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

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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

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FEDERAL COMMUNICATIONS COMMISSION

To: The Commission

**WESTERN PCS CORPORATIONS' OPPOSITION TO CINCINNATI BELL
TELEPHONE COMPANY'S PETITION TO IMPLEMENT MANDATE**

Western PCS Corporation ("Western"),^{1/} by its attorneys and in accordance with the Commission's rules, hereby opposes the Petition to Implement Mandate of United States Circuit Court of Appeals for the Sixth Circuit (the "Petition") filed in the above-captioned proceeding on December 8, 1995 by Cincinnati Bell Telephone Company ("CBT"). The Petition requests that the Commission amend its cellular attribution rules in light of the Sixth Circuit's decision in Cincinnati Bell Telephone Co. v. FCC, Case No. 94-3701/4113 (6th Cir. Nov. 9, 1995) and then "establish a procedure by which those licenses in areas where parties were adversely affected by the old attribution rule would be reassigned in accordance with proper eligibility rules." Petition at 4-5. Though the gravamen of CBT's Petition is a direct challenge to the A/B Block licensing process in the Cincinnati MTA, the unfounded positions asserted therein, if

^{1/} Western was the winning bidder for six A Block PCS licenses, including: (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. On June 23, 1995, the Commission granted the aforementioned broadband PCS licenses to Western. See Public Notice, released June 23, 1995. 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 its markets.

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accepted, would have a profoundly deleterious impact upon the A/B Block licensees nationwide and the public they wish to serve. Therefore, to the extent that the Petition may be construed as a request to revisit all A and B Block grants some six months after the winners have paid nearly eight billion dollars for their licenses^{2/} and substantial additional sums for microwave relocation and the construction of their systems, Western is unalterably opposed. The Commission should deny this extraordinary and belated claim for relief as being wholly unwarranted. In support hereof, the following is respectfully shown:

I. INTRODUCTION

At the outset, it is unclear on a national basis precisely what relief CBT seeks and, thus, how its Petition should be characterized. The Petition calls for revision of Section 24.204(d) and thus reads, in part, as a petition for rulemaking.^{3/} The Petition can also be construed as a grossly late petition to deny or an untimely application for review. Though the Petition also requests "a moratorium on further construction of PCS service facilities or the exercise of PCS licenses in the Cincinnati MTA," Petition at 6, and thus seems to request the issuance of a stay in that market, no attempt is made to justify the imposition of a stay under well established criteria nor is the request filed as a separate pleading as required under the Commission's Rules.

^{2/} See Public Notice, released March 13, 1995.

^{3/} CBT urges the Commission to adopt its proposed revisions to Section 24.204(d) without conducting the notice-and-comment rulemaking proceeding required by Section 553 of the Administrative Procedures Act, 5 U.S.C. § 553. Petition at 4, n. 8. The Commission has spent a great deal of time and effort developing its rules regarding PCS-cellular cross-ownership. In the aftermath of the Sixth Circuit's decision, it would be a mistake to take any further amendment of those rules lightly, especially since it is still unclear how the Commission intends to proceed in response to the remand. The Commission may opt to appeal the Sixth Circuit's decision and/or conduct further rulemaking proceedings. In either case, Western strongly urges the Commission not to adopt any new rule without accepting comments from interested parties.

See 47 C.F.R. § 1.44(e). Under these circumstances, Western will respond to CBT's filing as a generic "petition" under Section 1.45(a) of the Commission's Rules. 47 C.F.R. § 1.45(a).

II. CBT HAS NO STANDING TO CHALLENGE THE A AND B BLOCK LICENSE GRANTS

CBT has no standing to file its Petition, and on that basis alone, the Commission should deny CBT's requested relief. In order to have standing to challenge the A and B Block license grants, CBT must be able to demonstrate that it has suffered an "actual or imminent . . . injury-in-fact" that is "fairly traceable" to the contested action and "likely" to be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 112 S Ct 2130, 2136 (1992) (internal quotation marks and citations omitted). CBT, however, has suffered no legally cognizable injury traceable to any party other than itself.

CBT claims to be aggrieved by having been barred from participating in the A/B Block auction by what it contends was an unfair application of Section 24.204.^{4/} Petition at 2-4. However, it was not the cellular attribution rule which prevented CBT from bidding in the auction. Rather, CBT apparently opted not to participate because of private business decisions it made regarding the costs and benefits of seeking to acquire an A/B Block license.

On October 19, 1994, over a week before the filing deadline for the A/B Block auction, the Commission adopted its Third Memorandum Opinion, GEN Docket No. 90-314, 6 FCC Rcd

^{4/} Section 24.204 prohibits an entity with a twenty percent or greater equity interest in a cellular licensee from holding any 30 MHz broadband PCS license in the same geographic area. 47 C.F.R. § 24.204. As of the A/B Block application filing deadline, CBT had a 45 percent limited partnership interest in the Cincinnati SMSA Limited Partnership (the "Partnership"), which holds cellular licenses covering a geographic area which overlaps with the Cincinnati MTA. Cincinnati Bell Telephone Company Petition for Waiver of Section 24.204 of the Commission's Rules, Order, 9 FCC Rcd 7658, 7659 (November 3, 1994) ("Waiver Order").

6908 (1994) ("Third MO&O"). The Third MO&O liberalized Section 24.204, permitting certain entities, including CBT, with attributable, in-market cellular interests to participate in the A/B Block auction on the condition that they divest any prohibited cellular interest within 90 days following license grant. 47 C.F.R. § 24.204(f). Under the Third MO&O's expanded "bid but divest" procedure, CBT could have participated in the auction, and then, if it had won the Cincinnati MTA, divested its cellular interest in that market. Moreover, on November 3, 1994, the Commission granted in part CBT's July 21, 1994 Petition for Waiver of Section 24.204, allowing CBT an additional 90 days after grant to divest its cellular interest if it was a winning bidder for the Cincinnati MTA. Waiver Order at 7663.^{5/}

CBT, nevertheless, opted not to bid in the A/B Block auction, and did not file a short-form application by the October 28, 1994 deadline. Its decision not to bid was apparently motivated by its concern about the costs associated with divesting its cellular interest. As CBT explained in its Petition for Waiver, the cellular limited partnership agreement to which it was party would have imposed a significant financial penalty if CBT were to withdraw from the Partnership.

The Commission cannot be held responsible for CBT's private contractual arrangements. Such matters are beyond the scope of its jurisdiction. See Regents v. Carroll, 338 U.S. 586, 601-02 (1950); Kirk Merkley, Receiver, 54 Rad. Reg. 2d (P&F) 68, 75 (1983). Moreover, the

^{5/} CBT claimed that the rule, as applied to its case, was unreasonably burdensome because it would have been difficult for CBT to divest its cellular interests without suffering a loss as a result of contractual terms in its cellular limited partnership agreement. Petition for Waiver at 1. The Commission refused to abrogate the rule, holding that "the financial consequences of withdrawal from a partnership voluntarily entered into by CBT . . . [do not] constitute sufficient grounds for the unconditional waiver requested by CBT." Waiver Order at 7662.

Commission was more than accommodating to CBT. Not only did it amend its rules to put into place the "bid but divest" procedure to allow CBT and other similarly situated potential applicants to participate, the Commission also provided CBT with a unique 180 day period for divestiture in light of its particular circumstances. Thus, CBT has only itself to blame for its failure to file an application allowing it to bid for the Cincinnati MTA.

Never having filed an application to participate in the A/B Block auction, CBT cannot now challenge the results of that auction. "[O]ne who seeks to overturn a Commission licensing decision in the capacity of a disgruntled applicant, must actually apply, and do so in a timely fashion." Coalition for Pres. of Hispanic B/casting v. FCC, 931 F.2d 73, 79 (D.C. Cir. 1991). See also Aeronautical Radio, Inc. v. FCC, 983 F.2d 275, 281 (D.C. Cir. 1993); Public Broadcasting Service, 96 F.C.C. 2d 555, 557 (1984) (participation as a party in a rulemaking proceeding does not confer standing as to application proceedings). It is irrelevant that CBT's Petition for Waiver was pending as of the October 28, 1994 filing deadline for A/B Block applications. Absent a showing that there was not adequate notice of the filing deadline, which certainly was not the case here, failure to file an application by an existing cut-off date is fatal. Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1558-62 (D.C. Cir. 1987). If CBT wished to preserve its right to compete for an A/B Block license, it should have filed a timely application accompanied by a waiver request. The propriety of a Commission licensing action must be judged "as of the date the action was taken." Walker & Townsend, Inc., 11 Rad. Reg. 2d (P&F) 701, 707 (1967). On that date, the Commission "need only have considered applications on file." Id. at 708.

CBT's attempt to disturb the A and Block license grants is all the more defective given its scope. In addition to seeking a stay of the Cincinnati MTA licensing, CBT also requests that

the Commission establish a procedure by which licenses in any area "where parties were adversely affected by the old attribution rule would be reassigned." Petition at 5. CBT has never expressed an interest in applying for any market other than the Cincinnati MTA,^{6/} and while it lacks standing to assert its interest even in that market, it clearly has no standing to assert the interests of others who have not come forward to press their own case.

III. THE PETITION IS UNTIMELY

At its core, CBT's Petition is an untimely challenge to the license grants of the A and B Block winners. The long-form applications of the A/B Block winning bidders were accepted for filing on April 12, 1995. Public Notice, Report No. CW-95-02, released April 12, 1995. The 30-day petition to deny period thus ended on May 12, 1995. 47 C.F.R. § 827(b). CBT did not challenge any of the applications during that period. On June 23, 1995, the Wireless Telecommunications Bureau granted the applications of the A/B Block high bidders. Order, 78 Rad. Reg. 2d (P&F) 1216 (Wireless Tel. Bur. 1995). Applications for review by the Commission of actions taken pursuant to delegated authority must be filed within 30 days. 47 C.F.R. § 1.115(d). Again, CBT did not preserve its rights by seeking review of the license grants within the 30 day period. The A and B Block licenses are beyond challenge by CBT. McElroy Electronics Corporation, 10 FCC Rcd 6762, 6766-67 (1995) (dismissed applicant's failure to preserve claim by seeking timely administrative or judicial review fatal to challenge against timely filed applications).

Revisiting the A/B Block grants now would constitute impermissible retroactive agency action. Retroactive enforcement of a rule is improper where "the ill effect of the retroactive

^{6/} See Waiver Request at 7-8 (requesting the waiver so that CBT can bid for the Cincinnati MTA).

application" of the rule outweighs the "mischief" of frustrating the interests the rule promotes. SEC v. Chenery, 332 U.S. 194, 203 (1947). Here, the A and B Block winners, relying on the license grants which CBT now challenges, have invested billions of dollars in their systems. Western alone has expended hundreds of millions of dollars acquiring its PCS licenses, relocating microwave incumbents, and constructing the infrastructure to support the provision of PCS service. To "turn back the clock" at this juncture could potentially cripple the company. Moreover, PCS promises to revolutionize personal communications and to greatly expand competition in the wireless marketplace. Any delay in the provision of service is counter to the public interest. Retroactive application of any new cellular eligibility rule to impair the A and B Block license grants would thus have severe "ill effects" not only on Western and the other incumbent licensees, but on the public as well.

By contrast, the only "mischief" which CBT can claim to suffer is the product of its voluntary decision not to bid for A/B Block licenses, an injury for which the Commission cannot be held responsible. Even if the attribution rule is ultimately relaxed in the manner CBT suggests --hardly a guaranteed proposition-- no party similarly situated to CBT would be aggrieved by a failure to enforce such a rule retroactively. All such parties, like CBT, could have bid under the "bid but divest" regime that was operative on the date that the A/B Block short form applications were originally due.

IV. CBT HAS NOT MET THE REQUIREMENTS FOR A STAY

As discussed above, CBT's Petition reads in part like a request for stay in that it seeks a moratorium on construction and the exercise of PCS licenses in the Cincinnati MTA until "the validity of [A/B Block] licensing is confirmed." Petition at 6. Section 1.44(e) of the Commission's Rules provides that "[a]ny such request that is not filed as a separate pleading will

not be considered by the Commission." 47 C.F.R. § 1.44(e). On that basis alone, CBT's Petition may be dismissed as defective. Moreover, CBT does not even attempt to meet the standards necessary for grant of a stay. To obtain the extraordinary remedy of a stay, CBT must demonstrate that: (1) it is likely it will prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors grant of a stay.^{7/} CBT's Petition is silent on all four counts and therefore its stay request must be denied.

V. CONCLUSION

Western and the other winning bidders in the A and B Block auction would suffer tremendous harm if prevented from going forward with construction of their systems and the provision of service to the public. They have collectively paid over 7.7 billion dollars for their licenses and have invested considerable additional funds in microwave relocation and the build-out of their systems. The potential delay and confusion spawned by CBT's undefined "reassign[ment]" process would impose a direct economic penalty on Western and the other A and B Block winners. Moreover, Congress mandated that the Commission promote the development and rapid deployment of PCS for the benefit of the public.^{8/} Western and other A and B Block licensees are now well on their way to carrying out that mandate but CBT would stand in the way. CBT's request that license grants should be vitiated and that PCS service to the entire country delayed simply because of its voluntary business decision is a proposition

^{7/} See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

^{8/} See 47 U.S.C. § 309(j)(3)(A).

wholly inconsistent with the public interest and with basic notions of fairness and administrative finality. The Petition should be rejected.

For the foregoing reasons, Western respectfully requests that the Commission dismiss or deny CBT's Petition.

Respectfully submitted,

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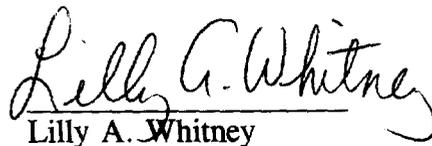
Its Attorneys

January 11, 1996

CERTIFICATE OF SERVICE

I, Lilly A. Whitney, a secretary in the law offices of Gurman, Blask and Freedman, Chartered, do hereby certify that I have on this 11th day of January, 1996, had copies of the foregoing "WESTERN PCS CORPORATION'S OPPOSITION TO CINCINNATI BELL TELEPHONE COMPANY'S PETITION TO IMPLEMENT MANDATE" mailed by U.S. first class mail, postage prepaid, to the following:

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