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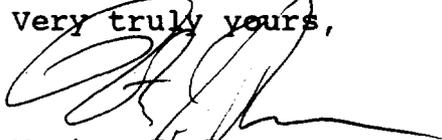
Re: Deferral of Licensing of MTA Commercial Broadband PCS  
(GN Docket No. 93-253; ET Docket No. 92-100)

Dear Mr. Caton:

Transmitted herewith, on behalf of American Portable Telecommunications, Inc., are an original, two paper copies, and three microfiche copies of its Opposition to Application for Review of Denial of Stay filed by the National Association of Black Owned Broadcasters, Perry E. Sutton, individually, and the National Association for the Advancement of Colored People in the above referenced matter.

If there are any questions concerning this matter, please call me.

Very truly yours,

  
Morton J. Posner

Enclosure

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20036

RECEIVED

AUG 8 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Deferral of Licensing of MTA )  
Commercial Broadband PCS )

) GN Docket No. 93-253;  
) ET Docket No. 92-100

To: The Commission

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**OPPOSITION OF AMERICAN PORTABLE TELECOMMUNICATIONS, INC.  
TO APPLICATION FOR REVIEW OF DENIAL OF STAY**

American Portable Telecommunications, Inc. ("APT"), by its attorneys, hereby opposes the July 21, 1995 Application for Review ("Application") filed by the National Association of Black Owned Broadcasters, Percy E. Sutton, individually, and the National Association for the Advancement of Colored People ("Joint Applicants").

The Joint Applicants claim to be or represent potential bidders for C block frequencies reserved for "designated entities." They ask that the Commission reverse the Wireless Telecommunication Bureau's ("Bureau's") June 23, 1995 Order denying their Application for Review and Request for Stay. In addition, the Joint Applicants ask that the Commission stay licensing of A and B block broadband PCS frequencies until the C block frequencies are licensed.

APT was the winning bidder for eight of the 99 A and B block PCS authorizations.<sup>1</sup> It has paid its full auction fee of \$288,872,034. Its interests and those of the public in obtaining PCS service will be irreparably injured by a grant of the stay sought here. The Joint Applicants repeat essentially the same factually unsupported arguments that the Bureau held did not meet the legal standard for issuance of a stay. Accordingly, APT requests that the Application be denied.

I. The Joint Applicants Cannot Meet the Legal Standard for Issuance of A Stay

Under the well-established test of Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977), a party seeking a stay must show: (1) a strong likelihood of prevailing on the merits; (2) irreparable harm if the stay is not granted; (3) the absence of harm to others if the stay is

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<sup>1</sup> Specifically, APT holds the following PCS authorizations:

- (1) Market 12, Minneapolis-St. Paul, Frequency Block B, File No. 00021-CW-L-95;
- (2) Market 13, Tampa-St. Petersburg-Orlando, Frequency Block A, File No. 00022-CW-L-95;
- (3) Market 14, Houston, Frequency Block A, File No. 00024-CW-L-95;
- (4) Market 21, Pittsburgh, Frequency Block B, File No. 00039-CW-L-95;
- (5) Market 34, Kansas City, Frequency Block B, File No. 00065-CW-L-95;
- (6) Market 38, Columbus, Frequency Block B, File No. 00073-CW-L-95;
- (7) Market 49, Alaska, Frequency Block A, File No. 00094-CW-L-95;
- (8) Market 50, Guam-Northern Mariana Islands, Frequency Block B, File No. 00097-CW-L-95.

granted; and (4) that the public interest will be served if the stay is granted. The Joint Applicants make essentially the same factually unsupported arguments in the instant Application that the Bureau rejected. Consideration of the Holiday Tours factors shows that the Application should be denied.

A. The Joint Applicants Do Not Show A Likelihood of Success on the Merits.

The Commission has already considered when and how to offer PCS frequencies. After assembling an exhaustive record, the Commission balanced the goal of expediting provision of PCS service to the public against the goal of minimizing the administrative burden of distributing a large number of interdependent PCS licenses. The Commission concluded that auctioning blocks of licenses in sequence met those goals.<sup>2</sup> In addition, the Commission concluded that designated entities would benefit from bidding on frequencies later in that sequence rather than earlier.<sup>3</sup> The Commission intended that the A and B block winners have a head start relative to the C block winners in the PCS licensing process. Having failed to convince the Commission to structure the PCS auctions in some other way, the Joint Applicants now seek a retroactive midcourse change in the auction

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<sup>2</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858, 6863-64 (1994); Fifth Report and Order, 9 FCC Rcd 5532, 5546-48 (1994).

<sup>3</sup> See Fourth Memorandum Opinion and Order, 9 FCC Rcd at 5547; Fifth Report and Order, 9 FCC Rcd at 6863-64.

process by staying A and B block licensing. Their request should be denied.

Three recent court cases have unavoidably compelled delay of the C block auction. First, the U.S. Court of Appeals for the District of Columbia Circuit ordered a stay of the C block auction in Telephone Electronics Corp. v. FCC, No. 95-1015. That Court has since dissolved the stay. Second, the Supreme Court decision in Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995), necessitated the Commission's reevaluation of its designated entity criteria. Third, on July 27, 1995, the D.C. Circuit again ordered a stay of the C block auction in Omnipoint Corp. v. FCC, No. 95-1374.<sup>4</sup> The Joint Applicants here adduce no facts to show that this judicial delay undercuts the goals of the Commission's thoroughly considered PCS licensing plan. The mere fact of judicial delay does not translate to a likelihood of success on the merits.

B. The Joint Applicants Do Not Show They Will Be Irreparably Harmed Unless A Stay Is Granted.

The Bureau and the Commission have stated on at least four occasions that C block winners may experience a number of competitive advantages by being licensed after their A and B

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<sup>4</sup> If we understand correctly the grounds for the D.C. Circuit's July 27, 1995 stay order, it should be possible to commence the C block application and auction process as soon as non-designated entities are allowed a reasonable period, perhaps as little as 60 days, to acquire 49 percent investors if they so desire.

block counterparts.<sup>5</sup> Among these competitive advantages are greater experience as to the real value of PCS licenses in the marketplace, improved ability to attract financing, and enhanced availability of pricing and product information. Ignoring these competitive advantages, the Joint Applicants again contend that they are competitively disadvantaged by the auction sequence. As before, the Joint Applicants point to no specific injury which will result from this sequence. The Bureau has already considered the Joint Applicants' arguments and found the alleged harm too speculative to merit a stay.<sup>6</sup> The alleged harm is no less speculative now.

C. APT and the Other A and B Block Auction  
Winners Will Be Irreparably Harmed If A Stay  
Is Granted.

Over seven billion dollars of the U.S. economy will be "frozen" if a stay is granted.<sup>7</sup> Under the Commission's rules, the remaining 80 percent of A and B block auction payments were due and paid on June 30, 1995. As of today, \$7,736,020,384 is in the U.S. treasury in payment of A and B block auction fees. APT

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<sup>5</sup> See Fourth Memorandum Opinion and Order, 9 FCC Rcd at 6863-64; Fifth Report and Order, 9 FCC Rcd at 5547-48; Deferral of Licensing of MTA Commercial Broadband PCS, Memorandum Opinion and Order ["Deferral Memorandum Opinion and Order"], DA 95-1410, PP Docket No. 93-253, ET Docket No. 92-100, ¶¶ 4, 6 (Wireless Telecom. Bur., released June 23, 1995).

<sup>6</sup> Deferral Memorandum Opinion and Order, ¶¶ 6, 27, 29.

<sup>7</sup> Id. at ¶ 31.

has paid \$288,872,034 of that amount. The day it begins to recoup that investment will obviously be delayed to the extent that a stay is granted.

The Commission's rules compel the winning bidders promptly to take steps to provide broadband PCS service to the public. Specifically, the winning bidders must comply with the broadband PCS/cellular cross-ownership rules, 47 C.F.R. § 24.204, within 90 days of the June 23, 1995 grant of A and B block licenses. APT has entered into divestiture arrangements, some of which are already on file with the Commission, to comply with these rules. Moreover, every day APT and the other winning bidders make business commitments to facilitate provision of PCS service. Companies do business with APT and the other winning bidders relying on their credibility as Commission PCS licensees. These arrangements are not only prudent business decisions but enable the winning bidders to prepare to construct facilities in accordance with the deadlines contained in their licenses and the Commission's rules.

The winning bidders have committed substantial funds and made irreversible business decisions as a result of winning PCS licenses. The winning bidders, as well as the companies with which they do business, will be irreparably harmed if a stay is granted.

D. Grant of A Stay Is Contrary to the Public Interest.

Congress mandates that the Commission rapidly provide PCS to the public. 47 U.S.C. § 309(j)(3)(A). According to one estimate, consumers are injured at the rate of at least ten million dollars every week that PCS service is delayed.<sup>8</sup> The Commission has already determined that PCS service is in the public interest and that issuance of A and B block licenses before C block licenses will benefit designated entities. A stay would violate Congress' mandate and would be contrary to the public interest.

II. Conclusion.

The Joint Applicants failed to convince the Bureau that they met the Holiday Tours standard for a stay of A and B block broadband PCS licensing. Except for the unavoidable delay in the commencement of the C block auctions caused by court actions, they have presented no new factual arguments. The Holiday Tours factors argue for denial rather than grant of a stay. The Application for Review should therefore be denied.

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<sup>8</sup> Declaration of Paul W. Milgrom, ¶ 6, Pacific Telesis Mobile Systems' Opposition to NAACP's Request for Stay, File Nos. 00001-CW-L-95 through 00098-CW-L-95 (May 19, 1995).

Respectfully submitted,

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By: \_\_\_\_\_



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August 8, 1995

CERTIFICATE OF SERVICE

I, Judy Cooper, a secretary in the law firm of Koteen & Naftalin, do hereby certify that a copy of the foregoing "Opposition of American Portable Telecommunications, Inc. to Application for Review of Denial of Stay," was sent by first class U.S. mail, postage prepaid, on this 8th day of August, 1995, to the offices of the following:

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Centennial Cellular Corporation  
c/o Richard Rubin  
Fleischman & Walsh, L.L.P.  
1400-16th Street, N.W.  
Washington, D. C. 20036

/s/ Judy Cooper  
Judy Cooper

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