on reconsideration, the reconsideration was on the Commission's own motion and did not modify the Commission's decision to proceed promptly with the Block A and B auction.

Petitioners have provided no basis for revisiting the Commission's auction timing decisions other than citing to the limited delay in starting the Block C auction and offering raw speculation that the Block C auctions may not commence on August 2, 1995. The recent, relatively minor, delay in starting the Block C auctions is not sufficient, however, to overcome

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[5] *Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 6858, *recon.* 9 FCC Rcd 7684 (1994).

"the overriding public interest in rapid introduction of service to the public." The delay was the result of a stay issued by the D.C. Court of Appeals in *Telephone Electronics Corp. v. F.C.C.*,[6] over which the Commission had no control. The Commission, in fact, opposed TEC's request for a stay.[7] In any event, TEC's appeal has now been dismissed, the stay has been dissolved,[8] and the Commission has moved quickly to reschedule the auction within the public notice requirements of the competitive bidding rules. Given the inherent vagaries in the length of auctions and in the administrative process generally, this brief, unavoidable interruption in the Commission's auction schedule does not provide a basis for delaying the grant of GTE Macro's applications.

Petitioners also attempt to bolster their argument by asserting that other potential delays *could* arise. Petitioners' assertion that problems could arise from a waiver request by Consolidated Communications, Inc., however, is moot, since the waiver request has been withdrawn.[9] Petitioners also note the existence of a request for stay filed by Radiofone, Inc., but that request raises issues relating to cellular/PCS cross-ownership that are entirely different from the issues raised by Petitioners. Finally, Petitioners assert that "it is *possible* that the

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[6] C.A. No. 95-1015, *slip op.* (D.C. Cir. Mar. 15, 1995).

[7] Federal Communications Commission Opposition to Emergency Motion for Stay, C.A. No. 95-1015 (D.C. Cir. filed Feb. 17, 1995).

[8] *Telephone Electronics Corp. v. F.C.C.*, C.A. No. 95-1015, *slip op.* (D.C. Cir. May 1, 1995).

[9] *See* Letter to William S. Caton from Veronica M. Ahern, Counsel to Consolidated Communications, Inc. (dated May 5, 1995).

Court [of Appeals] may issue another stay," but fail to note that no procedural vehicle exists for the Court to consider such a request at this time.

As the Bureau properly recognized, the COI Petition To Defer was no more than an untimely attempt to reopen long final rulemaking decisions regarding the scheduling of broadband PCS auctions. The Application for Review of the *Bureau Order* does not cure this fatal defect. Indeed, even assuming arguendo that the final auction schedule should be open to further review, the speculative assertions contained in the Application for Review do not provide any reasoned foundation for altering the Commission's prior decision.

2. *The distribution of licenses following the auction provides no basis for delaying PCS Block A and B licensing*

Petitioners have implicitly argued that the geographic distribution of licenses following the MTA auctions provides a basis for delaying the grant of Block A and B applications. Under the Commission's rules, however, aggregation of MTA licenses to provide PCS on a regional basis is not only lawful, but encouraged. In the competitive bidding rules adopted for the 2 GHz PCS MTA authorizations, the Commission used simultaneous multiple round bidding procedures precisely to facilitate aggregation by applicants.[10] As the Commission observed in the PCS proceeding, there are many benefits to consumers from regionalization, including "facilitat[ing] regional and nationwide roaming; allow[ing] licensees to tailor their

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[10] Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd 5532 at ¶31 (1994) (Fifth Report and Order) (stating "[w]e . . . believe that the values of most broadband PCS licenses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic regions").

systems to the natural geographic dimensions of PCS markets; reduc[ing] the cost of interference coordination between PCS licensees; and simplify[ing] the coordination of technical standards."[11] It should now come as no surprise that licenses, in fact, have been aggregated into regional systems.

Petitioners' insinuations that an implicit market division has occurred are unsupported and the linkage between the postulated illegal activity and the ability of designated entities to compete is tenuous at best. Indeed, GTE Macro is not a party to any of the consortia identified in the requests for stay, and Petitioners have offered no specific factual allegations that any applicant has engaged in conduct that does not comply with the Commission's anti-collusion rules. Furthermore, the argument that the recent auction of licenses has had a "chilling" effect on the ability of designated entities to enter the PCS market is nothing more than speculative conjecture. The fact of the matter is that the ability of designated entities to enter the PCS market or raise the necessary capital will be a function of their marketing and management expertise, rather than speculative assumptions concerning market dynamics.

In sum, Petitioners' allegations that the results of the 2 GHz PCS auction imply that some market division has occurred are entirely speculative. Furthermore, the appropriate time to raise these issues was at the time the Commission adopted its market aggregation policies. Petitioners did not, at that time, raise any objection. They should not be permitted to do so now.

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[11] New Personal Communications Services, 8 FCC Rcd 7700 at ¶74 (1993) (Second Report and Order); 7 FCC Rcd 5676 at ¶58 (1992) (Notice of Proposed Rulemaking);

B. The Bureau Properly Denied COI's Petition To Defer for Failure To Meet the Criteria Justifying Extraordinary Relief

As the Bureau observed in denying COI's Petition To Defer, "even if we were to treat COI's motion as a timely request for stay of A and B block licensing, . . . COI has failed to meet the standards necessary for grant of the requested relief." The Bureau then proceeded to find that the Petition To Defer failed to meet two necessary criteria for the grant of extraordinary relief -- it did not demonstrate that the petitioner would be irreparably harmed and did not demonstrate that the public interest would be served by granting a stay. Both of these determinations were entirely justified by the record and Petitioners have provided no additional relevant facts that warrant altering the Bureau's analysis.

To justify the extraordinary relief represented by a stay of an administrative order, the *Holiday Tours* case requires consideration of the following four factors:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits? . . .
>
> (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . .
>
> (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . .
>
> (4) Where lies the public interest?[12]

In the present case, the initial factor is not relevant, inasmuch as the stay itself is the ultimate rule change sought by the Petitioners. Petitioners have not, however, made the necessary

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[12] 559 F.2d at 842 (citing *Petroleum Jobbers*, 259 F.2d at 925).

showings under any of the other criteria, providing independent grounds for dismissal of their Application for Review.

1. Petitioners have not shown that they will be irreparably injured absent the requested stay

Petitioners have failed to substantiate the existence of any concrete harms that have arisen from the minor delay in the C Block auctions. Instead, Petitioners advance speculative arguments that, if the Commission proceeds with Block A and B licensing, they will be disadvantaged by potentially losing access to capital, base station cell sites, distributors and resellers, and market share. First, given that the Commission has *set aside* spectrum for entrepreneurs, any "loss of access to capital" as a result of the auction timing would, if true, act uniformly to depress the overall costs of license acquisition in the auctions, potentially resulting in *lower* capital costs for designated entities and an *improved* ability to compete.[13] Second, given the sheer number of cell sites required for microcellular PCS systems, the routine cycle of loss and acquisition of cell sites that occurs in all radio services, and the unlikely prospects of PCS licensees obtaining *exclusive* leases on potential tower sites, the potential for wholesale loss of "prime" locations is negligible. Finally, even if later market entrants lose market share or potential distribution avenues, any such losses would be

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[13] In contrast to Petitioners' arguments, the Commission's *Fourth Memorandum Opinion and Order* notes that one potential designated entity, BET Holdings, Inc., argued that "the Commission [should] affirm the sequence of the PCS auctions, [since] any market advantage afforded successful A and B block bidders from entering the market before the designated entities *will be more than offset* by the availability of price information and the accessibility of capital made available to designated entities by frustrated early bidders." *Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 6858 at ¶27 (1994) (emphasis added).

temporary in a competitive market.[14] Because Petitioners have not demonstrated that, absent the relief sought by COI, "irreparable injury" will occur, their Application for Review should be denied.

2. *Issuance of a stay will cause substantial harm to other interested parties*

Although Petitioners focus exclusively on asserting, quite mistakenly, that there will be no harm to applicants caused by a stay,[15] Petitioners ignore the most damaging aspect of issuing the requested stay -- the effect of delay upon the public. Any delay in issuing licenses to the Block A and B auction winners will deny the public access to new PCS offerings and the benefits of added competition in wireless services. Indeed, the Commission explicitly rejected arguments to delay finalizing license awards to avoid competitive advantage over winners in later auctions "because of the *overriding* public interest in rapid introduction of service to the

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[14] *See Holiday Tours*, 559 F.2d at 843 (noting that "[t]he mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact"). Contrary to Petitioners' claims, the Commission is not required to ameliorate any and all competitive imbalances between competitors under the Communications Act. As the Commission has previously noted, "[t]he issue is not whether [a competitor] has advantages, but, if so, why and whether any such advantages are so great as to preclude the effective functioning of a competitive market." *Competition in the Interexchange Marketplace*, 6 FCC Rcd 5880, 5891-92 (1991).

[15] Contrary to Petitioners' assertions, any licensing delays subject the applicants to specific, tangible, and substantial harms. As an initial matter, GTE Macro has already tendered to the Commission its deposit that could be used by GTE to expand other telecommunications services. Furthermore, given the vast capital costs of license acquisition, PCS deployment schedules have been developed, resources set aside, and contracts and agreements entered into in reliance on the Commission's prior statements that licenses would be expeditiously granted. Any delay in grant of the licenses thus has severe fiscal consequences for the applicants.

public."[16] Expediting the provision of new services for the public, in fact, was one of the Commission's four primary policy goals driving the PCS rules and policies and one of Congress's enumerated mandates in both the *Communications Act* and the *Omnibus Budget Reconciliation Act of 1993.*[17] The public should not be denied the benefits of competition and new offerings on the basis of the Petitioners' speculative showings.

3. *The public interest would not be served by delaying grant of the applications*

The Commission should summarily reject Petitioners' requests for stay of the issuance of Block A and B licenses. The policies attacked by the Petitioners were adopted in notice and comment proceedings, are now final, were relied upon by the applicants, and fully discharge the Commission's obligations under the *Omnibus Budget Reconciliation Act*. Moreover, the balancing of harms in this case pits speculative, remote potentialities against the concrete, substantial harm resulting from denial of new and competitive services to the public. Under the circumstances, the public interest is served by denying the requested stay.

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16 *Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 6858 at ¶32 (emphasis added).

17 *See New Personal Communications Services*, 8 FCC Rcd 7700, 7704 (1993) (identifying "speed of deployment" as a one of four objectives for PCS); *Omnibus Budget Reconciliation Act of 1993*, § 6002, Pub. L. No. 103-66, 107 Stat. 388 (1993) (stating that competitive bidding policies "shall seek to promote . . . the rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative . . . delay"); 47 U.S.C. §157 (1991) (noting that "[i]t shall be the policy of the United States to encourage the provision of new . . . services to the public").

III. CONCLUSION

As discussed above, the Application for Review should be dismissed. First, the Petition is fatally defective in that it does not provide any justification for Petitioners late attempt to raise these issues. Moreover, the Petition is no more than a belated attempt to seek reconsideration of rulemaking decisions settled by final Commission order. In any event, the arguments raised in the Application for Review are either moot or speculative, and do not provide a reasoned basis for reversing the Bureau Order. GTE Macro accordingly urges the Commission to dismiss the Application for Review.

Respectfully submitted,

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Dated: May 30, 1995

CERTIFICATE OF SERVICE

I, Kimberly Riddick, hereby certify that on this 30th day of May, 1995, I caused copies of the foregoing "GTE Macro Communications Opposition toApplication for Review" to be mailed, first-class, postage pre-paid, to the following:

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