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Friday, December 03, 1999

HAND DELIVERED

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, SW
TW-A325
Washington, D.C. 20554

RECEIVED
DEC 3 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

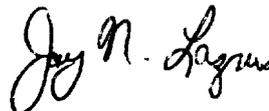
Re: WT Docket No. 98-169
RM-8951

Dear Ms. Salas:

On behalf of the AD HOC Coalition ("Coalition") enclosed please find an original and four (4) copies of its Petition For Reconsideration in the referenced proceeding. Please date stamp the enclosed file copy and return it with the courier to our office.

Please note that the enclosed petition supersedes the one made on behalf of the Coalition on October 12, 1999 in the same proceeding. If you have any questions regarding this matter, please telephone me at (202) 371-0062.

Very truly yours,



Jay N. Lazrus

Enclosures

No. of Copies rec'd
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
CELTRONIX TELEMETRY, INC. ET AL)
)
Application of Bidding Credits)
in the Interactive Video)
and Data Services Auction)

WT Docket No. 98-169
RM-8951

RECEIVED
DEC 3 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

PETITION FOR RECONSIDERATION

The coalition of Celtronix Telemetry, Inc., TV-Active, L.L.C., Texas Interactive Network, Inc., Hispanic & Associates, Zarg Corporation, IVDS Interactive Acquisition Partners, United Interactive Partners, Inc., and G. Ray Hale [collectively, the "Coalition"], by its attorneys and pursuant to Section 1.106(b)(2), 47 C.F.R. §1.106(b)(2), hereby petitions the Commission to reconsider its Report and Order and Memorandum Opinion And Order (FCC 99-239)¹, released September 10, 1999 [hereinafter, "Order"] which, among other things, dismissed in part as moot and denied in part the Coalition's Application For Review filed on June 29, 1998. The instant petition supersedes the one made on behalf of the Coalition on October 12, 1999 in the same proceeding.

¹ In the Matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169; RM-8951.

I. BACKGROUND

The Coalition is comprised of a group of parties who participated in the Commission's 1994 auction for licenses in the "Interactive Video and Data Service," now known as the "218-219 MHz Service." In that auction, the Commission afforded minority- and women-owned bidders with a 25% bidding credit. Following the Supreme Court's decision in Adarand Constructors v. Pena ("Adarand"),² the Commission acknowledged that it lacked an adequate record on which to base its race/gender bidding credit.³ On December 5, 1995, the Coalition filed a request for relief to remedy the situation in which its members paid 25% more for their licenses on the basis of race or gender. More than two and one-half years later, on May 28, 1998, the Wireless Telecommunications Bureau ("WTB") finally released a decision acting on the Coalition's request, denying it based on the "doctrine of waiver."⁴ According to the Commission, the "doctrine of waiver" meant that the Coalition's members should have objected to the bidding preference when their licenses were first issued in January and

² 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

³ See Order, at para. 60, for a discussion of this acknowledgment.

⁴ See In Re Community Teleplay, Inc., et al. Petition For Relief of Application of Bidding Credits in the Interactive Video and Data Service, Order, DA 98-1008, (rel. May 28, 1998). Community Teleplay, Inc. subsequently changed its name to Celtronix Telemetry, Inc.

February, 1995, even though such licensing occurred prior to the Supreme Court's decision in Adarand.⁵

The Coalition's Application, filed on June 29, 1998, demonstrated that the WTB's "doctrine of waiver" argument was unprecedented and erroneous, that Section 1.110 of the Commission's Rules was no bar to the Coalition's challenge, and that the WTB had failed to address the Coalition's arguments.⁶ Eight months later, in view of continuing delay and inaction on the part of the Commission with respect to that Application, the Coalition filed a petition for writ of mandamus with the U.S. Court of Appeals for the District of Columbia Circuit on February 26, 1999, asking the Court to order the agency to take action on the Application.⁷ The Court scheduled oral argument for September 14, 1999 on the Coalition's mandamus petition together with a similar petition filed by Graceba Total Communications, Inc. Just days before the oral argument, in what Judge Silberman called an "eleventh-hour report and order,"⁸ the Commission released its Order containing

⁵ Id.

⁶ See Application at pp. 4-19. The Application is incorporated herein, in its entirety, by reference.

⁷ Celtronix Telemetry, Inc., et al., Petition For Writ Of Mandamus, Case No. 99-1079.

⁸ See Order of United States Court of Appeals dismissing Case No. 99-1103 (in re Graceba Total Communications, Inc.) and Case No. 99-1079 (in re Celtronix Telemetry, Inc., et al.)(attached statement of Circuit Judge Silberman)(copy attached as Attachment A).

the "conversion" which it believes renders the Coalition's Application "moot." As shown below, the "conversion" is not an adequate remedy and does not render the Application moot.

II. The Commission Should Entertain This Petition

This petition for reconsideration is properly presented to the Commission because it satisfies the requirements of Section 1.106(b)(2) of the Commission's Rules, which provides:

Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

47 C.F.R. §1.106(b)(2). The instant petition satisfies this standard for seeking reconsideration of the dismissal in part and denial in part of the Coalition's Application. The event that has occurred is the "conversion" of the race/gender bidding credit to a small business credit. This event occurred months after the Coalition filed its Application, its last opportunity to present such matters. Such a "conversion" was not proposed in the Commission's Notice of Proposed Rulemaking in the proceeding in which the "conversion" occurred. The "conversion" therefore is also a new fact unknown to the Coalition until after its last

opportunity to present such matters, a fact which the Coalition, through the exercise of ordinary diligence, could not have learned prior to such opportunity. Since the Coalition is relying upon the new fact and event of the "conversion" to demonstrate that its Application is not moot and should not be otherwise denied, the Commission should entertain this petition for reconsideration. 47 C.F.R. §1.106(b)(2).

III. The "Conversion" Of The Bidding Credit From A Race/Gender Preference To A Small Business Preference Does Not Remedy The Unconstitutional Discrimination

The FCC's conversion of the race/gender credit to a small business credit, aside from its dubious lawfulness under the Administrative Procedure Act (APA), which requires notice and comment proceedings for the adoption of new rules, does not resolve the constitutional issue. One reason is that a bidder who received the race/gender credit, but was not a small business, would still get to keep the credit. The result is that Coalition members and others similarly situated are still paying 25% more for their licenses because of race or gender.

For example, a bidder named Georgia Felger claimed the status of a woman-owned business, but not a small business, on her FCC Form 175 application to participate in the 1994 auction. This bidder won four licenses, receiving the 25% bidding credit based on gender for three of the four licenses. Since the bidder did not

indicate "small" business on her Form 175 (in fact, the bidder blocked out the word "small" on the form), this bidder would not be entitled to the Remedial Bidding Credit pursuant to the Commission's Order, but nonetheless retains the 25% credit as a woman-owned bidder.⁹ The result is that Coalition members will continue to be the subject of unconstitutional discrimination, in this example by paying 25% more for their licenses because of gender. The Coalition's Application therefore is *not* moot. Perhaps even more serious is the treatment provided to 218-219 MHz Service licensees who did not receive the original gender/race bidding credit and are not entitled to the Remedial Bidding Credit. These licensees are still paying 25% more than those licensees that received the race/gender bidding credit.

Moreover, the "conversion" keeps the benefit afforded by the race/gender bidding preference given to minority and women owned firms in place, as the Commission itself acknowledges by its statement, " We note that there is no negative impact on minority- and women-owned bidders because all such bidders also met the small business qualifications and therefore are not disadvantaged by our

⁹ A copy of this FCC Form 175 application is supplied in Attachment B, along with an excerpt of an FCC public notice listing the winning bid amounts, adjusted for the gender credit, made by this winning bidder. This information contradicts the FCC's statement, used to justify the conversion of the race/gender credit to a small business credit, that "...there is no known negative impact on minority and women-owned bidders because all such bidders also met the small business qualifications and are therefore not disadvantaged by our action." Order at para 61.

action.”¹⁰ As Judge Silberman noted, “This is precisely the sort of motivation underlying facially neutral government action that the Supreme Court’s equal protection jurisprudence has refused to countenance. See Hunt v. Cromartie, 119 S. Ct. 1545, 1549 (1999).”¹¹

In Hunt, North Carolina residents claimed despite the facially neutral structuring of a voting district, North Carolina’s congressional redistricting plan was racially motivated in violation of the Equal Protection Clause. The North Carolina residents argued that the circumstantial evidence of maps showing the district’s size, shape, alleged lack of continuity, and statistical and demographic evidence supported an inference that the State drew district lines with an impermissible racial motive. The Court ruled that “a law that is facially neutral with respect to race classification warrants strict scrutiny under the Equal Protection Clause only if it can be proved that the law was motivated by a racial purpose or object, or if it is unexplainable on grounds other than race.” See Hunt 119 S. Ct. at 549, (quoting Miller v. Johnson, 515 U.S. 900, 904-905 (1995)).

In the instant case, as Judge Silberman observed, the Commission possessed the same impermissible racial motive when it converted its race and gender based bidding credits. The

¹⁰ Order at para. 61.

¹¹ See Attachment A.

Commission's "conversion" simply amounts to labeling a policy of preferential treatment of minorities and women with the facially neutral title of Remedial Bidding Credit. This action is unexplainable except on grounds of race/gender. Therefore, the FCC's "conversion" should face strict scrutiny under the Equal Protection Clause.

Had the Commission simply extended the Remedial Bidding Credit to *all* bidders in the 1994 auction, regardless of whether or not the bidder is a small business, no "conversion" of the race/gender credit would have been required, and the outcome would have been a constitutional remedy.¹²

In footnote 198 of the Order, the Commission found "no merit" to the Coalition's "takings" argument because the Commission believes it "fails to acknowledge the fundamental distinction between the exactment [sic] by a government agency of mandatory

¹² Such a remedy would also be required for non-preferred participants (bidders not minority- or women-owned) in the 1994 auction held by the Commission for regional Narrowband Personal Communications Services ("NPCS") licenses, in which it utilized a 40% race/gender bidding credit. At least one NPCS winning bidder received the unconstitutional race/gender bidding credit. Several of the other winning bidders that did not receive the credit are companies that do not qualify as a "small business." As the Coalition alleged to the Court, by converting the race/gender credit to a small business credit in the 218-219 MHz Service, the Commission is thus trying to avoid setting a precedent which will require the government to pay millions of dollars in refunds to NPCS winning bidders that are non-small businesses.

fees and the voluntary placing of an auction bid based entirely on a bidder's own evaluation of the fair market value of the licenses being auctioned." The Commission's position is meritless. There is no "fundamental distinction" between "mandatory fees" and an "auction bid" in a takings context. The Commission's rules mandate that both types of payments must be made or the licensee will suffer the serious consequence of license cancellation. This analysis fits squarely into the precedent of National Association of Broadcasters v. FCC, where the D.C. Circuit rejected the Commission's argument that the petitioners had an opportunity to challenge the specific fees assessed when payment was required.¹³ The Commission's Order misses the major point raised in the Coalition's Application that the WTB's so-called "doctrine of waiver" results in an unconstitutional takings because the rulemaking process leading to the unconstitutional race/gender credit was not an adequate pre-deprivation procedure satisfying due process. See Application at pp. 13-19. The Commission's Order does not dispute the Coalition's due process analysis that supports its takings argument. The Commission's position amounts to saying this to the public: "if you voluntarily make a bid under rules later determined to unconstitutionally require you to pay more for your license than someone else pays, we get to keep the amount

¹³ 554 F. 2d 1118, 1126-1130 (D.C. Cir. 1976).

unconstitutionally taken from you anyway, and you are entitled to no refund." Nothing in the law supports that outcome.

IV. CONCLUSION

For the forgoing reasons and the reasons contained in the Coalition's Application, the Commission should reconsider the Order and extend the Remedial Business Credit to all 1994 auction bidders regardless of whether they are small businesses. Otherwise the Commission's "conversion" of the race/gender bidding credit preserves unconstitutional discrimination.

Respectfully submitted,

THE AD HOC COALITION:

CELTRONIX TELEMETRY, INC.
TV-ACTIVE, L.L.C.
TEXAS INTERACTIVE NETWORK, INC.
HISPANIC & ASSOCIATES
ZARG CORPORATION
I V D S I N T E R A C T I V E
ACQUISITION PARTNERS
G. RAY HALE

By: _____


Richard S. Myers
Jay N. Lazrus
Its Attorneys

Myers Keller
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1522 K Street, N.W.
Suite 1100
Washington, DC 20005
(202) 371-0789

December 3, 1999

ATTACHMENT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

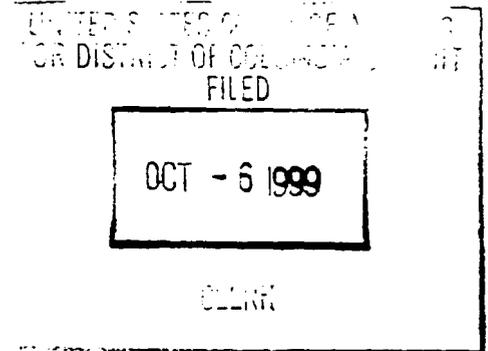
No. 99-1003

September Term, 1999

In re: Graceba Total Communications, Inc.,
Petitioner

99-1079

In re: Celtronix Telemetry, Inc., et al.,
Petitioners



BEFORE: Silberman,* Ginsburg and Henderson, Circuit Judges

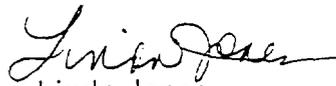
ORDER

Upon consideration of the motions to dismiss, of the responses and replies thereto, it is

ORDERED that the motions be granted and these cases are hereby dismissed.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: 
Linda Jones
Deputy Clerk

*Statement of Circuit Judge Silberman is attached.

In re: Graceba Total Communications, Inc., No. 99-1003

In re: Celtronix Telemetry, Inc., No. 99-1079

SILBERMAN, *Circuit Judge*: I find rather amusing the FCC's reference to its "good faith reliance on Supreme Court precedent" in its report and order. For it is now abundantly clear that this solicitude extends only to those constitutional precedents that the FCC finds conducive to its policy objectives. It has been almost four years since Graceba first challenged, in the wake of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the FCC's use of racial and gender "bidding credits" in its 1994 Interactive Video Data Services spectrum action. Through its eleventh-hour report and order, published just four days before we were to hear oral arguments on Graceba's petition for mandamus, the FCC has once again sought a last minute avoidance of judicial review of its race and gender based policies. See *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 348-49 (D.C. Cir. 1998).

It will not be surprising to anyone familiar with this litigation that the FCC's report and order neatly avoids resolving Graceba's "properly presented constitutional claims." *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1042 (1997). Instead, the FCC's remedial action—the blanket retroactive conversion of the auction's racial and gender preferences into "small business credits"—quite obviously is tailored to eliminate the claims of the petitioners before us without curing (or even addressing) the auction process's alleged constitutional defects. The FCC makes a truly astonishing admission that its choice of remedy was animated by a desire to ensure that, as a practical matter, the preferential racial

and gender bidding credits implemented in the 1994 auction remained in place. *See Report and Order* at ¶ 61 ("We note that there is no known negative impact on minority- and women-owned bidders because all such bidders also met the small business qualifications and are therefore not disadvantaged by our action."). This is precisely the sort of motivation underlying facially neutral government action that the Supreme Court's equal protection jurisprudence has refused to countenance. *See Hunt v. Cromartie*, 119 S. Ct. 1545, 1549 (1999).

But these observations are—for purposes of our review—beside the point. The FCC has acted on Graceba's claims, and mandamus is thus no longer appropriate. Graceba, and others affected by the FCC's curious remedial mandate, may now seek judicial review of the FCC's order through the procedures set forth at 47 U.S.C. § 402(a). Perhaps they can at least find some small comfort, however, in knowing that the expeditious resolution of their claims is no longer dependent on the FCC's "good faith."

ATTACHMENT B

Application to Participate in an FCC Auction
 Instructions on Back Before Completing

25
 11

B Approval 3060-0600
 Expires 4/30/97
 Estimate Average Burden
 Response: 30 Minutes

Applicant Name Georgia Felger		8. Applicant Classification: <input checked="" type="checkbox"/> Individual <input type="checkbox"/> Trust <input type="checkbox"/> Partnership <input type="checkbox"/> Corporation <input type="checkbox"/> Other _____	
Address (No P.O. Boxes) 31 Mandarin Drive		9. Preference Type: <input type="checkbox"/> Rural telephone company <input type="checkbox"/> Minority owned small business <input checked="" type="checkbox"/> Woman owned business <input type="checkbox"/> Small Business <input type="checkbox"/> None of the above	
City Coconut Raton	4. State FL	5. Zip Code 33433	
Account Number 2	7. FCC Account Number 0392-42-4940	10. Preference Claimed: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

Markets and Frequency Blocks for which you want to bid. If more than 5 markets, use supplemental form (FCC 175-S).

Market No.	Frequency Block No.										
	1	2	3	4	5	6	7	8	9	10	11
	ALL										

Check here if supplemental forms are attached. Indicate number of supplemental forms attached: _____

2. Person(s) authorized to make or withdraw a bid (Typed/Printed Name)

David Felger	(b) Dan Felger	(c)
---------------------	-----------------------	-----

Certification: I certify the following:

- that the applicant is legally, technically, financially and otherwise qualified pursuant to 308(b) of the Communications Act and the Commission's Rules and is in compliance with the foreign ownership provisions contained in Section 310 of the Communications Act.
- that the applicant is the real party in interest in this application and that there are no agreements or understandings other than those specified in this application (see instructions for certification), which provide that someone other than the applicant shall have an interest in the license.
- that the applicant is aware that, if upon Commission inspection, this application is shown to be defective, the application may be dismissed without further consideration, and certain fees forfeited. Other penalties may also apply.
- that the applicant has not entered into and will not enter into any explicit or implicit agreements or understandings of any kind with parties not identified in this application regarding the amount to be bid, bidding strategies or the particular license on which the applicant or other parties will or will not bid.
- that the applicant, or any party to this application, is not subject to a denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988.
- that, if a preference(s) is claimed in block 10, the applicant is eligible to receive a preference(s) under Part I of the Commission's Rules.

I declare, under penalties of perjury, that I am an authorized representative of the above-named applicant for the license(s) specified above, that I have read the instructions and the foregoing certification and all matters and things stated in this application and attachments, including exhibits, are true and correct.

Printed Name of Person Certifying Georgia Felger	Title of Person Certifying	Date June 22,
Signature of Person Certifying <i>Georgia Felger</i>	Contact Person DANIEL FELGER	Telephone No. 407-408-1111

DC IVDS Auction - Winning Bidder List for Public Notice

(Sorted by Applicant)

Date of Report: 7/30/94

17688



Cont	MSA	Segment	Bid Amt	Adjusted Bid Amt (if Bidding Credits)
N ALBERT 29 MIDIRON COURT MYRTLE BE. CH SC 29577	95	A	\$310,000.00	\$310,000.00
BER GEORGIA 31 MANDARIN DRIVE BOCA RATON BL 33433	161	A	\$25,000.00	\$63,750.00
BER GEORGIA 31 MANDARIN DRIVE BOCA RATON BL 33433	188	A	\$60,000.00	\$45,000.00
BER GEORGIA 31 MANDARIN DRIVE BOCA RATON BL 33433	255	A	\$40,000.00	\$30,000.00
BER GEORGIA 31 MANDARIN DRIVE BOCA RATON BL 33433	295	B	\$28,000.00	\$28,000.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	32	B	\$1,200,000.00	\$900,000.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	55	B	\$450,000.00	\$450,000.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	63	B	\$375,000.00	\$375,000.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	110	B	\$80,000.00	\$80,000.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	132	B	\$325,000.00	\$243,750.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	138	B	\$120,000.00	\$120,000.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	193	A	\$65,000.00	\$65,000.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	207	A	\$60,000.00	\$60,000.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	257	B	\$50,000.00	\$37,500.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	261	B	\$35,000.00	\$35,000.00
ENDS OF IVDS 3 OLD FULTON STREET; 5A BROOKLYN NY 11201	299	B	\$17,500.00	\$13,125.00
LTON SOFTWARE P.O. Box 3789 Rancho Santa Fe CA 92067	85	A	\$150,000.00	\$112,500.00
EDNER PRODUCTIONS Gardner Melvin 316 CANTRELL COURT CHESAPEAKE VA 23020	61	B	\$1,525,000.00	\$1,525,000.00