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

In the Matter of:	)	
	)	Gen. Docket No. 93-253
Deferral of Licensing	)	ET Docket No. 92-100
of MTA Commercial	)	
Broadband PCS	)	

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OPPOSITION TO THE APPLICATION FOR REVIEW OF THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, PERCY E. SUTTON, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE WASHINGTON BUREAU

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SUMMARY

The National Association of Black Owned Broadcasters, the National Association for the Advancement of Colored People Washington Bureau, and Percy Sutton (an individual) (collectively, "Minority Petitioners") have filed an Application for Review of the Bureau of Wireless Telecommunications' Order denying their request for a stay of *all* Block A and Block B PCS licenses. Memorandum Opinion and Order, Deferral of Licensing of MTA Commercial Broadband PCS, DA 95-1410, PP Docket No. 93-253, ET Docket 92-100 (June 23, 1995) ("Licensing Deferral Mem. Op.").

The Minority Petitioners' application should be denied. As the Bureau correctly determined, their primary argument -- that auctioning the "entrepreneurs' blocks" separately and last is inconsistent with Section 309(j) of the Communications Act -- is nothing more than an untimely motion for reconsideration of the Commission's decision to stagger the licensing of PCS blocks.[1/]

But even if one treats their argument as a traditional request for a stay of agency action, the request is still without merit. As an initial matter, it comes too late. The Commission

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[1/] See Order, Deferral of Licensing of MTA Commercial Broadband PCS, ET Docket No. 92-100, Gen. Docket No. 93-253, at 3 ¶ 5 (Wireless Bureau, released Apr. 12, 1995) (emergency motion to defer licensing the A and B Blocks "amounts to an untimely petition for reconsideration of the Commission's prior decision" to use a sequence of auctions to license PCS); Licensing Deferral Mem. Op. at 9, ¶ 19 ("As in the CommOne Order, we find the . . . NABOB Petitioners' Application to be untimely to the extent they seek reconsideration of the Commission's rules . . . with respect to the structure and sequencing of the auctions.").

cannot stay the issuance of the A and B block licenses because the licenses already have been issued and the licensees already have paid for them. To give the Minority Petitioners relief, the Commission would have to *withdraw* all 99 A and B block licenses *after* having accepted payment for them. Nowhere do the Minority Petitioners ask the Commission to take such drastic and unprecedented action; nor do they offer any legal authority for it.

In any event, the Minority Petitioners have singularly failed to demonstrate any of the prerequisites for the issuance of a stay. They cannot show that they will succeed on the merits. They cannot show irreparable injury. And they cannot show that the equities -- including the balance of hardships and the public interest -- favor the relief that they seek. To the contrary, each of these factors overwhelmingly weighs against issuance of a stay. The Bureau's decision was thus entirely correct.

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BACKGROUND

A new era of advanced wireless communication is about to begin. In 1989, the Federal Communications Commission began establishing the rules to govern a broad range of new radio communications services called personal communications services or "PCS." Memorandum Opinion and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957, 4959, 4965 ¶¶ 2, 3, 18 (1994). Industry analysts expect PCS to include "new wireless communications services ranging from 'Dick Tracy' wrist phones to cellular-like mobile telephone service," FCC Revises Broadband PCS Rules After Winning Industry 'Consensus', Communications Daily, June 10, 1994, at 1. The Commission itself has predicted a new generation of "small, lightweight multi-function portable phones, portable facsimile and other imaging devices," that would compete with existing cellular, paging and other mobile services.

9 FCC Rcd at 4959, ¶ 3. The Commission has allocated a large amount of spectrum, a total of 120 MHz, to these new services.[2/]

A. The Design and Establishment of PCS Auctions

Until relatively recently, the Commission would have allocated PCS licenses by giving them away for free through lotteries or through comparative hearings aimed at selecting the most "desirable" licensee. See Notice of Proposed Rule Making, Review of the Pioneer's Preference Rules, 8 FCC Rcd 7692 (1993); Singleton v. FCC, 952 F.2d 1444, 1446 (D.C. Cir. 1992). These processes were less than desirable. Comparative hearings were costly, unpredictable, and slow. Random drawings, while faster, often placed licenses in the hands of speculators. And both processes enriched the licensee at the expense of the public. Spectrum that could be and often was resold for hundreds of millions of dollars was placed into private hands absolutely gratis.[3/]

In 1993, however, Congress enacted long-awaited revisions to the Communications Act so that the Commission could allocate licenses in a more efficient, rational, and fair manner.

[2/]By comparison, early cellular licenses were limited to 25 MHz. Thus, PCS licenses will add the equivalent (in spectrum) of about five new cellular providers.

[3/]As Commission Chairman Reed Hundt remarked, these prior methods of license allocation "used to give (communications) licenses to the people with the best lawyers and lobbyists" -- rather than those who would best use them. Jube Shiver, Jr., 19 Companies Pay $7 Billion in FCC Sale of Wireless Rights, Los Angeles Times, Mar. 14, 1995, at D1.

Specifically, Congress enacted legislation permitting the Commission to sell PCS licenses at auction.[4] The legislation also directed the Commission to design an auction system that would promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public." 47 U.S.C. § 309(j)(3)(A). In addition, Congress directed the Commission to consider factors such as avoidance of "excessive concentration of licenses," "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use," preventing "unjust enrichment" of licensees, and ensuring "efficient and intensive use of the electromagnetic spectrum." Id. § 309(j)(3)(B)-(D).

B. The Division of Spectrum into License Blocks

After extensive hearings, endless rounds of comments, and numerous decisions developing and refining its PCS licensing and auction regime, the Commission decided to divide the 120 MHz of PCS spectrum into six license blocks. The first two blocks, the A and B blocks, contain the largest licenses. Each A and B block license entitles the purchaser to 30 MHz of spectrum and has a

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[4] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 1993 U.S.C.C.A.N. (107 Stat.) 387 (1993) ("1993 Budget Act"), codified at 47 U.S.C. § 309. Section 309(j) of the Communications Act (effective August 10, 1993) now allows the Commission to use an auction to choose among competing license applicants if the spectrum -- like spectrum dedicated to PCS -- is used to provide service for compensation. See Notice of Proposed Rule Making, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 8 FCC Rcd 7635, 7636, ¶ 11 (1993).

"Metropolitan Trading Area" or "MTA" as its service area. Because the entire Nation is divided into just 51 MTAs, each A and B block license covers a very large region and, as a result, is exceptionally valuable. The B block Los Angeles MTA, for example, sold for nearly half a billion dollars; it covers all of Southern California and Southern Nevada, including the cities of Los Angeles, San Diego, Las Vegas, and Bakersfield, as well as the San Fernando Valley, San Bernadino County, and Northwestern Arizona.

At the same time, the Commission aimed to promote the participation of small businesses, rural telephone companies, women, and minorities in PCS. Accordingly, the Commission set aside the C and F block licenses -- which represent 40 MHz or one-third of the spectrum dedicated to PCS -- for these groups alone. Second Report and Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 2348, 2392, ¶¶ 245-248 (1994). Until recently, the Commission planned to give bidding credits to minority and woman-owned enterprises for use in the entrepreneurs' block auctions; it also intended to employ special eligibility rules to encourage investment in minority and woman-owned businesses.

C. Auction Sequence and Conduct

Because it would be difficult if not impossible to sell over 2,000 licenses at once, the Commission decided to auction broadband licenses in three groups. First, the very large A and

B block licenses -- the licenses at issue here -- would be sold. The smaller C and F "entrepreneurs' blocks" licenses were to be sold second, and the D and E block licenses third. Fifth Report and Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 5532, 5547, ¶¶ 37-38 (1994). The Commission concluded that selling the A and B block licenses first made sense because: (i) consumers would benefit most from the rapid issuance of the largest licenses, (ii) the value of the revenue generated by the auction would be greater if larger licenses were sold sooner, and (iii) selling the larger licenses first would promote partnerships between large, A and B block licensees and smaller, entrepreneurs' block bidders. Id. at 5547-48, ¶¶ 39-40.

The auction for the A and B block auctions has now taken place and, by all accounts, was an overwhelming success; it generated over $7 billion in revenues for the U.S. Treasury. After numerous rounds of spirited bidding, Pacific Telesis Mobile Services ("Pacific") purchased the right to acquire the Los Angeles and San Francisco area MTA licenses for about three quarters of a billion dollars.

The C block auction, however, has run into legal difficulties. On March 15th, 1995, the United States Court of Appeals for the District of Columbia Circuit issued a stay of the auction in response to an appeal filed by Telephone Electronics Corporation ("TEC"). TEC challenged the constitutionality of the

Commission's use of gender and racial criteria in the entrepreneurs' block auction, and the Court of Appeals concluded that TEC was likely to prevail on the merits. Although TEC subsequently dropped its appeal and the stay was dissolved, the Supreme Court cast additional doubt on the legality of the Commission's gender and racial criteria when it announced its decision in Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (June 12, 1995).

Although the Commission is not of the view that Adarand necessarily precludes the use of gender and racial criteria in the allocation of PCS licenses, it concluded that the appropriate course was to eliminate those criteria from the C block auction. However, it covenanted to continue investigating the possibility of using similar criteria in other, later auctions. Sixth Report and Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, FCC No. 95-301, PP Docket No. 93-253, Gen. Docket Nos. 90-314, 93-252, at 1-2, ¶ 1 (released July 18, 1995) ("Sixth Report and Order"); see Further Notice of Proposed Rule Making, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, FCC No. 95-263, PP Docket No. 93-253, Gen. Docket Nos. 90-314, 93-252, at 1, ¶ 1 (released June 23, 1995) (stressing Commission's commitment to ensuring minority participation in PCS auctions) ("Further Notice of Proposed Rule Making").

This course, the Commission explained, would accomplish three goals:

> (1) promotion of rapid delivery of additional competition to the wireless marketplace by C block licensees; (2) reduction of the risk of legal challenge; and (3) minimal disruption to the plans of as many applicants as possible who were in advanced stages of planning to participate in the C block auction when Adarand was announced.

Sixth Report and Order at 1-2, ¶ 1. Accordingly, after this action, the C and F blocks are still reserved for entrepreneurs, but the preferences for minorities and women have been eliminated from the C block auction.

Unfortunately, one more delay has been interposed. When the Commission altered its attribution rules for the C block licenses in its Sixth Report and Order -- thus allowing all applicants to have 49 percent non-entrepreneur equity ownership -- it did not allow an extensive time period for affected companies to adjust their affairs. Arguing that the time the Commission had allowed was insufficient, Omnipoint Communications, Inc. (a company that already has received a PCS license in the Commission's "pioneer preference" proceedings) asked the Court of Appeals to stay the C block auction. On July 27, 1995, the Court of Appeals granted that relief, staying the deadline for filing applications to participate in the auction. Order, Omnipoint Corp. v. FCC, No. 95-1374 (July 27, 1995). Accordingly, it is not clear when the C block auction will actually begin, although the Minority Petitioners concede that they are likely to begin by March of

1996. Minority Petitioners' Supplement to Application for Review, Deferral of Licensing of MTA Commercial Broadband PCS, ET Docket No. 92-100, Gen. Docket No. 93-253, at 3 (Aug. 4, 1995) ("Minority Petitioners' Supplemental Filing").

D. Current Proceedings

Concerned that the C block auction has been delayed too much, the Minority Petitioners now seek to have the issuance of the A and B block licenses -- which have already been sold at auction and for which successful bidders have already paid over $7 billion -- stayed indefinitely. After the Bureau correctly rejected their request, they filed the instant Application for Review.

ARGUMENT

As a threshold matter, the Minority Petitioners request for a stay comes too late for meaningful relief to be granted. The actual A and B block licenses were issued a few days after they were granted and the licensees have already paid a total of $7 billion for them. Because the licenses have been issued, a stay of the order granting them -- the relief the Minority Petitioners have requested -- will have no effect whatsoever. Instead, all 99 licenses would have to be *withdrawn*. The Minority Petitioners do not request such drastic and unprecedented action, and offer no legal authority for it in any event. The Minority Petitioners' Application for review therefore should be dismissed as moot. See PowerTel PCS Partners, L.P., Motion to Dismiss,

Deferral of MTA Commercial Broadband PCS, ET Docket No. 93-253, Gen. Docket No. 92-100, at 1-2 (Aug. 3, 1995)[5].

Even setting aside this fatal procedural flaw, the Minority Petitioners' request for a stay is meritless. To obtain a stay of the Commission's licensing orders, the Minority Petitioners must demonstrate (i) a likelihood of success on the merits and (ii) that they will suffer irreparable injury if relief is withheld. Moreover, they must also demonstrate that the imposition of irreparable harm on other parties or injury to the public interest does not render issuance of such a stay inappropriate. Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985); Order Granting Stay, Amendment of Parts 15 and 76 Relating to Terminal Devices Connected to Cable Television Systems, 2 FCC Rcd 6488 (1987); Memorandum Opinion and Order, Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, MM Docket No. 86-406, RM 5480, FCC No. 87-248 (released July 17, 1987). None of these factors

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[5]In addition, the Minority Petitioners' request suffers from a second (and similarly fatal) threshold defect. As the Bureau correctly concluded and as Pacific demonstrated in greater detail elsewhere, the Minority Petitioners lack standing to challenge the issuance of the licenses. See Opposition of Pacific Telesis Mobile Services to the Application for Review of the National Association of Black Owned Broadcasters, Percy E. Sutton, and the National Association for the Advancement of Colored People Washington Bureau, Applications for A and B Block Broadband PCS Licenses, File Nos. 00001-CW-L-95 through 00099-CW-L-95, at 4-6 (Aug. 7, 1995) (attached for the Commission's convenience as Exhibit A). For the same reasons, they also lack standing to seek review of the order refusing to stay the issuance of the licenses.

favors issuance of a stay here. To the contrary, each of these factors weighs against issuance of a stay, and overwhelmingly so.

I. The Minority Petitioners Cannot Demonstrate a Likelihood of Success on the Merits

The Minority Petitioners argue that the Commission has failed to meet its statutory obligations to avoid "excessive concentration of licenses" and to "promote economic opportunity" for minority-owned businesses. They further contend that the Commission, by failing to provide incentives for Minority Participation in the A and B block auctions, somehow permitted an unlawful territorial allocation of licenses.

Pacific has refuted these arguments at length in response to the Minority Petitioners' bid to have all 99 A and B block licenses denied.[6] Nonetheless, in a supplemental filing, the Minority Petitioners change their argument somewhat.

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[6]Opposition of Pacific Telesis Mobile Services to the Application for Review of the National Association of Black Owned Broadcasters, Percy E. Sutton, and the National Association for the Advancement of Colored People Washington Bureau, Applications for A and B Block Broadband PCS Licenses, File Nos. 00001-CW-L-95 through 00099-CW-L-95 (Aug. 7, 1995) (Exhibit A). Pacific demonstrated that the Minority Petitioners' suffered no direct injury from the granting of the applications and hence had no standing to file petitions to deny. Id. at 4-6. Pacific also noted that the Minority Petitioners' application was nothing more than an untimely motion for reconsideration of the Commission's broadband PCS rules. Id. at 7-9. Finally, Pacific showed that the auction regime was entirely consistent with the Commission's statutory mandate, id. at 9-14, that issuance of the licenses was in the public interest, id. at 15-16, and that the Minority Petitioners' allegations of unlawful collusion in the bidding process had no bearing on the grant of Pacific's licenses -- Pacific is not alleged to have engaged in collusion -- and was entirely groundless in any event, id. at 14.

Concentrating less on the Commission's decision not to provide incentives for minority participation in the A and B block auctions and more on recent events suggesting that the C block auction may be delayed, the Minority Petitioners contend that *the delays* may require the Commission to stay the A and B block licenses. Minority Petitioner's Supplemental Filing at 3-5. Specifically, they assert that the A and B block licensees will have such a "head-start" over designated entities -- and minority and women petitioners will be at such a competitive disadvantage as a result -- that minority and woman-owned entities will effectively be shut out of the market. Minority Petitioners' Supplemental Filing at 4-5. This, they contend, is inconsistent with the Commission's obligation to avoid undue concentration of licenses and to promote minority participation.

This argument is meritless. First, it remains the case that one-third of all PCS spectrum is reserved for designated entities. Second, the Commission is currently investigating other mechanisms for ensuring that women and minorities participate in the spectrum auctions.[1/] In light of this more than generous set-aside and the Commission's avowed commitment to

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[1/] See Further Notice of Proposed Rulemaking at 1, ¶ 1 (Commission is "committed to [its] goal" of ensuring that "designated entities are afforded opportunities to participate" in the PCS auction (footnote omitted)); Sixth Report and Order at 2, ¶ 1 (Commission is "considering the means [it] should take to develop a supplemental record that will support use of [race- and gender-based provisions] in other spectrum auctions held post-Adarand" (footnote omitted)).

ensuring future designated entity participation, the assertion that designated entities are somehow "shut out" of PCS is both premature and unfounded.

Indeed, there is little reason to believe that delays will reduce minority participation at all. Similar predictions of doom and market foreclosure were made when the Commission licensed wireline carriers ahead of their non-wireline competitors in cellular markets. Yet non-wireline carriers have participated fully and competitively in the provision of cellular service.[8/] Moreover, even if one assumes that designated entity participation will be somewhat adversely affected, there is no reason to think that it will be so adversely affected as to violate the statute. After all, the statute commands the Commission to ensure that designated entities have the "*opportunity* to participate" in PCS. 47 U.S.C. § 309(j)(4)(D). It does not command the Commission to guarantee their participation -- and it certainly does not mandate a specific participation level.

[8/]The Commission has said as much. See Memorandum Opinion and Order, Applications of Craig O. McCaw and AT&T Co., 9 FCC Rcd 5836, 5861-62, ¶ 38 (1994) ("the wireless communications business is one in which relatively small, entrepreneurial competitors have often been as successful as . . . the BOCs."), aff'd, SBC Communications Inc. v. FCC, No. 94-1637 (D.C. Cir. June 23, 1995). And as the Bureau concluded, the arguments in favor of delaying PCS licensing are even less compelling than those raised -- and rejected -- in the context of cellular licensing ten years ago. "[U]nlike the wireline cellular carriers, A and B block licensees are not entering a new, untapped market but will be faced with stiff competition from the outset." Licensing Mem. Op. at 13-14, ¶ 29.

In essence, the Minority Petitioners are complaining not that the Commission failed to give designated entities the opportunity to participate in PCS but that the Commission failed to *maximize* their participation -- even if that maximization came at the cost of delaying PCS's introduction. Nothing in the statute, however, requires the Commission to make maximum designated entity participation its *only* goal. Quite the opposite is true. The statute expressly establishes two other, competing goals -- both of which firmly support the decision not to delay license issuance.

The first factor the Commission must consider under Section 309(j)(3) is "the development and rapid deployment of new technologies, products, and services for the benefit of the public." 47 U.S.C. § 309(j)(3)(A).[2/] There can be no denying that delaying issuance of the A and B block licenses would substantially undermine this goal, and result in significant losses in consumer welfare. The whole purpose of the delay the Minority Petitioners seek is to prevent *anyone* from introducing PCS until the designated entities can. The Bureau was entitled to conclude, as it did, that the statutory obligation to ensure prompt introduction of these new and valuable services outweighed

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[2/]So important was rapid development of PCS that Congress established specific timetables for Commission action. See Section 6002(b)(1), (2) of Pub. L. 103-66, 1993 U.S.C.C.A.N. (107 Stat.) 312, 387. The House Conference Report expressly stated that these provisions were designed to speed "the licensing of [PCS]." H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 492 (1993).

any incremental benefit to designated entity participation that might result from delay. License Deferral Mem. Op. at 10, ¶ 21 (nothing in the statute "requires the Commission to promote diversity at the cost of delaying much-needed service that could otherwise be provided to the public").

Indeed, the Commission reached precisely that conclusion when it decided to auction the A and B blocks first. Rejecting the argument that it should "delay finalizing the award of [MTA] licenses" until all auctions were complete, the Commission concluded that such a course would be inconsistent with "the overriding public interest," which favors "rapid introduction of service to the public." Fourth Memorandum Opinion and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 6858, 6864, ¶ 32 (1994).[10] The Commission also gave the same reasoning for not delaying the entry of certain cellular carriers a decade ago -- and the decision was affirmed by the D.C. Circuit. See MCI Cellular Tel. Co. v. FCC, 738 F.2d 1322, 1325 (D.C. Cir. 1984) (affirming the FCC's decision that "the harm to the public interest engendered

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[10] Commission Chairman Reed Hundt has echoed this conclusion, explaining that the "main value of the auction process [is] the speed with which the licenses are granted and with which these new, exciting services become available to the public . . . . And the faster the licenses get out, the sooner we'll see the increase in jobs, economic growth, and competition that these new technologies promise." Reed E. Hundt, The Word for the '90s:'Digitization': FCC Chairman Reed Hundt on Clearing the Way for Competition in This New World Order, Roll Call, Mar. 13, 1995.

by the wireline carrier's 'head start' was outweighed by the need to provide cellular service to the public as quickly as possible.").

The remaining statutory factor also supports this result. Section 309(j)(3)(D) requires the Commission to ensure "efficient and intensive use of the electromagnetic spectrum." Imposing an unnecessary delay in licensing is singularly inconsistent with the Commission's obligation to ensure "efficient and intensive use of spectrum." There can hardly be a less efficient or less intensive use of spectrum than allowing it to lie fallow for month after month, especially when willing licensees -- who have already paid billions of dollars for their licenses -- are ready to put it to good use.

II. The Minority Petitioners Have Failed to Show Irreparable Injury

To obtain a stay, a petitioner must demonstrate not only a likelihood of success on the merits but also irreparable injury. Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d at 974; Order Granting Stay, Amendment of Parts 15 and 76 Relating to Terminal Devices Connected to Cable Television Systems, 2 FCC Rcd 6488 (1987); Memorandum Opinion and Order, MM Docket No. 86-406 RM 5480 (FCC No. 87-248) (July 17, 1987). This the Minority Petitioners cannot do. As an initial matter, the Minority Petitioners contend that prompt issuance of the MTA licenses will put designated entities at a competitive disadvantage by making them a late entrant into PCS. But the Minority Petitioners

entirely ignore the fact that designated entities will be financially compensated for any such disadvantage. Because the entrepreneurs' block licenses will be sold at auction, the price paid for such licenses is likely to reflect their anticipated value. If late entry in fact will disadvantage the entrepreneurs, that disadvantage will translate directly into lower prices at auction, as bids are adjusted downward to compensate for the undesirability of late entry. Consequently, the damage done to the designated entities from late entry will be offset by more favorable prices in the licenses purchased -- as the Bureau correctly noted and the Minority Petitioners do not contest. See License Deferral Mem. Op. at 12-13, ¶ 26.

Moreover, as the Bureau also pointed out, the contention that delays will put designated entities at a disadvantage are entirely speculative. Id. at 13, ¶ 29. As explained above, see pp. 12, 14-15, supra, the same arguments were made when the Commission licensed wireline cellular providers ahead of their non-wireline competitors; yet all competitors seem to have done just fine. In fact, delays might actually give subsequent entrants an advantage in formulating their business strategy, permitting them to draw on "the business strategies and initial performance of the A and B block licensees." Id. at 12, ¶ 26.

Nor can the loss in the aggregate value of the entrepreneurs' block licenses -- or any supposed reduction in designated entity participation -- constitute the requisite

irreparable harm. First, the Commission can always compensate for such a harm by allocating more spectrum to PCS, and to the entrepreneurs in particular, in later auctions. Second, the Minority Petitioners have not demonstrated -- and cannot demonstrate -- that the participation of entrepreneurs will decline so rapidly as to render the Commission's effort to assist entrepreneurial participation insufficient under 47 U.S.C. § 309(j)(3)(B).

Moreover, even if late entry could give rise to uncompensated harm, that harm is not legally cognizable. The D.C. Circuit has recently declared that the reservation of licenses for certain groups in the entrepreneurs' block auctions is likely to be held unconstitutional. Surely one cannot claim the denial of an <u>illegal</u> benefit as irreparable injury.

III. Granting the Stay Will Impose Irreparable Injury on the Public, on Pacific, and on All Other Successful MTA Auction Participants

Finally, issuance of a stay is inappropriate where doing so imposes irreparable harm on other parties or the public interest. The Minority Petitioners address neither of these issues -- and with reason. While the benefit to the entrepreneurs from a stay is speculative at best, the harm to the public and to the MTA licensees would be irreparable, sizeable, and real.

A. Delaying the Introduction of PCS Irreparably Injures Consumers at a Rate of at Least $10 Million per Week

As explained above, see supra pp. 3-8, 13-14 & nn. 9-10, the Commission and Congress alike have recognized the strong public interest in rapid development and introduction of PCS. Each day that licensing is delayed is a day that consumers must do without new and beneficial services. See Licensing Deferral Mem. Op. at 14, ¶ 32 ("[A] stay will delay the introduction of new competition and new services to the public."). There is simply no method of restoring such foregone consumer welfare once it has been lost.

And the potential loss of consumer welfare here is substantial. As Professor Milgrom explained to the Bureau -- and the Bureau recited in its opinion -- a realistic estimate of public welfare loss from delaying the issuance of these licenses amounts to nearly $2.7 billion *per year*, or $225 million per month. Declaration of Paul W. Milgrom ¶ 6 ("Milgrom Decl.") (attached as Exhibit B for the Commission's convenience); Licensing Deferral Mem. Op. at 14, ¶ 32.[11] Of course, some

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[11] See also Statement of A. Daniel Kelley, Senior Vice President, Hatfield Associates at 1, In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Gen. Dkt. No. 90-314 (FCC Apr. 11, 1994) ("Investment and innovation are already being held back because spectrum allocations are being delayed . . . [T]he delay in licensing cellular cost the U.S. economy 86 billion dollars. It is, of course, possible to debate [the] methodology and data and arrive at a different number. However, the fundamental point is sound. The economic welfare loss associated with delaying the (continued...)

damage to consumer welfare will occur as a result of the delay of the entrepreneurs' block auction. But rather than seeking to confine that harm, the Minority Petitioners seek to expand it. It hardly seems a rational course to compound any damage to consumer welfare caused by a stay of the entrepreneurs' licenses by preventing the introduction of PCS service altogether.[12/]

B. Imposing a Stay Will Impose Irreparable Injury on Pacific by Placing Pacific at a Competitive Disadvantage and Will Disrupt its Settled, Investment-Backed Expectations

Far from eliminating competitive parity concerns altogether and restoring the parties' expectations, delaying the issuance of MTA licenses would introduce a host of new competitive parity concerns -- and upset the vested investment-backed expectations of the MTA licensees. Licensing Deferral Mem. Op. at 14, ¶ 31

[11/](...continued)
introduction of services can be quite large."); Statement of David A. Twyver, President of Wireless Systems, Northern Telecom, in Support of the FCC Demand Panel Related to Personal Communications Services at 6-7 (Apr. 11, 1994) (Studies "have shown that if the PCS industry is delayed, the demand for such services will significantly decrease. Delays in the deployment of these services will impact this country's competitive position internationally, allowing other countries to become more technologically advanced and reducing our exports . . . The adverse impact delays will have on demand and competitive positioning will in turn adversely affect this country's economic structure and much needed new business and job opportunities the PCS industry will provide.").

[12/]The Commission has found that the damage flowing from a stay of the MTA licenses will far exceed any damage caused by a stay of the entrepreneurs' block auction. See Second Report and Order, 9 FCC Rcd at 2368, ¶ 118.

(concluding that delaying issuance of the licenses has the potential "to cause harm to the winning A and B block bidders").

Simply put, a license today is worth more than a license tomorrow -- not merely to the public that wants new services sooner rather than later, but also to the licensee that must begin building its system to start generating revenue. Ibid.; Milgrom Decl. ¶ 9. The primary reason is that PCS already has a competitor, cellular telephony. Each day that PCS is delayed, cellular obtains a larger share of the market -- leaving a correspondingly smaller and less valuable share for PCS. Milgrom Decl. ¶ 10. Thus, delaying the issuance of the MTA licenses considerably decreases their value below the prices bid at the PCS auctions.

In fact, it is not just the existence of cellular competition that leads to this erosion in value. As part of its effort to speed the introduction of PCS, Congress already has directed the Commission to issue, and the Commission already has issued, three of the most important and valuable 30 MHz MTA licenses in the country -- the "A block" licenses for the Southern California MTA, for the New York/New Jersey MTA, and for the Washington D.C./Baltimore MTA.[13] Clearly, delaying issuance

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[13] Section 801 of the General Agreement on Tariffs and Trade, to be codified at 47 U.S.C. § 309(j)(13)(E), required the Commission to grant licenses to three companies -- American Personal Communications, Inc., Omnipoint Communications, Inc., and Cox Enterprises -- within 15 days of enactment. The Commission had originally chosen to give those three companies licenses in (continued...)

of the remaining MTA licenses will give these three companies a head-start over their auction-winning competitors. The Commission, however, has declared such a head-start to be unwarranted and contrary to the public interest.[14]

Moreover, giving these companies a head-start would upset Pacific's and other licensees' investment-backed expectations. Pacific, for example, bought the B block Southern California MTA license that will compete directly with the A block license that already has been issued to Cox Enterprises. When Pacific calculated the amount it was willing to bid on the Southern California license -- the most expensive license sold at auction -- Pacific certainly did not count on being a year behind its most significant rival. See Milgrom Decl. ¶ 7. Simply put, the Commission has agreed to sell and Pacific has agreed to buy two PCS licenses for almost $700 million, an amount Pacific has now

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[13] (...continued)
recognition of their allegedly "pioneering" efforts in PCS, but the awards were being challenged on appeal. In compliance with congressional command, the Commission has since awarded those three companies PCS licenses. See Memorandum Opinion and Order, American Personal Communications, et al., for Initial Authorizations in the Broadband Personal Communications Service, 10 FCC Rcd 1101 (1994).

[14] As the Commission explained in *rejecting* a proposal that pioneers be given a head-start, "the main effect of a headstart would be to give the pioneer a temporary service monopoly." Report and Order, Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488, 3492, ¶ 34 (1993). By contrast, the prompt issuance of the A and B block licenses would avoid such a monopoly, as there are *two* 30 MHz MTA licenses for each geographic region.