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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of the Commission's)
Rules To Establish New Personal)
Communications Services)
)
)

Gen Docket No. 90-314
ET Docket No. 92-100

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

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SUMMARY

Radiofone, Inc. (Radiofone) seeks partial reconsideration of the Second Report and Order in the captioned proceeding, by requesting that the Commission eliminate the cellular ownership restrictions which it has adopted as Section 99.204 of its new personal communications service (PCS) regulations. As demonstrated herein, this ownership restriction fails to pass both administrative and constitutional muster, since it arbitrarily hinders cellular participation in PCS without a rational basis or foundation in the record.

PCS and cellular are not identical services; and while there may be overlap, PCS providers will be in a position to provide a number of attractive new services that are more likely to attract customers away from a cellular carrier than vice versa. A cellular carrier that obtains a PCS license and fails to vigorously develop these new services will find that its own customers quickly migrate to one of the several other PCS licensees that will exist in any given geographic area.

In particular, the Commission bases its restriction on cellular carriers being licensed for PCS in areas where there is some overlap with the cellular service, because of a concern that these carriers can exercise "undue market power." However, there is no analysis of this market power, or the basis for this concern. Moreover, given the substantial number of competitors which will now be

introduced into the marketplace, it will be impossible for any cellular carrier to exercise such market power. In any given geographic area, there will be at least 10-15 providers of advanced mobile communications services, including cellular, PCS, specialized mobile radio (SMR) and mobile satellite services. For a cellular carrier to warehouse a single PCS license will therefore have little or no impact on the competitive environment in a given market.

Moreover, the Commission has adopted two licensing mechanisms which are specifically designed to prevent warehousing by competitors, and no further restrictions are necessary. In particular, PCS applicants will be required to pay a substantial bid in order to win the license at auction. The Commission has correctly noted in the auction proceeding that this bid requirement, and the opportunity costs of not either constructing and operating the license or selling it, will adequately deter warehousing. The Commission has also adopted strict construction and population coverage requirements, so that a cellular licensee trying to warehouse a PCS grant will either lose this license (and the substantial monetary bid paid) within five years, or will pay far more money constructing the system to avoid license forfeiture than could possibly be realized in any competitive advantage from blocking competition on only one of the several PCS licenses available. Therefore, the cellular ownership restriction,

and the Commission's concerns about undue market power by cellular carriers, lacks a rational basis and is arbitrary and capricious.

The Commission's 20 percent ownership and 10 percent population coverage standards also lack rational basis as a remedy for the perceived harm. A carrier with less than controlling interest in a cellular licensee will not be able to direct the affairs of the cellular operation, much less exercise undue market power. And a cellular licensee which provides a mere 10 percent coverage to the PCS service area will likewise not be able to exercise market power. Indeed, a cellular licensee serving even 80 percent of the PCS service area population will still be at a decided competitive disadvantage.

The proposed cellular ownership restriction also unduly discriminates against cellular carriers, since SMRs and mobile satellite carriers will be in an equal or better position to compete with PCS. The Commission is on the verge of adopting rules that will allow SMR carriers to establish cellular-like services, with the advantage that most SMR licensees can implement new digital equipment at the outset, and can provide dispatch service which cellular carriers are prohibited from providing. Cellular carriers cannot transition to digital equipment as quickly, because of the Commission requirement and market necessity to maintain an analog capability for their systems, which are

already crowded with customers using analog mobile units. Also, many of the new enhanced SMR licensees will be granted a service area on a BTA or MTA basis, and therefore will have identical coverage to the PCS operations. This is not the case for cellular carriers. The Commission has failed to justify this discriminatory treatment of cellular carrier versus potential competitors to PCS, and its action is therefore arbitrary and capricious. It also appears to be unconstitutional under the due process clause of the Fifth Amendment of the United States Constitution.

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PETITION FOR PARTIAL RECONSIDERATION

Radiofone Inc. (Radiofone), by its attorneys and pursuant to Rule Section 1.429, hereby requests reconsideration of the cellular ownership restrictions adopted by the Commission in its Second Report and Order in the above captioned proceeding (58 Fed. Reg. 59,174, November 8, 1993). As discussed below, the Commission's decision to limit cellular carriers to only 10 MHz of personal communications service (PCS) spectrum arbitrarily precludes a substantial portion of the wireless industry from effectively participating in this new technology, to the detriment of the public. The Commission's concerns about anticompetitive behavior by cellular providers are unfounded, and the methods adopted to address these concerns unnecessarily infringe on the rights of cellular carriers and their customers, and hinder the public interest benefits which the Commission acknowledges would result from participation by cellular carriers in PCS.

In support of this petition, the following is shown:

I. Interest of Radiofone

Radiofone is a radio common carrier that provides a variety of mobile services to the public, including wide-area paging and cellular. Radiofone entered the telecommunications industry as a small, family-owned telephone answering service. While it has grown substantially, it remains a family-owned business, even though it competes with a number of other, larger companies (including Regional Bell Operating Companies) in the provision of advanced communications services to the public. Radiofone has strived at all times to bring new and innovative technologies to its customers. It was among the first carriers in the state of Louisiana to introduce improved mobile telephone service (IMTS), network paging, and then cellular. Despite competition from larger companies, Radiofone has been able to maintain a greater than 50 percent share of its Louisiana cellular markets, through the efficient construction and operation of its systems, provision of reliable cellular service, and aggressive marketing designed to make the public aware of the benefits of cellular.

Radiofone is eager to continue providing cutting-edge technologies to its customers, including the many new services to be ushered in by broadband PCS. Radiofone wishes to apply its wireless engineering, service and marketing expertise to PCS, so as to develop this service and encourage its public acceptance. However, the

Commission's proposed restrictions on the licensing of PCS spectrum to existing cellular carriers jeopardizes this goal, to the detriment of Radiofone's customers and the public in general. Accordingly, Radiofone is an interested party which will be adversely affected by the Commission's action, and seeks reconsideration of this aspect of the Second Report and Order.

II. The Cellular Restriction Is Arbitrary and Capricious Because It Lacks a Rational Basis in the Record.

As numerous commentors have demonstrated, the nascent PCS industry and its potential customers have much to gain from the participation of established cellular providers. Cellular operators have existing plant, personnel, and resources available to rapidly deploy PCS service upon authorization, and have the experience, resources, and expertise useful in bringing PCS to its fullest potential. See Comments of Telocator at p. 5; Reply Comments of McCaw Cellular Communications, Inc. at pp. 34-38. Both the Commission and the National Telecommunications and Information Agency (NTIA) have acknowledged the valuable contribution which cellular licensees could make in pioneering PCS, and speeding these new services to the marketplace. See Comments of NTIA at pp 25-26; Second Report and Order, supra, at p. 45. However, the Commission proposes to restrict cellular participation in PCS by allowing incumbent licensees to hold only 10 MHz of PCS

spectrum in any service area where 10 percent or more of the population is served by the licensee's cellular system.

The Commission's justification for restricting the acknowledged public interest benefits of cellular participation is its concern with "ensuring that cellular operators do not exert undue market power." Second Report and Order, supra, at p. 47. The Commission accordingly purports to "strike a balance" between these conflicting considerations by limiting cellular carriers to 10 MHz within a Major Trading Area (MTA) or Basic Trading Area (BTA) which includes their cellular service area. As demonstrated below, the record contains no justification for the Commission's concerns about undue market power, and the 10 MHz "compromise" will not allow cellular carriers to effectively compete in the provision of PCS.

A. Cellular and PCS Are Not Fungible Services

The Commission assumes that cellular carriers will be tempted to engage in anticompetitive behavior because "PCS and cellular licensees serving the same area, while perhaps not offering identical services, will compete on price and quality." Id. at p. 43. While PCS may very well offer a number of services which are provided over cellular systems, the Commission and the industry clearly contemplate PCS being a platform from which to provide a number of new and innovative services. These innovations include video and data capabilities which are not currently available over a

cellular system, and may not become available in the foreseeable future. This is especially true since cellular systems in major markets are already crowded with analog users, which will hinder the full fledged conversion to digital technology that would allow some of these new services. Indeed, the Second Report and Order expressly declines to eliminate the requirement that cellular systems comply with the analog service requirement of OST Bulletin No. 53. Id. at p. 48. However, even if this requirement were repealed, McCaw correctly points out that the need to continue service to the thousands of existing customers with analog handsets will require cellular carriers to maintain this analog capacity for the foreseeable future. See McCaw Comments at pp. 29-30.

PCS, on the other hand, is envisioned to include so many new and innovative services that the Commission has nebulously defined PCS as "radio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks." See Rule Section 99.5, adopted by the Second Report and Order, supra. PCS providers entering into the marketplace would be foolish to simply introduce another cellular-like service, because they would be faced with two entrenched competitors at the outset, and hundreds of thousands of prospective customers that have already invested in an incompatible handset.

Thus, it is likely that PCS licensees will try to differentiate their service from cellular immediately, so that potential customers will be persuaded that it is worthwhile to purchase PCS subscriber equipment and service. These new services may at first be aimed at niches in the market, but will eventually be mass-marketed as having capabilities which surpass not only cellular but perhaps also traditional wireline service.

Because their spectrum is already at or near capacity, cellular carriers will be limited in their ability to respond to this changing marketplace. Therefore, even in its early stages, PCS is likely to be viewed as more of a complement to cellular service than a fungible competitor. Cellular carriers wishing to provide their customers with these innovative services will have to become PCS licensees themselves. This fact alone destroys any incentive for cellular licensees to use their PCS license for anticompetitive purposes; instead, PCS would be a means of remaining viable as a competitor in the long run.¹

¹The Commission should also consider the efficiencies that would be obtained by cellular carriers entering the PCS market. See Department of Justice Horizontal Merger Guidelines, released Apr. 2, 1992, § 4 ("mergers that the Agency otherwise might challenge may be reasonably necessary to achieve significant net efficiencies" including "better integration of production facilities"). As noted above and in the FCC's Office of Plans and Policy's White Paper, at 39, cellular carriers have infrastructure (e.g., switches and wireline services) that can be used also to provide PCS. Thus, cellular carriers can achieve production efficiencies that may counterbalance the speculative and undefined competitive risks of which the Commission is concerned.

In this regard, the Commission's attempt to allow cellular participation by allowing cellular carriers to bid on 10 MHz of PCS spectrum misses the mark. While an opportunity to obtain 10 MHz is marginally better than nothing, it will not allow cellular licensees to effectively compete in the provision of PCS. As Commissioner Barrett correctly notes, the record is void of any showing that a 10 MHz "sliver" of spectrum will allow the provision of the advanced services that can be provided on larger PCS allocations. This is especially true since the numerous incumbent 2 GHz licensees around the country will confound efforts to make full use of this narrow allocation for several years. See Second Report and Order, supra, (Dissenting Statement of Commissioner Andrew C. Barrett at pp. 7-8). Radiofone agrees that the 10 MHz allocation will not be able to support "bandwidth on demand" services such as compressed video, and high data rates. And while Commissioner Barrett notes that many licensees will overcome this barrier by aggregating multiple spectrum blocks into a larger allocation, this option will not be available to cellular carriers under the Commission's adopted restrictions. And cellular carriers will not be able to achieve a de facto aggregation by combining the 10 MHz block with their existing cellular allocation, because PCS spectrum is in a much higher band, making it incompatible with cellular equipment.

Incumbent licensees will have to be relocated at the cellular carrier's expense. A grant of only 10 MHz also increases spectrum management problems for cellular carriers, because capacity will more quickly be exhausted, and cell splitting and similar measures will be necessary much earlier than will be the case for licensees with 20 MHz or more. These additional start up and operational costs will put cellular carriers at a significant competitive disadvantage.

In summary, the licensing of a cellular carrier for PCS cannot be viewed as anticompetitive, since cellular carriers who fail to vigorously develop PCS will find potential PCS customers drawn to the other broadband licensees, not to their cellular service. And the 10 MHz allocation will not allow cellular carriers to compete on equal terms. A greater spectrum allocation is needed if the Commission wants to create the level playing field which it is attempting to implement in General Docket No. 93-252, as instructed by Congress in the Omnibus Budget Reconciliation Act of 1993.

B. Cellular Licensees Cannot Use A PCS License To Thwart Competition.

While the Commission expresses concern about cellular carriers exerting "undue market power," the Commission has not performed the elementary steps of estimating market power. It has not specified any relevant market within the

amorphous PCS family of services, nor has it shown what portion of that market cellular service would occupy. Claims that cellular carriers can exert undue market power therefore lack a rational basis in fact, and are unsupported by the record.

Indeed, no such market power exists. To the extent that PCS will compete with cellular, there are simply too many potential service providers for a cellular carrier to impact the competitive environment by warehousing a PCS license. Upon licensing of PCS, there will be two cellular carriers and up to seven PCS providers in each market. In addition, the Commission is on the verge of modifying its rules governing the Specialized Mobile Radio Service (SMR) to make both 800 MHz and 900 MHz SMR licensees direct competitors to cellular service. See Notice of Proposed Rulemaking, PR Dkt No. 93-144, 8 FCC Rcd. 3950 (1993); Second Report and Order and Further Notice of Proposed Rulemaking, PR Dkt No. 89-553, 8 FCC Rcd. 1469 (1993). Once these rules are implemented, SMR providers will have sufficient spectrum and service area to market their service as another form of cellular. These changes could introduce several SMR competitors into each market. Indeed, large SMR licensees such as Nextel have already begun implementing these new services pursuant to Commission-granted rule waivers. Finally, the Commission has laid the ground work

for mobile satellite licensees to provide cellular-like services.

Therefore, in any given geographic area, there will soon be approximately ten to fifteen providers of advanced mobile radio services. The Commission implies that granting a license to a cellular carrier will allow this carrier to warehouse the spectrum, thereby preventing its use to provide radio services that would compete with its cellular system. However, given the number of competitors from the various services described above, this cellular licensee would be successful in suppressing only one-tenth to one-fifteenth of the potential competition. Given the monetary bid that will have to be paid for this PCS license, it would be illogical and extremely unlikely that a cellular carrier will spend millions of dollars to have such negligible impact on competition.

Moreover, the Commission has already adopted adequate measures designed specifically to prevent the very warehousing which it professes to fear. In particular, the Commission has adopted strict performance requirements for PCS licensees, requiring that coverage be extended to one-third of the population of the PCS service area within five years; two-thirds of the population in seven years; and ninety percent of the population by the end of the ten year license period. See Second Report and Order, supra, at p. 55. Under this requirement, a cellular licensee seeking to

warehouse a PCS grant would lose its spectrum (and its substantial monetary bid) in five years, at which time a new competitor would be licensed. If the cellular carrier meets the construction benchmarks, the expense of constructing a PCS system would far outweigh the value of excluding only one of several competitors, since construction of such system is expected to involve tens or hundreds of millions of dollars.

In this regard, the Commission has observed that "as long as transfer of licenses is permitted, valuable spectrum licenses are unlikely to be warehoused, that is, held out of use even though it would be profitable for a firm without market power to provide service using that spectrum."

Notice of Proposed Rulemaking, PP Dkt No. 93-253, FCC 93-455 (released October 12, 1993) at para. 91. The Commission correctly observes that the cost of paying for the license at auction, combined with the opportunity cost of not either using the license or selling it, will prevent anti-competitive practices. Id. The Commission offers no justification in the Second Report and Order for deviating from its stated intention to let the market forces brought into play by auctions deter the threat of warehousing. And there is certainly no evidence in the record that the value to cellular licensees of hindering a fraction of the competition will surpass the extraordinary expense involved in acquiring and constructing a PCS license. If the

Commission wishes to let the marketplace assign the highest value to spectrum (the lynchpin of the spectrum auction proposal), it must be prepared to let these market forces operate. The entity that places the highest value on the spectrum will not be able to squander the license, if these forces are allowed to work.

In sum, the Commission's failure to explain its reasons for concluding that cellular carriers can exert undue market power violates the rulemaking requirements of the Administrative Procedure Act (APA). When the Commission promulgates a rule, the Commission must explain its reasons. 5 U.S.C. § 553(c); see Western Coal Traffic League v. United States, 677 F.2d 915, 927 (D.C. Cir. 1982). The Commission must also "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfr's Ass'n v. State Farm, 463 U.S. 29, 43 (1983); See also Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992). But as shown above, the Commission does not show any rational connection between the record and its concerns about anticompetitive behavior; nor can it, because the record contains no facts on this matter.

C. The Ten Percent Population Coverage and Twenty Percent Ownership Standards Do Not Reasonably Accomplish The Commission's Stated Goal

While the objective of preventing the exercise of market power by cellular licensees lacks a rational basis in

fact and support in the record, so too does the method of determining which carriers have such power. The Commission established two criteria for identifying cellular carriers to whom the PCS ownership restriction will apply, but did not provide any support for these criteria. First, the Commission stated that the restrictions on cellular licensees having PCS licensees in their cellular service areas would apply when the overlap of the PCS service area and cellular service area is 10% or more of the PCS MTA/BTA. The Commission arbitrarily stated that an overlap of less than 10% would present only a slight potential for use of undue market power, without explaining what basis it used to establish this threshold.

Second, the Commission stated that the restriction will apply to all parties with 20% or more ownership in a cellular system servicing the PCS license area. Again, the Commission stated the restrictions were based on its concerns about undue market power, but the Commission never explained what basis it used for establishing 20% as the threshold.

The Commission arbitrarily decides that a less than 10% overlap is permissible but a 10% overlap is not, without citing any facts to support such a conclusion. It arbitrarily decides that less than 20% ownership is permissible but 20% ownership is not, without citing any facts to support such a conclusion. In sum, there is no

rational basis given for the cellular licensing restrictions. Thus, the Second Report and Order violates the APA.

Radiofone further submits that any restriction on cellular participation contradicts the acknowledged public interest in encouraging cellular entry, because of the potential for cellular carriers to promote early development of PCS by taking advantage of cellular providers' expertise, economies of scope and infrastructures. Second Report and Order, para. 104.

As stated by McCaw (at p. 31 of its Comments),

Limiting the participation of cellular carriers in the new PCS arena would waste the knowledge, capabilities, and experience of these entities. . . . [C]ompanies like McCaw understand the complexities of raising capital, negotiating for cell sites, constructing facilities, choosing and developing new technologies, refining pricing and marketing strategies, and effectively meeting customer needs so as to build and maintain a loyal customer base.

The cellular restriction also defies common sense. The Commission uses a premise that any coverage by a cellular licensee of 10% or more of the population of a PCS service area will allow the cellular carrier to exert undue market power. This premise is not only unsupported by the record, it defies common sense. A carrier offering only a fraction of the coverage of another carrier cannot effectively compete, much less dominate. Not only is a 10% coverage limit unsupportable, but a 50, 60 or even 80% coverage limit

still places the cellular carrier at a considerable disadvantage.

Even if the Commission were somehow able to show how a party with less than 20% ownership interest in a cellular carrier with less than 10% coverage of a PCS MTA/BTA could obtain a comparatively large market share,² the Commission cannot ignore factors that would impede anticompetitive behavior. As noted by Stanley Besen (Reply Comments of the Cellular Telecommunications Industry Association, Appendix at 4-5), the behavior of firms and the performance of an industry can approximate a competitive outcome even if the industry has firms with large market shares. For example, the rapid pace of technological change, as has occurred in the cellular industry and will continue to occur through the growth of the PCS industry, is an influence that economists consider procompetitive. See id. at 6-7. Also, the degree of variability among the radio-based service providers of the future (e.g., cellular vs. PCS vs. SMR vs. mobile satellite) will make collusive agreements (and the resulting anticompetitive pricing) difficult to maintain and will weaken the incentive to enter such agreements. See id. at 7, 10. Furthermore, the history of competitiveness in the cellular industry (including the rapid growth in subscribers and steady decline in prices) will shape the future behavior

² The Commission also fails to explain what measure of market power it is employing. Market share is discussed herein because it frequently is used as a proxy for market power.

of cellular carriers. See id. at 8, 11. Thus, if anticompetitive pricing is the basis of the Commission's fears, such fear is unfounded.

III. The Commission's Cellular Restriction Constitutes An Unwarranted Discrimination Against Cellular Carriers

A. The Cellular Ownership Restriction Discriminates Against Cellular Licensees In Violation Of The APA

The cellular ownership restriction is also arbitrary and capricious, in contravention of the APA, because the Commission has failed to articulate any rational basis for discriminating against cellular carriers, while allowing similarly-situated SMR operators and mobile satellite carriers to hold PCS licenses without restrictions.

The definition of PCS in Rule Section 99.5, and the stated purpose of PCS ("meeting communications requirements of people on the move") very easily covers SMR service of all types, including dispatch and the enhanced SMR which is to be facilitated by the Commission. As discussed above, the Commission initiated two dockets to make SMR service in the 800 MHz band (PR Dkt No. 93-144), and in the 900 MHz band (PR Dkt No. 89-553) nearly identical to cellular. Conspicuously absent from the Commission's "market power" deliberations are any consideration of placing restrictions on soon to be identical SMR operators holding PCS licenses. This is particularly startling, since some SMR licensees have capitalizations larger than many cellular carriers, and advertise themselves as "better than cellular." Indeed,

their ability to provide dispatch service (which cellular carriers are prohibited from doing under Section 332 of the Communications Act of 1934, as amended) bolsters this claim. These enhanced SMR systems will in many cases be positioned to promptly install all digital equipment, unlike cellular carriers who must maintain an analog capability. Moreover, the Commission has proposed licensing regional SMR systems, with licenses to be awarded on an MTA or BTA basis. See Notice of Proposed Rulemaking, supra, 8 FCC Rcd. at 3951. SMR systems may thereby have service areas identical to PCS systems, whereas cellular carriers are restricted if they serve only 10% of a PCS service area. Thus, SMR licensees are more likely than cellular carriers to be in direct competition with PCS.

Despite the raising of this issue by McCaw and other commentators, the record in this proceeding lacks any consideration or discussion of the reason for distinguishing between cellular carriers, and their SMR competitors. Nor is the competitive threat from mobile satellite providers addressed.³ The Commission has not articulated any rational basis for this disparate treatment, as indeed, there is none. Therefore, discrimination against cellular carriers

³ Indeed, it could be said that PCS is a greater competitive threat to wireline telephone service than cellular, and yet only cellular carriers are singled out. The answer is not to consider restrictions on wireline, SMR or satellite carriers, as these entities have a right to compete. Instead, the remedy is to lift eligibility restrictions against cellular carriers.

is arbitrary and capricious, and likely will be reversed upon appeal. See National Wildlife Federation v. Costle, 629 F.2d 118 (D.C. Cir. 1980); Diplomat Lakewood, Inc. v. Harris, 613 F.2d 1009 (D.C. Cir. 1984) (reversing regulations where agencies failed to articulate a rational basis for disparate treatment). Accordingly, the Commission should eliminate this disparity on reconsideration.

B. The Cellular Restriction Violates the Due Process Protections of the Fifth Amendment.

The Commission's discriminatory treatment of cellular carriers vis-a-vis SMR and mobile satellite carriers violates the substantive due process provisions of the Fifth Amendment, and the equal protection requirements inferred therein.

Substantive due process requires that different PCS eligibility standards for cellular and SMR entities have a rational basis -- that is, it must rest on "some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis." McLaughlin v. Florida, 379 U.S. 184, 190, 85 S. Ct. 283, 287 (1964); see also Bolling v. Sharpe, 347 U.S. 497, 499, 74 S. Ct. 693, 694 (1954) (Equal protection norms are applicable to substantive due process). In other words, the Commission must show that the establishment of different PCS eligibility standards for cellular and SMR entities is

reasonable in light of the purpose of such standards.

McLaughlin v. Florida, 379 U.S. at 191, 85 S. Ct. at 288.

The Commission has made no such showing herein. Rather, it has done nothing more than repeat the concerns of self-interested parties such as Time Warner Telecommunications that cellular operators "might" have "potential unfair competitive advantages" over PCS licensees. Second Report And Order at para. 101, 104. The Commission has made no attempt to substantiate the nature or extent of these "potential" advantages. Nor has it explained why the same consideration does not apply to SMR systems, which it has acknowledged will possess the same or better capacity and service features compared to competing cellular systems. Rather, the Commission has proceeded without explanation or rational basis to establish a discriminatory PCS eligibility requirement for parties with cellular interests. The Fifth Amendment requires that entities having cellular interests as well as entities having SMR interests be permitted to apply for and bid on all otherwise unrestricted PCS authorizations in any markets they wish. The cellular restrictions as drafted fall short of this requirement, and therefore appear to be unconstitutional.