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

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

COMMENTS OF RADIOFONE, INC.

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TABLE OF CONTENTS

Page

SUMMARY ii

COMMENTS OF RADIOFONE, INC. 1

I. INTEREST OF RADIOFONE IN THIS PROCEEDING 1

II. THE CELLULAR PROHIBITION RULE SHOULD BE ELIMINATED 3

III. THE PROCEDURES USED IN ADOPTING THE REVISED PCS RULES ARE VIOLATIVE OF THE APA AS WELL AS THE COMMISSION'S OWN RULES 4

A. The FCC Has Violated the APA by Failing to Provide Sufficient Time for Interested Parties to File Meaningful Comments 4

B. The Commission's Current Auction Schedule Will Violate the APA by Failing to Allow 30 Days Before the Rules Become Effective 5

C. The Commission's Failure to Allow Reply Comments Violates the Commission's Rules 7

D. The Commission's Perceived Need for an Expedited Rulemaking Does Not Justify Violation of the APA and the Commission's Own Rules 8

CONCLUSION 10

SUMMARY

Radiofone, Inc. ("Radiofone"), by its attorney, hereby submits its comments in response to the Further Notice of Proposed Rule Making, 60 Fed. Reg. 34,200 (June 30, 1995) ("FNPRM").

Radiofone respectfully requests that, in modifying its cellular attribution rule in the wake of the Adarand[1] decision, the Commission take this opportunity to eliminate the PCS-cellular cross-ownership rule ("cellular prohibition") contained in Section 24.204 of the Commission's Rules. In its Petition for Partial Reconsideration, GEN Docket No. 90-314, filed Dec. 8, 1993, and on review in Radiofone, Inc. v. FCC, No. 95-3238 (6th Cir. filed May 1, 1995) (brief) (oral argument has not been scheduled), Radiofone has requested the FCC and the Sixth Circuit to eliminate the cellular prohibition. The Commission's proposed modification of the cellular prohibition does not resolve any of the deficiencies which form the basis of Radiofone's petition for review in the Sixth Circuit.

Radiofone also submits that the procedures followed in issuing the FNPRM and the procedures the Commission plans to follow in promulgating the revised PCS rules violate the Administrative Procedure Act ("APA") and the Commission's own rules, and are arbitrary and capricious. The FCC has violated the APA by allowing less than seven days for comments to be filed, and by its plans to allow less than 30 days between the publication of the final rules and the effective date of those rules. The FCC also has violated Section 1.415(c) of its own rules by not allowing reply comments. The Commission's perceived need to expedite this rulemaking does not justify violation of the APA and the Commission's rules, and does not qualify for any of the exceptions to the rulemaking requirements in Section 553 of the APA. Furthermore, the expedited proceeding will leave entrepreneurs without sufficient time to restructure their business plans once the outcome of the FNPRM becomes known. This rush to decision is not only unlawful, it is prejudicial.

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[1] Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (U.S. June 12, 1995).

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COMMENTS OF RADIOFONE, INC.

Radiofone, Inc. ("Radiofone"), by its attorney, hereby submits its comments in response to the Further Notice of Proposed Rule Making, 60 Fed. Reg. 34,200 (June 30, 1995) ("FNPRM"). The FNPRM specified a comments deadline of July 7, 1995.

Radiofone respectfully requests that, in modifying its cellular attribution rule in the wake of the Adarand[2] decision, the Commission take this opportunity to eliminate the PCS-cellular cross-ownership rule ("cellular prohibition") contained in Section 24.204 of the Commission's Rules. Radiofone also submits that the procedures followed in issuing the FNPRM and the procedures the Commission plans to follow in promulgating the revised PCS rules violate the Administrative Procedure Act ("APA") and the Commission's own rules, and are arbitrary and capricious.

I. INTEREST OF RADIOFONE IN THIS PROCEEDING

Radiofone is the Commission's non-wireline cellular licensee for the New Orleans, Baton Rouge and Houma-Thibodaux Metropolitan Service Areas ("MSAs") and the last family-owned

[2] Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (U.S. June 12, 1995).

cellular licensee among the top 30 cellular markets. Radiofone is eligible under the Commission's broadband PCS rules (PCS Rules) for licenses on frequency Blocks C and F ("Entrepreneurs' Blocks"). Radiofone further believes that it is the only cellular licensee that qualifies as an entrepreneur, under the PCS Rules, in the top 30 cellular markets. However, Radiofone does not qualify as a small business under the Commission's PCS Rules.

As a provider of cellular service in service areas encompassed by the New Orleans-Baton Rouge Metropolitan Trading Area ("MTA"), Radiofone is precluded from providing 30 MHz broadband PCS in those markets due to the Commission's cellular prohibition. Radiofone must compete head-on with BellSouth Mobility, Inc., the Commission's wireline cellular licensee in New Orleans and Baton Rouge, and to the extent that cellular competes with PCS, with Wireless Co., L.P. and PCS Primeco, LP, the Commission's A and B Block broadband PCS licensees in the New Orleans-Baton Rouge MTA, in the provision of mobile telecommunications service in southeastern Louisiana.

Radiofone has challenged the cellular prohibition in FCC proceedings and in the United States Court of Appeals for the Sixth Circuit. Petition for Partial Reconsideration, GEN Docket No. 90-314, filed Dec. 8, 1993; Radiofone, Inc. v. FCC, No. 95-3238 (6th Cir.) (transferred from the D.C. Circuit Feb. 27, 1995).

Notwithstanding Radiofone's pending Sixth Circuit challenge, Radiofone has entered into substantive business negotiations with various women- and minority-owned businesses, exploring opportunities to invest in an entity with preferred status, to the extent permitted under the Commission's Rules, to obtain C Block broadband PCS licenses and provide PCS service in Radiofone's cellular markets. The Commission's cellular prohibition has forced Radiofone to enter into these negotiations in order to participate to any meaningful extent in broadband PCS.

In any event, such participation will yield no more than a non-attributable interest in an in-market PCS applicant. The sudden changes proposed in the FNPRM, however, leave Radiofone without sufficient time to restructure its business plans once the outcome of the FNPRM becomes known. This rush to decision is not only prejudicial, it is unlawful. These points are discussed below.

II. THE CELLULAR PROHIBITION RULE SHOULD BE ELIMINATED

In the FNPRM, the Commission proposes to modify the cellular prohibition, 47 C.F.R. § 24.204, which, in general, prohibits cellular carriers from providing PCS service in-market. FNPRM para. 30. The proposed modification only would change the entities to which the 40 percent cellular ownership attribution threshold will apply. Id. With or without this modification, the rule will still be unlawful and should therefore be eliminated.

In its Petition for Partial Reconsideration, GEN Docket No. 90-314, filed Dec. 8, 1993, and on review in Radiofone, Inc. v. FCC, No. 95-3238 (6th Cir. filed May 1, 1995) (brief) (oral argument has not been scheduled), Radiofone has requested the FCC and the Sixth Circuit to eliminate the cellular prohibition. Radiofone has demonstrated that the cellular prohibition is based on the FCC's alleged anticompetitive concerns which are without basis in the record, and on the FCC's alleged need to promote new competitors, which the Commission based on a misinterpretation of its mandate from Congress. Brief at 14-20. Additionally, Radiofone has demonstrated that the cellular prohibition is discriminatory, because no similar prohibition is imposed on specialized mobile radio (SMR) and mobile satellite service (MSS). Id. at 20-24. For these reasons, the cellular prohibition is arbitrary and capricious, violative of substantive due process, and in excess of statutory authority. Id. at 18, 20, 22, 24.

The Commission's proposed modification of the cellular prohibition does not resolve any

of these deficiencies. FNPRM para. 30. Indeed, the proposed revised Section 24.204 retains the unlawful discrimination. Id. at 19. The Commission should take this opportunity to eliminate the cellular prohibition once and for all.

III. THE PROCEDURES USED IN ADOPTING THE REVISED PCS RULES ARE VIOLATIVE OF THE APA AS WELL AS THE COMMISSION'S OWN RULES

While the proposed rule changes are unlawful, the procedures employed by the Commission in issuing the FNPRM, combined with the Public Notice announcing the revised auction schedule, violate the APA as well as the Commission's own rules. As discussed further below, the Commission has violated the APA by failing to provide adequate time for interested parties to submit meaningful comments, and the Commission threatens to violate the APA by failing to allow at least 30 days between the publication of the final rules and their effective date. The Commission's current rulemaking schedule also will violate the Commission's own rules which require the FCC to permit reply comments to be filed.

A. The FCC Has Violated the APA by Failing to Provide Sufficient Time for Interested Parties to File Meaningful Comments

The exceedingly short comment period afforded by the FCC constitutes inadequate notice in violation of the APA's notice and comment requirement. 5 U.S.C. § 553 (1988); see Florida Power & Light Co. v. United States, 846 F.2d 765, 772 (D.C. Cir. 1987) (reasonable notice requires adequate time for comment), cert. denied, 490 U.S. 1045 (1989). In this instance, the FNPRM was published in the Federal Register on June 30, 1995, and listed a comments deadline of July 7, 1995. Considering that one of those days (July 4, 1995) was a federal holiday, this was not even seven days' notice. This inadequate period in which to file meaningful comments is particularly troublesome because the FCC did not give any indication prior to issuance of the FNPRM what its proposed rules would be. Furthermore, the seven-day comment period directly violates the United States Court of Appeals for the District of

Columbia Circuit's holding in Connecticut Light & Power Co. v. NRC, 673 F.2d 525 (D.C. Cir.), cert. denied, 459 U.S. 835 (1982). In that case, the D.C. Circuit held that the APA requires a minimum 30-day comment period. 673 F.2d at 534. For all these reasons, the short comment period also is arbitrary and capricious. See Idaho Farm Bureau Federation v. Babbitt, 839 F. Supp. 739, 750 (D. Idaho 1993) (10-day comment period held to be arbitrary and capricious).

B. The Commission's Current Auction Schedule Will Violate the APA by Failing to Allow 30 Days Before the Rules Become Effective

In addition to providing an unduly short comment period, the Commission is planning to provide an unlawfully short publication period for the final rules.

Under the Commission's current auction schedule, FCC Form 175 applications for the C Block auction are due no later than 5:30 p.m. on Friday, July 28, 1995. Public Notice, DA 95-1420, released June 23, 1995. Therefore, no matter how soon the Commission publishes its final rules in the Federal Register, there will not be 30 days between the Federal Register publication date and the date on which Form 175 applications are due. This is in direct contravention of Section 553(d) of APA, which requires the FCC to publish its rules not less than 30 days before their effective date. 5 U.S.C. § 553(d) (1988).

In addition to violating the APA, the FCC is not providing interested parties adequate time to arrange their business affairs in accordance with the new rules. This is in contravention to the purpose and spirit of Section 553(d) of the APA, which is to "'afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take other action which the issuance may prompt.'" United States v. Gavrilovic, 551 F.2d 1099, 1104 (8th Cir. 1977) (citation omitted).

The short publication period also is inconsistent with the Commission's prior decision to give potential applicants time to complete business plans prior to the auction. The Commission originally announced that the FCC Form 175 applications for the C block auction would be due on the later of April 17, 1995 or 30 days after the close of the A and B block auction. Public Notice, FCC Announces Short Form Date for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band and Requests Comment on Auction of F Block Licenses, released Dec. 23, 1995. However, in response to requests to allow more time between the A and B block auction and the application deadline for the C block auction, so that participants could complete business plans, raise financing and negotiate with strategic partners, the Commission extended the application deadline to 45 days after the close of the A and B block auction. Public Notice, FCC Extends Short Form and Auction Dates for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band, released Feb. 10, 1995. In making this change, the Commission also noted that potential applicants stated they were not able to enter into substantive negotiations with bidders in the A and B block auction because the auction was not over. Id.

The impending promulgation of PCS rule changes is analogous to the completion of the A and B block auction. Radiofone is not able to enter substantive negotiations with potential partners until it knows what the new rules are. Additionally, once the new rules are published, Radiofone will need time to evaluate the new rules and their impact on the women- and minority-owned businesses with which it is currently negotiating, and will need time to complete negotiations and finalize its business plans. Even if the Commission were able to release and publish new rules within one week after the comments are filed, Radiofone and other potential applicants would have only 14 days to review the rules and develop business plans commensurate with those rules, prior to filing their C block auction applications. This time is grossly inadequate, especially in comparison to the 30 days the FCC previously provided for

potential applicants to develop business plans after the A and B block auction was completed, and especially in light of the fact that the FCC recognized that this 30 days was too short and extended it to 45 days.

In sum, the abbreviated publication period not only violates the APA, but also acts as a substantial prejudice to potential auction participants.

C. The Commission's Failure to Allow Reply Comments Violates The Commission's Rules

The FNPRM also violates the Commission's rules which require a reply comment period. 47 C.F.R. § 1.415(c) (1994).

The Commission calls for the filing of comments in its FNPRM but does not allow the filing of reply comments. FNPRM para. 2. However, Section 1.415(c) of the Commission's own rules requires that the Commission provide reasonable time for filing comments in reply to the original comments. The D.C. Circuit has previously noted that "it is elementary than an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned . . . for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action." Reuters Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (citations omitted). Accordingly, the FCC's failure to provide a reply comment period here cannot be condoned.

Additionally, the FCC itself has noted that "[t]he purpose of the reply comment period is to allow all interested parties to respond to pleadings filed during the initial comment period and to call to the Commission's attention possible solutions to or defects in mutually exclusive requests." Report and Order (Amendment of Section 73.202(b)), 2 FCC Rcd. 3316, 3317 (Policy and Rules Div. 1987). By not allowing Radiofone and other interested participants in

the rulemaking an opportunity to file reply comments, the Commission is denying these entities a most fundamental role in the administrative process. The initial comments received by the Commission may suggest new and unforeseen issues that were not addressed in the FNPRM. And these initial comments may, and indeed should, have an impact on the substance of the final rules. Radiofone and the other parties will not have an opportunity to amplify, refute, or otherwise respond to these initial comments.

In sum, the Commission's failure to provide a reply comment period violates the Commission's rules and prejudices Radiofone's ability to participate fully in this proceeding.

D. The Commission's Perceived Need for an Expedited Rulemaking Does Not Justify Violation of the APA and the Commission's Own Rules

The Commission attempts to justify its expedited rulemaking by citation to five letters that it received prior to issuing its FNPRM. FNPRM nn. 8, 32. However, one of these letters urged the Commission to "follow[] proper procedures in promulgating the rules." Letter from Eliot J. Greenwald and Howard C. Griboff, attorneys with Fisher, Wayland, Cooper, Leader & Zaragoza L.L.P. representing Central Alabama Partnership L.P. 132 and Mobile Tri-States L.P. 130, to William F. Caton, Acting Secretary, FCC at 4 (June 16, 1995) ("Central Alabama"). Central Alabama recommended a schedule allowing 10 days for reply comments, 20 to 30 days between the time the last pleadings are filed and the promulgation of the revised rules, and 30 days between the publication of the final rules in the Federal Register and the Form 175 due date. Id. at 5. Thus, Central Alabama's letter can provide no justification for the Commission's unlawful abandonment of APA and FCC rulemaking procedures. Additionally, none of the other four letters cited by the Commission requested the Commission to violate the APA. In sum, the Commission's citation to these five letters is inappropriate.

Another justification advanced by the Commission for the expedited proceedings is

Congress' alleged "directive to disseminate PCS licenses quickly." FNPRM para. 9. While Congress may have instructed the Commission to provide for the "rapid deployment of new technologies . . . without administrative or judicial delays," 47 U.S.C. § 309, Congress did not direct the Commission to violate the APA or its own rules. In the absence of such a clear and unambiguous directive from Congress, the FCC must follow the APA and its own rules. See New Jersey v. EPA, 626 F.2d 1038, 1042-47 (D.C. Cir. 1980) (statutory deadline did not constitute good cause to forgo notice and comment absent any express indication by Congress to that effect); see also American Federation of Government Employees, AFL-CIO v. Block, 655 F.2d 1153, 1158 (D.C. Cir. 1981) (even where there are statutory deadlines, such deadlines do not necessarily constitute a good cause exception under Section 553(b)(B) of the APA).

Furthermore, any need to act swiftly is outweighed by the need of potential auction participants to have adequate notice of the rulemaking, adequate opportunity to participate in the rulemaking, and adequate time to develop business plans in accordance with any revised rules adopted by the FCC. Eliminating these opportunities is clearly not in the public interest, and certainly not necessary. While one party's business plans may be enhanced by swift procedures, others will be hurt, especially those who had already partnered with a minority or female applicant that does not qualify as a small business. These entities will have their business plans shattered by the proposed rules, and are only given a week or two to reformulate these plans. Additionally, compliance with the APA and the reply comment rules was and is practical. The FCC could have readily provided a longer comment period, followed by a short reply comment period, and set the auction application deadline 30 days after Federal Register publication of the final rules. Swift action also could have been accomplished by the Commission publishing the FNPRM shortly after the Adarand decision, and by the Commission publishing its final rules quickly after the end of the comment cycle. For the foregoing reasons, this proceeding does not qualify for any of the exceptions to the provisions of Section 553. 5

U.S.C. § 553(b), (d) (1988); see New Jersey v. EPA, 626 F.2d at 1045-49 (the exceptions to Section 553 "will be narrowly construed and only reluctantly countenanced"). Additionally, any rules promulgated pursuant to violations of the APA will be null and void. See Hotch v. United States, 212 F.2d 280, 282 (9th Cir. 1954) ("Unless the [APA] prescribed procedures are complied with, the agency . . . rule has not been legally issued, and consequently it is ineffective.").

CONCLUSION

Radiofone respectfully requests the Commission to eliminate the cellular prohibition. Radiofone also respectfully submits that the procedures by which the FCC is promulgating and proposes to implement its revised broadband PCS rules violate the APA and the Commission's rules, and are arbitrary and capricious.

WHEREFORE, in light of the foregoing, Radiofone respectfully requests that the Commission act in accordance with the preceding comments.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Ashton R. Hardy, a member of Hardy and Carey, certify that I have caused to be hand-delivered this 7th day of July 1995, a copy of the foregoing COMMENTS OF RADIOFONE, INC. to the following:

ITS
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Ashton R. Hardy