PCS PRIMECO, L.P.

May 25, 1995

BY HAND

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William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Mail Stop Code 1170
Washington, D.C. 20554

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Re: PCS PRIMECO, L.P.
- Opposition to Communications One, Inc./GO Communications Corporation Petition for Reconsideration
- PP Docket No. 93-253; ET Docket No. 92-100

Dear Mr. Caton:

On behalf of PCS PRIMECO, L.P., enclosed for filing are an original and four copies of its Opposition to the Petition for Reconsideration jointly filed May 12, 1995 by Communications One, Inc. and GO Communications. The microfiche copies of this filing will be submitted on Friday, May 26, 1995.

Please contact us should you have any questions concerning this filing.

Sincerely yours,

PCS PRIMECO, L.P.

By: William L. Roughton, Jr.

cc: Rosalind K. Allen (by hand)
Regina Keeney (by hand)

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c/o AirTouch Communications ✦ 1818 N Street, N.W., Suite 800 ✦ Washington, DC 20036
(202) 293-3800

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Deferral of Licensing of MTA Commercial Broadband PCS	)	PP Docket No. 93-253
	)	ET Docket No. 92-100
	)	
Implementation of Section 309(j) of the Communications Act — Competitive Bidding	)	

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OPPOSITION TO PETITION FOR RECONSIDERATION

PCS PRIMECO, L.P.

William L. Roughton, Jr.
% AirTouch Communications, Inc.
1818 N Street, N.W., Suite 800
Washington, DC 20036
(202) 293-4960

May 25, 1995

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SUMMARY

PCS PRIMECO, L.P. ("PRIMECO") opposes the Petition for Reconsideration ("Petition") jointly filed by Communications One, Inc. ("CI") and GO Communications Corporation ("GO") seeking full Commission reconsideration of the Wireless Telecommunications Bureau Order denying CI's "Emergency Motion to Defer MTA PCS Licensing" ("*CI Order*").

The Petition is in fact principally a request for stay of A/B Block MTA licensing which should be summarily denied, for the reasons stated in PRIMECO's Consolidated Opposition filed May 19, 1995.

In addition, contrary to CI/GO's claims, there is no new or novel issue of law before the Commission warranting reconsideration. Petitioners' assertions are based on a complete misreading of the Budget Act. Contrary to Petitioners' flawed analysis, A/B licensing will promote rapid deployment, competition, diversity and the public interest — not excessive concentration of licenses — and the Commission's rules, as well as the A/B auction results, fully comply with all Budget Act objectives. The Bureau appropriately followed Commission precedent in the *CI Order*.

The Petition is also procedurally infirm because, again contrary to CI/GO's claims, no changed circumstances exist here. In the *CI Order*, the Bureau considered the potential for delay between licensing of A/B Block and C Block winners. No new decisional facts are present.

Finally, the public interest is served by rapid deployment of PCS services and increased wireless competition. The CI/GO Petition should be denied and PRIMECO's MTA applications should be expeditiously granted.

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OPPOSITION TO PETITION FOR RECONSIDERATION

PCS PRIMECO, L.P. ("PRIMECO")[1] hereby opposes the Petition for Reconsideration ("Petition") jointly filed May 12, 1995[2] by Communications One, Inc. and GO Communications Corporation ("CI/GO") seeking full Commission reconsideration of the April 12, 1995 Wireless Telecommunications Bureau ("Bureau") Order denying CI's "Emergency

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1 PRIMECO is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc.) and PCS Nucleus, L.P. (owned by AirTouch Communications, Inc. and U S WEST, Inc.)

2 This filing was consolidated with a Request for Stay of the A/B Block MTA licensing. While this consolidated filing was procedurally defective under the rules (*see* 47 C.F.R. § 1.44(e)), PRIMECO previously filed an opposition to the stay request. *See* PRIMECO Consolidated Opposition (PP Docket No. 93-253, ET Docket No. 92-100; File Nos. 0004-CW-L-95, *et. al.*), filed May 19, 1995. PRIMECO hereby incorporates by reference this earlier filing. To the extent a waiver is needed for acceptance of the incorporated filing, PRIMECO hereby requests such waiver.

Motion to Defer MTA PCS Licensing" ("Emergency Motion").[3] For the reasons stated herein, CI/GO's Petition should be denied.

I. INTRODUCTION/STATEMENT OF INTEREST

PRIMECO was the winning bidder for 11 markets in the A/B Block MTA auction. On November 17, 1994, PRIMECO submitted a $54,666,431 upfront payment to participate in the auction; thereafter, on March 20, 1995, PRIMECO submitted an additional $166,778,769 to the Commission to bring its total down payment up to 20% of the winning bid amount for the 11 markets won (or $221,445,200). On April 5, 1995, PRIMECO submitted 11 long-form (Form 600) applications for its winning MTA markets. Upon license grants, an additional $885,780,000 will become due from PRIMECO.

Any delay in the processing of the A/B Block licenses is tremendously prejudicial and detrimental to PRIMECO (as well as to the other winning MTA license applicants).[4] Importantly, licensing delay directly contravenes critical Congressional objectives for the rapid deployment of PCS services and increased wireless competition — and thus disserves the public interest.[5] PRIMECO has demonstrated its financial, legal and other qualifications to be a Commission licensee, and is ready, willing and able to commence PCS construction and

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3 *Order, Deferral of Licensing of MTA Commercial Broadband PCS*, GEN Docket No. 93-253, ET Docket No. 92-100, DA 95-806 (released Apr. 12, 1995) ("*CI Order*").

4 *See* letter from Mr. George F. Schmitt, President and Chief Executive Officer, PRIMECO, to Chairman Reed E. Hundt (Mar. 23, 1995). Together, winning bidders have submitted a total of $1.4 billion in deposit money with the Commission. Upon license grants, an additional $5,615,523,038 will be due from PRIMECO and the other Block A/B MTA market winners (representing the total winning bid amount of $7,019,403,797 for the 99 licenses).

5 See 47 U.S.C. § 309(j)(3)(A) (Supp. 1995).

deployment. Petitioners have provided no legitimate reason for deferral of action on PRIMECO's applications.

Despite being titled a "Petition for Reconsideration," a review of the pleading indicates that CI/GO principally are seeking a stay of A/B Block MTA licensing with respect to three MTA winners — PRIMECO, AT&T and WirelessCo. As demonstrated in PRIMECO's Consolidated Opposition (to Requests for Stay), filed with the Commission on May 19, 1995, Petitioners' stay request is without merit and should be summarily denied.[6] In the interest of resolving all matters which may delay licensing action on the A/B Block MTA frequencies, however, PRIMECO hereby addresses CI/GO's claims that novel questions of law or changed circumstances require reconsideration of the *CI Order*. For the reasons discussed herein, no basis for reconsideration has been presented.[7]

II. NO NEW/NOVEL QUESTIONS OF LAW WARRANT RECONSIDERATION OF THE *CI ORDER*

Petitioners contend that reconsideration of the *CI Order* is warranted to address the "novel" question of law that "licensing the three largest winners [in the A/B auctions] . . . would violate Section 309(j) of the Communications Act"[8] — allegedly because such licensing

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6 *See* note 2 *supra*.

7 As demonstrated herein, the CI/GO Petition fails to present any issues warranting reconsideration, and fails to satisfy the requirements for a stay. Accordingly, PRIMECO submits that the Petition was filed for purposes of delay only, and should be dismissed as being contrary to the public interest. *See Los Angeles License Renewals*, 68 FCC 2d 75 (1978); *General Communications Inc. v. Alascom Inc. (Abuse of Process Allegations), Memorandum Opinion and Order*, 4 FCC Rcd. 7447 (1988).

8 Petition at 2-3. CI/GO claim they are seeking reconsideration of the Bureau's action on the earlier CI Emergency Motion. However, CI did <u>not</u> originally seek to stay the licensing of PRIMECO, WirelessCo and AT&T. This request is new to the Petition.

would result in an excessive concentration of licenses without dissemination of licenses to a wide variety of applicants.[9]

PRIMECO is unable to discern what novel question of law the Bureau failed to consider before adopting the *CI Order*. The A/B auctions concluded March 13, 1995, one month prior to the adoption of the *CI Order*. Thus, the Bureau was fully aware of who the top three winners were when it addressed CI's Emergency Motion. In light of the facts, the Bureau evaluated the Commission's Section 309(j) mandates, and determined that the public interest in rapid deployment of service outweighed any potential harm C Block winners might experience as a result of licensing the A/B Block winners first. This decision was entirely consistent with the Commission's earlier conclusions in the *Fifth Report and Order* and *Fourth Memorandum Opinion and Order* — wherein the Commission initially decided, and affirmed, its decision to auction and license PCS spectrum in sequential blocks.[10]

By the Petition, CI is again improperly seeking an untimely reconsideration of these prior Commission decisions. Despite CI/GO's dramatic claims, the fact is that the MTA licensing scheme and the MTA auction results fully comport with Section 309(j) and with Commission precedent.

A. CI/GO's Economic Analysis of the A/B Auction Results is Erroneous

Petitioners argue that licensing the A/B Block winners prior to licensing C Block winners will "produce excessive concentration of licenses and not provide designated entities

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9 Petition at 7-10.

10 *Fifth Report & Order*, PP Docket No. 93-253, 9 FCC Rcd. 4957, 4969-71 (1994) ("*Fifth R&O*"); *Fourth Memorandum Opinion & Order*, PP Docket No. 93-253, 9 FCC Rcd. 6858, 6869-73 (1994).

mandated opportunities."[11] Relying on an affidavit from A. Daniel Kelley, Petitioners base their claim of excessive concentration on the Department of Justice's ("DOJ") Joint Horizontal Merger Guidelines and, in particular, DOJ's use of the Herfindahl-Hirshman Index ("HHI").[12] However, as demonstrated in the attached declaration of Professor Robert G. Harris,[13] Dr. Kelley's analysis and conclusions are fatally flawed. In fact, issuing the A/B licenses expeditiously will both decrease concentration and increase competition in the wireless industry.[14]

Prompt licensing of the A/B Block winners will in fact promote the public interest by decreasing the concentration of mobile communications services licenses and increasing

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[11] *See* Petition at i.

[12] *See* Department of Justice and Federal Trade Commission Joint Horizontal Merger Guidelines, ¶ 13,104 Trade Reg. Rep. (CCH) § 1.51 (1992).

[13] *See* Declaration of Robert G. Harris (Associate Professor, Walter A. Haas School of Business, University of California, Berkeley; Principal, Law and Economics Consulting Group), dated May 23, 1995 (Attachment 1).

[14] *See* Harris Declaration at 4-6. First, Dr. Kelley's use of the HHI is economically meaningless because it is calculated on the basis of the population of the areas that the various bidders have won — not on market share. The winners of the A/B Block auction have no market share — they have no licenses, no networks, and no customers. As a result, licensing the winners cannot increase concentration in the mobile communications services industry; in fact, the A/B winners can only decrease concentration upon deployment of their systems. Dr. Kelley also uses a flawed definition of the relevant product market. The relevant product market is not simply PCS, but all mobile communications services. Dr. Kelley makes his relevant product market even more artificial by confining "PCS" to the A/B Block, and ignoring forthcoming licensing of frequencies in the C, D, E and F Blocks.

competition in the mobile communications services market. When one accounts for narrowband PCS, ESMR, and paging services, the shortcomings in Petitioners' analysis become all the more pronounced. In sum, Petitioners' economic analysis is erroneous and cannot support a claim that the Commission has violated its statutory obligation to avoid excessive concentration of licenses.[15]

B. No New Questions of Law Result from the A/B Auction

Contrary to Petitioners' claims, the Commission has fully complied with its statutory obligations to prevent excessive concentration of licenses and promote dissemination of licenses to a wide variety of applicants. Licensing the A/B Block winners is entirely consistent with those statutory goals.[16]

Through its design of the auction process, service area designations, and bandwidth assignments, the Commission has ensured that excessive concentration will <u>not</u> occur.[17] First, the Commission has established frequency blocks and service areas of varying sizes.[18] PCS spectrum was allocated in this manner to reduce capital costs for designated entities and to ensure that established companies would not dominate the market for PCS services.[19]

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15 *See* Harris Declaration for a more complete rebuttal to Petitioners' economic claims.

16 As noted above, PRIMECO fully addressed CI/GO's claims regarding the alleged Section 309(j) violation in its Consolidated Opposition to the CI/GO Stay Request.

17 *See id.*

18 Two 30 MHz blocks (A and B) were established for a nationwide service; a third 30 MHz BTA block (C) was set aside for designated entity participation; a 10 MHz BTA block (F) was also set aside as a second designated entity block; and two additional 10 MHz BTA blocks were established. *Memorandum Opinion & Order*, GEN Docket No. 90-314, 9 FCC Rcd 4957, 4975-88 (1994) ("*PCS MO&O*"); *Fifth R&O* at 5587-88.

19 *Fifth R&O* at 5579; *see also PCS Reconsideration MO&O* at 4978-82.

The Commission also imposed varying attribution limits on PCS and cellular ownership interests, again to ensure that there be no excessive concentration of licenses in the hands of a few controlling entities.[20] The Commission also adopted spectrum aggregation limits to ensure "that no individual or person or a single entity is able to exert undue market power through partial ownership in multiple PCS licensees in a single service area."[21] Specifically, PCS licensees may not have an ownership interest in frequency blocks that total more than 40 MHz and which serve the same geographic area.[22]

In addition, the Commission imposed even more rigid limits on the amount of PCS spectrum which may be held by cellular licensees in areas where there is a significant overlap between the designated PCS service area and a cellular licensee's service area.[23] The Commission also promulgated a separate rule for designated entity licenses, limiting the number of licenses applicants may obtain in the C and F blocks.[24] Clearly, then, the Commission has established safeguards which ensure that there will be no excessive concentration of licenses, and that there will be a dissemination of licenses to a wide variety of entities. Petitioners' failure to address or acknowledge these relevant Commission actions is nothing short of remarkable.

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20 *PCS Reconsideration MO&O* at 4997-5010.

21 *Second Report & Order*, GEN Docket No. 90-314, 8 FCC Rcd 7700, 7728 (1993) ("*Second R&O*").

22 *See* 60 Fed. Reg. 26375 (1995) (to be codified at 47 C.F.R. § 24.229). A 45 MHz spectrum "cap" has also been imposed on CMRS providers in general. 59 Fed. Reg. 59945 (1994) (to be codified at 47 C.F.R. § 20.6).

23 *Second R&O* at 7744. *See* 50 Fed. Reg. 32830 (1994) (to be codified at 47 C.F.R. § 24.204).

24 *See* 59 Fed. Reg. 53463 (1994) (to be codified at 47 C.F.R. § 24.710).

III. NO CHANGED CIRCUMSTANCES EXIST WHICH WARRANT RECONSIDERATION

Petitioners contend that reconsideration is warranted due to changed circumstances. Specifically, Petitioners maintain that the *CI Order* failed to address both the potential for delay of the C Block auction and the potential impact of the D.C. Circuit's stay of the C block auction on designated entities' ability to attract capital.[25] Contrary to CI/GO's claims, however, the Bureau expressly acknowledged that the Court-imposed stay could result in a significant delay in the licensing of the C Block.[26] The Bureau noted that oral argument on the TEC appeal was not scheduled until September 12 — nearly six months after the D.C. Circuit's announced stay of C block activities.[27] In fact, the stay in effect at the time of the *CI Order* could have lasted well beyond the August 2 date now scheduled for the C Block auction commencement. Thus, the only changed circumstance here is the fact that, because of the dissolution of the stay, it is now likely that the C Block auction will commence sooner than previously expected.

CI/GO further contend that the Bureau failed to consider the impact delay would have on designated entity financing efforts subsequent to adoption of the CI Order.[28] At the outset, PRIMECO notes that CI/GO do not rely on facts/circumstances unknown at the time of CI's Emergency Motion filing. Thus, the Petition is procedurally infirm on this basis.[29]

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25 *See* Petition at 11-12 (citing *Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. 1995)).

26 *CI Order* at ¶ 6 and n.3.

27 *Id.*

28 *See* Petition at 11-12.

29 *See* 47 .C.F.R. § 1.106(c).

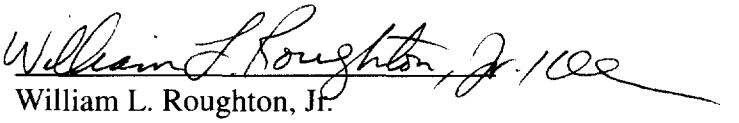
Moreover, CI/GO provide no facts to substantiate their generalized claim of financing difficulties, or that these difficulties were in any way caused by the *CI Order*, the auction results, or the prospect of A/B licensing. Assuming *arguendo* that financing difficulties exist, CI/GO also ignore the fact that other factors may be causing the difficulties complained of.[30] That the Bureau did not fashion the *CI Order* to somehow alleviate CI/GO's purported financing dilemma is simply not a basis for reconsideration.

CONCLUSION

Rapid deployment of PCS service will increase wireless competition and further public interest objectives. CI/GO have presented no reasons for reconsideration of the *CI Order*. For the reasons discussed herein, and in PRIMECO's earlier filed Consolidated Opposition, the CI/GO Petition should be denied and PRIMECO's MTA applications expeditiously granted.

Respectfully submitted,

PCS PRIMECO, L.P.



By: William L. Roughton, Jr.
c/o AirTouch Communications, Inc.
1818 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 293-4960

May 25, 1995

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30 *See, e.g., Adarand Constructors, Inc. v. Federico Pena, Secretary of Transportation, et. al.*, 115 S.Ct. 41 (1995) (oral argument Jan., 17, 1995).

ATTACHMENT 1

DECLARATION OF DR. ROBERT G. HARRIS

A. Qualifications

1. My name is Robert G. Harris. I am an Associate Professor in the Walter A. Haas School of Business, University of California, Berkeley, and a Principal in the Law and Economics Consulting Group. I earned a Doctor of Philosophy degree in Economics from the University of California, Berkeley. At Berkeley, I teach undergraduate, MBA and Ph.D. courses in Business & Public Policy; Economics for Managerial Decisions; Antitrust and Economic Regulation; and Competitive Strategies and Public Policies in Telecommunications. I have published several dozen articles and papers analyzing the effects of public policies on industry performance in telecommunications industries. I am Co-Director of the Consortium for Research in Telecommunications Policy, a collaborative program of the University of California at Berkeley, the University of Michigan and Northwestern University.

2. I have testified before committees of the U.S. Senate and the U.S. House of Representatives on antitrust, transportation and telecommunications legislation; to the Federal Communications Commission on spectrum auction rules, transfer of cellular licenses, price cap regulation, deployment of broadband networks and cable rate regulation; to the public utility commissions of fourteen states on rate design, price cap regulation and local competition policy; and to U.S. District Courts in antitrust, intellectual property and other business litigation. I have served as a consultant to the U.S. General Accounting Office, U.S. Office of Technology Assessment, U.S. Department of Justice, U.S. Department of Transportation, Interstate Commerce Commission, California Attorney General and California Department of Consumer Affairs. I have also consulted to numerous telecommunications carriers and equipment manufacturers. My curriculum vitae is attached as Exhibit 1.

3. I have followed the development of PCS spectrum allocation policies since the legislative debate in 1993. With Professor Michael Katz, I submitted testimony on behalf of NYNEX Corporation in Docket 93-253, in support of competitive bidding rules. While we initially favored simultaneous auctions for all PCS licenses,[1] we also recommended that, if the Commission did adopt a sequential auction process, it should simultaneously auction one or more whole blocks at a time, as the Commission has done. We noted that no auction mechanism perfectly satisfies all of the eight desirable properties of auctions. Hence, we urged that "The best the Commission can do is explicitly identify the tradeoffs it faces and then make judicious choices among the imperfect alternatives available." In reviewing the Commission decisions and implementation of competitive bidding rules in PP Docket No. 93-253, I am impressed by the extent to which the Commission has made "judicious choices" among the alternatives it considered.

4. Having observed the outcome of the A/B MTA PCS license auction, and in anticipation of the outcomes in the C, D, E and F PCS auctions, I am convinced that the rules adopted and implemented by the Commission are generating their intended results: encouraging rapid deployment of new PCS networks and services, guaranteeing opportunities for diversity in the services and suppliers of mobile communications; ensuring efficient use of spectrum and capturing a large share of the economic value of the spectrum for the public treasury.

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[1] The economic rationale supporting our recommendation of a simultaneous auction of all six PCS blocks was that it would facilitate the aggregation of licenses into regional or national coverage areas, which, in our view, would promote the public interest in rapid deployment of PCS. We did not believe that simultaneity was needed to prevent earlier licensees from gaining a "headstart" advantage over later licensees, because it is evident that auction prices would capitalize any possible advantages of early starts or disadvantages of later starts.

B. Purpose of the Declaration

5. With that background and in that context, I have been asked by PCS PRIMECO, L.P. ("PRIMECO") to review and respond to the petition of Communications One, Inc. (Comm One) and GO Communications Corporation ("GO") seeking reconsideration of an earlier Wireless Telecommunications Bureau decision and urging the Commission to defer the issuance of the A and B PCS licenses of PRIMECO, AT&T and WirelessCo. I cannot imagine a step more calculated to interfere with the rapid deployment of PCS and the continued development of competition and diversity in mobile communications services. At this point, deferral of license issuance would constitute blatant "recontracting" -- changing the rules of the game after it has been played. The prices of the A and B licenses were established by a highly competitive bidding process that relied upon the Commission's commitment to issue these licenses and, subsequently, conduct auctions for the C, D, E and F licenses. Just as the prices paid by the A and B licenses incorporated the separate auctions, so too will the bidding by potential licensees in the subsequent auctions account for this timing of the auctions and licensing. For these and other reasons, there is no public policy justification for deferral.

6. The purpose of this declaration is to rebut the flawed arguments offered by Comm One and GO in their petition and in the declaration of Daniel Kelley attached thereto. I will show, in Section C, that Dr. Kelley's measure of concentration is fatally flawed and that the petitioners are wrong in characterizing the industry structure as concentrated. By any reasonable measure, wireless services is an unconcentrated industry. Moreover, the issuance of the A and B licenses will decrease concentration and increase competition in wireless communications services. Section D discusses the effects of a deferral in the issuance of A and B licenses on PRIMECO, AT&T and WirelessCo. Whereas PRIMECO and others would be substantially harmed by a deferral because their bid prices reflected an anticipated lag between the A/B and C auctions, Comm One and GO will not be injured because the prices bid in the C

auction will reflect any perceived business costs of that time lag. I conclude, in Section F, that immediate issuance of all A and B block PCS licenses is in the public interest and promotes the public policy objectives of Section 309.

C. Effects of Issuance of A and B Licenses On Concentration and Competition

7. Petitioners base their characterization of the industry structure as "highly concentrated" on the declaration of Dr. Kelley, whose measure of concentration is patently wrong for two separate reasons, either of which make his calculations worthless. First, Dr. Kelley claims to use the Hirschman-Herfindahl-Index (HHI) as a measure of concentration, but the HHI is defined as "the sum of the squared values of all firms' market shares in a given market."[2] Dr. Kelley computes his "HHI" not on market share, but on the population of the areas of the A/B winning bidders. There is no economic rationale for the use of population as the basis for an HHI calculation; it is economically meaningless. Adding up the "POPs" of A/B winning bidders across local markets is roughly equivalent to computing an HHI for the television broadcasting industry by adding up the population of the cities in which each network has local affiliates, irrespective of their audience shares. Second, Dr. Kelley errs by using the wrong product market definition for calculating his "HHI."[3] Dr. Kelly uses a highly restrictive product market definition by including only the A/ B PCS licenses in his "HHI" calculations. The relevant product market for measuring concentration is mobile communications, not just PCS, much less counting only the A/B blocks of PCS.

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[2] *The New Palgrave Dictionary of Economics*, edited by John Eatwell, Murray Milgate and Peter Newman, London: The Macmillan Press Limited, 1987.

[3] For a detailed explanation of the importance of correct market definition in assessing concentration, see Robert G. Harris and Thomas M. Jorde, "Antitrust Market Definition: An Integrated Approach," *California Law Review* 72(1), January 1984. Reprinted in *Corporate Counsel's Annual*, Matthew Bender, 1985.

8. When defined and measured correctly, it is evident that, in contrast to petitioners' claim that the industry is "highly concentrated," the U.S. mobile communications industry is highly unconcentrated. There are more than 400 cellular carriers alone in the U.S., in stark contrast to most other nations, which have granted national licenses to only a handful of nationwide licensees.[4] In addition, there are hundreds more companies involved in paging and Enhanced Special Mobile Radio services, which will compete with cellular and PCS in the broader market for wireless services. Even by counting only cellular carriers, though, it is clear just how unconcentrated the market for mobile communications is: the HHI for cellular carriers, based on their 1994 shares of national cellular revenues, is well under 1000.[5] An HHI less than 1000 is considered "unconcentrated."

9. Petitioners are also fundamentally wrong about the effects of license issuance on concentration: in fact, issuing the A/B PCS licenses will increase competition in mobile communications, thereby decreasing existing concentration. This was a primary motive in the Commission's decision to allocate six additional blocks of spectrum to PCS; it is assuredly a major benefit of issuing the A/B licenses in a timely fashion. Published reports indicate that there are already more than 20 million cellular subscribers and cellular carriers are signing up approximately 1/2 million new customers per month.[6] In anticipation of the increase in

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[4] Most major nations have licensed only a few wireless carriers: the UK has licensed two cellular and two PCS carriers; Germany has licensed three cellular carriers; France has licensed three cellular carriers; Japan has four cellular carriers; Italy has two cellular carriers. *The Wireless Communications Industry.* Donaldson Lufkin Jenrette, Summer 1994, pp. 33-45. There are more wireless carriers in the U.S. than all the rest of the world combined.

[5] The accumulative HHI of the ten largest carriers is 840, based on the following national revenue shares: AT&T, 16%; SBC, 12%; GTE, 11%; BellSouth, 11%; AirTouch, 8%; Bell Atlantic 8%; Sprint, 5%; NYNEX, 5%; U S West, 4%; U S Cellular, 2%. Based on first quarter 1994 revenues. *The Wireless Communications Industry.* Donaldson Lufkin Jenrette, Summer 1994, page 11.

[6] "1994 closed with roughly 22 million cellular subscribers in the United States... Cellular phone subscribers continue to sign up at a rate of approximately 17,000 a day... more than six million new subscribers... in

competition from PCS service providers, cellular carriers are introducing new pricing plans, adding new features, reducing roaming charges and upgrading their networks to digital. Since PCS licensees will decrease economic concentration by gaining market share, the sooner the PCS licenses are issued, the sooner PRIMECO and other PCS licensees can build, offer services and increase competition in wireless communications. Thus, the position of petitioners -- that A and B licensing should be delayed -- is directly contrary to the public interest in promoting competition in wireless services and directly contrary to the explicit Congressional mandate to promote rapid deployment of PCS services. Deferring issuance of the A and B PCS licenses to PRIMECO, AT&T and WirelessCo would only delay the increase in competition. Subsequent issuance of the C, D, E, and F licenses will serve to further increase competition in wireless communications services.

D. Economic Effects of Deferring Issuance of A and B Licenses

10. While petitioners emphasize the "cost of delay" in the auction for C licenses, they completely discount the cost of deferral to PRIMECO and other A and B licensees. In fact, the costs of delay in the C block auction are not symmetrical to the costs of deferral in the issuance of A and B licenses, because the A and B auctions have already been concluded, while the auction for C licenses have not yet begun. This difference in timing is fundamental to assessing whether the parties will or will not be injured by alternative Commission actions. At the time of the A and B block auctions, it was understood by all of the parties -- those who participated and those who chose not to participate -- that there would be a time period between the issuance of A and B licenses and the subsequent auctions and issuance of licenses for the C, D, E and F blocks. Rational decision-makers would have even factored in the

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1995." Rhonda L. Wickham, "'95 News and Goods: Cellular Industry Forecast," *Cellular Business*, Vol. 12(1), January 1995, p. 62.

uncertainty over just how long that time period would be. To the extent the petitioners' are right that the A and B licenses have a "headstart" advantage in the market, the prices paid by A and B licensees have already capitalized any expected gains of the headstart over C licensees. Since that price premium of A/B licenses over C licenses has already been paid, there would be no feasible way of compensating the A and B licenses for the loss in business value that would be caused by changing the rules after the auction is concluded.

11. In addition to the "headstart premium" incorporated in the A and B license prices, PRIMECO would be injured in other ways by a deferral of the A and B licenses won through competitive bidding. First, the decisions regarding maximum bids for the various BTAs were based on business plans, which in turn depended crucially on "rational expectations" about (a) when the A/B licenses would be issued; (b) how fast the winning bidders could build their systems; (c) how soon the cash flow of PCS licensees would begin; and (d) how far the existing cellular carriers would have penetrated the market by the time a new PCS carrier can offer service. Deferral of licensing <u>after the auction has concluded</u> would greatly harm the winning bidders, which bid prices in the reasonable expectation of entering the market in a timely fashion. Second, PRIMECO has already incurred substantial sunk costs in preparing to enter the wireless communications market. It has paid 20% of its license fees and has incurred substantial general and administrative expenses (e.g. employee staffing and office space commitments). It is a matter of elementary economics that these costs have been "sunk" into the business by PRIMECO; any delay in generating revenues from offering services causes a real and permanent loss in economic value of PRIMECO's business.

12. The issuance of A/B MTA PCS licenses, even with a subsequent delay in the C block auction, will not cause economic harm to C-license bidders because the prices bid in the auction will capitalize the expected business prospects of the licensees at the time the auction is held. Furthermore, given forecasts of 100 million or more wireless users within the next ten

years,[7] the window of opportunity for PCS service providers will not close any time soon; it will remain open for the foreseeable future. The important point, though, is that whatever the costs of delay, the winning bids will capitalize any expected effects of the time lag between the entry of C licensees and the A/B licensees.

E. Issuance of A and B Licenses Will Serve the Public Interest

13. In assessing compliance with the legislative mandates and public policy objectives of Section 309, it is critical to evaluate the effects of the Commission's policies in terms of the overall PCS results and not merely the A/B auction results. The structure of the Commission's PCS spectrum allocation and auction process promotes all of the policy objectives of Section 309:

- the allocation of three 30Mhz and three 10 Mhz for PCS licenses ensures a wide variety of licensees and fair opportunity for small/medium businesses in wireless communications;
- the rules for designated entities ensure fair opportunities for small business and minority enterprises in wireless communications;
- the PCS auction rules ensure openness in the bidding process and public confidence in the integrity of the auction results;

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[7] "[B]y the year 2004, there could be as many as 116 million wireless subscribers..." *Mobile Data Report*, Vol. 6(24), December 5, 1994.

- the competitive auctions and the buildout requirements ensure substantial payments to the public treasury and will promote efficient use of spectrum by successful bidders; and

- issuance of A/B licenses and subsequent auctions for and issuance of C/D/E/F licenses will promote competition, investment and innovation in the national information infrastructure.

14. The Commission's pro-competitive policies toward wireless communications are among the best examples of public policies that truly serve a multiplicity of policy goals by judiciously balancing among those objectives. Of central importance among those objectives -- indeed, the first policy objective listed in the Act -- is "the development and rapid deployment of new technologies, products and services for the public...". [(Section 309(j)(1)(a)] Deferring the licensing of certain of the A/B auction winners would do grave harm to the development and deployment of new wireless products and services. Not only would it specifically delay the buildout and entry of the A/B winners -- though that would surely be great harm in and of itself. More generally, deferring licenses after the A/B auction process has concluded would also send shock waves though the investment community, raising serious questions as to whether the regulatory risks of investing billions of dollars in the "information skyways" exceed the potential returns on those investments. This the Commission need not and should not do. By issuing the PRIMECO, AT&T and WirelessCo A/B PCS licenses now, the Commission will be acting in a manner that is fully consistent with the economic policy objectives of the Budget Act. In doing so, the Commission can continue on its well-chosen course of promoting competition, providing opportunities for diversity, and ensuring rapid deployment of wireless communications services. The American public will benefit greatly thereby.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 23rd day of May, 1995.

Robert G. Harris

Dr. Robert G. Harris

Exhibit 1

ROBERT G. HARRIS

Law & Economics Consulting Group, Inc.
2000 Powell Street, Suite 600
Emeryville, CA 94608
Tel. (510) 653-9800
Fax (510) 653-9898

University of California
Haas School of Business
Berkeley, CA 94720
Tel. (510) 642-0961
Fax (510) 642-2826

EDUCATION

Ph.D., M.A., UNIVERSITY OF CALIFORNIA, Economics, Berkeley, 1973-77.
Fields of Emphasis: Industrial Organization, Antitrust, Regulation, Public Finance.
M.A., B.A., MICHIGAN STATE UNIVERSITY, Social Science, 1961-65, 1972-73.

PRESENT POSITION

HAAS SCHOOL OF BUSINESS, UNIVERSITY OF CALIFORNIA, Berkeley, 1977 - present. Associate Professor, Business & Public Policy Group; and
Co-Director, Consortium for Research in Telecommunications Policy and Strategy

LAW & ECONOMICS CONSULTING GROUP, 1993-present.
Principal-in-Charge, Regulation Practice Group

ACADEMIC HONORS AND AWARDS

Industry Expert Panel, Center for Telecommunications Management, University of Southern California
Charles C. Slater Award (outstanding contribution to the Journal of Macromarketing, 1983-86).
Schwabacher Prize (outstanding University service), 1983.
Phi Beta Kappa, 1977.
Alfred P. Sloan Dissertation Fellowship, 1975-77.
Blue Key and Excalibur Honorary Fraternities, 1964-65.
President, All-University Student Government, 1964-65.

TEACHING

Graduate Courses: Business and Public Policy (MBA Core Course), Competitive Strategies & Public Policies in Telecommunications, Microeconomic Analysis for Managerial Decisions, Industry Analysis and Competitive Strategy, Doctoral Research in Business & Public Policy, Antitrust Law (School of Law, with L. Sullivan), Antitrust Economics (Department of Economics).

Undergraduate Courses: Social and Political Environment of Business (Core Course), Economics of Regulated Industries, The Corporation and the Global Economy.

Executive Education: Competitive Strategy, Telecommunications Policy and Strategy, Public Policy Strategy, Managing Business-Government Relations.