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January 13, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: Comments on Broadband C and F Block Rules and Installment Payment Issues
WT Docket No. 97-82; DA 97-679
EX PARTE PRESENTATION

Dear Ms. Salas:

On Wednesday, January 7, 1998, Byron F. Marchant, Senior Vice President & General Counsel of Black Entertainment Television, and Leonard J. Kennedy, Esq. of Dow Lohnes & Albertson, PLLC, met with Ari Fitzgerald, Legal Advisor to Chairman Kennard, and David Siddall, Legal Advisor to Commissioner Ness, to discuss the C Block options set forth in the *Second Report and Order* adopted by the Federal Communications Commission ("Commission") in the above-referenced docket.

In their meetings with Commission staff, Mr. Marchant and Mr. Kennedy discussed R&S PCS, Inc.'s position as set forth in its Petition for Waiver and Comments filed with the Commission on June 23, 1997, and its September 15, 1997 ex parte letter. The attached materials were referenced in the meetings.

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This letter is being filed in original with two duplicates pursuant to the Commission's rules. If you have any questions related to this ex parte letter, please do not hesitate to contact the undersigned.

Respectfully submitted,

Leonard J. Kennedy

LJK/rll

cc: Ari Fitzgerald
David Siddall

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

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In the Matter of	)	
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PETITION FOR WAIVER AND COMMENTS OF R & S PCS, INC.

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June 23, 1997

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TABLE OF CONTENTS

PAGE

SUMMARY i

I. Introduction 1

II. Need for Relief 3

A. Dramatic Tightening of Domestic Capital Markets 4

B. Potential for Increased Foreign Investment in Domestic Market 6

C. Increasing Consolidation and Competition in the Telecommunications Marketplace 8

1. Mergers 8

2. Considerable A and B Block Head Start 9

3. Unanticipated Availability of Additional CMRS Spectrum 10

III. Proposed Waivers/Modifications To Facilitate the Return of C-Block Licenses or Sales to Third Parties 12

A. Establish A Period For Return of C-Block Licenses 47 C.F.R. § 24.704 13

B. Waive or Modify Unjust Enrichment Rules and Transfer Restrictions - 47 C.F.R. §§ 24.839(d), 24.711(c), 24.712(b) 14

C. Waive or Modify Application of the CMRS Spectrum Cap - 47 C.F.R. § 20.6 17

IV. Other Waivers/Modifications to C-Block PCS Rules 17

A. Waive or Increase the C-Block Small Business Financial Caps - 47 C.F.R. § 24.720(b) 18

B. Treat Only Exercised Options and Other "Converted" Interests as Fully-Diluted for Eligibility Purposes - 47 C.F.R. § 24.709(b)(8) 19

C. Continue Suspension of Installment Payments - 47 C.F.R. § 24.711 . . 21

D. Adjust Value of C Block Licenses to Reflect A & B Block Market Prices - 47 C.F.R. § 24.704, 24.711 22

V. The Public Interest Favors Waiver or Modification of the CBlock Rules 22

VI. Conclusion 23

SUMMARY

Over the past three years, C Block licensees have found it increasingly difficult to access capital to satisfy their financial obligations to the Federal Communications Commission (the "**Commission**") and to construct wireless networks that compete with cellular, broadband SMR, and A and B Block PCS operators. Having bid for their licenses at a time when financial markets appeared receptive to small business enterprises, and when Commission rules offered benefits that seemingly ensured partnering opportunities, C-Block licensees are now faced with a collapse of confidence in their ability to provide PCS services to the public and to fulfill their financial obligations. Moreover, the C-Block rules intended to protect against fraud and benefit designated entities are now harming C-Block licensees seeking to undertake deals consistent with changes in the marketplace. Therefore, the rules are not accomplishing the goals originally intended by the Commission. The following changes in the marketplace since the C-Block licenses were auctioned have made it more difficult than ever for small PCS businesses to develop competitive PCS offerings:

- The domestic capital markets have tightened dramatically, leaving C-Block licensees with only limited opportunities for raising money. Wall Street has turned against small PCS operators, and A and B Block licensees generally have exhausted funds available for PCS investment.

- The sequence of the Commission's PCS license auctions has given a head start and a competitive advantage to A and B Block licensees.

- Significant mergers of telecommunications companies have occurred, increasing the competitive obstacles faced by small businesses. The mergers provide the larger entities unmatched access to capital and economies of scope and scale.

- Through the World Trade Organization Telecommunications Agreement (the "**WTO Agreement**"), the U.S. will take significant strides to open domestic markets to foreign investment. To date, however, investment by foreign telecommunications companies has been focused more toward established large U.S. telecommunications providers and generally has not helped C-Block licensees.

- The Commission has auctioned additional wireless spectrum, causing an oversupply of wireless spectrum in the marketplace, thus reducing the value of spectrum won at the C Block auction.

At the time the C-Block rules were adopted, the limitations imposed on small PCS enterprises appeared to be reasonable. Changed circumstances, however, now require the Commission to adjust its C-Block rules to promote the expeditious use of the C Block licenses. The Commission should waive its C-Block rules to: (1) allow designated entities to exit the PCS business without incurring massive financial penalties; and (2) encourage strategic partnerships and transfers of control between third party investors and C-Block PCS enterprises. Specifically, the Commission should:

(1) **Establish A "Window" For Return of C Block Licenses.** The Commission should establish a window during which C Block licensees can elect to return their licenses, to be promptly re-auctioned by the Commission to any eligible bidders, including non-designated entities or foreign telecommunications companies given access to the U.S. market under the WTO Agreement. Under this proposal, current licensees electing the re-auction option would receive reimbursement for the monies paid for the licenses to date, including any up-front and down payments, and would be released from any liability for any shortfalls in proceeds if any occur upon subsequent re-auction of the C Block licenses.

(2) **Waive or Modify Unjust Enrichment Rules and Transfer Restrictions.** The Commission should: (i) forebear from applying the C-Block unjust enrichment provisions to license transfers to non-designated entities during the first five years following license grant in specified foreclosure, default or financial distress situations; and (ii) waive the application of the C-Block unjust enrichment provisions to license transfers following the fifth anniversary of the license grant.

(3) **Waive or Modify Application of the CMRS Spectrum Rule.** To the extent that C-Block licensees have difficulty locating interested purchasers, the Commission should waive the application of the CMRS spectrum cap for acquisition or transfer of control of C-Block licenses in order to increase the pool of potential buyers, thereby ensuring the preservation of existing licenses and continued service to the public.

(4) **Waive or Increase the C-Block Small Business Financial Cap.** The revenue and asset caps for C-Block small business licensees should be waived for purposes of distress sales. To promote greater investment in C-Block licensees, the revenue and asset caps also should be increased to at least $2 billion and $8 billion respectively. These financial thresholds reflect the size of competing companies and the capital-intensive nature of the wireless PCS business.

(5) **Treat Only Exercised Options and Other "Converted" Interests as Fully-Diluted for Eligibility Purposes.** Given the need to encourage greater third party buyer/investor interest in C-Block PCS businesses and given the Commission's treatment of options in other FCC license contexts, the Commission should only attribute *exercised options* and *converted equity interests* of investors in C-Block licensees when assessing transfers of control or de jure and de facto C-Block control issues.

(6) **Continue Suspension of Installment Payments.** 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 period from 10 years to 15 years.

(7) **Adjust Value of C-Block Licenses to Reflect A and B Block Market Prices.** As recommended by MCI and General Wireless, Inc., the Commission should permit adjustment of the value of all C-Block licenses to reflect A and B Block market prices. Under our proposal, all C-Block licensees would be permitted to adjust their installment debt by a designated A and B Block average "discount factor."

Adoption of the recommendations outlined above will facilitate the operation of C Block licenses in the market. Indeed, it will permit C-Block licensees to sell their licenses or establish strategic partnerships with larger companies that can provide greater access to capital, industry experience, and engineering expertise. For those C-Block licensees who believe that intervening events have created insurmountable obstacles, a license return "window" would facilitate speedy re-auction of the licenses. For other C-Block licensees, identifying a viable strategic buyer or investor would facilitate construction of the C-Block PCS systems by companies financially able to compete with existing cellular, CMRS and A and B Block systems.

Before the
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PETITION FOR WAIVER AND COMMENTS OF R & S PCS, INC.

I. Introduction

R & S PCS, Inc. ("**R&S**"), by its attorneys, hereby submits this Petition for Waiver and Comments for consideration in response to a Public Notice released by the Wireless Telecommunications Bureau ("**WTB**") on June 2, 1997. The Public Notice requests comment on a number of options presented to the WTB by C Block Personal Communications Services ("**PCS**") licensees seeking a restructuring of the broadband PCS C and F Block debt, and certain waivers or modifications of existing PCS rules. As discussed below, the R&S Petition for Waiver recognizes the immediate need to address the unexpected financial and industry developments that threaten the achievement of the goals of the Federal Communications Commission (the "**Commission**") for C Block PCS licensees ("**C-Block licensees**").

R&S urges herein that the Commission relieve it and other C-Block licensees from operation of C-Block PCS rules that restrict these businesses from effectively operating these licenses or finding larger strategic entities who have sufficient economies of scale and scope to operate these licenses. Specifically, R&S requests that the Commission relieve C-Block

licensees of the ownership and transfer restrictions that prevent the companies from finding a viable framework to operate their business or transfer control of their licenses to larger entities who can compete in the converging wireless marketplace. Changing market forces have made it impossible for most, if not all, designated entities to finance the construction and operation of their C-Block PCS systems pursuant to current C-Block restrictions.

As a result of unprecedented consolidation in the industry, the sudden availability of additional spectrum and the unintended consequences of C-Block financing restrictions, strategic partners and sources of capital for network construction build-out have become extremely scarce. The Commission, therefore, should waive or modify its designated entity C-Block rules to mitigate their harmful effects. In particular, the Commission should: (1) recognize that current market conditions have changed dramatically since the enactment of the Telecommunications Act of 1996, and are significantly less favorable to investment in PCS services than when the C-Block rules were adopted; (2) release designated entities from the operation of restrictive penalty and transfer rules that prevent C-Block licensees from returning the licenses to the Commission or transferring their licenses to any willing buyers throughout the license term; and (3) permit C-Block licensees to employ more flexible investment practices, widely accepted in the industry.[1/]

1/ *See Geller v. FCC*, 610 F.2d 973, 979-980 (D.C. Cir. 1979) (if underlying circumstances change, the Commission is compelled to revisit the applicable regulations to ensure that the public interest continues to be served). 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.

II. Need for Relief

The Commission's rules provide for grant of waivers when: (1) the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and grant of the waiver is otherwise in the public interest; or (2) the unique facts and circumstances of a particular case render application of the rule inequitable, burdensome or otherwise contrary to the public interest.[2/] Generally, to obtain a waiver, a party must demonstrate that the application of a particular rule would not be in the public interest in the specific circumstances under consideration.[3/] Moreover, the Commission may approve a waiver request when consideration of hardship, equity or more effective implementation of overall policy dictate that a waiver is warranted.[4/]

Significant changes in the wireless telecommunications marketplace during the past three years require the Commission to grant the relief requested herein. Due to such changed market circumstances, the current designated entity C-Block operational and financing restrictions no longer will accomplish Congress' purpose of encouraging diversity in the ownership of radio licenses by viable small-business entities. Further, application of the current C-Block PCS rules will undermine the competitiveness of C-Block licensees as designated entities increasingly are unable to obtain capital for the build-out and operation of PCS networks that must compete against huge incumbent cellular and PCS operators like Bell Atlantic/NYNEX Mobile, AT&T Wireless and Sprint Spectrum.

2/ *See* 47 C.F.R. § 24.819(a); *see also* Section 1.3 of the Commission's rules providing that the Commission can waive its rules upon a showing of good cause. 47 C.F.R. § 1.3.

3/ *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

4/ *See WAIT Radio v. FCC*, 418 F.2d 1153,1158 (D.C. Cir. 1969), *cert. denied* 409 U.S. 1027 (1972).

As Chairman Hundt has recognized, licensees must satisfy enormous capital requirements to provide service to the public.[5] Chairman Hundt's comments have been substantiated by the fact that the roll-out of PCS to date generally has been limited to the largest of telecommunications carriers.[6] The intense need for capital, as well as the telecommunications industry market changes discussed below, necessitate a waiver or modification of certain C-Block rules to provide licensees: (1) the opportunity to exit the business or transfer control of the license to a larger, viable entity in a publicly beneficial manner; and (2) the flexibility necessary to attract the interest of limited domestic and international strategic investors/buyers.

A. Dramatic Tightening of Domestic Capital Markets

More than $2.4 billion in public debt was raised by A and B Block PCS licensees last year, and vendors, banks and the Commission have committed at least $8.15 billion more to the five players that have already tapped the public markets. In contrast, some of the largest C- Block licensees, including NextWave, General Wireless, Inc. and Chase Telecom have been forced to put public financings on hold for months because of unfavorable financial markets and increased uncertainty among PCS investors. In fact, it has been observed that the equity markets are "effectively closed" to PCS and that the junk bond market is "in retreat."[7]

5/ *See* "Competition, Wireless Development and New Spectrum Policy," by Chairman Reed Hundt (as prepared for delivery March 4, 1997) ("[B]uild-out and expansion needs are huge. Everyone knows you can't be the raiders of the local loop without a bankroll").

6/ *See* Corporate Financing Week, Vol. XXIII, No. 21 p.1 (June 2, 1997) ("Some market observers argue that telecommunications powerhouses such as AT&T Corp. and Sprint Corp. have already moved to establish alliances and build out PCS systems in the U.S., making smaller, lesser-known operators risky bets.").

7/ *See* Communications Today, April 17, 1997 ("Given the abysmal market conditions facing wireless companies, NextWave, along with other C Block licensees which planned to finance their network through a public stock offering, suddenly is desperate to bring in more private capital.").

Moreover, the recent bankruptcy filing of Pocket Communications has confirmed the worst fears of potential investors. Investment analysts have observed that several large bidders for PCS licenses have been unable to line up financing to pay for the licenses. In addition, "with the atmosphere on Wall Street turning sharply against all wireless telephone providers lately," analysts also indicate that more C-Block players likely will follow Pocket into insolvency.[8] Given such analysis and the increasing volatility of capital markets, it is likely that there will be further constriction of the limited funds available for C-Block investment. Unless relief is provided from certain C-Block restrictions as described in Section III below, these licensees will be unable to attract the investors and entities necessary to build, operate and market systems to compete with the larger cellular and A and B Block PCS companies; companies which have already exhausted most funds earmarked for PCS build-out by the financial community.[9]

A and B Block PCS licensees are well-capitalized and were adequately supported by the investment community. (InterCel, Sprint Spectrum, Western Wireless and Aerial Communications have all successfully completed public offerings.) Moreover, D, E and F Block licensees do not have the same capital demands as C-Block licensees, and have also generally benefitted from weaker prevailing spectrum market prices at the time of auction. C-Block licensees are caught between these circumstances, and are threatened with the prospect of

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8/ *See* Mark Landler, "Airwave Auctions Falter as Source of Funds for U.S.," N.Y. Times, April 3, 1997 at D4; *see also* Jacqueline Doherty, "A Healthy Painful Purge for the Junk Bond Market," Barron's, April 7, 1997 at MW9 (noting that news of Pocket Communications seeking bankruptcy has sent the wireless sector of the high-yield market tumbling).

9/ *See Wireless Business & Finance*, Section 4 No. 8 (April 9, 1997) ("Telltale signs of trouble for the wireless industry have been there to see for some time, all pointing to a paradoxical conclusion: Money is not flowing in as freely as it was as recently as a year ago, even while the industry has continued registering appreciable rates of growth. The ongoing retreat of wireless stock prices underscores how Wall Street has taken more of a jaundiced view of the industry's prospects.").

being unable to build and operate PCS systems that can compete with the largest providers of communications services in the world.

Many C-Block licensees have satisfied all the financial obligations of purchasing their licenses and have been struggling to implement their business plans in an efficient and timely manner.[10/] However, even companies that bid conservatively on C-Block PCS licenses face the same realities caused by changed circumstances beyond their control. Grant of this Waiver Petition will reflect a recognition of the dramatic changes in the telecommunications market and the significant constriction of capital resources that has occurred since the auction of C- Block PCS licenses.

B. Potential for Increased Foreign Investment in Domestic Market

Since radio spectrum auctions for broadband PCS spectrum were initiated in December 1994, significant changes in the foreign investment regulatory climate have occurred that harm the ability of small businesses to compete in the U.S. wireless markets under current C-Block restrictions. In addition to discrete situations in which the Commission has approved greater investment by foreign entities in large entities holding common carrier licenses, the Commission has taken bold steps in opening domestic markets to foreign investment and competition. Sprint Corp. (the largest investor in Sprint Spectrum), for example, now has authority to permit foreign investors to hold up to 35% of the company's stock.[11/]

10/ Granting relief does not constitute and should not be viewed by the Commission as "bailing out" companies that have paid too much for their licenses. *See e.g., Petition for Rulemaking.* In the Matter of Administration and Disposition of Competitive Bidding Installment Payment Obligations, filed by Cook Inlet Region, Inc. at 7 (May 7, 1997).

11/ *See* "FCC Lets Foreigners Own As Much As 35% of Stock," The Wall Street Journal, Business Brief (September 19, 1996).

The most important development, however, is likely to be the World Trade Organization Telecommunications Agreement adopted in February 1997 (the "**WTO Agreement**"). The WTO Agreement has been touted as the most significant movement to world trade and international integration in decades. The WTO Agreement holds the promise of opening U.S. telecommunications markets to greater foreign competition and investment. Indeed, as part of the inducement to other countries to grant liberalized access to U.S. telecommunications companies and investments, the U.S. agreed to allow 100% foreign indirect investment in non-broadcast radio licensees.[12/]

For C-Block PCS businesses seeking to compete in the domestic wireless market, this means that large international companies now will be able to enter and compete in the U.S. telecommunications industry either by acquiring domestic telecommunications companies already providing service, obtaining significant investment interests in such companies, or competing directly through their foreign-owned entities. C-Block PCS businesses, however, will be unable to fund PCS construction and deployment "from investors around the world," as envisioned by Chairman Hundt, because of restrictive C-Block ownership, attribution and transfer restrictions.[13/]

12/ *See* "Competition, Wireless Development, and New Spectrum Policy," by Chairman Reed Hundt (as prepared for delivery March 4, 1997).

13/ *Id.* A, B, D, and E Block PCS licensees, as well as cellular, SMR and newly-licensed Wireless Communications Service ("WCS") operators all will benefit directly from these developments, thereby enhancing their capital aggregation and market shares. Designated Entity PCS businesses constrained by inflexible ownership, attribution and transfer restrictions, however, will find it impossible to offer potential partners and investors attractive investment or acquisition options that promise comparable returns.

C. Increasing Consolidation and Competition in the Telecommunications Marketplace

1. Mergers

In recent months, the domestic telecommunications industry has witnessed unprecedented consolidation among the world's largest communications companies. The largest competitors in the telecommunications industry intend to use economies of scale and scope as a competitive weapon. Most recently, the Justice Department approved Bell Atlantic's $20 billion merger with NYNEX. As reported by the press, "[The acquisition] will make Bell Atlantic the nation's second largest phone company behind AT&T Corp., with 138,900 employees and $29 billion in annual revenue. Its size instantly makes it a more formidable competitor in domestic and global long-distance markets."[14/] It is anticipated that the Commission will likewise approve the merger.

Moreover, SBC Communications, Inc. recently completed a merger with Pacific Telesis Group, Inc. for $16.7 billion. The surviving company has more than 100,000 employees, revenues of over $21 billion and operating cash flow of $9 billion, making it one of the nation's largest telecommunications companies in terms of market value.[15/] Following the merger, the new company controlled over 80 million potential wireless customers across the country.[16/] This transaction was followed by the announcement of an even larger merger between MCI Communications Corp. and British Telecom PLC, to form one of the largest companies in the

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14/ *See* Mike Mills, "Justice Approves Bell Atlantic, NYNEX Merger," The Washington Post, Business at D1 (April 25, 1997).

15/ *See* PR Newswire Association, Inc., "SBC Communications Inc. and Pacific Telesis Group Announce Merger Agreement; Creates New California-Based Companies," August 1, 1996.

16/ Id.

world, with a combined revenue of $43 billion a year.[17] Most recently, AT&T Corporation and the recently merged SBC Communications, Inc. entity are discussing a transaction which, if consummated, will be the largest corporate merger in history with a value of more than $50 billion; the consummation of such a deal would "dwarf[] even the other telecommunications giants created in the wake of deregulation."[18]

The Telecommunications Act of 1996 has stimulated mergers as a means to gain economies of scale and the ability to cross-market a bundle of services from incumbent local exchange companies ("**ILECs**"), interexchange carriers ("**IXCs**") and wireless operators.[19] C-Block licensees, however, are precluded or severely constrained from competing with such bundled services as a result of overly restrictive PCS financing and ownership limitations. Moreover, it is now evident that a C-Block designated entity small business company limited to $40 million in annual gross revenues and $500 million in total assets simply cannot compete with companies commanding billions in revenues and assets, embedded infrastructure advantages, full access to public and private equity, and significant revolving lines of credit.

2. Considerable A and B Block Head Start

As foretold by a number of C-Block applicants before the A and B Block licenses were awarded, the licensing of A and B Block authorizations over a year before the C-Block licenses

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17/ *See* John Keller, "Telecommunications: As MCI Changes Hands, a Gadfly Buzzes Off," The Wall Street Journal (April 3, 1997).

18/ *See* Mark Landler, "AT&T and SBC Reportedly Talk of Huge Phone Merger," The New York Times, Business Day at C1 (May 28, 1997). *See* "Hundt Declares Against An AT&T-SBC Merger," The Washington Post at G1 (June 20, 1997).

19/ *See* Catherine Arnst, "Telecommunications - Long Distance, local, wireless - Every Sector Will be Wide Open," Business Week, January 13, 1997 at 108 ("The quickest way to gain share in a new market is to buy it. So look for merger mania to continue.").

were awarded has had a significant detrimental effect on C-Block licensees.[20] C- Block licensees have found it more difficult to secure tower/PCS cell sites because of existing moratoria imposed by various local communities due to A and B Block siting actions. Further, the head start given to A and B Block licensees also has had a significant, adverse financial impact upon the C-Block licensees' ability to access capital, to acquire equipment and to remain competitive in the provision of service.

At the time the A and B licensees were seeking initial funding for their PCS projects, the financial markets were eager to extend funds to an industry viewed as offering substantial growth opportunities. However, C-Block FCC auction delays following the Supreme Court ruling in *Adarand*,[21] additional C-Block delays due to other eligibility rule changes,[22] as well as the changed market factors highlighted above, have significantly harmed C-Block licensees. The more C-Block licensees are forced to defer the build-out of their systems because of insufficient business and funding flexibility, the more they will suffer severe irreparable competitive harm.

3. Unanticipated Availability of Additional CMRS Spectrum

Since 1993, when Congress granted authority to the Commission to auction radio spectrum to the public, the Commission has more than doubled the amount of spectrum available for the

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20/ *See e.g Petition to Deny and Request for Stay*, filed by the National Association of Black Owned Broadcasters, Percy E. Sutton and the National Association for the Advancement of Colored People, File Nos. 00001-CW-L-95 through 00099-CW-L-95 (filed May 12, 1995); *Emergency Motion to Defer MTA PCS Licensing*, filed by Communications One, Inc. (filed March 8, 1995).

21/ *See Adarand Contractor, Inc. v. Pena*, 515 U.S. 200 (1995).

22/ *See Public Notice*, "FCC Announces Changes in Short Form and Auction Dates for 493 BTA Licenses Located in the C Block For Personal Communications Services in the 2 GHz Band" (rel. April 26, 1995); *Public Notice*, "FCC Postpones Short-Form Filing Date For 493 BTA Licenses Located in the C Block For Personal Communications Services in the 2 GHz Band" (rel. June 13, 1995).

delivery of Commercial Mobile Radio Services ("**CMRS**"). In 1993, for instance, there was a total of 93 MHz of spectrum allocated for CMRS use. In 1997 there will be over two and one half times that amount -- 246 MHz of spectrum -- including recently auctioned Wireless Communications Service ("**WCS**") spectrum. By 2000, it is anticipated that 310 MHz of CMRS spectrum will be available for the delivery of wireless service.[23/]

This burgeoning surplus of CMRS spectrum has had a devastating impact on the value of C-Block licenses.[24/] As broadly reported by industry experts, the availability of additional spectrum has depressed the value of C-Block licenses and permitted D, E and F Block competitors to obtain licenses at comparatively low cost.[25/] The addition of CMRS spectrum at lower prices has harmed C-Block licenses which are burdened with additional debt, face greater competition and are burdened with higher costs for equipment procurement and system construction.

During the Commission's deliberations regarding eligibility and service limitations on WCS licenses, some PCS licensees warned that dumping additional spectrum on the CMRS market would discourage investment in CMRS licenses and undermine the value of CMRS spectrum. Indeed, it was argued that making an additional 30 MHz of spectrum available for

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23/ *See* Commercial Mobile Radio Services Second Competition Report, Wireless Telecommunications Bureau Action, Report No. 97-14, Chart 3: Spectrum Available for CMRS (rel. March 25, 1997).

24/ *See* Edward Warner, "Spectrum Glut Predicted From WCS," Wireless Week - Online (February 17, 1997) ("[R]esearchers see a mobile services spectrum glut at hand, even without the 30 MHz of WCS being added to the pot.").

25/ *See* "FCC Slashes Minimum Bid Requirements in Effort to Jumpstart WCS Auction," PCS Week (April 23, 1997).

CMRS use would discourage financial institutions from funding CMRS licensees.[26] Unfortunately, these predictions have become a reality.[27]

Due to changes in the telecommunications market, and the vast amount of additional spectrum licensed by the Commission, C-Block licenses no longer have the value they had at the height of the competitive bidding process. Consequently, small business C-Block licensees have found it increasingly difficult to convince underwriters, banks and potential investors of their ability to compete in an increasingly competitive wireless environment. To ensure equal footing in competing for the interest of financial investors, the Commission should provide C-Block licensees flexibility to transfer control, sell or form strategic partnerships, to the same extent enjoyed by non-designated entity PCS licensees. Unless small PCS businesses can capitalize upon such opportunities, the Commission will find itself faced with wide-scale work-outs and bankruptcies in the C-Block.

III. Proposed Waivers/Modifications To Facilitate the Return of C Block Licenses or Sales to Third Parties

In light of the dramatic and unexpected changes in the telecommunications marketplace discussed above, the Commission should relieve C-Block licensees of restrictions that prevent them from selling their PCS licenses to any interested buyer. As outlined below, the Commission should waive C-Block rules in order to allow C-Block licensees to sell, transfer

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26/ *See e.g.*, Comments of Primeco Personal Communications, L.P. at 4-5, GN Docket No. 96-228 (filed December 4, 1996) ("[I]n the current environment, the degree of flexibility being considered for WCS will adversely affect competition in wireless services thereby delaying the provision of services, discouraging investment in CMRS licenses and undermining the value of CMRS spectrum.").

27/ *See* "FCC Slashes Minimum Bid Requirements in Effort to Jumpstart WCS Auction," PCS Week (April 23, 1997) ("As the D/E/F-block auction showed, it is possible to overload the market with spectrum . . . .").

control of, or exit their PCS business without incurring substantial penalties throughout the license term.

A. Establish A Period For Return of C-Block Licenses - 47 C.F.R. § 24.704

In recognition of the unanticipated events that have had an adverse effect on small business PCS operators in recent months, the Commission should establish a window during the first five years of a license term in which C-Block licensees could return their licenses *without penalty* for subsequent reauction by the FCC. Under this proposal, licensees would receive reimbursement for the monies paid for the licenses to date, including any up-front and down payments. They also would not be required to compensate the Commission for shortfalls in proceeds resulting from a subsequent reauction of the C-Block licenses. Further, in the reauction of surrendered licenses the Commission should permit participation by non-designated entities, including foreign investors pursuant to the Commission's implementation of the WTO Agreement. Thus, the reauction would more likely attract bidders that are financially capable of constructing and operating the licensed facilities.

Adopting the proposal for a C-Block license return filing window would acknowledge the industry changes that make many, if not all, small business C-Block licensees unviable wireless competitors. Despite industry predictions prior to the C-Block auctions, and the best intentions of the Commission, market realities have dictated that a C-Block PCS licensee simply cannot survive as a small business venture.

The establishment of a window for return of the C-Block licenses, followed by the reauctioning of surrendered licenses, would have definite public benefits. First, it will encourage larger companies to partner with designated entities in the near-term and place an incentive upon the completion of negotiations prior to the window closure because licensees will have an

alternative where presently there is none. If the licenses may be surrendered for reauction, existing telecommunications companies may well prefer partnering with current C-Block licensees rather than facing the uncertainties of a new auction. Second, this return option would permit the efficient recovery by the Commission of licenses that would, in most instances, only be recovered following protracted bankruptcies. Third, the reauction of the returned licenses, with non-designated-entity participation, would permit the acquisition of such licenses by companies financially capable of constructing and operating competitive PCS facilities in today's market climate.

B. Waive or Modify Unjust Enrichment Rules and Transfer Restrictions - 47 C.F.R. §§ 24.839(d), 24.711(c), 24.712(b)

Under existing rules, C-Block licensees are permitted to transfer their licenses to non-designated entities following the fifth anniversary of license grant so long as the unjust enrichment penalties are paid prior to consummation of the transfer. These penalties include recoupment of any bidding credits used in the auction process and full payment of the cost of the license in satisfaction of the licensee's installment payment obligations.[28] As applied, the rules prevent C-Block licensees from exiting the PCS business, regardless of the changed circumstances that cause their inability to compete, and undermine attempts by C-Block businesses to attract substantial investors; potential partners know that their ownership is encumbered for a ten-year period, a time period that is abnormally long within the investment community, particularly in an industry that is so dynamic.

To permit C-Block licensees to make sound economic choices, and encourage greater investment flexibility in C-Block small businesses, the Commission should: (1) forebear from

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28/ *See* 47 C.F.R. § 24.711(c); 47 C.F.R. § 24.712(b).

applying the C-Block unjust enrichment provisions to license transfers to non-designated entities during the first five years following license grant in specified foreclosure, default or financial distress situations; and (2) waive the application of the C-Block unjust enrichment provisions to license transfers following the fifth anniversary of the license grant.

The benefits of waiving or modifying the application of the unjust enrichment provisions can be achieved without harm to the policies underlying the Commission's designated entity rules. Transfers to non-designated entities likely will occur when the C-Block licensee cannot satisfy its financial obligations or is otherwise in financial distress. In such circumstances, the public is offered the alternative of placing the license in the hands of an entity committed to providing competitive PCS service and financially capable of competing in the market. Moreover, the Commission is offered the opportunity to collect on an installment payment debt that remains largely uncollectible. Further, potential C-Block licensing investors are offered near-term comfort that they can protect their investment in PCS in cases of financial distress or bankruptcy. Grant of a waiver or forbearance from applying the unjust enrichment provisions in situations of financial distress, therefore, will further the Commission's competitive goals for the C Block.

Further, adoption of these proposals will make C-Block licensees more attractive investment vehicles to strategic investors and commercial lenders by offering: (i) the opportunity for greater ownership in the PCS venture under a normal, negotiated sale scenario within a time frame customary within the investment community, and (ii) a procedure for foreclosing upon or acquiring ownership of the PCS venture without severe financial penalties in foreclosure, default or distressed-sale situations, so long as the license-transferee pays the outstanding balance of the installment obligation.

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.[29/] 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.[30/]

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.[31/] This application of the unjust enrichment rules inhibits C-

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29/ 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.").

30/ 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.

31/ *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).