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

In the Matter of

Deferral of Licensing of MTA
Commercial Broadband PCS

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)

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

GTE MACRO'S OPPOSITION TO THE APPLICATION FOR REVIEW

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Corporation

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August 10, 1995

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SUMMARY

GTE Macro opposes Petitioners' *Application for Review* and urges the Commission to uphold the Bureau's *June 23 Order*. As an initial matter, GTE notes that the Bureau has already approved the A and B block license applications and the new license holders have paid the balance of their auction fees. Accordingly, the requested stay is no longer possible.

Petitioners, insofar as they argue that the Commission erred in its decision to auction and license the A and B block PCS frequencies, and that the Commission allowed participants in that auction to behave in an anticompetitive manner, effectively seek untimely reconsideration of previous Commission orders and should be denied.

The *Application for Review* also should be denied because Petitioners fail to satisfy any of the four prongs of the *Holiday Tours* decision: Petitioners have not made a strong showing that they likely will prevail on the merits; Petitioners have not shown that they will suffer irreparable harm; issuance of a stay will cause substantial harm to other interested parties; and the public interest would not be served by issuance of a stay.

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GTE'S OPPOSITION TO THE APPLICATION FOR REVIEW

GTE Macro Communications Corporation ("GTE Macro") hereby submits its opposition to the *Application for Review* filed on July 21, 1995 jointly by the National Association of Black Owned Broadcasters, Inc. ("NABOB"), Percy Sutton individually, and the National Association for the Advancement of Colored People, Washington Bureau ("NAACP") (collectively referred to as "Petitioners").¹ Petitioners seek full Federal Communications Commission ("FCC" or "Commission") review of the *Memorandum Opinion and Order* issued by the Chief, Wireless Telecommunications Bureau ("Bureau") on June 23, 1995.² In the *June 23 Order*, the Bureau denied petitions seeking reconsideration of the Bureau's April 12, 1995 *Order* denying the "Emergency Motion to Defer MTA PCS Licensing" filed by Communications One, Inc. ("CommOne").³

¹ Deferral of Licensing of MTA Commercial Broadband PCS, *Application for Review*, GN Docket No. 93-253, ET Docket No. 92-100, filed July 21, 1995.

² Deferral of Licensing of MTA Commercial Broadband PCS, *Memorandum Opinion and Order*, GN Docket No. 93-253, ET Docket No. 92-100, DA 95-1410 (Wireless Telecom. Bur., released June 23, 1995) (hereinafter "*June 23 Order*").

³ Deferral of Licensing of MTA Commercial Broadband PCS, *Order*, GN Docket No. 93-253, ET Docket No. 92-100 (Wireless Telecom. Bur., released April 12, 1995) (hereinafter "*April 12 Order*"). Petitions for reconsideration of the *April 12 Order* were filed by

Petitioners argue that the Commission should reverse the Bureau's decision in the *June 23 Order* and stay the licensing of the A and B block broadband frequencies until the Commission is ready to license the C block frequencies. They argue that the Bureau, in refusing to stay the licensing of the A and B block frequencies has violated its statutory obligation to disseminate PCS licenses among a wide variety of applicants, including businesses owned by minority groups and women. They argue, further, that by not providing incentives to minority bidders in the A and B block auctions, the Commission allowed dominant carriers to allocate PCS licenses among themselves in an anticompetitive manner. Finally, Petitioners argue that a stay is warranted under the four-part test set forth in *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*⁴

GTE Macro opposes the *Application for Review* and urges the Commission to uphold the Bureau's *June 23 Order*. As an initial matter, GTE notes that because the A and B block licenses have been granted, the requested stay is no longer possible. In addition, Petitioners arguments that the Commission erred in its decision to auction and license the A and B block PCS frequencies, and in allowing auction participants to behave in an anticompetitive manner, effectively seek untimely reconsideration of previous Commission

CommOne jointly with GO Communications Corporation ("GO") and by Petitioners (although Petitioners' pleading was styled an "Application for Review" of the "*April 12 Order*," the Bureau chose to treat it as a petition for reconsideration).

⁴ 559 F.2d 841 (D.C. Cir. 1977) (hereinafter "*Holiday Tours*").

orders and should be denied. Petitioners also fail to satisfy any of the four parts of the *Holiday Tours* test. Accordingly, the Commission should uphold the Bureau's decision not to stay the licensing of A and B block PCS frequencies.

I. DISCUSSION

A. Petitioners' Request for a Stay Ignores the Fact that A and B Block PCS Licenses Have Already Been Granted

Petitioners' *Application for Review* seeks ultimately to overturn a Bureau order denying Petitioners' request to stay the licensing of the A and B block broadband auction winners. By separate order issued on June 23, 1995, however, the Bureau rejected a petition to deny the A and B block winners' license applications and granted the licenses.⁵ Immediately thereafter, GTE Macro and other license winners paid the balance of their auction fees. Accordingly, the requested stay is no longer possible.

B. Petitioners' Effectively Seek Untimely Reconsideration of Past Commission Orders

Petitioners request to stay the licensing of the A and B block PCS licenses is nothing more than another attempt to overturn Commission Rules governing how PCS spectrum has been auctioned and allocated. Thus, in their *Application for Review*, Petitioners argue that "the Commission's decision not to include any incentives for minority ownership in the auction rules for the A and B block licenses may result in a complete failure to comply with its statutory

⁵ Applications for A and B Block Broadband PCS Licenses, *Order*, File Nos. 00001-CW-L-95 through 00099-CW-L-95; Call Signs KNLF 204 through KNLF, DA 95-1411 (Wireless Telcom. Bur., released June 23, 1995) (hereinafter "*Application Order*").

mandate under Section 309(j).⁶ Petitioners also argue that the Commission's Rules governing the A and B block auctions failed to prevent "dominant" telecommunications carriers from engaging in a "territorial allocation" of PCS broadband frequencies. They argue that because carriers were able to form joint ventures and satisfy their spectrum needs in the A and B block auction, fewer carriers will need to partner with a designated entity in order to obtain a national wireless footprint.⁷

The rules governing the structure and sequence of PCS auctions were adopted in the Commission's *Fifth Report and Order* in PP Docket No. 93-253⁸ and reviewed on reconsideration in the *Fourth Memorandum Opinion and Order* in that docket.⁹ Likewise, rules prohibiting collusion in the competitive bidding context were applied to the broadband PCS auctions and reviewed in the same orders.¹⁰ Thus, in order to grant Petitioners' *Application for Review*, the Commission would need to reconsider rules adopted in previous orders. As the Bureau correctly noted in its *June 23 Order*, however, "the deadline for reconsideration of these rules has long since passed."¹¹ Accordingly, the

⁶ *Application for Review* at 9-10, citing 47 U.S.C. § 309(j).

⁷ *Application for Review* at 11-14.

⁸ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, PP Docket 93-253, 9 FCC Rcd 5532, 5546-5548 (1994).

⁹ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fourth Memorandum Opinion and Order*, PP Docket 93-253, 9 FCC Rcd 6858, 6863-6864 (1994).

¹⁰ *Fifth Report and Order*, 9 FCC Rcd at 5570-5571; *Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6866-6869.

¹¹ *June 23 Order* at 9 (para. 19).

Commission should find that Petitioners' *Application for Review* is, in effect, an inappropriate and untimely petition for reconsideration of the *Fifth Report and Order* which must be denied.

C. Petitioners Fail to Satisfy any Part of the *Holiday Tours* Test

The *Application for Review* also should be denied because Petitioners fail to satisfy any of the four prongs set forth in the *Holiday Tours* decision. *Holiday Tours* established the rule that in order to justify the extraordinary relief of a stay of an administrative order, a petitioner must demonstrate that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) a stay is in the public interest.¹²

1. Petitioners Have Not Made a Strong Showing that They Likely Will Prevail on the Merits

Petitioners advance two arguments in support of their contention they will succeed on the merits. They argue, first, that the Commission's decisions to auction A and B block licenses separate from C block licenses and to include no incentives for bidding by the designated entities in the A and B block auctions violate the statutory mandate to disseminate PCS licenses to minorities and women. They claim that the Commission's failure to include minority incentives has resulted in three entities winning the rights to a majority of the A and B

¹² 559 F.2d at 842.

spectrum blocks. As a result, they claim, large carriers no longer need to partner with designated entities in order to fill their PCS spectrum needs.¹³

These claims must be rejected. As noted above, Petitioners arguments attempt to reargue issues that were settled in the Commission's *Fifth Report and Order* and subsequent *Fourth Memorandum Opinion and Order* and cannot now be reconsidered.¹⁴ Moreover, the argument that the recent A and B block auction has had a chilling effect on the ability of designated entities to raise capital or to compete in the market is speculative. The ability of designated entities to enter the market or to raise capital will be a function of their marketing and management expertise, rather than speculative assumptions concerning market dynamics.¹⁵

Petitioners argue, second, that delays in the C block auction further enhance the competitive advantage bestowed upon the A and B block winners and constitute grounds for the Commission to delay A and B block licensing.¹⁶ Although the Commission has, in response to a judicial stay,¹⁷ been forced to

¹³ *Application for Review* at 17-18.

¹⁴ See Section I.B., *supra*.

¹⁵ GTE Macro Communications Corporation Opposition to Requests for Stay of Licensing, GN Docket No. 93-253, ET Docket No. 92-100, filed May 19, 1995.

¹⁶ *Application for Review* at 18-19. Petitioners' argument focused on previous delays to the start of the C block auction caused by the first judicial stay and by the Commission's decision to reconsider its race- and gender-based preferences in the aftermath of the United States Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 115 S.Ct 2097 (1995).

¹⁷ *Omnipoint Corporation v. FCC*, No. 95-1374 (D.C. Cir. 1995) (Order Granting Motion for Stay, July 27, 1995).

postpone the start of the C block auction, this delay does not constitute grounds for staying the A and B block licenses.¹⁸

In the *June 23 Order*, the Bureau found that the Commission's decision to license the A and B blocks before the C block auction was not based on a particular timetable or date for the C block auction.¹⁹ Moreover, the Commission found, in the *Fourth Memorandum Opinion and Order*, that holding the C block auction after the A and B block auction would, on balance, benefit the designated entities.²⁰ While the Commission stated its intention to hold all broadband auctions as close together as possible to limit any competitive advantage that might result from a substantial head start, it declined "to delay finalizing the award of A and B block licenses . . . because of the overriding public interest in rapid introduction of service to the public."²¹

These past decisions strike a balance between enabling new entities to compete in the mobile services marketplace and ensuring that one group of PCS providers does not receive a substantial advantage over another. These orders represent the Commission's view that the public interest is best served by

¹⁸ Public Notice No. 55042, "FCC Postpones Short-Form Filing Date for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band in Response to Court Stay" (released July 27 1995).

¹⁹ *June 23 Order* at 13.

²⁰ *Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6863-6864.

²¹ *Id.* at 6864 (para. 32). Given that the Commission did not find that auctioning the D and E block frequencies after the C block auction -- and thus well after the A and B block auction -- would, on balance put winners of those blocks at a competitive disadvantage, it is unlikely that it will find a delay of the C block auction materially affects future winners of those licenses.

licensing the A and B block auction winners as soon as possible, and that licensing these entities can precede subsequent auctions without unduly harming future auction winners. The Commission has also indicated that a moderate delay in the start of subsequent auctions will not affect this balance.

In commenting on the current stay, the Commission has renewed its commitment to hold the C block auction as soon as possible.²² As such, any ill effects of the current stay upon future PCS auction winners should be minimized. Therefore, consistent with past decisions in this proceeding, the Commission should rule that the public interest would not be served by a stay of the A and B block PCS licenses.

2. Petitioners Have Not Shown that They Will Suffer Irreparable Harm

Petitioners argue that if the requested stay is not granted, C block bidders will suffer: (1) loss of access to capital; (2) loss of base station cell sites; (3) loss of access to distributors and retailers; and (4) loss of market share.²³ These arguments, however, are entirely speculative and do not constitute "irreparable harm." First, given that the Commission has set aside spectrum for entrepreneurs, any loss of access to capital will serve to lower what entrepreneurs are willing to bid for C block licenses. As a result, the cost of license acquisition, and thus the cost of capital, will drop leading to lower overall

²² Recently, the Chairman of the Commission stated that the FCC plans "to pursue every possible avenue to get this auction back on track." Statement of Reed E. Hundt, Chairman, Federal Communications Commission, Regarding Court Stay of PCS Entrepreneurs' Block Auction (July 27, 1995).

²³ *Application for Review* at 15-16.

costs and an improved ability to compete.²⁴ Second, Petitioners cell site availability argument fails to consider the unlikely prospects of PCS licensees obtaining exclusive leases on potential tower sites, and the routine cycle of loss and acquisition of cell sites that occurs in all radio services. These factors make it unlikely that C block winners will lose out on prime cell site locations. Finally, even if later market entrants lose market share or distribution avenues, any such losses would be temporary in a competitive market.²⁵ Because Petitioners have not demonstrated irreparable harm, their application for review must be denied.

3. Issuance of a Stay Will Cause Substantial Harm to Other Interested Parties

Petitioners argue that A and B block auction winners will not suffer any significant harm as a result of a stay. They argue that the A and B block winners are not currently offering service so they would not be prevented from engaging in any current business enterprise. They also argue that the A and B block winners are not required to pay the remaining 80% balance of their auction payments until the FCC grants their licenses. Therefore, they claim, the delay will not require A and B block auction winners to incur any additional FCC auction license expense until the stay is lifted.²⁶

Contrary to these arguments, a stay of A and B block licenses would cause substantial harm to the public as well as to the auction winners. Any

²⁴ See *Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6863 (para. 27).

²⁵ See *Holiday Tours*, 559 F.2d at 843 (noting that “[t]he mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact”).

²⁶ *Application for Review* at 16-17.

delay in the A and B block winners' licensing process would deny the public access to new PCS offerings and the benefits of added competition in wireless services.²⁷ Expediting the provision of new services for the public is one of the four goals mandated under Section 309(j)(3) of the Communication Act.²⁸

Any delay in licensing A and B block licensing (or an order suspending such licenses) would also cause enormous harm to A and B block auction winners. Contrary to Petitioners' statements, A and B block PCS licenses were granted by Bureau order on June 23, 1995.²⁹ Full payment of GTE Macro's balance of its auction payment was made on June 29, 1995. Since then, A and B block licensees have begun deploying networks, securing cell sites, contracting with vendors, soliciting customers, and taking other steps towards rolling out PCS service as soon as possible. In many cases, expenditures have been made that would not be recoverable if a stay is granted.³⁰ In light of the harm that would be inflicted on the public and upon licensees, Petitioners' *Application for Review* must be denied.

4. The Public Interest Would Not Be Served by Issuance of a Stay

Petitioners argue that section 309(j)(3) of the Communications Act requires the Commission, in the furtherance of the public interest, to avoid

²⁷ As noted earlier, the Commission has previously rejected pleas to delay A and B block licensing "because of the overriding public interest in rapid introduction of service to the public." *Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6864 (para. 32).

²⁸ 47 U.S.C. § 309(j)(3).

²⁹ *Application Order*.

³⁰ As such, a stay would also harm entities doing business with A and B block licensees.

excess concentration of licenses, to disseminate licenses to businesses owned by members of minority groups, and to promote economic opportunity for businesses owned by members of minority groups. They accuse the Bureau of ignoring its mandate to protect minority interests in order to concentrate solely on the congressional mandate to protect the development and rapid deployment of PCS for the benefit of the public with a minimum of administrative or judicial delay.³¹

Congress enumerated four objectives for the Commission to follow in designing a competitive bidding system. In addition to the two identified by Petitioners and listed above, Congress also required the Commission to: recover for the public a portion of the public spectrum resource made available for commercial use; and promote efficient and intensive use of the electromagnetic spectrum.³² The Commission and the Bureau have carefully balanced each of these objectives in designing and conducting the broadband PCS auctions.³³ The policies attacked by Petitioners were adopted in notice and comment proceedings, are now final, were relied upon by the applicants, and fully discharge the Commission's public interest obligations under the Communications Act. Accordingly, the public interest is best served by denying the *Application for Review*.

³¹ *Application for Review* at 19-20.

³² 47 U.S.C. § 309(j)(3).

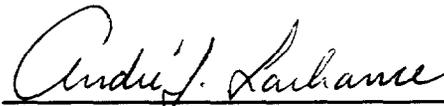
³³ Indeed, by focusing entirely upon the minority interest issue, Petitioners rather than the Commission are guilty of giving disproportionate weight to one of the four objectives.

II. CONCLUSION

Petitioners *Application for Review* seeks ultimately to stay the licensing of A and B block broadband PCS auction winners. However, since auction winners' license applications have already been approved, a stay is no longer possible. Petitioners raise a number of issues concerning the structure and sequence of PCS broadband auctions. The rules governing these auctions were adopted in notice and comment rulemaking proceedings and are long since final. Petitioners attempt to reargue these issues in the context of an *Application for Review* constitutes an untimely petition for reconsideration that must be denied. On the merits, Petitioners' request for stay fails to meet the four part test established in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* Petitioners fail to establish either that they are likely to succeed on the merits, that they will suffer irreparable harm, that other parties will not be substantially harmed as a result of a stay, or that a stay is in the public interest. Accordingly, the *Application for Review* must be denied.

Respectfully submitted,

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August 10, 1995

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Certificate of Service

I, Judy R. Quinlan, hereby certify that copies of the foregoing "GTE Macro's Opposition to the the Application for Review", have been mailed by first class United States mail postage prepaid, on the 10th day of August, 1995 to all parties of record.



Judy R. Quinlan