

ORIGINAL

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

In the Matter of )  
 )  
Implementation of Sections 3(n) and 332 ) GN Docket No. 93-252  
of the Communications Act )  
 )  
Regulatory Treatment of Mobile Services )

AUG 9 1994

COMMENTS OF MCCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"), by its attorneys, hereby submits its comments in the above-captioned proceeding.<sup>1</sup> As detailed below, management agreements, resale agreements and joint marketing agreements that do not otherwise constitute a de facto transfer of control have never before been considered an indicia of ownership under the Commission's policies, and there is no justification for treating them differently in the context of personal communications services ("PCS"). Thus, McCaw believes that such agreements should not be considered attributable interests for purposes of applying the PCS spectrum aggregation cap, the PCS cellular cross-ownership restrictions or a general commercial mobile radio service ("CMRS") spectrum cap.

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<sup>1</sup> Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, FCC 94-191 (rel. July 20, 1994) ("Second Further Notice").

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There Is No Public Policy Basis For Regarding  
Management Agreements And Resale Agreements  
As An Indicia Of Ownership

The purpose of the Second Further Notice "is to examine resale agreements, management contracts, joint marketing agreements, and other similar arrangements" to determine "whether these arrangements should be treated as attributable interests in applying the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, or a general CMRS spectrum cap."<sup>2</sup> The Commission acknowledges, at the outset, however, "that any agreement that confers on a party other than the licensee de facto control over an FCC-licensed facility will be considered an attributable interest."<sup>3</sup> Moreover, "[i]ssues of de facto control will be determined pursuant to existing precedent."<sup>4</sup>

The Commission thus will continue to weigh the criteria set forth in Intermountain Microwave<sup>5</sup> to determine whether a licensee "has relinquished control of and responsibility" for its facilities through management agreements or other means in contravention of the Commission's Rules.<sup>6</sup> Relevant criteria include whether the licensee: (1) has unfettered

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<sup>2</sup> Second Further Notice at ¶ 5.

<sup>3</sup> Id.

<sup>4</sup> Id. at n.7

<sup>5</sup> 24 Rad. Reg. (P & F) 983 (1963).

<sup>6</sup> Second Further Notice at ¶ 7.

use of all facilities and equipment; (2) has relinquished control of daily operations; (3) determines and carries out policy decisions, including the preparation and filing of applications with the Commission; (4) is in charge of employment, supervision, and dismissal of personnel; (5) is in charge of the payment of financing obligations; and (6) receives monies and profits derived from operation of the licensed facilities.<sup>7</sup>

With these limitations, there is no valid public policy reason for considering management agreements that meet the Intermountain Microwave test as triggering special contrary treatment in the PCS context. The agency already has determined that appropriately drawn management agreements constitute arm's length transactions and there is no reason to believe that additional safeguards are necessary in this instance.

Similarly, there is no basis for different treatment of PCS resale agreements. Far from "reduc[ing] the quantity of service available to the public,"<sup>8</sup> resale agreements have traditionally been viewed by the Commission as promoting competition in the marketplace. McCaw accordingly agrees with the Commission's determination that there is "no reason to attribute the spectrum of the underlying service provider

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<sup>7</sup> Id., citing Intermountain Microwave, 24 Rad. Reg. (P & F) at 984.

<sup>8</sup> Second Further Notice at ¶ 13.

to resellers for purposes of spectrum caps."<sup>9</sup> To hold otherwise would have the negative effect of discouraging service providers from entering into such agreements without any corresponding benefits since there is no concern "that a reseller would exercise effective control over the spectrum on which it provides service or have the ability to reduce the amount of service provided ...."<sup>10</sup>

Furthermore, the Commission has previously examined joint marketing agreements in the context of the broadcast ownership rules and determined that such agreements are not prohibited "so long as a licensee maintains de facto control over the licensed facilities and complies with the antitrust laws."<sup>11</sup> The Second Further Notice recognizes that unlike the broadcast service, CMRS or PCS joint ventures do not involve programming diversity concerns, and that consumers are likely to benefit from such arrangements.<sup>12</sup> Surprisingly then, the Commission proposes to treat as an ownership interest, a joint marketing venture between two or more licensees whose geographic market areas overlap by ten percent of the population.<sup>13</sup> In light of the FCC's previous policy findings as well as its existing rules, McCaw believes

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id. at ¶ 16.

<sup>12</sup> Id.

<sup>13</sup> Id.

that there is no justification for singling out these agreements for contrary, and adverse, treatment.

Conclusion

For the reasons stated above, McCaw urges the Commission to retain its existing policies regarding management, resale, and joint marketing agreements. There is no justification for construing such agreements that do not otherwise constitute a de facto transfer of control as attributable ownership interests in the PCS context

Respectfully submitted,

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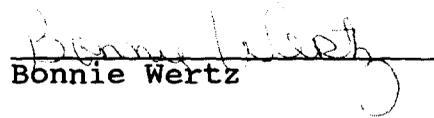
August 9, 1994

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing "Comments of McCaw Cellular Communications, Inc." was hand delivered to the following this 9th day of August, 1994.

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