

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

QTEL WIRELESS, INC.,

Petitioner.

v.

FEDERAL COMMUNICATIONS
COMMISSION

and

UNITED STATES OF AMERICA.

Respondents.

Civil Action No. 95-_____

DECLARATION OF O.T. KENAN

I, O.T. Kenan, hereby declare as follows:

1. I am the President of QTEL Wireless, Inc. ("QTEL Wireless"). QTEL Wireless is a minority-owned company incorporated under Michigan law. QTEL Wireless' corporate offices are located at 30768 Sudbury Court, Farmington Hills, Michigan 48331-1372.

2. QTEL Wireless is a company specializing in wireless telecommunication services for personal and business use, offering both voice and data traffic service.

3. Prior to the formation of QTEL Wireless, I served as Director of Sales and Marketing at Amertech Cellular. In this senior executive management position, I exercised full responsibility for Amertech Cellular's Michigan market, which accounted for \$250 million in sales annually.

4. I have extensive knowledge of the cellular and telecommunications marketplace and am fully aware of the emerging technological advances and opportunities developing in the telecommunications marketplace.

5. Following the mandate of Congress to the FCC after the enactment of the Communications Act in August 1993, a law which directed the FCC to employ competitive bidding procedures to award licenses to use portions of the electromagnetic spectrum, I began to develop a

business plan in order to enter into the broadband Personal Communications Services ("PCS") market by obtaining a license through the competitive bidding process.

6. In November of 1994, I left Ameritech Cellular to form QTEL Wireless with the intent to participate in the FCC auction process in reliance on the auction rules set forth by the FCC. I was particularly encouraged by the FCC rules that enhanced the ability of minority and women-owned small businesses to obtain investment capital. These rules were an incentive to investors to participate in the ownership of QTEL Wireless and increased the likelihood that I would obtain a broadband PCS license. In short, these rules eased the main barrier to participation in the ownership of telecommunication companies by women and minorities, namely, access to capital markets.

7. Upon forming QTEL Wireless, I began to pursue my business plan, positioning QTEL Wireless and its FCC-designated minority-owned small business status with investors in Detroit, Michigan, Washington, D.C. and Wall Street in New York.

8. Following extensive travel and numerous presentations to potential investors, I was able to garner commitments of \$30 million in equity venture capital and an additional \$45 million in contingent debt financing through banks for a total of \$75 million in capital to pursue a C Block license.

9. My committed investors became nervous following the initial stay of the C Block auction caused by TEC's suit against the FCC in March of 1994. This initial delay caused investor uneasiness because it threatened the rules under which the auction was to be held and impacted the potential investment return due to the possible delay in the process. As a result, I was forced to reassure my committed investors as to the continued viability of QTEL Wireless' bid for a PCS broadband license.

10. With investors committing millions of dollars in venture capital for QTEL Wireless' bid to obtain a PCS license, any delay in the process leaves investment capital idle and the investors looking for more viable alternatives in which to invest their money.

11. Ultimately, my investors pulled out of the deal in June, 1995 following the FCC's elimination of the minority and gender-based provisions of the rules governing the C Block auction in the wake of the Adarand decision. The FCC not only delayed the C Block auction once again, but summarily eliminated the vital access to capital that minority or women-owned small businesses had under the old C Block rules. The scenario the investors feared came to fruition as their money was tied up in an enterprise involved in an uncertain auction process under rules which only held potential for further delay.

12. There is no question that the C Block auction of the broadband PCS frequencies represents a once-in-a-lifetime opportunity for a businessperson such as myself. The new technologies, coupled with an FCC license to utilize a protected frequency, provide an unprecedented opportunity for expansion of the telecommunications marketplace.

13. The C Block auction is scheduled for August 29, 1995. The loss of my initial investors coupled with the FCC's decision to go forward with the C Block auction without delay has completely eliminated my ability to participate in the auction. There is insufficient time to locate additional investors, much less convince potential investors that the process is sound and their money will be safely and profitably invested. The new final FCC order eliminating the race and gender-based provisions from the C Block auction rules has denied me the opportunity to participate in this momentous event in telecommunications history. I will be irreparably harmed if the auction is not stayed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 2nd day
of August, 1995


J.T. Kamin

APPEARANCES: (Continued)

ASHTON R. HARDY, ESQ., Hardy & Carey, L.L.P.,
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American PSC, L.P., d/b/a American Personal
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1 was the vehicle that attracted the capital to QTEL Wireless.
2 If you go to a sale -- let me rephrase that.

3 What you had was a situation where minorities were
4 attractive to investors because of the 25 percent bidding
5 credit. If you give that to everybody, they are no longer
6 more attractive, and that was the damage in this particular
7 case with regard to QTEL Wireless. And if you add to that
8 the procedural problems, the 7-day notice, which is in
9 effect 4 days because it was over the Fourth of July
10 holiday, then the --

11 QUESTION: Just to paraphrase the first thing,
12 would your argument, if fairly restated this way, that even
13 if they didn't preserve everything the way it was, you would
14 have liked it the way it was in the Fifth Report, but before
15 they moved to an adjustment they had to have seriously
16 considered and show that they had seriously considered
17 whether or not that amendment was going to, in effect, take
18 away or not insure the participation of women and
19 minorities, that it wasn't going to un-do what they had
20 done, consistent with the Constitution. Unless we say that
21 Congress was unconstitutional in saying they wanted the FCC
22 to insure the opportunity to participate, then there are
23 ways to do that, I assume, constitutionally, as well as
24 unconstitutionally.

25 MR. HARRISON: Yes, Your Honor, that is correct

1 and there is not one single sentence in the Sixth R&O with
2 regard to what might happen potentially to minority
3 companies when they change all the rules.

4 QUESTION: Just two quick questions. Your time is
5 up, unless my colleagues have more. Did you indicate the
6 extent to which the problem you face, the loss to investors
7 was at the bank or individual?

8 MR. HARRISON: Your Honor, we did not address that
9 in our brief.

10 QUESTION: There is nothing in the record to
11 indicate whether -- and I am not slighting it, I am just
12 trying to figure out what the FCC was looking at. Were they
13 looking at any record evidence from you or anyone to suggest
14 that there was a mass exodus of investors who had previously
15 been there?

16 MR. HARRISON: Your Honor, QTEL Wireless did
17 submit a letter comment. In addition, BET also submitted
18 comments suggesting that it would significantly damage
19 minority and women owned companies if the FCC went forward
20 with eliminating these minority provisions.

21 QUESTION: How long was the comment period?

22 MR. HARRISON: Your Honor, it was 7 days. The
23 notice in the Federal Register was on the 30th and closed on
24 the 7th.

25 QUESTION: The other thing I wanted to ask you is

1 do you doubt the FCC's suggestion that the longer this is
2 delayed, the more we are fighting about nothing?

3 MR. HARRISON: Your Honor, at some point I believe
4 that will be true. I do not believe --

5 QUESTION: And this will all be just idle chatter,
6 because these things aren't going to be worth anything,
7 right?

8 MR. HARRISON: At some point, but, Your Honor, I
9 would submit that that point is not today and it is not in
10 the near future. I believe that is down the road. This is
11 a new technology that needs to be developed.

12 QUESTION: I am just curious. I am curious what
13 people think. How far down the road do you think that is
14 before that becomes a serious issue?

15 MR. HARRISON: Your Honor, I will not deny that it
16 is a serious issue at this point in time.

17 QUESTION: That is what I thought.

18 MR. HARRISON: But it is not a situation where it
19 justifies eliminating people from the pool.

20 QUESTION: No, no, no, forget that. I understand
21 what you are saying on that. It may or may not, but that is
22 the question. I am trying to understand to what extent you
23 acknowledge that if this just continues on the course it is
24 on now, with no disposition, it won't matter because we are
25 not going to be talking about anything, no minorities are

1 going to be served, no majority is going to be served, no
2 one is going to be served because the C license will be
3 about nothing.

4 MR. HARRISON: Your Honor, I would submit -- and I
5 am not a technician, I am a lawyer -- I would submit that a
6 year from now the ability to compete will be substantially
7 reduced.

8 QUESTION: You agree that the FCC, as a
9 responsible agency, has to worry about that, that was a
10 critical consideration? I am not saying what the answer is,
11 but they had to responsibly consider that, because you
12 certainly cannot serve minority rights if there is nothing
13 left at the end of the line.

14 MR. HARRISON: I agree, Your Honor, but it was one
15 factor to balance against other factors that Congress
16 requested it balance.

17 QUESTION: I just wanted to make sure it wasn't a
18 lost point.

19 QUESTION: At this point in time -- I know what
20 your druthers are, your druthers are some kind of order to
21 go back to where they were before and justify it under the
22 strict scrutiny. But if you couldn't have your druthers,
23 would you rather stick with what now excludes you in 49
24 percent or at least the minorities to the 49 percent deal,
25 or require the Commission to rethink it in order to give

1 what we would say was adequate consideration to the need to
2 insure that participation?

3 MR. HARRISON: Remand, Your Honor, in that case.

4 QUESTION: Using a usual time frame.

5 MR. HARRISON: Your Honor, I would submit that in
6 a remand order there should be some direction given by this
7 Court. The FCC has already realized and demonstrated that
8 it can move quickly when it wants to.

9 QUESTION: Some direction didn't tell us much.

10 MR. HARRISON: Sorry?

11 QUESTION: Some direction didn't tell us much.

12 What is that direction which you say we should give?

13 MR. HARRISON: Your Honor, in a remand situation,
14 this Court should direct the FCC to apply the strict
15 scrutiny standard to the record as it is before it, require
16 that the FCC move expeditiously --

17 QUESTION: Wait just one moment. Now, I have
18 eliminated your druthers. We are talking about between
19 affirming the status quo or sending it back to the
20 Commission to have a new rulemaking with its usual time
21 frames.

22 QUESTION: Well, I am not sure that the usual time
23 frames should be part of the equation. The FCC has already
24 said we think this is really necessary to do expedited
25 actions, so presumably --

1 QUESTION: Choosing among the options that Judge
2 Wald and I between us have come up with, pick amongst those
3 options, please, sir.

4 MR. HARRISON: Your Honor, with regard to the
5 usual time frames, a minimal bare-bones comment period of 30
6 days is not going to eliminate the competitiveness of the C
7 Block auction.

8 QUESTION: Does this mean that you would like us
9 then to remand it with a 30-day comment period?

10 MR. HARRISON: Yes, Your Honor.

11 THE COURT; Thank you.

12 MR. HARRISON: Thank you, Your Honor.

13 THE COURT: Mr. Greenwald?

14 ORAL ARGUMENT OF ELIOT J. GREENWALD, ESQ.,

15 ON BEHALF OF PETITIONERS CENTRAL ALABAMA PARTNERSHIP

16 MR. GREENWALD: May it please the Court: My name
17 is Eliot Greenwald, and I represent three small
18 telecommunications companies that are poised to bid in the C
19 Block auction.

20 I would like to reserve 10 minutes for rebuttal.

21 My clients present a different issue. The FCC,
22 without acknowledging what it was doing --

23 QUESTION: 10 minutes for rebuttal? You are in
24 your rebuttal time.

25 MR. GREENWALD: I have 20 minutes.