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WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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FEDERAL COMMUNICATIONS COMMISSION
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Sept. 8, 1997

By Hand Delivery

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, DC 20554

RE: In re Broadband PCS C and F Block Restructuring, WT Dkt. No. 97-82 & DA 97-697

Dear Mr. Caton:

The Office of Advocacy, U.S. Small Business Administration (SBA), by its undersigned representative and in accordance with Sections 1.415, 1.419 of the Commission's rules, hereby respectfully submits an original and six copies of comments for the above-referenced proceeding. To the extent that a waiver is necessary, we respectfully request the Commission's approval of this late filing.

Thank you for your assistance in this matter. Please call with any questions.

Very truly yours,

S. Jenell Trigg
Assistant Chief Counsel for
Telecommunications
Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Suite 7800
Washington, D.C. 20416
(202) 205-6950

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 8, 1997

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW Suite 814
Washington, DC 20554

RE: In re Broadband PCS C and F Block Restructuring,
WT Dkt. No. 97-82 & DA 97-697

Dear Mr. Chairman:

The Office of Advocacy commends the Federal Communications Commission's ("FCC or Commission") efforts in addressing the concerns of licensees of the Personal Communications Services (PCS) C block. Advocacy recognizes that a "one-size fits all" approach to resolving these concerns would not be reasonable given the range of issues before the Commission and the different needs of C block licensees.[1] We have consulted with finance, investment, and entrepreneurship experts in other divisions of the U.S. Small Business Administration, in addition to talking to PCS C block licensees and investment companies. These comments are a result of these efforts.

Advocacy agrees that it is important to preserve the integrity of the FCC's auction process, particularly for continued small business participation.[2] However, we are most concerned about the ability of small businesses not only to compete against larger entities and incumbents in the auction process on a equal playing field, but also compete in the telecommunications marketplace as viable service providers. Small businesses need equitable rules and decisions from local, state, and federal regulatory bodies; rules that eliminate market entry barriers in this still monopolistic industry. Providing a level playing field for small businesses is in the public interest, pursuant to the Commission's statutory mandate under the Communications Act of 1934, as amended by the Telecommunications Act of 1996,[3] and the Small Business Regulatory Enforcement Fairness Act of 1996.[4]

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[1] Major issues facing C block licensees may include difficulty in making installment payments, difficulty in accessing capital for construction of systems and marketing, difficulty in executing business plans given uncertainty with the status of other licensees and continued obstruction from cellular incumbents and A and B block licensees. *See e.g.*, Letter from Leonard S. Sawicki, MCI Telecommunications Corporation, to William F. Caton, Secretary, FCC (May 1, 1997); Letter from James H. Barker and Michael S. Wroblewski, Latham & Watkins, representing Fortunet, to William F. Caton, Secretary, FCC (May 9, 1997).

[2] Letter from John S. McCain, Chairman, U.S. Senate Committee on Commerce, Science, and Transportation, to Reed E. Hundt, Chairman, FCC 3 (Aug. 19, 1997).

[3] 47 U.S.C. §§ 309(j), 257.

[4] 15 U.S.C. §§ 601 *et seq.* (Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).

FEDERAL RECYCLING PROGRAM PRINTED ON RECYCLED PAPER

I. THE OFFICE OF ADVOCACY RECOMMENDS THREE BASIC PRINCIPLES FOR REACHING A FINAL DECISION

The Commission has a difficult task in resolving many complex issues and balancing the widely divergent interests of the parties. Advocacy asks that the Commission consider the following principles in reaching a final decision. First, the promotion of competition and bringing rapid new services to the public should be paramount over raising revenue or preserving auction payments to the U.S. Treasury.[5] Second, the preservation of small business involvement is essential to fulfilling the promises of the Telecommunications Act of 1996 that there will be effective competition, innovative new services and products to consumers, universal service to niche and under-served markets, and the creation of new jobs.[6] Finally, the characteristics of small telecommunications businesses are unique.[7] Therefore, the impact of small regulatory changes and marketplace obstacles faced by small business can result in a significant economic impact which will ultimately determine a small businesses' success.

Given these principles, the Office of Advocacy recommends the following:

1. Short-term deferral in the submission of installment payments in combination with an extension of the five-year construction deadline or alternatively, a long-term deferral with no change in the construction deadline;

2. Modification of installment payment schedule from a quarterly to annually;

3. Option to turn in license, in whole or in part, under an amnesty program; and

4. Preservation of exclusive small business participation in a C block re-auction, if a re-auction is necessary.

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[5] This principle is consistent with the mandate set forth in the Communications Act of 1934 that the Commission "not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from . . . . competitive bidding under this subsection." 47 U.S.C. § 309(j)(7)(A).

[6] In high technology and communications industries, the rate of job creation is expected to increase driven by the creation of new small business entrants. From 1992 to 1996, the number of firms with 1-4 employees increased 87%; firms with 5-19 employees increased 26.2%; and firms with 20-49 employees increased 14.8%. Cognectics, Inc., Table: Gross Flows of Jobs by 1992 Firm Size, Transp., Comm., Util. NEC, Section 1, (draft report on contract to the U.S. Small Business Administration). Small businesses also hire the bulk of workers terminated due to corporate downsizing. Ralph Reiland, *Small Business, Big Government & American Prosperity*, The American Enterprise, July/Aug 1997, at 46 (citing Robert Reich, then a Harvard University Professor). "Small Businesses [are] now widely regarded as the principal generator of net new employment in the United States." William J. Dennis Jr., et al., *Small Business Job Creation: The Findings and Their Critics*, Business Economics, July 1994, at 23.

[7] *In re* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Report*, GN Dkt. No. 96-113, FCC 97-164, adopted and released May 8, 1997, at paras. 29-34 [Section 257 Report].

II. A REDUCTION OF PRINCIPAL BID AMOUNTS IS NOT REASONABLE GIVEN THE DIFFICULTY OF ASSESSING THE APPROPRIATE MARKETPLACE VALUE

The Office of Advocacy does not support a reduction of the principal bid amounts for C Block. Not all licensees over-bid or are facing bankruptcy. Although a haircut reduction in principal would provide immediate relief to those licensees whose bids were, arguably, excessive, such a drastic move is not reasonable given the difficulty in determining what the appropriate market value of the licenses should be. The standard value measurements used to compare bids; "dollars per pop" and "dollars per MHz-pop," do not take into account the multiple tangible and intangible factors that influence bid activity and bid amounts.[8] One must also factor geography, the size of the license area (MTA's v BTAs), demographics, spectrum allocation (30 MHz v 10 MHz), complexity of build-out, interest rates, cost of capital, etc.[9] In the absence of a detailed analysis of bidder characteristics, the actual bidding process, round activity, and the financial environment and marketplace circumstances during each of the auctions, including a regression analysis to isolate individual factors, Advocacy does not believe that it can be determined with certainty that the adjusted marketplace value of C block should be based on either A and B or D-F bid amounts. A reduction in principal would also seriously undermine the integrity of the auction as well as set a dangerous precedent for small business participation in future auctions.

Advocacy is not convinced that C block was not the true marketplace at work given the 750% increase of the number of bidders compared to A and B blocks (30 bidders in A and B v. 255 bidders in C) and the emergence of new players to the field. It could also be argued that the bidding in A and B blocks was controlled or stifled given the involvement of incumbents with a desire to protect their own cellular or wireline interests and therefore, diminishing the entry of competitors in their markets. The absence of such traditional telecommunications providers in C block could have facilitated the vigorous competition not present in A and B - resulting in higher bids for C. Furthermore, a 40% reduction in the number of bidders in D-F (estimated 154) compared to C block may also be a factor in setting the lower *average* bids for D-F - fewer competitors reduces competition resulting in lower bids. Even though D-F prices were on the average less than C, several BTAs in D and E blocks *exceeded* C block bids in the amount bid and price per pop - for less spectrum.[10] Does this mean that C block bids, in those particular markets, were too low or, alternatively, that the D and E bids were excessive?[11] What adjustments would be made for individual market anomalies? How would an anomaly be defined?

A re-auction should not be heralded as the ideal solution but as an option of last resort. A re-auction will not determine the "true market value" of C block. A re-auction will only reflect a deflated value of PCS spectrum based on the totality of the circumstances at the time of the re-auction which would include the current volatile financial market for wireless investments and the influence of the controversies surrounding C block. Even an expedited auction means that service to the public would be further delayed given the time needed for the Commission to issue new rules and procedures; adequate lead-time for potential small business bidders to devise business plans and secure financial support; completion of the actual bidding; the assignment of licenses; plus time for the construction of the systems.

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[8] BIA Consulting, Inc., Personal Communications Services: In the Wake of D,E, and F-Block Auctions 6 (Mar. 1997) [BIA Report].

[9] *See id.*

[10] For example, the winning bid for Columbus, GA (BTA 92) for D and E blocks were $16,635,000 and $17,470,366, respectively - exceeding the C block winning bid of $5,265,000. The average price per pop in C block is $14.59 compared to $46.09 for D block and $48.40 for E block. FCC PCS Auction Results and BIA Report at Appendix 4 (BTA population figures are from the BIA Report).

[11] BIA reports that for the 20 least populous MTAs, the total bids for D-F blocks are greater than the average of A-C blocks. BIA Report at 6. The reverse is true for the 20 most populous MTAs. *Id.*

III. THE COMMISSION'S IMPOSITION OF A SUSPENSION ON THE ENTIRE BLOCK HAS HINDERED THE ABILITY OF LICENSEES TO PERFORM THEIR CONTRACTUAL OBLIGATIONS

The Office of Advocacy disagrees with the assertion that a blanket deferral of installment payments would be a "windfall" to some licensees.[12] Advocacy is of the opinion that, rather than creating a windfall, the FCC's suspension of installment payments,[13] *inter alia,* has triggered market forces that have unexpectedly hindered, delayed and prevented licensees from meeting their construction of service requirements, even for those licensees that are not in financial distress.

The license agreement between the FCC and C block winning bidders is essentially a contract.[14] Therefore, the FCC operates not only as regulator and banker/debt-collector, but also serves in the capacity of government-as-contractor. As a matter of law, there is an implied condition in any contract that neither party will do anything that will "hinder, delay, or prevent performance by the other party" in the absence of a right reserved or express language to the contrary.[15] The express terms of the FCC's security agreement do not enable the Commission to alter or modify the terms of this contract unilaterally. In fact, the security agreement states that "[n]one of the terms or provisions . . . may be waived, altered, modified or amended *except by an instrument* in writing, duly executed by the Commission."[16] The Wireless Telecommunications Bureau's *Order* imposing the suspension is not an instrument as established in this paragraph.[17] Even if the *Order* were to be construed as an "instrument," contract law would not give the Bureau under delegated authority, nor the Commission authority to change the terms of the contract materially without mutual consideration and assent by the licensee.[18] The unilateral suspension of payments is indeed a material change.

This suspension interjected even more uncertainty into this proceeding which directly affects the ability of a small business licensee to secure and keep investors and partners, execute business plans and construct their systems. The Bureau issued the suspension with noble intentions and as a means to help prevent future bankruptcies or defaults. However, the unilateral suspension of installment payments to a date uncertain, has in effect, put some licensees in a worse position than they were in prior to the suspension. The suspension has created a misperception that all C block licensees are in trouble causing

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[12] David Kaut, *Hundt: We Should Do Now What Eventually Must Be Done to Correct C-Block Bid Levels*, BNA, Aug. 26, 1997 at C-4.

[13] *In re* Matter of Installment Payments for PCS Licenses, *Order*, DA 97-649 (released Mar. 31, 1997).

[14] In consideration for receiving a license(s) issued by the FCC as a representative of the United States, winning bidders in C block have executed Security Agreements and Installment Payment Plan Notes that set forth the terms and conditions of the payment of a license pursuant to 47 C.F.R. §§ 24.711, 1.2110.

[15] *George A. Fuller Co. v. United States,* 69 F. Supp. 409, 411 (1947); *Allied Contractors v. United States*, 124 F. Supp. 366 (1954); *Dale Construction Co. v. The United States, Seaboard Surety Company*, 168 Ct. Cl. 692 (1964).

[16] Security Agreement, Broadband Personal Communications Service, C Block, Auction Event No. 5, Para. 10.

[17] Secured Transactions; Sales of Accounts and Chattel Paper, Article 9 of the Uniform Commercial Code defines "instrument" as a negotiable instrument (as defined in Section 3-104), or a certificated security (as defined in Sec. 8-102.) The definition of "instrument" does not include a regulatory decision or order.

[18] The FCC is "bound by contractual obligations just as any private party, and principles of general contract law are equally applicable to government contracts unless congress enacts special standards governing the contract." *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947); *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2464-65 (1996).

further uncertainty about the viability of C block licensees to compete. This unanticipated stigma on C block as a whole has inhibited licensees from performing their contractual obligations to construct their systems and thus, has increased the cost of doing business considerably.[19]

Many of the suspension-induced hardships were not known until recently. For example, vendors, and suppliers, are now requiring additional documentation and engineering studies that detail specific cell cite locations as a prerequisite for engaging in preliminary or continued discussions.[20] Prior to the suspension, there was less scrutiny by third parties and such detailed documentation was not needed until the later stages of negotiations or upon reaching a final agreement.[21] This conservative approach is understandable since vendors and suppliers may themselves be small businesses and need some assurance of a C block licensee's viability given the uncertainly created by the suspension. There are thousands of small business vendors, suppliers, contractors, engineering, and marketing firms across the country who have not had the opportunity to finalize service contracts or commence work for C block licensees.[22]

Substantial costs and other obstacles have hindered the ability of C block licensees to comply with these requests for detailed documentation. Unlike larger licensees that have in-house engineering departments and better access to capital, a C Block licensee must prematurely expend time and money to complete the due diligence necessary to hire a qualified RF engineer and contractor. In particular, those licensees that submitted the March 31, 1997 installment payment, without knowledge of the suspension imposed on the same date, have not had the ability to utilize those funds on deposit with the U.S. Treasury.[23] The timely completion of engineering plans is further complicated by local and state moratoriums or regulations restricting the approval of cell/tower cites.[24] There is also continued difficulty faced by C block licensees in acquiring information regarding microwave relocation from incumbent A and B block licensees.[25] Each of these factors are essential to the success of new entrants and yet the Commission has not yet resolved these market entry barriers.

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[19] *See e.g.*, Letter from Rhonda McKenzie, President/ CEO, McKenzie Telecommunications Group, to John S. McCain, U.S. Senate, (Aug. 13, 1997) [McKenzie Letter].

[20] Telephone statement of Mateo Camirillo, Chairman, Integrated Communications Group Corp., Sept. 4, 1997, to the Office of Advocacy, U.S. Small Business Administration [Camirillo Statement]. Mr. Camirillo is an experienced broadcaster and is very familiar with engineering specifications and requirements. Prior to the suspension many C block licensees were courted by suppliers and vendors and were in active negotiations for the construction of their systems. Today, negotiations and contracts have been put on hold. McKenzie Letter; *see also* Telephone statement of Rhonda McKenzie, to the Office of Advocacy, Aug. 14, 1997.

[21] *Id.*

[22] *See e.g.*, Letter from Rhonda McKenzie, President/ CEO, McKenzie Telecommunications Group, to William F. Caton, Secretary, FCC (June 20, 1997).

[23] Letter from Comtel PCS Mainstreet Limited Partnership, to Regina Dorsey, Chief Billings and Collection Branch, OMD, FCC (Apr. 4, 1997).

[24] A proceeding to address tower approval issues is pending before the Commission. *In re* Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332 (c)(7)(B)(v) of the Communications Act of 1934, *Second Memorandum Opinion and Order* and *Notice of Proposed Rulemaking*, WT Dkt. No. 97-192, ET Dkt. No. 93-62, RM-8577, FCC-97-303, released and adopted Aug. 25, 1997.

[25] Camirillo Statement.

The Office of Advocacy recommends either the grant of a short-term deferral in combination with an extension of the five year construction deadline or a long-term deferral without an extension that would serve as compensation for the harm caused by the FCC's unilateral suspension of installment payments. Although a deferral of three or more years would provide C block licensees with a better opportunity to invest capital to expedite the construction of their systems, an extended deferral period is more likely to induce litigation - causing further delay and uncertainty.

The five-year construction deadline clock for C Block has continued to run during the suspension.[26] Although each C Block licensee has an incentive to build-out as soon as possible in order to bring their systems to service and start to receive a return in their investment, many of the obstacles that have hindered construction have not been of their own making. A short-term deferral alone does not adequately provide enough breathing room given the inability to contract for construction services. Conversely, a long-term deferral would enable a licensee to invest heavily in construction to make up for lost time - therefore, a construction deadline extension would not be necessary.[27]

There is a critical need to let the financial market settle down and provide licensees with an opportunity to educate investors about "the auction process, the technology, and the business case."[28] Licensees also need the lead-time to regroup or modify their business plans based on any changes in their own licenses or the license status of others as a result of the Commission's final decision on restructuring, i.e., creation of an amnesty or a disaggregation program. Unlike larger and more established entities, small businesses have fewer resources and staff to execute such changes immediately.

To be truly effective, a deferral period must commence *after* the Commission has lifted the cloud of regulatory uncertainty. This elimination of uncertainty includes setting forth a final order that establishes the appropriate interest rate, and firm policy that eliminates market entry barriers on local and state tower siting restrictions. These are "impediments to entry within the Commission's jurisdiction that justify regulatory intervention."[29] Resolution of these issues will in turn affect the financial markets. The start of the deferral period should not be calculated from March 31, 1997, the effective date of the stay. Such a calculation would be unfair and illusory. For those licensees that were not timely informed that a suspension had been imposed and paid their quarterly installment payments on or before March 31,[30] they should be refunded their installment payments *with interest*. They should be no worse off than those licensees that did not submit their March installment payments who have benefited from the accruing interest income on funds in their control.

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[26] 47 CFR § 24.203(a).

[27] *See* Comments of National Association of PCS Entrepreneurs, Position Paper: Financial Restructuring of PCS Entrepreneurs Blocks (C&F) License Payments, May 1997.

[28] Letter from Steven R. Bradley, Vice President, Integrated Communications Group Corp., to S. Jenell Trigg, Office of Advocacy 2 (Sept. 1, 1997).

[29] Section 257 Report, para. 16.

[30] *See e.g.*, Letter from Julia F. Kogan, representing Americall International LLC, to Linda King Friedman, Chief, Financial Operation Division, OMD, FCC (Apr. 2, 1997).

VI. LICENSEES IN OTHER BANDS AND SERVICES ARE NOT SIMILARILY SITUATED TO C AND F BLOCK THEREFORE, APPLICATION OF MEASURES TO ASSIST C AND F BLOCK SMALL BUSINESSES ARE NOT SUBJECT TO REGULATORY PARITY

The Commission's adoption of narrowly-tailored measures to provide relief for C and F block does not set a precedent for similar measures to be received for licensees in other bands or services. Proponents of regulatory parity, unless those proponents are defined as small businesses *and* have been subjected to similar government action that has directly hindered or delayed the performance of their contractual agreements, are not entitled to equal treatment.[31] No other class of licensees have been subjected to the number of delays and degree of uncertainty that C and F block participants have had to endure - commencing from 1995 to present.[32]

Section 332(c) of the Communication Act of 1934, 47 U.S.C. 332(c), which requires regulatory parity in the Commission's regulation of equivalent mobile services is not applicable in this matter. This provision "ensure[s] that all carriers providing such services [commercial mobile] are treated as common carriers . . . ."[33] The regulatory status of PCS and other wireless services as common carriers are not at issue here.

V. RECOMMENDATIONS FOR RE-AUCTION PROCEDURES

It is critical that the Commission take all necessary regulatory steps first to stabilize the value of C block prior to the imposition of a re-auction. Not until investors can properly evaluate the worth of a C block portfolio, will the licensee be able to make an informed decision whether to retain or turn in the license.

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[31] We distinguish any relief provided by the Commission for Interactive Video and Data Services (IVDS) from C Block. The Bureau's suspension of installment payments for IVDS did not operate to hinder, delay, nor prevent the performance of IVDS licensees' contractual obligations. *See e.g.*, In re Interactive Video and Data Service Licenses, *Order*, 11 FCC 3031 (1995). Quite the contrary. The Petitioners for the stay requested relief because the Commission had not acted on their substantive requests. *Id.* para. 1. Moreover, in the absence of new technology required to develop the IVDS service, there were few licensees, if any, that were in active negotiations for the construction of their systems with vendors and suppliers. Unlike C block, IVDS licensees also were not facing a considerable head start from larger and better capitalized competitors.

[32] *See e.g.*, Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, §2, 109 Stat. 93 (1995) (Congressional elimination of tax certificates during critical financing stage); *In re* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Report and Order*, 10 FCC 136, paras. 3-4 (1995) (delays due to the Telephone Electronic Corp. judicial stay and Supreme Court's release of the *Adarand Constructors Inc., v. Pena* decision.). The R&O eliminated race and gender-based bidding incentives in response to the Supreme Court's decision in *Adarand*, 115 S. Ct. 2097 (1995). Two additional court-ordered stays were to delay further the commencement of the C block auction, affecting the economic viability of C and F block licensees. Antoinette Cook Bush and Marc S. Martin, *The FCC's Minority Ownership Policies From Broadcasting to PCS*, 48 Fed. Comm. L.J. 423, 433 (1996).

[33] H.R. Rep. No. 103-111, at 259 (1993).

If the Commission opens up bidder eligibility in a C block re-auction to non-small businesses, the elimination of installment payments would not be acceptable. The Office of Advocacy, however, would not take issue with the elimination of installment payments if the recovered licenses were to be auctioned to small businesses exclusively. [34] Eligibility to participate in the re-auction should not be restricted to only new bidders nor preclude C block licensees that opted to return a license (s) from bidding. First, this would dramatically reduce the bidder pool and stifle potential competition. Second, such a restriction would foreclose the ability of a licensee to bid based on strategic decisions, (e.g., to acquire more contiguous BTAs and turn in non-contiguous BTAs) and not for the purpose of reducing debt. If necessary, a restriction that would prohibit a licensee from bidding on the same license returned may resolve the issue that it is unfair to allow a licensee who has purportedly over bid to participate in a re-auction and lower its current obligations.

VI. CONCLUSION

For these reasons, we reiterate our recommendations: 1) a short-term deferral in the submission of installment payments in combination with an extension of the five-year construction deadline or alternatively, a long-term deferral with no change in the construction deadline; 2) modification of installment payment schedule from a quarterly to annually; 3) option to turn in license(s), in whole or in part, under an amnesty program; and 4) preservation of exclusive small business participation in a C block re-auction, if a re-auction is necessary.

Whatever steps the Commission takes - each step must be executed with finality. It is important to send a clear and unequivocal message to the industry and financial markets that there will be no further changes in the rules for C and F Block. As demonstrated by the current circumstances, continued uncertainty is the death kneel for small businesses.

The Office of Advocacy appreciates the Commission's consideration of these views.

Sincerely,

Jere W. Glover
Chief Counsel

S. Jenell Trigg
Assistant Chief Counsel
Telecommunications

The Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W. Ste. 7800
Washington, D.C. 20416
(202) 205-6533

cc: The Honorable James Quello
The Honorable Susan Ness
The Honorable Rachelle B. Chong
Mr. William E. Kennard
Mr. Daniel Phythyon
Ms. Catherine J.K. Sandoval

[34] Small businesses would be defined by the FCC and subject to the advance approval of the Administrator, U.S. Small Business Administration. 15 U.S.C. § 632(a)(2)(C).