

Telephone Electronics Corp. (TEC), which implicated both gender and minority provisions in our rules.

We are concerned that gender-based provisions could similarly result in legal challenges and delays to the C block auction. As described below, we intend to make rule changes that are the least disruptive to bidders who were in an advanced stage of planning to participate in the C block auction at the time the *Adarand* decision was handed down. We intend to make such changes swiftly, in order to minimize the effect of the modified rules on existing business relationships formed in anticipation of the C block auction.⁸ Moreover, in order to facilitate swift action on our rule changes, comments are due July 7, 1995, and we are not requesting reply comments.

3. Accordingly, we tentatively conclude that our broadband PCS rules for the C block auction should be modified as follows:

- Amend § 24.709 of the Commission's Rules to make the 50.1/49.9 percent "control group" equity structure available to all entrepreneurs' block applicants, and not solely businesses owned by women or minorities.
- Amend § 24.720 of the Commission's Rules to eliminate the exception to the affiliation rules that excludes the gross revenues and total assets of affiliates controlled by minority investors who are members of an applicant's control group.
- Amend § 24.711 of the Commission's Rules to provide for three installment payment plans for entrepreneurs' block applicants that are based solely on financial size. In particular, the small business installment payment plan would reflect the terms previously available to minority- or women-owned small businesses.
- Amend § 24.712 of the Commission's Rules to provide for a 25

percent bidding credit for small businesses only.

- Amend § 24.204 of the Commission's Rules to make the 40 percent cellular attribution threshold applicable only to ownership interests held by small businesses and rural telephone companies, or to ownership interests held by investors in broadband PCS applicants/licensees that are small businesses.

- Amend 20.6 of the Commission's Rules to make the 40 percent attribution threshold applicable only to ownership interests held by small businesses and rural telephone companies.⁹

Background

4. In the Omnibus Budget Reconciliation Act of 1993,¹⁰ Congress authorized the FCC to award licenses by competitive bidding for certain spectrum-based services.¹¹ In authorizing the use of auctions, Congress directed the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women [collectively known as "designated entities"] are given the opportunity to participate in the provision of spectrum-based services."¹² In response to many comments recommending how we should implement Congress's mandate and providing data explaining special problems faced by the designated entities, we adopted several rules designed to encourage the participation of designation entities, including women and minorities, in broadband PCS by addressing the difficulties these groups experience in accessing capital.¹³ We determined that these special provisions for minorities and women are constitutional under the "intermediate scrutiny" standard of review articulated in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-565 (1990).¹⁴ In conjunction with

these special provisions, we also established "entrepreneurs' blocks" (the C and F frequency Blocks allocated for broadband PCS) which require bidders to satisfy a financial cap to be eligible to bid on licenses in these blocks.¹⁵

5. On March 15, 1995, in response to a request filed by TEC alleging that our rules violated equal protection principles under the Constitution, the U.S. Court of Appeals for the District of Columbia Circuit issued an *Order* stating that "those portions" of the Commission's *Order* "establishing minority and gender preferences, the C block auction employing those preferences, and the application process for that auction shall be stayed pending completion of judicial review."¹⁶ The court explained that TEC had "demonstrated the requisite likelihood of success on the merits."¹⁷ The stay, however, was subsequently lifted on May 1, 1995, on TEC's motion, after TEC decided to withdraw its lawsuit.¹⁸ On June 12, 1995, the Supreme Court decided in *Adarand* to overrule *Metro Broadcasting* "to the extent that *Metro Broadcasting* is inconsistent with" *Adarand*'s holding that "all racial classifications * * * must be analyzed by a reviewing court under strict scrutiny."¹⁹ The Court ruled that any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest.²⁰

6. The holding in *Adarand* potentially affects four race- or gender-based measures in our C block auction rules.²¹ The purpose of these provisions was to address the lack of access to capital problem that our record showed women

programs (even if not remedial in the sense of being designed to compensate victims of past governmental or societal discrimination) "are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Metro Broadcasting v. FCC*, 497 U.S. at 565.

¹⁵ 47 CFR § 24.709(a).

¹⁶ *Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. Mar. 15, 1995) (order granting stay).

¹⁷ *Id.* at 2.

¹⁸ *Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. May 1, 1995) (order granting dismissal of petition for review).

¹⁹ *Adarand*, 63 U.S.L.W. at 4530.

²⁰ *Id.* at 4533.

²¹ In the *Fifth R&O*, we also adopted a tax certificate program for minority and women-owned businesses under 26 U.S.C. § 1071. 59 Fed. Reg. 37566 (July 22, 1994), 9 FCC Rcd at 5580, ¶113. Congress subsequently repealed Section 1071. H.R. 831, 1045h Cong. 1st Sess. § 2. As a result of this action by Congress, we are compelled to eliminate the specific tax certificate provision in our broadband PCS rules, 47 CFR § 24.713, as indicated in Appendix A.

⁸ The Commission has received numerous letters urging it to go forward with the C block auction as expeditiously as possible. See, e.g., Letter from Sandra Goeken Martis, Wireless Works, Inc., to Cathy Sandoval, Office of Communications Business Opportunities, Federal Communications Commission (FCC) (June 16, 1995); Letter from Michael Walker, Executive Director, National Paging and Personal Communications Association, to Reed Hundt, Chairman, FCC (June 16, 1995); Letter from Jonathan Chambers, Director, Public Policy, Sprint Telecommunications Venture, to Reed E. Hundt, Chairman, FCC (June 19, 1995); Letter from Roy M. Huhndorf, President, Cook Inlet Region, Inc. to Reed E. Hundt, Chairman, FCC (June 14, 1995); Letter from Eliot J. Greenwald and Howard C. Gribhoff, attorneys with Fisher, Wayland, Cooper, Leader & Zaragoza L.L.P., representing Central Alabama Partnership L.P. 132 and Mobile Tri-States L.P. 130, to William F. Caton, Acting Secretary, FCC (June 16, 1995).

⁹ The proposed rule changes are attached as Appendix A.

¹⁰ Budget Act, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312 (1993).

¹¹ Budget Act, Pub. L. 103-66, Title VI, § 6002(a), 107 Stat. at 388.

¹² 47 U.S.C. § 309(j)(4)(D).

¹³ See *Fifth Report and Order*, PP Docket 93-253, 59 Fed. Reg. 37566 (July 22, 1994), 9 FCC Rcd 5532 (1994) (*Fifth R&O*), recon. *Fifth Memorandum Opinion and Order*, 59 Fed. Reg. 63210 (Dec. 7, 1994), 10 FCC Rcd 403 (1994) (*Fifth MO&O*).

¹⁴ See *Fifth R&O*, 59 Fed. Reg. 37566 (July 22, 1994), 9 FCC Rcd 5532, 5537 at ¶9. In *Metro Broadcasting*, the Supreme Court ruled that the Commission's minority preference program for mutually exclusive applications for licenses for new radio or television broadcast stations and its distress sale program did not violate the equal protection component of the Fifth Amendment. The Court held that Congressionally mandated minority