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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
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In the Matter of	)	
	)	
Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees	)	WT Docket No. 96-148
	)	
Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers	)	WT Docket No. 96-113

OPPOSITION OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION TO MOTION FOR STAY PENDING JUDICIAL REVIEW

The Personal Communications Industry Association ("PCIA"), by its attorneys, hereby opposes grant of the Motion for Stay Pending Judicial Review filed by the Rural Telecommunications Group ("RTG") on February 20, 1997 ("*RTG Stay Motion*"), in the above-captioned docket. RTG filed a petition for review of the Report and Order and Further Notice of Proposed Rulemaking in this proceeding[1] with the United States Court of Appeals for the District of Columbia Circuit on February 9, 1997. RTG now requests the Commission to "grant a stay pending judicial review of the effectiveness of the modification of the PCS partitioning rules adopted in the [*Report & Order*]" or alternatively to "grant a stay pending a decision on reconsideration of the PCS partitioning rules adopted in the [*Report & Order*]."[2]

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[1] *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, FCC 96-474 (Dec. 20, 1996) (Report and Order and Further Notice of Proposed Rulemaking) ("*Report & Order*"); *Erratum* (Jan. 30, 1997).

[2] *RTG Stay Motion* at 26.

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RTG opposes the Commission's action in the *Report & Order* to eliminate restrictions on the partitioning of broadband personal communications service ("PCS") authorizations that permitted PCS licensees to partition only to rural telephone companies. Rules embodying the Commission's policy to promote partitioning flexibility currently are scheduled to become effective on March 7, 1997.[3] PCIA opposes the imposition of any stay -- temporary or otherwise -- on the effectiveness of policies that will further, as the Commission found, the development of the PCS marketplace. As discussed below, RTG has failed to demonstrate that grant of a stay is warranted under the applicable legal standards. Indeed, imposition of a stay would run directly counter to the public interest.

To justify the extraordinary relief represented by a stay of an administrative order, the Court of Appeals for the D.C. Circuit has indicated that the decision-maker must consider the following four factors:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits? . . .
>
> (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . .
>
> (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . .
>
> (4) Where lies the public interest?[4]

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[3] *See* 62 Fed. Reg. 653 (Jan. 6, 1997).

[4] *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 (D.C. Cir. 1977), citing *Virginia Petroleum Jobbers v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

The Court has further indicated that "[a] stay may be granted with either a high probability of success and some injury, or *vice versa*."[5] In this case, however, RTG has failed to demonstrate that it has a high probability of success or that it (or its members) will suffer the requisite level of irreparable injury in the absence of the stay. Moreover, RTG entirely ignores the harm to be suffered by other parties, specifically including the public, in the event that the requested stay is imposed. In sum, review of these factors as well as consideration of the public interest indicates that the *RTG Stay Motion* should be promptly denied.

Likelihood of success on the merits. In its stay motion, RTG largely repeats the arguments made by it and other rural telephone companies during the rulemaking proceeding, which were specifically evaluated and rejected in the *Report & Order*.[6] Nothing in the *RTG Stay Motion* is persuasive in describing how the Commission's analysis is incorrect. Instead, RTG relies upon unsupported assertions that the revised rules will somehow foreclose rural telephone companies from receiving partitioned licenses (despite the fact that rural telephone companies are eligible -- along with many other potential licensees -- to obtain partitioned licenses under the revised rules) and that PCS licensees will engage in certain partitioning practices that will have the effect of depriving service to rural areas.[7] Relying on these factually unsupported claims, RTG concludes that the Commission has failed to comply with

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[5] *Cuomo v. United States Nuclear Regulatory Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985).

[6] *Report & Order*, ¶¶ 13-18.

[7] *See, e.g.*, *RTG Stay Motion* at 13.

the requirements of Section 309 of the Communications Act of 1934, as amended,[8] regarding the dissemination of licenses for new and innovative technologies to a wide variety of applicants, including rural telephone companies and the provision of such services to rural areas.

Initially, the bare assertions offered by RTG do not suffice to demonstrate that it is likely to succeed on the merits in its appeal of the *Report & Order*. Moreover, the mechanisms advocated by RTG are not the only means for implementing the rural telephone company and service to rural areas provisions of Section 309. Finally, as the Commission has previously recognized in denying a request to stay issuance of the A and B block PCS licenses, Congress enumerated additional objectives in Section 309, including: "(1) development and rapid deployment of services with a minimum of administrative and judicial delay; (2) recovery for the public of a portion of the value of the spectrum; and (3) promoting efficient and intensive use of the spectrum."[9] Comparably to that situation, there is no reason for the Commission to promote the interests of rural telephone companies at the expense of a balanced implementation of all of the objectives adopted by Congress to govern the Commission's PCS licensing policies. Thus, one can only conclude that RTG has failed to demonstrate that it has *any* chance of success -- let alone made a showing that it is likely to prevail -- on the merits in seeking to override the Commission's expanded eligibility for the holding of partitioned PCS licenses.

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[8] 47 U.S.C. § 309.

[9] *Deferral of Licensing of MTA Commercial Broadband PCS*, FCC 96-139, ¶ 10 (Apr. 1, 1996), citing 47 U.S.C. § 309(j)(3)(A), (C), and (D).

Irreparable harm to RTG members. RTG's claim of irreparable harm amounts to an assertion that somehow its members will be prejudiced in the absence of a stay of the new rules.[10] To demonstrate the necessary irreparable harm, however, "the injury must be both certain and great; it must be actual and not theoretical."[11]

Here, the asserted harm is neither certain, nor great, nor actual. At most, it is theoretical. In the absence of the rule changes adopted by the *Report & Order*, there is no requirement that *any* PCS licensee must partition *any* of its geographic area to *any* rural telephone company, including RTG's members. Currently, RTG's members have the right to pursue negotiations with a PCS licensee, nothing more. Such licensee may or may not decide to sign a partitioning agreement with the rural telephone company, depending upon its business interests. RTG's members will retain the same right to pursue partitioning discussions with PCS operators under the revised rules.

Moreover, any parties seeking to take advantage of the new partitioning rules must still comply with the Commission's application and prior approval rules. The mere effectiveness of the revised partitioning rules will not permit implementation of partitioning agreements. Rather, RTG's members will be able to file petitions to deny against any partitioning application for which they have the requisite standing.

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[10] *RTG Stay Motion* at 21-22.

[11] *Deferral of Licensing of MTA Commercial Broadband PCS*, DA 95-1410, ¶ 29 (June 23, 1995), quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Thus, RTG has not shown that its members will suffer certain, actual harm directly resulting from the revised rules when they go into effect. Rather, the harm can be categorized only as theoretical, linked only tenuously to the rule changes adopted in the *Report & Order*.

Absence of harm to other interested parties. RTG alleges that, since a stay will preserve the *status quo*, there will be no harm to the public or other interested parties.[12] RTG ignores the fact that a stay will indefinitely postpone effectuation of the public interest objectives and benefits in the *Report & Order*. These include: "(1) remov[ing] potential barriers to entry thereby increasing competition in the PCS marketplace; (2) encourag[ing] parties to use PCS spectrum more efficiently; (3) speed[ing] service to unserved and underserved areas."[13] Impeding achievement of these policies will adversely affect the public.

Imposition of the stay sought by RTG will prevent a host of potential partitionees -- including new entrants and small businesses -- from even initiating discussions concerning potential partitioning arrangements during a critical period in the design and deployment of PCS systems. Moreover, the RTG-requested stay could prevent partitioning to interested entities in areas (rural and otherwise) where no rural telephone companies are present at all or are not interested in holding a partitioned PCS license.

Given all these ramifications resulting from adoption of the stay requested by RTG, it is hard to believe that RTG could credibly assert that no one would be harmed by the stay it seeks. As the above indicates, the public as well as a range of potential PCS providers would be adversely affected by delaying the effective date of the revised partitioning rules.

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12 *RTG Stay Motion* at 23.

13 *Report & Order*, ¶ 13; *see also id.*, ¶ 14.

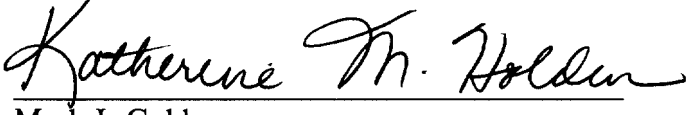
Public interest. Despite the claims made by RTG, grant of a stay would be contrary to the public interest as the discussion above indicates. The Commission has accurately concluded, based on the record in the rulemaking proceeding, that revising its rules to promote greater flexibility in the partitioning of PCS licenses will have substantial public interest benefits, all favorably affecting the American public. Delaying the implementation of such benefits directly undermines the public interest.

In conclusion, RTG has failed to demonstrate that the grant of a stay is warranted in the circumstances described in its filing. RTG has not shown that it is likely to succeed on the merits; it has not demonstrated that its members will suffer irreparable harm in the absence of a stay; it has ignored the extent of injury that would be imposed on the public and other interested entities if the stay is granted; and it has not demonstrated that the public interest would be furthered by the stay. Accordingly, the Commission should promptly deny the *RTG*

Stay Motion, and allow the revised Part 24 rules to become effective as scheduled on March 7, 1997.

Respectfully submitted,

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION



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Dated: February 27, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1997, I caused copies of the foregoing "Opposition of the Personal Communications Industry Association to Motion for Stay Pending Judicial Review" to be mailed via first-class postage prepaid mail to the following:

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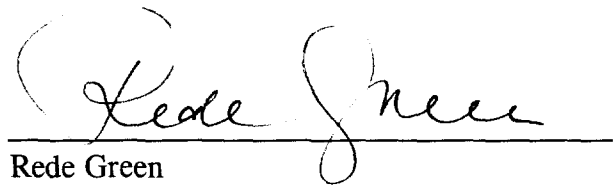

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