90-314

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FEDERAL COMMUNICATIONS COMMISSION
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SUMMARY OF ORAL EX PARTE PRESENTATION TO PCS TASK FORCE

April 13, 1994

By: Alliance of Rural Area Telephone and Cellular Service Providers
Re: Petition For Reconsideration and Reply filed in Doc. No. 90-314

Represented by:

Robert C. Clemons, Manager
Bledsoe Telephone Cooperative, Inc.
Pikeville, Tennessee

Levoy Knowles, Manager
Ben Lomand Rural Telephone Cooperative, Inc.
McMinville, Tennessee

Attorneys: David L. Nace and Pamela L. Gist, Lukas, McGowan, Nace & Gutierrez, 1819 H Street, N.W., 7th Floor, Washington, D.C. 20006 (202) 857-3500

Members of the Alliance of Rural Area Telephone and Cellular Service Providers ("Alliance") desire to offer broadband PCS in areas of the country which are not likely to receive the focus of attention by most auction bidders. The following changes to the rules adopted in the Second Report and Order will promote the deployment of PCS in rural areas, with accompanying investment and employment benefits:

Partitioning of Market Areas:

MTAs and the smaller BTAs include, by design, centers of commerce and their surrounding areas. Even BTAs are large in size and population when compared to the service areas of the vast majority of the nation's telephone companies. Frequently the telephone service areas of rural local exchange carriers ("LECs") straddle BTA boundaries. For example, Bledsoe Telephone Cooperative offers telephone service in three MTAs and three BTAs, and Ben Lomand Rural Telephone Cooperative provides service in two MTAs and three BTAs.

Many rural LECs desire to offer PCS to customers, as a complement to the local loop. They believe that their failure to offer advanced services with PCS will restrict economic development in their rural communities. But most rural companies cannot afford to bid for, or construct, PCS systems for an entire BTA.

Partitioning of areas for separate licensing will allow companies to limit the direct costs, as well as the risks, of acquiring licenses and developing PCS systems in rural areas. The Alliance requests the Commission to provide for separate licenses on a geographic basis within an MTA or BTA in two situations: (1) by agreement among parties to a consortium which is a successful bidder for a license; and (2) where a PCS licensee voluntarily agrees

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to a partial assignment of its license. Each licensee must be qualified and responsible to the Commission. There will be no "sublicensing" of markets and no question of which entity is in absolute control of the PCS facilities.

Coverage Requirements:

One of the benefits of separate licenses for partitioned areas is that each licensee is independently responsible for meeting any coverage requirements. The Alliance submits that no one should lose a license simply because an entity which provides PCS in another portion of the MTA or BTA fails meet its construction requirements.

There is a possibility that, under a partitioning scenario, an unscrupulous licensee in an attempt to meet a population coverage objective, might partition its market to meet a coverage benchmark and avoid a forfeiture of its license. Such efforts to circumvent the rules can be avoided if the Commission changes coverage requirements to provide for forfeiture of rights only to the unserved area, and allows retention of the license for the area served. This type of rule is similar to the cellular rules where a licensee loses an area unserved after five years. The Commission might allow a longer than five year build-out period for PCS.

In any case a 90 percent population coverage requirement is too strict for sparsely populated areas.

The Commission's decision not to adopt a reliable service area standard renders enforcement of any coverage requirement an awkward administrative problem. The Commission should consider adoption of a presumptive reliable service area if it concludes that coverage requirements are indeed necessary.

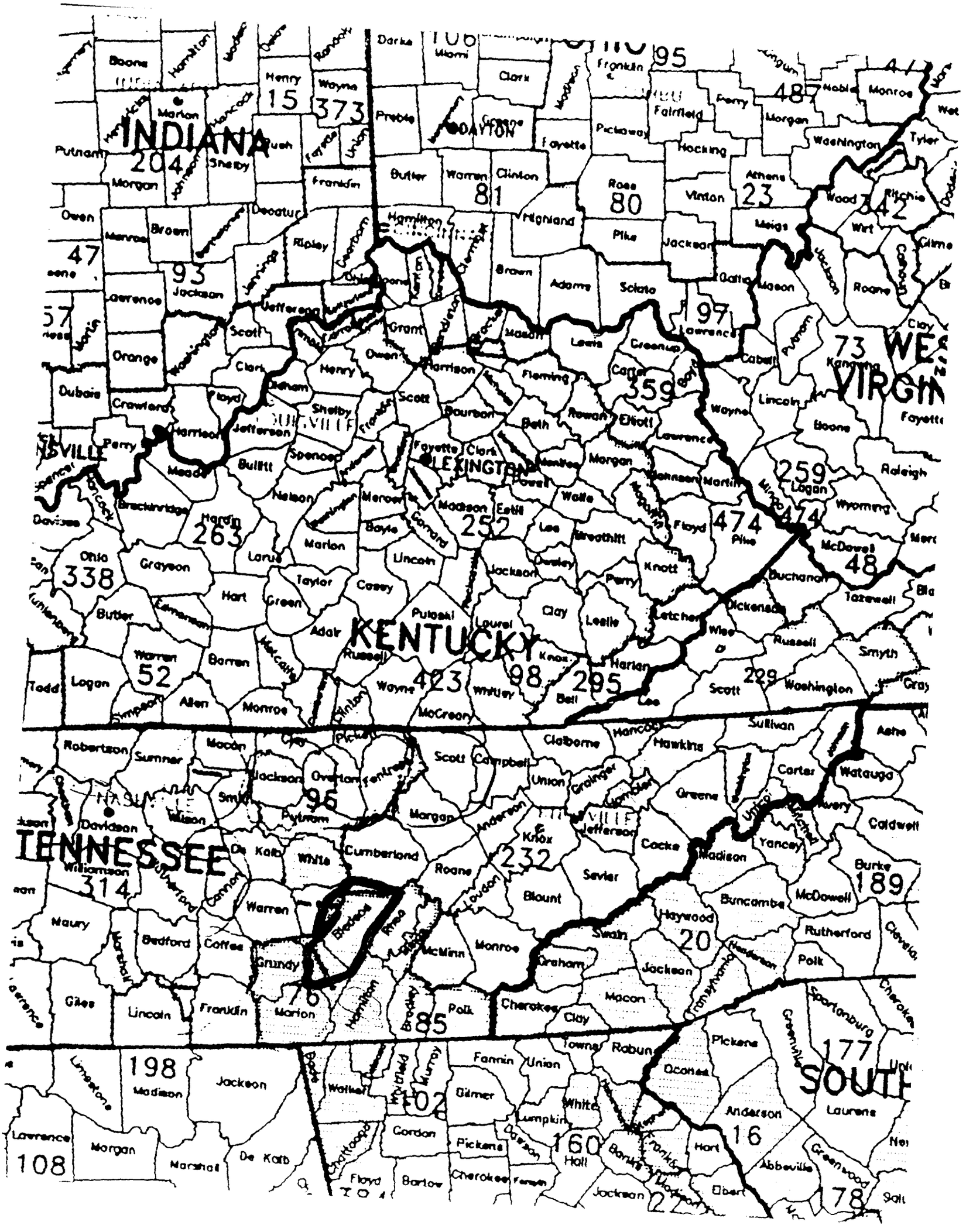
Set-Aside Licenses for Designated Entities:

If the set-aside of PCS licenses for Designated Entities ("DEs") is eliminated, and only relaxed payment terms are available, it is entirely possible that DEs will be outbid for PCS licenses and there will be no participation by DEs in the industry. The Alliance does not believe that Congress intended such a result.

The Commission should foster diversity in ownership of PCS systems. Set-aside licenses remain the best approach to achieving such diversity.

Cellular-PCS Cross-Ownership Restrictions:

Interests in cellular systems of a non-controlling nature should not be considered in determining eligibility for PCS spectrum. Limited partners, for example, lack influence in their cellular partnerships to impede competition and the development of PCS. A control standard as the basis for any cross-ownership rule should be adopted.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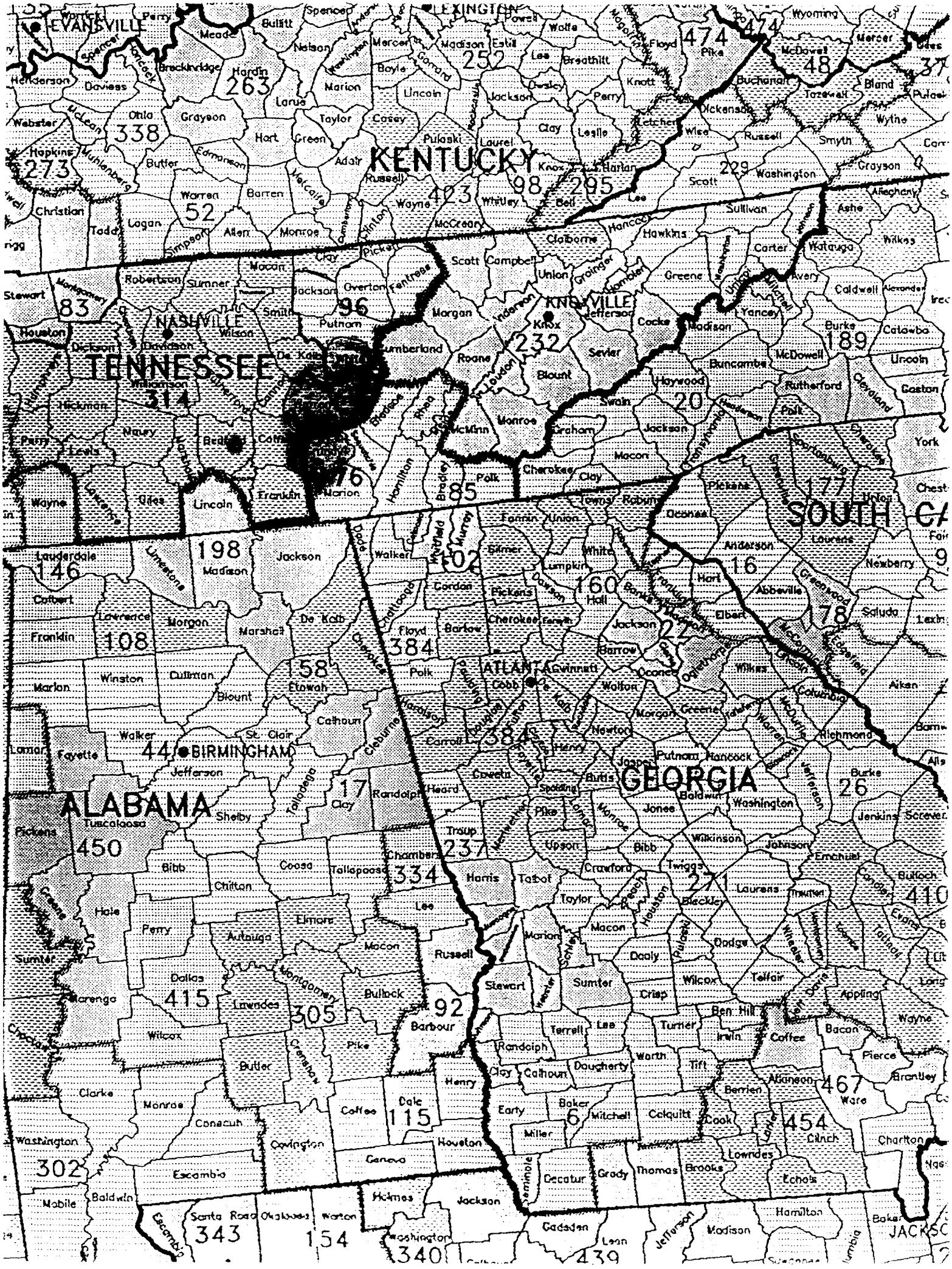
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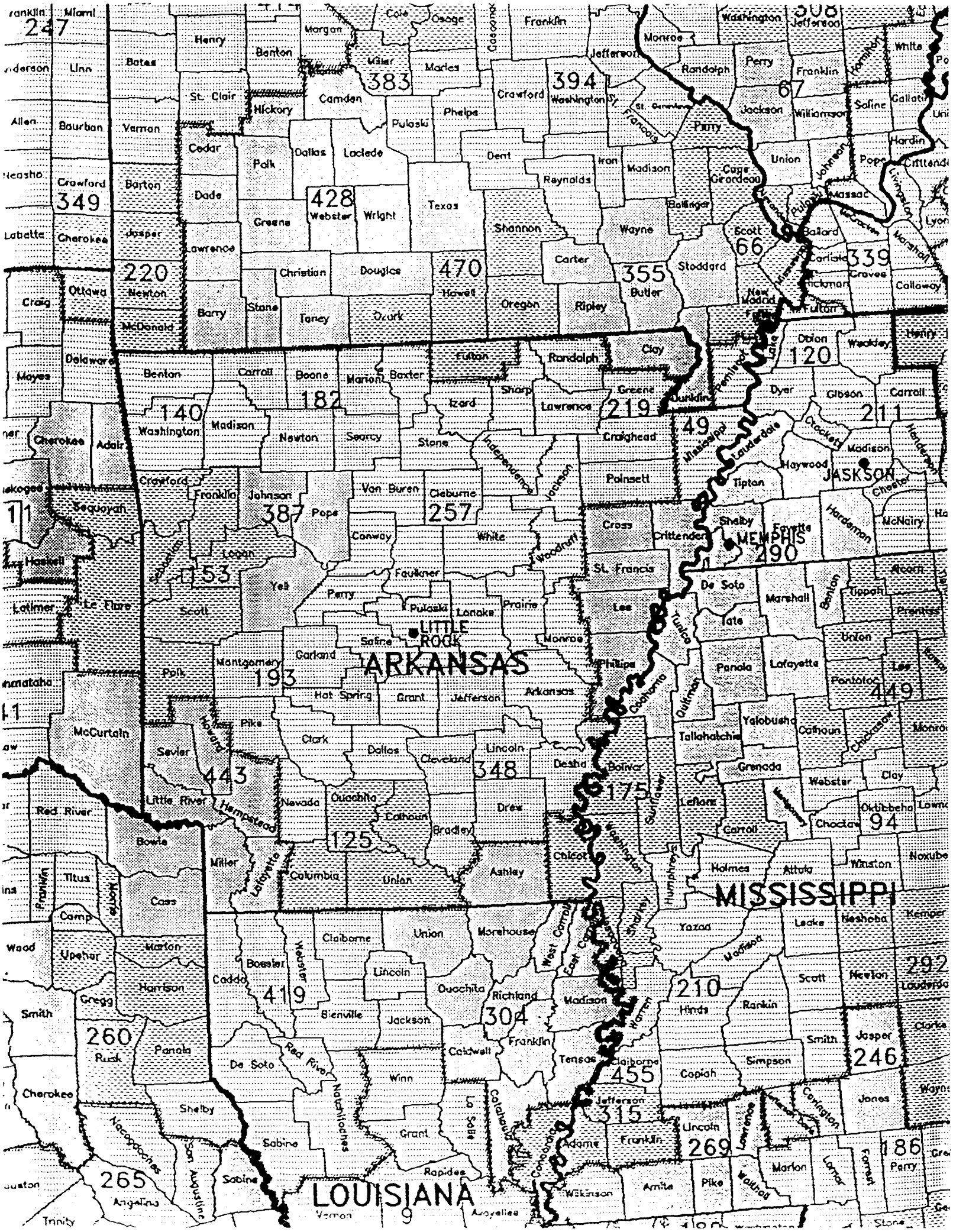
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Before the
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Washington, D.C. 20554

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| Amendment of the Commission's Rules to Establish New Personal Communications Services | ) | GEN Docket No. 90-314 |
| | ) | RM-7140, RM-7175, RM-7618 |
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To: The Commission

**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

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[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

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[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.

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[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

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[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

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[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

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[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.

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[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

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[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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## CERTIFICATE OF SERVICE

I, Loren Bradon, a secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, hereby certify that I have on this 13th day of January 1994, sent via First Class U.S. Mail, a copy of the foregoing REPLY to the following persons:

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
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Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Amendment of the Commission's Rules to Establish New Personal Communications Services | ) | GEN Docket No. 90-314 |
| | ) | RM-7140, RM-7175, RM-7618 |

To: The Commission

**PETITION FOR RECONSIDERATION**

The Alliance of Rural Area Telephone and Cellular Service Providers (the "Petitioners"),[1] by its attorneys, and pursuant to Section 1.106 of the Federal Communications Commission's ("FCC" or "Commission") rules, hereby petitions for partial reconsideration of the rules adopted in the above-captioned proceeding.[2] Petitioners are rural area local exchange carriers or cellular system licensees, or affiliates thereof, who are prospective applicants for licenses in the Personal Communications Services ("PCS") and are directly affected by the Commission's action in this matter. Certain of the Petitioners have minority ownership interests in cellular system licensees in Rural Service Areas ("RSAs") and/or smaller sized Metropolitan Statistical Areas ("MSAs").

## I. The Commission Should Recognize Partitioned Areas as Separately Licensed Areas for PCS

1. The Second R&O provides for licensing of PCS according to a division of the U.S. and territories based upon

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[1] A list of the companies participating in this Petition For Reconsideration 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.

Major Trading Areas ("MTAs") and Basic Trading Areas ("BTAs") as defined in Rand McNally's 1992 Commercial Atlas & Marketing Guide, 123rd Edition.[3] These areas may approximate the "...natural flow of commerce" for some purposes,[4] and may prove administratively efficient for initial PCS licensing purposes. But the Commission should recognize the benefit of, and provide in its rules for, post-auction partitioning of the MTAs and BTAs into separate PCS license areas.

2. The principal benefit of partitioning is that companies who are committed to providing PCS in rural areas may do so without need to also attempt to purchase license rights to serve the urban areas which dominate the MTAs and BTAs. This will promote an expeditious offering of new telecommunications services to the public in metropolitan and rural areas alike.

3. The MTAs and BTAs, by design, are large commercial trading areas with one or more densely populated urban centers. Rand McNally's system for dividing the entire country into MTAs and BTAs reflects an effort to associate rural counties with the urban center of influence in the region. By the very nature of the effort, rural counties are relegated to secondary importance to the population centers for the purpose of tracking commerce. In some cases, the decision of whether to associate an individual county with one

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[3] See Sections 99.13, 99.102 and 99.202 of the rules.

[4] Second R&O, para. 73.