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FEDERAL COMMUNICATIONS COMMISSION
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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments of Mountain Solutions
PCS D, E, and F Block Rule Making
WT Docket No. 96-59 & GN Docket No. 90-314

Dear Mr. Caton:

On behalf of Mountain Solutions, there is transmitted herewith an original and nine (9) copies of its comments in response to the Commission's Notice of Proposed Rulemaking in the above-referenced proceedings, released March 20, 1996. Sufficient copies are being provided so that each Commissioner should receive a copy.

Please direct any questions regarding this filing to the undersigned.

Very truly yours,

James U. Troup

James U. Troup

Enclosures

cc: Mr. Mark Bolinger, FCC (hand delivery).

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the Matter of	)	
	)	
Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314

COMMENTS OF
MOUNTAIN SOLUTIONS

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April 15, 1996

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SUMMARY

Mountain Solutions, a small business seeking to provide competitive wireless services, is deeply troubled by the apparent domination of the C block auction by large corporations. All the evidence suggests that large entities have used qualifying small businesses as "fronts," and have driven C block license values out of the reach of legitimate small businesses. As a result, the A, B, and C block licenses -- all of the 30-MHz blocks -- have gone or will go to large corporations.

In order to achieve Section 309(j)'s statutory mandate of ensuring designated entities can provide spectrum-based services to the public, the FCC must now set aside the D and E blocks, as well as the F block, for designated entities. Greater restrictions must also be put in place to prevent small businesses from serving as fronts for large entities. The affiliation rules should be modified to disqualify entities with ineligible investors or affiliates. Also, the FCC should scrutinize loan arrangements for indicia of control, and treat loan conditions as exercised for attribution purposes.

To ensure compliance with the affiliation and real-party-in-interest rules, parties filing petitions to deny against PCS long-form applications should have full discovery powers, including the power to take depositions under oath, where appropriate. Transfer restrictions should be implemented to prevent designated entities from assigning their PCS licenses to ineligible applicants at any time.

The FCC should auction the D, E, and F block channels simultaneously. If Mountain Solutions' proposal is adopted to set aside all three blocks for designated entities, the three blocks could be offered in a single auction. Alternatively, Mountain Solutions supports one auction for the D and E blocks, concurrent with the F block auction.

The cellular/PCS cross-ownership rule is defensible and should be maintained. The Telecommunications Act's 10 percent attribution standard should apply.

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COMMENTS OF
MOUNTAIN SOLUTIONS

To: The Commission

Mountain Solutions, by counsel, hereby submits its comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned matters.[1] Mountain Solutions is a small wireless services provider hoping successfully bid in the D, E, and F block auctions, and is therefore keenly interested in the outcome of this proceeding.

I. Small Business Incentives.

In authorizing licensing by competitive bidding, Congress in Section 309(j) also obligated the FCC to ensure that small businesses receive an opportunity to provide new spectrum-based services to the public,[2] because the auction process is otherwise

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[1] In the Matter of Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap (WT Docket No. 96-59) and Amendment of the Commission's Cellular PCS Cross-Ownership Rule (GN Docket No. 90-314), Notice of Proposed Rule Making, FCC 96-119 (released March 20, 1996) (the "Notice").

[2] 47 U.S.C. § 309(j)(3). Mountain Solutions presumes that this aspect of Section 309(j)'s mandate is also part of the FCC's goals in this proceeding, though small businesses were not mentioned in paragraph 6 of the Notice.

likely to exclude small businesses with their more limited resources. In response, the FCC set aside the C and F blocks of PCS spectrum as "entrepreneurs' blocks" and instituted small business incentives for the auctions within those blocks.[3]

As the C block auction has shown, however, these protections have been entirely inadequate to prevent large companies from dominating the auction process. Large corporations have selected or created small business front entities through which the larger entities participate in the auction. The large corporations have taken a "non-controlling" interest in the front entities that is allowable under the affiliation rules, and have loaned the front entities the money to participate in the auction. Generally, the loans include conditions that will allow the large corporation to turn the loans into equity after the brief FCC-mandated holding period has expired.

While this strategy complies with the letter of the rules, it frustrates meaningful participation by legitimate small businesses in the auction-based licensing process. Further, it will result in the transfer of virtually all "entrepreneurs' block" spectrum out of the hands of even these puppet small businesses and into the hands of large corporations after a relatively brief period of no more than five years. Although this result appears to reflect small business participation in the auction, it is not a meaningful effort to fulfill the statutory mandate.

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[3] 47 CFR §§ 24.709, 24.711; 24.712.

A significant example of this strategy is NextWave Personal Communications Inc. ("NextWave"), the current aggregate high bidder in the C block auction with total high bids in excess of $4 billion. NextWave is the high bidder on more than 65 BTAs, including the top markets of New York and Los Angeles. NextWave has very little money of its own, and is relying on loans from huge foreign companies, including Japanese and South Korean wireless handset manufacturers.[4] The FCC's rules currently contain no provisions to guard against the de facto control these investors may exercise as a result of loan conditions or sheer financial might. As a result, large, foreign equipment manufacturers and other large corporations stand to walk away with the spectrum that was to be set aside for U.S. small businesses.

Because of NextWave's prominence in the auction, its situation has been subjected to scrutiny in the press. It is impossible to know how many other C block bidders are also front entities for large companies. Clearly, however, the unprecedented amount of high bids in the C block auction suggests that large corporations are making their presence felt.

To deal with this problem, the FCC should take immediate steps to ensure that the Section 309(j) small business mandate is carried out in a meaningful fashion. To that end, Mountain Solutions recommends the following.

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[4] "South Korean Money Pumps Up Auction for Wireless Licenses," The Washington Post, April 4, 1996, at D9 (citing "a private memo to potential investors issued in December and other sources").

A. The D and E Blocks, in Addition to the F Block, Should Be Set Aside for Designated Entities.

As discussed above, large companies have managed to prevent meaningful participation by legitimate small businesses in the A, B, and C block auctions. The FCC must therefore take meaningful action now to "avoid excessive concentration of licenses" and to "disseminat[e] licenses among a wide variety of applicants, including small businesses."[5] The only way this can now be accomplished is if the FCC sets aside all three remaining PCS channel blocks for designated entities. Given the failure of the C block auction to allow participation by legitimate small businesses, the F block set-aside is entirely inadequate to fulfill the statutory mandate. This is particularly true given that PCS providers need to aggregate at least 30 MHz of spectrum to provide a competitive service.

To encourage meaningful small business participation in the D, E, and F block auctions, the additional measures discussed below should all be implemented with respect to the three remaining spectrum blocks.

B. The Commission's Affiliation Rules and Transfer Restrictions Should Be Strengthened.

To avoid the problem that has pervaded the C block auction, discussed above, of large corporations dominating the auction process, the FCC should strengthen its affiliation rules to prevent all ownership by non-qualified entities and to allow closer scrutiny of loan conditions and other financing arrangements. For

[5] 47 U.S.C. § 309(j)(3).

the same reason, the Commission should prohibit the assignment of PCS licenses awarded in set-aside auctions to non-qualified applicants at any time after the auction.

Further, any loan conditions or other financial arrangements that would result in any indicia of control by a lender in a bidder should be deemed exercised for attribution purposes. This analysis should apply if such arrangements ever could result in the lender's holding an actual ownership interest in the bidder. For purposes of this restriction, "indicia of control" would be found where a lender provides a significant percentage of an applicant's funding. A "significant percentage" should be defined as approximately 35 percent.

As a further step to combat the use of front entities in set-aside auctions, assignment of set-aside licenses to non-qualified applicants should not be allowed at all. The FCC's current unjust enrichment provisions are inadequate for this purpose because they seek to achieve a different goal -- the recovery of bidding credits and installment payment amounts (essentially government small business grants and loans) upon assignment to a non-qualified entity. While these goals are important, they do not address the need to prevent large corporations from using small business entities as fronts to acquire spectrum set aside for true small businesses.

A five-year waiting period is not a meaningful deterrent for large corporations given the early stage of the PCS industry and the anticipated value of wireless spectrum. Under the statutory mandate, small businesses must be assured the chance to participate

in the provision of spectrum-based services -- and not just for five years. Therefore, PCS auction winners should never be allowed to transfer their licenses to non-qualified entities.

So that transactions between small business auction participants will not be prohibited if these entities grow during the normal course of business after the auction, assignments should be allowed to any entity that meets the small business criteria at the time of the assignment, or that would have met them at the time of the filing of the FCC Form 175.

C. The Long-Form Petition to Deny Process Should Include a Full Discovery Procedure, Including Depositions Under Oath.

The high anticipated value of PCS spectrum creates strong incentives for entities to attempt to abuse the designated entity provisions and other aspects of the rules, such as the real-party-in-interest restrictions. Given these incentives, no certifications or long-form disclosure requirements can ever protect entirely against unscrupulous applicants. With this in mind, and given the FCC's limited enforcement resources, the auction rules wisely provide for a petition to deny process to allow other parties to bring such matters to light.

Outside petitioners will rarely have access to the information necessary to prove that an applicant has violated the rules, however. Mountain Solutions therefore urges the Commission to expand the scope of the petition to deny proceeding to give petitioners the right to full discovery of the winning applicant's relevant papers and documents, and to require depositions under oath where appropriate. These requirements are consistent with the

Commission's authority pursuant to Section 409 of the Communications Act of 1934, as amended (47 USC § 409).

The Commission should act quickly so that discovery can be used not only in the D, E, and F block auctions but also in the C block auction. Only by allowing other parties to force disclosure of abuse can the Communications Act's goals truly be realized.

D. The Small Business Bidding Preferences Proposed for the F Block Should Apply to the D, E, and F Block Auctions.

Only a very few legitimate small businesses may be successful in the C block auction, particularly in small markets. To ensure small business participation in PCS, the Commission should apply the same small business bidding preferences to the F block auction that it did to the C block auction. In addition, the Commission should redesignate the D and E blocks as small business blocks and apply the same small business bidding preferences to them. Consistent application of small business incentives will allow legitimate small businesses to proceed with their business plans in a stable regulatory environment.

These small business bidding preferences include reduced upfront payments and installment payments of high bid amounts over the ten-year license term, with interest-only payments during the first six years at the ten-year treasury bond rate. The current rules also provide for bidding credits for small businesses. If only small businesses are allowed to participate in the D, E and F block auctions, a bidding credit would serve no purpose as all bidders would qualify as small businesses for the same bidding credit. Accordingly, Mountain Solutions recommends eliminating the

bidding credit in the event the D, E and F blocks are set aside for true small businesses.

E. The FCC Should Modify its Small Businesses Definition and Eliminate the Entrepreneur/Small Business Distinction.

The FCC's rules currently classify applicants as "entrepreneurs," and therefore eligible to participate in set-aside auctions, if the entity, together with affiliates and attributable investors, has gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million.[6] Additional incentives, such as installment payment terms, reduced upfront payments, and bidding credits, are available within the set-aside auctions to "small businesses," which are defined as businesses which, together with their affiliates and attributable investors, have gross revenues of $75 million or less in the preceding three years.[7]

Mountain Solutions believes that these criteria have failed to effectuate the statutory mandates of Section 309(j). This is demonstrated by the failure of legitimate small businesses to succeed in the C block auction. Accordingly, the following alternative provisions are proposed.

As an initial matter, Mountain Solutions proposes that the FCC eliminate the distinction between entrepreneurs and small businesses. Set-aside spectrum and incentives should be available to only small businesses. The structure of the markets for

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[6] 47 CFR § 24.709(a)(1).

[7] 47 CFR § 24.711(b).

telephone services in general, and wireless services in particular, does not justify further gradations of distinction. Current providers can be grouped broadly into two categories: established providers, which are large, and new companies (like Mountain Solutions), which are small. The mandate of Section 309(j) extends only to the latter.

In promulgating a single, unified small business standard, the FCC should use elements from both of its current tests, as well as new elements. An applicant's level of total assets, from the entrepreneurs' test, is extremely relevant to determining small business status, and an assets-based criterion should be incorporated into the small business definition. However, the current total asset threshold of $500 million is 40 percent too high.

Another extremely relevant element which is not currently considered is net worth. When combined with a total assets test, net worth provides a more meaningful definition of a small business than does the current gross revenues test. A set of criteria based on a combination of net worth and total assets is therefore proposed for determining small business eligibility. A small business should be defined as an entity that has a net worth of $30 million or less and total assets of $300 million or less. Only those small businesses should be eligible to bid in the D, E and F block auctions. Any ownership interest, including contingent interests, in an otherwise qualified small business by an ineligible entity would disqualify the small business.

II. Cellular/PCS Cross-Ownership.

A. The Cross-Ownership Rule.

The court in Cincinnati Bell[8] determined that the purpose of the cross-ownership rule -- preventing cellular companies from exercising undue market power in the wireless services market -- was not adequately supported by the record in the FCC proceeding.[9] Mountain Solutions believes that rational economic reasons exist for the cross-ownership prohibition, however, and believe it should be maintained.

Simply stated, the goal of the rule is to ensure that any given American consumer has the maximum practical choice in wireless service providers. Currently, the cellular licensees are the only companies providing large-scale wireless telephone service to the public. PCS is a potential competitor in this market. Therefore, if the incumbent cellular licensee receives all (or even most) of the PCS spectrum in the market or markets where the cellular company holds cellular licenses, then the consumers in that geographic area will have fewer wireless services providers to choose from: instead of being able to choose between two cellular companies and the PCS company, there will only be the two cellular companies.

The Cincinnati Bell court clearly did not understand this rationale, however. The court stated that "if the FCC were truly concerned about diversifying ownership, the current rules are a

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[8] Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752 (6th Cir. 1995).

[9] Id. at 764.

curious way of going about it" because they only prevent the large cellular companies from receiving licenses in the areas where they also provide cellular service, though they can extend their reach in PCS nationwide.[10] The court fails to note, however, that this result does no harm to diversity in each individual wireless services market nationwide. Indeed, this is a rational way of ensuring that at least one other competitor, besides the two incumbent cellular companies, can provide wireless services in each city in the country.

The court also expresses a concern that simply disqualifying a class of applicants (cellular licensees) from the PCS bidding would be an arbitrary means of achieving the permissible goal of avoiding excessive concentration of licenses.[11] However, Mountain Solutions believes that the exclusion of cellular licensees -- and only cellular licensees -- would be justified. Cellular licensees, after all, are the only significant existing wireless services providers. Excluding them in each market where they already provide service is an entirely rational way to ensure a diversity of providers.

Mountain Solutions believes the foregoing analysis provides adequate support to justify maintaining the cross-ownership rule. Because Mountain Solutions believes that the restriction is in the public interest, Mountain Solutions urges the Commission to maintain it.

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[10] Id. at 764.

[11] Id.

B. The 20 Percent Attribution Standard.

Because of the 6th Circuit's decision in Cincinnati Bell, supra, the FCC must offer economic support for any cellular/PCS attribution standard that it adopts by rule. More complex than the simple question of whether cellular interests could exercise undue economic power in the PCS marketplace, this showing would involve proof of what level of interest would allow such impermissible influence. This process would be time-consuming, difficult, and ultimately subject to judicial review.

The FCC should therefore adopt the standard promulgated by Congress in the Telecommunications Act of 1996, and impose a 10 percent attribution standard.[12] Because Congress may be arbitrary and capricious if it wishes to be, the use of a statutory benchmark should prevent further court challenge.

III. Auction Schedule.

Mountain Solutions strongly supports the FCC's proposal in the Notice to auction the D, E, and F blocks concurrently. Given Mountain Solutions's proposal that all three 10-MHz blocks be set aside for small businesses,[13] Mountain Solutions proposes that all three spectrum blocks be auctioned together in the same auction.

Even if the FCC fails to adopt Mountain Solutions proposal to set aside the D and E blocks for only true small businesses, Mountain Solutions would support the proposal to auction the three

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[12] Telecommunications Act of 1996, Pub. L. No. 104-104, Section 3(a)(2)(33), 110 Stat. 56 (1996).

[13] See supra Section I.A.

blocks concurrently, with the D and E blocks in a single auction. The FCC is correct about applicants' need to aggregate the greatest amount of spectrum possible.[14] Moreover, the simultaneous availability of more than one spectrum block will avoid unnatural upward pressure on license values, as may have occurred during the C block auction. Auctioning the three blocks concurrently would serve the public interest.

CONCLUSION

Because the C block auction has done nothing to further Section 309(j)'s small business mandate, the Commission must set aside the D, E, and F blocks for only small businesses. The Commission should apply its small business preferences (other than bidding credits) to all auction participants, and auction the three blocks in a single auction. The affiliation rules and holding limitations should be strengthened to prevent large corporations from using small business front entities to participate in the auction. A combination of net worth and total assets should be used to define a qualified small business. Furthermore, the cellular/PCS cross-

[14] NPRM, mimeo at 37, paras. 83-84.

ownership rule should be retained, with a 10 percent attribution standard.

Respectfully submitted,

MOUNTAIN SOLUTIONS

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