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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

DEC 8 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act -)	
Competitive Bidding)	

To: Chief, Wireless
Telecommunications Bureau

OPPOSITION TO PETITION FOR WAIVER OF
NATIONAL TELECOM PCS, INC.

U.S. AirWaves Inc. ("AirWaves"), pursuant to Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, hereby opposes the Petition for Waiver filed by National Telecom PCS, Inc. ("NatTel"), in the above referenced docket. In an attempt to change the rules in the middle of the game, "NatTel asks for a waiver to increase its upfront payment, notwithstanding the December 1, 1995, deadline for making these upfront payments. See Public Notice (Nov. 20, 1995).

AirWaves' interest in this matter arises out of the fact that, on December 1, it and many (perhaps hundreds) other applicants submitted upfront payments in good faith, as required by the Commission. Indeed, AirWaves submitted the maximum amount that could be submitted for the "POPs" available for bidding by a single applicant in the C-block auction. Thus AirWaves, and any other applicant that

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submitted this maximum amount, would be uniquely disadvantaged by grant of NatTel's petition.

I. NATTEL IS ACTUALLY REQUESTING, WITHOUT GOING THROUGH REQUIRED PROCEDURES, A CHANGE IN THE COMMISSION'S RULES.

Although NatTel characterizes its request as a "waiver," in fact it is a request for a change in the rules relating to the C-block auction. Under long-standing principles of administrative law, a waiver typically applies to a single entity, or at most to a group of entities, whereas NatTel is asking for a "waiver" that applies to everyone who is a "qualified bidder." NatTel Petition at 5.^{1/} Indeed, the very rule under which NatTel seeks its waiver refers to granting a waiver when justified by the "particular case." 47 C.F.R. § 24.819(a)(1)(i), (ii).

When one is seeking a change in the rules that would apply to all applicants, as NatTel is doing here, the appropriate procedure is to file a petition for rulemaking, see 47 C.F.R. § 1.401, which the Commission would then address with the full procedural safeguards for rulemakings provided by the Administrative Procedure Act. See 5 U.S.C. § 553.

^{1/} It is not clear what NatTel means by a "qualified bidder." AirWaves presumes that some of those who filed short form applications on November 6 did not make any upfront payment on December 1. Is NatTel proposing that those entities, which would normally be dismissed from the auction, be allowed to increase their upfront payments from zero?

II. NATTEL HAS FAILED TO MEET THE STANDARDS FOR A WAIVER.

Even assuming, arguendo, that the NatTel petition is properly considered as one for waiver, the petition must be denied for failure to meet the "affirmative showing" requirement of Section 24.819(a) of the Rules. Although NatTel's request is somewhat ambiguous as to the basis for waiver, NatTel appears to be relying on the general "public interest" rationale for a waiver grant, as well as claiming somehow that "considerations of hardship [or] equity" warrant a waiver grant. Petition at 2 & n.2. However, NatTel goes on, confusingly, to state that, "[s]ince granting this waiver will not violate any Commission rule or regulation, the Commission should grant the waiver unless" Id. at 3.

By definition, of course, NatTel's request must involve a "violation of a Commission rule or regulation"; otherwise, there would not be any need for a waiver. In fact, the Commission's rules regarding upfront payments could not be more clear, and the public notice implementing the rules set a clear December 1 deadline. See 47 C.F.R. §§ 1.2106(a), 24.711(a)(1); Public Notice (Nov. 20, 1995). NatTel, moreover, gets the burden of proof entirely reversed when it makes the statement that "the Commission should grant the waiver unless"; the very rule under which NatTel has filed its waiver request places the burden on NatTel to make an "affirmative showing." Thus, contrary to NatTel's assertion, Petition at 3, the question is not whether the

proposed waiver "is adverse to the public interest," 47 C.F.R. § 24.819(a)(1), but rather whether NatTel has made an "affirmative showing . . . that grant of the waiver is . . . in the public interest." 47 C.F.R. § 24.819(a)(1)(i). This NatTel has failed to do.

III. NO LEGITIMATE PUBLIC INTEREST BASIS FOR NATTEL'S REQUESTED RELIEF HAS BEEN DEMONSTRATED.

NatTel maintains that the public interest would be served by allowing NatTel and other applicants to increase their upfront deposits after the due date for such deposits, because increased bidding eligibility in the applicant pool will result in higher overall bids. If such a consideration were a proper basis for a waiver of the rules, this would auger for waiver of all of the deadlines imposed on C-block applicants, because the deadlines act to limit the number and eligibility of applicants. Indeed, under NatTel's reasoning, the Commission should "waive" the November 6 short-form deadline and the rules limiting C-block auction eligibility to certain qualified small business entities; both steps would undoubtedly lead to "higher overall bids . . . and, ultimately, more money for the U.S. Treasury." Petition at 4.

The upfront deposit due date, as well as the application due date and other deadlines the C-block applicants are required to observe, are essentially "cut-off" rules, and there is long-standing FCC precedent

supporting the use of such rules, which provide certainty and administrative finality to applicants. It is firmly established Commission policy that such rules will be waived only in response to extraordinary and compelling circumstances, even when denying a waiver will lead to harsh results. See, e.g., Florida Institute of Technology, 4 F.C.C. Rcd. 1549 (1989), aff'd, 952 F.2d 549, 550 (D.C. Cir. 1992); State of Oregon, 8 F.C.C. Rcd. 3558, 3560 (1993). Waiver of such rules to increase the pool of applicants, or the pool of money available for bidding, would clearly defeat the purpose of a cut-off rule.

The Commission has rightly followed this strict policy in conducting the various spectrum auctions. For example, the Commission recently refused to allow an applicant in the Multipoint Distribution Service auction to amend its application after the deadline for such amendments. The Auctions Division emphasized that the applicant's dilemma was avoidable, "as demonstrated by the fact that other bidders . . . filed accurate amendments to their applications by the applicable deadline." Letter from Kathleen O'Brien Ham to Jonathan D. Blake, Nov. 28, 1995, at 6.

IV. PERMITTING ONE OR MORE BIDDERS TO INCREASE THEIR AUCTION ELIGIBILITY AFTER THE INITIAL DUE DATE FOR UPFRONT PAYMENTS WOULD CONFER UNFAIR COMPETITIVE BIDDING ADVANTAGES ON SELECTED BIDDERS.

NatTel's waiver request argues that it is equitable to provide all applicants with an opportunity to increase their upfront deposits. NatTel's petition does not, however, address the overriding competitive impact of its request on applicants that structured their activities in reliance on the December 1, 1995, due date.

The management of one's own eligibility, and the assessment and tracking of a competitor's eligibility, are among the most important aspects of bidding strategy and tactics in a simultaneous multiple round auction. In setting an upfront payment date ten business days prior to the start of the C-block auction, the Commission struck a reasonable tradeoff between giving applicants sufficient time to secure financing, and allowing for the timely dissemination of eligibility data for analysis by all auction participants.

To permit a bidder to change, and particularly to increase, its eligibility one business day before the auction would effectively and unfairly conceal that bidder's initial auction position and intentions from all other participants. Such concealment would be especially problematic in the forthcoming C-block auction, which has an activity requirement of 60% in Stage I; eligibility levels

will thus play an important competitive role from the first round.

Establishing the sort of precedent that NatTel seeks would create an incentive for all auction participants to withhold the bulk of their upfront payments until the last moment. There is simply no public interest basis for disadvantaging those applicants that complied with the rules in the first instance, nor is there a discernible public interest rationale for encouraging the sort of "gamesmanship" inherent in NatTel's request. All that a grant of NatTel's request would do is encourage future applicants to treat due dates lightly.

V. THE WAIVER REQUEST, IF EXTENDED TO ALL QUALIFIED C-BLOCK BIDDERS, COULD FORCE THE DELAY OF THE AUCTION.

NatTel suggests that the waiver it seeks be applied to all C-block qualified bidders. If adopted, this proposal would mean that potentially hundreds of additional deposits could be made -- all presumably at the last possible moment -- on Thursday afternoon, December 14, 1995. This would give the Commission one business day (Friday, December 15) to process all of the additions prior to commencement of the auction on Monday morning December 18, 1995.

The administrative burden on the FCC staff of this proposal is obvious. Realistically, moreover, pre-auction disclosure to all qualified bidders would be impossible in the proposed timeframe, thus necessitating a delay in the

start of the auction. Given the several delays that have already occurred in the C-block auction, see NatTel Petition at 5-6, and given the strong public interest in quickly introducing competitive PCS service, Federal Communications Commission v. Radiofone, Inc., No. A-368, Memorandum of Justice Stevens, October 25, 1995, the likely further delay that would ensure from a grant of NatTel's proposal would clearly be contrary to the public interest.

CONCLUSION

For the above reasons, AirWaves respectfully requests that the Commission deny NatTel's Petition for Waiver and proceed with the C-block auction in accordance with the November 20, 1995, Public Notice.

Respectfully submitted,

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December 8, 1995

CERTIFICATE OF SERVICE

I, Kathleen Arnold, hereby certify that I have on this 8th day of December, 1995, caused to be served a copy of the foregoing, by hand or by first class mail, postage prepaid, to Jack E. Robinson, Chief Executive Officer, National Telecom PCS, Inc., Clearwater House, 2187 Atlantic Street, Stamford, CT 06902.

/s/Kathleen Arnold
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