

participants in new and existing wireless services (see Attachment 1), PCIA has and will continue to be the preeminent forum for reaching industry consensus on many important PCS issues.

B. PCIA's Commitment to PCS

Through its committees, PCIA plays a pivotal role in defining the direction of PCS by successfully developing industry consensus on key issues facing the PCS industry to present to the FCC, Congress, and the Administration. PCIA's extensive involvement stretches across all aspects and stages of the PCS industry, from the initial request for spectrum allocation to the development of appropriate technical standards.

1. The association's commitment to PCS is reflected by its substantial past efforts to initiate and achieve the allocation of spectrum and licensing of new PCS

PCIA first called for establishment of an FCC PCS proceeding in December of 1989. (See Attachment 2). Later, in January, 1991, PCIA petitioned the Commission to allow the use of the 930-931 MHz "advanced technology paging" reserve for Advanced Messaging Services ("AMS") that combine computer capabilities with portable subscriber devices. PCIA's petition received broad support from the industry and was eventually consolidated in GEN Docket No. 90-314 under the 900 MHz narrowband PCS framework.

In addition, PCIA has produced some of the most widely cited studies and white papers on PCS issues through the work of three main committees -- the PCS Technical and Engineering, PCS Marketing and Consumer Affairs, and PCS Legislative and Regulatory committees. These documents include:

- ▶ PCIA's Service Descriptions Document, which established standardized terminology, categories and feature descriptions for both existing and emerging personal communication services;
- ▶ PCIA's PCS Market Demand Forecasts, which illustrate market demand for both existing and new PCS services in a fully competitive market in 1998 and 2003;
- ▶ PCS Market Trials Report, which summarizes findings from the initial round of PCS market and technical trials;
- ▶ PCS Spectrum Auctions White Paper, which outlines key issues facing the industry and the FCC as it prepares to undertake spectrum auctions for PCS; and,
- ▶ Standards Requirements Documents, which analyze critical issues such as requirements for a Common Air Interface.

These and similar documents produced by the association have given the industry valuable insight into consumer demand for the next generation of wireless services and have identified critical issues that must be resolved as PCS services are offered to the public.

2. The association is currently engaged in numerous activities designed to facilitate the finalization of sound PCS rules and the successful deployment of services

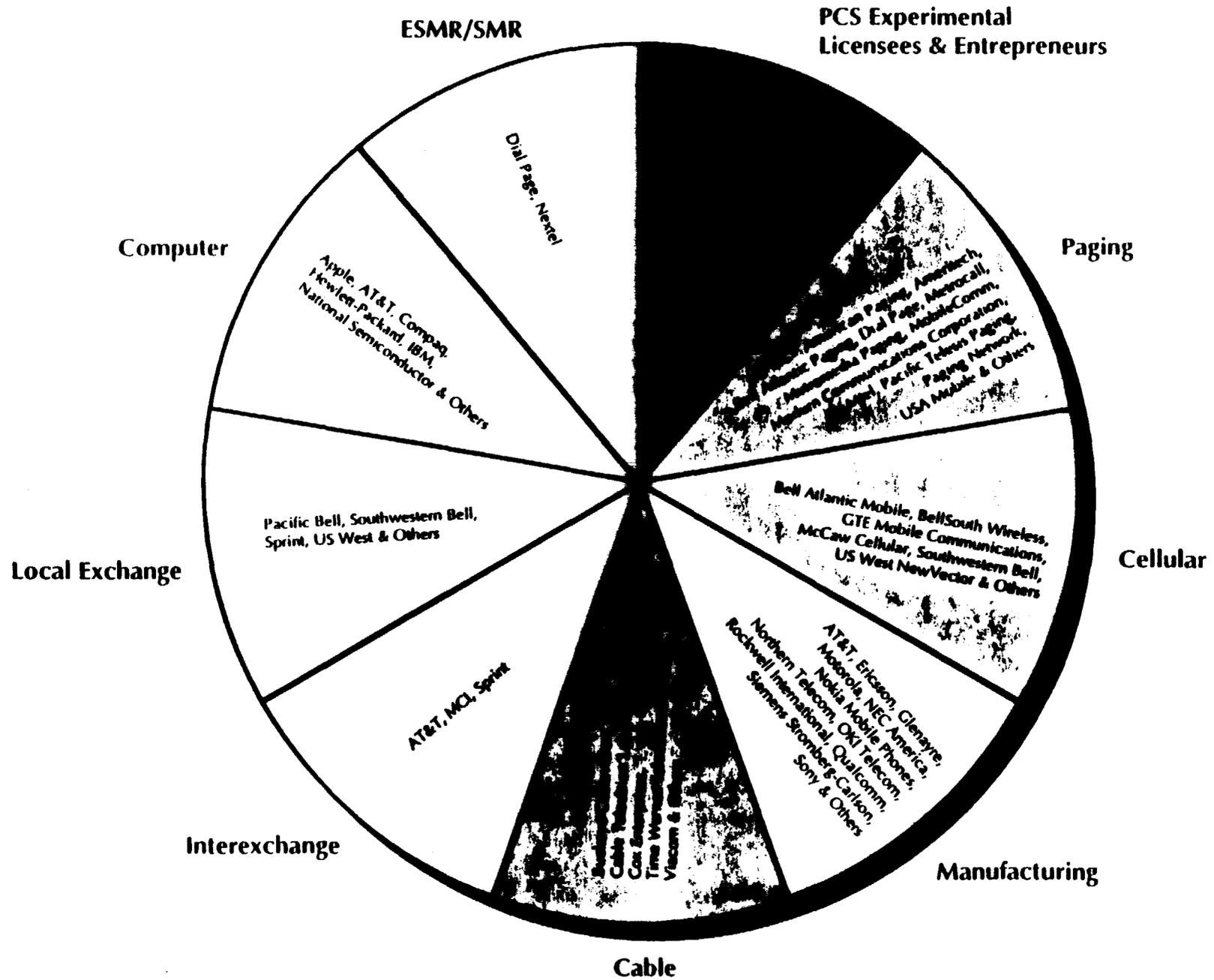
PCIA continues to demonstrate its commitment to PCS through its involvement in recent activities designed to remove significant obstacles to the timely introduction of functional and competitive PCS services. Highlights of some of PCIA's efforts in this regard include:

- ▶ ***PCIA has recently concluded an agreement with Rand McNally which removes all uncertainties with regard to the use of MTAs and BTAs for PCS licensing.*** Specifically, PCIA has secured a blanket license which permits the industry and the FCC to reproduce, create derivative works from, publicly distribute and publicly display the MTA/BTA listings adopted in the Commission's 2 GHz PCS Second Report and Order. Under the terms of this agreement, the use of this material in connection with the licensing, building, marketing and operation of a PCS service by an applicant would be free from any individual licensing requirement. See Attachment 3.

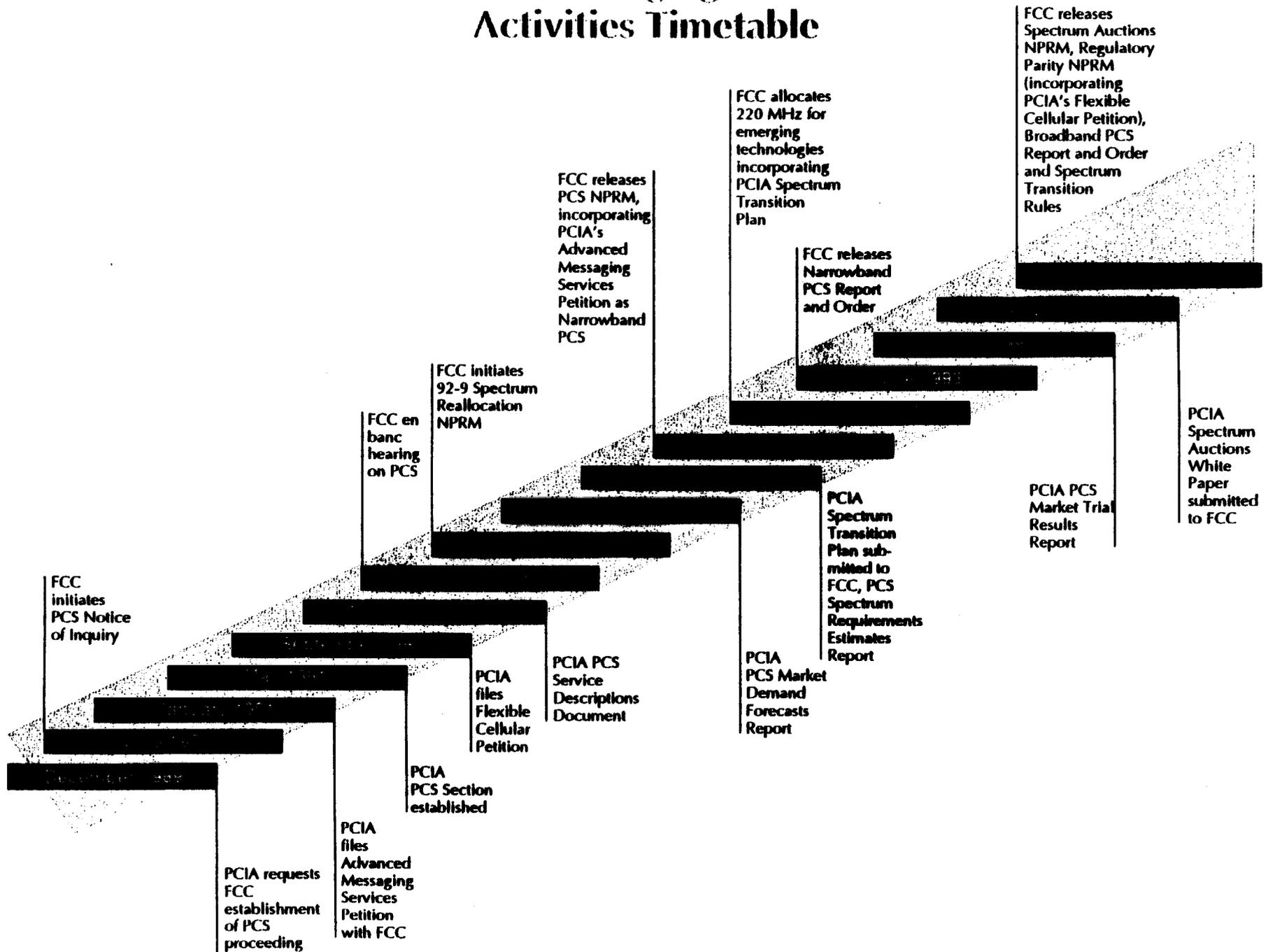
- ▶ ***PCIA has documented the FCC's legal authority to procure outside contractors to assist in the implementation of competitive bidding for PCS.*** The FCC has aggressively pursued the requirements of the Budget Act within the constraints of its required rulemaking procedures. As explained in Attachment 4, the Commission has ample authority to quickly procure the outside services of a support contractor consistent with federal procurement rules.
- ▶ ***PCIA is presently working with public safety organizations, such as the National Emergency Number Association and the Association of Public-Safety Communications Officials, to develop sound policies and procedures for E-911 capabilities.*** Some of the technical and consumer issues PCIA is working to resolve include: the ability to dial 911 without restriction from any PCS terminal; call control or call back capability; proper Public Safety Answering Point routing; hearing impaired and TDD access; and caller location information. See Attachment 5.
- ▶ ***PCIA has taken a leadership role in developing technical standards for spectrum sharing.*** Because PCS providers in the 1850-1990 MHz band will initially share spectrum with the fixed microwave facilities which currently operate in that band, spectrum sharing standards are crucial to the PCS industry. PCIA is thus extensively involved in the current revision of TIA Bulletin 10F to address interference and sharing standards between PCS and fixed microwave licensees. Moreover, PCIA has filed a Petition for Reconsideration of the Commission's 2 GHz PCS Second Report and Order, identifying a number of technical rules that must be modified to greatly facilitate the expeditious deployment of economic and high-quality wireless PCS systems and devices. See Attachment 6.
- ▶ ***PCIA is providing critical industry support to ensure timely and reasonable interconnection for new PCS providers.*** PCIA supports the FCC's decision to require local exchange carriers ("LECs") to provide reasonable and fair interconnection for all commercial mobile radio service providers, including PCS providers, and will soon begin developing model agreements to assist PCS licensees in negotiating such interconnection arrangements.

Through these and other measures, PCIA is working to set a sound stage for the deployment of the next generation of radio services.

The Personal Communications Industry Association And Its Membership



PCIA PCS/Paging/Cellular Activities Timetable



LICENSE AGREEMENT

THIS LICENSE AGREEMENT made as of the 10th day of February, 1994, by and between Rand McNally & Company, 8255 North Central Park, Skokie, Illinois 60076 ("RMC") and Telocator, doing business as "The Personal Communications Industry Association," 1019 19th Street, N.W., Suite 1100, Washington, D.C. 20036 ("PCIA").

1. DEFINITIONS

- a. "Agreement" shall mean this License Agreement.
- b. "Licensed Material" shall mean the BTA/MTA listings contained in Attachment I hereto and the BTA/MTA Map.
- c. "BTA/MTA Map" shall mean the map contained on pages 38-39 of the 1992 version of RMC's Commercial Atlas & Marketing Guide, which graphically depicts the BTA/MTA listings contained in Attachment I hereto.
- d. "License" shall mean the license granted under Section 2 hereof.

2. LICENSE

a. Subject to the terms and conditions of this Agreement, including without limitation Section 4 hereof, RMC irrevocably grants to PCIA, and all other interested persons (collectively referred to as "Licensees") a nonexclusive license to reproduce, create derivative works from, publicly distribute and publicly display the Licensed Material and derivative works created

therefrom, provided however that such rights may be exercised solely for the purposes set forth in Attachment II hereto.

b. As a condition of the License, Licensees shall include:

(i) on any reproduction of all or any substantial portion of the Licensed Material the following legend:

Copyright © 1992 Rand McNally & Company. Rights granted pursuant to a license from Rand McNally & Company (through an arrangement with the Personal Communications Industry Association) to all interested parties for use solely in connection with the licensing, building, marketing and operation of personal communications services, certain specialized mobile radio services and local multipoint distribution services.

(ii) on any reproduction of all or any substantial portion of any derivative work based on the BTA/MTA listings or the BTA/MTA Map (including but not limited to any official Commission version of geographic boundaries based on such listings), the following legend:

Based on Material Copyrighted © 1992 by Rand McNally & Company. Rights granted pursuant to a license from Rand McNally & Company (through an arrangement with the Personal Communications Industry Association) to all interested parties for use solely in connection with the licensing, building, marketing and operation of personal communications services, certain specialized mobile radio services and local multipoint distribution services.

For purposes of this subparagraph 2(b), a reference to twenty-five (25) or less of the BTA/MTA listings in the Licensed Material shall

not constitute a "substantial portion" of the Licensed Material or of any derivative work based thereon.

c. Subject to the rights granted the Licensees hereunder, the Licensed Material and all copyright and other proprietary rights therein are and remain the property of RMC.

3. PAYMENT TO RMC

a. As consideration for the License granted herein, but subject to the terms of Section 4(c) hereof, PCIA, on its own behalf and on behalf of all other Licensees, shall make a one-time payment to RMC in the amount of \$250,000.

b. Payment shall be made in U.S. funds by wire transfer or in the form of a certified bank check payable to Rand McNally & Company which shall be transferred or delivered to RMC within 10 business days after the execution of this Agreement.

4. TERM AND TERMINATION

a. The License granted hereunder shall extend for the entire term of copyright in the Licensed Material, subject to earlier termination as provided herein.

b. RMC may terminate the License as against any particular Licensee for a material breach by such Licensee of the terms of the License described herein, if such breach is not cured within 30 days after such Licensee receives notice of the breach. This right of termination is in addition to, and not in lieu of, any other remedies RMC may have for breach of this Agreement. It

is understood and agreed that PCIA shall have no obligations hereunder to enforce the terms of this Agreement against persons or entities not a party hereto, and, furthermore, any breach of the terms of the License by such third parties shall not be deemed a breach of this Agreement by PCIA nor impair PCIA's rights hereunder. Notwithstanding the foregoing, to the extent PCIA's willful conduct in violation of this Agreement causes or results in a breach of the License by a third party, such willful conduct shall constitute a breach of the License by PCIA.

c. This Agreement and the License granted hereunder shall terminate and be of no further force and effect with respect to all Services specified in Attachment II hereto if, at any time prior to the initial auction of 2 GHz broadband Personal Communications Services licenses, the Commission elects to use geographic boundaries for such auction that are not based on the Licensed Material, provided that PCIA so notifies RMC within 60 days after the Commission's decision. Within 10 business days after receiving such notification, RMC will refund to PCIA \$250,000.

5. OBLIGATIONS OF RMC

a. Upon execution of this Agreement, RMC shall provide to PCIA: (i) The 1993 version of RMC's Trading Area System MTA/BTA Diskette, which is an electronic version of the BTA/MTA listings contained in Attachment I hereto, and (ii) twelve (12)

copies of each of the BTA/MTA listings comprising Attachment I hereto and the BTA/MTA Map.

b. Upon execution of this Agreement, RMC shall provide to the Commission two copies of the Licensed Material in hard copy form for use by Licensees in accordance with the terms and conditions of this Agreement.

c. For a period of six (6) months after the date hereof, RMC shall, upon request therefor, make available to individual Licensees additional copies of the Licensed Material (excluding the BTA/MTA Map), which shall include the alterations and enhancements made by the Commission that are summarized in the Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd 7700 (1993), in hard copy and electronic form, at the fees summarized in Attachment III hereto. RMC shall have no obligation to (i) make any other alterations or enhancements to the Licensed Material that may be made by the Commission or any other Licensee, or (ii) include any alterations or enhancements whatsoever in any version of its Commercial Atlas & Marketing Guide.

6. RESERVATION OF RIGHTS BY RMC

a. RMC reserves its right to alter the Licensed Material or any part thereof in the future. Any modifications to the Licensed Material shall not be included in the Licensed Material under this Agreement, unless the parties agree otherwise in a signed writing.

b. RMC reserves all rights with respect to the Licensed Material not expressly granted herein, including but not limited to rights in respect of use of the Licensed Material or any part thereof for purposes other than those described on Attachment II hereto. The purposes for which the Licensed Material may be used may be expanded (e.g., to provide for use in connection with future Commission proceedings) solely with the prior written authorization of RMC and upon payment of additional compensation to RMC by an appropriate party, in an amount to be negotiated with such party.

7. REPRESENTATIONS AND WARRANTIES OF RMC

a. RMC represents and warrants that (i) it is the owner of the Licensed Material and any and all copyright rights therein, (ii) it has all rights necessary to enter into this Agreement and to grant the License granted herein, and (iii) the Licensed Material constitutes "work made for hire," as such term is defined under the Copyright Act of 1976, as amended.

b. RMC shall indemnify and hold harmless PCIA from and against any losses, damages, liabilities, actions, judgments, settlements, costs and expenses (including reasonable attorneys' fees) arising from any assertion against PCIA that the Licensed Material used within the scope of this Agreement infringes or violates any rights of any third party, provided that: (i) PCIA promptly notifies RMC of any such assertion; (ii) RMC has sole control over the defense of such claim, including any related settlement negotiations; and (iii) PCIA cooperates with RMC in the

defense of such claim (at no cost to PCIA). This indemnity shall not apply to any modification or adaptation of the Licensed Material if use of the Licensed Material alone would not be infringing.

8. GENERAL

a. Waiver. The failure or delay by any party to enforce any term of this Agreement shall not be deemed a waiver of such term or of the right to enforce such term in the future. No waiver shall be binding unless in a writing signed by the party making the waiver. RMC's waiver of breach by one Licensee shall not be deemed a waiver of breach by another Licensee.

b. Complete Agreement. This Agreement, including the Attachments hereto, constitutes the entire agreement between the parties and supersedes all prior and contemporaneous communications, representations, understandings or agreements between the parties with respect to the subject matter hereof. It may be modified only in a writing signed by the parties.

c. Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the other provisions of this Agreement shall continue in full force and effect notwithstanding such holding.

d. Notices. Notices relating to this Agreement shall be in writing and sent by reliable air courier service, or by registered or certified mail addressed to the parties at the addresses set forth above. Any notice to RMC shall be sent to the

attention of Deborah Lipoff, Esq. Any notice to PCIA shall be sent to the attention of Thomas A. Stroup (with a copy, which shall not constitute notice, to R. Michael Senkowski, Esq., Wiley, Rein & Fielding, 1776 K Street, N.W., Washington, D.C. 20006). The address to which any notice may be given may be changed upon written notice as provided above.

e. CONTROLLING LAW. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED UNDER THE SUBSTANTIVE LAWS OF THE STATE OF ILLINOIS, AS APPLICABLE TO CONTRACTS MADE AND TO BE PERFORMED IN ILLINOIS.

f. COUNTERPARTS. This Agreement may be executed in separate counterparts, each of which shall be deemed an original and both of which together shall constitute one and the same instrument.

g. Publicity. The parties hereto agree to issue a mutually acceptable press release regarding this Agreement or the License granted hereunder.

ATTACHMENT I

BTA/MTA Listings Attached

ATTACHMENT II

Statement of Purposes For Which the Licensed Material May be Used

The Licensed Material may be used:

(i) In any documents prepared in connection with Services (described below) referred to in proceedings completed or pending before the Commission as of the date of this Agreement that rely on or refer to the Licensed Material. The "Services" shall be limited to: 2 GHz broadband Personal Communications Services ("PCS"), as authorized in GEN Docket 90-314 or any successor proceedings; 900 MHz narrowband PCS, as authorized in GEN Docket No. 90-314 and ET Docket 92-100 or any successor proceedings; 800 MHz wide-area Specialized Mobile Radio Services or Expanded Mobile Service Providers, as authorized in PR Docket No. 93-144 or any successor proceedings; and Local Multipoint Distribution Services, as authorized in CC Docket No. 92-297 or any successor proceedings.

(ii) In any documents or other materials prepared in connection with the licensing, building, marketing and operation of the Services listed in (i) above.

ATTACHMENT III
SCHEDULE OF FEES FOR ADDITIONAL COPIES OF PRINTED LISTINGS

Print Listing of Licensed Materials	\$25/copy *
MTA/BTA Diskette	\$25 for first copy; \$5 for each additional copy*

* additional charge for Federal Express

WILEY, REIN & FIELDING

MEMORANDUM

TO: Personal Communications Industry Association

FROM: R. Michael Senkowski
Philip J. Davis

DATE: February 7, 1994

RE: FCC's Authority to Secure a Support Service Contractor
for Competitive Bidding Implementation

I. INTRODUCTION

A question has been raised whether the Federal Communications Commission ("FCC" or "Commission"), in implementing Title VI of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), is required to follow the full and open competition requirements of the Competition in Contracting Act ("CICA") and its implementing provisions in the Federal Acquisition Regulation ("FAR"). Research shows that, under the terms of CICA and the FAR, as well as applicable precedent, there are two exceptions to the general requirement for competition which could apply in the circumstances here.

The first, the so-called "Public Interest" exception, provides that full and open competition need not be provided for when the agency head determines that it is not in the

public interest to do so, provided the agency head complies with prescribed procedural requirements. Where, as here, an agency is required to comply with a Congressional mandate of significant importance to the public at large, the use of this exception appears especially appropriate.

The second exception which appears applicable is the so-called "Unusual and Compelling Urgency" exception. Under this exception, full and open competition is not necessary when an agency's need for supplies or services is of such "unusual and compelling urgency" that the Government would be "seriously injured" unless it was permitted to limit competition. As with the Public Interest exception, certain procedural steps must be followed in order to properly rely on this exception. However, the head of the agency need not be involved, for the authority to invoke this exception is within the purview of the Contracting Officer.

In this instance, the FCC has actively pursued the implementation of the competitive bidding and licensing provisions of the Budget Act since its passage. Under its established procedures, the Commission has had to invite full public comment and afford due consideration to various options for implementing competitive bidding. It now appears that the FCC might require the help of a support services contractor to assist it in meeting its mandate to begin issuing licenses and permits for Personal Communications Services ("PCS") by May 7, 1994, and to effectively achieve

Congressional goals. Under these unusual and compelling circumstances, it appears appropriate for the FCC to take such actions as are necessary to avoid the serious harm to the Government that would occur if the licensing and permitting process could not be initiated in a timely and efficient manner.

II. BACKGROUND

On August 10, 1993, Congress enacted the Budget Act. The Budget Act directs the FCC to prescribe competitive bidding regulations by March 8, 1994 (within 210 days after the date of enactment) and to begin issuing licenses and permits for PCS by May 7, 1994 (270 days after enactment).

Among other things, Title VI of the Budget Act amended the Communications Act of 1934 ("1934 Act") by authorizing the FCC to utilize a system of competitive bidding to award licenses for radio services. More specifically:

If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

(Budget Act § 6002(a); 1934 Act § 309(j)(1)(emphasis added)).¹ The FCC may utilize competitive bidding procedures to issue licenses "only when the Commission accepts for filing mutually exclusive applications for a license and the Commission has determined that the principal use of that license will be to offer service in return for compensation from subscribers." (H.R. Rep. No. 213, 103d Cong., 1st Sess. 473 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1162).

The Budget Act directed the FCC to:

[P]rescribe regulations to implement section 309(j) . . . within 210 days after the date of enactment . . . [and] within 270 days after such date of enactment, commence issuing licenses and permits in the personal communications service.

(Budget Act § 6002(d)(1), (2)(B)). The Budget Act does not specify the competitive procedures to be used but, rather, leaves it to the FCC to establish a "competitive bidding methodology" by regulation and to "design and test multiple alternative methodologies [for issuing licenses or permits] under appropriate circumstances." (Id. § 6002(a)(3)).

The FCC released its Notice of Proposed Rulemaking to implement the competitive bidding provisions of the Budget Act on October 12, 1993. Public comments were required by November 10, 1993. Due to the volume of the comments -- approximately 200 -- the FCC's reply date was extended from

¹ Licensing was previously accomplished by lottery or through comparative hearings in an auction-like proceeding.

November 24 to November 30, 1993. Competitive bidding regulations must be prescribed by March 8, 1994.

The FCC is currently evaluating the record in this proceeding and various entities are in the process of conducting experiments on bidding methodologies. For example, NTIA advocates the use of simultaneous electronic bidding and planned to conduct a software experiment at CalTech on January 27-28 to demonstrate the feasibility of this approach. The Commission is expected to announce its general competitive bidding rules at its March open meeting. The rules will be subject to the reconsideration process.

On a related note, the Commission issued its PCS rules on October 22, 1993. These rules identify the number of PCS licenses upon which prospective licensees would be bidding, the PCS service areas available, and other matters. Sixty-six parties filed petitions for reconsideration of these rules on December 8, 1993. Public comments and reply comments on the petitions were received on January 3 and January 13, respectively. As noted above, the statutory deadline for issuing PCS licenses is May 7, 1994, 270 days after the date of enactment of the Budget Act.

III.

Alternative Methods of Acquiring the Services of a Support Contractor to Meet Statutory Mandates

1. **CICA in General**

CICA requires that, with certain limited exceptions, executive agencies conducting a procurement for supplies or services:

- (A) shall obtain full and open competition through the use of competitive procedures . . . and
- (B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(41 U.S.C. § 253 (a)(1)). These provisions are implemented in the FAR which applies to the acquisition of all goods and services obtained by an executive agency, such as the FCC, pursuant to a contract that obligates the Government to expend appropriated monies. (FAR §§ 1.103, 2.101, 6.101). The phrase "competitive procedures" refers to procedures under which an agency enters into a contract pursuant to full and open competition. (41 U.S.C. §§ 259(b)(2), 403(b)). A contract is deemed to be awarded pursuant to full and open competition when all responsible sources are permitted to compete for the product or service being acquired. (41 U.S.C. § 403(7); FAR § 6.003).

CICA also provides that an agency may use other than fully competitive procedures in seven specific circumstances: (1) only one specific source can satisfy the Government's needs, (2) competition must be restricted due to unusual and compelling circumstances, (3) to facilitate industrial mobilization, (4) to comply with a treaty or international agreement, (5) when expressly authorized by statute or for brand-name commercial items for resale, (6) to protect National Security, and (7) when deemed in the Public Interest by the agency head. (41 U.S.C. § 253(c); FAR § 6.302). However, an agency is prohibited by CICA from using these procedures on the basis of "lack of advance planning" on the agency's part. (41 U.S.C. 253(f)(5)(A); FAR § 6.301(c)).

2. The Public Interest Exception to Full and Open Competition

The so-called "Public Interest" exception appears applicable here. This exception may be invoked when the head of an agency:

- (A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and
- (B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(41 U.S.C. § 253(c)(7); accord, FAR § 6.302-7). Certain procedural prerequisites apply to this exception: (i) the

decision by an agency head must be supported with a determination and finding ("D&F") prepared pursuant to subpart 1.7 of the FAR; (ii) the D&F must be signed by the agency head (this responsibility cannot be delegated); (iii) Congress must be notified not less than 30 days before award of a contract; and (iv) this exception may only be used when no other exception to competition applies. (FAR § 6.302-7).²

Of particular interest to the issues faced by the FCC is a recent decision of the General Accounting Office ("GAO") denying a protest that involved, among other things, an agency head's decision to limit competition on the basis of the public interest exception. (See Affiliated Precision Services, Inc., B-253757, 1993 WL 437173). Although the particular issue raised by the protester in Affiliated Precision was its classification as other than a small business, it was decided in the context of the NASA Administrator's reliance on the Public Interest exception in order to comply with a statutory goal:

The agency explains that this procurement was set aside for SDB concerns to meet NASA's statutory goals, as set out in the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act

² The term "agency head" shall mean the head or any assistant head of any executive agency, and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration.