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

In re	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	
	)	

U S WEST REPLY

U S WEST, Inc. submits this reply to the comments and oppositions filed in response to the reconsideration petitions filed in connection with the Second Report and Order, 8 FCC Rcd 7700 (Oct. 22, 1993) ("PCS Order").

I. Cellular Carriers Should Be Permitted to Bid for PCS Licenses So Long as Successful Bidders Later Divest Their Cellular Interests

The Commission has determined that the public interest is served if PCS licenses are awarded "to part[ies] who value [them] the most."[1] It has further observed that firms with cellular experience can "promote the early development of PCS by taking advantage of [their] expertise."[2]

U S WEST proposed in the rulemaking proceeding that firms with cellular interests be permitted to bid for PCS licenses so long as they divest their cellular interests before PCS service is initiated.[3] U S WEST documented how such an arrangement would promote the public interest and be fully consistent with Commission precedent. While the Commission did not directly address this proposal in its PCS Order, it did give cellular carriers the opportunity to participate in the auctions. Under the eligibility restriction adopted, PCS licensees need not comply with the restriction until the date PCS construction authorizations are granted.[4]

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[1] Competitive Bidding Notice, 8 FCC Rcd 7635, 7640 ¶ 34 (Oct. 12, 1993).

[2] PCS Order, 8 FCC Rcd at 7744-45 ¶¶ 104-107.

[3] *See* U S WEST Reply, Docket No. 90-314, at 17-20 (Jan. 8, 1993).

[4] Section 99.204 provides that entities with attributable cellular ownership interests "shall not be eligible for assignment" of more than one 10 MHz PCS frequency block in any PCS service area. Because this rule applies to the "assignment of" rather than the "application for" PCS frequencies, eligibility problems need not be cured until the construction permit is granted. However, a proposal in the auction proceeding appears to suggest that applicants must certify prior to the auction that they already meet all eligibility restrictions. *See* Competitive Bidding Notice, 8 FCC Rcd at 7651 ¶ 98.

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It is unlikely that successful PCS bidders will be able to complete an orderly divestiture of their cellular interests before the date their PCS construction permit is awarded. Many other parties have therefore encouraged the Commission not only to confirm that firms with cellular interests may participate fully in the bid/auction process, but also to clarify that successful bidders be given adequate time to divest their cellular holdings and meet the legitimate eligibility restrictions.[5]

U S WEST supports these efforts. If only to avoid the submission of many waiver requests later, the Commission should clarify now that successful PCS applicants may have at least 18 months from the award of a license in which to comply with any eligibility restrictions.

II. Any Cellular Eligibility Restrictions Should Also Apply to Any Equivalent Services, Including ESMR Services

The Commission has noted that enhanced SMR carriers provide services that are functionally equivalent to cellular carriers.[6] The record in this proceeding further demonstrates that enhanced SMR and cellular carriers will provide services that will be functionally equivalent to PCS services.[7] Several parties have asked the Commission to clarify that any PCS eligibility restriction imposed on cellular carriers also be imposed on others providing functionally equivalent services, including enhanced SMR carriers.[8]

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[5]*See, e.g.*, GTE Clarification Pet. at 5-7; McCaw Clarification Pet. at 5-6; Cablevision Comments at 7-8; CTIA Comments at 14-15; TDS Comments at 10. The only difference of opinion among these parties relates to the length of additional time successful PCS bidders should be given to divest conflicting cellular interests. Most recommend that such entities must complete any divestiture before PCS service begins. Cablevision recommends a six-month period because the first construction milestone does not come into play for five years and because Cablevision fears that PCS licensees would defer construction of their systems in order to hold onto their cellular interests. *See* Cablevision Comments at 7-8.

Cablevision's concern is unfounded. Having paid substantial sums just to acquire their spectrum, PCS licensees have every incentive to build their systems rapidly to begin recouping their investment. In any event, Cablevision's concern can be adequately addressed by adopting an 18-month divestiture period — a time period the Commission has often used when addressing waivers involving other eligibility and cross-ownership restrictions.

[6]*See, e.g.*, PCS Order, 8 FCC Rcd at 7734 ¶ 78; SMR Eligibility Order, 7 FCC Rcd 4398, 4399 at ¶ 4 (July 15, 1992); Private Land Mobile Services, 7 FCC Rcd 4484, 4488 at ¶ 16 (July 16, 1992).

[7]*See, e.g.*, Nextel Opp. at 8 (It is an "entirely unremarkable proposition that ESMR providers will also compete with PCS."); Nextel (Fleet Call) Reply, Docket No. 90-314, at 5-6 (Jan. 8, 1993) ("ESMR squarely fits within the Commission's proposed definition of PCS . . . ESMR technology offers an optimum platform for PCS service.").

[8]*See, e.g.*, U S WEST Recon. Pet. at 16-22; Point Pet. at 3 n.4; Radiophone Pet. at 16-18; Sprint Pet. at 13; AIDE Comments at 21; McCaw Comments at 12 n.24; TDS Comments at 11. *See also* BellSouth Recon. Pet. at 13-14; CTIA Pet. at 12 n.31; Bell Atlantic Reply, Docket 90-314, at 12 n.23 (Jan. 8, 1993).

Predictably, only Nextel, an enhanced SMR provider, opposes this straightforward proposition. According to Nextel, while cellular carriers should be limited to 35 MHz of spectrum and PCS providers 40 MHz, enhanced SMR providers like itself should be eligible for over 50 MHz of spectrum to compete with cellular and PCS providers. Nextel takes this position even though it "does not dispute that the Budget Act requires that functionally equivalent mobile communications services be regulated in a similar manner,"[9] and even though enhanced SMR providers "have larger regional footprints than the cellular operators."[10]

The principal argument Nextel advances for its "I-deserve-special-treatment" position is an erroneous proposition of law.[11] According to Nextel, notwithstanding the directive of the Budget Act (adopted largely because of current regulatory disparities between cellular and SMR providers), the Commission "cannot" legally apply the same PCS eligibility restrictions to anyone other than cellular carriers because the Notice of Proposed Rulemaking supposedly gave "no hint that eligibility restrictions for SMR licensees might be considered":

> Therefore, an interested person reading the NPRM could not have been apprised that restrictions on SMR licensees might be considered.[12]

This argument lacks merit. The purpose of an NPRM is to give persons who may be affected by regulation an opportunity to comment on the proposal.[13] In this case, Nextel is fully aware of the eligibility issue as it may affect enhanced SMR operators, and it has addressed this matter in detail in its opposition. All of this occurred before any action adverse to Nextel has been taken.

The fact is that Nextel has been afforded (and has exercised) an opportunity to comment on the proposal to extend any PCS eligibility restriction to carriers like itself. Thus, all the purposes of the Administrative Procedures Act notice rules have been served:

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[9]Nextel Opp. at 7 (emphasis added).

[10]Point Recon. Pet. at 3 n.4. *See also* U S WEST Recon. Pet. at 17-20.

[11]Nextel also argues that there is no public policy rationale for applying to it the same restrictions applicable to entrenched cellular carriers. However, the fact is that, consistent with the reason underlying the cellular eligibility restriction, a decision allowing enhanced SMR operators to acquire 30 MHz blocks (especially when there are only two such blocks per MTA), would "reduce the number of independent competitors in the market and raise antitrust concerns." PCS Notice, 7 FCC Rcd 5676, 5701 at ¶ 63 (Aug. 14, 1992).

[12]Nextel Opp. at 4-5 and 6.

[13]*See, e.g.*, Small Refiner v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983).

Nextel's interests have been fully protected; the Commission has heard both sides of the issue before making its decision; and a full record will have been developed for purposes of judicial review once the Commission issues its decision.[14]

The Commission has determined that the public interest is served by imposing an eligibility restriction on cellular carriers. Given Nextel's admission that its services are functionally equivalent to those provided by both cellular and PCS carriers, logic, equity and law dictate that similar eligibility restrictions be imposed on enhanced SMR providers.

III. The Record Overwhelmingly Supports Increasing the Maximum PCS Base Station Power Limit to 1,000 Watts ERP (or 1,600 Watts EIRP)

Over 20 parties address the issue of the maximum power limits for PCS base stations.[15] One of them, Nextel, opposes increasing the maximum limit to 1,000 watts.

Nextel's position may be dismissed summarily. First, its opposition does not even attempt to address (much less dispute with facts) any of the reasons advanced in the reconsideration petitions for increasing the maximum power limit.[16] Second, the one reason Nextel does recite is, in the end, factually incorrect.[17]

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[14]Besides, it is astonishing for Nextel to assert that, having boasted to financial analysts and the press that it is capable of providing PCS and a better service than cellular carriers (*see* U S WEST Recon. Pet. at 17-18), it had "no hint" that restrictions on SMR licensees might be considered in this proceeding when the Commission asked "whether there is a need for any restrictions on eligibiility of a PCN license" (Notice of Inquiry, 5 FCC Rcd 3995, 3999 at ¶ 27 (June 28, 1990), and when 10 parties have now argued that such restrictions should be imposed on enhanced SMR operators.

The fact is that the Administrative Procedures Act does not require that agencies adopt rules only that track their notice precisely. Indeed, Nextel freely acknowledges that agencies are free to adopt any rule that is "a logical outgrowth" of a proposed rule. *See* Nextel Opp. at 4 n.5. The imposition of a PCS eligibility restriction on enhanced SMR providers is unquestionably a logical outgrowth of this proceeding — especially given the subsequent enactment of the Budget Act.

[15]See, e.g., Petitions for Reconsideration: Ameritech at 1-2; APC at 308; MCI at 7-8; Northern Telecom at 4-21; Pacific Bell at 3-4; PacTel at 1-7; Sprint at 13-15; Telocator at 1-7; Time Warner at 11-13; and U S WEST at 1-16. Comments: AAR at 5-7; Alcatel at 4-5; APC at 20-21; Bell Atlantic at 14; Citizens at 12-13; CGI at 2-3; GTE at 11-12; MCI at 18-19; Murray at 6-7; Nextel at 14-15; Northern Telecom at 3-6; Omnipoint at 13; Pacific Bell at 1-3; Telocator at 2-6; TIA-Fixed Microwave at 6-7; and UTC at 14-16.

[16]For example, Nextel does not dispute that increased limits are needed so "PCS licensees may compete with cellular carriers, provide service in rural areas, and comply with the Commission's strict buildout requirements." Nextel Opp. at 14.

[17]According to Nextel, the Commission has "already . . . rejected" a 1,000-watt limit and it "should stand by that decision." Nextel Opp. at 14. Nextel is mistaken if it is claiming that a reasoned decision rejecting a 1,000-watt limit has been made, because the Commission has never explained why a 1,000-watt limit would be inappropriate, as has been previously documented. U S WEST Recon. Pet. at 4-6.

While it is understandable why Nextel would prefer that its competitors be hobbled with maximum power limits less than 10% that available to itself,[18] its position cannot be squared with the regulatory parity directive of the Budget Act — a point Nextel elsewhere concedes.[19] Nor can Nextel's position be squared with the facts (as documented in the pleadings[20]) or with the public interest.

IV. All Mobile Service Providers Should Be Permitted to Provide Any Non-Broadcast Service, Including "Fixed" Services

Cellular carriers historically have been permitted to provide "fixed" services on an "incidental" basis only,[21] and the Commission has determined that PCS carriers should be permitted to provided "fixed" services on an "ancillary" basis only.[22] Several parties have encouraged the Commission to remove these "fixed" restrictions,[23] and U S WEST joins in this request. All mobile service providers should be permitted to provide any non-broadcast service, including "fixed" services.

Limitations on use of spectrum available for mobile services were perhaps justifiable when only 50 MHz of spectrum was allocated for this purpose. However, the Commission has recently allocated another 160 MHz for PCS (with additional spectrum held in reserve), and other licensees like enhanced SMR and mobile satellite have deployed new

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[18]As an enhanced SMR provider, Nextel can use up to 1,000 watts (ERP) in providing mobile services which compete with the services offered by PCS providers (*see* 47 C.F.R. § 90.635) while, under the PCS Order, PCS providers have a maximum power limit of only 64 watts (ERP).

[19]*See* Nextel Opp. at 7 ("Nextel does not dispute that the Budget Act requires that functionally equivalent mobile communications services be regulated in a similar manner.").

[20]*See especially* Northern Telecom Comments at 3-6 (which appends an updated study documenting that "interference to existing microwave users would not materially increase as the rural cell power increased from 100 watts EIRP to 1,600 watts EIRP, and in some cases would decline.").

[21]*See* 47 C.F.R. § 22.308.

[22]PCS Order, 8 FCC Rcd at 7712 ¶ 23. *See also* New Section 99.3. It would appear that the Commission, consistent with the regulatory parity directive of the Budget Act, intended that PCS carriers be able to provide fixed services to the same extent as cellular carriers. The Commission has determined that, for cellular carriers, the provision of fixed service on an incidental basis includes the provision of basic exchange services. *See* Liberalization of Technology and Auxiliary Cellular Service Offerings, 3 FCC Rcd 7033, 7041 at ¶¶ 61-66 (Dec. 12, 1988). However, the provision of the same "fixed" services by PCS carriers may not be permitted. *See* PCS Order, Appendix A, U.S. footnote 331 ("[T]he only fixed PCS services permitted are ancillary services used in support of mobile personal communications services."), 8 FCC Rcd at 7790. Any differences in spectrum uses between cellular and PCS carriers can no longer be justified.

[23]*See, e.g.*, Northern Telecom Recon. Pet. at 15 n.12; Southwestern Bell Pet.; Citizens Pet. at 13-14; UTC Comments at 18.

technology to enter the mobile/PCS market as well. There appears, in short, adequate spectrum to support any radio-based services which the public may demand.

The Commission should rely upon market forces, rather than regulatory fiat, to determine how spectrum should be used. The market may dictate that the PCS spectrum be used exclusively for "non-fixed" services. However, market demand may also exist for some "fixed" services — be it use of spectrum in the provision of wireless loops, remote payphones, emergency services, data services (*e.g.*, premises security alarms and vending machines), or retail services such as credit card verification and lottery ticket sales, particularly from temporary or remote locations. The provision of these innovative services and applications would largely appear to be prohibited under the current rules.

The Commission expects PCS to be "a competitor to local wireline exchange service."[24] This expectation will not be realized, or at least realized as quickly as it could be, if licensees are precluded by regulation from offering "fixed" services. Especially with the introduction of competitive bidding, licensees should be free to use their spectrum in a manner they deem most appropriate (*e.g.*, in ways that maximize the ability to recoup the costs of acquiring the spectrum).

V. Common Carriers Should be Eligible to Use the Unlicensed Band

AT&T asks the Commission to preclude common carriers from using the unlicensed band in the provision of services to consumers.[25] The Commission should reject this request because it would reduce the array of choices available to the American public. As Bell Atlantic notes, AT&T's proposal "would preclude any type of third-party provision of unlicensed PCS services, e.g., a cordless pay-phone at a convenience store."[26]

Consumers benefit by having more, rather than fewer, choices. For example, businesses today can choose from a wide variety of PBXs. Or, using the same telephones, they can order Centrex service if they wish to avoid the burden of purchasing and maintaining their own phone system.

The assignment of 40 MHz of unlicensed PCS spectrum will enable vendors to manufacture wireless PBXs, thereby giving consumers yet more alternatives. But under AT&T's proposal, consumers would not have the additional option of using wireless Centrex services — or entirely new services — unless they scrap their wireless PBX handsets

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[24] PCS Notice, 7 FCC Rcd at 5705 ¶ 71.

[25] *See* AT&T Recon. Pet. at 6-11.

[26] Bell Atlantic Opp. at 13.

and purchase new handsets, thereby increasing the cost of using competitive alternatives.[27]

AT&T's assertion that a common carrier prohibition is necessary to avoid congestion in the unlicensed band is flawed.[28] First, common carriers have no natural incentive to use the unlicensed band (because they forsake protection from interference).[29] Second, and more importantly, congestion is caused by the use of the spectrum, not by who owns or provides the service (*e.g.*, a business using a wireless PBX rather than a wireless Centrex service).

The unlicensed PCS band is intended to give consumers the same type of flexibility they have enjoyed with Part 15 spectrum. User restrictions have never been imposed on Part 15 spectrum, and AT&T has advanced no legitimate reason to impose such restrictions on the new unlicensed PCS band.

VI. The Buildout Requirements Need to be Re-examined

Considerable concern has been expressed over the PCS buildout requirements the Commission has adopted.[30] U S WEST shares these concerns, particularly the 90% buildout requirement.[31]

The table below documents that PCS licensees, to reach 90% of a BTA's population (as opposed to 67%), must extend their coverage and networks exponentially:

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[27]If common carriers are precluded from offering services on the unlicensed band, the wireless CPE used with common carrier services will be incompatible with the wireless CPE used with the unlicensed band.

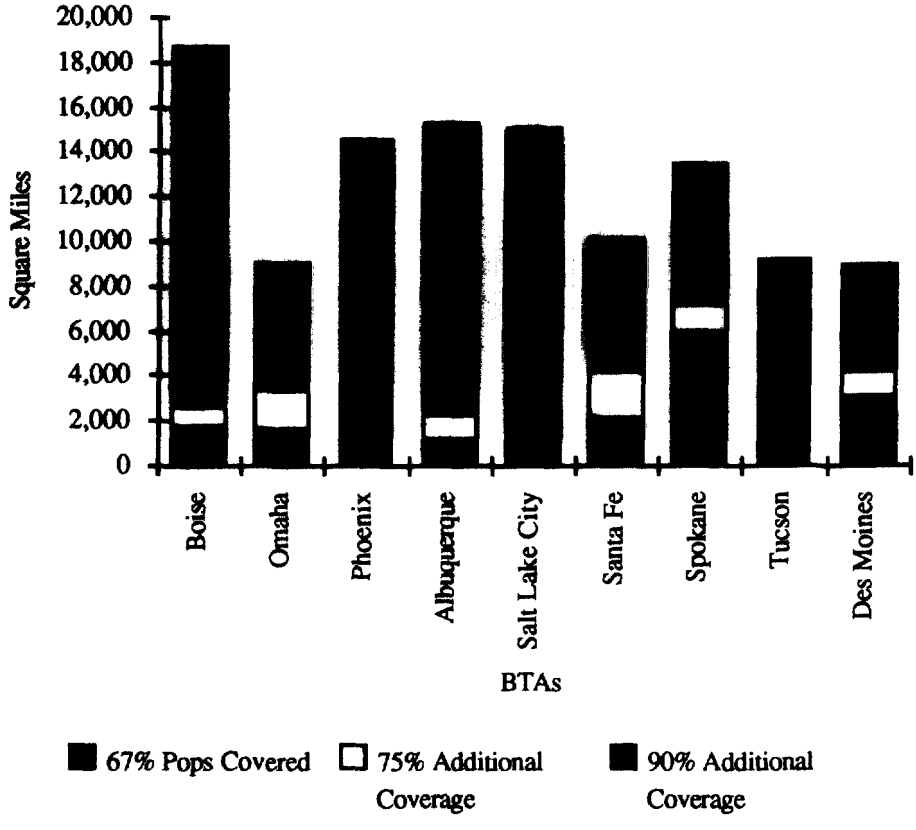
[28]AT&T Recon. Pet. at 10-11. Completely baseless is AT&T's additional assertion that common carrier access to the unlicensed band will require "a totally new premise to fairly allocate band clearing costs" which, in turn, "could . . . severely delay" the "deployment of unlicensed emerging technologies." Id. at 8. Consumers must purchase CPE compatible with the unlicensed band regardless of who owns or provides the service (*i.e.*, themselves, a common carrier, or another third party). Consequently, allowing common carrier access to the unlicensed band will have no impact on the current method for compensating the relocation costs of incumbent licensees.

[29]What this means is that common carriers will provide services in the unlicensed band primarily when consumers demand a service in this band. U S WEST cannot agree with AT&T that satisfying this consumer demand is "unnecessary." *See* AT&T Recon. Pet. at 10 and 11.

[30]*See, e.g.*, Petitions for Reconsideration: Alliance at 5-7; BellSouth at 7-10; Columbia at 4-6; Mabtel at 1-4; Motorola at 5-6; NTCA at 8-10; Pacific at 5-6; PNS at 10; RCA at 6-7; Southwestern Bell; Sprint at 13-14. Comments: AIDE at 2-7.

[31]Buildout requirements have historically been imposed to prevent warehousing, but warehousing is not a concern with PCS spectrum because of the introduction of competitive bidding. Because licensees must pay for their spectrum, they have every incentive to deploy their systems as rapidly as possible, so they can begin generating a cash flow and recoup their investment.

PCS Coverage Analysis: Square Miles Covered in BTAs to Meet Population Coverage Requirement



Given the density characteristics of many BTAs, a PCS licensee's cost to provide service will increase dramatically if the licensee is required to serve 90% of a BTA's population. U S WEST estimates that, on average, the cost of PCS service will increase fourfold if licensees are required to serve 90% of a BTA's POPs as opposed to 67% of a BTA's POPs.

U S WEST is not convinced that buildout requirements are the best means to facilitate the rapid deployment of PCS.[32] It believes that the better approach is to rely upon market forces and for the Commission to adopt policies that will encourage licensees to serve all portions of their areas and to serve them in the most efficient manner. There are several

[32]It is questionable whether urban areas can support 10 radio-based service providers (seven PCS carriers, two cellular carriers, and one enhanced SMR). Rural areas certainly cannot support this many providers (nor are that many providers necessary to give residents meaningful choices).

steps which the Commission could take to facilitate the availability of PCS services in rural areas:

- Permit licensees to subdivide (or partition) their service areas;[33]
- Adopt for PCS a "fill-in" arrangement similar to that used with the cellular industry, where the Commission would, after a specified period of time, re-license PCS service areas not served by the original licensees;[34] and
- Permit licensees to include, as part of any buildout requirement imposed, areas served by reselling the services of other mobile service licensees.

If the Commission does not reconsider its buildout requirements, it should at minimum commit to reconsider any requirements within five years. Experience may demonstrate all areas are adequately served, whether by PCS carriers or other licensees (*e.g.*, cellular, satellite) and that, as a result, the buildout requirements are unnecessary.

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[33] *See, e.g.*, Petitions for Reconsideration/Clarification: Alliance at 1-5; Columbia at 1-4; McCaw at 6-8; NTCA at 1-8; RCA at 7-8; USIN at 7-8. Comments: AAR at 8-9; AIDE at 5; Citizens at 10-12; CTIA at 16; GTE at 9-10; McCaw at 21-24.

[34] *See, e.g.*, Alliance Recon. Pet. at 5-7; Columbia Pet. at 4-5; AIDE Comments at 5-7.

CERTIFICATE OF SERVICE

I, Lea Ann M. Hauck, do hereby certify that on this 13th day of January, 1994, I have caused a copy of the foregoing U S WEST REPLY to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.

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