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

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

GEN Docket No. 90-314

RM-7140, RM-7175,
RM-7618

ORIGINAL

REPLY

The Alliance of Rural Area Telephone and Cellular Service Providers (hereafter the "Alliance"),^{1/} by its attorneys, and pursuant to Section 1.106(h) of the Commission's rules, hereby submits its Reply to parties opposing its Petition for Reconsideration ("Petition") of the Second Report and Order.

^{2/}

In its Petition, the Alliance requested the Commission to (1) recognize partitioned areas as separately licensed areas for PCS, (2) modify construction requirements for broadband PCS licensees and (3) change the ownership attribution standard for cellular licensees. This Reply addresses contrary views as expressed in oppositions to petitions filed by MCI Telecommunications Inc. ("MCI") and General Communication, Inc. ("GCI").

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^{1/} A list of the companies participating in the Alliance is attached.

^{2/} Second Report and Order, GEN Docket No. 90-314, 58 FR 59174, November 8, 1993 ("Second R&O"); Erratum, rel. November 22, 1993, concerning broadband Personal Communications Services ("PCS").

**I. Voluntary Partitioning of Market Areas
for Separate Licenses**

MCI and GCI oppose the Alliance request for flexibility in the PCS licensing process. The Alliance asked that the Commission allow post-auction, voluntary partitioning of Major Trading Areas ("MTAs") and Basic Trading Areas ("BTAs") so as to encourage the participation of local service providers in the offering of PCS. Spectrum aggregation limits would not be altered under the Alliance proposal, nor would the proposal disrupt the auction process, since all MTAs and BTAs would be auctioned in their entirety. The Alliance does not seek "involuntary" or "mandatory" partitioning, only an opportunity to form bidding consortiums which would lead to a post-auction market subdivision, and the right to purchase from an auction winner a portion of a market and obtain a separate license for that area.

In its opposition, MCI argues that voluntary partitioning would cause

[e]xcessive 'splintering' of either spectrum or geography [that] would greatly increase the complexity and cost of coordinating frequency use and avoiding interference among systems occupying adjacent territories and frequency bands.

(MCI Opposition at p. 4, fn. omitted) GCI adopts a similar view, suggesting that partitioning "...would result in a multiplicity of very small, possibly incompatible systems."^{3/} First, the Alliance did not request and it does not endorse

^{3/} "Comments and Opposition of General Communication, Inc., on the Petitions for Reconsideration" ("GCI Opposition"), p. 15.

any form of spectrum partitioning. Only geographic partitioning is contemplated by the proposal. Second, since a voluntary partitioning plan is proposed, the parties involved will assume the largest part of the frequency coordination responsibility. Especially in those partitioning arrangements involving local service providers, frequency coordination will be a relatively easy process. Third, GCI's concern over possible incompatibility is overshadowed by the Commission's intention that PCS providers have "...the maximum degree of flexibility to meet the communications requirements of differing mobile and portable applications for both business and individuals." (Second R&O, para. 23) The Alliance submits that local service providers are in the best position to understand the local service needs. If full compatibility with other PCS systems is of primary importance to system users, that goal will no doubt be achieved between particular PCS licensees. However, the Commission's broad definition of PCS is also intended to promote "diversity of services and competitive delivery". (Second R&O, para. 23) It is clear that licensees of partitioned areas will have ample motivation to meet compatibility goals while offering services which meet changing local needs.

Both MCI and GCI express concern that partitioning could lead to manipulation or evasion of the build-out requirements.^{4/} The Alliance anticipated such concern and

^{4/} MCI Opposition at pp. 4-5, and GCI Opposition at pp. 15-16.

suggested in its Petition that the build-out requirements be modified from a population-based standard to one similar to the cellular "fill-in" rules.^{5/} Such a change would not only eliminate the potential for abuse, but, as summarized in Section II below, it would better facilitate the Commission's goal of service availability to all persons regardless of location.

The Commission should likewise reject MCI's fall-back position that voluntary partitioning, if permitted, should be limited to areas no smaller in size than BTAs.^{6/} As the Alliance explained in its Petition, the BTA boundaries were drawn to associate rural counties with large commercial trading areas.^{7/} Rural counties included with an urban center in a BTA sometimes have little if any commercial association with that city. One of the principal benefits of partitioning is to allow a local service provider in fringe areas of a BTA or MTA to introduce, speedily, services which the urban area licensee has less incentive to offer in the fringe areas. MCI and others with a national interest in PCS should welcome participation by Alliance members who seek to assure that rural areas are not left behind as the telecommunications revolution unfolds.

^{5/} See Petition, fn. 9.

^{6/} MCI Opposition, p. 5.

^{7/} See Petition at pp. 2-3.

II. Construction Requirements Based On Population Should Be Modified To Correspond To The Cellular "Fill-In" Rules

The Alliance explained in its Petition that the current population-based coverage requirements will result in an administrative morass at the enforcement stage. Three elements combine to cause the problem: (1) the absence of an objective standard for ascertaining the reliable service area of a PCS system, (2) the potential for reasonable disagreement about the population count within the licensee's service area which almost certainly will not coincide with political boundaries, and (3) the draconian penalty of a complete license forfeiture upon a failure to meet the standard.^{8/}

MCI and GCI oppose change to the current build-out requirements, although MCI indicates flexibility on this issue if the Commission does not substantially increase base station and mobile unit power limits.^{9/} The Alliance does not dispute MCI's reasoning that the Commission must adopt performance requirements to prevent stockpiling and warehousing of spectrum; the only question is how the Commission should meet that responsibility.

The Alliance suggested that a more appropriate and administratively feasible means of discouraging warehousing of PCS frequencies is to borrow the successful model of the cellular fill-in period. An incentive to serve area, instead of a population-based coverage requirement, would offer the

^{8/} See Petition, pp. 5-6.

^{9/} MCI Opposition at pp. 17-18, GCI Opposition at pp. 13-14.

considerable advantages of (a) more service to rural areas that might otherwise remain unserved if a population standard is satisfied by the licensee, and (b) a plan more familiar to Commission staff and the wireless industry by which only the unserved area, after a date-certain, is forfeited. If individual licensee responsibility for a partitioned area is permitted, as the Alliance requests, it is likely that more areas will be built-out, because the licensee will focus on its market segment. Concern for *failure* to build-out the market is more realistic if the market is left intact, because the more densely populated and profitable areas will be prioritized and the rural areas will be neglected.

III. The Cellular Restriction For PCS Eligibility Should Be Control, Not Ownership

The Alliance requested in the Petition that a "control" test be substituted for the 20 percent cellular ownership standard adopted by the Second R&O.^{10/} In urging the Commission to retain the 20 percent rule, MCI referred to the Commission's intention to adopt "a clear ownership test" and reject a standard based upon "fine legal distinctions of what constitutes 'control.'"^{11/} GCI opines that the 20 percent standard "...strikes a reasonable balance" between participation and dominance by cellular carriers.^{12/} While expressing some flexibility on the point, GCI contends that

^{10/} Section 99.204 of the rules.

^{11/} MCI Opposition at p. 9 (quoting Second R&O para. 109).

^{12/} GCI Opposition, p. 10.

the standard should not be increased "significantly".

MCI overlooks the fact that the Commission's 20 percent standard misses the mark in two ways: First, it is over-inclusive because it encompasses cellular owners who lack the ability to impede competition between cellular and PCS providers, such as passive limited partners. Second, the standard is under-inclusive because it fails to encompass cellular owners with less than a 20 percent interest who have the ability to determine a cellular licensee's course of conduct.^{13/}

In adopting the restriction, the Commission recognized the benefit of participation by cellular operators in PCS, and decided there should be no exclusion of cellular operators outside their cellular service areas.^{14/} However, the Commission expressed concern over "...the potential for unfair competition if cellular operators are allowed to operate PCS systems in areas where they provide cellular service."^{15/} With concern over unfair competition as the only reason to limit cellular and PCS cross-ownership, it follows that an appropriate restriction should be based on the ability of a cellular operator, or owner of a cellular operator, to engage

^{13/} The Commission was fully aware of such a possibility when it adopted the 20 percent ownership standard. See, Second R&O, para. 109. In recognizing the inadequacy of the standard, the Commission warned that it will "reconsider this limit" if it appears that the intent of the rule "... is being evaded or abused." Second R&O, para. 110.

^{14/} Second R&O at para. 104.

^{15/} Second R&O, para. 105.

in unfair competitive practices involving PCS. The Alliance submits that the 20 percent ownership standard adopted by the Second R&O completely misses the mark.

The ownership standard also fails to meet a least restrictive means analysis under the First Amendment. The Commission defines PCS to encompass the "widest possible range" of communications services to individuals and businesses. ^{16/} A PCS licensee can provide a service involving "editorial discretion" over information conveyed. The PCS licensee may thus engage in speech protectable under the First Amendment. See City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

Common carriers are protected by the First Amendment when they seek to provide a communication service which involves a form of speech. E.g., C&P Telephone Co. of Virginia v. United States, 830 F.Supp. 909 (E.D. Va. 1993). Section 99.204 of the proposed PCS rules prospectively places restrictions on a carrier's ability to provide PCS. As such, the rule is a "content-neutral regulation" that could infringe upon speech protected by the First Amendment.

Section 99.204 must survive scrutiny under the First Amendment by passing the test enunciated in United States v.

^{16/} So long as they do not engage in "broadcasting" as defined by 47 U.S.C. § 153(0), PCS licensees are free to provide "any mobile communication service on their assigned spectrum." See 47 C.F.R. § 99.3.

O'Brien, 391 U.S. 367, 377 (1968). ^{17/}

Nothing in the record justifies any significant government interest in prohibiting cellular licensees from providing PCS. Instead of the 20 percent cellular ownership standard, the Alliance urges the Commission to return to its traditional reliance on control, including both de jure and de facto control, as the standard to identify which owner(s) of a cellular licensee have the ability to determine and carry out the cellular licensee's decisions. While preventing cellular licensees from exerting undue market power, the proposed control standard effectively eliminates those cellular owners who have the ability to interfere with the development of PCS.

IV. Conclusion

The Alliance respectfully requests the Commission to provide for partitioning and separate licensing of areas within the MTAs and the BTAs to promote the rapid deployment

^{17/} Section 22.904 is subject to intermediate scrutiny under the O'Brien test, not the diminished review applied to broadcast regulation. PCS is not broadcasting, and the lower level of First Amendment protection afforded broadcasting was premised on spectrum scarcity. That justification allowed the Commission to place ownership restrictions on broadcasters to promote the public interest in the "diversification of the mass communications media". See, e.g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 799 (1978). For PCS, any spectrum scarcity is alleviated by spread spectrum techniques, optical-fiber transmission, semi-conductor electronics, signal compression, and software-controlled digital signal processing. Cellular operators do not now provide mass communication, so prohibiting them from providing PCS in their service areas does not promote "diversification".

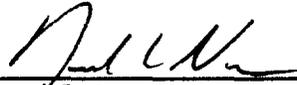
of PCS in rural areas which otherwise will be left behind under the current MTA/BTA licensing scheme.

The Commission could avoid considerable verification and enforcement complications if the current population-based build-out requirements for PCS are changed. The public interest would be better served if PCS licenses were subject to a market "fill-in" period, similar to the cellular rules.

Finally, the limitation on cellular owners to apply for and hold PCS licenses should be the least restrictive means necessary to achieve the desired result. If "unfair competition" is the harm to be avoided, or minimized, through a cross-ownership restriction, a more appropriate restriction would be control over a cellular system, either de jure or de facto, in the PCS license area.

Respectfully submitted,

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Granite State Telephone, Inc. (New Hampshire)

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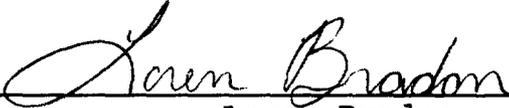
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