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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

DOCKET FILE COPY ORIGINAL

OPPOSITION TO APPLICATION FOR REVIEW

AT&T Wireless PCS Inc. ("AT&T"), by its attorneys and pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, hereby opposes the Application for Review ("Application") filed by the National Association of Black Owned Broadcasters, Inc., Percy E. Sutton, and the National Association for the Advancement of Colored People Washington Bureau (collectively "Petitioners") on July 21, 1995. The Petitioners ask for review of a Memorandum Opinion and Order ("Order"), in which the Chief, Wireless Telecommunications Bureau ("Bureau") denied a previous Application for Review and Request for Stay ("Stay Request") submitted by the Petitioners, as well as a similar Petition for Reconsideration filed by Communications One, Inc. and GO Communications Corporation.[1/]

In denying the Petitioners' Stay Request, the Bureau properly determined that prompt licensing of the A and B blocks would serve the congressional directive "to promote the

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[1/] Memorandum Opinion and Order, GN Docket No. 93-253, ET Docket No. 92-100 (released June 23, 1995).

development and rapid deployment of PCS for the benefit of the public with a minimum of administrative or judicial delay."[2] The Bureau also reasonably determined that accomplishing this public interest objective outweighs any possible competitive harm that might result from licensing the A and B block applicants before auction winners in other PCS blocks.[3] The Petitioners fail to present any new evidence or changed circumstances that warrant deferring grant of the A and B block authorizations and, therefore, the Commission should affirm the Bureau's Order.

The Bureau properly concluded that the Petitioners had failed to meet the standards necessary for grant of a stay of A and B block licensing.[4] A party seeking a stay must show that it has a strong likelihood of succeeding on the merits, it will suffer irreparable harm absent the grant of a stay, interested parties will not be harmed if the stay is granted, and the public interest favors the requested relief.[5] The Petitioners do not satisfy any of these criteria.

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[2] Order at ¶ 31, citing the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), 47 U.S.C. § 309(j)(3)(A).

[3] Order at ¶ 31.

[4] Id. at ¶¶ 20-31. The Bureau initially found the Stay Request untimely to the extent it sought reconsideration of the Commission's rules regarding auction structure and sequencing. Id. at ¶¶ 17-19. As the deadline for challenging those rules has long passed, the Commission should affirm the Bureau's determination in this regard.

[5] Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985); Washington Metro. Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Assn v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

The Petitioners have not shown that a court would find their arguments on the merits persuasive. The Bureau was entirely correct that nothing in the Budget Act or its legislative history requires the Commission to delay the introduction of PCS services generally until they can be provided by the Petitioners or other designated entities.[6] Contrary to Petitioners' contentions, the Bureau did not ignore the statutory mandates regarding designated entities and diversity of license ownership. Rather, in denying the Stay Request, the Bureau reiterated that, in implementing the Budget Act, the Commission had properly balanced these objectives with the other goals enumerated in the statute: "(1) development and rapid deployment of services with a minimum of administrative and judicial delay; (2) recovery for the public of a portion of the value of the spectrum; and (3) promoting efficient and intensive use of the spectrum."[7]

The Commission adopted the entrepreneurs' block framework after carefully considering the hundreds of pages of comments submitted by interested parties during months of rulemaking proceedings. On this record, the FCC reasonably determined that reserving almost one half of the available broadband PCS licenses for smaller entities would fully meet the requirements of Section 309(j)(3)(C).[8] Many potential broadband PCS bidders strongly advocated such a spectrum reservation, arguing that

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[6] Order at ¶¶ 20-21.

[7] Id. at ¶ 21.

[8] 47 U.S.C. § 309(j)(3)(C).

"establishment of entrepreneurs' blocks 'provides a good balance between Congress's clear mandate to provide opportunities for designated entities and avoid undue concentration of PCS licenses on the one hand with the goal of capturing the value of allocated spectrum for the American public on the other.'"[9/]

In addition, the Commission reasonably determined that a sequence of broadband PCS auctions, with the A and B blocks auctioned first, would strike the proper balance in fulfilling the many objectives of the Budget Act. The FCC stated that auctioning licenses in the entrepreneurs' blocks after those in the MTA blocks would assist designated entities in attracting partners among unsuccessful bidders of the large unrestricted blocks and would produce valuable price information for designated entities.[10/] The Commission also declined to delay

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[9/] Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 4957, ¶ 122, citing Ex Parte filing of Columbia PCS, June 2, 1994. Although Petitioners purport not to challenge the structure of the A and B block auction, the gist of their argument is that the Commission violated its statutory obligation by failing to grant preferences for minorities in the A and B block auction. In essence, Petitioners are claiming that the FCC had a legal obligation to foresee the consequences of the Supreme Court's ruling in Adarand Contractors, Inc. v. Pena, 115 S.Ct. 2097 (1995), and to hold an auction quickly with the full panoply of minority-based preferences before the Court could declare such programs null and void. This cannot be what the law requires.

[10/] See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858 ¶¶ 28-30 (1994). Parties were given more than sufficient time to submit comments on this issue and some, such as BET Holdings, Inc., urged the Commission to retain the PCS auction sequence, arguing that any market advantage afforded A and B block licensees would be more than offset by the availability of price information and the accessibility of capital from frustrated early bidders. Id. at ¶ 27.

finalizing the award of A and B block winners "because of the overriding public interest in rapid introduction of service to the public."[11]

As the Petitioners' case rests entirely on the mistaken notion that the Budget Act requires "the Commission to promote diversity at the cost of delaying much-needed service that could otherwise be provided to the public,"[12] there is little likelihood that they will succeed on the merits of their lawsuit.

The Petitioners also have failed to show that they will suffer irreparable harm absent a stay. The Bureau correctly concluded that, even given the delay in the C block auction resulting from court litigation, the Petitioners have not demonstrated that this interval will impair the ability of designated entities to participate successfully in the auction or to compete in the marketplace.

If anything, history demonstrates that the Commission properly concluded that numerous competitive opportunities remain open to subsequent PCS entrants. For example, in 1991, the FCC eliminated its "headstart" policy for cellular licensees, which allowed nonwireline competitors to ask for a six-month deferral

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[11] Id. at ¶ 32.

[12] Order at ¶ 21. In a separate Opposition to Application for Review, also filed today, AT&T responds to the Petitioners' argument that the A and B block licensees engaged in anticompetitive behavior in the auction. AT&T demonstrates that the Petitioners' claims in this regard are entirely baseless. See Opposition to Application for Review of AT&T Wireless PCS Inc., In the Matter of Applications for A and B Block Broadband PCS Licenses, File Nos. 00001-CW-L-95 through 00099-CW-L-95 (August 10, 1995).

in the initiation of wireline service because of the wireline operator's early entry into the market.[13] The Commission noted that during the nine-year existence of the policy, no nonwireline carrier had been able to demonstrate that a moratorium was in the public interest.[14] It stated that "it is not at all clear that early entry into a cellular market provides a wireline carrier with an anticompetitive advantage over a nonwireline carrier," adding that it had "not received any concrete evidence that late entry by a nonwireline carrier has hampered its ability to compete."[15]

In arguing that the requested stay will not significantly prejudice other parties, the Petitioners incomprehensibly ignore the fact that the A and B block winners already have submitted the 80 percent balance of their auction payments to the FCC. These payments were made on June 30, 1995, three weeks before the Petitioners filed the Application. AT&T, for instance, submitted a total of $1.7 billion to the government by that date, and it is unclear whether the United States Treasury would return this payment if the Petitioners' stay was granted. Requiring an investment of this magnitude to lie fallow for any period of time will result in extreme harm to AT&T. Thus, to the extent the

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[13] Amendment of part 22 of the Commission's Rules to Provide For Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd. 6185, ¶ 97 (1991).

[14] Id. at ¶ 99.

[15] Id. at ¶ 100.

Petitioners' argument that "the delay will not require [the A and B block winners] to incur any additional FCC auction license expense until the stay is lifted"[16] had any validity before, it is no longer relevant.[17]

Finally, the Commission should affirm the Bureau's conclusion that deferral of the A and B block licensing would be contrary to the public interest. The Commission has taken a number of steps to fulfill the explicit congressional mandate to promote the development and rapid deployment of PCS without administrative and judicial delay and has consistently denied requests to slow down the entry of new wireless competitors. Granting a stay at this point would undermine those pro-competitive efforts, resulting in harm to both consumers and the A and B block winners.

The record in the proceedings adopting auction rules and policies demonstrates that the Commission has struck a proper balance among the various objectives set forth in the Budget Act. In contrast, the Petitioners have failed to demonstrate that they are likely to prevail on the merits of their case or that they will be irreparably harmed by issuance of the A and B block

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[16] Application at 17.

[17] If the Commission decides to grant the Application, it should condition such grant on the return of the entire auction payment to the A and B block winners to avoid severe hardship to these licensees.

licenses. Accordingly, for the foregoing reasons, AT&T respectfully requests that the Commission deny the Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tanya Butler, hereby certify that on this 10th day of August, 1995, I caused copies of the foregoing Opposition to Application for Review to be sent by First Class mail, postage prepaid, or to be delivered by messenger (*) to the following:

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