

BEFORE THE
Federal Communications Commission RECEIVED

WASHINGTON, D.C.

JUL 25 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of the Commission's) Gen. Docket 90-314
Rules to Establish New Personal)
Communications Services)

**PETITION FOR FURTHER RECONSIDERATION OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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The Cellular Telecommunications Industry Association ("CTIA"), by its attorneys, respectfully submits its petition for further reconsideration in the above-captioned proceeding.¹

**I. THE COMMISSION SHOULD RECONSIDER ITS OVERLY RESTRICTIVE
CELLULAR-PCS ATTRIBUTION AND GEOGRAPHIC OVERLAP RULES**

The Commission's PCS Order puts in sharp relief the policy goals which it seeks to balance with its cellular-PCS attribution and geographic ownership rules. Unfortunately, the rules which the Commission has adopted do not strike the sought-after balance between the twin goals of (i) promoting early and robust development of PCS through cellular participation,² and (ii) promoting "vigorous competition between PCS and cellular

¹ See In the Matter of Amendment to the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order in Gen. Docket No. 90-314, FCC 94-144 (rel. June 13, 1994) ("PCS Order") Further Order on Reconsideration, FCC 94-195 (rel. July 22, 1994). CTIA has participated extensively in all phases of this proceeding.

² See PCS Order at ¶ 110.

licensees in the same area."³ Instead, the combination of the 20% cellular-PCS attribution rule and the 10% population overlap rule will unnecessarily hinder cellular participation in PCS -- even in markets where there is no overlap -- and thus stunt PCS' rapid development. These severe standards go far beyond what is necessary to insure competition between PCS and cellular licensees, and are not supported by competition theory. Therefore, the Commission should reconsider their adoption. CTIA urges the Commission to replace the 20%-10% rules with a 30-35% cellular-PCS attribution rule and a 40% population overlap rule.

A. The Commission Should Set Its Attribution and Geographic Overlap Thresholds in Accordance with Its Articulated Goals

In setting its attribution and geographic overlap rules the Commission should squarely confront a stark but simple truth -- it is impossible to predict today how the still inchoate PCS market will develop. In fact, the Commission said as much just days ago.⁴ Current regulatory attempts to fine tune the PCS market may be heroic, but have no more than a random chance of achieving the desired equipoise. These attempts at fine tuning, which stand to retard PCS development if the unavoidable guesses that underlie them do not bear out, should be abandoned in favor

³ See PCS Order at ¶ 113.

⁴ See In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, FCC 94-145 (released July 1, 1994) at ¶ 43 ("Because PCS has not yet been licensed for operation, we have little information about the competitive position PCS will hold in the marketplace.")

of attribution and overlap rules designed to minimize unnecessary costs.

In rejecting without discussion CTIA's suggestion that the Commission base its attribution and overlap rules on the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, the Commission has missed an opportunity to ensure competition without risking inadvertent harm to a nascent industry.

The possibility of unwanted consequences is increased materially by virtue of other aspects of the PCS Order. The determination to reduce the number of licenses from seven to six and, in the Fifth Report and Order,⁵ the Commission's treatment of Designated Entities combined with maintenance of the original attribution and overlap rules has an apparently unintended result. It will prevent cellular companies from obtaining enough spectrum to compete evenly with MTA rivals. In circumstances where a cellular firm exceeds the attribution and overlap limit in part of the MTA, it is precluded from obtaining at auction more than 20 MHz of spectrum in those parts of the MTA where it has no presence at all. This creates a genuine anomaly. If the Commission's implicit guess is correct -- that 30 MHz across large geographic areas is required for full competition -- it has disabled cellular companies that have more than a nominal

⁵ See In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order in PP Docket No. 93-253, FCC 94-178 (rel. July 15, 1994) at ¶¶ 93-217.

presence in the MTA from being a full competitor. The arbitrarily low attribution and overlap rules exclude a cellular licensee with a limited, but disqualifying, presence in the MTA from bidding on 30 MHz MTA Blocks A&B (by virtue of cross-ownership limits), on 30 MHz BTA Block C (reserved for designated entities) and 10 MHz BTA Block F (reserved for designated entities). It may bid only on 10 MHz BTA Blocks D and E. A minimally present cellular company is limited to a maximum of 20 MHz even in those BTAs where it has no presence at all. This result is flatly inconsistent with the Commission's stated goals of early development and full competition.

Stated bluntly, if the Commission's guess about the need for large frequency blocks and large geographic areas is right, its attribution and overlap rules are wrong. Fortunately, it is a matter easily and safely remedied.

B. Increasing the Attribution and Overlap Thresholds is Consistent with Consumer Welfare and Minimizes the Frequency of Anomalous Results

The 10% overlap threshold can be increased to 40% and the 20% attribution threshold can be increased to 30%-35% without adversely affecting consumer welfare. As the Besen and Burnett analysis attached to CTIA's Petition for Reconsideration demonstrates, the population overlap would have to exceed 40% before a cellular licensee acquiring a 30 MHz PCS block would

have a weighted average market share which exceeds the market share allowed a non-cellular licensee.⁶

In the attribution context, consumer welfare is adequately protected at a 30%-35% threshold because of the existence of an absolute 40 MHz cap on PCS spectrum ownership. The 40 MHz cap operates to prevent any PCS provider from controlling more than 23.5% of the PCS spectrum. This percentage is well below the 35% threshold necessary for the possession of undue market power. Moreover, as a practical matter, a 30%-35% ownership interest -- much less a 20% ownership interest -- typically does not confer control. Without such control, a party holding a minority position in a cellular provider could not control the provider and thus suppress competition, even assuming it had the incentive to do so.

Bright line tests of attribution and overlap will create anomalous results regardless of the level at which the threshold is set. However, the frequency of such anomalous situations will decrease if the thresholds are raised. For instance, under the Commission's current rules a cellular company which exceeds the 20% and 10% thresholds may be forced to hold three different amounts of spectrum within a contiguous geographic area.⁷ The

⁶ Stanley M. Besen and William B. Burnett, An Antitrust Analysis of the Market for Mobile Telecommunications Services, December 8, 1993 at 46-49, 57-58.

⁷ For example, in a situation where a cellular MSA/RSA and a PCS BTA overlap, a cellular company exceeding the attribution and overlap thresholds may hold (a) 25 MHz in the portion of the cellular MSA/RSA which does not overlap the PCS BTA, (b) 10 MHz in the portion of the PCS BTA which does not

same holds true for the daisy chain of divestiture decisions, described on Attachment A, which every cellular company must make for bidding decisions involving adjacent markets. Most important, a higher threshold would diminish the number of instances where a cellular company was subject to the counterproductive limitation described in Section IA.⁸ That, according to the Commission's estimates for PCS, would improve the prospects for both early development and full competition.

II. The Commission Should Allow Incumbent Cellular Providers Immediate Access to the 15 MHz of Spectrum

The PCS Order unjustifiably discriminates against cellular providers by subjecting them to a 35 MHz spectrum cap until January 1, 2000 while allowing non-incumbents to acquire up to 40 MHz of spectrum immediately. In fact, such discrimination is all that such a policy has to commend it since there is no evidence that it will foster actual competition -- as distinct from "competitive parity."⁹

The Commission should reconsider and abolish this restriction simply because the secondary market is infinitely more likely to produce an efficient allocation of the marginal 5

overlap the cellular MSA/RSA, and (c) 35 MHz in the area in which the PCS BTA and the cellular MSA/RSA overlap.

⁸ A higher percentage would also ameliorate one of the more arbitrary effects of the current rules which permit a cellular carrier with 100% ownership of a license covering 9.9% of a market's population to hold up to 40 MHz of PCS spectrum, while arbitrarily denying that right to a cellular incumbent with only a 20.1% ownership interest in a license covering 10.1% of the market's population.

⁹ PCS Order at ¶ 67.

MHz of spectrum than is the Commission. Allowing cellular providers to purchase the marginal 5 MHz in the secondary market is as likely to enhance competition as it is to impede it and gives a weaker PCS provider a greater range of exit strategies. Moreover, allowing unfettered alienation of the marginal 5 MHz would increase its initial value at auction.

Even if the Commission determines that cellular's competitors are to be given a "head start" in PCS, the Commission's five year prohibition paints with too broad a brush. If the goal is to let non-cellular PCS providers "rapidly begin service as strong competitors,"¹⁰ the ban should be lifted as soon as there is actual PSC competition to cellular incumbents. CTIA thus urges the Commission to raise the 35 MHz cap to 40 MHz one year after actual inauguration of service by a new PCS entrant in the relevant PCS service area if it is not willing to eliminate the 35 MHz/40 MHz distinction ab initio.

III. Post-Auction Divestiture Should be Available Regardless of the Degree of Geographic Overlap

The PCS Order creates a post-auction divestiture procedure with sufficient safeguards to prevent abuse. However, the Commission inexplicably stopped short of allowing all cellular incumbents to bid on all available spectrum with the obligation, if successful, to divest itself of prohibited cellular holdings within ninety days of the PCS license grant. Nothing in the record supports the arbitrary line drawn in the Commission's

¹⁰ PCS Order at ¶ 67.

rule. CTIA respectfully requests that the Commission reconsider limiting post-auction divestiture to cellular providers with less than 20 percent overlap.

The Commission correctly observes that cellular providers with less than 20% overlap "have little incentive to risk incurring penalties for abusing the bidding process. . . ." ¹¹ However, the same holds true for cellular providers that have an overlap in excess of 20%. As the degree of overlap increases, the adverse consequences of attempting to "game the system" (by, for example, attempting to force bidding to a high level without actually winning) and thus the incentive not to do so, increase. For example, a cellular provider with 40% overlap could attempt to abuse the system only by taking the risk of making the winning bid and being forced to quickly divest a large portion of its cellular holdings. For this reason, CTIA does not believe it necessary or appropriate to put any artificial overlap limit on post-auction divestiture.

¹¹ PCS Order at 143.

CONCLUSION

CTIA respectfully requests that the Commission alter the attribution limit, overlap restriction, aggregation rules and post-auction divestiture rules in accordance with the recommendations herein.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION**

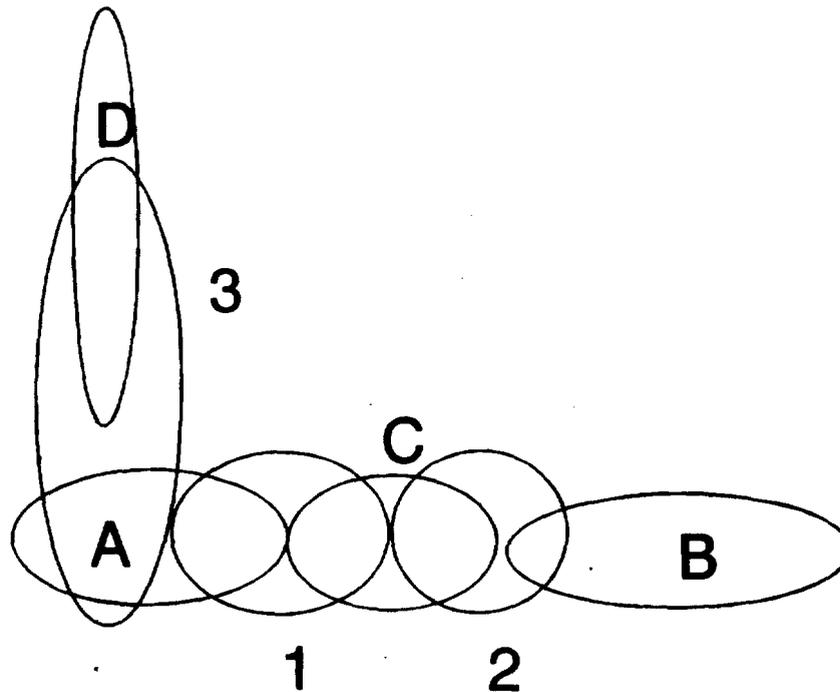


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ATTACHMENT A



The Commission's overlap rule will produce a daisy chain of divestiture decisions for every bidding decision a cellular company makes for adjacent markets. In the example above, the bubbles represent existing MSAs and RSAs (lettered A through D) and BTAs (numbered 1 through 3).

In this example, a cellular company serves RSAs A and B, but not MSA C. If it wants to link its wireless markets, it must either acquire MSA C, or bid for BTAs 1 and 2. While BTA 2 overlaps with the RSA B, the population overlap is less than 10 percent and the company can bid for up to 20 MHz of spectrum. BTA 1, however, has an overlap of 18 percent with RSA A, and the company is limited to bidding for 10 MHz of spectrum. If the company wants to bid for 20 MHz of spectrum in BTA 1, it must divest RSA A. As this would defeat its objective of assembling a contiguous wireless market, the company would have to bid for BTA 3.

This last bid, however, may be for a BTA which overlaps another RSA (RSA D) already served by the cellular company. If the overlap is more than 20 percent, the company would be ineligible to divest the RSA, and it would be limited to a 10 MHz block in BTA 3. The result would leave the company with the option of either trading a 25 MHz cellular operation for a 10 MHz PCS operation, or forsaking the creation of larger, contiguous markets.