

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Implementation of Sections 3(n) )  
and 332 of the Communications Act )  
 )  
Regulatory Treatment of Mobile )  
Services )

GN Docket No. 93-252

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REPLY COMMENTS OF McCAW CELLULAR COMMUNICATIONS, INC.

McCAW CELLULAR COMMUNICATIONS,  
INC.

Cathleen A. Massey  
FCC Regulatory Counsel  
McCaw Cellular Communications,  
Inc.  
1150 Connecticut Ave., N.W.  
4th Floor  
Washington, D.C. 20036  
(202) 223-9222

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REPLY COMMENTS OF McCaw CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding concerning comparable regulatory treatment of substantially similar Commercial Mobile Radio Service ("CMRS") providers.<sup>1</sup> As detailed below, McCaw limits these reply comments to a discussion of the Commission's general CMRS spectrum cap proposal as well as selected technical, operational, and licensing rule change proposals affecting both McCaw's cellular operations and those entities and services with which those operations may compete. McCaw's Messaging Division (engaged primarily in paging activities) supports the positions expressed in the opening and reply comments filed by the Personal Communications Industry Association ("PCIA") in this docket.

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<sup>1</sup> Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, FCC 94-100 (May 20, 1994) (hereinafter "Further Notice").

I. SUMMARY

McCaw supports the Commission's efforts to implement its mandate to ensure that substantially similar services are subject to comparable regulations and that marketplace competitors are not hampered by regulatory disparities. Based upon a review of the comments in this proceeding, McCaw offers the following suggestions designed to achieve the Commission's important mission.

First, the Commission should abandon the general CMRS spectrum cap proposal contained in the Further Notice. Commenters overwhelmingly agree that there is no factual, competitive or public policy basis for imposing such a blanket CMRS spectrum cap. If, however, the FCC establishes that valid competitive concerns do exist with respect to a particular CMRS offering, these concerns can be addressed when the Commission adopts licensing rules for such service. Moreover, any CMRS spectrum cap, whether general or service specific, must be applied to all similarly situated mobile service licensees, including enhanced specialized mobile radio ("ESMR") service providers.

Second, rather than establishing mandatory interoperability rules, the Commission should allow the marketplace to determine the nature and extent of interoperability. Given the success of the marketplace in dictating the appropriate level of interoperability, there is

no compelling public interest reason for imposing mandatory interoperability requirements, and their resulting costs, on CMRS licensees at this time.

Third, the agency should treat CMRS licensees who have constructed their facilities within twelve months and who either are interconnected to the public switched telephone network ("PSTN") or are providing service to at least two unaffiliated parties as having met the Commission's completion of construction requirements. Such a definition appropriately focuses on a system's readiness to provide service to the public.

Fourth, the Commission must ensure that marketplace competitors are similarly situated with respect to their service areas. Thus, the Commission should not delineate geographic service areas for ESMRs that are any larger than the current cellular service areas as the agency has recognized that these two mobile service providers are head-to-head competitors.

Finally, the Commission should retain the current first-come, first-served procedures for filing Phase II cellular unserved area applications. Conversion to a thirty day filing window, as proposed in the Further Notice, would harm the public interest by inviting speculative filings and delaying service to subscribers.

**II. THERE IS NEAR UNIVERSAL AGREEMENT AMONG COMMENTERS THAT THE PUBLIC INTEREST WILL NOT BE SERVED BY THE PROPOSED CAP ON THE AGGREGATION OF CMRS SPECTRUM**

While their reasons are varied and many, virtually all parties oppose the Commission's general CMRS spectrum cap proposal. Commenters generally note that the cap will unduly burden existing CMRS licensees, such as cellular carriers, and restrict their ability to participate in new CMRS services.<sup>2</sup> Indeed, "the overlay of [such] a unified, rigid structure on all CMRS providers" will prevent existing licensees from keeping pace with the dynamic nature of the mobile marketplace,<sup>3</sup> creating market inequities and hindering competition.<sup>4</sup>

Other commenters suggest that the imposition of a spectrum cap cannot be reconciled with the Commission's mandate to use competitive bidding procedures for the award of mutually exclusive licenses.<sup>5</sup> For example, a cap would unnecessarily stifle participation in future auctions for available CMRS spectrum by precluding participation by

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<sup>2</sup> Century Cellnet at 3; DialPage at 4; GTE at 19; Motorola at 6; and NYNEX at 5.

<sup>3</sup> AirTouch at 8-9, Hausman Affidavit, McAfee and Williams Report.

<sup>4</sup> AirTouch at 10-12; BellSouth at 6-12; Comcast at 8; McCaw at 10-11; and NYNEX at 4.

<sup>5</sup> Celpage at 21-22; Metrocall at 21-22; Network USA at 21-22; and RAM Technologies at 21-22.

existing operators. This, in turn, potentially would prevent spectrum from being put to its highest economic use and block incumbent carriers from obtaining additional spectrum to add value to their networks.<sup>6</sup>

Additional implementation problems underscore the deficiencies of a comprehensive spectrum cap. Identification of the appropriate geographic areas for applying the cap<sup>7</sup> and application of the highly restrictive attribution rules,<sup>8</sup> for example, are virtually irresolvable issues associated with the imposition of a blanket spectrum cap. In addition, unless the Commission can foresee the future development of CMRS services and the availability of new spectrum, any rationale for a general cap likely will be overtaken by changed marketplace conditions even before it is implemented.

Still other parties point to the lack of evidence that entities with aggregated CMRS spectrum have or will exercise undue market power to limit competition. Given the existing requirements for the auction of CMRS spectrum, and the deadlines for the construction and operation of facilities in particular services, there can be little fear that spectrum

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<sup>6</sup> CTIA at 9; Nextel at 24.

<sup>7</sup> Comcast at 6; GTE at 21-22; Motorola at 11.

<sup>8</sup> AirTouch at 17-20; APC at 3; DialPage at 5-6; GTE at 22; Motorola at 12-13; Roseville Telephone Company at 5-6.

warehousing will occur.<sup>9</sup> Moreover, the FCC has sufficient regulatory tools already in place under the Communications Act and the antitrust laws to prevent anticompetitive aggregation of spectrum.<sup>10</sup> Thus, the agency's proposal to establish a blanket CMRS spectrum cap is without any demonstrable basis.<sup>11</sup>

If the Commission establishes that valid competitive concerns do exist with respect to a particular CMRS offering, these concerns can be addressed when the Commission adopts licensing rules for the service.<sup>12</sup> In contrast to the proposed "one size fits all" spectrum cap, consideration of spectrum limitations on a service specific basis enables the Commission to analyze any potential competitive problems associated with the specific CMRS offering, and to make an informed decision as to the nature and extent of any spectrum

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<sup>9</sup> Century Cellunet at 2; GTE at 18-19; Motorola at 5-6.

<sup>10</sup> PageMart at 4-5; PageNet at 4-7.

<sup>11</sup> In the event the Commission does adopt a blanket cap on CMRS spectrum, any limitation must be applied consistent with the goal of ensuring symmetrical regulatory treatment. Indeed, the Commission already is confronted with claims that some categories of spectrum (such as ESMR) should be accorded special treatment. See Nextel at 28-35, 36-37. Nextel's statements, while self-serving, underscore why a blanket spectrum cap is problematic. These comments also highlight the care needed to ensure that all CMRS operators are treated fairly and consistently under any spectrum cap proposal that may be adopted.

<sup>12</sup> APC at 1-2; Century Cellunet at 3; Comcast at 6; GTE at 18; McCaw at 12-14; Motorola at 7; NYNEX at 5-6; PCIA at 7-9; Southwestern Bell at 5-8, 16.

aggregation restrictions.<sup>13</sup> A service specific approach also avoids the enormous administrative costs and implementation problems associated with an across-the-board spectrum cap.<sup>14</sup>

The record in this proceeding thus makes clear that there is no factual, competitive, or public policy basis for imposing a blanket CMRS spectrum cap. The public interest would be served best by Commission rejection of the Further Notice's spectrum cap proposal.<sup>15</sup>

In addition, in crafting service specific limits, the Commission must ensure that ESMR providers -- self-declared cellular substitutes -- are governed by the same limits on PCS participation as cellular providers.<sup>16</sup> Notwithstanding Nextel's efforts to distinguish itself from its cellular competitors for purposes of PCS spectrum aggregation limits, Nextel and other ESMR operators have touted themselves as a cellular substitute in the marketplace. Indeed, Nextel promotional pieces -- targeted to the public and not this

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<sup>13</sup> Century Cellunet at 3.

<sup>14</sup> Onecomm at 8, 10; PCIA at 7-9.

<sup>15</sup> Moreover, there is no justification for granting reclassified Part 90 carriers an additional six-month grace period after August 10, 1996, to divest any CMRS interests necessary for cap compliance. Nextel at 39. Such carriers will have two years' notice of any applicable spectrum limitations, which is more than adequate time for achieving compliance.

<sup>16</sup> See Amendment of the Commission's Rules To Establish New Personal Communications Services, FCC 94-144, ¶ 104 (June 13, 1994) (Memorandum Opinion and Order).

Commission -- trumpet the alleged superiority of Nextel's services over cellular offerings.<sup>17</sup> This inconsistent message is the hallmark of Nextel's comments in this and related proceedings as it blatantly attempts to "cherry pick" the most advantageous elements of common carrier and private carrier regulation without being subject to the burdens of either regulatory status. Fair application of PCS eligibility and ownership requirements to all comparably situated competitors such as cellular carriers and ESMRs is vital to ensure that direct competitors are treated equally. Accordingly, ESMR operators should be subject to the same eligibility restrictions and ownership constraints as have been applied to cellular licensees seeking PCS licenses.

### **III. TECHNICAL, OPERATIONAL, AND LICENSING RULES**

In this section, McCaw addresses a limited number of issues arising out of the Further Notice proposals for revised technical, operational, and licensing rules.

#### **A. Interoperability Standards**

McCaw concurs with those parties opposing the imposition of any additional interoperability standards on CMRS

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<sup>17</sup> E.g., Connie Weaver, "MCI Will Invest \$1.3B in Nextel to Offer Nationally Branded Wireless Service," Corporate Release (Feb. 28, 1994), at 1.

operators.<sup>18</sup> Rather than establishing mandatory interoperability rules, the Commission should allow the marketplace to determine -- as it has successfully done to date -- the nature and extent of interoperability.<sup>19</sup>

McCaw agrees that imposing mandatory interoperability requirements at this time would entail substantial and unjustifiable costs as "[e]xisting licensees would have to retrofit or replace" current equipment for no compelling public interest reason.<sup>20</sup> Moreover, by allowing the marketplace to determine the appropriate level of interoperability, the FCC permits manufacturers and service providers to retain their flexibility to tailor their offerings to the public and to provide innovative and useful new services. Finally, McCaw believes that Commission reliance on market forces in this instance is consistent with the agency's position with respect to other CMRS operations. Indeed, the FCC has specifically declined to adopt interoperability standards for broadband PCS services as well

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<sup>18</sup> APC at 4-5; BellSouth Corporation at 15-16; Ericsson at 2-4; National Association of Business and Radio, Inc. ("NABER") at 29; New Par at 9-11; Paging Network, Inc. at 24-25; PCIA at 14; Pittencrief Communications at 10; Southwestern Bell Corporation at 13; and United States Sugar Corporation at 13.

<sup>19</sup> Ericsson at 4.

<sup>20</sup> Id. at 3.

as for digital cellular systems.<sup>21</sup> Given the success of the marketplace in dictating the appropriate level of interoperability, mandatory interoperability requirements for CMRS providers are unnecessary.

**B. Commencement of Service Definition**

With regard to the Commission's proposed construction period and coverage requirements, many commenters support adoption of a clearly articulated definition of "commencement of service." The Further Notice generally proposes to require CMRS licensees to complete construction within twelve months and to commence providing service to at least two third parties within this time period.<sup>22</sup> There is broad support, however, for an alternative proposal. Many commenters urge the Commission to focus on a system's interconnection to the public switched telephone network ("PSTN") and its capability to provide service at the end of twelve months, rather than on the system's actual provision of service to subscribers.<sup>23</sup>

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<sup>21</sup> Amendment of the Commission's Rules To Establish New Personal Communications Services, FCC 94-144 (June 13, 1994).

<sup>22</sup> Further Notice ¶¶ 62-63.

<sup>23</sup> Celpage at 15-17; McCaw at 28; Metrocall at 15-17; NABER at 30-31; Network USA at 15-16; PageNet at 26; PCIA at 16; and RAM Technologies at 15-17.

McCaw agrees with the Personal Communications Industry Association's ("PCIA") proposal to treat licensees who have constructed their facilities and who either are interconnected to the PSTN or are providing service to at least two unaffiliated parties as having met the Commission's completion of construction requirements.<sup>24</sup> This recommendation appropriately recognizes that a system may be fully ready for use without having yet attracted potential subscribers through marketing, and should accordingly be adopted.

**C. ESMR Service Areas**

In conjunction with its proposals to establish an ESMR block license and to "retune" traditional SMR systems to operate on non-ESMR block frequencies, Nextel suggests that the Commission must delineate a geographic service area for ESMRs, based on Rand McNally's Major Trading Areas ("MTAs"), within which ESMR providers would have exclusive use of these channels.<sup>25</sup> Incredibly, Nextel uses the guise of advocating regulatory symmetry to argue that self-defined service areas -- in lieu of geographic licenses -- "would perpetuate the current operational and licensing disparities between

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<sup>24</sup> PCIA at 16.

<sup>25</sup> Nextel at 15.

ESMR systems and cellular."<sup>26</sup> Nextel suggests that an MTA-defined service area is more appropriate because "it allows for economies of scale, represents the natural commercial markets within the United States, facilitates roaming, reduces the need for interference coordination, and provides uniformity with other CMRS service areas."<sup>27</sup>

This argument in support of MTAs completely ignores events of recent years involving the mobile services marketplace. ESMR operators have repeatedly sought to provide services that are functionally indistinguishable to the consumer from Part 22 cellular services, and have marketed themselves to the public on that precise basis.<sup>28</sup> Indeed, the Further Notice recognizes that "some licensees are using SMR as a vehicle to develop wide-area multi-channel interconnected systems that potentially offer the public a competitive alternative to cellular service."<sup>29</sup> Accordingly, consistent with the Commission's mandate to ensure that substantially similar services are subject to comparable regulations and that marketplace competitors are not hampered by regulatory discrepancies, the FCC cannot delineate geographic service areas for ESMRs that are any larger than

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<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> E.g., Nextel at 5.

<sup>29</sup> Further Notice ¶ 15.

the current cellular service areas. To do otherwise would accord ESMR operators with a distinct service area advantage over their head-to-head competitors. Such action is fundamentally at odds with the Congressional regulatory mandate.

In addition, Nextel's proposal is yet another in a series of requests that the Commission grant it all the benefits of the regulatory scheme governing cellular without the concomitant burdens. While decrying as unfair the licensing rules applicable to it, Nextel fails to note that it successfully demanded that Congress and the Commission grandfather its status as a private carrier for another two years. If the regulatory status it fought so hard to preserve has now become burdensome, Nextel and other ESMRs should be given the option to shed their protected status and accept the benefits and associated obligations of their common carrier competitors. Until such time, however, the Commission should rebuff Nextel's transparent attempts to choose the best elements of both regulatory worlds without shouldering the burdens.

**D. Cellular Unserved Area Applications**

McCaw reiterates its objection to the Commission's proposal to subject Phase II cellular unserved area applications to a thirty-day window for the filing of mutually exclusive applications. Contrary to BellSouth's

assertions, the current first-come, first-served procedure for Phase II applications does not "hinder the potential for filing legitimate applications."<sup>30</sup> Rather, the existing procedure "curtail[s] the filing of speculative applications and avoid[s] unnecessary processing delays."<sup>31</sup>

McCaw therefore shares GTE's concern that "conversion to a 30-day filing window would be inimical to the public interest."<sup>32</sup> By placing Phase II applications on public notice for thirty days, the Commission will invite speculative filings and submissions designed solely to obtain a favorable settlement. In effect, the proposals outlined in the Further Notice will create precisely the artificial incentive for parties to file Phase II applications that the agency sought to avoid in the cellular unserved areas docket<sup>33</sup> by motivating "entities to find some way to put together a competing proposal, whether valid or not."<sup>34</sup> In this manner, the proposed amendments, if adopted, would delay the provision of new and improved service to the public.

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<sup>30</sup> BellSouth at 17.

<sup>31</sup> GTE at 14. See also Comments of Committee for Effective Cellular Rules at 2.

<sup>32</sup> GTE at 14.

<sup>33</sup> See Amendment of Part 22 of the Commission's Rules to provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service, 6 FCC Rcd 6185, 6196-97 (1991) (First Report and Order and Memorandum Opinion and Order on Reconsideration).

<sup>34</sup> GTE at 14.

McCaw accordingly suggests that the current first-come, first-served procedures for Phase II unserved applications should be retained.

**IV. CONCLUSION**

McCaw commends the Commission for its concerted efforts -- reflected in the Further Notice -- to implement the regulatory parity policies mandated by Congress and outlined in the Second Report and Order in this docket. Adoption of rule provisions and policies consistent with the principles outlined in McCaw's opening comments and this reply is an important step in attaining comparable regulation for all CMRS providers and permitting the marketplace efficiently and effectively to operate.

Respectfully submitted,

MCCAW CELLULAR COMMUNICATIONS,  
INC.

By: Cathleen A. Massey/lac  
Cathleen A. Massey  
Senior Regulatory Counsel  
McCaw Cellular Communications,  
Inc.  
1150 Connecticut Ave., N.W.  
4th Floor  
Washington, D.C. 20036  
(202) 223-9222

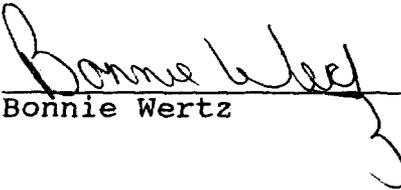
July 11, 1994

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing "Reply Comments of McCaw Cellular Communications, Inc." was hand-delivered to the following this 11th day of July, 1994.

John Cimko, Jr.  
Chief, Mobile Services Division  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Room 644  
Washington, D.C. 20554

Beverly G. Baker  
Deputy Chief  
Land Mobile and Microwave Division  
Private Radio Bureau  
2025 M Street, N.W.  
Room 5202  
Washington, D.C. 20554

  
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Bonnie Wertz