

n. 6, which the Court recognized as "an independent limitation on the amount of spectrum that any entity is able to aggregate in a single wireless communications service area." *Id.* at 23.¹ We believe that it is very unlikely that the Commission would, in response to Radiofone's rulemaking petition, reexamine the merits of the 45 MHz spectrum cap, which was adopted a little over a year ago to promote competition, discourage anti-competitive behavior and create incentives for innovation and efficiency in CMRS, including broadband PCS. This rule was not the subject of the Sixth Circuit's remand, and like the PCS/cellular cross-ownership rule, already contains special accommodations for small business through more relaxed ownership attribution criteria for the C block auction (*see* 47 C.F.R. §§ 20.6(d)(2), 24.204(d)(2)(ii)). It appears, however, that Radiofone's request would have the Commission expand this special attribution provision even further to exempt all cellular licensees eligible for the C block auction, not just small businesses.² Additionally, since Radiofone's rulemaking petition implicates the basic underpinnings of the PCS/cellular cross-ownership rule and the CMRS spectrum cap,³ such a rulemaking could possibly implicate other wireless spectrum limits not mentioned by Radiofone and never challenged: *i.e.*, 40 MHz limit in same broadband PCS market (47 C.F.R. § 24.229(c)); 50 MHz limit on same-market cellular (47 C.F.R. § 22.942); and ownership restrictions in narrowband PCS (47 C.F.R. § 24.101). Given that the C block auction began on December 18, 1995, Radiophone is incorrect in suggesting that such a proceeding could be completed before the commencement of the C block auction.⁴

4. Denying Radiofone's stay request will not cause it irreparable harm. Radiofone and similarly situated companies are not barred from participating in the C block auction, despite application of the 45 MHz CMRS spectrum cap. *See Public Notice, "FCC Will Proceed with C Block Auction on Schedule"* (Wireless Tel. Bur. Nov. 13, 1995). Even if Radiofone's pending request to waive the 45 MHz cap (as well as the PCS-cellular cross-ownership rule) is denied, the Commission will not "foreclose . . . Radiofone from obtaining a thirty MHz Personal Communications Service license within [its] geographic region."⁵ Such license, once obtained, will be conditioned on compliance with the Commission's rules that ultimately "result from further judicial and administrative proceedings" as well as the Commission's

¹ The Court's opinion indicates that the Court did not reach the 45 MHz cap because it "was not presented to the Court in Radiofone's initial petition." The Court would have lacked jurisdiction to consider the rule in any event, because it was the product of a separate rulemaking proceeding that was not timely challenged by Radiofone under 47 U.S.C. §402.

² Radiofone Emergency Petition for Rulemaking at 7.

³ *Id.* at 4.

⁴ Radiofone Emergency Petition for Rulemaking at 2.

⁵ *See* Radiofone Emergency Motion for Stay at 4, quoting *Cincinnati Bell v. FCC*, slip op. at 21.

ruling on Radiofone's waiver request. Nov. 13, 1995 Public Notice, supra. Radiofone has always been allowed to bid unconditionally on any of the 490 licenses outside of its cellular service areas and its affiliates have submitted applications and upfront payments to bid on these licenses. See Public Notice, "Qualified Bidders and Bidding Instructions for December 18, 1995 Broadband PCS C Block Auction", Attachment A at 1, 2 & 4, Attachment B at 6, 16 & 42-43 (Auc. Div. December 8, 1995).⁶ Nevertheless, Radiofone alleges that it will suffer irreparable harm because (1) it lacks assurances that it will not have to forfeit its upfront payment if it withdraws a high bid, (2) that it will not have its license revoked if its common PCS and cellular ownership does not comply with the Commission's rules, and (3) that it will be able to divest its cellular properties at full value, if necessary, to come into compliance with the Commission's rules. Radiofone also indicates that it could somehow be prevented from participating in future auctions for 10 MHz PCS licenses. These uncertainties are not unique to Radiofone and do not rise to the level of irreparable harm that would be caused by a stay of the C block auction.

5. It is clear that the grant of a stay would cause irreparable harm to other parties and would be inconsistent with the public interest. In addition to Radiofone's affiliates, 250 qualified bidders have tendered more than \$763 million to the U.S. Treasury in preparation for the C block auction. As Cook Inlet points out in its opposition, the Commission is not authorized to pay interest on these amounts during any delay that would be caused by a rulemaking proceeding. Most significantly, as the Commission has repeatedly demonstrated before the D.C. Circuit Court of Appeals, the Sixth Circuit and the Supreme Court, further delay of the auction will cause severe harm to each of the other C block applicants and to the United States. See Federal Communications Commission v. Radiofone, Inc., 116 S.Ct. 283 (1995, Stevens, J., in chambers) ("[T]he harm to the public caused by a nationwide postponement of the auction would outweigh the possible harm to [Radiofone]."), motion to vacate denied, 116 S.Ct. 373 (1995) (Mem.); Omnipoint v. FCC, No. 95-1391 and consolidated cases (D.C. Cir. Sep. 28, 1995) (order dissolving stay); Radiofone v. FCC, No. 95-3238 (6th Cir. June 12, 1995) (order denying Radiofone's stay request, "especially noting the possible injuries to other parties and the public interest").

⁶ Radiofone's affiliates bidding in the C block auction are Baton Rouge PCS Limited Partnership, Houma-Thibodaux PCS Limited Partnership, Radiofone Nationwide PCS, L.L.C., and Radiofone PCS, L.L.C.

6. Accordingly, IT IS ORDERED that the "Emergency Request for Stay" filed by Radiofone, Inc., IS DENIED.⁷

FEDERAL COMMUNICATIONS COMMISSION

Michele C. Farquhar, Acting Chief,
Wireless Telecommunications Bureau

⁷ Radiofone's Petition for Rulemaking will be addressed separately pursuant to Section 1.401(e) of the rules, 47 C.F.R. § 1.401(e), or pursuant to Sections 1.403, 1.405 and 1.407 of the rules, 47 C.F.R. §§ 1.403, 1.405 and 1.407, consistent with the Court's opinion in Cincinnati Bell Telephone Co. v. FCC, No. 94-3701 (6th Cir. Nov. 9, 1995), and consistent with the Commission's rights to pursue further judicial review of such decision.