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

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 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

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To: The Commission

COMMENTS OF CELLULAR SERVICE, INC.

Cellular Service, Inc. ("CSI") hereby files comments in response to the Commission's Further Notice of Proposed Rule Making ("Notice"), FCC 95-263 (June 23, 1995).

CSI is a cellular reseller in Southern California which qualifies as a small business and intends to participate in the Block C auctions. CSI supports the changes proposed in the Notice. Regardless of whether the Commission could ultimately develop a record to satisfy the "strict scrutiny" review mandated by Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (Sup.Ct. June 12, 1995), there is no doubt that distribution of Block C licenses would be delayed, if not frustrated completely, by a failure to make the proposed changes. In the absence of those changes, Adarand would encourage losing bidders to challenge licenses awarded to applicants controlled by minorities or women. Any substantial delay in the issuance of licenses would handicap

the winning bidders' ability to compete against existing cellular licensees as well as parties who have already received PCS licenses in Blocks A and B.

Nor need the Commission be concerned at this juncture that the changes proposed in the Notice will unfairly disadvantage or otherwise limit the opportunities for minorities and women to participate in the ownership of PCS licenses. Minorities and women who are owners of small businesses will still enjoy the credits and other preferences made available to small businesses. Indeed, minorities and women may be able to use those preferences to secure the same number of licenses that they would have under the prior rules. This is especially so since the cost of the license is, in most cases, only a small fraction of the monies needed to construct the system. In other words, the credits and other preferences under the prior rules were only of marginal value and may have been insufficient in many, if not most cases, to overcome the bid of another applicant that was not controlled by women or minorities.

Minorities and women, as well as other small businesses, would be further benefited if the Commission clarified its definition of a "consortium of small businesses" in Section 24.720(b) of its rules. The Commission authorized the formation of a small business consortium in order to enable a group of small businesses to pool their resources in bidding for licenses. That goal assumes even more importance with the elimination of the preferences for minorities and women. Small businesses

controlled by minorities and women, as well as other small businesses, may find it particularly useful to form a consortium in light of the very substantial cost involved in constructing a PCS system.

Unfortunately, the Commission has created considerable uncertainty by its denial of a reconsideration petition filed by Omnipoint Communications, Inc. requesting that a small business consortium be allowed to form a single corporation. Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 434 (1994). The Commission explained that its concept of a consortium "is that each small business participant remains a distinct corporate entity independent of other consortium members and that each member has rights and obligations similar, or equal to, those held by participants in other types of joint ventures." The Commission expressed its concern that formation of a corporation "could tend to dilute each member's influence and insulate their responsibilities in the venture." 10 FCC Rcd at 434.

Although its explanation is not entirely clear, the Commission is apparently concerned that formation of a corporation would (1) remove some or most of the participating small businesses from any involvement in management and (2) limit each participating small business's liability, and thus its ultimate responsibility, for the consortium's activities.

The Commission's concerns would be inapplicable to a limited partnership in which (1) the general partner is a corporation whose stock is held exclusively by all of the small businesses

participating in the consortium, (2) each of the participating small businesses has the right to appoint one director to the corporate general partner's board of directors (which would have responsibility to manage the consortium's affairs), and (3) the limited partnership interests are distributed only to members of the consortium.[1]

Use of a limited partnership vehicle in accordance with the foregoing parameters would enable small businesses to pool their individual resources in a manner consistent with the Commission's goals. Each small business in the consortium would participate in management through the appointment of a director. And each small business would have liability as a stockholder of the corporate general partner. The limited partnership, as described above, would thus eliminate the risk that small businesses would simply contribute monies to a large organization and then remain passive in the management of its affairs.[2]

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[1]The division of general partnership and limited partnership interests could be distributed in a manner commensurate with each consortium member's investment in the applicant. In that latter event, different members of the consortium could have different ownership interests -- but no individual member would have a majority of the ownership interest and each member would still have a right to appoint one board member (and thus have an equal voice in the management of the consortium's affairs).

[2]A general partnership would also satisfy the Commission's goals for a consortium of small businesses, and the Commission should clarify that a general partnership would also be an acceptable vehicle. However, the limited partnership has one major advantage over a general partnership: state laws generally allow a single partner to bind the partnership; in contrast, a limited partnership with a corporate general partner could act only if all the participating small businesses, acting through their respective directors, agreed to any decision.

Conclusion

WHEREFORE, in view of the foregoing, it is respectfully requested that the Commission adopt the rules proposed in its Notice and clarify the form in which small businesses can participate as a consortium.

Respectfully submitted,

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July 7, 1995

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing COMMENTS OF CELLULAR SERVICE, INC. was delivery by hand on this 7th day of July, 1995 to the following:

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