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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

To: The Commission

DOCKET FILE COPY ORIGINAL

**PETITION FOR RECONSIDERATION OF THE**
**NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.**

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), by and through its undersigned counsel and pursuant to Section 1.106 of the Commission's Rules, hereby petitions for reconsideration of the Commission's decision to modify its competitive bidding rules for the "C block" of Personal Communications Services in the 2 GHz band ("Broadband PCS") in the Sixth Report and Order, FCC 95-301 (released July 18, 1995), stating as follows:

For the reasons set forth below, NABOB requests the Commission to a) reconsider the Sixth Report and Order in light of the President of the United States' July 19, 1995 "Memorandum for Heads of Executive Departments and Agencies" and the June 28, 1995 "Memorandum to General Counsels" from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, b)reverse the Sixth

Report and Order and c) reinstate the rules for the C block PCS auction which were eliminated by the Sixth Report and Order.

On July 18, 1995, the Commission adopted and released its Sixth Report and Order in the above-captioned proceedings. In the Sixth Report and Order, the Commission modified its competitive bidding rules for the PCS C block auction to eliminate all race- and gender-based provisions that the Commission asserted it believed raised "legal uncertainties in the aftermath of the Supreme Court's decision in Adarand Constructors, Inc. v. Peña." [115 S.Ct. 2097 (1995)] Sixth Report and Order at ¶ 1.

In making this Petition for Reconsideration, NABOB relies on facts which relate to events which have occurred and circumstances which have changed since the last opportunity to present such matters to the Commission. Section 1.106(c)(1) of the Commission's Rules. In addition, consideration by the Commission of the facts and circumstances relied upon in the instant Petition is required in the public interest. Section 1.106(c)(2) of the Commission's Rules.

In the Sixth Report and Order, the Commission repeated its earlier statement in the Further Notice of Proposed Rulemaking FCC 95-263 (released June 23, 1995) that the Commission's current record concerning the adoption of the race- and gender-based measures contained in the then-current C block auction rules was "strong," but that additional evidence might be necessary to meet the strict scrutiny standard required by Adarand. Sixth Report and Order at ¶ 6. The Commission confirmed this concern in the Sixth

Report and Order and indicated that it believed that it would need additional evidence to sufficiently develop the record to support these race- and gender-based provisions consistent with the "dictates" of Adarand. Sixth Report and Order at ¶ 11. The Commission repeated its concern expressed in the Further Notice of Proposed Rulemaking that efforts to obtain this additional evidence "would require additional time, and therefore, delay the commencement of the C block auction." Ibid. The Commission concluded that "[t]he legal uncertainty associated with the race- and gender-based provisions, combined with the views of potential C block bidders that the auction not be subject to any further delay, prompt us to modify our rules in a fashion which would be minimally disruptive to as many of the interested parties, potential bidders as well as members of the financial and investment communities as possible." Id.

In reaching this conclusion the Commission totally ignored the advice and recommendations of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, contained in a June 28, 1995 "Memorandum to General Counsels" (the "DOJ Memorandum"), despite NABOB's explicit reference to the DOJ Memorandum in its comments in response to the Further Notice of Proposed Rulemaking. It clearly is in the public interest for the Commission to consider the legal advice of the Office of Legal Counsel of the Department of Justice. Section 1.106(c)(2) of the Commission's Rules.

In addition, the Commission did not have the benefit of the President of the United States' "Memorandum for Heads of Executive

Departments and Agencies" (the President's Memorandum")[1] regarding "Evaluation of Affirmative Action Programs" for the simple reason that the President's Memorandum was not released until July 19, 1995 -- the day after the release of the Sixth Report and Order. The issuance of the President's Memorandum clearly constitutes a fact which has occurred or circumstances which have changed since NABOB last had a chance to comment on the Further Notice of Proposed Rulemaking. Section 1.106(c)(1) of the Commission's Rules.

In the President's Memorandum, the President made the following statements which are relevant to the Commission's Further Notice of Proposed Rulemaking:

> . . .[I]n all programs you administer that use race, ethnicity or gender as a consideration to expand opportunity or provide benefits to members of groups that have suffered discrimination, I ask that you take steps to ensure adherence to the following policy principles. The policy principles are that any program must be eliminated or reformed if it:
>
> (a) creates a quota;
>
> (b) creates preferences for unqualified individuals;
>
> (c) creates reverse discrimination; or
>
> (d) continues even after its equal opportunity purposes have ben achieved.
>
> In addition, the Supreme Court's recent decision in Adarand Contractors, Inc. v. Pena requires strict scrutiny of the justifications for, and provisions of, a broad range of race-based affirmative action programs. You recently received a detailed legal analysis of

[1] A copy of the President's Memorandum downloaded from the White House's World Wide Web site is attached hereto as Exhibit A for the Commission's convenience.

> Adarand from the Department of Justice. Consistent with that guidance, I am today instructing each of you to undertake, in consultation with and pursuant to the overall direction of the Attorney General, an evaluation of the programs you administer that use race or ethnicity in decision making. . . .
>
> Using all the tools at your disposal, you should develop any information that is necessary to evaluate whether your programs are narrowly tailored to serve a compelling interest, as required under Adarand's strict scrutiny standard. Any program that does not meet the constitutional standard must be reformed or eliminated.

President's Memorandum at 1-2.

The Commission's Sixth Report and Order materially deviates from the advice of the President's Memorandum.

First, the President's Memorandum makes it clear that a race-based program should not be "reformed or eliminated" until after a determination is made that the program violates one of the four policy principles set forth in the Memorandum. The Sixth Report and Order has abolished race- and gender-based provisions before such a determination has been made.

Second, the President's Memorandum instructs that a review of any race- or ethnicity-based provisions is to be conducted consistent with the DOJ Memorandum. The Sixth Report and Order has abolished race- and gender-based provisions without consideration of the analysis and advice set forth in the DOJ Memorandum.

Third, President's Memorandum makes it clear that a race-based program should not be "reformed or eliminated" until after a determination is made that the program fails to meet the strict scrutiny standard of Adarand. The Sixth Report and Order has abolished race- and gender-based provisions without such a

determination and indeed in the face of a statement by the Commission that the current record supporting the race- and gender-based provisions is "strong" and further statements that its action does not indicate that the provisions could not be sustained without further development of the record and that such measures are not inappropriate for future auctions of spectrum-based auctions.

The Sixth Report and Order also fails to follow the standards and advice set forth in the DOJ Memorandum. For example, the DOJ Memorandum states clearly that court decisions have all concluded that an agency may rely on "post-enactment" evidence (i.e., evidence that the agency did not consider when it adopted the measure) to support a race-based provision of a program under the strict scrutiny standard. DOJ Memorandum at 2. Yet the Commission has taken the position that it must have all the evidence in the record at the time it adopts the measure. In addition, in the Sixth Report and Order, the Commission failed to consider the questions the DOJ Memorandum sets forth at pages 35-38 as a "checklist of questions that provide initial guidance as to what should be considered in the review process." DOJ Memorandum at 34. The Commission also decided to eliminate the race- and gender-based provisions without determining that they do not meet the strict scrutiny standard of Adarand, despite the DOJ Memorandum's admonition that a program using race or ethnicity as a basis for decision making should not even be suspended (no less eliminated) before an evaluation that the program does not meet the strict

scrutiny standard. DOJ Memorandum at 34.

The foregoing establishes that the Commission should reconsider its Sixth Report and Order in light of the President's Memorandum and the DOJ Memorandum. The foregoing also establishes that, after such reconsideration, the Commission should vacate the Sixth Report and Order and reinstate the prior race- and gender based rules governing the C block auction which were eliminated by the Sixth Report and Order.

WHEREFORE, the National Association of Black Owned Broadcasters, Inc. respectfully moves the Commission to reconsider the Sixth Report and Order in light of the President's Memorandum and the DOJ Memorandum, to reverse the Sixth Report and Order and to reinstate the rules for the C block PCS auction which were eliminated by the Sixth Report and Order.

Respectfully submitted,

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Dated: August 4, 1995

# EXHIBIT A

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release July 19, 1995

July 19, 1995

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Evaluation of Affirmative Action Programs

This Administration is committed to expanding the economy, to strengthening programs that support children and families, and to vigorous, effective enforcement of laws prohibiting discrimination. These commitments reflect bedrock values -- equality, opportunity, and fair play -- which extend to all Americans, regardless of race, ethnicity, or gender.

While our Nation has made enormous strides toward eliminating inequality and barriers to opportunity, the job is not complete. As the United States Supreme Court recognized only one month ago in Adarand Constructors, Inc. v. Pena, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." This Administration will continue to support affirmative measures that promote opportunities in employment, education, and government contracting for Americans subject to discrimination or its continuing effects. In every instance, we will seek reasonable ways to achieve the objectives of inclusion and antidiscrimination without specific reliance on group membership. But where our legitimate objectives cannot be achieved through such means, the Federal Government will continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to reevaluation, and fair.

Accordingly, in all programs you administer that use race, ethnicity, or gender as a consideration to expand opportunity or provide benefits to members of groups that have suffered discrimination, I ask you to take steps to ensure adherence to the following policy principles. The policy principles are that any program must be eliminated or reformed if it:

(a) creates a quota;

(b) creates preferences for unqualified individuals;

(c) creates reverse discrimination; or

(d) continues even after its equal opportunity purposes have been achieved.

In addition, the Supreme Court's recent decision in Adarand Constructors, Inc. v. Pena requires strict scrutiny of the justifications for, and provisions of, a broad range of existing race-based affirmative action programs. You recently received a detailed legal analysis of Adarand from the Department of Justice. Consistent with that guidance, I am today instructing each of you to undertake, in consultation with and pursuant to the overall direction of the Attorney General, an evaluation of programs you administer that use race or ethnicity in decision making. With regard to programs that affect more than one agency, the Attorney General shall determine, after consultations, which agency shall take the lead in performing this analysis.

Using all of the tools at your disposal, you should develop any information that is necessary to evaluate whether your programs are narrowly tailored to serve a compelling interest, as required under Adarand's strict scrutiny standard. Any program that does not meet the constitutional standard must be reformed or eliminated.

WILLIAM J. CLINTON ###

CERTIFICATE OF SERVICE

I, Rena I. Curtis, a secretary at the law firm of Rubin, Winston, Diercks, Harris & Cooke do hereby certify that a copy of the attached **PETITION FOR RECONSIDERATION OF THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.** was served this 4th day of August, 1995 to the following persons by first class mail, postage prepaid:

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