

Flexibility in permitting license transfers without the application of unjust enrichment penalties will allow small business C-Block licensees to compete with the investment terms offered to strategic partners by the larger wireless A and B Block competitors. It will remove a substantial disincentive to the investment in, or purchase of, C-Block PCS companies by established telecommunications companies, including foreign investors seeking to enter the U.S. marketplace.<sup>29/</sup> The Commission's rules must recognize that investment interest in C-Block PCS by strategic partners will increase only if the investment or acquisition presents a return-on-investment comparable to other available market opportunities. Thus, the Commission's C-Block rules must encourage strategic investment action that is consistent with conventional market expectations.<sup>30/</sup>

Similarly, providing flexibility in cases of C-Block foreclosure and financial distress will increase investor willingness to participate with small business entrepreneurs in the build-out of competitive C-Block PCS systems. To achieve this end, the Commission must waive its policy to apply the unjust enrichment penalties to involuntary license transfers in instances of financial distress, foreclosure or bankruptcy.<sup>31/</sup> This application of the unjust enrichment rules inhibits C-

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<sup>29/</sup> Peter Elstrom, Amy Barrett and Catherine Arnst, "Next Stop for Wireless: Shakeout City," *Business Week*, December 2, 1996 at 104 ("Investors are already nervous about the potential PCS payoff.").

<sup>30/</sup> At this relatively late date, it is doubtful that many C-Block licensees will be able to attract new investors. Existing circumstances plainly illustrate that the ability of PCS licensees to attract much needed capital peaked, in many circumstances, at the close of the C Block auction, or soon thereafter. Moreover, many interested investors have already chosen their partners. It is essential, therefore, that the Commission waive or modify the rule to encourage further investment flexibility in C-Block small businesses.

<sup>31/</sup> See Public Notice, "Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block auction" at 6 (rel. June 8, 1995); *Letter to Leonard J. Kennedy and Richard S. Denning from William E. Kennard, General Counsel of FCC and Michele C. Farquhar, Chief, Wireless Telecommunications Bureau* (rel. December 17, 1996).

Block licensees from attracting capital from both lending institutions and strategic investors who seek to protect their investment in financial-distress circumstance without incurring additional financial penalties.

**C. Waive or Modify Application of the CMRS Spectrum Cap - 47 C.F.R. § 20.6**

Because C-Block licensees have difficulty in locating interested strategic investors/buyers, the Commission should waive the application of the CMRS spectrum cap to increase the pool of potential entities interested in acquiring C-Block licenses, and thereby ensure the preservation of existing investments and continued service to the public.

Relieving C-Block licensees and potential purchasers of the CMRS spectrum cap will encourage third-party investment in such licensees. It would give investors comfort that in instances of financial distress the FCC's rules would facilitate transfers to qualified entities better equipped to operate the PCS enterprise. Moreover, it would increase the possibility of the successful transfer of control of a financially distressed C-Block company without the threat of penalizing investors willing to partner with such C-Block licensees.

Waiving the application of the CMRS spectrum cap also will ensure that the existing C-Block installment obligations are honored. Without grant of a waiver of these rules, the Commission likely will be faced with additional bankruptcies that will lead to a complete investment loss in C-Block licenses.

**IV. Other Waivers/Modifications to C-Block PCS Rules**

Although R&S believes that the relief outlined in Section III is critical, the following proposals are also worthy of adoption. For the reasons discussed above, the Commission also should waive and grant relief from certain C-Block requirements to increase the attractiveness of C-Block licensees to large strategic investors. Enhanced flexibility and marketability are

required if C-Block licenses are to be implemented by viable entities in an increasingly competitive wireless marketplace. This goal can be accomplished only if PCS rules *encourage* market investment interest in C-Block entities.

Specifically, the Commission should waive or modify the following designated entity rules:

**A. Waive or Increase the C-Block Small Business Financial Caps - 47 C.F.R. § 24.720(b)**

The revenue and asset caps for C-Block small business licensees should be waived or increased to at least \$2 billion and \$8 billion respectively. As discussed above, the economics of the wireless business require greater access to equity funding. As a result of the WTO Agreement and the stream of mergers among telecommunications industry giants, small business licensees must compete with companies which enjoy substantially higher revenues and hold substantially more assets. The financial thresholds established for PCS, therefore, must reflect the size of competing companies and the capital-intensive nature of the PCS business.<sup>32/</sup>

In establishing low financial thresholds for the C-Block designated entities, the Commission and potential licensees of PCS spectrum expected that designated entities would be able to find "deep pocket" investors to permit the acquisition of PCS licenses and the build-out of PCS networks. However, C-Block licensees have found it increasingly difficult to locate strategic investors or to access capital through financial markets. C-Block licensees simply cannot compete in the marketplace unless they attract investors or buyers whose financial resources exceed the requirements of the existing designated entity financial caps.

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<sup>32/</sup> Increasing the small business financial caps likely will necessitate a waiver of the general designated entity financial caps for the entrepreneurs' block. R&S urges the Commission to grant a similar waiver of the general entrepreneur block caps to the extent it will promote competitive build-out and funding of all C Block licensees.

For the most part, the wireless competitors of C-Block small business PCS providers are affiliated with incumbent LECs or IXC's. On average, these companies earn revenues of \$14 billion, with some of the largest incumbent LEC's and IXC's earning \$18 billion and \$79 billion respectively.<sup>33/</sup> Unless small businesses are able to attract investors or buyers that can provide capital, and expertise needed to compete with these formidable companies, they likely will be forced into bankruptcy. As the PCS market has developed, the need for economies of scope and scale has become increasingly evident. Without the ability to attract buyers or strategic partners unrestricted by the limitations of the existing designated entity C-Block financial caps, C-Block licenses will not be viable. The revenue and asset caps for C-Block, therefore, should be waived for purposes of distress sales. To promote greater investment in C-Block licensees, the revenue and asset caps also should be raised to at least \$2 billion and \$8 billion respectively.

**B. Treat Only Exercised Options and Other "Converted" Interests as Fully-Diluted for Eligibility Purposes - 47 C.F.R. § 24.709(b)(8)**

In establishing the C-Block eligibility rules, the Commission provided that unexercised options and convertible ownership interests would be considered as fully-diluted for purposes of determining whether the ownership requirements of the entrepreneurs' block are satisfied. At that time, the Commission was concerned that such interests would give investors "control" over PCS spectrum and potentially would deny small business entrepreneurs of the ability to control their PCS facilities and businesses.<sup>34/</sup> Nevertheless, the Commission should waive the rule

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<sup>33/</sup> See *Statistics of Communications Common Carriers*, Federal Communications Commission 1995/1996 Edition at Table 1.1.

<sup>34/</sup> See *Fifth Memorandum Opinion and Order*, PP Docket No. 93-253 ¶ 95 (stating that call options "would vest an impermissible degree of control in the applicant's so called 'non-controlling' investors").

because it continues to prevent C-Block licenses from locating strategic partners or viable "buy-out" investors.

Under current rules, potential investors are offered only limited inducements for their investment in small business PCS ventures. Indeed, they are either offered fixed returns based on loans made to PCS businesses or are permitted to take limited ownership interests that relegate them to the status of "minority" shareholders who must invest under rules more unfavorable than apply to non-designated entity investments.<sup>35/</sup> Without more flexible investment incentives, C-Block PCS licensees will be unable to attract strategic "buy-out" investors who seek flexibility in structuring their investments, and face no restriction in other wireless entity opportunities.

Moreover, unexercised options and other convertible interests have *not* traditionally been treated on a fully-diluted basis for other purposes, such as determining compliance with the general CMRS spectrum cap.<sup>36/</sup> In determining whether a licensee controls too much CMRS spectrum in a specific service area, the Commission's CMRS spectrum cap rules expressly recognize only *exercised* ownership options. Because options do not affect control of an enterprise, the identical approach should be taken with regard to C-Block licensees' eligibility.

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<sup>35/</sup> Although the Commission permits transfers of licenses to non-designated entities after the fifth year of licensing, 47 C.F.R. § 24.839, the PCS rules require the recoupment by the Commission of the bidding credits and installment payment benefits received by the small business licensees at the time of transfer. Moreover, because the value of the licenses have diminished significantly since the time of auctioning, it would be uneconomic for third parties to purchase these licenses under the current rules. Accordingly, there presently are few incentives that encourage investment in designated entities.

<sup>36/</sup> See 47 C.F.R. § 20.6(d)(5) ("Debt and instruments such as warrants, convertible debentures, options, and other interests . . . with rights of conversion to voting interests shall not be attributed unless and until conversion is effected . . .").

Finally, the Commission has suspended application of certain C-Block rules when circumstances so dictate for the benefit of the public.<sup>37</sup> Indeed, in applying its PCS rules, the Commission has been called upon in numerous instances to balance competing interests. Given present circumstances, the Commission should waive or modify the eligibility rule that treats all options and convertible interests as fully-diluted.<sup>38</sup>

**C. Continue Suspension of Installment Payments - 47 C.F.R. § 24.711**

On March 31, 1997, the Commission temporarily suspended C-Block payment obligations pending consideration of proposed changes for making and collecting installment payments in the future.<sup>39</sup> To relieve C-Block licensees of the financial burdens imposed by the prevailing unavailability of capital from traditional sources, the Commission should maintain the suspension until the fifth anniversary of the grant of the C-Block licenses and extend the repayment term from 10 years to 15 years.<sup>40</sup>

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<sup>37/</sup> See e.g., *Order*, Southern Communications Systems, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B085, File No. 00551-CW-L-96 (rel. February 4, 1997); *Letter* to Melodie Virtue, Esq., Haley, Bader & Potts, P.L.C. from David Furth, Chief, Commercial Wireless Division, Wireless Telecommunications Bureau (rel. January 29, 1997) (granting waiver of Section 24.709(c)(2)(i)); *Order*, Northern Michigan PCS Consortium L.L.C. Request for Waiver of Sections 24.720(f) and (g) of the Commission's Rules (rel. January 29, 1997); *Order*, Waiver of Section 24.813 of the Commission's Rules -- General Requirements for the Broadband Personal Communications Service, PP Docket No. 93-253 (rel. May 19, 1995).

<sup>38/</sup> Moreover, the Commission should waive or modify Section 24.804 of its rules to reflect the U.S.'s commitments in the WTO Agreement. Specifically, the rules should permit foreign ownership in PCS licenses above current limits, which were imposed before the WTO Agreement was signed in February 1997.

<sup>39/</sup> See *Order*, In the Matter of Installment Payments for PCS Licenses (rel. March 31, 1997).

<sup>40/</sup> See *Letter* to William F. Caton, Secretary, FCC, from James H. Barker, Michael S. Wroblewski, counsel to Fortunet Communications, L.P. (filed May 9, 1997).

The extension of a grace period for submitting installment payments during this critical start-up period will encourage greater investment by third parties in C-Block entities, thereby speeding service to the public, without adversely impacting the collection of the money bid during the C-Block auctions. In fact, grant of this request will *enhance* the Commission's ability to collect under established C-Block payment schedules because it will increase the funds available for near-term roll-out of a competitive PCS service.

**D. Adjust Value of C Block Licenses to Reflect A & B Block Market Prices - 47 C.F.R. § 24.704, 24.711**

As recommended by MCI and General Wireless, Inc.,<sup>41/</sup> the Commission should permit adjustment of the value of C-Block licenses to reflect A & B Block market prices. Under our proposal, all C-Block licensees should be permitted to readjust their bid prices to reflect an average A and B Block "discount factor" to their current license installment debt. As proposed, all licensees would receive the *same percentage reduction* in their bid prices. They also would be given the option of: (1) making a one-time reduced payment for their licenses; or (2) assuming the installment payment obligations after the A & B Block discount factor is applied.

These adjustments are worthy of consideration because they no longer will burden C-Block licensees with inflated debt obligations that do not reflect the true value of the C-Block licenses based on dramatically changed market factors.

**V. The Public Interest Favors Waiver or Modification of the C-Block Rules**

Congress' 1993 mandate to ensure small business participation in the communications industry requires waiver or modification of certain PCS rules to allow all C-Block licensees to

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<sup>41/</sup> See Letter to William F. Caton, Secretary, Federal Communications Commission, from Leonard S. Sawicki, Director, FCC Affairs, (filed May 1, 1997); *General Wireless, Inc. Presentation* to the Wireless Telecommunications Bureau (May 6, 1997).

find viable business structures or buyers for their license operation. Indeed, any progress in diversifying the ownership of radio spectrum licenses will be undermined unless prompt relief is afforded to C-Block entrepreneurs.

The PCS rules identified above must be waived or modified to give potential investors and strategic partners the incentive to make C-Block licenses a viable business. Given the dramatic reshaping of the telecommunications landscape in the last three years, the Commission must seize the day and fundamentally refashion C-Block rules to promote the infusion of capital into the C-Block licensees. For some, the recommendations outlined above provide an exit option, with the licenses being reauctioned to those financially capable of constructing and operating the licensed systems. For others, a waiver or modification of the PCS ownership, transfer and spectrum cap rules identified above should permit C-Block licensees to find viable, interested investors and strategic "buy-out" partners that can provide greater access to capital, industry experience, and engineering expertise. R&S believes that the incentives outlined herein will induce increased investment in C-Block licensees.

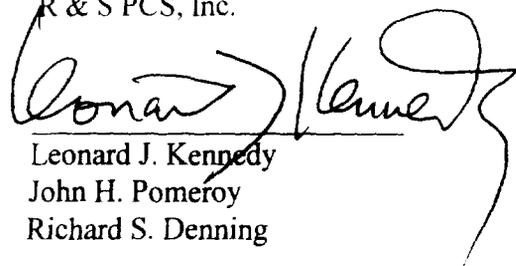
## **VI. Conclusion**

Consistent with the Commission's goals for small business participation in PCS, and for the foregoing reasons, R&S respectfully requests that the Commission grant its Petition For Waiver set forth herein under Section 24.819 of the Commission's Rules. To the extent R&S' Petition for Waiver is opposed in this rulemaking docket, R&S requests that consideration of its Petition be treated as a non-restrictive, permit-but-disclose proceeding under the Commission's

ex parte rules. Alternatively, R&S requests that its Petition be treated as informal comments in  
WT Docket No. 97-82.

Respectfully submitted,

R & S PCS, Inc.

A handwritten signature in black ink, appearing to read "Leonard J. Kennedy", written over a horizontal line. The signature is stylized and cursive.

By: Leonard J. Kennedy  
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June 23, 1997

CERTIFICATE OF SERVICE

I, **Jeanette M. Corley**, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 23rd day of June, 1997, I caused copies of the foregoing "**Petition for Waiver and Comment of R&S PCS, Inc.**" to be served via hand delivery to the following:

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