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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314 RM-7140, RM-7175, RM-7618
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314
	)	
Implementation of Sections 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553

To: The Commission

OPPOSITION TO EMERGENCY REQUEST FOR STAY

Cook Inlet Region, Inc. ("CIRI"), by its attorneys and pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), submits this Opposition to the Emergency Request for Stay filed in the above-captioned proceedings on December 8, 1995 by Radiofone, Inc. ("Radiofone"). CIRI urges the Commission to deny Radiofone's request for stay and to proceed with the broadband PCS C Block auction as scheduled on December 18, 1995.

Two-hundred fifty-four qualified bidders have tendered more than $767.5 million to the Commission in preparation for the C Block auction[1] and they stand ready to open the bidding in one week. Radiofone's eleventh hour petition should not delay the start of this historic auction of public spectrum.

I. INTRODUCTION

Radiofone comes to the Commission one week before the opening of the C Block auction to have the Commission stay the C Block auction while it addresses a Petition for Rulemaking filed concurrently by Radiofone. Radiofone Emergency Request at 3. Pointing to the November 9, 1995 decision of the United States Court of Appeals for the Sixth Circuit[2] directing the Commission, inter alia, to provide further substantiation for its cellular-PCS cross-ownership rule, Radiofone contends that a stay is warranted because the Commission must "amend" its rules to satisfy the Sixth Circuit. Radiofone Emergency Request at 3. Specifically, Radiofone maintains that "it is necessary" for the Commission "to amend the cellular-PCS cross-ownership rule, 47 C.F.R. § 24.204, the 45 MHz spectrum cap, 47 C.F.R. § 20.6, and any related rules to ensure that they do not have the effect of frustrating the Sixth Circuit's order." Id.

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1. Public Notice: Qualified Bidders and Bidding Instructions for December 18, 1995 Broadband PCS C Block Auction, Attachment A (rel. Dec. 8, 1995) ("Qualified Bidder Public Notice"). Three CIRI-owned entities are among the 254 qualified bidders.

2. Cincinnati Bell Telephone Co. v. FCC, No. 94-3701 (6th Cir. Nov. 9, 1995).

Radiofone fails to establish that a stay of the entire C Block auction is warranted.[3] First, Radiofone has made no case that it will prevail on the merits of its claim. In asserting that the Commission will violate the Sixth Circuit's order if it does not undertake the rulemaking suggested by Radiofone, Radiofone offers a reading of the Sixth Circuit's decision that is expansive at best. Second, Radiofone will not suffer irreparable harm without a stay. Radiofone has been permitted to bid conditionally and is counted by the Commission as a qualified bidder. Third, Radiofone makes light of the substantial harm to the 252 other qualified C Block bidders from further delay in the commencement of the C Block auction. Finally, the public interest — and Section 309(j) of the Communications Act — plainly demands rapid dissemination of the 493 licenses to provide broadband PCS to the public. For these reasons, Radiofone's request for stay should be denied.

II. RADIOFONE WILL NOT PREVAIL ON THE MERITS OF ITS CLAIM

The Commission should deny Radiofone's request for stay, if for no other reason, because Radiofone will not prevail on the merits of its claim. Radiofone contends that "the FCC cannot continue under rules that would bar Radiofone from acquiring a 30

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[3] In reviewing a request for a stay, the Commission examines the four factors described by the United States Court of Appeals for the District of Columbia Circuit in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958) and modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). See Sevier Valley Broadcasting, Inc., 10 FCC Rcd 9795, 9795 n.1 (1995).

MHz license" without the further proceedings directed by the Sixth Circuit. Radiofone Emergency Request at 4-5. Indeed, as noted above, Radiofone asserts that the Commission must amend any rules that would conflict with the decision of the Sixth Circuit or risk being in violation of the Court's order. Id. at 3. As the Commission has argued in that Court, however, that is not the case.

In its November 22, 1995 Opposition to Radiofone's Motion for Clarification in the Sixth Circuit ("FCC Opposition"), the Commission noted that the Court expressly declined to strike down the Commission's aggregate 45 MHz spectrum cap in the course of reviewing the cellular-PCS cross-ownership rule. FCC Opposition at 2-3 (citing Cincinnati Bell, slip op. at 23 n.6). The Court itself noted that the spectrum cap — which is an independent bar to the ability of an incumbent cellular licensee such as Radiofone to hold a 30 MHz PCS license in its service area — was "not presented to the Court in Radiofone's initial petition." Cincinnati Bell, slip op. at 23 n.6.

Having failed to challenge the 45 MHz spectrum cap in any court in a timely fashion, Radiofone cannot now claim that the Commission will stand in violation of the Sixth Circuit's order if it does not amend that rule. Indeed, the Sixth Circuit expressly declined to include the spectrum cap within the scope of its decision. At bottom, the 45 MHz spectrum cap is still very much a part of the Commission's broadband PCS auction and service rules and could be applied to deny Radiofone PCS licenses

in its cellular service area irrespective of the Sixth Circuit's decision and the Commission's review of its cellular-PCS cross-ownership rule.

Notwithstanding the enforceability of spectrum cap, the Commission has permitted Radiofone to participate in the C Block auction with respect to the PCS licenses in its cellular service area pending the Commission's review of its cellular-PCS cross-ownership rule and ruling on Radiofone's request for waiver of the spectrum cap. FCC Opposition at 4. Radiofone's eligibility for the 490 broadband PCS licenses outside of its cellular service area has never been questioned. Nevertheless, Radiofone now asks the Commission to stay the C Block auction while it amends rules that it is not required to amend. Radiofone's request must fail, however, because it cannot show that the Commission would be in violation of a court's order if Radiofone ultimately was required to comply with the 45 MHz spectrum cap.

III. RADIOFONE WILL NOT SUFFER IRREPARABLE HARM WITHOUT A STAY

Radiofone's request for stay also should be denied because Radiofone fails to establish that it will be irreparably harmed without a stay of the auction. Arguing that it will be harmed, Radiofone sets forth the litany of enforcement options available to the Commission under its auction rules. Radiofone Emergency Request at 5. Radiofone also describes the risk that the Commission would revoke its licenses after the auction, forcing it to sell a going concern for less than its value. Id. at 5-6.

As a threshold matter, Radiofone's eligibility to bid on and win any of the 490 broadband PCS licenses outside of its cellular service area has never been questioned. As to the three PCS licenses within its cellular service area, Radiofone has been permitted to bid conditionally and is counted by the Commission as a qualified bidder for at least one of the licenses. Qualified Bidder Public Notice, Attachment B at 42-43. As the Commission noted before the Sixth Circuit, having invited Radiofone to bid conditionally, it would be an abuse of discretion for the Commission to retain Radiofone's auction payments if Radiofone was not permitted to hold the subject licenses. FCC Opposition at 5-6.

Moreover, Radiofone has applied to bid for 491 of the 493 licenses being offered in the C Block auction. Qualified Bidder Public Notice, Attachment B at 42-43. Being the high bidder in the C Block auction ultimately gives a party only the right to apply for the subject license. As in any Commission licensing process, there is a risk that Radiofone would not be permitted to retain one of the licenses that it ultimately wins at auction. In this case, Radiofone has been permitted to bid conditionally on the three licenses that it is otherwise not eligible to hold under the Commission's 45 MHz spectrum cap. Radiofone was aware of the spectrum cap when it challenged the Commission's rules in the Sixth Circuit and when it applied for the C Block auction. Radiofone did not challenge the spectrum cap before the Sixth

Circuit and cannot now claim to be irreparably harmed if its waiver of that rule is not granted by the Commission.

IV. A STAY WOULD DO DRAMATIC HARM TO OTHER C BLOCK QUALIFIED BIDDERS

Radiofone's request for stay also should be denied by the Commission in light of the dramatic harm that yet another stay of the C Block would do to qualified bidders. Radiofone maintains that "[n]o other parties will be harmed should the Commission grant Radiofone's request." Radiofone Emergency Request at 6. In support of that facile conclusion, Radiofone argues that previously asserted fears among C Block bidders of the substantial headstart to market enjoyed by broadband PCS A and B Block licensees are unfounded. Id. at 6-7. It is Radiofone, however, that misses the mark.

As noted above, 254 qualified bidders have tendered more than $767.5 million to the Commission in preparation for the C Block auction[4] and they stand ready to open the bidding in one week. The Commission, however, is not authorized by Congress to pay interest on that $767.5 million. As the Commission noted before the Sixth Circuit, each of the 254 qualified bidders is a small business and many have been founded by entrepreneurs who have left other positions in preparation for the C Block auction. FCC Opposition at 6. Those entrepreneurs tendered substantial upfront payments in anticipation of a timely auction. If the Commission returns those upfront payments because of a stay — or

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4. Qualified Bidder Public Notice, Attachment A.

actually retains the funds for the duration of the stay — many investors could withdraw from these entrepreneurial entities to find a more reliable vehicle for their capital.[5]

It is worth noting that Radiofone faces a no-lose proposition with the prospect of a stay of the C Block. As a qualified bidder for 491 C Block licenses, Radiofone will benefit from an auction conducted with expedition. As an incumbent cellular provider, Radiofone will benefit from a stay that delays the advent of increased competition in its service area and, perhaps, thins the field of C Block bidders. See FCC Opposition at 7. It is the other qualified bidders for the C Block auction that will be dramatically harmed by yet another stay of this auction for smaller businesses.

V. THE PUBLIC INTEREST STRONGLY FAVORS DENIAL OF RADIOFONE'S REQUEST

Finally, Radiofone's request should be denied because the public interest strongly favors a prompt auction of the C Block licenses. In promulgating the Commission's auction authority, Congress directed the Commission to design a system of

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[5] The effects of recurring delays in beginning the C Block auction were detailed by the Commission in its Application to the Supreme Court of the United States to Vacate the stay of the C Block auction entered by the Sixth Circuit. See Exhibit A. As Attachments to its Application, the Commission included the Affidavits of Janis A. Riker, DCR Communications, Inc., Stephen C. Hillard, Cook Inlet Communications, Inc., Lance C. Cawley, Go Communications Corporation, and Q.T. Kenan, QTEL Wireless, Inc., and a letter from Brian A. Rich of Toronto Dominion Bank to Stephen C. Hillard, all of which described the harm to prospective bidders, to consumers, and to the Federal Government from delay in auctioning the C Block licenses. See Exhibit A.

competitive bidding to secure "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 delays." 47 U.S.C.A. § 309(j)(3)(A) (West Supp. 1995) (emphasis added).

Indeed, in vacating an earlier stay of the C Block auction secured by Radiofone in the Sixth Circuit, Justice Stevens was "persuaded that the harm caused by a nationwide postponement of the auction would outweigh the possible harm to [Radiofone]." Federal Communications Commission v. Radiofone, Inc., No. A-368 slip op. (Oct. 25, 1995, Stevens, J., in chambers). Similarly, shortly before lifting a stay of the C Block auction rules in another proceeding, Chief Judge Edwards of the United States Court of Appeals for the District of Columbia Circuit asked if it was true that the longer the C Block auction was delayed, "the more we are fighting about nothing?"[6] The same is true, here. Granting Radiofone's request will contribute to the evisceration of the value of the C Block licenses. At bottom, Radiofone's concerns about its eligibility for three of the 493 licenses available in the C Block auction do not warrant delaying the

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6. Omnipoint Corporation v. FCC, No. 95-1374, Record of Oral Argument at 28 (D.C. Cir. Sept. 28, 1995). Chief Judge Edwards also said: "I am trying to understand to what extent you acknowledge that if this [C Block auction] just continues on the course it is on now, with no disposition, it won't matter because we are not going to be talking about anything, no minorities are going to be served, no majority is going to be served, no one is going to be served because the C [Block] license will be about nothing." Id. at 28-29. See Exhibit B.

auction yet again for all 254 qualified bidders and for the public at large.

VI. CONCLUSION

For these reasons, Radiofone's Emergency Request for Stay of the Commission's C Block auction rules should be denied.

Respectfully submitted,

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December 11, 1995

CERTIFICATE OF SERVICE

I, Wanda Marshall, hereby certify that the foregoing Opposition to Emergency Request for Stay and Exhibits were mailed, first class postage prepaid, to the following on December 11, 1995:

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No. A-___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, APPLICANTS

v.

RADIOFONE, INC.

APPLICATION TO VACATE A STAY
ENTERED BY THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Pursuant to this Court's Rule 22 and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the Federal Communications Commission (FCC) and the United States of America, respectfully applies for an order vacating a stay entered in this case by the United States Court of Appeals for the Sixth Circuit on October 18, 1995. App., infra, 1-2. The court of appeals denied the government's emergency motion for reconsideration of the stay on October 20, 1995. App., infra, 3.

Unless vacated, the stay will prevent the FCC from holding an auction of electromagnetic spectrum for wireless telephone service scheduled for December 11, 1995, with applications due on November 6, 1995. Time is of the essence in holding that auction. Unless the auction is conducted as scheduled, the market for personal communications services (PCS) will be

adversely affected, with great detriment to consumers. Furthermore, if the auction is delayed, many prospective participants will suffer serious financial impairment and will not be able to participate in the auction when it is ultimately held. Even the eventual winners of the auction will be seriously disadvantaged in their ability to compete effectively against entrenched competitors.

STATEMENT

1. This case presents a challenge to regulations adopted by the FCC in the area of personal communications services (PCS), a new form of wireless communication comparable to cellular telephone service. The FCC has allocated for PCS licenses 120 megahertz (MHz) of the radio spectrum, in six blocks -- the A, B, and C blocks of 30 MHz each, and the D, E, and F blocks of 10 MHz each. See 47 C.F.R. 229(a) and (b). The auction at issue in this case concerns the C block of PCS licenses; the A and B blocks have already been auctioned.

Congress and the FCC have been particularly concerned about undue concentration in the market for wireless communications services. When Congress authorized the FCC to allocate PCS licenses by auction (see 47 U.S.C. 309(j)(1)), it directed the FCC to include "safeguards to protect the public interest in the use of the spectrum," and to promote "the following objectives":

> promoting economic opportunity 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 businesses, rural telephone companies, and businesses owned by members of minority groups and women.

47 U.S.C. 309(j)(3)(B). The FCC has similarly expressed concern that anti-competitive conditions in the cellular telephone service market -- which is, in effect, a duopoly in each geographic area, with each operator using 25 MHz of spectrum -- might be extended to the PCS market if incumbent holders of cellular licenses acquire PCS licenses in the same area. See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, FCC 95-217, ¶¶ 65-66 (released August 18, 1995); In the Matter of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking and Tentative Decision, 7 F.C.C. Rcd 5676, 5702 (1992) (NPRM). The FCC has found that incumbent cellular companies would have a significant advantage over new entrants and could inhibit competition and raise prices if they dominated an overlapping PCS market. Id. at 5702-5703.

To forestall the emergence of anti-competitive conditions in the PCS market, the FCC concluded, after an extensive rulemaking, to limit the amount of spectrum in any one geographical area that could be licensed to an entity. The FCC envisions a market in which wireless telephone services in each area are offered by at least five participants -- the two incumbent cellular licensees and at least three holders of PCS licenses. Under the FCC's

spectrum cap rules, no PCS operator may acquire more than 40 MHz of spectrum in any one area. 47 C.F.R. 24.229(c). Thus, a PCS operator may hold, at most, one 30 MHz block and one 10 MHz block of spectrum in any area. In addition, no incumbent holder of a cellular license may be granted a PCS license in excess of 10 MHz in its cellular service area until the year 2000. 47 C.F.R. 24.204(a). Cellular companies may therefore acquire an additional 10 MHz block in their service areas, but not a 30 MHz block of spectrum. Outside their service areas, cellular companies, like all others, may acquire up to 40 MHz of spectrum. The FCC may also waive the spectrum caps if the purpose of the rule would not be served by its application in a particular case, or if unique facts or circumstances would make application of the spectrum caps inequitable or contrary to the public interest. 47 C.F.R. 24.819.

Pursuant to the statutory mandate to ensure the wide dissemination of licenses among a wide variety of applicants, including small businesses, the FCC has set aside the C block as an "entrepreneurs' block" open to bidding only by companies with gross annual revenues of $125 million or less. 47 C.F.R. 24.709(a)(1). The C block has been divided into 493 geographic regions known as "basic trading areas" or "BTAs." The scheduled C block auction thus involves 493 separate licenses, each for 30 MHz of spectrum that will be used to provide PCS within a particular BTA.

2. Respondent Radiofone, Inc., which brought this challenge in the Sixth Circuit, is one of the incumbent providers of cellular telephone service in southeastern Louisiana. It is barred by the spectrum cap rules from obtaining C block licenses for three of the 493 BTAs -- New Orleans, Baton Rouge, and Houma-Thibodeaux, Louisiana. It may, however, bid without restriction on the C block licenses in any of the other 490 BTAs in the country.

Radiofone wishes to acquire the C block licenses for southeastern Louisiana and thus hold 55 MHz of spectrum in that geographic area. Radiofone has argued that the FCC has no authority to implement any cross-ownership rule, and that the rulemaking record does not support the FCC's decision to impose the caps. It has also argued that the rule arbitrarily discriminates between cellular companies and holders of specialized mobile radio (SMR) licenses, which have been used for taxi dispatch services. (A separate FCC rule imposes a 45 MHz cap on the total amount of PCS, cellular, and SMR spectrum that one entity may hold in the same geographic area. <u>In the Matter of Regulatory Treatment of Mobile Services, Third Report and Order</u>, 9 F.C.C. Rcd 7988, 8109 (1994).) The spectrum cap limiting cellular companies to one 10 MHz license in their service areas area is intended to advance the FCC's goal of competition among at least five wireless telephone providers, for the 170 MHz of spectrum devoted to wireless telephone services (the 120 MHz of new PCS spectrum plus the 50 MHz of existing

cellular spectrum) could accommodate only three companies with 55 MHz each.

3. The FCC initially scheduled the C block auction for May 1995. In February 1995, however, Telephone Electronics Corporation (TEC) asked the D.C. Circuit to stay the C block auction because the FCC had adopted race and gender-based measures, including bidding credits, pursuant to 47 U.S.C. 309(j). The D.C. Circuit stayed the auction on March 15, 1995, but TEC subsequently withdrew its challenge to the race and gender-based rules, and the D.C. Circuit lifted the stay on May 1, 1995. The auction was rescheduled for early August 1995.

After this Court's decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), issued on June 12, 1995, the FCC immediately opened a rulemaking proceeding to remove the race and gender-based measures. The FCC concluded that, unless those measures were deleted immediately, the award of the licenses would be delayed for an unacceptably long period of time. New auction rules without any race or gender-based provisions became effective in July 1995, and the auction was scheduled for late August 1995. See App., infra, 21-70.

In July 1995, the D.C. Circuit again stayed the auction at the request of Omnipoint Corporation, which argued that, although the new rules were facially neutral as to race and gender, companies other than those owned by women and members of minority groups had not had time to adjust to the new rules. The FCC requested that the D.C. Circuit lift the stay, and was supported

in that request by 16 intervenors who emphasized the irreparable harm that they were suffering on account of the stay. Those intervenors, all small companies planning to bid in the C block auction, explained that their owners and employees had left jobs to establish new businesses, and that they had been spending hundreds of thousands of dollars preparing for the auction. They also explained that investors were becoming nervous on account of the delay in the auction, and were questioning whether the relatively small businesses hoping to acquire the fifth wireless telephone license in most markets would be able to compete successfully, given their competitors' head start. See Affidavit of Janis A. Riker (App., infra, 4-6); Letter of Aug. 8, 1995, from Brian A. Rich, Managing Director, Toronto-Dominion Bank, to Steve Hillard (App., infra, 7).

The D.C. Circuit also received evidence concerning the substantial cost of delay to the government. The C block auction was expected to raise nearly $4 billion for the federal treasury, but that figure will decrease at about $6 million per day of delay in holding the auction. One affiant estimated that, because of the decreasing chance that the C block winners would be able to catch up with the incumbent holders of the A and B block licenses and the cellular operators, every thirty days' delay in holding the auction would reduce the licenses' value by about 3% to 5%. Affidavit of Stephen C. Hillard (App., infra, 8-11). After hearing argument on September 28, 1995, on the consequences of its stay (including oral argument from Radiofone,

which had intervened in the Omnipoint proceeding), the D.C. Circuit lifted the stay within hours. App., infra, 12-13. The Commission immediately rescheduled the auction for December 11, 1995, with applications due on November 6, 1995.

4. In late May, Radiofone asked the Sixth Circuit to stay the auction pending the decision on its petition for review. The Sixth Circuit denied Radiofone's request for a stay in an order issued on June 12, 1995. The court stated that the traditional factors governing issuance of a stay, including "especially * * * the possible injuries to other parties and the public interest," required denial of the stay. App., infra, 14-15. At oral argument held in the Sixth Circuit on October 10, 1995, counsel for the FCC informed the court of the Omnipoint proceedings, including the dissolution of the stay. The presiding judge (Judge Martin) suggested to agency counsel that the court could enter a stay to preserve the status quo.

Radiofone did not file any papers renewing its request for a stay, nor did the court request briefing on that issue. Nonetheless, on October 18, the Sixth Circuit issued the stay order now at issue. The order restrains the FCC "from taking any action in furtherance of the C Block auction pending further order of this court, including, but not limited to, issuance of any public notices other than to advise of this order, acceptance of any bid applications, and review and/or award of licenses within this block." App., infra, 2. The order states that "a stay of agency action is necessary and proper to ensure that the

status quo remains and to avoid issues of mootness pending our decision." Ibid. The order also identifies four factors as relevant to determining whether a stay should issue (likelihood of success on the merits, irreparable harm to the applicant, irreparable harm to other parties, and the public interest), but it provides no discussion of those factors, other than to state that the court had "reviewed" them and had concluded "that a stay should issue." Ibid. The court did not mention or distinguish its earlier ruling that a stay would harm other parties and the public interest.

The FCC filed an emergency motion for reconsideration. In that motion, the FCC presented the same evidence of serious injury to the public, the government, and potential C block bidders that had been presented to the D.C. Circuit in the Omnipoint case. The FCC also suggested that, even if the court did not lift the stay entirely, it should modify the stay to apply only to the auctions of the three C block licenses on which Radiofone is ineligible to bid on account of the spectrum cap, and should permit the auctions on the other 490 licenses to go forward. The FCC also suggested that the court could simply allow Radiofone to bid on those three licenses. The court denied the motion for reconsideration in a summary order issued a few hours after it was received. App., infra, 3.

ARGUMENT

It is settled that this Court, or a single Justice, has authority to enter an order vacating a stay issued by a court of

appeals or a district court. See Delo v. Stokes, 495 U.S. 320 (1990) (per curiam); OPM v. American Fed'n of Gov't Employees, 473 U.S. 1301 (1985) (Burger, C.J., in chambers); O'Connor v. Board of Education, 449 U.S. 1301, 1304 (1981) (Stevens, J., in chambers); Certain Named and Unnamed Non-Citizen Children v. Texas, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers); Coleman v. PACCAR, Inc., 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). Moreover, "[t]he well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay":

> [T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari * * * ; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

Named and Unnamed Children, 448 U.S. at 1330 (Powell, J.). In addition, "in a close case, it may be appropriate to 'balance the equities' -- to explore the relative harms to applicant and respondent, as well as the interest of the public at large." Rostker v. Goldberg, 448 U.S. 1306, 1309 (1980) (Brennan, J., in chambers).

All four conditions for the vacatur of a stay are present in this case. Without providing any explanation or authority, and without making any findings about the likelihood of injury to Radiofone or others in the absence of a stay, the court of appeals has enjoined a critical component of the FCC's regime for

a competitive market in personal communications services. As explained below, Radiofone's challenge to the spectrum cap is meritless. And although the court ostensibly stayed the auction to preserve the status quo, in fact that order will irreparably harm bidders for the C block licenses (who already labor under competitive disadvantages vis-a-vis entrenched incumbents), thus tilting the playing field in favor of the established cellular operators.

1. There is a "reasonable probability" that, if the court of appeals invalidates the FCC's spectrum caps, four Justices will vote to grant review in this case. Named and Unnamed Children, 448 U.S. at 1327 (Powell, J.). The spectrum cap is a critical part of Congress's and the FCC's regulatory regime for wireless telecommunications services. Congress has specifically directed the FCC to avoid excessive concentration of wireless communications licenses and to disseminate such licenses broadly. See 47 U.S.C. 309(j)(3)(B). In carrying out Congress's mandate, the FCC has concluded that, in the absence of the caps, the wireless industry would fall into the same anti-competitive conditions that now prevail in the cellular market, with spectrum concentrated in the hands of a few dominant players. That situation would deny consumers the benefits of a fully competitive market, one of Congress's principal objectives in telecommunications.

"Congress in a complex statute has imposed an arduous burden on the [FCC] and then provided for judicial review under the

Administrative Procedure Act[.] * * * But the complexity of the issue does not change the time-honored presumption in favor of the [FCC's] determination, nor shift the burden of showing probable success from the shoulders of the parties who seek to upset that determination." Coleman v. PACCAR, 424 U.S. at 1306 (Rehnquist, J.). If the court of appeals were to invalidate the spectrum caps, that ruling would raise serious questions about the proper role of the courts in exercising judicial review over the FCC's rulemaking, such that this Court's review would be warranted. As the Court has observed in the analogous area of cross-ownership rules governing broadcast licenses, "antitrust values * * * may properly be considered by the [FCC] in determining where the public interest lies," FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978) (NCCB), and the FCC is "entitled to rely on its judgment, based on experience" (id. at 797), that diversity of holdings will not be attained in the absence of a spectrum cap. Congress has delegated to the FCC the task of articulating the public interest in the wireless communications market, and the FCC's regulations codifying its view of the public interest must be upheld, "so long as that view is based on consideration of permissible factors and is otherwise reasonable." Id. at 793; see also United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

The court of appeals' decision to stay the auction also raises serious questions of proper judicial administration, for

that court does not appear to have considered adequately the appropriate standards for granting a stay. On hearing of the D.C. Circuit's lifting of the Omnipoint stay, the presiding judge suggested that a further stay was warranted to preserve the status quo, even though no motion for a stay was pending before the Sixth Circuit, and even though that court had previously declined to stay the auction. The court's counterintuitive reaction to the news of the D.C. Circuit's action indicates that its judgment was based not on the likelihood of success on the merits or on the balance of harms, but rather on a reflexive but misguided concern about mootness. Moreover, in its order, the court did not address either the merits of the case or the harm to any party. Under similar circumstances, then-Justice Rehnquist vacated a stay entered by the court of appeals in Coleman v. PACCAR, stating that, "if the record convincingly demonstrates that the Court of Appeals could not have considered each of these factors [harm and the likelihood of success] at all and the effect of its decision is shown to pose a danger of irreparable harm * * * I believe that I should afford the interim relief sought." 424 U.S. at 1305.

2. If the Court granted certiorari, it would very likely conclude that the FCC's spectrum cap is valid. The cap is a reasonable exercise of the FCC's regulatory authority. Congress has expressly authorized the FCC to "disseminat[e] licenses among a wide variety of applicants." 47 U.S.C. 309(j)(3)(B). Similar rules limiting the total number of licenses that may be

accumulated by one entity have long been recognized as effective means to curb undue concentration in holdings. See National Broadcasting Co., supra (upholding regulation prohibiting network ownership of more than one broadcast station in a service area); Storer Broadcasting, supra (upholding regulation limiting number of broadcast licenses that any one person could acquire). Even without the explicit authorization in Section 309(j)(3)(B) to disseminate licenses broadly, the FCC would have had authority to promulgate the caps under 47 U.S.C. 303, which delegates to it the responsibility to regulate communications licensing in the "public convenience, interest, or necessity." The spectrum caps, like other cross-ownership rules that have been upheld by this Court, have been found by the FCC to "serve[] the public interest * * * by preventing undue concentration of economic power." NCCB, 436 U.S. at 780.

The spectrum cap is well supported by the administrative record. The FCC had before it compelling evidence that the existing cellular market was not competitive. The FCC also was aware that cellular carriers had a significant head start over competitors in customers, physical infrastructure, and technical expertise. See In the Matter of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, 9 F.C.C. Rcd 4957, 4983 (1994); NPRM, 7 F.C.C. Rcd at 5702-5703. That evidence strongly indicated that, unless the FCC capped the amount of spectrum that a cellular company could hold, cellular companies could quickly move to gain control