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

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JUN 19 1997

Federal Communications Commission  
Office of Secretary

In the Matter of )  
)  
Amendment of the Commission's Rules )  
to Establish New Personal Communications )  
Services, Narrowband PCS )  
)  
Implementation of Section 309(j) of the )  
Communications Act - Competitive Bidding, )  
Narrowband PCS )

GEN Docket No. 92-253  
ET Docket No. 92-100

PP Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION

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Date: June 19, 1997

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## **SUMMARY**

CONXUS Communications, Inc. ("CONXUS") requests that the Federal Communications Commission ("FCC") reconsider its decision in the Report and Order and Further Notice of Proposed Rulemaking, GEN Docket No. 90-314, adopted April 17, 1997 in connection with the service and competitive bidding rules governing narrowband Personal Communications Services ("PCS") because the Commission failed to respond the CONXUS' comments and requests for actions which were relevant to the decisions made by the Commission. CONXUS asks the Commission to take action to conform the rules governing Designated Entities in the narrowband PCS rules to those governing Designated Entities in the broadband PCS rules. CONXUS also requests the Commission clarify its decision in which it declined to create an entrepreneur's block in the narrowband PCS service, but proposed to permit Designated Entities to apply bidding credits on only selected licenses available in an auction.

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**To: The Commission**

**PETITION FOR RECONSIDERATION**

CONXUS Communications, Inc. ("CONXUS"),<sup>1</sup> pursuant to Section 1.429 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission") and by counsel, respectfully requests the Commission to reconsider its decisions in the Report and Order adopted April 17, 1997 in the above-styled proceeding.<sup>2</sup>

**I. Introduction**

CONXUS is implementing a nationwide narrowband Personal Communications Service ("PCS") system, which will provide two-way messaging to the public. Its product is a portable "answering machine" or "voice mail" device. It is an economical means for voice messaging with an acknowledgement feature by which the sender will know whether the message was received. It currently has several major markets

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<sup>1</sup> CONXUS was formerly known as "PCS Development Corporation."

<sup>2</sup> Report and Order and Further Notice of Proposed Rulemaking (FCC 97-140), GEN Docket No. 90-314, 62 F.R. 27507 (May 20, 1997) ("Report and Order").

constructed and will commence commercial operation on September 1, 1997. It intends to have its nationwide buildout completed in 1998.

CONXUS, through its subsidiary, holds five regional 50/50 kHz narrowband licensed which it acquired through the competitive bidding process. CONXUS was considered a minority-/woman-owned, small business for purposes of the competitive bidding process and was afforded certain financial benefits. It was able to apply a 40% bidding credit against its gross aggregate winning bid on the licenses it won as a minority-/woman-owned, small business. As a small business, the Federal government is financing 80% of the net winning bid amount during the initial license term. CONXUS is paying installment payments on a quarterly basis.

In addition, CONXUS participated, through another of its subsidiaries, in the 900 MHz Specialized Mobile Radio ("SMR") Major Trading Area ("MTA") auctions and acquired over twenty (20) licenses through this process. In the 900 MHz SMR auction, no race or gender preferences were afforded to applicants. CONXUS, therefore, was considered a small business and was afforded bidding credits and installment payment benefits based on this status.

In the Competitive Bidding Third Report and Order and Further Notice of Proposed Rule Making,<sup>3</sup> the Commission proposed to redesignate two BTA channels as regional licenses. In addition, it proposed to create an entrepreneur's block, such

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<sup>3</sup> Competitive Bidding Third Report and Order and Further Notice of Proposed Rule Making, 10 FCC Rcd 175 (1994) ("Competitive Bidding Further Notice").

as established in the broadband PCS service, and proposed modifications to the Designated Entity definitions.

CONXUS submitted comments and made several ex parte presentations in connection with the Competitive Bidding Further Notice. It opposed the redesignation of the BTA channels. Further, it argued that the rules governing the competitive bidding process for narrowband PCS licenses should conform to the rules adopted in the broadband PCS service, specifically as such rules relate to Designated Entity.

In addition, after the issuance of the Adarand decision,<sup>4</sup> it asserted that the Commission should modify the narrowband PCS rules to eliminate the minority-/woman-owned classification and allow incumbent licensees to restructure to meet the small business criteria without any penalty, such as contemplated by the unjust enrichment provisions of the FCC rules. As it set forth in its pleadings, the bidding credit which it was afforded provided no "discount" on the market value of the license when compared with the price paid by the other winning bidder for the exact same licenses.

In the Report and Order, the Commission took four actions: (1) it amended paragraphs (d) and (e) of Section 24.132 of the FCC rules, which govern power and antenna height limits, to reflect these rules apply to regional areas; (2) it denied relief to any parties affected the Canadian Interim Sharing Arrangement; (3) it declined to establish an entrepreneur's block; and (4) it amended the definition of minority groups to more specifically identify the groups which were considered minority groups. The

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<sup>4</sup> Adarand Constructors v. Peña, 115 S.Ct. 2097 (1995).

Commission, however, did not address many of the issues raised by CONXUS' pleadings either in the Report and Order or in the Further Notice. CONXUS asks that the Commission reconsider its decision and resolve the issues raised by CONXUS in its pleadings.

## **II. Discussion**

**A. The Commission failed to consider CONXUS' request to conform the narrowband PCS Designated Entity definition to that codified in the broadband PCS rules.**

- 1. Narrowband PCS and Broadband PCS are comparable services which will compete head-to-head in the marketplace.**

The Commission has adopted differing regulatory treatment for narrowband PCS and broadband PCS applicants/licensees particularly in the treatment of Designated Entities. CONXUS, however, submits that narrowband PCS and broadband PCS provide, in part, the same service, and should be regulated in a similar manner.

Broadband PCS, as part of its bundle of services, offers customers voice messaging and paging. Narrowband PCS is a two-way messaging service and offers voice messaging and paging services. Broadband PCS and narrowband PCS will target substantially the same consumers.

The requirement for capital to fund the development and implementation of the narrowband PCS systems is substantial, and is comparable to the capital needs of a number of the C and F block broadband PCS licensees.<sup>5</sup> CONXUS to date has raised

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<sup>5</sup> The capital funds necessary to deploy a narrowband PCS system is more comparable to the broadband PCS systems than any other CMRS services which are licensed by geographic areas and by auction. For example, IVDS is licensed on more  
(continued...)

or has access to, in excess of \$260 million in equity and vendor financing and requires approximately \$150 million in new capital to implement its nationwide system, which will provide CONXUS access to an additional \$135 million of vendor financing. Based on CONXUS' experience, it expects that other entrepreneurial small business narrowband PCS licensees holding regional licenses or receiving MTA licenses will require funding in excess of \$75 million to acquire the necessary license(s) and deploy the infrastructure to provide service to the consumer and meet the Commission's coverage benchmarks. This amount of capital normally will not be acquired through small business loans or family and friends solicitations. CONXUS and other entrepreneurial small business narrowband licensees, therefore, must compete with broadband PCS licensees for the same capital funding.

The capital market is divided into industry segments, of which telecommunications is one. Wireless telecommunications is a subset of the telecommunications segment. Wireless providers, such as cellular, paging, broadband PCS and narrowband PCS all vie for the same dollars within this subset. CONXUS often presents to the same decision makers at institutions making investments in small business broadband PCS licensees, such as NextWave, Inc. (one of the largest C Block

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<sup>5</sup>(...continued)

local basis and will provide a far different wireless service than narrowband PCS. Except for wide-area, enhanced SMR providers, such as Nextel Communications, Inc., RAM Mobile Data, and Geotek Communications, Inc., the cost to deploy an SMR system is not as substantial as that for narrowband PCS. Nor will the 220 MHz service comparable in capital costs required for narrowband PCS systems based on CONXUS' understanding of the service. Thus, for purposes of comparison, narrowband PCS is more comparable, in terms of service offering, customer base, and capital requirements, with broadband PCS.

broadband PCS licensees). CONXUS has encountered the same difficulties in raising capital as have the C and F block broadband PCS licensees.

CONXUS, like the entrepreneurial broadband PCS licensees, has not been completely successful in its offerings in the capital markets. In one instance, in early 1996, even with aggressive pricing, CONXUS had to pull an equity offering when it could not obtain sufficient interest in it. In another instance, in late 1996, investors were reluctant to invest in a high yield offering because of a concern that CONXUS would be unable to obtain additional capital financing in the near future. Its most recent equity offering, while successfully completed in May 1997, was scaled back from the amount that CONXUS initially wished to raise. One of its investors therein, which also has investments in small business broadband PCS licensees, reduced its commitment because the FCC appears to be providing better financing terms to the broadband PCS licensees.

**2. Narrowband PCS and broadband PCS rules treat Designated Entities differently.**

Narrowband PCS was one of the first services which was subject to the auction process. In the initial nationwide narrowband PCS auction, no Designated Entity was awarded a license through the process. The Commission recognized that its rules did not afford sufficient preferences to Designated Entity to meet the Commission's goal of promoting entry of Designated Entities into the wireless telecommunications industry.<sup>6</sup> Accordingly, it re-visited its narrowband PCS rules and afforded greater

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<sup>6</sup> See Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, Title VI, § (continued...)

bidding credits to select Designated Entities for purposes of the regional narrowband PCS auction. The combination of a small geographic licenses and the bidding credits resulted in Designated Entities winning the licenses to which bidding credits could be applied. Thus, 11 of the 30 regional narrowband licenses were awarded to four Designated Entities.

The Commission also concurrently was crafting and re-crafting the broadband PCS rules affecting Designated Entities eligibility for such licenses. Initially, the broadband PCS rules defining those entities which were classified as Designated Entities were the same as the narrowband PCS rules. The final rules governing the competitive bidding process for the C Block licenses were adopted in July 1995.<sup>7</sup> These final rules provided greater flexibility in structuring an entity which wish to be considered as a Designated Entity (for purposes of the C Block auction) than provided to similarly-situated narrowband PCS licensees. The critical differences were: (1) defining a Designated Entity only as a small business; (2) no personal net worth criteria; (3) permitting a non-designated entity to hold control group equity, thereby reducing the amount of equity required to be held by a Designated Entity; (4) permitting reduction of the equity of a Designated Entity control entity by an additional 5% after three years; and (5) providing a six year interest only installment payment. The Wireless Telecommunications Bureau has recently deferred the C and F Block

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<sup>6</sup>(...continued)  
6002(b), 108 Stat. 312 (1993) ("Budget Act").

<sup>7</sup> Sixth Report and Order (FCC 95-301), PP Docket No. 93-253, 11 FCC Rcd 136 (1995).

licensees quarterly installment payments and the Commission is contemplating modifying the quarterly payments to an annual payment.

3. **Because of the similarity in services and capital requirements, narrowband PCS and broadband PCS should be regulated in a comparable, equitable manner.**

The Commission's action affording the broadband PCS licensees more favorable treatment adversely affects the narrowband PCS licensees ability to compete with the broadband PCS licensees in the capital market. Without adequate capital funding, the deployment by entrepreneurial businesses of narrowband PCS service may be delayed or derailed. An additional service offering will be not be available to the consumer, which may result in a less competitive market.

In its ex parte presentations in the Competitive Bidding Further Notice of Proposed Rulemaking, CONXUS requested that the Commission provide the same relief to entrepreneurial narrowband PCS licensees as the Commission provided to the C Block licensees. It asked that (1) narrowband PCS Designated Entities be permitted to restructure their control groups to permit reduction of the qualifying Designated Entity to 15% with a corresponding reduction in equity to 10% as permitted in the broadband PCS rules; and (2) narrowband PCS Designated Entities be permitted to restructure as a small business without reference to the requirements as a minority-/woman-owned business without penalty, i.e., no repayment of the bidding credit as provided under the unjust enrichment provisions of the narrowband PCS rules.

As CONXUS argued, the bidding credit provided no "discount" as to the market value of the licenses acquired through the auction process. The Commission when

it adopted the bidding credits and the unjust enrichment provisions envisioned that affording Designated Entities bidding credits would result in such entities obtaining licenses at a value below the fair market value. In fact, CONXUS paid more for its "nationwide" license, after application of the credits, than those larger, entrenched telecommunications companies paid for similar nationwide licenses (\$91,000,000 vs. \$80,000,000). Additionally, PageMart II, Inc. (a non-designated entity) which also acquired all five (5) regional 50/50 kHz paired channels, paid aggregately approximately \$91,000,000 (including penalties). Thus, the availability of the bidding credit did not result in CONXUS paying a price below "market."

The Commission failed to address CONXUS' arguments or request in connection with its decision on Designated Entities in the Report and Order nor did it incorporate CONXUS' position or requests into the Further Notice. The only action it took was to conform the description of which groups are considered minority. CONXUS provided the Commission substantial comments which demonstrated that immediate action was necessary to conform the narrowband PCS rules to the broadband PCS rules to meet Congressional mandates that similar services be regulated the same. The Commission took no action on CONXUS' comments nor did it respond to CONXUS' comments either by reference in the Report and Order or by incorporating proposed changes in the Commission rules to reflect CONXUS' comments.<sup>8</sup> The Commission, therefore, must reconsider its decision on designated entities and modify the definition of Designated Entity in the narrowband PCS rules to conform with that provided in the

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<sup>8</sup> See 5 U.S.C. § 533(c).

broadband PCS rules, or justify its failure to consider and respond to CONXUS' comments. The Commission, similarly, must provide the requested clarification as to whether incumbent narrowband licensees may restructure their control groups to meet the newly-adopted definition without penalty or application of the unjust enrichment provisions.

**B. The Commission's decision not to establish an entrepreneur's block in the narrowband PCS service is reversed by its proposal to allow application of bidding credits to only a select number of narrowband PCS licenses.**

CONXUS opposed the creation of an entrepreneur's block in the narrowband PCS service. The creation of such an entrepreneur's block does not promote diversification of licensees and encourage the entry of new business into the industry as mandated by Congress. CONXUS further contended that limiting the licenses to which bidding credits could be applied had the same affect on the distribution of licenses as the entrepreneur's block.

The Commission, by directing small businesses to a limited number of channels, affords larger telecommunications companies an opportunity to acquire more spectrum with substantially less competition. As demonstrated in the regional narrowband PCS auctions, the only licenses which were acquired by Designated Entities were those which the Designated Entities could apply bidding credits. As discussed previously, however, the availability of the bidding credits did not result in the Designated Entities paying a reduced price for the license. In certain instances, for example, when the other non-designated entity 50/50 kHz channel pair's bid was under the net bid of the designated entity 50/50 kHz channel pair, CONXUS would bid on the non-designated

entity 50/50 kHz channel. For CONXUS to win a 50/50 kHz channel pair, it was required to bid through its credit. Had the bidding credits been available on both channels, the market value of the licenses may have been increased and two Designated Entities may have been able to acquire each of the 50/50 kHz channel pair.

Even though the Commission declined to establish an entrepreneur's block in the narrowband PCS service, its proposed rules associated with the Further Notice continue to reflect that bidding credits may be applied only to select frequencies. For example, the Commission proposes to license the two remaining 50/50 kHz paired channels on a nationwide basis, but provides bidding credit to be applied to only one of the two channel pairs. The Commission, in effect, has created an entrepreneurial's block as the Designated Entities will have greater success in bidding against other Designated Entities for the channel pair than larger, well established, well financed entrenched telecommunications company. CONXUS asks that the Commission clarify that its decision to decline to establish entrepreneur's block will also result in a Designated Entity's ability to apply bidding credits (which may be adopted pursuant to the Further Notice) to any narrowband PCS license available during an auction, or explain its reasoning as to the inconsistency between its decision and its proposal.

### **III. Conclusion**

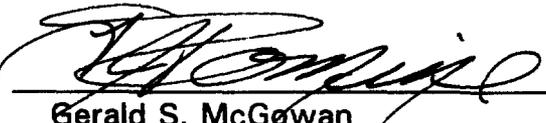
Broadband PCS and narrowband PCS will compete head-to-head in the marketplace. Broadband PCS providers will offer a substantially similar service to narrowband PCS which is may bundle with its other offerings. Substantially the same consumer will be target of both broadband PCS and narrowband PCS. The capital

needs of narrowband PCS licensees is significant and comparable to a number of the C and F Block broadband PCS licensees. The similarities between services require the Commission to regulate similarly. CONXUS is confident that it will be able to compete successfully in the marketplace against its broadband PCS competitors, but only as long as the Commission equitably regulates the two services' providers. CONXUS, therefore, asks the Commission to reconsider its decision in the Report and Order and take the action requested in this Petition.

Respectfully submitted,

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