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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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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REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION OF DENIAL OF COMMUNICATIONS ONE, INC. EMERGENCY MOTION TO DEFER MTA PCS LICENSING

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Communications One, Inc. ("Comm One") and GO Communications Corporation ("GO"), by and through their attorneys (collectively, "the Petitioners"), hereby submit their joint reply to various oppositions ("the Oppositions") to the Petitioners' Petition for Reconsideration ("Petition") of the Wireless Telecommunications Bureau ("Bureau") Order denying Comm One's March 8, 1995 "Emergency Motion to Defer MTA PCS Licensing." For the reasons stated below and in the Petition for Reconsideration, reconsideration is warranted by (1) the need to consider novel questions of law, and (2) changes in circumstances in the interval subsequent to the Bureau's April 12 order.

The various Oppositions to the Petition are far more noteworthy for their omissions than their contents.[1/] As stated in the Petition, licensing the three major A and B block

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1/ The AT&T and WirelessCo Oppositions, filed May 30, 1995, should be dismissed as untimely oppositions to a petition for reconsideration. Oppositions were due May 25, 1995. *See* 47 C.F.R. §§ 1.106(g), 1.4(h). Despite those parties' assertions, *see*

(continued...)

winners at present would violate the mandates of Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), to prevent excessive concentration of licenses and to distribute licenses among a wide variety of applicants, including designated entities ("DEs").[2/] Only PRIMECO even attempted to address this statutory violation or the sound economic analysis of Dr. A. Daniel Kelley, who demonstrated the excessive market concentration that would result from licensing the three major A and B auction winners at present. PRIMECO's economic analysis, however, is counter-intuitive and asks the Commission to accept a fictitious notion of the marketplace. The linchpin of PRIMECO's argument is the mistaken conclusion that wireless markets are already competitive and free of undue concentration, even though the only two existing providers per market with 25 MHz each of broadband capacity -- i.e., cellular service providers -- also acquired most of the broadband PCS licenses through consolidated bidding in the A/B auction.

1/(...continued)

AT&T Opposition at 1 n.1, WirelessCo Opposition at 1-2 nn.1-2, the filing dates for a petition for review do not apply where petitioners request immediate review by the full Commission. The rules recognize the Commission's ability to act on a petition for reconsideration of an action taken under delegated authority, *see* 47 C.F.R. § 1.106(a)(1), and the rules do not change the comment dates depending upon the identity of the decision-maker. *See* 47 C.F.R. § 1.106(g).

2/ Contrary to the assertions of WirelessCo and PhillieCo, the Comm One / GO Petition did not "arise in the context of designated entities other than those owned by racial minorities." *See* WirelessCo Opposition at 3 n.6. The statutory provisions encompass all designated entities, including rural telephone companies, businesses owned by minority group members or women, and small businesses.

I. Reconsideration is Warranted to Address Novel Questions of Law

PRIMECO and WirelessCo assert that no new or novel issue of law is before the Commission warranting reconsideration.[3/] PRIMECO argues that the Bureau was aware that the top three winners were PRIMECO, AT&T and WirelessCo when it issued its Order, and it determined that the public interest in rapid deployment outweighed potential harm to C block winners.[4/] WirelessCo contends that the Wireless Bureau already found that "the balance of competitive interests favors prompt licensing of at least some PCS providers . . . ."[5/]

The Petition clearly presents the novel legal question of whether licensing the top three A and B auction winners now would violate the Communications Act because it would result in excessive market concentration, lack of dissemination of licenses among a diverse array of applicants, and failure to ensure that DEs have an opportunity to provide this class of services. The Bureau's Order did not address that issue.

Due process considerations underlying administrative procedure require the government to explain to the public its disposition of such compelling problems as potential violations of statutory mandates expressly protecting a party before the agency. As the Court of Appeals for the D.C. Circuit stated in 1968, the agency's statement of basis and purpose must "enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." Automotive Parts & Accessories

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3/ PRIMECO Opposition at 3-8; WirelessCo Opposition at 6-9.

4/ *Id.* at 4.

5/ WirelessCo Opposition at 7-8.

Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). In 1970, Judge Leventhal stated that the court will intervene if it "becomes aware . . . that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making," and that "of course the court must not be left to guess as to the agency's findings or reasons." Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 850-52 (D.C. Cir. 1970) (citation omitted), cert. denied, 403 U.S. 923 (1971). In Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983), the Supreme Court noted that the Department of Transportation must explain its decision to ignore alternatives clearly presented in the record before it. The Court also stated that an agency action is arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." 463 U.S. at 43, 48; accord, Yakima Valley Cablevision, Inc. v. F.C.C., 794 F.2d 737, 745-46 & n.36 (D.C. Cir. 1986).

The FCC is not free to elevate one statutory objective, rapid deployment of service, over other statutory mandates, i.e., avoiding license concentration and ensuring wide distribution of licenses to entities including DEs. Congress did not afford the Commission the discretion to fulfill some objectives and ignore others. The "balancing" to be done necessitated implementation of all of the imperatives decreed by Congress. The Petition raises clearly the novel question of whether a deferral of licensing of the three top winners of A/B Block licenses is necessary to effectuate that result. The Bureau did not deal with that issue, and reasoned decision-making requires that it be explicitly addressed on reconsideration.

II. Changed Circumstances Warrant Reconsideration

PRIMECO and WirelessCo allege that the Petition is procedurally impaired because no circumstances changed after the agency decision.[6/] In the April 12 Order, PRIMECO contends, the Bureau considered the potential for delay between A/B and C block licensing.[7/] WirelessCo makes a similar argument, asserting that the Bureau found no circumstances had changed since adoption of the Commission's Fourth Memorandum Opinion and Order in PP Docket No. 93-253, and stating that the Commission had rejected the argument that auctioning the A/B blocks prior to the C block would give the A and B block auction winners an impermissible "head start."

These characterizations of the facts are patently incorrect. In the Fourth Memorandum Opinion and Order, referenced by the Bureau Order as the basis for the Bureau's decision regarding timing, the Commission expressed concern that a significant gap between auctioning A/B licenses and C block licenses would afford the A/B applicants a competitive advantage over winners in later auctions.[8/] The decision not to delay A/B licensing was based upon holding the auctions as close together as administratively possible, i.e., a 75-day gap.[9/] The Commission item did not reflect the disruption of DE plans resulting from the TEC stay, and, most importantly, neither that item nor the Bureau Order mentioned the additional delay flowing from the Bureau's then as-yet unpublished decision

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6/ PRIMECO Opposition at 8-9; WirelessCo Opposition at 5-6.

7/ PRIMECO Opposition at 8.

8/ Fourth Memorandum Opinion and Order, PP Docket No. 93-253, 9 FCC Rcd 6858, ¶ 32 (1994).

9/ *See id.*

not to proceed as rapidly as possible with the C block auction once the TEC stay was lifted. These delays, moreover, are not analogous to the cellular "head start" of over 10 years ago.[10/] Only after the Order was released did the Bureau release a Public Notice announcing the consequent two month delay in addition to the 75 days contemplated by the Commission.[11/] These new facts merit reconsideration of the Bureau's Order.

10/ Moreover, PRIMECO and the Bureau are incorrect in comparing the PCS situation with the Commission's cellular precedent. In its cellular items, the Commission, indeed, found that a headstart can be problematic, but it ultimately found that no petitioners met their burdens of demonstrating headstart injury. Those conclusions were unsurprising; cellular was a completely new service, customers were slow to purchase the unfamiliar service, and the technology was new, resulting in some coverage problems. PCS service providers, in contrast, can capitalize on contemporary citizens' familiarity with wireless voice services and with computer technologies, such as personal digital assistants and various lightweight computers with wireless modems. Thus, the A/B licensees, unlike cellular licensees, are likely to quickly attract an interested customer base, and the headstart will thus result in tangible harm to DEs.

Even the potential opportunity to obtain resale of others' capacity will not mitigate the headstart in the PCS context. First, PCS technologies are not only unlike cellular technologies but are also often incompatible with each other. Various applicants have stated that they will adopt AMPS-compatible systems, CDMA, TDMA, GSM, and variations on these standards. Second, the licensees have authority to construct systems covering different geographic service areas. Third, network design in PCS will vary depending on each provider's business plan. For example, some may be committed to significant in-building penetration, resulting in placement of more numerous transmitters than other licensees construct. Other licensees may be more interested in high-end mobility. Thus, even if it were technologically feasible, resale of capacity would not generally provide a C block licensee's customers with the particular services or coverage that would make it worthwhile for them to subscribe to the C block service.

11/ Moreover, only after the Order was released did the Commission accept the A/B applications for filing.

III. Economic Analysis

PRIMECO and WirelessCo contend that the Petitioners' economic analysis is flawed. First, PRIMECO argues that concentration should be calculated based on market share, rather than based on population of the market areas.[12/] PRIMECO asserts that the A/B winners have no "market share," which it defines as licenses, networks, and customers already obtaining service. Second, PRIMECO argues that the relevant product market is not PCS or the A and B blocks, but, in fact, all mobile communications services.[13/] Most remarkably, PRIMECO, by manipulating the definitions of factors in the equation, alleges that licensing the A/B applicants now will increase competition and decrease concentration in the wireless industry.[14/]

WirelessCo apparently believes that a market concentration inquiry is unnecessary because Comm One does not raise any facts suggesting a flaw in the FCC's anti-collusion rules.[15/] WirelessCo also argues that the PCS market is not as concentrated as the Joint Petitioners suggest, apparently because 16 companies or consortia, rather than merely three, were winning bidders in the A/B auction.[16/]

As shown in detail below, the conclusions of PRIMECO and WirelessCo are based on incorrect and distorted argumentation, supported by absolutely no numerical analysis. The

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12/ *See* PRIMECO Opposition at 5 n. 14.

13/ *Id.*

14/ *Id.* at 5.

15/ *See* WirelessCo Opposition at 9.

16/ *Id.* at 8.

Commission therefore should accept Petitioners' clear Herfindahl-Hirshman Index (HHI) computations to the contrary.[17/] The Commission may use the Merger Guidelines as an aid to its analysis, just as the 9th Circuit did in 1993.[18/]

Regarding WirelessCo's observation, market concentration inquiries are not only relevant but essential where the Commission is statutorily instructed to avoid excessive concentration in its licensing processes.[19/] In regard to WirelessCo's assertion that the PCS market is not as concentrated as the Joint Petitioners suggest, we note that not only did Dr. Kelley's HHI analysis include all 16 companies or consortia that were licensed, but also Comm One and GO certainly did not "ignor[e] the dilution of this concentration that will result from the C block auction and other future auctions."[20/] That dilution is in fact the reason why licensing of the three largest A/B winners should be deferred until after the C block is substantially licensed: only then will licensing the three largest A/B winners fail to result in a highly concentrated market. As WirelessCo itself so aptly states, "entry of new,

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17/ Dr. Kelley's Declaration, appended to the Petition for Reconsideration, includes charts demonstrating that the HHI measurement of concentration in the broadband PCS market resulting from immediate licensing the A and B blocks would be 2010. The Department of Justice characterizes an HHI exceeding 1800 as evidence of a "highly concentrated" marketplace. *See* Department of Justice and Federal Trade Commission Joint Horizontal Merger Guidelines, Trade Reg. Rep. (CCH) ¶ 13,104, at 20,573 - 20,576 (1992) ("Merger Guidelines"). The HHI will drop to 962 when the C block is licensed. *See* Appendix to Petition for Reconsideration, at Table 2.

18/ *See* Olin Corp. v. F.T.C., 986 F.2d 1295, 1300 & n.4 (1993).

19/ *See* 47 U.S.C. § 309(j)(3)(B).

20/ *See* WirelessCo Opposition at 8-9 & n.17.

smaller firms will increase the number of PCS service providers, consistent with Section 309(j)."[21]

A. **Market Share**

PRIMECO argues that market concentration can only be measured by the market share of PCS licensees, i.e., their licenses, networks, and existing customers, rather than based on the population of the market areas.[22] Under this measure there is no undue concentration because PCS has not yet been introduced. This is an absurd result. It would gut the statutory requirements and demand that the Commission close its eyes to the fact that three entities are poised to control a major share of the national PCS market by virtue of the A/B auction results.

To give meaning to the statutory mandate to avoid undue concentration, the Commission must develop a mode of analysis which permits it to make such a determination. The Department of Justice calculates market shares using "the best indicator of firms' future competitive significance."[23] Population of each licensee's service area, in the aggregate, is an eminently reasonable indicator of likely market share and, under the current circumstances, is wholly appropriate to analyze in determining excessive concentration. Service area population represents the likely proportionate[24] number of customers that each

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21/ *Id.* at 9.

22/ *See* PRIMECO Opposition at 5 n.14.

23/ *See* Merger Guidelines, at ¶ 13,104, § 1.41.

24/ It is understood that for each population examined, penetration might be only two or five percent, for example. If all market shares are divided by the average annual penetration percentage, the resulting HHI will remain the same.

licensee can attract, resulting in a fairly accurate forecast of the licensee's sales, shipments, and production. In addition, population is readily determined by reference to U.S. Census figures and the 1992 Rand-McNally Atlas & Marketing Guide, reference tools accepted by the Commission for competitive bidding purposes.

The geographic size of each licensed service area could be aggregated in the alternative, but population has greater relevance than area in this case. Some geographic areas, such as the Alaska MTA, M049, are vast but contain few inhabitants (550,043, according to the U.S. Census of April 1, 1990), and thus fewer potential customers, than small areas with highly concentrated populations, such as the Boston - Providence MTA, M008, with a 1990 population of 9,452,712. For the same reason, the number of licenses or networks that a licensee holds can be completely unrelated to its actual customer base and ultimate unit sales. Accordingly, population of the licensed service areas represents the best empirical measurement of potential market shares.[25/]

B. **Definition of Product Market**

The market at issue is defined by the statute as "each class of licenses or permits that the Commission grants through the use of a competitive bidding system." 47 U.S.C. §

25/ Economists for the cellular industry have used other market share measurements which more accurately reflect likely customer base and thus ultimate revenue flows. *See, e.g.*, Stanley M. Besen, Competitive Issues in the Mobile Telecommunications Market 6 & n.7, app. Tables 1-6 (Apr. 7, 1994) (Charles River Associates, prepared on behalf of the Cellular Telecommunications Industry Association). Dr. Besen based market share on effective spectrum capacity, based in turn upon the amount of MHz licensed to each market participant. Pops are a proxy for effective capacity. An economist can examine, for example, the total number of pops that each applicant can load onto its system. Because that total number is limited in the real world by the number of pops actually within the licensee's geographic service area, Dr. Kelley refined the measurement accordingly.

309(j)(3). Part 24, Subparts H and I of the Commission's Rules sets forth a particular competitive bidding system for broadband PCS. Thus, the relevant product market is defined by the Act itself, as implemented by the Commission's competitive bidding rulemaking, as broadband PCS.

Even if the statute had not so clearly circumscribed the marketplace, it would be blatantly erroneous under sound economic principles to define the relevant product market as "all mobile communications systems." Markets are generally defined by reference to a product market and a geographic market.[26/] A product market encompasses products or services with high cross-elasticity of demand or of supply, as measured by "the change in the quantity of another product induced by a price rise in the merged firm's product, either over time or in different geographic markets."[27/] The Department of Justice and the Federal Trade Commission, for example, note that separate product markets may be evidenced by factors including distinctive characteristics rendering a product suitable only for specialized use; purchasers' preference to utilize a particular kind of product for a distinct use; or persistent, sizeable price disparities for different products.[28/] The Department of Justice generally considers the relevant product market to be the smallest group of products such that a hypothetical monopolist over that group of products could profitably impose at least a "small but significant and non-transitory" price increase.[29/]

26/ *Id.*, at ¶ 20,905.

27/ *Id.*

28/ *Id.*

29/ *Id.*, at ¶ 20,573.

Mobile services such as private railroad or police systems, or commercial services including Specialized Mobile Radio ("SMR") or paging services, are characterized by highly specialized applications which cannot be substituted for the products of a broadband, digital PCS system. A PCS provider is enabled by the Commission's flexible Part 24 rules to provide enhanced services which narrowband, SMR or analog cellular systems have neither the capacity nor the technology platform to support. The intelligent and lasting competitive provider will choose to offer new broadband, digital multimedia transmission services characterized by a variety of data manipulation choices, in order to distinguish its offerings from those of providers of other mobile services. PCS providers will achieve market penetration by making use of their greater PCS allocation bandwidth and state of the art digital signal compression technologies, resulting in tremendous data throughput. Broadband PCS products could not be offered over the narrowband channels of a paging system, the dispatch technologies of SMR systems, or the analog equipment still deployed as the vast bulk of cellular infrastructure.

Moreover, price differentials are sizeable. Private mobile services by definition are not offered for profit,[30/] whereas paging, SMR and cellular services are made available for profit, at different prices. Further, the prices of broadband PCS will reflect the operational costs of providing new and distinct services. It is highly unlikely that a customer would subscribe to a broadband system with an extensive array of digital products merely in order to obtain paging capabilities that could be inexpensively purchased from a paging licensee, or

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30/ *See* 47 U.S.C. § 332; *Second Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994).

dispatch services which could be obtained from an all-dispatch SMR network using old technologies still serviceable for that purpose. Thus, any cross-elasticities of demand would be minute, and the product market should not be expanded to encompass poor substitutes for PCS.

While Dr. Harris asserts that an HHI analysis should not be based only upon PCS licensees' market shares, he cites with approval an HHI analysis of cellular based only upon the market shares of cellular service providers.[31/] Even more incredibly, Dr. Harris plainly asserts that cellular service today is unconcentrated and presumably competitive. This self-serving conclusion flies in the face of Congressional intent in enacting Section 309(j)(3) and (4) of the Act, and the voluminous record of the rulemaking in ET Docket No. 90-314, which allocated spectrum for PCS to provide competition for services including cellular and established PCS/cellular cross-ownership rules to "maximize the number of new viable and vigorous competitors."[32/] Dr. Kelley's HHI charts correctly show the extreme concentration that would result in the broadband PCS market from licensing the three major A and B block winners now, in contrast to licensing those applicants at the same time as the C block. That concentration level would be even higher if the geographic market area was reduced, for example, to a regional size. Moreover, the Merger Guidelines upon which Dr.

31/ *See* Declaration of Robert G. Harris, PRIMECO Opposition app. at 5 n. 5.

32/ *See Memorandum Opinion and Order,* ET Docket No. 90-314, ¶ 103 (1994); *Second Report and Order,* ET Docket No. 90-314, 8 FCC Rcd 7700 (1993), ¶¶ 14, 18, 105, 108.

Kelley's HHI analyses are based have been characterized as in fact "tend[ing] to expand relevant markets and thus diminish apparent market power."[33/]

Finally, even assuming arguendo that the market definition could include cellular service as well as PCS, we have conducted HHI analyses, attached as Appendix B, demonstrating that licensing the three main A/B applicants before the C block DEs would still result in a highly concentrated market. Dr. Kelley's initial analysis generously assumed a nationwide geographic market to demonstrate concentration of licenses. Because cellular customers tend to roam throughout geographic markets of regional or even smaller dimensions, we have conducted HHI analyses on a regional basis[34/] incorporating cellular in addition to the PCS bands. Concentration remains high until the C block is licensed.[35/]

33/ *See* Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust, supra,* at 1808.

34/ We did not reduce the geographic market size to any particular point, as even the cellular industry has done upon occasion. *See, e.g.,* Stanley M. Besen, Competitive Issues in the Mobile Telecommunications Market 6 & n.7, app. Tables 1-6 (Apr. 7, 1994) (Charles River Associates, prepared on behalf of the Cellular Telecommunications Industry Association). This reduction in market size would even further increase the already unacceptable HHI which would result from licensing the three major A and B block winners without the C block. For example, Dr. Besen derived an HHI of 1,633 of a hypothetical situation where the market consisted of two cellular players (each with 15 MHz of PCS spectrum in addition to their cellular frequencies), two thirty MHz PCS licensees, one 20 MHz PCS licensee, two 5 MHz PCS licensees, and a 10 MHz SMR licensee. Dr. Besen based market share on effective spectrum capacity. If we were to use his geographic market size and product definition, the HHI for a market with two 25 MHz cellular licensees and two 30 MHz PCS licensees would be **2704**. *See* Appendix B.

35/ *See* Appendix A, Declaration of Dr. A. Daniel Kelley, and charts in Appendix B.

IV. Deferral of Licensing of the Three Top Winners in the A/B Auction, Is Essential to Avoid a Statutory Violation

A. Statutory Violation

PRIMECO contends that A/B licensing will promote rapid deployment, competition, diversity and the public interest, rather than excessive concentration of licenses. PRIMECO asserts that the Commission's rules and the auction results fully comply with all Budget Act objectives. PRIMECO argues that the Commission ensured that excessive concentration would not occur by establishing frequency blocks and service areas of varying sizes and imposing varying ownership attribution and spectrum aggregation limits for PCS and cellular interests.

Although the Commission took steps to facilitate diversification of the marketplace, those steps, particularly completing the C and F block auctions, have not yet been implemented and have in fact been substantially delayed. The Bureau's actions therefore jeopardize the Commission's ability to meet the objectives set forth by the statute, absent deferral of licensing the top three A/B auction winners. The Commission's rules were well thought-out, but the timing of the A/B licensing should be reconsidered to ensure that the broadband PCS auction results will comply with all of the objectives of the Communications Act of 1934, as amended in 1993. The Commission's rules must now be fairly and quickly implemented in order to meet the clear statutory requirements of Section 309(j).

B. Financing Drawbacks

PRIMECO also alleges that GO and Comm One provide no facts to substantiate their assertion that DEs are experiencing financing difficulties, or that these difficulties were

caused by the Order, the auction results, or potential A/B licensing.[36/] It is ludicrous that PRIMECO and others go to great lengths to assert that some financial harm would come to them from delay in the A/B licensing process, yet claim that DEs would not be injured by permitting the A/B competitors to gain a much more egregious headstart, far in excess of the 75 days originally contemplated by the Commission. The A/B applicants distinguish the two situations by pointing to their upfront payments on deposit on the Commission. Those

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36/ It would be unreasonable to expect other DEs to lay out their financing plans for us. We therefore referenced articles discussing how delays have injured DEs. *See* Petition for Reconsideration, at 12-13 & nn. 17-22, *citing* business texts and also articles reporting that Windkeeper Communications, Inc. and a Texas company, *inter alia,* stated that investors lost interest due to the TEC delay. PRIMECO's failure to acknowledge these references is inexcusable.

The financial and competitive injuries caused to DEs by delays and the A/B headstart are amply demonstrated by applicants' public statements. Augusto Failde, president of Tropix Media Inc., for example, lamented that the TEC delay was "a major nightmare. . . . Our solid backers are now saying, 'wait a second.'" *See Court Halts DE Auction Process for TEC Case, Schedules Opening Arguments for September Time Frame,* PCS WEEK, March 22, 1995. Martin F. McDermott, vice president of American Wireless Comm. Corp., a coalition of DEs, stated that due to the TEC delay, "small companies . . . will be unable to achieve funding. . . . Once again the big guys will take over the market and the little guys will be left with nothing but a lot of work and debt at the end of this period." After the TEC settlement, McDermott noted, "Every time there is a delay, the financial community stops answering the telephones." *Small Firms Back in Action in FCC Auction,* BOSTON BUSINESS JOURNAL, March 31, 1995. Sandra Goeken Martis, president and CEO of Wireless Works Inc., stated:

> [A]ll of our momentum in financing, partnering and selected sites comes to a screeching halt. . . . The true innovators -- the designated entities -- could be blocked out of the market by this delay. The case has taken one year of operating revenues and market penetration out of the DEs. This hurts the public, the Treasury -- everyone.

Court Halts DE Auction Process, supra.

distinctions may not be considered by the Commission, which is forbidden from considering amounts bid at auction.[37/]

V. The Public Interest Favors a Competitive Marketplace

PRIMECO asserts that the public interest is served by rapid deployment of PCS services and increased wireless competition. PRIMECO ignores the need for new entrants and the competitive markets they engender that both Congress and the Commission foresaw as necessary fuel for such rapid deployment. Merely issuing licenses to incumbents in an already concentrated industry is no guarantee of rapid deployment and will actually harm the emergence of full competition. With the relief we request, however, all A, B and C block PCS systems should be licensed and ready for construction by early next year.

PRIMECO also ignores the balancing of harms involved in determining the public interest: assuming arguendo the existence of any potential benefit of licensing the A and B block first, the public will be disserved if the PCS available to them is provided by a duopoly in each market area, rather than a competitive array of service providers. The public has a compelling interest in obtaining the lower prices, quality and diverse array of services that are the results only of a truly competitive marketplace. This paramount public interest is in establishing from the outset a competitive marketplace that provides consumers with the full and lasting benefits of this unique class of services known as broadband PCS.

37/ See 47 U.S.C. § 309(j)(7)(A),(B) ("the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection").

VI. Conclusion

The public interest will be best served by initially establishing a competitive marketplace that provides customers with true choice from among a variety of competitive service providers. In Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j), Congress required the Commission to avoid auction processes that result in excessive concentration of licenses and to ensure distribution of licenses to a wide variety of applicants, including designated entities. In order to ensure that the Commission will meet its obligations under the particular requirements of Section 309(j) and under its general authority to grant common carrier licenses only in the public interest, convenience and necessity, see 47 U.S.C. § 309(a), the Petitioners respectfully request that the Commission defer the licensing of PRIMECO, AT&T and WirelessCo until the results of the C block

auction are released and it can be objectively determined whether the statutory mandates have been met.

Respectfully submitted,

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APPENDIX A

DECLARATION OF A. DANIEL KELLEY

I, A. Daniel Kelley, declare as follows:

1. I am Senior Vice President of Hatfield Associates, Inc., where I conduct economic and policy studies for a wide variety of firms in the telecommunications industry. I filed a Declaration submitted by Communications One, Inc. and Go Communications Corporation on May 12, 1995. I have been asked to respond to comments on my earlier Declaration by Dr. Robert G. Harris on behalf of PCS Primeco.

2. Dr. Harris maintains that the only valid use of the HHI is to measure concentration of market shares.[1] He is incorrect. The HHI is an index number that can be used to describe the concentration of any meaningful distribution. The first use of this particular index was to measure the concentration of trade among nations in commodities.[2] I applied the HHI to PCS licenses to describe with a single index number the concentration of licenses resulting from the A and B block bidding.

3. As my Declaration notes, the Department of Justice Merger Guidelines characterize HHI's in the range resulting from those auctions as "highly concentrated." The Merger Guidelines generally apply to market shares, but the breakdown among "unconcentrated," "moderately concentrated," and "highly concentrated" can also be usefully applied to describe the results of the PCS auction. Using the Department of Justice taxonomy, the distribution of PCS licenses is highly concentrated, contrary to Congressional intent.

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[1] See p. 4.

[2] See Albert O. Hirschman, "The Paternity of an Index," American Economic Review, September 1964, p. 761.)

4. Dr. Harris believes that the HHI can only be applied to actual market shares. I measured concentration in PCS on the basis of population in the MTA's. This is, in effect, a proxy for capacity. The Merger Guidelines specifically recognize that market shares can be computed by measurement of capacity.[3] Indeed, the CTIA sponsored an analysis of PCS licenses based on spectrum capacity rather than market share in an earlier PCS proceeding.[4] There are as yet no actual PCS customers. Therefore, this is a circumstance in which a capacity-based measure is useful.

5. I was asked to measure and characterize PCS concentration in light of Congressional intent to sponsor diversity in the licensing of PCS spectrum. Consequently, I focused on the nationwide results of the A and B band PCS auction. An analysis of economic markets, as Dr. Harris suggests, does not change my conclusion that the A and B band PCS auction has resulted in excessive concentration.

6. Dr. Harris would include SMRs and paging companies in a broad "mobile communications" market. Including paging and SMRs in the relevant market is speculative because of the different technological capabilities and customer bases of the firms providing these services. Moreover, Dr. Harris ignores the geographic dimension of economic markets. The relevant economic markets in question are local or regional. Local wireless markets are highly concentrated, even with the addition of PCS A and B band licensees.

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[3] See Department of Justice and Federal Trade Commission Joint Horizontal Merger Guidelines, Trade Reg. Rep. (CCH) para. 13,104, at section 1.41 (1992).

[4] See Stanley M. Besen and William B. Burnett, "An Antitrust Analysis of the Market for Mobile Telecommunications Services," December 8, 1993.

7. Under the assumption that cellular and PCS together constitute a relevant economic market, in any given locality, prior to entry by C band competitors, customers would have a choice among only four carriers (two with 25 MHz of capacity and two with 30 MHz). The resulting HHI is over 2,500. Rapid licensing of the C block will reduce concentration in that highly concentrated market. As I pointed out in my earlier Declaration, delay in licensing of the C Band will reduce the potential for C Band licensees to become significant competitors.

8. Nothing in the Declaration of Dr. Harris changes my conclusion that a small number of bidders has obtained an unduly large number of the A and B block PCS licenses.

I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge, information and belief.

A. Daniel Kelley

A. Daniel Kelley

Executed on: June 6, 1995

APPENDIX B

Wireless Market Concentration -- Typical Geographical Area
(Before C-Block Auctions)
Herfindahl-Hirschman Index Analysis

	Total Capacity Points:	560	(MHz owned/total)	HHI Index:
	Bidder Name:	Capacity Points:	Market Share:	(M.S. Squared)
1	Cellular-A	100	17.86%	318.9
2	Cellular-B	100	17.86%	318.9
3	PCS-MTA-A	180	32.14%	1,033.2
4	PCS-MTA-B	180	32.14%	1,033.2
	Total:	560	100.0%	**2,704.1**
				HHI Index

Assumptions:
Note: Based on same assumptions as Concentration Analysis by Stan Besen for CTIA, April 7, 1994:
Assumes 10MHz of each cellular operator's bandwidth remains analog, while 15 MHz converts to digital.
Effective Capacity Ratio of 6:1 digital to analog -- therefore Cellular = 10MHz + (15 MHz x 6) = 100 "points."
All 30 MHz of PCS is digital -- therefore PCS = 30 MHz x 6 = 180 "points."

Wireless Market Concentration -- Houston MTA
(Before C-Block Auctions)
Herfindahl-Hirschman Index Analysis

	Total Pops	19,817	(Pops owned/total)	HHI Index:
	Company Name:	Pops (000s)	Market Share:	(M.S. Squared)
1	GTE	3,938	19.87%	394.9
2	AT&T (McCaw + LIN)	2,321	11.71%	137.1
3	BellSouth	1,706	8.61%	74.1
4	Centennial	384	1.94%	3.8
5	Sprint Cellular (must be sold)	342	1.73%	3.0
6	Galveston Mobile Partners	180	0.91%	0.8
7	Mercury Cellular Telephone Co.	174	0.88%	0.8
8	Western Cellular	92	0.46%	0.2
9	ALLTEL	91	0.46%	0.2
10	Lufkin-Conroe	91	0.46%	0.2
11	SW Bell (SBC)	86	0.43%	0.2
12	Fort Bend Telephone	30	0.15%	0.0
13	TDS (American Portable Telecom)	5,191	26.19%	686.1
14	PCS PrimeCo	5,191	26.19%	686.1
	Total:	19,817	100.0%	**1,987.5**
				HHI Index

Assumptions:
PCS Pops based on 1990 Census
Cellular Ownership Data from "The Cellular Telephone Atlas," copyright 1994 Paul Kagan Associates, Inc. and "The Wireless Communications Industry," Winter 1994-1995, Donaldson, Lufkin, & Jenrette
Houston MTA includes the following MSAs: Houston, Beaumont, Galveston, Bryan, Victoria, & Lake Charles, LA
Analysis excludes approx 1mm pops in RSAs