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Federal Communications Commission
Office of Secretary

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

In re	)	
Request of Cellular Communications of Puerto Rico, Inc. to Hold Auctions to License Certain Cellular RSAs	)	RM-8897

To: Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

MOTION TO STRIKE AND REQUEST FOR SANCTIONS AGAINST CCPR

The RSA Operators Group ("RSAOG"), by their counsel, move to strike the September 9, 1996 Petition for Declaratory Ruling or, in the Alternative, for Rulemaking ("Petition") filed by Cellular Communications of Puerto Rico, Inc. ("CCPR") which is the gravamen of this rulemaking proceeding, as well as the Comments of Western Wireless Corporation ("WWC") and Bell Atlantic NYNEX Mobile Corporation ("BANM") that were filed in support of CCPR's Petition.[1]

I. CCPR's Petition was a Prohibited *Ex Parte* Presentation in a Restricted Proceeding and Should be Stricken

CCPR's Petition requested a Commission declaration

> ... that an auction will be used to license cellular rural service area ("RSA") No. 727A, Ceiba, Puerto Rico,

[1] The RSAOG's Comments and Reply Comments responded to a Commission request for Comment, and in so doing did not seek to adversely affect any of the pending RSA applications which have been accepted for filing. Accordingly, RSAOG requested waiver of its service obligations respecting the pending RSA applicants. CCPR's Petition, and the comments of WWC and BANM all advocate dismissal of pending RSA applicants, and those parties were required to serve their filings on all pending RSA applicants. Waiver is not appropriate for them. *See* discussion, *infra*.

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> which is currently slated for 'relottery.' In the alternative, CCPR requests that the Commission commence a rulemaking proceeding to determine whether the public interest would be better served by holding an auction for this RSA.

Petition at p.1. CCPR's Petition was directed specifically at, and intended to affect, the applicants in the Ceiba RSA proceeding.

The Ceiba RSA proceeding became a restricted proceeding upon public notice of the filing of mutually exclusive applications. 47 C.F.R. § 1.1208(a). That Public Notice, Mimeo No.3611, was released July 20, 1989. A second Public Notice was issued more recently, in case anyone had forgotten the prior Public Notice Mimeo No. 63896, released July 12, 1996. The Ceiba proceeding remains restricted until finally settled by final order of, or settlement agreement approved by, the Commission. Id. With limited exceptions not applicable here, *ex parte* presentations of any kind are prohibited in restricted proceedings.[2]

In the notice requesting public comment on the Petition, the Commission acknowledged that the Petition was an impermissible *ex parte* presentation, and in fact cautioned all parties that "the pending application proceedings in the six RSAs identified in the July 12 Public Notice remain restricted pursuant to 47 C.F.R. § 1.1208."[3] Rather than sanctioning the party that flagrantly

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[2] If CCPR mistakenly thought that the Ceiba RSA proceeding was unrestricted, it still had a duty to serve the Petition on all pending applicants, especially where, as here, the Petition proposes to extinguish the Ashbacker rights of the pending applicants.

[3] *See* Public Notice, "Public Comment Invited on Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures

violated its *ex parte* rules, the Commission practically embraced CCPR. We urge the Commission to reconsider this course of action, and to dismiss the petition immediately.

Agencies have an obligation "to prevent the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record." Professional Air Traffic Controllers Organization v. FLRB, 685 F.2d 547 (D.C. Cir. 1982). By the time the Commission released the Public Notice, the decision-makers had been so tainted by the prohibited *ex parte* contacts of CCPR that an impartial decision on the merits of CCPR's Petition cannot issue.

CCPR's legal counsel is an ex-Commission employee who was intimately involved in promoting auctions over other selection processes during her tenure at the FCC.[4] On behalf of her client, CCPR's counsel went right to the staff members of FCC Commissioners to lobby behind closed doors in favor of dismissal of protected, pending applications, so that new applications could be filed and the winner selected via auction (and in favor of allowing her client, which holds an IOA for that market, to participate). The Ceiba RSA proceeding was a restricted proceeding, as applicants for

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Should Be Used to License Certain Cellular Rural Cellular Service Areas", DA 96-1685, release October 24, 1996 ("Public Notice").

[4] Specifically, CCPR's counsel was an attorney in the Policy and Program Planning Division of the Commission's Common Carrier Bureau, prior to becoming as Assistant to the General Counsel for common carrier and wireless matters in May 1992. Before departing the Commission in March 1995, she was, by the FCC's own admission, "intimately involved in crafting the rules for spectrum auctions." Public Notice, "Sara F. Seidman Departing FCC to Join Mintz, Levin" released March 14, 1995, 1995 FCC Lexis 1702.

that authorization had long ago been "cut-off" from the acceptance of any new applicants.

First, counsel had a phone conversation with the Chairman's legal advisor on August 23, 1996. That phone conversation was followed by a personal meeting with the same legal advisor on August 28, 1996. These two unlawful contacts were not reported until September 26, 1996.[5] In addition, CCPR's counsel had a prohibited meeting with legal advisors to Commissioner Quello on August 26, 1996 and with legal advisors to Commissioner Chong on August 28, 1996.[6] CCPR undertook these meetings with the constructive, if not actual knowledge that the Ceiba RSA proceeding was restricted.[7] CCPR also knew, consistent with the express terms of its IOA, that CCPR was prohibited from participating in or impeding with the permanent licensing process in the Ceiba RSA proceeding.[8] The substance of the Petition had been discussed illegally with advisors to two Commissioners and the Chairman. No notice of any of those meetings was provided to any of the nearly five hundred pending applicants for the Ceiba RSA license or the

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[5] The meetings with the Chairman' staff were not reported until sixteen days after the Commission postponed the scheduled lottery of the Ceiba RSA and five other RSA lotteries that were to occur on the same date.

[6] Both meetings were reported by letter filed with the Commission on August 28, 1996.

[7] This legal issue was definitively disposed of in the seminal decision Russell H. Carpenter Jr., Esq., 3 FCC Rcd 6141 (OMD 1988)

[8] CCPR's Petition was filed with the Commission on September 9, 1996, and the Commission's Public Notice postponing the Ceiba PR RSA lottery was released by the Commission on September 10, 1996. The Commission's immediate attention to CCPR's Petition certainly suggests that CCPR's illegal backdoor maneuvering was successful.

thousands of other pending RSA applicants whose basic due process rights would be affected by CCPR's proposal. Any decision by the Commission at this juncture to do anything but conduct the lottery would be subject to extremely strict scrutiny by the U.S. Court of Appeals. See Press Broadcasting Company, Inc. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995).

II. As a Result of Its Conduct, Sanctions Should Issue Against CCPR

CCPR was aware that the Ceiba RSA proceeding was restricted and that its status as the IOA holder in Ceiba (through a commonly owned subsidiary) prevented it from participating in the permanent licensing proceeding in that market. Yet CCPR made a conscious decision to, by way of strictly prohibited *ex parte* contacts with the highest level of Commission personnel, place its own pecuniary interests ahead of the rights of the pending applications to a fair lottery and ahead of the public interest in having a permanent licensee selecting to provide competitive service to the Ceiba RSA market. Severe sanctions against CCPR are warranted, and the Commission has the authority, and in this case the obligation, to institute a forfeiture proceeding against CCPR for its flagrant disregard of the Commission's IOA policy and more importantly its *ex parte* rules.

In Jacksonville Broadcasting Corp. v. FCC, 348 F.2d 75 (D.C. Cir. 1965), the Court of Appeals upheld the disqualification of a broadcast applicant based on its prohibited *ex parte* communication to Commission decision-makers in a contested proceeding. The disqualified applicants had hired the services of a former

Commission employee to make the prohibited *ex parte* contacts. CCPR has committed a more egregious crime in disrupting a restricted proceeding that it is not, and specifically disavowed the right to become a party to. The proper punishment for CCPR is the immediate revocation of its IOA to operate in Ceiba.

At the very least, a substantial forfeiture should be levied against CCPR. In Elkhart Telephone Company, 11 FCC Rcd 1165 (1995), the Commission issued a notice of apparent liability and forfeiture for $5,000 for the subject company's unsuccessful attempt to solicit the intervention of a U.S. Senator in a restricted formal complaint proceeding then pending at the Commission against the company. In assessing the fine, the Commission noted that *ex parte* presentations

> threaten the integrity and independence of the Commission's decision-making process in adjudicatory proceedings. Moreover, the Commission has repeatedly warned and admonished parties against such conduct. (citations omitted). Because such warnings and admonishments appear to have been less than fully successful, we believe that more serious sanctions are appropriate. (citation omitted). For this reason, we believe that an assessment of a forfeiture in the amount of five thousand dollars ($5,000) for the violations appears appropriate.

11 FCC Rcd 1166 (1995). The fine against Elkhart was based on a single attempted *ex parte* contact. CCPR was successful in making not one, but four separate *ex parte* contacts (two to the Chairman's advisors and one each to advisors to two of the other Commissioners). CCPR made these contacts in a restricted proceeding without regard to the hundreds of legitimate parties to the Ceiba RSA proceeding. CCPR's conduct was far more egregious than Elkhart's and as such any forfeiture should be substantially greater.

III. Comments Supporting CCPR's Petition Should be Stricken

The comments of WWC and BANM in response to CCPR's Petition also must be stricken. These comments ask the Commission to dismiss the pending applications in the six RSA markets that are the subject of this rulemaking proceeding. The Commission's *ex parte* rules required BANM and WWC to serve copies of their comments on each of the pending applicants that their comments are asking the Commission to dismiss. The Commission has the power to waive its *ex parte* rules where, as with RSAOG's filings, the written submissions do not seek to adversely affect the protected applications that are being addressed. However, it could never be rational to allow *ex parte* filings seeking dismissal of protected applications; therefore, the Commission does not have the power to *sua sponte* waive its *ex parte* rules for these two commenters.

The *ex parte* rules are designed to prevent lobbying for the dismissal of an applicant without that applicant being on notice of such lobbying efforts. Those rules help ensure that the due process rights of all parties before the Commission are preserved. Commission consideration of the comments filed by WWC and BANM is a violation of the constitutional due process rights of the

applicants. For these reasons, the comments of WWC and BANM in support of CCPR's Petition should be stricken from the record.

Respectfully submitted,

RSA OPERATORS GROUP

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December 10, 1996

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CERTIFICATE OF SERVICE

I, Melissa L. Clement, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "**Motion to Strike and Request for Sanctions Against CCPR**" to be sent via first class U.S. mail, postage prepaid or hand delivered, this 10th day of December, 1996 to each of the following:

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