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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

October 31, 1995

VIA HAND DELIVER

William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C.

Re: PP Docket No. 93-253

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Please find enclosed an original and nine copies of a petition by the Washington Legal Foundation to disqualify Chairman Reed E. Hundt in the above-captioned rulemaking proceeding.

Because of the urgency of this matter, we request that the petition be distributed to Chairman Hundt and the other Commissioners as soon as possible.

Sincerely yours,

Paul D. Kamenar

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OCT 31 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

DOCKET FILE COPY ORIGINAL

In the Matter of		
Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service	)	PR Docket No. 89-552 RM-8506
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
Implementation of Section 309(j) of the Communications Act — Competitive Bidding, 220-222 MHz	)	PP Docket No. 93-253

PETITION OF THE WASHINGTON LEGAL FOUNDATION TO DISQUALIFY CHAIRMAN REED E. HUNDT FROM FURTHER PARTICIPATION IN THE SECTION 309(j) PORTION OF THIS RULEMAKING PROCEEDING

The Washington Legal Foundation (WLF) hereby petitions Federal Communications Commission Chairman Reed E. Hundt to disqualify himself — or, if he refuses to do so, petitions the Commission to disqualify Chairman Hundt — from further participation in the Section 309(j) portion of the above-captioned rulemaking on the grounds that Chairman Hundt has already prejudged the issue. The proposed rule seeks public comment as to whether those applications for nationwide non-commercial licenses of the 220-222 MHz service should be resolved by random selection, comparative hearings, or competitive bidding. Chairman Hundt has made public statements that clearly indicate, however, that he has already made up his mind to vote in favor of conducting competitive bidding in this proceeding.

Consequently, there is clear and convincing evidence that he is unable to give meaningful consideration to the public comments submitted to the FCC in this rulemaking proceeding, including those submitted by WLF, that support the current random selection process. Under these circumstances, concerns of fairness and due process require that Chairman Hundt be recused from these proceedings.

INTERESTS OF THE WASHINGTON LEGAL FOUNDATION

WLF is a national non-profit public interest law and policy center based in Washington, D.C., with over 100,000 supporters nationwide. WLF has regularly participated in rulemaking proceedings before a number of federal agencies, including the Federal Communications Commission (FCC), as well as in litigation challenging the validity of agency rules or decisions. In particular, WLF submitted timely comments on September 27, 1995 in the current rulemaking proceeding and presented its views as to why the pending 33 mutually exclusive applications should be resolved by random selection. WLF notes that most of the other commenters have also filed comments favoring retention of the current random selection procedures for the 220 MHz service for equitable and other stated reasons.

In addition to filing the comments in this proceeding, WLF also has a keen interest in ensuring that government agencies conduct the public's business in a fair and unbiased manner. For example, WLF has participated in collateral litigation involving the integrity of certain FCC proceedings. See Barnstead

Broadcasting Corporation v. Offshore Broadcasting Corporation, No. 94 CV 02167 (D.D.C.) (oral argument held September 26, 1995 on motion to hold defendant in contempt of court for contacting a U.S. Senator regarding irregularity of FCC's approval of assignment of television construction permit). In addition, WLF participated in Association of National Advertisers, Inc. v. Federal Trade Commission, 627 F.2d 1151 (D.C. Cir. 1979), in which the impartiality of Michael Pertschuk, then-Chairman of the Federal Trade Commission, was challenged in an FTC rulemaking proceeding on the basis of public statements he made regarding the subject of those proceedings. Id. at 1156, n.7.

For these reasons, WLF has an interest in ensuring that the the current rulemaking proceeding is conducted in a fair and unbiased manner.

BACKGROUND OF THE 220 MHz SERVICE RULEMAKING PROCEEDING

On September 7, 1995, the Commission published a notice in the Federal Register seeking public comment with respect to the Third Notice of Proposed Rulemaking portion of the above-captioned proceeding regarding the resolution of certain applications for licenses of the private mobile radio services in the 220-222 MHz band (220 MHz service). 60 Fed. Reg. 46564 (Sept. 7, 1995). The proposed item was adopted by the Commission at a public meeting on July 28, 1995, but the actual text of the proposal was not released to the public until August 28, 1995. At that time, the Commission invited public comments which were due on September 27, 1995, and reply comments which were due by

October 12, 1995.

The 220 MHz service was established by the Commission in 1991. This service was intended to provide for a certain use of private and Federal Government mobile land radio. On May 1, 1991, the Commission began accepting applications for the nationwide and non-nationwide licenses for both commercial and non-commercial uses, and received approximately 60,000 applications. In 1992 and 1993, the Commission conducted lotteries to resolve the mutually exclusive non-nationwide and some of the nationwide applications, issuing nearly 3,800 authorizations for the non-nationwide stations, and four licenses for nationwide, commercial stations. Only 34 applicants sought the four nationwide non-commercial systems (14 for the two ten-channel systems and 20 for the two five-channel systems).

Through no fault of these applicants, their applications have been allowed to languish over the last several years due to delays caused by the FCC. While it is true that in August 1993, Congress provided the FCC with a certain amount of discretion in deciding whether to award certain future licenses by competitive bidding,[1] these particular applications, pending since 1991,

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[1] See 47 U.S.C. § 309(j). It should be noted, however, that Congress specifically circumscribed the Commission's discretion in deciding whether to employ competitive bidding in at least two important respects. First, the general authority for competitive bidding provided by § 309(j)(1) is applicable only if the licensee will "receive compensation from subscribers" to use the spectrum. 47 U.S.C. § 309(j)(2). Applicants for the 220 MHz non-commercial service, such as Airborne Freight Corporation, the American Red Cross, and others, applied for these licenses to serve their internal communication needs, not

(continued...)

would have been disposed of by random selection or lottery had they been acted upon in a timely fashion. Consequently, vis-a-vis other applicants in the 220 MHz service, these remaining applicants would be singled out unfairly for different treatment with respect to their applications if the Commission were to adopt an auction system. For those and other reasons stated by WLF and the other commenters, there are compelling reasons why the Commission should retain the current lottery system with respect to these applications. Unfortunately, however, these reasons will not be meaningfully considered by Chairman Hundt because he has already made up his mind to resolve these applications by auction.

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[1](...continued)
for subscriber services. Even if the licensees were to receive compensation from subscribers, § 309(j)(3) provides for a number of objectives that the Commission must take into account in making its decision whether to hold competitive bidding, only one of which concerns the recovery of revenue "of a portion of the value" of the spectrum made available "for commercial use." 47 U.S.C. § 309(j)(3)(C). The pending 33 applications for 220 MHz service are for a "non-commercial use" and therefore, it would appear that § 309(j)(3)(C) does not apply in this proceeding.

Secondly, Congress expressly prohibited the Commission in § 309(j)(7)(A) from even considering possible revenues in assigning a band of frequencies "to a use for which licenses will be issued." The Commission's proposal to convert these licenses from non-commercial use to commercial use would appear to constitute a decision "to assign a band of frequencies to a use for which licenses. . . will be issued." Hence, revenue considerations are improper under § 309(j)(7)(A) in deciding whether to convert these applications from their originally intended non-commercial use to commercial use. Even if one disagrees with this analysis, there certainly can be no dispute that the Commission does not have unfettered and unreviewable discretion in deciding whether to utilize competitive bidding in this proceeding.

EVIDENCE OF PREJUDGMENT BY CHAIRMAN REED E. HUNDT

WLF submits that there is clear and convincing evidence in the form of public statements and remarks made by Chairman Hundt that, taken as a whole, would lead a reasonable person to conclude that Chairman Hundt has already decided to vote for an auction in these proceedings **before** public comments were even solicited and received by the Commission, and that he will not or could not give meaningful consideration to public comments which are to the contrary. Accordingly, he must disqualify himself or be disqualified from these proceedings.

On August 25, 1995, three days **before** the Commission released a text of the rulemaking proposal in question soliciting public comment, Chairman Hundt publicly announced the schedule for upcoming auctions at a luncheon address at Phillips Business Information in Potomac, Maryland. The FCC also issued a press release that same day summarizing Chairman Hundt's remarks in which the auction schedule as announced by Chairman Hundt was as follows:

> **Other auctions in 1996 <u>will</u> include:**
> *** * ***
> **220 MHz (3rd Quarter 1996)**
> *** * ***
> **This is an aggressive schedule, but we're going to do our best to meet it.**

<u>FCC NEWS</u>, August 25, 1995, at p. 2 (Exhibit A attached hereto) (emphasis added).

This FCC press release accurately restates the prepared text of Chairman Hundt's public remarks. <u>See</u> Remarks of Chairman Reed E. Hundt at a VIP Luncheon of Phillips Business Information, Inc.

at 4 (Exhibit B). Chairman Hundt further stated in his prepared remarks: "**Our auctions should continue**; let's not threaten their success by attacking the tiny, intrepid, hardworking FCC." Remarks of Chairman Hundt at 5 (emphasis added). This comment suggests that Chairman Hundt perceives opposition to an auction as an "attack" on the FCC itself, and that he cannot meaningfully consider the comments to the contrary on their merits.

While it is a generally well-known fact that Chairman Hundt is an auction proponent, it appears from his statement that as far as he is concerned, the 220 MHz service **"will"** be auctioned in the third quarter of 1996. As noted, this unequivocal prognostication was made three days **before** the Commission publicly solicited comments on whether to employ an auction for these proceedings.

It does not come as a surprise that Chairman Hundt believes that there "will" be an auction. During the public meeting of the FCC on July 28, 1995, when the proposed rulemaking was first discussed, Chairman Hundt made several statements that further demonstrate that his mind has been made up in favor of holding an auction in these proceedings.

The proposed rule seeks public comment as to whether the current 33 applications should be resolved by random selection, competitive bidding, or comparative hearing. Chairman Hundt disagreed with the neutral phrasing of the proposal, preferring instead one that suited his pre-conceived views, when he stated:

> **"As of now, I will tell you that my own personal preferences would have been to say that we should**

> **suggest that the licenses be auctioned, and then ask for comment as opposed to present[ing] ourselves in some neutral manner."**

Remarks of Chairman Hundt, FCC Meeting, July 28, 1995, FCC Videotape, segment at 10:02:27 a.m (FCC Videotape).

Chairman Hundt further went on to disparage the notion that these applications should be resolved by random selection by asking a series of rhetorical questions with the Commission staff and making statements that further left the clear impression that Chairman Hundt's mind is made up in this proceeding. For example, using the AT&T company, one of the 220 MHz applicants, as a target, Chairman Hundt discredits those who would support the current random selection procedure as being advocates for the proposition that **"it would be in the public interest to give $80 million of its [the public's] money to AT&T in return for $24,500 [the application fee]. . . That's the notion behind the lottery, right?"** FCC Videotape at 10:06:50 a.m. By setting up these straw man arguments, Chairman Hundt makes a thinly veiled attempt to justify his already pre-conceived views on the subject. Clearly, no public money, let alone $80 million, will be going from the public treasury to AT&T or any other applicant, large or small, who may prevail in a random selection process.[2]

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[2] And even assuming that AT&T would be willing to pay $80 million to have a 220 MHz license, that does not mean that the only criterion by which to judge the public interest is how much a company would be willing to pay to obtain a license from the government to operate a channel of communication. Otherwise, it would be in the public interest to charge any other business or person what it would pay the government for official permission to operate in any other channel of commerce, be it a shipping license to transport goods on public navigable rivers, or an FAA

(continued...)

After a series of rhetorical questions with the staff clearly designed to elicit answers that support his preconceived position, Chairman Hundt proclaims that **"we seem to be coming up with a certain amount of emptiness and even wondering exactly why its [the rulemaking proposal] asked in a neutral manner."** FCC Videotape at 10:08:13 a.m.

Chairman Hundt continues to mischaracterize the position of those who would support the random selection procedure as supporting giving **"public property of multi-million dollar gifts,"** id. at 10:10:50 a.m.; a **"giveaway of as much as a quarter billion dollars. . . in return from a few thousand dollars worth of [application] fees. . . that's what we neutrally ask about [for public comment]?"** Id. at 10:11:10-35 a.m. Finally, with respect to the third option in the proposal that the Commission could hold a comparative hearing to determine which applicants would be the best suited to serve the public interest, Chairman

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[2](...continued)
pilot license or aircraft certification to fly airplanes in the public airspace.

Such property is not "owned" by the federal government in the same sense that the federal government "owns" or has title to certain lands in the West for which it may charge grazing fees to private ranchers or mining fees to those who wish to extract minerals from public property. Instead, the federal government has the power to regulate the use of the airwaves, airspace, navigable waters, and other channels of commerce so that the use of the spectrum, navigable waters, etc., is in the public interest. Thus, while certain shipping companies, airline companies, and the like, may value their licenses from the government which give them official permission to operate their business, and would pay a premium to obtain or renew such licenses, that fact does not necessarily mean that it is the public interest to charge these businesses whatever the "market" would bear before granting them permission from the government to operate these otherwise lawful businesses.

Hundt quips, **"we could hold a comparative hearing in which we said we're going to compare the applications on the following basis: the one who wants to give us the most money wins the hearing!"** Id. at 10:19:12 a.m. [general laughter]. Unfortunately, Chairman Hundt's prejudgment in this particular proceeding is no laughing matter.

These public statements by Chairman Hundt provide clear and convincing evidence that he has made up his mind on this issue and will be unable to give, or will not give, meaningful consideration to the comments by WLF and others who advocate a contrary position. As the following section demonstrates, Chairman Hundt must — and, at the very least, should — recuse himself from these proceedings.

STANDARD FOR DISQUALIFICATION IN RULEMAKING PROCEEDINGS

The standard for disqualifying agency decisionmakers from rulemaking proceedings was enunciated by the United States Court of Appeals for the District of Columbia Circuit in the case of Association of National Advertisers, Inc. v. Federal Trade Commission, 627 F.2d 1151 (D.C. Cir. 1979). In that case, the Association of National Advertisers (ANA) and other industry groups petitioned then-Chairman Michael Pertschuk of the FTC to disqualify himself from a rulemaking proceeding in which the FTC proposed to limit children's advertising as suggested by an FTC staff proposal, on the grounds that Pertschuk's prior public statements demonstrated his bias and prejudgment of the issue.

When he refused to do so, and when the Commission ruled (without Pertschuk participating) that Pertschuk need not be disqualified, ANA and others brought suit in federal court seeking his disqualification from the rulemaking proceeding.

The district court ruled against Chairman Pertschuk, applying the disqualification standard in Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970). In Cinderella, the court held that in an adjudicatory agency proceeding, an official would be disqualified if it appeared that the decisionmaker "in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Id. at 591 (emphasis added). However, because the ANA case dealt with a rulemaking proceeding in which the court recognized that agency decisionmakers will "in some measure" have already formulated general opinions about a subject before embarking upon rulemaking proceedings, the ANA court held that the adjudicatory standard for recusal should not apply in these circumstances. Accordingly, the court ruled that a agency decisionmaker would be disqualified in a rulemaking proceeding if it appears by "clear and convincing evidence" that the decisionmaker "has an unalterably closed mind on matters critical" to the specific agency proceeding. ANA, 627 F.2d at 1170-71.

Applying this more demanding standard, the court examined the strongest public statement made by Chairman Pertschuk on the subject, a speech delivered at a conference in November 1977, some six months before the FTC adopted its notice of proposed

rulemaking on children's advertising. ANA, 627 F.2d. at 1171. The Court concluded that the speech and related statements merely fleshed out Pertschuk's theory that the FTC might have general legal authority to regulate in the area of children's advertising. Further, the court noted that the remarks were made well before the notice of proposed rulemaking was issued. Id. at 1173. So viewed, the statements "merely demonstrate that Pertschuk discussed a legal theory by which the Commission could adopt a rule, if circumstances warranted." Id. at 1174 (emphasis added). Accordingly, the court of appeals concluded that Pertschuk "remained free, both in theory and in reality, to change his mind upon consideration" of the public comments in the particular proceeding. Id. at 1172 (emphasis added).[3]

Indeed, the FCC itself filed a brief in the ANA case (along with six other independent agencies) urging the court to adopt the disqualification standard that it did, stating that a decisionmaker who has an unalterably closed mind on the subject "is obviously unable to give meaningful consideration to public comments in an informal rulemaking" proceeding. Brief For Independent Regulatory Agencies at 15 (emphasis added). Thus,

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[3] Even these general statements by Chairman Pertschuk regarding the legal theory of the FTC to regulate children's advertising were considered by one of the panel judges in ANA to be sufficient grounds for disqualification. When Pertschuk's statements are such that he "commits himself in the public mind, he jeopardizes his ability to make fair determinations and in extreme cases, such as we have here, he should be disqualified from subsequently posing as a fair decisionmaker on the subject of his advocacy." 627 F.2d at 1195 (McKinnon, J., dissenting in part and concurring in part).

the ultimate basis or rationale for the "unalterably closed mind" standard is whether the decisionmaker can give "meaningful consideration to public comments" in the rulemaking proceeding.

WLF submits that the public statements made by Chairman Hundt about whether there should be an auction in this proceeding were no mere musings about the Commission's general legal authority to conduct auctions with respect to various classes of licensing applications. Rather, those statements express clear and firm views about the very proceeding before the agency in such a way as to suggest that Chairman Hundt is unable to give "meaningful consideration to public comments" in this proceeding.

At the time the proposed rule was adopted on July 28, 1995, Chairman Hundt decried the "neutral" phrasing of the proposal and made statements that demonstrate that as far as he was concerned, the possibility of raising revenues from an auction trumps all other public interest considerations that should be considered in making a decision as to whether to hold a lottery, auction, or comparative hearings with respect to the 220 MHz applicants. Subsequent to the July 28, 1995 meeting, and three days <u>before</u> the text of the proposal was released to the public for comment, Chairman Hundt gave a speech in which he announced the schedule of auctions that "will" be held, including the one for 220 MHz. While "in theory" Chairman Hundt remains free to change his views, the "reality" is that his mind has already been made up in this proceeding.

The court of appeals had another occasion in which to

evaluate the bias of an agency decisionmaker in a rulemaking proceeding. In United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980), a challenge was made against Occupational Safety & Health Administrator Eula Bingham for prejudging a lead exposure rule because of a speech she gave before the Steelworkers that expressed solidarity with the workers, and made references to worker safety and lead exposure. While the Court concluded that Bingham "served her agency poorly by making statements so susceptible to an inference of bias," id. at 1208, the court found that it "must bear in mind" that her remarks on the general issue were made after the comment period closed in the proceeding, 30 days after she formally made her decision, and 10 days after she approved the final language of the regulation. The speech came, however, five days before the Secretary of Labor finally signed off on the rule which was by then, a fait accompli. In addition, the court found that the remarks did not address the "precise" or "specific" issue in the proceeding but rather were "general" expressions of policy. Accordingly, the court did not find the evidence sufficient to find prejudment.

Thus, in both the ANA and Steelworkers case, both the timing of the decisionmakers' comments and the general nature of those comments led the court to conclude that disqualification was not warranted. In sharp contrast to those two cases, Chairman Hundt's remarks came at the precise moment the Commission adopted the proposal and three days before the text of the proposal was

released to the public for comment. Furthermore, the statements made by Chairman Hundt did not express general views on the issue of auctions versus lotteries, but were specifically directed at the 220 MHz proceeding itself. Thus, with respect to both the timing of the remarks and their specificity, this case is a significantly stronger case of prejudment than either the ANA or Steelworkers case.

CONCLUSION

While a reviewing court would have no trouble concluding that Chairman Hundt cannot meaningfully consider public comments in this proceeding because his mind is unalterably closed, we believe it to be in the public interest for Chairman Hundt to disqualify himself in the first instance, failing which the matter should be addressed by the Commission itself. At a minimum, Chairman Hundt has, to use the words of the court in Steelworkers, "served his agency poorly by making statements so susceptible to an inference of bias," and on that basis alone, he should be disqualified from this proceeding by the Commission.

We urge Chairman Hundt and, if necessary, the Commission to act expeditiously on this petition, and certainly before any meeting is scheduled to vote on the proposed rule. We further request that we be informed immediately of any action taken with respect to this petition so that we may consider what further steps, if any, may need to be taken to protect the public

interest in ensuring fair agency decisionmaking in this proceeding.

Respectfully submitted,

DANIEL J. POPEO

PAUL D. KAMENAR

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Date: October 31, 1995

NEWS

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

August 25, 1995

CHAIRMAN HUNDT ANNOUNCES AUCTION SCHEDULE

FCC Chairman Reed E. Hundt announced today the schedule for upcoming auctions. He made the announcement in remarks delivered at a luncheon address at Phillips Business Information in Potomac, MD.

The pertinent portion of his remarks follows:

MMDS and 900 MHz SMR in November 1995. These are both firsts in this country: the first special mobile radio auction and the first auction of spectrum for the purpose of delivering video.

Broadband C Block in December 1995

As you know, the courts again have stayed our scheduling of this auction. We are committed to moving forward as expeditiously as possible after the Court of Appeals rules on the challenge to the auctions rules. We are confident that we will prevail on the merits in the litigation, and that we can get the auction back on track as soon as the court rules. Oral arguments are scheduled for Sept. 28.

This is a key auction, not only because C block will provide a significant opportunity for small businesses and new entrants to participate in the communications market, but also because this third 30 megahertz auction is the one that essentially guarantees vigorous competition in all geographic markets.

IVDS auction in 1st Quarter 1996. This should complete the IVDS auctions. Then it will be up to the licensees to make Broadcast TV an interactive service.

(over)

EXHIBIT "A"

We will auction the Broadband PCS D and E blocks in the First Quarter of 1996, and the F block in the Second Quarter of 1996. These are the ten megahertz licenses that may be combined to form mobile phone businesses in some markets. In others they will be the vanguard of new wireless applications.

Other auctions in 1996 will include:

Cellular Unserved (1st Quarter)
Narrowband PCS (2nd Quarter 1996)
800 MHz SMR (3rd Quarter 1996)
50 MHz (GWCS -- General Wireless Communications Service -- 3rd Quarter 1996)
220 MHz (3rd Quarter 1996)

We don't make predictions but there isn't much doubt that these auctions will total more than a billion extra dollars for the Treasury.

More important -- because it's not about the auction revenue -- these auctions will energize brand new competition and brand new wireless industries that will add hundreds of thousands of jobs to the economy.

This is an aggressive schedule, but we're going to do our best to meet it.

So if people ask you what is the purpose of the FCC, tell them that among other things we are working overtime to promote rapid introduction of new wireless services to the American consumer.

- FCC -

For the complete text of the speech, call the FCC's fax on demand number (202) 418-2830 and request document 1146.

Remarks of Chairman Reed E. Hundt
at a VIP Luncheon of
Phillips Business Information Inc.
August 25, 1995

I'm honored to be here. At the Commission, we learn a great deal about the industry's perspectives on current issues from reading your publications. I hope it is equally true that the industry can learn as much about what the Commission is up to and why. If that is not the case, I hope the fault is not at our end. I want the Commission to be as open and accessible as our rules permit. I want your reporters to feel free to go beyond merely reporting what is in our public statements and our public notices, so that your readers gain the fullest possible understanding of what it is that we are doing. It is in that spirit of openness that I accepted your kind invitation today.

Our nation's wireless communications industry, which many of your publications cover, probably is the most exciting business in the world.

It is this industry that has recorded the biggest auction in history. That was our first PCS auction, raising nearly $8 billion. It is in the Guinness Book of Records.

It is this industry that is in the middle of the biggest single investment boom ever made in a single technology: PCS. Over the next few years more than $30 billion will be invested.

This investment will ultimately create directly and indirectly more than one million new jobs. This investment will ultimately generate in tax revenues far more every year than the auction revenues already earned.

That is why when people compliment the FCC on the success of the auction I always say: it's not about the money we raise; it's about the businesses we help get started; it's about the economic growth they generate.

You may have read that a group of former FCC employees, along with some new arrivals on the communications scene, gave themselves a press conference in which they blithely opined that the FCC should be eliminated.

It is fairly obvious that this group has a rhetorical and political mission that pushes their logic beyond the limits of good sense.

Still these commentators are honorable men and we owe it to the process of rational debate to ask seriously what is the purpose of the FCC.

EXHIBIT "B"

To: 2025880302 From: FEDERAL COMMUNICATIONS FAX LINE 10-30-95 11:31AM P.1 0

No one has a better idea of this purpose than someone in the wireless industry.

First, the FCC manages the public property of the airwaves to promote the public interest. This means, among other things, that we make sure that new businesses have a chance to get access to spectrum. Without us, the big established companies would be in total control of the communications revolution. These are fine companies but they shouldn't be the only ones involved in the most important industry in this country's future.

Second, we do auctions of spectrum, like no one else in the world has done. The most important facts about the auction techniques that we have pioneered are these: auctions are fast; auctions are fair; auctions create efficient markets. In addition, we have demonstrated that you can conduct auctions that guard the rights of incumbents, such as the incumbents in the PCS spectrum.

Third, the FCC stands ready to set fair rules of competition for new wireless businesses. If you can't get access to the local loop; if you aren't treated fairly by long distance companies; if you aren't given your fair chance to compete -- the FCC is there for you. The Department of Justice and the state public utility commissions each have their roles, but only the FCC can and has set fair national rules of competition for everyone in our burgeoning national communications businesses.

FCC, as you know, stands for Fair Competition in Communications.

I spoke earlier of the incumbents in the PCS spectrum. With the recent issuance of the A and B block licenses, the process of relocating these incumbents has just begun. Our rules provide for a period for voluntary negotiations,followed by a period of mandatory negotiations. Even though relocation is in its earliest stages, we are hearing a growing number of complaints from participants, especially from the PCS side of this equation. The PCS industry has joined behind a petition for rulemaking that would permit PCS licensees to share the costs of relocating incumbents. We expect to issue a NPRM on cost sharing rules this fall.

Beyond cost sharing concerns, many other complaints go to the issue of whether our rules grant too much leverage to the microwave incumbents during the initial stages of the negotiation period. Some PCS licensees are describing what they face in negotiations with some microwave incumbents as "greenmail." We will be looking at both sides of this issue very carefully, to see how the process is working. Our goal remains the same -- we want to facilitate the fastest possible rollout of PCS services to the American public, while protecting the rights of incumbent occupants of the PCS spectrum.

I don't know how far or how fast this industry is going. No one does. But, when I think of its future I'm reminded of the history of General Motors.

In 1908, William Durant, the first CEO of General Motors, met with J.P. Morgan's chief partner George W. Perkins. The House of Morgan was the key source of finance for the industrialization of America. Durant assured Perkins that Perkins ought to loan him money because, he said, "There will come a time when a half million automobiles are built and sold in this country."

After Durant left, with no commitment, Perkins said, "If this man has any sense at all, he will keep those observations to himself when he tries to borrow money."

Within six years, the U.S. auto industry achieved Durant's prediction. By 1920, another six years later, this country was making two million automobiles a year.

Wireless borrowers can use this story when they go to Wall Street.

And as you already know, the number of cellular subscribers grew last year by almost 50 percent -- to more than 25 million. Wireless is the fastest growing sector of the U.S. economy in terms of new customers added.

Think about AM/FM radios. They are ubiquitous, cheap, in every home, car and workplace; easy to carry, simple to use, always ready to be turned on.

Soon, the same thing will be true about *interactive* radios: also called wireless devices.

In order to make our contribution to your future, we created a new Bureau to focus on wireless telecommunications issues -- under the terrific leadership of Gina Keeney. Under her leadership, the new bureau has completed four spectrum auctions and we are moving forward rapidly on more.

I am pleased to take this opportunity publicly to announce our lineup of upcoming auctions:

MMDS and 900 MHz SMR in November 1995. These are both firsts in this country: the first special mobile radio auction and the first auction of spectrum for the purpose of delivering video.

Broadband C Block in December 1995

As you know, the courts again have stayed our scheduling of this auction. We are committed to moving forward as expeditiously as possible after the Court of Appeals rules on the challenge to the auctions rules. We are confident that we will prevail on

the merits in the litigation, and that we can get the auction back on track as soon as the court rules. Oral arguments are scheduled for Sept. 28.

This is a key auction, not only because C block will provide a significant opportunity for small businesses and new entrants to participate in the communications market, but also because this third 30 megahertz auction is the one that essentially guarantees vigorous competition in all geographic markets.

IVDS auction in 1st Quarter 1996. This should complete the IVDS auctions. Then it will be up to the licensees to make Broadcast TV an interactive service.

We will auction the Broadband PCS D and E blocks in the First Quarter of 1996, and the F block in the Second Quarter of 1996. These are the ten megahertz licenses that may be combined to form mobile phone businesses in some markets. In others they will be the vanguard of new wireless applications.

Other auctions in 1996 will include:

Cellular Unserved (1st Quarter)
Narrowband PCS (2nd Quarter 1996)
800 MHz SMR (3rd Quarter 1996)
50 MHz (GWCS -- General Wireless Communications Service -- 3rd Quarter 1996)
220 MHz (3rd Quarter 1996)

We don't make predictions but there isn't much doubt that these auctions will total more than a billion extra dollars for the Treasury.

More important -- because it's not about the auction revenue -- these auctions will energize brand new competition and brand new wireless industries that will add hundreds of thousands of jobs to the economy.

This is an aggressive schedule, but we're going to do our best to meet it.

So if people ask you what is the purpose of the FCC, tell them that among other things we are working overtime to promote rapid introduction of new wireless services to the American consumer.

When I talk about overtime I mean overtime all the time -- and without extra pay.

It has been said that "government isn't the solution, it's the problem."

I am perfectly willing to admit that government is filled with problems, but that is in part because government takes on hard problems. And having problems is no excuse for abandoning the pursuit of the public interest that is the purpose of government.

The FCC has struggled for years to find a fair, fast, and efficient way to mete out licenses to use the public property of the airwaves. Auctions are the best thing we've come up with and they work terrifically well.

I call that an example of government finding a solution to a problem.

And when I tell you your civil servants at the FCC are working overtime; they are doing this so that others get the chance to build careers. They don't profit for themselves.

They are doing this to help you and to have something historic to share with their children.

So I think everyone in the Wireless Bureau deserves, for their selfless hard work and the hard work they are committing to do for the rest of this year, a round of applause.

Our auctions should continue; let's not threaten their success by attacking the tiny, intrepid, hardworking FCC.

As Abraham Lincoln explained, "the legitimate object of government is to do for the people what needs to be done but which they cannot, by individual effort, do at all, or do so well, for themselves."

Lincoln therefore thought that government funds should be used to help build infrastructure in the new western state of Illinois. No one in Illinois could build that infrastructure acting alone. By acting together, through government, the country could make sure that the small businesses, entrepreneurs, immigrants, and little people of Illinois would have a fair chance to explore their own future.

As it happened, their future became the great united country we are proud to call ours today.

We have before us today the same necessity -- but this time we need to build the infrastructure not of the industrial age but the information age.

One clear example of the proper role of Government and this Commission in building the information age infrastructure is our plan to address the wireless communications needs of the public safety community. We have joined with the Administration, and with the industry itself to ensure that public safety is part of modern communications and that the process to bring this about be a fair and open one. We are unwilling to let matters simply evolve.

With NTIA, which has the spectrum management responsibilities for federal agencies, we have established the Public Safety Wireless Advisory Committee. Last week

Assistant Secretary Irving and I announced a group of distinguished individuals to chair and oversee the work of the Advisory Committee. Its chairman, Philip Verveer has a well earned reputation of fairness and commitment to public service in communications. His steering committee includes senior public safety officials from the federal, state and local governments, and from key public safety equipment manufacturers.

I do not intend this Advisory Committee's work to culminate simply in a report. Its recommendations will become part of a parallel rulemaking that will allow the Committee's decisions to be put into place as soon as possible.

The Committee will address five key goals:

First, to obtain sufficient spectrum for public safety to meet all its communications needs, at the quality and service standards it demands.

Second, to create an environment that promotes interoperability, emerging technologies, and efficiency, where technology can meet public safety requirements instead limiting them.

Third, that competition be turned to public safety's advantage by providing it with the opportunity to purchase equipment and services from multiple vendors.

Fourth, that the structure evolves to one managed by the users, and not Washington.

And, fifth, to take advantage of the auction environment so that some of this money can provide the means to finance new equipment and the transition costs of public safety.

We are committing substantial resources to this endeavor. It is a major priority of the Commission and the Administration.

Just as all Americans acting through government had to take special steps to open up the West for everyone in the last century, so at the predawn of the 21st century we need to take special steps to make sure that the communications revolution will include all Americans and benefit all Americans.

Advances in communications technologies hold out the promise of vastly increasing our wealth and comfort. They also have the capacity to sow violence and despair by dividing further the gap between the haves and the have-nots.

We must understand that the power of communications tests as never before our capacity to act as a wise and caring society. The power of communications tests as