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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

To: The Commission

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COMMENTS OF
CENTRAL ALABAMA PARTNERSHIP L.P. 132
AND MOBILE TRI-STATES L.P. 130

Central Alabama Partnership L.P. 132 ("Central Alabama") and Mobile Tri-States L.P. 130 ("Mobile Tri-States"), by their attorneys, hereby submit their comments in response to the Commission's *Further Notice of Proposed Rulemaking* ("*Further Notice*") released on June 23, 1995. In its *Further Notice,* the Commission proposed to amend its rules governing the broadband PCS C Block auction to eliminate all preferences based on race and gender. The *Further Notice* was issued by the Commission in response to *Adarand Constructors, Inc. v. Pena,* No. 93-1841, 1995 U.S. LEXIS 4037 (June 12, 1995), and the informal comments filed by various parties subsequent to *Adarand.*

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Central Alabama and Mobile Tri-States are women-controlled small business limited partnerships whose partners are primarily small rural local exchange carriers. Both Central Alabama and Mobile Tri-States were poised to file their short-form applications on June 15, 1995 for the C Block auction, and prior to *Adarand,* both were expecting to use the full panoply of FCC preferences accorded small businesses, woman-controlled businesses, and rural telephone companies.

I. *Adarand* Analysis

There is no doubt that *Adarand* now casts an imposing shadow of legal and regulatory uncertainty over any FCC auction rules giving preferences to businesses owned by women and businesses owned by minorities, the constitutionality of which was directly supported in a final Commission order by legal principles now overruled. *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding,* PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2398-400, ¶¶ 289-297 (1994) ("*Second R&O*"). In its *Further Notice,* the Commission correctly concluded that the immediate elimination of all race and gender based preferences would "avoid further delay and legal uncertainty concerning the C block auction [and] is the best means of providing opportunities for businesses owned by minorities and women, many of whom have made preparations to bid in the C block auction." *Further Notice* at para. 1.

In *Adarand,* the Supreme Court insisted that the proper equal protection analysis of an affirmative action measure called for the governmental actor to "address the question of narrow tailoring . . . by asking, for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation.'" *Adarand,* 1995 U.S. LEXIS 4037, at

*69-70 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). With the Commission's rationale for the minority and gender-based preferences resting on the "important and legitimate" objective of promoting economic opportunity for minorities and women who are under represented in the communications industry due to discrimination hindering their ability to raise capital, *Second R&O,* 9 FCC Rcd at 2398-99, ¶¶ 290-292, a small business not controlled by minorities or women challenging the auction preferences would argue that it has the same difficulty obtaining financing as businesses owned by minorities and women. Without an extensive record showing specifically why women and minority owned small businesses have more difficulty raising capital than other small businesses, a court strictly applying *Adarand* would ask whether the existence of the C Block exclusively for entrepreneurs as well as preferences for smaller businesses within the C Block provide an effective race-neutral opportunity for minority and women owned businesses to compete in the PCS auctions, given that many of the minority and women owned businesses <u>are</u> small businesses. Under *Adarand,* the Commission's race-based auction preferences would not withstand strict scrutiny under such a challenge, and given the views of the majority of the Court, it is unlikely that gender-based preferences would withstand judicial review as well.

Given that *Adarand* was decided on June 12 of this year, and there is no case law pursuant to *Adarand* showing the type of record that would be necessary to establish that race-based preferences are narrowly tailored to further a compelling governmental interest, the Commission wisely proposed to eliminate all race and gender preferences as they apply to the C Block auction. To do otherwise would invite years of uncertainty and post-auction litigation that would turn the C Block auction into a great disaster rather than a great opportunity. For the

reasons given below, Central Alabama and Mobile Tri-States support each of the proposals set forth in the Commission's *Further Notice.*

II. The Proposed Rules

Central Alabama and Mobile Tri-States support the Commission's proposal to extend to all C Block applicants the Control Group Minimum 50.1 Percent Equity Option, wherein any single non-control group investor may own up to 49.9 percent of the equity. This option can be very helpful when women and minority owned businesses are raising capital, and may be used by Central Alabama or Mobile Tri-States. By extending the option to all C Block applicants, the Commission will avoid any *Adarand* type challenges.

Central Alabama and Mobile Tri-States also support the Commission's proposal to eliminate the exception to the affiliation rule that allows minorities to exclude the gross revenues and total assets of affiliates controlled by minority investors who are members of the control group. The exception as it now stands allows well-financed entities who might otherwise not qualify for the C Block to bid in the C Block to the detriment of those having difficulty raising capital. It also allows well-financed entities to qualify as small businesses, to the detriment of those who truly are small businesses. This exception was also one of the reasons for the TEC appeal and stay. *Telephone Electronics Corp. v. FCC,* No. 95-1015 (D.C. Cir. Mar. 15, 1995) (order granting stay). Retaining the exception can lead only to further legal challenges. Therefore the Commission was correct in proposing to eliminate it.

Central Alabama and Mobile Tri-States support eliminating installment payment plans that apply only to women and minority owned businesses and extending to all small businesses the installment payment plan that allows for six years of interest-only payments, followed by

four years of principal plus interest payments, with interest at the ten-year U.S. Treasury bill rate. By extending its availability to all small businesses, the Commission can avoid an *Adarand* type challenge and provide small businesses, including women and minority owned small businesses, a reasonable means of financing the cost of the spectrum.

Central Alabama and Mobile Tri-States also support increasing from 10 to 25 percent the bidding credit for small businesses and eliminating all race and gender based bidding credits. The 25 percent bidding credit is necessary for small businesses such as Central Alabama and Mobile Tri-States to be able to bid competitively in the auction. As the Commission acknowledges, most women and minority owned businesses are small. *Further Notice* at n.39. Therefore, applying the 25 percent bidding credit to all small businesses is a way to avoid an *Adarand* type challenge and at the same time provide the bidding credit to minority and women owned small businesses.

Central Alabama and Mobile Tri-States support applying the 40 percent attribution threshold for cellular ownership to small businesses and rural telephone companies and to entities with a non-controlling equity interest in a PCS licensee or applicant that is a small business. By eliminating the 40 percent attribution threshold based on race or gender, the Commission can again avoid an *Adarand* type challenge.

III. Section 309(j) Considerations

In authorizing the use of auctions, Congress directed the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. §309(j)(4)(D). Congress suggested that the Commission could use a variety of mechanisms to bring about this objective, including set asides, bidding credits and installment payment plans. *Id.*[1/] Nevertheless, Congress did not specifically direct the Commission how to achieve its objectives. It left the details of implementation to the Commission.

Prior to the *Adarand* decision, the Commission correctly relied upon *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 564-565 (1990), when it developed its preferences for women and minority owned businesses. *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding,* PP Docket 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5537 at ¶9 (1994), *recon.* Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1994). However, as a result of *Adarand,* any preferences based on race are constitutionally suspect, and it is likely that preferences based on gender would have similar problems. Therefore, the Commission must look to race-neutral means to achieve the objectives mandated by Congress. *Adarand,* 1995 U.S. LEXIS 4037, at *69-70. Because most businesses owned by women and minority group members are small businesses, it appears as though maintaining the entrepreneurs block itself and providing various bidding preferences to small businesses is the

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1/ Although the use of tax certificates was originally contemplated by Congress, the authority for tax certificates was later withdrawn. Pub. L. No. 104-7, §2, 109 Stat. 93, 93 (1995).

best way to achieve the objectives set by Congress in 47 U.S.C. §309(j)(4)(D) using race-neutral means as required by *Adarand.*

On the other hand, there is no way of knowing for sure whether the elimination of preferences based on race and gender combined with the enhancement of preferences for small businesses will achieve the Congressional objective of ensuring that businesses owned by members of minority groups and women are given an opportunity to participate in the provision of spectrum-based services. Therefore, the Commission correctly concluded in paragraph 17 of the *Further Notice* that it should continue to request bidder information on the short-form filings as to minority or women owned status. By doing so the Commission will be able to analyze the applicant pool and the auction results to determine whether the small business preferences were sufficient to achieve the Congressional objective of participation by women and minorities. In addition, should the Commission find that it has fallen short of achieving the Congressional objective, the information developed will help provide the record that the Commission would need under *Adarand* to establish preferences based on race or gender for future auctions.

IV. Procedural Considerations

In the *Further Notice,* the Commission recognized the need to move forward quickly "in order to minimize the effect of the modified rules on existing business relationships formed in anticipation of the C block auction." *Id.* at para. 2. Therefore, the Commission did not request reply comments. Section 553 of the Administrative Procedures Act ("APA") requires notice in the Federal Register and an opportunity for public comment before an agency can adopt new rules. The APA does not require an opportunity for reply comments. Although Section 1.415(c) of the Commission's rules does provide for a reply comment period, the Commission can justify

eliminating the reply opportunity if the elimination of the reply opportunity does not eliminate an opportunity for the public to comment on the proposed rules. This means that the Commission can adopt rules without a reply opportunity if the adopted rules are substantially similar to those proposed in the *Further Notice,* because the public has an opportunity to respond to the *Further Notice.* On the other hand, if the Commission were to consider adopting a significantly different proposal than the proposal set forth in the *Further Notice,* the Commission would be wise to publish a notice in the Federal Register asking for comments on the new proposal, even if this means a short delay in the acceptance of applications and commencement of the auction. To do otherwise would deny the opportunity for public comment required by Section 553(c) of the APA and would provide a dissatisfied party the opportunity to challenge the modified rules in court. *See, e.g., MCI Telecommunications Corporation v. FCC,* No. 93-1464 (D.C. Cir. June 27, 1995). This type of litigation would create uncertainty for several years, leading to low bid prices and a failure to construct C Block systems.

Footnote 3 of the *Further Notice* makes reference to a Public Notice which specifies July 28, 1995 as the deadline for accepting applications, August 15, 1995 as the deadline for up-front payments and August 29, 1995 as the commencement date for the C Block auction. *See Public Notice,* DA 95-1420, June 23, 1995. As a result, the short form applications (FCC Form 175) will be due to be submitted to the Commission less than 30 days after any modified rules could be adopted and published in the Federal Register. Although Section 553(d) of the APA requires that substantive rules be published in the Federal Register on not less than 30 days notice, Section 553(d)(3) provides an exception "for good cause found and published with the rule." 5 U.S.C. §553(d)(3). In determining whether good cause exists, an agency and a reviewing court

must apply a balancing test which considers "whether the necessity for immediate implementation outweighs any hardship affected persons might experience because of the reduced time to adjust to the new rule." *Nance v. EPA,* 645 F.2d 701, 709 (D.C. Cir. 1981).

The Commission can make a finding of good cause based on the fact that (i) applicants were poised to file their applications on June 15, 1995; (ii) as a result of *Adarand* being issued on June 12, 1995, the Commission suspended the filing deadline for the short form applications on June 13, 1995; (iii) that financing arrangements may fall apart if the auction is not put back on track rapidly;[2/] (iv) that the Public Notice issued on June 23, 1995 gives the public 30 days notice of the new filing deadline; and (v) that the *Further Notice* gives the public notice of what the rules are likely to be. On balance, because applicants were only two days away from the filing deadline before the deadline was suspended, it would be unreasonable to require the Commission to set a new filing deadline 30 days after the new rules are published in the Federal Register.

However, to comply with Section 553(d)(3) of the APA, publication of the finding of good cause to issue the rules on less than 30 days notice in the report and order promulgating the new rules is insufficient. The Commission must also *publish the finding of good cause in the Federal Register* along with the new rules and the summary of the report and order. It is of particular importance that the publication of the new rules in the Federal Register be sufficiently prior to the July 28, 1995 filing deadline so as to avoid a challenge of the type lodged against the Commission in *Evans v. FCC,* Case No. 92-1317 (D.C. Cir. Filed July 30, 1992). In *Evans* the appellant challenged the promulgation of a new rule which took effect two days after publication of the rule in the Federal Register, where the finding of good cause was published in the report

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2/ *See, e.g.,* Further Notice at n.8 and n.32.

and order but not in the Federal Register. The *Evans* case resulted in a delay of investment in the 220 MHz industry of over two years. An *Evans* type situation must be avoided, because a delay caused by two or more years of litigation would be disastrous for those planning to bid in the C Block auction. Therefore, if the Commission cannot adopt rules in time for publication in the Federal Register reasonably prior to the July 28, 1995 short form application filing deadline, in order to avoid destructive litigation, the Commission would need to extend the filing deadline and auction date.

Conclusion

For the reasons stated above, Central Alabama and Mobile Tri-States support the adoption of the rules proposed in the *Further Notice* and urge the Commission to avoid any procedural pitfalls that could result in extensive litigation that would place an ominous cloud over the C Block auction.

Respectfully submitted,

CENTRAL ALABAMA PARTNERSHIP, L.P. 132
MOBILE TRI-STATES L.P. 130

By: _____
Eliot J. Greenwald
Glenn S. Richards
Howard C. Griboff
Kevin M. Walsh

Their Attorneys

FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, DC 20006
(202) 659-3494

Of Counsel:

Mark D. Wilkerson
PARKER, BRANTLEY &
WILKERSON, P.C.
P. O. Box 4992
Montgomery, AL 36103-4992
(334) 265-1500

Dated: July 7, 1995