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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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AUG 1 0 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

DOCKET FILE COPY ORIGINAL

OPPOSITION

PCS PRIMECO, L.P.

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August 10, 1995

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SUMMARY

PCS PRIMECO, L.P. opposes the Application for Review filed by the National Association of Black Owned Broadcasters, Inc., *et al.* NABOB, *et al.* have failed to satisfy the requirements necessary for grant of a stay request, and their actions are clearly motivated by a desire to delay deployment of broadband PCS services at all costs.

NABOB, *et al.* have shown no likelihood that they are likely to prevail on the merits. The Commission has fully complied with the Budget Act by properly balancing the various statutory objectives, including wireless competition, rapid deployment of new technologies and wide dissemination of licenses to a variety of entities, including small and minority-owned businesses. Applicants' assertions of anticompetitive abuse by the Block A/B winning bidders are reckless and unfounded.

NABOB, *et al.* also have not demonstrated irreparable harm in the absence of a stay. The alleged injuries they claim are speculative and without factual support. Moreover, grant of the stay request will not address Applicants' alleged injuries.

Contrary to NABOB, *et al.* claims, others will be significantly harmed by grant of the stay request. The A/B Block licenses have already been granted, and licensees are already conducting PCS-related business. PRIMECO and others have already paid over $7 billion in payments for their winning bids, and have incurred other PCS deployment costs.

Finally, the public interest would be disserved by grant of a stay request. The public's interest in rapid deployment of PCS services and competition with incumbent cellular carriers will be undermined if the A/B licenses are rescinded.

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OPPOSITION

Pursuant to Section 1.115(d) of the Commission's Rules, PCS PRIMECO, L.P. ("PRIMECO") hereby opposes the Application for Review filed July 21, 1995 by the National Association of Black Owned Broadcasters, Inc., *et al.*[1] NABOB, *et al.* seek Commission review of those portions of an Order of the Chief, Wireless Telecommunications Bureau ("Bureau"), denying a stay request filed on May 12, 1995, by NABOB, *et al.*, requesting stay of licensing of all MTA license winners in the Commission's A/B Block auction.[2] Applicants ultimately seek reversal of an earlier Bureau Order denying a motion filed by Communications One, Inc., to defer

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1 *See* Application for Review ("Application") filed July 21, 1995 by the National Association of Black Owned Broadcasters, Inc., the National Association for the Advancement of Colored People, Washington Bureau, and Percy E. Sutton ("NABOB, *et al.*" or "Applicants").

2 Deferral of Licensing of MTA Commercial Broadband PCS, *Memorandum Opinion and Order*, DA 95-1410 (rel. June 23, 1995) ("*Request for Stay Order*").

MTA PCS licensing until after the C block auction is concluded.[3] For the reasons discussed herein, the Application is without merit and should be promptly denied.

I. INTRODUCTION/STATEMENT OF INTEREST

PRIMECO was the winning bidder for 11 markets in the A/B Block MTA auction. PRIMECO's long-form Form 600 applications for its winning MTA markets were granted on June 23, 1995, and on June 30, 1995, PRIMECO submitted the remaining $885,780,000 of its winning bids, bringing its total payment for the 11 licenses to $1,107,225,200. PRIMECO has expended considerable financial and other resources in PCS deployment activities, and has entered into agreements for the purpose of constructing its PCS systems. Clearly, any administrative delay in the deployment of PCS is tremendously prejudicial and detrimental to PRIMECO as well as to the other winning MTA license applicants.[4] Importantly, licensing delay directly contravenes critical Congressional objectives for the rapid deployment of PCS services and increased wireless competition — and thus disserves the public

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3 *See* Deferral of Licensing of MTA Commercial Broadband PCS, *Order*, PP Docket No. 93-253, DA 95-806 (rel. April 12, 1995). At the outset, PRIMECO notes that, because the A/B Block MTA licenses were issued on June 23, 1995, Applicants' effort to stay *issuance* of the MTA licenses is erroneous and their stay request is moot.

4 The other MTA license winners are similarly situated and also prejudiced by any administrative delays. Even without regard to PCS construction expenses, winning licensees have submitted over $7 billion in payments for the MTA licenses. This fact undermines Applicants' naive contention that PRIMECO and other winning bidders will not suffer any harm in the event that the stay request is granted. In fact, the potential harm to PRIMECO has increased significantly since the Bureau issued the *Request for Stay Order* because PRIMECO has now submitted its full license payments and has continued to incur costs associated with PCS service deployment.

interest.[5] Applicants have provided no legitimate reason for rescission of the A/B Block MTA licensing, and the Application should be promptly denied.

II. THE REQUIREMENTS FOR A STAY OF THE MTA LICENSING PROCESS HAVE NOT BEEN MET

It is well-established that a party seeking a stay must meet the four-pronged test articulated by the D.C. Circuit in *Virginia Petroleum Jobber's Ass'n v. FPC*.[6] Applicants must show (1) a strong likelihood of prevailing on the merits; (2) irreparable harm if the stay is not granted; (3) the absence of harm to others if the stay is granted; and (4) that the public interest will be served if the stay is granted. The Bureau appropriately found that Applicants failed to satisfy each of these requirements.

A. Applicants Have Shown No Likelihood of Success on the Merits

Applicants assert that they are likely to prevail on the merits because grant of the A/B Block licenses prior to licensing the C Block auction constitutes a violation of the Commission's statutory obligations under Section 309(j) of the Communications Act, 47 U.S.C. § 309(j).[7] Applicants also maintain that licensing the A/B Block winners will result in an excessive concentration of licenses in the hands of a few dominant companies in contravention of

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5 47 U.S.C. § 309(j)(3)(A) (Supp. 1995).

6 259 F.2d 921 (D.C. Cir. 1958); *see Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

7 Application at 7.

Section 309(j).[8] As a related matter, Applicants allege that the winning bidders divided the MTA licenses in an unlawful territorial allocation.[9]

Applicants' arguments are based on a misreading of the Omnibus Budget Reconciliation Act and the Commission's PCS licensing requirements, adopted pursuant to notice and comment rulemaking proceedings. In fact, no statutory violation has occurred in the MTA licensing scheme or through the MTA auction process. Further, Applicants' anticompetitive claims have no factual support and are scandalous.

1. The Commission Has Fully Complied With Its Statutory Obligations Under the Budget Act

Under the Budget Act, Congress sought to facilitate the competitive and rapid deployment of PCS services to the public. Congress directed the Commission to establish a competitive bidding methodology for auctionable frequencies, and directed the Commission to "*seek to promote*" the following objectives in so doing:

- The development and rapid deployment of new technologies, products and services without administrative and judicial delays;
- The promotion of economic opportunities and competition by avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minority groups and women (so-called "designated entities");
- The recovery for the public of a portion of the value of the spectrum auctioned; and

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8 *Id.* at 9-14.

9 *Id.* at 11-14.

- Efficient and intensive use of the electromagnetic spectrum.[10]

Congress left to the Commission's discretion which particular bidding methodology should be employed to ensure compliance with these objectives. Further, Congress specifically did not set aside licenses for any particular group, minority-owned or otherwise, and gave the Commission explicit instructions not to construe the Act to predetermine the outcome of PCS licensing.[11]

Conspicuously absent from the Application is any reference to or discussion of the Commission rules which have been established to ensure that meaningful opportunities for designated entities are fully present and that there will be a wide dissemination of licenses in a wide variety of geographic areas to a wide variety of entities — as required by the Budget Act.[12] The Commission's rules governing PCS service areas, frequency blocks, and auction eligibility are all intended to facilitate competition, rapid deployment and wide dissemination of licenses.[13] All of the Commission's actions in this regard comport with the objectives of the Budget Act.[14]

Moreover, while Congress did not mandate that the Commission prioritize one statutory objective over another, NABOB, *et al.* mistakenly suggest that the awarding of PCS

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10 47 U.S.C. § 309(j)(3)(A-D). *See also id.* § 309(j)(4)(C) (mandating that bandwidth assignments, and area designations be consistent with the public interest, the Budget Act's objectives, and the characteristics of the proposed service).

11 H.R. Rep. No. 111, 103d Cong., 1st Sess. at 255-57 (1993)("*House Report*").

12 *See* 47 U.S.C. § 309(j)(4)(C).

13 *See PCS Reconsideration Order* at 4975-86 (establishing a variety of service areas and frequency blocks), 4997-5010 (limiting eligibility of incumbent cellular licensees to hold interests in PCS licensees); *Second Report and Order* at 7728 (limiting the amount of spectrum any entity can obtain in a single service area); 59 Fed. Reg. 53463 (1994) (to be codified at 47 C.F.R. § 24.710) (stating that no applicant may be deemed the winning bidder of more than 10 percent of the licenses available in frequency blocks C and F).

14 47 U.S.C. § 309(j). Indeed, the Commission exceeded its statutory obligations by setting aside particular PCS frequency blocks for designated entities.

licenses to designated entities should take precedence over all other objectives. NABOB, *et al.* simply ignore certain other statutory objectives, particularly those regarding rapid deployment of PCS and new wireless technologies to the public.[15] Nothing in the statute or its legislative history requires that the Commission delay the introduction of PCS services generally until licenses are disseminated to minority-owned entities — the outcome requested by Applicants.[16]

NABOB, *et al.* also take an unreasonable view regarding the Commission's statutory obligation to promote competition.[17] One critical objective of the Budget Act and Commission's PCS proceeding was to increase wireless competition with *incumbent cellular carriers.*[18] The Commission's actions to date are fully consistent with this objective.[19] The public will be denied the benefits of a more competitive marketplace, including lower costs and improved quality for equipment and service, if the A/B Block licenses are not allowed to promptly deploy their systems.[20]

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15 Further, in this regard, it is worth noting that in discussing the need for the competitive bidding legislation, Congress focused particularly on the need for rapid deployment of new technologies, efficient use of the spectrum and international competitiveness in wireless technologies — not designated entity participation in PCS. *See House Report* at 247-49, 253. Congress also imposed expeditious deadlines for completion of the PCS rulemaking proceeding and commencement of PCS licensing, again indicating that deployment of PCS was of particular concern to Congress. Budget Act § 6002(d)(2).

16 *Request for Stay Order*, at ¶¶ 20-21.

17 47 U.S.C. § 309(j)(3)(B).

18 *See, e.g., PCS Reconsideration and Order*, at 4957, 4979-81, 4999, 5003; *Second Report and Order* at 7710, 7734; *Notice of Proposed Rulemaking and Tentative Decision*, GEN Docket No. 90-314, 7 FCC Rcd. 5676, 5688, 5701-04 (1994).

19 *See House Report* at 256 (explaining Congress' neutrality toward PCS rulemaking proceeding).

20 *See PCS Reconsideration Order* at 4979; *Second Report and Order* at 7710. For the reasons discussed in PRIMECO's Opposition to Applicants' original Petition to Deny,

(continued...)

It should also be emphasized that despite the lack of bidding preferences in the A/B Block auction, both large and small companies participated in the auction, and large companies were not the only winners. There is, in fact, diversity among the A/B Block auction winners, with respect to size, ownership and numbers. The Commission's rules did not prevent small businesses or minority bidders from participating in the A/B Block auctions and Applicant's assertions to the contrary are simply wrong.[21]

Finally, PRIMECO notes that Applicants' discussion of the likelihood of success on the merits does not adequately address the impact of the recent Supreme Court decision in *Adarand Constructors, Inc. v. Pena.*[22] NABOB, *et al.*'s argument that the Commission violated the Budget Act by failing to provide designated entity preferences in the A/B Block auctions is unpersuasive in view of concerns raised about the legitimacy of minority preferences in the C

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20 (...continued)
NABOB *et al.*'s argument that C Block licensees will be denied economic opportunities as a result of the MTA licensees' earlier licensing date is without merit. *See* PRIMECO Opposition at 9-15. PRIMECO recognizes that the Commission has expressed concern that delays in the C Block auction may give a head start to MTA licensees that would afford them some competitive advantage over winners in later auctions. PRIMECO supports the Commission's efforts to commence the C block auction expeditiously, and believes that the public interest in promoting opportunities for women- and minority-owned businesses is important. The public's interest in rapid deployment and competition in wireless telecommunications services is no less compelling, however, and the Commission decision to stagger the PCS auctions properly balanced the various statutory objectives.

21 For example, winners in the A/B Block auction include South Seas Satellite Communications Corp., a small women-owned business; Poka Lambro Telephone Cooperative, a rural telephone company; and Centennial Cellular Corp., a small telephone operator in New Canaan, Connecticut.

22 115 S.Ct. 2097 (1995).

Block auction.[23] While *Adarand* caused the Commission to revise its race- and gender-based bidding preferences for the C Block auction, bidding preferences for small businesses have been retained, thus continuing to ensure that many minority- and women-owned businesses will be eligible for bidding preferences.[24]

2. Applicants' Claims of Anticompetitive Conduct Are Reckless and Factually Unsupported

NABOB, *et al.* persist in their scandalous statement that an excessive concentration of licenses has occurred in the form of a "territorial allocation" in violation of the antitrust laws.[25] Applicants also assert that "the activity of the aligned RBOCs appears particularly anticompetitive, since they did not bid in markets where any other RBOC was bidding."[26]

In the Bureau's Order denying Applicants' accompanying Petition to Deny, however, the Bureau properly found NABOB, *et al.*'s conclusory allegations to be unsupported *by any facts* that A/B Block auction winners violated any of the Commission's rules, including the collusion rules regarding the aggregation of PCS spectrum.[27] In fact, and as noted in the Order, "much of the bidding behavior alluded to by [NABOB, *et al.*] was *required* by the

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23 *See Sixth Report and Order*, PP Docket No. 93-253, FCC 95-301, ¶¶ 4-12 (rel. July 18, 1995) (*"Sixth Report & Order"*) (discussing concern for legal challenges to constitutionality of race- and gender-based measures in C block auction).

24 *Sixth Report and Order* at ¶¶ 8 n.29, 42.

25 Application at 10.

26 *Id.*

27 Applications for A and B Block Broadband PCS Licenses, *Order*, DA 95-1411, ¶¶ 9-14 (rel. June 23, 1995) (*"Petition to Deny"*).

Commission's cellular cross-ownership rules, which prohibited bidders with cellular interests from bidding for PCS licenses in those markets."[28]

Moreover, and again as recognized by the Bureau, the extent of the bidding for the 99 Block A/B MTA licenses, and the winning bid amounts for the licenses, which totaled over $7 billion, belie any claim of concerted anticompetitive activity.[29] The bidding that occurred for the MTA markets reflected individual bidders' business plans and strategies — alone. As stated by PRIMECO in its earlier Opposition to Applicants' Request for Stay, it is difficult to believe that government intervention would *not* have occurred before today if a violation of the antitrust laws on the scale described by Petitioners appeared even remotely probable. No facts have been presented by NABOB, *et al.* and their reckless charges should be rejected.

B. Applicants Have Not Demonstrated Irreparable Harm in the Absence of a Stay

Applicants have failed to show that they will be irreparably harmed by a denial of the requested stay; further, the alleged injuries they claim are speculative and without factual support. Applicants allege that *prospective* C Block bidders will experience the following "harms:" (1) loss of access to capital; (2) loss of base station cell sites; (3) loss of access to

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28 *Petition to Deny Order* ¶ 14. Pursuant to 47 C.F.R. § 24.204, cellular carriers are prohibited from obtaining licenses for broadband PCS in excess of 10 MHz in markets that would "result in a significant overlap of the PCS licensed service area(s) . . . and the cellular geographic area(s)." PRIMECO and others were thus prohibited from holding significant PCS interests in markets where their partners (and affiliates) had cellular operations. In general, Section 24.204 also prevents any entity owning 20 percent or more of a cellular license covering 10 percent or more of the "pops" in the overlapping PCS market from having an interest greater than five percent in the overlapping PCS license. In the case of PRIMECO, for example, this rule prevented it from bidding for the PCS license in the New York area because of the Bell Atlantic/NYNEX ownership of the B Band cellular license there. This rule explains why PRIMECO and others did not bid in certain markets.

29 *Petition to Deny Order* at ¶ 14.

distributors and retailers; and (4) loss of market share.[30] Assuming, *arguendo*, that there was factual support for these claims, grant of the stay request will still not resolve Applicants' alleged concerns.[31]

With respect to Applicants' claim that uncertainty regarding the timing of the C Block auction has negatively impacted designated entity investment opportunities, a stay of A/B licensing will not solve the perceived problem because uncertainty regarding timing of C Block licensing will remain. Also, assuming arguendo that designated entity investment opportunities have been negatively impacted, Applicants fail to address other critical factors — such as concerns regarding the constitutionality of the Commission's preference scheme — which may be affecting designated entity investment decisions.[32]

Applicants also allege that they will experience a loss of base station cell sites because the A/B Block licensees "will be able to enter into purchase agreements for prime base station locations precluding C Block licensees from obtaining access to those sites, and thereby *possibly* precluding C Block licensees from being able to serve some geographic areas . . . ."[33] Not only is this alleged harm purely speculative, a grant of the stay request will not remedy it. This is also true with respect to Applicants' claim that they will experience a "loss of access to

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30 Application at 15-16.

31 Further, assertions of injuries of this type, even if documented, have been found by the courts not to be the type of irreparable harm which warrants grant of a stay. See *Virginia Petroleum*, 259 F.2d at 925 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.").

32 *See Adarand Constructors, Inc.*, 115 S.Ct. 2097, *Sixth Report and Order*, PP Docket No. 93-253, FCC 95-301, ¶¶ 7-8 (rel. July 18, 1995) (discussing impact of constitutional questions on C Block licensees).

33 Application at 15 (emphasis added).

distributors and retailers." It is unclear how the A/B Block licensees can preclude C Block licensees from entering into distribution, resale or other agreements. It is equally unclear how a grant of the requested stay would prevent A/B Block winning bidders from entering into such arrangements. Applicants' claim that C Block licensees will experience a "loss of market share" is also purely speculative and unsupported by the facts.[34]

C. Others Will Be Harmed By Grant of the Stay

Applicants claim that the only parties affected by the requested stay are the A/B Block winners and that the A/B winners will not suffer much if the stay is granted. Applicants state: (1) that the A/B Block winners are not currently conducting PCS business; and (2) that the A/B winners have not paid the remaining 80% of the winning license amounts for the licenses.[35] These claims are grossly inaccurate. As the Commission well knows, the A/B Block licensees *have* already been granted and issued, and the MTA licenses *have* paid the balance (80%) of their winning bid amounts — of over $5.5 billion — for the licenses.[36] Moreover, the A/B Block broadband PCS licensees *are* currently conducting PCS business as they seek to deploy PCS services. PRIMECO and the other MTA winners have developed business plans, hired personnel, incurred business expenses and signed agreements. They are moving forward to build out their systems and deliver service to the public.

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34 *Id.* at 16. *See* discussion *supra* n.20.

35 Application at 16-17.

36 As discussed above, PRIMECO's licenses were granted on June 23, and PRIMECO submitted its remaining license payments (80%) of $885,780,000 on June 30, 1995, bringing its total payment for the licenses to $1,107,225,200.

D. The Public Interest Would be Disserved by Grant of a Stay

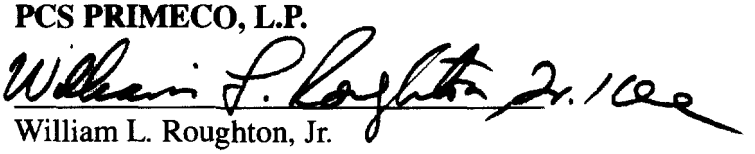
The public at large will also be injured by any further delay in PCS deployment activities. A central premise of the Budget Act was to facilitate rapid deployment of PCS services to the public and promote competition with incumbent cellular carriers. A stay will undermine these objectives — without corresponding benefit. Grant of the stay will delay the introduction of new competition and new services to the public and disserve the public interest.[37]

CONCLUSION

In granting the Commission competitive bidding authority, Congress delegated to the Commission the task of balancing numerous objectives. The Commission has done a commendable job in balancing those objectives, and the Bureau's decision is consistent with both the Budget Act and Commission policy. NABOB, *et al.*'s Application is premised on a flawed interpretation of the Commission's statutory mandate and motivated simply by a desire to delay broadband PCS deployment — at any and all costs. For the reasons discussed herein, the Commission should affirm the Bureau's denial of NABOB, *et al.*'s Application for Review.

Respectfully submitted,

PCS PRIMECO, L.P.



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[37] In addition, because the A/B licensees would be entitled to a return of their license sums, revenues in the National Treasury would be reduced.

CERTIFICATE OF SERVICE

I, Jo-Ann Grayton, a secretary at the law firm of Wilkinson, Barker, Knauer & Quinn, do hereby certify that copies of the foregoing "Opposition" were served this 10th day of August, 1995 by first class United States mail, postage prepaid, or via hand delivery as indicated below, to the following:

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