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

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

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SUMMARY

Western PCS Corporation opposes the Application for Review jointly filed by the National Association of Black Owned Broadcasters, Inc., the National Association for the Advancement of Colored People Washington Bureau and Percy E. Sutton (collectively, the "Petitioners"), seeking review of the Wireless Telecommunications Bureau's ("Bureau") Memorandum Opinion and Order, PP Docket 93-253, DA 95-1410, released June 23, 1995.

The Application suffers from two procedural infirmities, either of which alone would justify its dismissal: (1) it fails to meet the criteria of Section 1.115(b)(2), which sets forth the minimum procedural requirements for applications for review; and (2) the May 12, 1995 pleading which underlies the Application violated Section 1.44(e) of the Commission's rules, which requires that requests for stay be filed as stand-alone pleadings.

The Applications fares no better on its merits. First, contrary to Petitioner's assertion, the grant of the A and B block licenses is fully consonant with the requirements of Section 309(j) of the Act. In designing the broadband PCS auction regime, the Commission properly balanced its statutory obligation to guarantee participation by designated entities with Congress' mandate that the Commission ensure the rapid provision of the new service to the public.

Second, Petitioners contention that they will suffer an insurmountable competitive disadvantage because of the "headstart" afforded to the A and B block licensees has been considered -- and rejected -- by the Commission on no less than three prior occasions. Petitioners fail to adduce any new facts that would require the Commission to reach a different conclusion now.

Third, Petitioners offer no support for the allegation that the bidders for the A and B block licenses engaged in collusion and territorial allocation.

Finally, the Commission must deny the Application's stay request because Petitioners have not met the standards necessary for grant of such extraordinary relief. Imposition of a stay at this juncture would be wholly inconsistent with the Commission's obligation under Section 309(j) of the Act to rapidly deploy new PCS technologies, products and services without administrative or judicial delay. Moreover, grant of a stay would wreak an enormous financial hardship upon the A and B block licensees, who have already paid for the spectrum in full, without any countervailing public benefit.

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

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Western PCS Corporation ("Western"), by its attorneys and in accordance with the Commission's rules, hereby opposes the Application for Review ("Application") jointly filed on July 21, 1995 by the National Association of Black Owned Broadcasters, Inc. ("NABOB"), the National Association for the Advancement of Colored People Washington Bureau ("NAACP") and Percy E. Sutton (collectively, the "Petitioners").[1/] The Application seeks review of the Wireless Telecommunications Bureau's ("Bureau") Memorandum Opinion and Order, PP Docket 93-253, DA 95-1410, released June 23, 1995 (the "June 23rd Deferral Order"), which denied

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[1/] On August 4, 1995, the Petitioners filed a "Supplement to Application for Review" to note that the United States Court of Appeals for the District of Columbia Circuit has stayed the C block auction in response to a challenge to the Sixth Report and Order, PP Docket 93-253, released July 18, 1995, filed by Omnipoint Corporation. As discussed more fully below, this does not constitute a material change in circumstance warranting the Commission's reconsideration of the order under review. See n. 43 infra and accompanying text.

an earlier Application for Review and Request for Stay filed by Petitioners on May 12, 1995.[2] That earlier pleading (i) requested that the Commission reverse the Bureau's April 12, 1995 Order denying the "Emergency Motion to Defer MTA PCS Licensing" filed March 8, 1995 by Communications One, Inc. ("CommOne") and (ii) requested a stay of the licensing of the eighteen winners of the broadband PCS licenses for the A and B block MTA frequencies. For the reasons shown below, Petitioners' Application should be denied.

I. INTRODUCTION

Western was the winning bidder for six block A PCS licenses in the recently concluded MTA auctions.[3] Through its two wholly-owned subsidiaries, Western PCS I Corporation and Western PCS II Corporation, Western intends to construct and operate systems in each of those markets.[4]

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[2] In its June 23rd Deferral Order, the Bureau treated the Application for Review and Request for Stay as a petition for reconsideration subject to the Bureau's review, rather than as an application for review by the full Commission. June 23rd Deferral Order at 8. The Bureau did so because it concluded that the Petitioners' pleading "rel[ied] on factual allegations not previously presented to the Bureau," in contravention of Section 1.115(c) of the Commission's rules. Section 1.115(c) provides that no application for review will be granted if it relies on "questions of fact or law on which the designated authority has been afforded no opportunity to pass." 47 C.F.R. § 1.115(c). Though the Bureau would have been justified in dismissing the application as procedurally infirm, it elected instead to address the issues raised.

[3] The six markets were: (1) Mkt. 30, Portland; (2) Mkt. 32, Des Moines-Quad Cities; (3) Mkt. 36, Salt Lake City; (4) Mkt. 39, El Paso-Albuquerque; (5) Mkt. 41, Oklahoma City; and (6) Mkt. 47, Honolulu.

[4] Western's parent corporation, Western Wireless Corporation, through other subsidiaries, owns or controls operating cellular systems in over 80 markets throughout the western United States.

On June 23, 1995, the Commission granted broadband PCS licenses to Western's above noted subsidiaries and the seventeen other winning bidders in the A and B block auctions, marking the beginning of what promises to be a revolution in wireless communications.[5] PCS, by all accounts, will bring new technologies, products and services to the public and will promote competition for the established cellular, wireline and other existing service providers.[6]

Petitioners, however, seek to stand in the way. At a point in time where the A/B block winners have already made full and final payments for their licenses totalling $7,736,020,384,[7] have begun the build-out of their systems,[8] and executed substantial vendor contracts,[9] the subject Application, in effect, requests that the Commission rescind the licenses, delaying indefinitely the introduction of the advanced technologies and services the licensees will offer

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5/ See Public Notice, released June 23, 1995.

6/ See Fifth Report and Order, PP Docket 93-253, 9 FCC Rcd 5333, 5334 (1994) ("Fifth R&O") (PCS auctions will "lead to the introduction of an array of new telecommunications products and services that are expected to fuel our nation's economic growth and revolutionize the way in which Americans communicate").

7/ See Public Notice, released March 13, 1995 (giving total of all winning bids); Public Notice, released June 29, 1995 (requiring full payment by June 30, 1995).

8/ See, e.g., APC Nears Operation With First Network Call, Begins Marketing Campaign, PCS Week, Phillips Business Information, June 14, 1995 at 4 (noting that system build-out is "well underway").

9/ See PCS Technology Selections In North America Far From Finished, PCS Week, Phillips Business Information, Inc., July 19, 1995, at 6 (several PCS providers have signed equipment contracts). Western, for example has signed a five-year, $200 million contract with Northern Telecom Ltd. for network equipment and services. Western Wireless Taps Nortel for PCS-1900 Network and Services, PCS Week, Phillips Business Information, Inc., July 19, at 8.

the public. In a companion filing,[10] Petitioners request that once the licenses are set aside, they should be denied. As before, the Commission must flatly reject Petitioners' unsupported, protectionist claims for relief.

The Commission has recognized that there is an overriding public interest in the rapid deployment of PCS. Petitioners advance no convincing countervailing argument. Not only does the subject Application repeat, nearly verbatim, the same points that Petitioners raised in their May 12 Application for Review and Request for Stay; those arguments themselves were a rehash of claims put forward, and rejected, any number of times over the history of this proceeding. In its June 23rd Deferral Order, the Bureau considered those arguments yet again and found them without merit. Petitioners have not adduced any evidence to show that the Bureau's consideration of these same arguments was defective, that the facts and circumstances have changed to a degree that these issues must be revisited, or that they have met their burden for the issuance of a stay. The mere pendency of these meritless filings represents a continuing cloud on the finality of the licenses awarded. Most finance agreements in the wireless industry make finality a condition to the availability of funds, or the availability of funds beyond certain lending limits. Accordingly, the Application may be expected to have severe negative effects upon the continued availability of capital for construction and operation. Therefore, the Commission should act expeditiously to deny the Application, and let the A and B block licensees proceed with the build-out of their systems and the rapid commencement of service to the public.

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[10] See Petitioners' Application for Review, filed contemporaneously with the subject Application, of the Bureau's June 23, Order denying Petitioners' May 12, 1995 Petition to Deny and Request for Stay.

II. THE APPLICATION IS PROCEDURALLY DEFECTIVE

The Commission need not address the merits of the Application, which suffers from two procedural infirmities, either of which alone would justify its dismissal: (1) it fails to meet the criteria of Section 1.115(b)(2) of the Commission's rules, which sets forth the minimum procedural requirements for applications for review; and (2) the Application, like Petitioners' May 12, 1995 pleading, violates Section 1.44(e) of the Commission's rules, which requires that requests for stay be filed as stand-alone pleadings.

A. Petitioners Have Failed to Meet the Requirements for an Application For Review

Section 1.115(b)(2) of the Commission's Rules, 47 C.F.R. Section 1.115(b)(2), requires that applications for review "shall specify with particularity" which of several enumerated factors warrant the Commission's consideration of the question presented.[11]

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[11] 47 C.F.R. § 1.115(b)(2). Those factors include:

> (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
>
> (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
>
> (iii) The action involves application of a precedent or policy which should be overturned or revised.
>
> (iv) An erroneous finding as to an important or material question of fact.
>
> (v) Prejudicial procedural error.

Petitioners, however, make no reference to Section 1.115(b)(2), and it is not at all clear from the Application which of the several factors are alleged to warrant Commission reconsideration of the Bureau's decision. The Application merely recites the Commission's obligations under Section 309(j) of the Communications Act of 1934, as amended (the "Act"); speculates as to the alleged likelihood of further delay in the block C auction; reiterates the purported ill effects of the "headstart" that will result from awarding the A and B block licenses prior to licensing the C block frequencies; and alleges, without any factual support, unlawful "territorial allocation" of the A and B block licenses among certain dominant carriers. Western is not among these carriers and no allegation of improper conduct has been made with respect to Western. Petitioners' unsupported allegations and speculations do not constitute the particularized statement of the basis for review required by Section 1.115(b)(2) of the Commission's rules.

The Section 1.115(b)(2) requirement is absolute.[12] "It is well established in this regard that the Commission will not grant rehearing 'merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken.'"[13] Where, as here, a party seeking review has failed to identify any of the Section 1.115(b)(2) criteria, the review is "procedurally defective and subject to dismissal."[14]

Id.

[12] Chapman S. Root Revocable Trust, 8 FCC Rcd 4223 (1993).

[13] Id. at 4224.

[14] Id.

B. A Request for Stay Must Be Filed As A Separate Pleading

The Application is also defective in that it -- like Petitioners' previous filing disposed of by the June 23rd Deferral Order -- violates Section 1.44(e) of the Commission's rules. Section 1.44(e) requires that "any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request not filed as a separate pleading will not be considered by the Commission."[15]

Petitioners' May 12, 1995 Application For Review and Request For Stay impermissibly requested both that the Commission reverse the Bureau's April 12, 1995 Order denying CommOne's Motion and independently sought a stay of the "licensing of the A and B block PCS frequencies until the Commission is ready to license the C block frequencies."[16] Though the Bureau apparently overlooked the procedural error and considered the May 12, 1995 pleading on its merits, the Commission should not do so again when acting on the Application.[17]

III. GRANT OF THE A AND B BLOCK LICENSES IS FULLY CONSONANT WITH THE REQUIREMENTS OF SECTION 309(J) OF THE ACT

At the core of Petitioners' argument is the contention that, in designing the structure of the broadband PCS auctions, the Commission failed to comply with the Congressional directives contained in Section 309(j) of the Act. Specifically, Petitioners assert that the Commission has

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[15] 47 C.F.R. § 1.44(e).

[16] Petitioners' Application for Review and Request for Stay, filed May 12, 1995, at 21.

[17] See, e.g., PCS PRIMECO, L.P., Consolidated Opposition at 4.

failed in its obligations to provide for the broad dissemination of licenses and to ensure participation by minority- and women-owned companies. Petitioners' argument, however, rests on a completely erroneous reading of Section 309(j) and on unsupported allegations of "collusion" among certain A and B block bidders.

A. The Commission's Auction Structure Was Designed to Provide for the Rapid Introduction of PCS Services to the Public While At the Same Time Providing Opportunities for the Participation of Designated Entities in the PCS Marketplace

Section 309(j) sets forth several objectives that the Commission must "seek to promote" when auctioning spectrum. Those objectives include:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delay;

(B) promoting economic opportunities and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small business, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resources made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and

(D) efficient and intensive use of the electromagnetic spectrum.[18]

First and foremost among the above objectives is that the Commission ensure the rapid introduction of service to the public. Yet Petitioners fail to acknowledge this point, omitting this

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[18] 47 U.S.C. § 309(j)(3).

objective alone from their listing of Section 309(j)(3)'s requirements.[19] Instead, Petitioners focus entirely on what they perceive as the Commission's failure to guarantee the participation of designated entities.

According to Petitioners, it was not enough that the Commission initially set aside two entire blocks of spectrum exclusively for small businesses and businesses owned by minorities and women. Petitioners refer to the C and F blocks as "frequency ghettos" and contend that in order to have met its statutory obligation, the Commission was required to promote minority ownership in each of the six broadband PCS auctions, including the already completed A and B block auctions.[20] Petitioners provide no support for this reading of Section 309(j), and in fact, such an interpretation is insupportable.

In enacting Section 309(j), Congress left it to the Commission to decide how best to comply with its directives.[21] Congress did not require that the Commission establish preferences for designated entities in every spectrum auction that it conducts. Nor did Congress specify that <u>any</u> licenses must be set aside for designated entities.

When the broadband PCS auction rules were adopted in the <u>Fifth Report and Order</u>, the Commission carefully balanced its various obligations under Section 309(j) of the Act and determined that the structure ultimately adopted best served those goals. Taking into account

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[19] Application at 5.

[20] Application at i-ii.

[21] 47 U.S.C. § 309(j). <u>See</u> <u>Fifth Memorandum Opinion and Order</u>, PP Docket 93-253, 10 FCC Rcd 403, 413 (1994) ("In establishing a competitive bidding process for the provision of spectrum-based services, Congress gave the Commission broad authority to adopt bidding procedures and policies, so long as certain objectives are fulfilled.").

the anticipated capital constraints of designated entities,[22] the Commission established a number of different frequency blocks, of varying sizes and service areas for PCS licensing auctions, in order to ensure diversity among licensees. The Commission set aside 986, or slightly less than fifty percent, of the initial 2074 PCS licenses to be awarded, as "entrepreneurs' blocks," explicitly "to fulfill Congress's mandate that we ensure that designated entities have the opportunity to participate in providing broadband PCS."[23] Furthermore, designated entities were free to bid in the other four auctions, including the A and B block.[24]

In addition to designing the auction structure with designated entities in mind, the Commission also promulgated several additional rules to ensure that broadband PCS licenses will be widely disseminated.[25] First, the Commission imposed a 40 MHz cap on the total amount

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[22] Fifth R&O at 5547, 5585.

[23] Fifth R&O at 5538. The Commission also established numerous other benefits for designated entities, including bidding credits, installment payment terms, and advantageous options for structuring their ventures. These preferences, however, were rendered dubious constitutionally suspect by the Supreme Court's recent decision in Adarand Constructors, Inc. v. Pena, No. 93-1841 (U.S. June 12, 1995) ("Adarand"). In the Sixth Report and Order, PP Docket No. 93-253, released July 18, 1995 ("Sixth R&O"), the Commission opted to eliminate the affected provisions from its C block rules, rather than risk further delay from constitutional challenges. One of the Commission's manifest reasons for doing so was its desire to further the participation of designated entities in PCS by conducting the C block auction as soon as possible.

[24] Despite the lack of preferences, several small companies not only participated in the A and B block auction, but bid successfully for several licenses. For example, South Seas Satellite Communications Corp. and Poka Lambro Telephone Cooperative both won A block licenses, and Western itself, which won six licenses, is a relatively small company which bid successfully notwithstanding the participation of dominant carriers.

[25] See Memorandum Opinion and Order, GEN Docket No. 90-314, 9 FCC Rcd 4957, 4959-60 (1994).

of PCS spectrum that any one entity can hold in a given geographic area.[26] Second, the Commission adopted even more rigid restrictions on the cross-ownership of cellular and PCS licenses.[27] Third, the Commission established a separate rule for designated entity licenses, which limits the number of licenses applicants may obtain in the C and F blocks.[28]

In order to speed the provision of PCS service to the public, the Commission decided to conduct sequential auctions, rather than auction all six blocks of spectrum simultaneously.[29] It further determined that the public would be best served if the first PCS spectrum to be auctioned were the A and B blocks, because of their unrestricted nature and large geographic scope.[30] The Commission also noted that auctioning the C block after the A and B blocks would be to the benefit of designated entities. It found that:

> Many potential partners may be unwilling to commit themselves to a partnership arrangement with designated entities prior to the auction of licenses on the A and B blocks. So, designated entities that are unable to raise independent financing . . . may have difficulty participating in an auction in which block C is put up for bid simultaneously with blocks A and B. If, however, block C is auctioned after blocks A and B, we expect that non-designated entities who are unsuccessful in acquiring MTA licenses on blocks A and B will want to become partners with or make investments in designated entities . . . In addition, the auction on blocks A and B will produce price information that would be valuable to designated entities in their business planning.[31]

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[26] See 47 C.F.R. § 24.229(c).

[27] See 47 C.F.R. §§ 24.204, 24.229(d).

[28] See 47 C.F.R. § 24.710 (stating that no applicant may be deemed the winning bidder of more than 98 (10%) of the licenses available for the C and F blocks).

[29] Fifth R&O at 5546-47.

[30] Id.

[31] Id. at 5547.

Thus, in implementing its broadband PCS licensing scheme, the Commission closely adhered to Congress's objective of promoting broad-based participation in competitive bidding, while at the same time ensuring the rapid provision of service to the public. In no respect, has the Commission failed to meet its statutory obligations. Petitioners' argument that the Commission was duty-bound to provide exclusive benefits for designated entities in each of its broadband PCS auctions finds no support in Section 309(j), and is directly contrary to the Supreme Court's decision in Adarand, declaring generic minority and gender-based set-aside to be unconstitutional.[32]

B. Petitioners' "Headstart" Argument Has Repeatedly Been Considered and Rejected

Petitioners further contend that the Commission's decision to auction the A and B frequency blocks before the C block confers a competitive headstart on the A and B block licensees which C block auction winners will be unable to overcome. This exact argument, however, has been considered -- and rejected -- by the Commission on no less than three prior occasions. Petitioners fail to adduce any new facts that would require the Commission to reach a different conclusion now. Moreover, the experiences of the cellular and long distance industries suggest that headstarts are not insurmountable and sometimes even benefit the latecomer who can profit from the earlier market entrant's mistakes.

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[32] Adarand, slip op. at 25-26.

1. The Commission Has Rejected the Headstart Argument on Three Prior Occasions

In the Fourth Memorandum Opinion and Order,[33] the Commission affirmed its decision to auction the A and B frequency blocks prior to the C block. The Commission specifically rejected the argument that doing so would afford the earlier licensed A and B block winners an unfair competitive advantage over designated entities. To the contrary, the Commission found that auctioning the entrepreneurs' block licenses after the block A and B licenses were awarded was in the best interests of designated entities because it would enable them to more easily attract financial partners and would provide them with critical pricing information regarding the value of PCS licenses that would assist them in attracting capital and formulating bidding strategies.[34]

Furthermore, while the Commission acknowledged that the A and B block winners would have some degree of a head start, it found that the "overriding public interest in rapid introduction of service" dictated that it not delay in finalizing the award of the A and B block licenses.[35]

The Commission addressed the "headstart" argument a second time in the Order denying CommOne's Emergency Motion to Defer MTA Licensing filed on March 8, 1995[36]. In that

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[33] PP Docket No. 93-253. 9 FCC Rcd 6858 (1994) ("Fourth MO&O").

[34] Id. at 6863.

[35] Id. at 6864.

[36] PP Docket No. 93-253 (rel. April 12, 1995) (the "CommOne Order"). Western was one of several entities which opposed the Motion. See Western PCS Corporation's Opposition to Communication One, Inc.'s "Emergency Motion to Defer MTA PCS

Motion, CommOne argued that "every day of headstart given to the MTA auction winners will cost the Entrepreneur Block 'millions of dollars and countless opportunities,'"[37] and that in order to "remedy the unfair headstart advantage, the Commission must defer licensing the MTA auction winners until after the Entrepreneur Block auction has been conducted."[38] CommOne also asserted that the headstart was exacerbated by the fact that the Commission intended to delay the C block auction pending the outcome of the Telephone Electronics Corporation ("TEC") litigation,[39] mirroring Petitioners' instant argument that the actual and potential delays in the block C auction will aggravate the headstart advantage.

In the CommOne Order, the Bureau found that CommOne had failed to show good cause to delay the licensing of the A and B blocks. After noting that the argument raised by CommOne had been expressly considered and rejected in the Fourth MO&O, the Commission again declined to delay the final licensing of the A and B block winners, holding once again that "the overriding public interest in rapid introduction of service outweighed the risk of A and B block winners gaining a headstart advantage."[40] In responding to CommOne's argument that the repeated delays in the C block auction process compounded the A and B block competitive advantage, the Bureau stated:

Licensing" filed with the Commission on March 29, 1995 in PP Docket No. 93-253 and ET Docket No. 92-100.

[37] Motion at 2.

[38] Id. at 3.

[39] Id. at 2.

[40] Id. (footnote omitted).

> We find that [CommOne's] contention that subsequent PCS licenses will be fatally hamstrung is purely speculative. Even if A and B block licensees obtain some benefit from being licensed before other PCS providers, we believe that numerous competitive opportunities remain open to subsequent PCS entrants . . . Finally, even assuming *arguendo* that a significant interval between the issuance of the A and B block licenses and the issuance of the C block licenses would reduce the value of the C block licenses, [CommOne] and other bidders are free to discount their bids in the C block auction accordingly.[41]

The Bureau considered the headstart argument yet again in its June 23rd Deferral Order, denying Petitioners' May 12, 1995 Application for Review and Request for Stay. The Bureau recognized that the TEC stay request and the Supreme Court's decision in Adarand Constructors v. Pena had affected the timing of the C block auction. It concluded, however, that "the revised auction schedule does not warrant a delay in the A and B block licensing."[42] The Bureau noted that the Commission's decision to conduct the auctions sequentially was not "based on a particular timetable; in fact, the precise timing of each auction was not known at that time."[43] Thus, the unforeseen delays in the C block auction process provide no basis to revisit the perfectly sound decision to award licenses in the A and B blocks.

2. No Material Circumstance Has Changed Warranting Reconsideration

No material circumstance has changed since the June 23rd Deferral Order was released to warrant reconsideration of the Bureau's previous disposition. While it is true that the C block

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[41] CommOne Order at 3.

[42] June 23rd Deferral Order at 13.

[43] Id.

auction has again been stayed by the Court of Appeals,[44] that is a circumstance wholly beyond the Commission's control. Moreover, it would hardly advance the purpose of Section 309(j) of the Act to penalize the A/B block licensees and the public they seek to serve, all in an effort to assure that prospective PCS competitors leave the starting gate at approximately the same time. The Court has set the Omnipoint case for an expedited schedule, with final briefs due September 11, 1995 and oral argument set for September 28, 1995. However, other parties have filed petitions for review of the Sixth R&O with the Court,[45] all of which may be expected to delay final resolution of the C block rules. While these unforeseen circumstances have regrettably caused delay, that factor by itself does not warrant reconsidering the sound public policy objectives underlying the June 23rd Deferral Order.

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[44] On July 27, 1995, the U.S. Court of Appeals for the D.C. Circuit granted the stay sought by Omnipoint Corporation ("Omnipoint") in conjunction with its appeal of the Commission's Sixth Report and Order, PP Docket 93-253, released July 18, 1995) (Sixth R&O"). Omnipoint Corporation v. FCC, No. 95-1374 (D.C. Cir. July 27, 1995). In the Sixth R&O, the Commission eliminated the minority preference provisions from its C block auction rules, in response to the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, which subjected all federal race-conscious programs to strict scrutiny. Though the Commission expressed its continuing commitment to fostering the participation of minority- and women-owned companies in PCS, it concluded that the interests of designated entities would best be served by amending its rules to bring them into clear compliance with Adarand, rather than risk legal challenges and the attendant delays. Sixth R&O at 1. Among other changes, the Commission extended the 49% equity structure, previously available only to designated entities, to all C block applicants, prompting Omnipoint's challenge. Omnipoint argues that by opening the 49% equity option to all bidders, the Commission has undermined its reservation of the C block for bidding by smaller companies.

[45] See Omnipoint Corporation, Petition for Review, filed July 24, 1995; Radiofone, Inc., Petition for Review, filed August 1, 1995; QTEL Wireless, Inc., Petition for Review, filed August 2, 1995.

The Commission has made it clear that it plans to "pursue every possible avenue to get this auction back on track."[46] However, as the Commission found in its June 23rd Deferral Order in connection with the TEC stay, the worst case scenario of a delay of several months is not decisionally significant. The Commission's decision to hold the auctions sequentially was not predicated on any particular set of auction dates.[47] In fact, at the time that determination was made, no schedule for the auctions had even been set.[48]

Petitioners are mistaken in focusing on broadband PCS as if it were a wholly separate product market from the existing wireless industry. The Commission has explicitly rejected such a balkanized definition of the wireless industry. In Motorola, Inc.,[49] the Commission held that the relevant market "includes cellular, SMR, 220 MHz, interconnected Business Radio Service, conventional dispatch, paging and PCS offerings."[50] Petitioners ignore the ten-year headstart that established cellular companies have over all PCS providers and the competition that exists from a host of other wireless services. The A and B block licensees are themselves "not

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[46] Statement of Reed E. Hundt, Chairman, Federal Communications Commission, Public Notice, released July 27, 1995.

[47] June 23rd Deferral Order at 13.

[48] Id.

[49] In the Matter of Applications of Motorola, Inc. for Consent to Assign 800 MHz Licenses to Nextel Communications, Order, __ FCC Rcd __, DA 95-890, rel. April 27, 1995, recon. pending. See also In the Matter of Applications of Nextel Communications, Inc. For Transfer of Control of OneComm Corporation, N.A. and C-Call Corp., Order, __ FCC Rcd __, DA-95-1677, rel. July 28, 1995.

[50] Motorola, Inc. at 9. The Commission included PCS specifically because, as a potential competitor for existing wireless services, "these PCS offerings already have served to lower prices for mobile telephone service and increase capabilities of existing offerings." Id.

entering a new, untapped market but will be faced with stiff competition from the outset."[51]

3. The Experiences of the Cellular and Long Distance Industries Suggest that Petitioners' Claims of Long-term Competitive Injury May Be Overstated

The experience of the cellular industry suggests that Petitioners' concerns regarding irreparable competitive harm may be overstated. When the Commission first fashioned its cellular rules, it decided to license wireline and nonwireline applicants separately. Concerned that the differing procedures would afford the wireline applicants a headstart advantage over their nonwireline competitors, the Commission said that it would consider requests to defer wireline licensing if a non-wireline applicant could demonstrate that the headstart was anticompetitive and counter to the public interest. However, competition developed so quickly in the cellular industry that none of the parties who filed headstart requests was able to meet the necessary burden, and, in 1991, the Commission eliminated the headstart policy.[52] The Commission 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. We have not received any evidence that late entry by a nonwireline carrier has hampered its ability to compete."[53]

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[51] Id.

[52] See 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, 6 FCC Rcd 6185, 6226 (1991).

[53] Id.

A headstart advantage in PCS is even less likely to cause lasting competitive harm because -- unlike cellular where the two licensees in each area provide essentially identical service offerings -- PCS offers the promise of a broad array of diverse services in competition with one another. Latecomers will be able to exploit the almost endless possibilities for providing specialized or niche services in addition to competing with the A and B block licensees head on. Moreover, as the Commission recognized in connection with its approval of AT&T's acquisition of McCaw Cellular, PCS is part of a wireless industry undergoing rapid change and growth, fostering an environment in which "relatively small, entrepreneurial competitors [are] often . . . as successful as large ones."[54] It is thus far from clear that the headstart of the A and B block licensees will preclude the entry and ultimate success of designated entities in PCS.

The state of competition in the long distance industry further undermines the headstart argument advanced by Petitioners. Until the early 1970's, AT&T enjoyed a monopoly in the provision of common carrier long distance service.[55] By 1984, as a result of the Commission's pro-competitive decisions and the divestiture, AT&T's share slipped to 84%.[56] In the decade since the AT&T divestiture, however, that share has dropped precipitously and

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[54] In Re Applications of Craig O. McCaw and American Telephone and Telegraph Company For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, Memorandum Opinion and Order, 9 FCC Rcd 5836, 5861-62 (1994).

[55] See MCI, 18 FCC 2d 953 (1969), recon. denied, 21 FCC 2d 190 (1970).

[56] See Long Distance Market Share: First Quarter 1995, Industry Analysis Division, Common Carrier Bureau (July, 1995) at 10.

is now only 58% and still falling.[57] As of December 31, 1994 over 465 long distance companies were competing against what was once considered an invincible monopoly.[58] Sprint, MCI, and LDDS have had particular success, collectively taking a $20 billion dollar bite out of AT&T's revenues.[59] While there is no guarantee that the PCS industry will evolve in the same fashion, past experience suggests where the potential market is as vast as the wireless industry, a competitive headstart of months, rather than decades, may well be surmountable by small and aggressive entrepreneurs.

C. The Antitrust Argument Advanced By Petitioners Is Without Merit

Petitioners also repeat the claim, first advanced in their May 12 Application for Review and Request for Stay, that the bidding for the A and B block licenses "took on the classic characteristics of a 'territorial allocation,' an unfair business practice under existing antitrust law." Petitioners, however, offer absolutely no support for this allegation, other than the conclusory assertion that the bidders "bid for only those markets not already controlled by their

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[57] Id.

[58] See Long Distance Carriers and Their Code Assignments, Industry Analysis Division, Common Carrier Bureau (May, 1995) at 10.

[59] See Long Distance Market Share: First Quarter 1995, Industry Analysis Division, Common Carrier Bureau (July, 1995) at 12.

new partners -- i.e. their former competitors."[60] That, however, may simply be a function of the cellular/PCS "significant overlap" rule, 47 C.F.R. §24.204, and not indicative of any improper design.

In the companion pleading filed the same day as the subject Application, Petitioners assert that the existence of a conspiracy in violation of the antitrust laws can sometimes only be proven with circumstantial evidence. The case that Petitioners cite, Kreuzer v. American Academy of Periodontology,[61] does indeed stand for that principle. Kreuzer, however, also makes clear that such an inference may only be drawn "when the alleged conspirators have acted in a way inconsistent with independent pursuit of economic self interest, [and] that inference is warranted only when a theory of rational, independent action is less attractive than that of concerted action."[62]

Such is manifestly not the case here. Petitioners have adduced absolutely no evidence that the bidders were not acting independently and pursuing bidding strategies intended solely to maximize their own interests. In point of fact, bidding patterns were determined to a large degree by the desire of the individual applicants to acquire national wireless footprints and/or to acquire markets complementing their existing telecommunications holdings. There is no evidence of any improper contact between the parties, and Petitioners fail even to allege, much less prove, that there has been any prohibited exchange of information regarding markets and prices. Western itself has not engaged in such collusive behavior, and is presently unaware of

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[60] Application at 12.

[61] 735 F.2d 1479 (D.C. Cir. 1984).

[62] Id. at 1487 (quoting Federal Prescription Service, Inc. v. American Pharmaceutical Association, 663 F.2d 253 (D.C. Cir. 1981), cert denied, 455 U.S. 928 (1982)).