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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of Amendment of the) GEN Docket No. 90-314
Commission's Rules to Establish New) RM-7140, RM-7175, RM-7618
Personal Communications Services)

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**RESPONSE TO OPPOSITION OF GTE MOBILNET INCORPORATED
TO CINCINNATI BELL TELEPHONE COMPANY'S PETITION
TO IMPLEMENT MANDATE OF UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

Cincinnati Bell Telephone Company ("CBT") petitioned the Commission to implement the mandate of Cincinnati Bell Telephone Co. v. FCC, Case No. 94-3701/4113 (6th Cir. Nov. 9, 1995), by adopting appropriate rule amendments consistent with the Court's decision and taking such steps as are necessary to afford CBT the same opportunity to participate in PCS as it would have had in absence of the arbitrary cellular attribution rules. GTE Mobilnet Incorporated and affiliates ("GTE") have now opposed CBT's petition.

A. CBT Has Sought All Appropriate Remedies And Is Entitled To Relief.

CBT filed its Petition for Review of the Commission's arbitrary cellular attribution rules on July 1, 1994, long before the A and B Block auctions commenced. As a participant in the PCS rulemaking proceedings, GTE was served with a copy of CBT's Petition for Review and had the opportunity to intervene in that case if it chose to do so. Other PCS auction participants did intervene and participate.¹ While the appellate proceedings were

¹Intervenors in the appeal to the Sixth Circuit Court of Appeals included the United States Telephone Association, US West, Inc., New York Telephone Company, New England Telephone and Telegraph Company, Pacific Bell, Nevada Bell, MCI Telecommunications Corporation, Pacific Telesis Mobile Services and Pacific Bell Mobile Services. Pacific Telesis Mobile Services and Pacific Bell Mobile Services filed a brief and appeared at oral argument.

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pending, CBT simultaneously filed a request for waiver of the cellular attribution rule and a Motion for Stay of the A and B Block auctions with the Commission on July 21, 1994. CBT asked the Commission to waive Section 24.204 to permit CBT to bid on and obtain the same amount of broadband PCS spectrum as an entity having no attributable cellular interests. The Commission did not act on CBT's request for waiver until November 3, 1994, after the October 28, 1994 deadline for registration for the A and B Block auction. Even then, the Commission did not waive the attribution rule for CBT but, rather, merely extended the length of time CBT would have in which to divest itself of an attributable cellular interest. The ruling on the waiver request would not have allowed CBT to obtain an interest in a 30 MHz PCS license in the Cincinnati-Dayton MTA and keep its present cellular interest.²

The Commission never acted upon CBT's Motion for Stay. The A and B Block auctions went forward beginning December 5, 1994, even while CBT's challenge to the eligibility rules was pending in the Court of Appeals and its stay request was pending before the Commission. GTE was well aware of CBT's Petition for Review and Motion for Stay when it participated in the auction. Being on notice that the eligibility rules for the A and B Block auctions were potentially defective, GTE should not be heard to complain now that the Court of Appeals has confirmed that the rules were defective. The auction results, and the

²Divestiture of CBT's interest in the Ameritech cellular partnership was not a viable option because the terms of the limited partnership agreement make it impossible for CBT to realize fair value for its interest. CBT may only divest its partnership interest with the consent of the general partner. CBT and Ameritech are still engaged in litigation in Delaware in which CBT seeks to dissolve the partnership.

subsequently issued licenses, have never been valid.³ The participating bidders went forward at their own peril with the risk that the auction results would be invalid.

CBT requested the Commission to make a simple rule change that would merely restore CBT to the position it should have been in when registrations for the A and B Block auctions were due. CBT could not have done anything more to protect its own interests than it has done. It directly challenged the eligibility rules before the auction even commenced, it requested the Commission to stay the auction and it requested a waiver of the eligibility rules. The Commission denied CBT the relief it could have granted, leaving the Court of Appeals proceeding as CBT's only means of redress. Now that CBT's position has been vindicated, the Commission may not deny CBT the only remedy that can right the wrongs done to CBT. It is unfortunate that GTE or others may have invested in reliance upon their PCS licenses. However, they did so knowing the risks that they faced in light of CBT's challenge of the eligibility rules. In the event GTE has to relinquish its license as part of the remedy in this proceeding, GTE may have its own remedies to be made whole. However, the position GTE put itself in is no justification for denying CBT the only remedy it has left.

B. CBT's Proposal Will Not Disrupt Nationwide Implementation of PCS.

GTE exclaims that the relief sought by CBT would disrupt the auction results and PCS licenses nationwide. That need not be the case. CBT was only denied eligibility for a PCS license in one market area, the Cincinnati-Dayton MTA. CBT has no interest in

³There should be no question that the Commission is empowered to revoke license authorizations that it granted pursuant to rules that were later declared to be arbitrary and capricious on review by a Court of Appeals. See Orion Communications, Ltd., 1995 FCC LEXIS 7631, FCC 95-456 (released Nov. 29, 1995).

reopening the licenses in any other market. CBT was the only aggrieved party that pursued vacation of the cellular eligibility rule. Conceivably, the Commission could fashion a rule that limits relief to CBT. Even in the event the Commission decides to provide blanket relief to all minority cellular owners in CBT's position, according to information available to CBT, there are only 17 similarly situated companies in the entire country.⁴ Only this small group of companies would be eligible to take advantage of the requested rule change and it is unclear whether any of them would do so. None of these companies could have any impact on any of GTE's license areas. Most, if not all, of these companies would be eligible to participate in the C Block auction as designated entities due to their small business statuses. Thus, GTE's concerns about the "devastating effect" the proposed rule change would have are greatly exaggerated.

C. **Revision Of the Eligibility Rules Is The Only Practical Method Of Implementing The Court of Appeals Decision.**

GTE suggests that the Court's opinion does not require the type of relief sought by CBT, but might simply be a reissuance of the old rule with new justification. That sort of a response by the Commission would only prolong the controversy and not result in the speedy implementation of PCS. CBT would remind the Commission of the Court's admonition:

Finally, we note that, while attempting to buttress the Cellular eligibility restrictions, the FCC may simply find more support for its conclusions. However, as Judge Posner has stated so well, "Not all remands result in the reinstatement of the original decision with merely a more polished rationalization." Schurz Communications, 982 F.2d at 1050. Perhaps the

⁴See Appendices to Petition for Reconsideration of Chickasaw Telephone Company, Cincinnati Bell Telephone Company, Illinois Consolidated Telephone Company, Millington Telephone Company and Roseville Telephone Company, filed December 8, 1993, GEN Docket No. 90-3114, RM-7140, RM-7175, RM-7618.

FCC's reexamination of the Cellular eligibility rules will result in a modification of those rules.

In the event the Commission does not revise the rules accordingly, CBT will likely be forced to return to the Court to seek appropriate redress. Until such a new challenge were resolved, the validity of the PCS licenses issued under the rules would continue to be in doubt. The more rational approach would be to craft a rule that satisfies the Court's concerns and which is agreeable to CBT. That course of conduct would end this controversy and allow the implementation of PCS to proceed.

D. The Relief Sought By CBT Is Not Impermissible Retroactive Rulemaking.

GTE argues that the rule change sought by CBT cannot apply retroactively. GTE has not properly analyzed this issue. The Court has declared that the eligibility rules the Commission used for the A and B Block auctions were arbitrary and capricious. Therefore, the auctions and licenses that were issued under those rules were invalid ab initio. The Commission has a duty to rectify the errors that were committed under the rules. The new rules would not apply retroactively, but prospectively. What CBT has requested is that the Commission vacate actions that have occurred under invalid rules, go forward with new rules and reissue licenses accordingly. The cases cited by GTE have no application to this situation at all. In each of those situations, there was an attempt to have an agency issue new rules and apply them retroactively to conduct that had not been challenged.⁵ There was

⁵In MPAA v. Oman, the agency properly refused to issue a retroactive regulation. In MCI v. FCC, the Court declared that the Commission had improperly promulgated a rule that would have retroactively eliminated claims belonging to MCI. In Bowen, the Supreme Court declared that the Department of Health & Human Services could not retroactively change cost reimbursement calculations. None of these cases held that the Commission could not reverse actions it had taken in accordance with past rules adjudicated to have been

no question of the validity of the prior rules or the parties' conduct pursuant to those rules. In this case, the Commission's earlier rules have been declared invalid by a court of law. The Commission has no choice but to correct the rules, which is in no way retroactive rulemaking.

E. It Was Not Necessary For CBT To Object To Issuance Of Licenses.

Next, GTE argues that CBT should have objected to the issuance of a license to GTE. First, the argument that the current Petition should have been served in the licensing cases is makeweight and form over substance. CBT served GTE's counsel with the Petition in this proceeding. GTE clearly received CBT's request, because it has filed its opposition. GTE's argument that CBT should have objected to issuance of the PCS licenses is equally odd. In the very next paragraph, GTE acknowledges that the Commission denied all petitions to deny licenses on June 23, 1995. Had CBT filed an opposition, it certainly would have been denied, too. The appeal to the Sixth Circuit Court of Appeals wasn't even argued until October and the decision was not announced until November 9, 1995. Does GTE seriously contend that the Commission would have denied its license had CBT objected? In any event, it makes no difference. The Court has now spoken and overridden anything the Commission may have done in the past pursuant to the invalid rule. It is time for the Commission to rectify the situation, correct the rules, and reopen licenses in the Cincinnati-Dayton MTA.

invalid. CBT merely requests the Commission to implement the Court of Appeals' mandate, which not only requires the Commission to issue proper eligibility rules, but compels the Commission to rectify past errors committed under the arbitrary rules.

F. **CBT Can Not Be Denied Relief Because It Did Not Participate In The A and B Block Auction.**

Participation in the A and B Block auctions was not a viable option for CBT. GTE suggests that CBT should have participated despite being ineligible, and then litigate with the FCC whether it was improperly declared ineligible, while at the same time being obligated to make payment on the license and invest in building PCS facilities. This was not a practical solution for CBT, nor would it have been in the public interest. It should not be incumbent upon a party to have to violate Commission rules in order to preserve its rights should it prevail on appeal. The Commission should correct the eligibility rules in accordance with the Court's decision and then proceed to correct the licensing problems that stemmed from the old rule.

Respectfully submitted,

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