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

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In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314
	)	
Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

To: The Commission

COMMENTS ON FURTHER NOTICE OF PROPOSED RULE MAKING

The parties listed below, through counsel, hereby submit these comments in response to the Federal Communications Commission's ("FCC") June 23, 1995 Notice of Proposed Rule Making ("NPRM") for the personal communications services ("PCS") broadband C Block auction, re-scheduled for August 29, 1995. This proposal outlines a waiver proposal whereby any applicant who can demonstrate "good cause" would be eligible for those preferences and bidding credits currently reserved in the NPRM only for small businesses. NPRM at ¶ 27.

The proposed waiver would provide companies, regardless of revenues, an opportunity to make an individualized showing, wherein they could articulate their unique and individualized hardship and why they should be eligible for a waiver on a case by case basis. Waiver requests submitted by minority and women-owned businesses would receive a "plus" factor since there

is a record of evidence in this proceeding and in congressional legislation that establishes a compelling governmental interests in diversity of ownership. Additionally, minority and women-owned businesses justifiably relied on the previously existing rules and procedures, and as such should be afforded latitude in applying for a waiver that recognizes their unique financial and other obstacles. The availability of such a waiver with a "plus" factor for minority and women-owned businesses would demonstrate the "FCC's [continuing] obligation and commitment to ensure that [minorities and women] are afforded the opportunities to participate in the provision of spectrum-based services." NPRM at ¶ 1. The proposed waiver procedure is narrowly tailored to further a number of compelling governmental interests, and would be constitutional under a strict scrutiny standard for the reasons articulated below.

I. PCS and the Programming Diversity Theory

As technologies converge, PCS, telephony, broadcasting, computer services and cable will all be information providers, and therefore become a means of providing and disseminating programming and information for our multi-cultural society. This convergence and its application with PCS technology was evidenced by the joint-venture of Sprint (long-distance carrier), Tele-Communications, Inc. (cable), Cox (cable), and Comcast (cable), formed to participate in the A and B Block auctions.

PCS may also have implications for video and on-line services, but currently its ultimate capabilities are unknown. As a "broadband" service, the C Block PCS licenses will clearly have the spectrum capacity to provide voice, data, and video services. This capability exceeds that available to VHF broadcasters, cellular operators, SMATV operators and others. As such, PCS cannot be examined simply as a portable telephone, but must be considered as a dynamic

communications service with unforeseen information accessing possibilities. Therefore, programming diversity, which is ensured by diverse ownership of FCC licenses, as articulated in Metro Broadcasting, Inc. v. F.C.C. ("Metro"), 497 U.S. 547, 566 (1990), is in fact a compelling governmental interest that does have relevance for PCS.

In Metro, the Supreme Court recognized the importance of programming diversity, and held that the FCC's minority ownership policies serve the important governmental objective of broadcast diversity. Id. The Court stated that "Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preferences." Id. Further, the Court added that "[s]afeguarding the public's right to receive diversity of views and information over the airwaves is therefore an integral component of the FCC's mission. Id. at 567.

In elaborating on the importance of broadcast diversity, the Court stated the following:

> "Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, Regents of University of California v. Bakke ("Bakke") 438 U.S. 265, 311-313 (1978) (opinion of Powell, J.), the diversity of views and information on the airwaves serves important First Amendment values. Cf. Wygant v. Jackson Board of Education, 476 U.S. 267, 314-315 (1986) (Stevens, J., dissenting). The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience. As Congress found, 'the American public will benefit by having access to a wider diversity of information sources.'" Id. at 568.

It is important to note that Adarand Constructors, Inc. v. Peña ("Adarand"), No. 93-1841, 25-26, slip op. (U.S. June 12, 1995) did not affect Metro's holding that diversity of media ownership is an important governmental interest, but instead only held that strict scrutiny would be applied to all racial classifications in the future. The Court did not reach the question of whether diversity is a compelling governmental interest. Although the Court stated that the policies at issue in Metro would be construed under a strict scrutiny standard, rather than its "intermediate scrutiny" standard, Justice O'Connor's opinion did not find the non-remedial goal of diversity unconstitutional.

As technologies converge, licensees will have increasing control over the information and programming provided to our society, and that is one of the compelling reasons for ensuring ownership diversity in the next millennia. The FCC acknowledged the power of the licensee when it recognized that "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of [information] presentation." F.C.C. v. NCCB, 436 U.S. 775, 785 (1978) (quoting Rules Relating to Multiple Ownership of Standard, FM and Television Stations, Second Report and Order, 50 F.C.C. 2d 1046, 1050 (1975). Even in 1994, FCC licenses remain concentrated, evidenced by the fact that only 323 of the 11,128 broadcast facilities (including television and radio stations) were owned by minorities. The Minority Telecommunications Development Program, National Telecommunications and Information Administration, Analysis and Compilation of Minority-Owned Commercial Broadcast Stations in the United States (Sept. 1994). Thus, diversity among PCS licensees is imperative, as they are likely to control vast amounts of information and programming capabilities in the near future.

II. Waivers Should be Liberally Granted

The C Block auction has already been delayed twice, causing great uncertainty within the investment community. It is important to note that even though the C Block auction has been delayed twice, the A and B Block auction was concluded in early 1995, and those licenses were awarded in June, 1995. Thus, the licenseholders are already building-out their systems. The A and B Block winners are very well capitalized. are currently acquiring the best PCS sites, hiring the relatively few engineers with expertise in the PCS industry, and scouring the marketplace to "lock-in" the ancillary businesses -- preventing them from working with C Block license winners. Thus, by the time the licensees in the entrepreneurs' block finally get their licenses, their obstacles, financial and otherwise, will have increased tenfold; thus, the need for prompt action is critical.

Pursuant to this NPRM, following Adarand, minorities and women may be ineligible for pure class-based relief. Nevertheless, both minorities and women still face the obstacle of inadequate access to traditional sources of capital.

On June 28, 1995, the U.S. Department of Justice, Office of Legal Counsel, issued a Memorandum to General Counsels on Adarand ("DOJ Memorandum") that advised reviewing affirmative action programs, but did not advocate abandoning them. In contrast to the Department of Transportation, which elected to maintain the program challenged in Adarand, the FCC quickly abandoned its minority and women ownership policies in the C Block auction and has fashioned as race-neutral program. The DOJ Memorandum also emphasized that the Court had not found a single federal affirmative action program unconstitutional by stating:

> "Adarand did not determine the constitutionality of any particular federal affirmative action program. In fact, the Supreme Court did

> not determine the validity of the federal legislation, regulations, or program at issue in Adarand itself. Instead, the Court remanded the case to the Tenth Circuit for a determination of whether the measures satisfy strict scrutiny." DOJ Memorandum at 8.

The DOJ Memorandum mentions waivers in previous cases as a method of narrowly tailoring affirmative action programs, bolstering their constitutionality. Further, the DOJ Memorandum notes that "Justice O'Connor's opinion declared that the federal government may have a compelling interest to act on the basis of race to over come the 'persistence of both the practice and lingering effects of racial discrimination against minority groups in this country.'" DOJ Memorandum at 4.

The current NPRM provides significant benefits to all small businesses. The FCC defines "small business" as an entity that has had revenues under $40 million for the three preceding years. Fifth Memorandum Opinion and Order in PP Docket No. 93-253, Released November 23, 1994 at ¶ 17. The FCC elected to "retain a single gross revenue size standard, which is an established method for determining size eligibility for various kinds of federal programs that aid small businesses." Id. at ¶ 23. This is a reasonable threshold for small businesses, and does in fact ensure competition by "small" companies in the C Block auction. Further, since such a criteria is based on revenues, it is surely constitutional because it would only be examined under rational basis scrutiny. Nevertheless, despite Adarand, if the FCC is going to entirely forego specific relief for minority and women-owned businesses, it should consider granting waivers to those individual non-small businesses that can demonstrate good cause for such relief, allowing for a "plus" factor when examining the requests of minorities and women.

In accordance with Sections 1.3 and 24.819(a), the FCC has discretionary and equitable power to grant waivers of its rules based upon a showing of good cause.[1] The FCC may exercise this discretion when the factual circumstances make strict compliance with the rules inconsistent with the public interest. See Northeast Cellular Telephone Co. v. F.C.C., 897 F.2d 1164 (D.C. Cir. 1990). The FCC may also take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. WAIT Radio v. F.C.C., 418 F.2d 1153, 1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

Any applicant, including but not limited to, that does not meet the small business criteria should be able to apply for the small business preferences, by requesting a waiver based on good cause. To obtain the waiver, each applicant should make and an individualized showing of good cause based upon any of the following criteria:

1) justifiable reliance on the previously existing rules and procedures;

2) prior discrimination in lending or employment;

3) its difficulties in obtaining capital from traditional sources;

4) commitment to serve underserved urban or rural areas in furtherance of national policy to provide universal telecommunications service; and

5) hardship of deployment due to the lack of a strategic partner.

The opportunity to apply for a waiver on any of these bases demonstrates the FCC's commitment to ensuring that women and minority-owned businesses will be able to meaningfully compete for licenses in the C Block auction.

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[1] See, e.g., Fox Television Stations, Inc., FCC 95-188, Released May 4, 1995, at 72.

Through this waiver procedure, companies making a showing such as that contemplated above, may show that they should be imputed to be, and should be treated as small businesses. For example, where the telecommunications capital-formation ability of a $60 million business is only equivalent to that of a $30 million business, that business should be treated as a small business.

The FCC's authority to grant waivers is and has been constitutional, provided such action is based upon on good cause and in the public interest.

III. FCC Waivers are Narrowly Tailored

Waivers based on good cause are in the public interest, and promote congressionally mandated compelling governmental interests such as competition, economic opportunity for all Americans, innovations to technology, technological access for underserved areas, programming diversity, and remedying the effects of discrimination. 47 U.S.C. § 309(j)(3)(B). The above-mentioned waivers would be narrowly tailored because they are based on the individual facts of each applicant. The above criteria are not based on race alone, although race and gender should be considered as "plus" factors. Waivers are a method by which those who may have justifiably relied on the FCC's minority and women ownership policies, and have developed financial plans in good faith in reliance on those policies, can at least obtain the preferences reserved for small businesses.

Waivers comport with the DOJ Memorandum because they rely of the FCC's authority to grant such, and are narrowly tailored, and thereby constitutional. The DOJ Memorandum emphasized instances when Adarand may not apply. In instances where the "government does not use racial or ethnic classifications in selecting persons from an expanded pool, Adarand

ordinarily would not apply." DOJ Memorandum at 7. Merely using minority or women-owned businesses status as a "plus" factor is very different than using it as a sole criterion.

The DOJ Memorandum outlined a number of relevant criteria with respect to narrow tailoring that are relevant herein to the waiver proposal. The NPRM is entirely race-neutral, and the "plus" factor for minorities and women is merely a consideration, and not a barrier to entry. The burden on non-minorities and women is minimal, and the scope of the waiver is for only the C Block auction.

Unlike the case of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the waiver proposed herein is not a "rigid numerical quota", but instead a flexible tool that allows an individualized determination of whether a particular individual has suffered one or more of the hardships mentioned earlier. Even more narrowly tailored than the ten percent minority requirement upheld in Fullilove v. Klutznick, 448 U.S. 448 (1980) that could be waived if a minority charged a higher price that was not attributable to the effects of past discrimination, the waiver covers only the C Block auction and would be determined on an individual basis. The "plus" factor used in reviewing the waiver requests of minority and women-owned businesses does not impose an undue burden on non-minorities and men, since it may be invoked only in the C Block, and they are not excluded from applying for it. Further, the waiver and "plus" factor is not a quota or fixed quantity set-aside. Thus, the waiver proposal would be constitutional under a strict scrutiny analysis.

IV. Negative Effects of Additional Delay

The waiver process will not open the C Block auction to challenge. The only possible attack would be on those winners who received waivers. The waiver proposal articulated herein,

submitted as a compromise, will hopefully meet with the approval of those prospective bidders who were heavily dependent on the previously existing rules and procedures.

Additional delay beyond August 29, 1995 will lead to increased uncertainty for investors. At some point, potential bidders and investors will simply "walk away" from the C Block auction as the values of the licenses continues to decrease over time due to lingering instability. This will negatively affect the values of the licenses when the auction occurs, ultimately diminishing the amount of money received by the federal government.

Competition in telecommunications will be diminished without diversity of licensees, leading to slower technological development and higher pricing. Without a diversity of ownership, there will be fewer information providers, lessening the diversity of viewpoints available to our multi-cultural society.

By not facilitating a diversity of licensees, employment opportunities will be lost in underserved urban and rural areas. Without licensee diversity, underserved areas will be the last to receive technological advancements, creating a society of information "haves" and "have nots". The waiver option proposed herein will cause no delay in the auctions, and will enable the agency to obtain valuable input and experience in adapting its jurisprudence to Adarand on a case by case basis.

V. Conclusion

For the reasons stated in the foregoing, we support the rules proposed in the NPRM with the addition of the proposed narrowly tailored waiver provision and believe the FCC should proceed with the auction as scheduled on August 29, 1995.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Michael Heningburg, Jr., as Associate of the law firm of McManimon & Scotland, do hereby certify that a copy of the attached Comments on Further Notice of Proposed Rule Making was served this 7th day of July, 1995 to the following persons by hand:

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