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AGENDA DOCUMENT NO. 97-3



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: JAN 9 1997

December 31, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Nohlin - *(12)*
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 1996-49

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 9, 1997.

Attachment

076.0273

DRAFT

1 **ADVISORY OPINION 1996-49**

2
3 **William H. Boger**
4 **Wilkinson, Barker, Knauer & Quinn**
5 **1735 New York Avenue, N.W.**
6 **Washington, D.C. 20006-5209**
7

8 **Dear Mr. Boger:**
9

10 **This responds to your letter dated November 8, 1996, as supplemented by your**
11 **letters dated December 12 and 20, 1996, requesting an advisory opinion on behalf of**
12 **PrimeCo Personal Communications, L.P. ("PrimeCo") concerning the application of the**
13 **Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission**
14 **regulations to the relationship between a political committee established by PrimeCo and**
15 **other political committees.**

16 **Your request presents the situation of the establishment of a political committee**
17 **by a joint venture partnership owned indirectly by corporations that are connected**
18 **organizations of a number of separate segregated funds (SSFs). You ask whether the**
19 **partnership's PAC would be affiliated with those committees and the effects of any**
20 **affiliated relationship.**

21 ***Factual Background***

22 **PrimeCo was established as of October 20, 1994, as a non-corporate joint venture**
23 **partnership by PCSCO Partnership ("PCSCO") and PCS Nucleus, L.P. ("PCSN"),**
24 **pursuant to the Delaware Revised Uniform Limited Partnership Act. PCSCO and PCSN**
25 **each hold a 50 percent partnership interest in PrimeCo, including a 20 percent general**
26 **partnership interest for each.**

27 **PCSN is a Delaware Limited Partnership which is 50 percent owned by AirTouch**
28 **Communications ("AirTouch"), a California corporation, and 50 percent owned by US**
29 **West, a Colorado corporation. PCSCO is a Delaware General Partnership which is**
30 **indirectly owned (50/50) by NYNEX Corporation ("NYNEX"), through a wholly-owned**
31 **subsidiary and by Bell Atlantic Corporation ("Bell Atlantic"), through a wholly-owned**
32 **subsidiary. (PCSCO and PCSN will hereafter be referred to as the "partners" or each**
33 **separately as a "partner," and the corporations making up these partnerships will be**

1 referred to as "constituent corporations.") PrimeCo was formed by the constituent
2 corporations to acquire, manage and maintain personal communications services ("PCS")
3 licenses.

4 On April 21, 1996, Bell Atlantic Corporation and NYNEX announced an
5 agreement to merge their corporations. The resulting corporation will be known as Bell
6 Atlantic Corporation.¹ For the purposes of this opinion, the Commission will assume that
7 the merger is effective.

8 According to the Agreement of Limited Partnership for PrimeCo ("Partnership
9 Agreement"), an Executive Committee, composed of six persons, is responsible for
10 managing the business affairs of PrimeCo, including hiring top personnel, and delegating
11 responsibilities to officers, employees, agents and representatives as appropriate.
12 Partnership Agreement, §§5.1.1 and 5.1.9. Each general partner (i.e., PCSCO and PCSN)
13 has the right to select three members of the Executive Committee. Each member must be
14 an officer or former employee of the partner or an affiliate of the partner, and may be
15 removed or replaced by the partner that made the appointment. Partnership Agreement,
16 §5.1.2. Three members of the Executive Committee represent Bell Atlantic (and
17 NYNEX), and three represent AirTouch and US West. Presently, the members consist of
18 three present high level executives from Bell Atlantic and NYNEX, two from Air Touch,
19 and one from US West.²

20 The Partnership Agreement spells out the decision-making process of the
21 Executive Committee. If only one member appointed by a general partner is present (or
22 participates by proxy), that member may exercise "the entire voting power" held by all
23 members appointed by that partner. If more than one member (appointed by a general
24 partner) is present, that partner's entire voting power is voted by those members as a
25 single unit. If there is a disagreement among a general partner's members, the vote of the

¹ Regulatory approvals with respect to the merger are pending from Federal and state agencies and are expected by the first quarter of 1997. Once the merger is effective, Bell Atlantic will own 50 percent, rather than 25 percent of PrimeCo, and NYNEX will remain a wholly-owned subsidiary of Bell Atlantic.

² These are the Executive Vice President and Chief Operating Officer of Bell Atlantic, the President and CEO of Bell Atlantic Mobile, the President and Group Executive of NYNEX Worldwide Services, the President and CEO of the US West Media Group, AirTouch's Vice President for Corporate Strategy and Development, and the President and CEO of AirTouch Cellular Operations, who is also the Executive Committee's Chairman.

1 member designated by that partner as its senior representative is controlling and the vote
2 of the other members representing that partner is disregarded with respect to the matter.
3 Partnership Agreement, §5.1.7. The Partnership Agreement provides that any action of
4 the Executive Committee requires the affirmative vote of the members representing each
5 of the general partners, except as specifically provided by the agreement. Partnership
6 Agreement, §5.1.8.

7 The Partnership Agreement lists eleven specific actions requiring an Executive
8 Committee vote and the affirmative vote of each partner.³ These actions include the
9 admission of a new partner; PrimeCo's engagement in any business other than the
10 personal communications services ("PCS") business; amending the agreement;
11 dissolution or initiation of bankruptcy; major acquisitions or dispositions of property or
12 assets; approval or material modification of a one-year or five-year Business Plan; the
13 making of a request for additional contributions of capital to the partnership ("Capital
14 Call") other than as provided for in a Business Plan; appointment, removal, and
15 compensation of PrimeCo's senior top executive officers, and entry into material
16 transactions outside the scope of the Business Plan, or any other material deviation from
17 the Business Plan. Partnership Agreement, §5.1.9.

18 With respect to PCSN, the partner that is still owned by two constituent
19 corporations, you have stated that the PCSN partnership agreement makes no provision
20 for picking a senior representative, as to whether this person will be a senior
21 representative for all votes, or as to which corporation will provide the senior
22 representative. You state that, thus far, there has been no need to utilize the voting
23 procedures and a senior representative for PCSN has not been picked. Moreover, there is
24 no provision in that agreement or any other agreement for determining how the three
25 PrimeCo Executive Committee memberships from PCSN will be apportioned.

26 The Partnership Agreement also provides for a two-stage procedure to break a
27 deadlock between the partners in certain disputes pertaining to approval of an annual

³ The preface to this list indicates that the list is not meant to exclude other powers and authority of the Executive Committee. Partnership Agreement, §5.1.9.

1 business plan, the choice of PrimeCo's CEO, and Capital Calls.⁴ First, each partner
2 refers the matter to a CEO from one of its constituent corporations designated by that
3 partner to resolve the matter. If the designated CEOs from each partner cannot agree
4 within 20 days of the referral, the CEOs of each of the constituent corporations attempt to
5 resolve the dispute. If there is no agreement within 40 days after that, the matter is
6 defeated. You state that it has not been necessary to resolve an Executive Committee
7 deadlock, and there is no procedure set out in the PCSN partnership agreement for
8 choosing the CEO for the first stage.

9 Although certain officers and employees of PrimeCo are former employees of the
10 constituent corporations, you note that, with the exception of the Executive Committee
11 members, PrimeCo shares no executive or administrative personnel or other employees,
12 with either the partners or the constituent corporations. In addition, there are no formal or
13 informal agreements in place that any PrimeCo officers or employees will return to the
14 constituent corporations after working at PrimeCo for a set period of time.

15 You state that neither CSCO nor PCSN has established a political committee,
16 but that each of the four constituent corporations, along with entities affiliated with some
17 of the corporations, has established at least one political committee.⁵

18 You describe PrimeCo's reasons for establishing a political committee. You state
19 that PrimeCo's purpose, i.e. the acquisition, management, and maintenance of PCS
20 licenses, is a separate and distinct line of business from that engaged in by the partners or
21 the constituent corporations. You maintain that PrimeCo's political interests can, and
22 often do, differ from those of the constituent corporations, and thus it "seeks to have an
23 independent and distinct voice on political issues." To that end, PrimeCo's officers and

⁴ Specifically, the "deadlock events" are: (1) a disagreement on an annual Business Plan within 90 days of the next fiscal year (where no Business Plan had been approved for the current year); (2) a disagreement lasting for at least 30 days over the removal of a CEO, or a vacancy in the CEO position lasting more than 30 days after a partner has proposed a candidate; and (3) a disagreement lasting for at least 30 days over the timing or amount of a Capital Call other than as provided for in a Business Plan.

⁵ Bell Atlantic and its affiliates have established several committees, including Bell Atlantic Corporation PAC, Bell Atlantic-Pennsylvania Inc. Federal PAC, New Jersey Bell Telephone Company Federal PAC, Chesapeake & Potomac Telephone Co. Federal PAC, and Diamond State Telephone Co. PAC. NYNEX and its affiliates have established NYNEX Employees' Federal PAC, New England Telephone & Telegraph Co. Federal PAC, and New York Telephone Federal PAC. US West has established US West Inc. PAC and AirTouch has established AirTouch Communications PAC.

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1 employees intend to establish a non-connected political committee. It would solicit
2 contributions from PrimeCo's officers and employees, but not from the officers or
3 employees of PCSCO, PSCN, or the constituent corporations. It is also PrimeCo's
4 "intent" that the SSFs of the constituent corporations will not solicit contributions from
5 PrimeCo's officers or employees.

6 *Questions Presented*

7 You ask a number of questions pertaining to the question of affiliation and its
8 consequences which the Commission restates and reorders as follows:

9 (1) Would PrimeCo's "non-connected political committee" be affiliated with the
10 SSFs of the constituent corporations?

11 (2) If PrimeCo's PAC is affiliated with one or more of the SSFs, may PrimeCo's
12 PAC solicit contributions from the officers and employees of those SSFs' connected
13 organizations?

14 (3) If PrimeCo's PAC is considered to be affiliated with one or more of the SSFs,
15 may the affiliated SSFs' connected organizations pay the expenses of PrimeCo's PAC?

16 (4) May PrimeCo establish an SSF?

17 *Legal Analysis*

18 The Commission's response to these questions is divided into two parts. The first
19 part will address question one, i.e., whether PrimeCo's PAC would be affiliated with the
20 committees of the constituent corporations. The second part will address the
21 consequences of any such affiliation in response to questions two through four.

22 *A. The Affiliated Entities*

23 The Act and Commission regulations provide that committees, including
24 separate segregated funds, that are established, financed, maintained or controlled by the
25 same corporation, person, or group of persons, including any parent, subsidiary, branch,
26 division, department, or local unit thereof, are affiliated. 2 U.S.C. §441a(a)(5); 11 CFR
27 100.5(g)(2). Contributions made to or by such committees shall be considered to have
28 been made to or by a single committee. 2 U.S.C. §441a(a)(5); 11 CFR 100.5(g)(2),
29 110.3(a)(1), and 110.3(a)(1)(ii). In addition, a corporation may make communications to
30 and solicit the restricted class (i.e., executive and administrative personnel and

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1 stockholders, and the families thereof) of its subsidiaries or other affiliates for
2 contributions to the corporation's separate segregated fund. 2 U.S.C. §441b(b)(2)(A) and
3 (4)(A)(i); 11 CFR 114.3(a)(1) and 114.5(g)(1). The Commission has long held that
4 affiliates may include entities other than corporations, such as partnerships. Advisory
5 Opinions 1994-11, 1992-17, 1989-8, 1987-34, and 1983-48. See also Advisory Opinion
6 1996-38.

7 Where an entity is not an acknowledged subsidiary of another entity, as in 11 CFR
8 110.3(a)(2)(i),⁶ Commission regulations provide for an examination of various factors in
9 the context of an overall relationship to determine whether one company is an affiliate of
10 another and, hence, whether their respective SSFs are affiliated with each other. 11 CFR
11 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J).⁷

12 The relevant factors in the situation you have presented are as follows: (B)
13 whether a sponsoring organization has the authority or ability to direct or participate in
14 the governance of another sponsoring organization through provisions of constitutions,
15 by-laws, contracts or other rules, or through formal or informal practices or procedures;
16 (C) whether a sponsoring organization has the authority or ability to hire, appoint, demote
17 or otherwise control the officers, or other decisionmaking employees of another
18 sponsoring organization; (E) whether a sponsoring organization has common or
19 overlapping officers or employees with another sponsoring organization which indicates a
20 formal or ongoing relationship between the organizations; (F) whether a sponsoring
21 organization has any members, officers, or employees who were members, officers, or
22 employees of another sponsoring organization which indicates a formal or ongoing
23 relationship or the creation of a successor entity; and (I) whether a sponsoring

⁶ According to Commission regulations, committees established by a single corporation and its subsidiaries are affiliated *per se*. 11 CFR 110.3(a)(2)(i).

⁷ Specifically, the regulations, at 11 CFR 110.3(a)(3)(ii), state in part:

The Commission will examine these factors in the context of the overall relationship between committees or sponsoring organizations to determine whether the presence of any factor or factors is evidence of one committee or organization having been established, financed, maintained or controlled by another committee or sponsoring organization.

1 organization had an active or significant role in the formation of another sponsoring
2 organization. 11 CFR 110.3(a)(3)(ii)(B), (C), (E), (F), and (I).⁸

3 Bell Atlantic, along with its wholly-owned subsidiary NYNEX, exercises 50
4 percent control of the Executive Committee through its ownership of PCSCO, a PrimeCo
5 partner. The Executive Committee is the governing body of PrimeCo. As indicated in
6 the Partnership Agreement provisions described above, the assent of the members
7 appointed by PCSCO is necessary for the PrimeCo Executive Committee to take a
8 significant number of major actions. These are actions that determine how the officers
9 and employees of PrimeCo will conduct business operations and the appointment,
10 removal, and compensation of top executive officers. The Executive Committee itself
11 includes the Chief Operating Officer of Bell Atlantic and two other high ranking officers
12 of Bell Atlantic affiliates. With respect to the final factor listed above, Bell Atlantic was
13 one of the creators of PrimeCo.

14 The position of Bell Atlantic in PrimeCo is similar to the positions of the
15 corporate owners of a joint venture partnership in Advisory Opinion 1992-17. In that
16 opinion, two corporations each had a fifty percent interest in the partnership. The Board
17 of the partnership consisted of three senior officers of each of the two corporations who
18 represented their respective corporations. The Commission concluded that, although
19 neither partner had the predominant management role or a controlling position, each
20 corporation was affiliated with the partnership and thus their SSFs were each affiliated
21 with the partnership's PAC. The Commission noted the presence of the high-ranking
22 corporate officers on the Board, the creation of the partnership by the corporations, and
23 the fact that the assent of each corporation was necessary in order to make a significant
24 number of major decisions. Similar circumstances are present in your request and the
25 Commission concludes that PrimeCo is an affiliate of Bell Atlantic. Although the Act
26 does not specifically provide for the establishment by partnerships of SSFs, the
27 Commission has concluded that a PAC established and sponsored by a partnership is
28 affiliated with the SSF of an affiliated corporation. Advisory Opinions 1994-9, 1992-17,

⁸ The list of ten circumstantial factors set out at 11 CFR 110.3(a)(3)(ii) is not an exclusive list, and other factors may be considered. See Advisory Opinion 1995-36.

1 and 1989-8. The Commission concludes, therefore, that PrimeCo's PAC would be
2 affiliated with the committees established by Bell Atlantic and its affiliated entities,
3 including NYNEX. The PAC's statement of organization should list Bell Atlantic
4 Corporation PAC, the political committee established by the top-level parent entity, as an
5 affiliated committee. 2 U.S.C. §433(b)(2); 11 CFR 102.2(b)(1)(ii)(B).

6 The Commission does not reach the same conclusion with respect to PrimeCo's
7 PAC and the committees established by AirTouch, US West, and its affiliates. In view of
8 the fact that the Executive Committee members from either AirTouch or US West could
9 conceivably exercise a veto power over the vote exercised by PCSN, and thus affect the
10 Executive Committee's ability to make a decision, the Commission acknowledges that
11 there may be a basis for affiliating the two corporations with the partnership's PAC.
12 However, there are a number of factors weighing against such a conclusion. First, unlike
13 Bell Atlantic, each corporation by itself does not carry the full vote necessary to prevent
14 the Executive Committee from taking an action. Moreover, although either AirTouch or
15 US West could conceivably obstruct an affirmative vote by the PCSN side, this would
16 occur at a secondary voting level, rather than the primary level exercised by the two
17 corporations together.⁹ Second, at this secondary level of decisionmaking, the powers
18 that each corporation exercises on a consistent basis are speculative, due to the fact that
19 there are, and have been, no arrangements for selecting a deciding senior representative
20 for PCSN or a CEO for the first stage of resolution in a deadlock event.¹⁰ The
21 Commission emphasizes that its conclusion is based on the combination of the factors,
22 and that each of those factors might not, by itself, be sufficient to lead to a conclusion of
23 non-affiliation.

⁹ It may be possible to conclude that Air Touch and US West are affiliated with PrimeCo by virtue of the fact that each has equal representation and voting power in PCSN and that PCSN has fifty percent control over PrimeCo. This conclusion would be reached by stating that PCSN is affiliated with each of the corporations and PrimeCo is affiliated with the corporations in a direct line through its affiliation with PCSN. However, although there is a partnership agreement for PCSN, it is not an operating entity and has no officers or employees. It exists only as a vehicle for investments by Air Touch and US West in "PCS ventures of mutual interest."

¹⁰ The Commission's conclusion as to the affiliated status of AirTouch or US West might differ if there were arrangements indicating a senior representative designation that consistently or predominantly went to one of the two companies, or if the same were the case with respect to the choice of CEO in a deadlock event.

1 ***B. The Consequences of Affiliation***

2 Although PACs sponsored by partnerships (as nonconnected committees) do not
3 normally carry the same restrictions on solicitations that SSFs do, a PAC of a partnership
4 that is an affiliate of a corporation that has an SSF may not make solicitations to an
5 unlimited class, but is limited in a way that a corporate SSF would be. Advisory Opinion
6 1992-17 and 1989-8. See 11 CFR 114.5(g)(1). As a result of the affiliation of PrimeCo
7 with Bell Atlantic and the affiliation of their respective political committees, PrimeCo's
8 PAC may solicit contributions from PrimeCo's executive and administrative personnel
9 and the families thereof. It may, if desired, also solicit the executive and administrative
10 personnel and stockholders, and families thereof, of Bell Atlantic, Bell Atlantic's
11 subsidiaries (such as NYNEX), and other entities that are affiliated with Bell Atlantic
12 under 11 CFR 110.3(a)(3). It may not solicit the personnel, stockholders, or families
13 thereof, of Air Touch or US West, or their subsidiaries and affiliates. Since PrimeCo's
14 PAC and the political committees of Bell Atlantic and its subsidiaries and affiliates are
15 considered to be one committee for the purpose of contribution limitations, contributions
16 to all of those committees must be aggregated with each other and all contributions by
17 those committees must be aggregated with each other.

18 Under 2 U.S.C. §441b(b)(2)(C), a corporation may use its general treasury funds
19 to pay for the costs of establishing, administering, or soliciting contributions to its SSF,
20 without a resultant contribution or expenditure. See also 2 U.S.C. §§431(8)(B)(vi) and
21 (9)(B)(v). In applying this law in the context of affiliation, the Commission has
22 permitted a corporation that is affiliated with another corporation to pay the
23 administrative and solicitation costs of the latter corporation's SSF. Advisory Opinion
24 1996-26 and 1983-19. Similarly, it has permitted incorporated entities to pay such costs
25 for the political committees of its affiliated entities that are not incorporated. Advisory
26 Opinions 1996-38 and 1992-17. Therefore, Bell Atlantic may pay for the establishment,
27 administration, and solicitation costs for PrimeCo's PAC. In that event, the PAC would
28 be an SSF of Bell Atlantic. See 2 U.S.C. §431(7) and 11 CFR 100.6(a).

29 With respect to the ability of PrimeCo itself to establish an SSF, the Commission
30 notes that the Act does not extend to a partnership the ability granted to a corporation at 2

1 U.S.C. §441b(b)(2)(C) to conduct itself as a connected organization and avail itself of the
2 exemptions. Advisory Opinions 1991-1 and 1990-20. See also *California Medical*
3 *Association v. Federal Election Commission*, 453 U.S. 182 (1981). Nevertheless, the
4 Commission has treated joint venture partnerships differently as a result of the
5 partnership's ownership by, and affiliation with, corporations. Advisory Opinions 1994-
6 11, 1994-9, 1992-17, and 1987-34. If a partnership is owned entirely by corporations and
7 affiliated with at least one of them, it may perform the functions of a connected
8 organization for its PAC. Advisory Opinions 1994-11, 1994-9, and 1992-17. Therefore,
9 PrimeCo may pay the establishment, administration, and solicitation costs of PrimeCo's
10 PAC without a resulting contribution from PrimeCo.

11 Even though the Commission has concluded that a partnership can perform the
12 functions of a connected organization under the above-described circumstances,
13 Commission regulations defining "connected organization" do not include partnerships.
14 11 CFR 102.6(a). Bell Atlantic would be the connected organization of PrimeCo's PAC
15 and would pay for the exempt costs either by itself or through PrimeCo. Advisory
16 Opinions 1994-11 and 1992-17. If such support is provided directly by Bell Atlantic or
17 its affiliates, or indirectly by Bell Atlantic by virtue of support from PrimeCo, then
18 PrimeCo's PAC should amend its statement of organization and identify Bell Atlantic as
19 its connected organization. 2 U.S.C. §433(b)(2); 11 CFR 102.2(b)(2).

20 This response constitutes an advisory opinion concerning the application of the
21 Act, or regulations prescribed by the Commission, to the specific transaction or activity
22 set forth in your request. See 2 U.S.C. §437f.

23 Sincerely,

24
25 John Warren McGarry
26 Chairman
27

28 Enclosures (AOs 1996-38, 1995-36, 1994-11, 1994-9, 1992-17, 1991-13, 1991-1,
29 1990-20, 1989-8, 1987-34, 1983-48, and 1983-19)
30
31