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PCS *ACTION, INC.*

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

May 27, 1994

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HAND DELIVER

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 202
Washington, D.C. 20554

Re: Ex Parte Presentation
PCS Licensing Plan
GEN Docket No. 90-314

Dear Mr. Caton:

Throughout the proceedings on the reconsideration of the Commission's PCS Second Report and Order, PCS Action has asserted that the allocation of spectrum for new PCS services must be accomplished in a way that enables rapid rollout *and* new entrant viability, which will engender effective competition to existing wireless and wireline providers. Over the course of the past several weeks, many licensing plans have been proposed and debated. PCS Action submits this letter to underscore that whatever plan is finally adopted, the Commission must further clarify and develop policies to ensure that the plan does not block the emergence of new competitive entrants in PCS or create a tremendous level of uncertainty in PCS. In particular, the Commission's rules must affirmatively prevent in-region cellular operators from impeding competition from new PCS operators.

Some of the proposals would give the in-region cellular industry a significant competitive advantage. It has been proposed that they be given the opportunity to obtain 10 MHz licenses in the lower bands, which is of obvious and immediate benefit. Moreover, we understand that others are proposing that cellular be given an overall wireless spectrum allocation aggregation cap of 40 MHz rather than 35 MHz as provided in the PCS Second Report and Order. As discussed below, this would permit cellular to effectively block independent PCS operators from aggregating 40 MHz licenses when required or appropriate for effective competition in certain regions of the country.

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The Commission must ensure that the promise of PCS as an independent competitor to the current in-region cellular duopolies is preserved. The Commission's final allocation plan needs to be accompanied with bright-line standards, as discussed below, and a policy dedicated to keeping in-region cellular interests from destroying meaningful PCS competition. These must include: (i) continuation of the FCC's current five percent attribution rule; (ii) a prohibition on all other relationships between in-region cellular and PCS other than a carrier-user relationship; (iii) a prohibition on disaggregation of PCS licenses, particularly the 30 MHz licenses; and (iv) a cap of 35 MHz per region for in-region cellular companies.

Five Percent Attribution Should be Maintained.

The Commission should continue to adhere to the cellular eligibility rules advanced in the PCS Second Report and Order. In particular, it is important to confine in-region cellular participation. In addition, the five percent attribution rule *must* continue to apply to in-region cellular companies. A more lenient attribution standard would simply lead to in-region control through consortia. For example, with a 20 percent attribution rule, five cellular companies with 20 percent could own and operate a de facto nationwide license across each of the five regions. Although one member of PCS Action has in the past advocated a 20 percent attribution standard, it was proposed only as a substitute to the 10 MHz set-aside at 2.1 GHz, in order to allow non-dominant cellular companies limited lower band participation in PCS. It was certainly never intended to permit cellular to gain *additional* PCS spectrum nor as a means for cellular to outbid a designated entity under the guise of 19.9 percent ownership. The five percent rule must be maintained, particularly if in-region cellular firms are eligible to participate in licenses in the lower bands.

Limit the Relationship Between In-Region Cellular and PCS Licenses.

The Commission should also take into account the ability to evade the cellular eligibility proscription through non-equity relationships. For example, the cellular operator could control the activities of an otherwise independent PCS licensee through financing agreements. Similarly, the current rules would permit in-region cellular to build, operate, and manage supposedly "unrelated" PCS licenses. Therefore, the eligibility restrictions should be clarified to prohibit all relationships between in-region cellular and PCS other than carrier-user relationships. Such a restriction would in no way prevent cellular or other financing or management agreements, so long as the in-region cellular operator is not involved.

Prohibit Disaggregation.

The licenses provided by the FCC should not be subject to disaggregation. In particular, in-region cellular companies must be prevented from using PCS spectrum from any PCS license other than a single 10 MHz license. PCS Action advocates flexible use through joint ventures of PCS spectrum among new entrants in order to achieve speedy and more viable competition in the wireless market.[1] But, breaking up an independent PCS licensee in order to give more spectrum to the cellular duopolist makes the market less competitive, not more competitive.

The argument against disaggregation would also apply to the plan that Motorola proposed two days ago, which would allocate three 30 MHz and three 10 MHz licenses in the lower part of the emerging technologies bands. Such a plan, for example, coupled with a 40 MHz aggregation cap for in-region cellular, would be particularly egregious if the Commission were to permit disaggregation of 15 MHz of any of the 30 MHz licenses. Not only would this permit the cellular operator to gain an additional 15 MHz of spectrum, it would effectively break up a 30 MHz license that could have been used to provide viable competition to the cellular operator.

Moreover, even partitioning a 10 MHz license to permit the cellular incumbent to aggregate 15 MHz also would fortify cellular's duopoly. It is equally dangerous because it allows an in-region cellular operator to take away the ability of other competitors to create 40 MHz licenses, which PCS Action has always believed is necessary in microwave congested areas. This is particularly the case since cellular has no technical or operational need to have a 15 MHz rather than a 10 MHz license.

Under the proposed Motorola plan, the 10 MHz licenses could be an attractive "plum" in the bidding between independent 30 MHz PCS operators and the in-region cellular operators. The ability to disaggregate this "plum" would allow the cellular industry another tool to prevent the creation of competitive PCS licenses, potentially blocking a new entrant's ability to provide service. This post-auction option would have significant disruptive effects on legitimate auction strategies and may reduce auction revenues.

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1 PCS Action has proposed permitting *lower band* licensees seeking to aggregate to 40 MHz to lease or otherwise obtain portions of spectrum from *other lower band* licensees. Under the Commission's current plan, in-region cellular operators would be eligible only for upper band spectrum -- *not* for lower band licenses.

Cap In-Region Cellular at 35 MHz.

Underlying the concept of disaggregation is to enable cellular as well as new entrants to obtain 40 MHz of spectrum. This is not parity. Forty MHz for in-region cellular (25 MHz of clear spectrum in the 800 MHz band and an additional 15 MHz of PCS spectrum) is not equivalent to 40 MHz of encumbered PCS spectrum proposed for new entrants. Parity in the wireless market certainly does not demand that cellular receive an additional 5 MHz, since cellular already enjoys numerous advantages over PCS entrants.

First, the 25 MHz of clear spectrum allows cellular far more capacity than the 30 or 40 MHz of PCS spectrum congested with microwave incumbents. Independent spectrum engineers have proven that 25 MHz of clear spectrum at 800 MHz is the equivalent of 50 MHz of clear spectrum at 1800 MHz. The enormous cost and time for microwave relocation is itself a significant advantage for cellular.

Second, the auction prices to be paid by new PCS entrants for the spectrum are a competitive cost advantage for cellular, since many paid nothing for the 25 MHz of clear spectrum obtained under the Commission's wireline set-aside policy or through lotteries.

Third, independent PCS operators, before they construct the first antenna, will be forced into competition with cellular operators with an existing wireless infrastructure and customer base. Further, in-region cellular operators that have a true interest in participating in PCS are fully able to do so outside of the region they now dominate. Therefore, whatever management, marketing, or technical expertise that cellular may bring to PCS can be exercised using 40 MHz outside of their cellular regions.

Last, unlike PCS entrants that may need to aggregate spectrum in order to operate around microwave incumbents, cellular has no technical or operational need for 15 MHz rather than 10 MHz of PCS spectrum as stated above.

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PCS Action is committed to a licensing scheme that reduces uncertainty and positions PCS for rapid and viable entrance into the wireless market. However, under any PCS licensing plan, especially one that would permit cellular eligibility in the lower

bands, competition in the wireless market will be realized only if the Commission enforces a policy that protects new entrants in the PCS spectrum with strong preventive rules.

Sincerely,

Ronald L. Plesser
Counsel to PCS Action, Inc.

RLP/pq
Enclosure
cc: Honorable Reed Hundt
Honorable James Quello
Honorable Andrew Barrett
Honorable Rachelle Chong
Honorable Susan Ness
Mr. Ralph Haller
Mr. Thomas Stanley
Mr. Don Gips
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