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

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In the Matter of)
)
Amendment of the Commission's)
Rules to Establish New Personal)
Communications Services)

Gen. Docket 90-314

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

COMMENTS OF AMERICAN PERSONAL COMMUNICATIONS
ON PETITIONS FOR RECONSIDERATION

Anne V. Phillips
Vice President, External Affairs

J. Barclay Jones
Vice President for Engineering

AMERICAN PERSONAL COMMUNICATIONS
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-0001

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SUMMARY

The PCS rules establish equitable policies for allowing in-region cellular participation in PCS and for promoting new, competitive and independent PCS entrants. Notwithstanding the Commission's balanced regulatory regime and the recent consolidations in the cellular industry, some cellular incumbents believe that the Commission should expand cellular participation in PCS in order to preserve their market power and duopoly profits. Consistent with these efforts, the instant petitions claim that: 1) the cellular attribution and overlap rules should be relaxed; 2) the 10 MHz spectrum cap should be eliminated; and 3) the post-auction divestiture policy should be applicable for all cellular providers for a six month period. These claims should be denied because cellular incumbents already have substantial advantages over their emerging PCS competitors in terms of geographic coverage, clear spectrum and market power. The adoption of these proposals could cripple the development of the new PCS industry.

The Commission also should not establish a guard band in the upper portion of the 1970-1990 MHz band. The guard band would eviscerate spectrum blocks C & F, the entrepreneurs' blocks, and is not necessary to protect broadcast auxiliary operations.

Finally, the Commission should not unnecessarily modify certain technical aspects of the PCS rules -- as proposed by Celsat, Inc. and ArrayComm, Inc./Spacial

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Communications, Inc. -- that are sufficient as crafted by the
Commission.

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**COMMENTS OF AMERICAN PERSONAL COMMUNICATIONS
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The recent cellular consolidations involving U.S. West/Airtouch, NYNEX/Bell Atlantic and perhaps others underscores the need to limit in-region cellular participation in PCS so that new and competitive PCS entrants can emerge. American Personal Communications^{1/} ("APC") hereby opposes certain aspects of the petitions for reconsideration or clarification of the Memorandum Opinion and Order, Gen. Docket 90-314, released on June 13, 1994 ("Order") in the above-captioned proceeding. First, APC opposes the petitions of the Cellular Telephone Industry Association ("CTIA") and Comcast Corporation ("Comcast") to the extent they would thwart the development of PCS services by providing more opportunities for in-region cellular providers to acquire PCS licenses in overlapping markets to the exclusion of new, competitive and independent PCS providers. Second, APC opposes the petition

^{1/} American PCS, L.P., d/b/a American Personal Communications, a limited partnership in which American Personal Communications, Inc. is the general managing partner and The Washington Post Company is an investor/limited partner.

of the Association for Maximum Service Television, Inc. ("MSTV") and eight Joint Parties^{2/} to the extent it would adopt a guard band in the upper portion of the 1970-1990 MHz band and thereby eviscerate spectrum blocks C&F, the entrepreneurs' blocks. Third, APC opposes the petitions of Celsat, Inc. ("Celsat"), and ArrayComm, Inc./Spatial Communications, Inc. ("ArrayComm/SCI") to the extent they would unnecessarily modify certain technical aspects of the PCS rules that are sufficient as crafted by the Commission.

I. THE PRO-COMPETITIVE CELLULAR ELIGIBILITY RULES SHOULD BE MAINTAINED TO PREVENT INCUMBENT CELLULAR OPERATORS FROM DOMINATING PCS AT THE EXPENSE OF THE AMERICAN PUBLIC.

The PCS rules, as amended by the Order, strike an equitable balance between allowing cellular participation in PCS and establishing in-market restrictions to achieve the Commission's goal of "maximizing the number of new viable and vigorous competitors." Order at ¶ 103. Despite this fair and pro-competitive regulatory regime, some cellular incumbents -- individually and through CTIA -- have sought to expand their participation in PCS for the sole purpose of preserving their duopoly profits and hindering competition. In line with these efforts, the instant petitions claim that: 1) the cellular attribution and overlap rules will prevent entrenched

^{2/} The eight joint parties include: Capital Cities/ABC, Inc., CBS Inc., Fox, Inc. & Fox Broadcasting Stations, Inc., the National Association of Broadcasters, National Broadcasting Company, Inc., Public Broadcasting Service, the Radio-Television News Directors Association, and the Society of Broadcast Engineers.

incumbents from "compet[ing] evenly with MTA rivals";^{3/} 2) the 10 MHz PCS spectrum cap should be eliminated; and 3) post-auction cellular divestitures should be permitted for a 6-month period, regardless of the amount of overlap.^{4/} Each of these demands should be denied.

A. The PCS Rules Will Promote Competition Between New PCS Entrants and Incumbent Cellular Providers.

It is ironic indeed that the cellular industry -- which regularly boasts of its nationwide coverage, its 16,000,000 subscribers, and its general success -- now complains to the federal government that it will be unable to compete with a service that does not yet have a single subscriber. There is no factual evidence whatsoever that the PCS rules -- including the cellular attribution and overlap rules -- will disable cellular providers "from obtaining enough spectrum to compete evenly with MTA rivals". CTIA Petition, p.3. Quite the contrary is true - new PCS providers will enter a market where the in-region cellular operators have exploited a decade-long headstart on obtaining subscribers, cell sites, and even regional distribution

^{3/} CTIA Petition, p.3.

^{4/} CTIA's petition raises these three issues, but does not propose to increase the post-auction divestiture period to six months. Comcast's petition addresses only the third issue. APC also opposes Comcast's Petition to the extent that it would distinguish between active and passive investments in applying the Commission's attribution standards.

outlets. The Commission's attribution and overlap rules simply seek to prevent cellular operators from crippling the nascent PCS industry.

Cellular providers have more than adequate geographic coverage and spectrum to compete with PCS entrants. As the attached coverage maps demonstrate, the aggregation of MSAs and RSAs has enabled cellular providers to serve large geographic areas that equal or exceed MTAs. See Exhibit 1. This market power and geographic reach has been expanded through cellular mergers and joint ventures involving NYNEX/Bell Atlantic, U.S. West/Airtouch and perhaps Southwestern Bell/McCaw.^{5/}

In addition to these large geographic service areas, cellular operators have 25 MHz of clear spectrum and, unlike their "MTA rivals", do not have to relocate microwave incumbents. As a consequence, cellular providers will have more available clear spectrum than their PCS competitors. Even after several years of microwave relocation, PCS providers will continue to have limited spectrum. Estimates

^{5/} The cellular industry has long advocated for 20 MHz PCS spectrum blocks. However, CTIA now complains that cellular providers may be limited to only 20 MHz of spectrum in certain markets. CTIA Petition, p. 3. While this may be theoretically correct, the coverage maps show that cellular providers will be able to acquire 35 MHz (and eventually 40 MHz) of spectrum in substantial portions of their large geographic service areas. Since cellular providers will be able to aggregate spectrum and coverage area, there is no reason to amend the PCS rules to take into consideration CTIA's extremely remote hypothetical.

indicate that it will take eight to ten years to clear the microwaves for PCS providers. Consequently, even by the year 2000, PCS providers will not have spectrum equivalent to their cellular competitors. These advantages in terms of geographic coverage, clear spectrum and market power belie any claim that the Commission should relax the cellular attribution and overlap standards so that cellular can compete with PCS.^{6/}

Although new PCS entrants will need to overcome the substantial cellular headstart, increasing cellular participation in PCS by relaxing the 20% cellular attribution and 10% cellular overlap rules will adversely affect consumer welfare. CTIA Petition, pp. 4-5. The existing attribution and overlap rules are needed to promote the opportunity for viable new PCS entrants in each market. Order at ¶ 103. If the attribution threshold is relaxed to 30% or 35% and the overlap threshold to 40%, the number of new competitors could substantially decline.^{7/}

^{6/} Furthermore, parties with attributable cellular interests will be able to acquire 10 MHz of PCS spectrum in areas where there is a 10% or greater overlap, without divesting their cellular holdings.

^{7/} Contrary to CTIA's claim, the Commission should not enhance cellular participation in PCS simply because CTIA claims there is some uncertainty concerning how the PCS market will develop. CTIA Petition, pp. 2-3. The PCS rules -- including the attribution and overlap rules -- are based on years of study and extensive public comment. The PCS industry is ready and willing to bring PCS to the American public; our industry knows precisely how our service offerings will develop, even if CTIA does not.

For example, APC's study indicates that in the Charlotte-Greensboro MTA, the current rules sensibly preclude the six largest cellular providers -- Sprint Cellular, GTE/Contel, NYNEX/Bell Atlantic, United States Cellular Corp., ALLTEL and BellSouth -- from acquiring more than an additional 10 MHz of spectrum in this region.^{2/} With a 30% or 35% attribution standard and 40% overlap rule, five of these companies -- GTE/Contel, NYNEX/Bell Atlantic, United States Cellular Corp., ALLTEL and BellSouth -- would be eligible to bid for up to 40 MHz of PCS spectrum without being required to divest their overlapping cellular holdings. In numerous areas of this market, these companies could control up to 65 MHz of spectrum. Similarly, CTIA's proposed attribution and overlap rules would enable U.S. West/Airtouch to acquire up to 40 MHz of PCS spectrum in five MTAs where it already has significant cellular population coverage.^{2/}

There are other examples where CTIA's proposal would allow cellular carriers to acquire up to 65 MHz of spectrum in certain areas. For example, Ameritech could acquire up to 40 MHz of PCS spectrum in the Indianapolis MTA even though it currently provides cellular service to over 18% of the population. Similarly, GTE/Contel could acquire up to 40 MHz

^{2/} Under the current rules, ALLTEL and BellSouth could bid on 40 MHz of PCS spectrum, provided that they certify to divest their in-region cellular holdings within 90 days of the license grant.

^{2/} These MTAs include Des Moines-Quad Cities, El Paso-Albuquerque, Omaha, Portland and Spokane-Billings.

of PCS spectrum in the San Antonio, Miami-Fort Lauderdale, Atlanta, and Des Moines-Quad Cities MTAs where it has significant population coverage. Southwestern Bell could acquire up to 40 MHz of PCS spectrum in the Wichita market, despite its existing 24.24% population coverage. McCaw/AT&T would be eligible for 40 MHz in the Buffalo-Rochester MTA where it now has over 10% cellular population coverage. BellSouth would receive similar benefits in the Richmond-Norfolk market. Sprint Cellular would stand to gain in Cleveland, Chicago, Kansas City and other markets.^{10/} In each instance, the incumbent would not be required to divest its overlapping cellular holdings. These results would undermine the Commission's goal of providing new competition for the public.

Finally, APC supports the Commission's "bright-line" cellular and PCS attribution standards. See Comcast Petition, pp. 2-7. These standards are clear and easy to administer because they generally do not distinguish between equity and voting interests. These "bright-line" rules also will expedite the PCS licensing process because the Commission will not have to analyze whether the purported equity investors in a PCS applicant are truly passive. The rules also will reduce the likelihood of petitions to deny, lengthy administrative hearings and other actions concerning applicants' ownership

^{10/} These are simply examples of how CTIA's proposals could affect the emergence of new PCS entrants and may not necessarily be exhaustive.

structures that ultimately could delay for years the licensing and operation of PCS, contrary to the intent of Congress.^{11/} Therefore, the Commission should maintain its current standards for determining whether to attribute cellular and PCS ownership interests.

B. The Commission Should Maintain the 35 MHz Spectrum Limit for Cellular Providers Until January 1, 2000.

The decision to limit in-region cellular providers to 35 MHz of spectrum until January 1, 2000, is consistent with the Commission's goal of maximizing the number of new competitors and does not "unjustifiably" discriminate against cellular providers. CTIA Petition, at pp. 6-7. As set forth above, cellular providers will have a substantial headstart over their PCS competitors in terms of geographic coverage, clear spectrum and market power. The 35 MHz spectrum cap must be maintained until January 1, 2000 so that PCS entrants can establish competitive and viable services. Eliminating the cap one year after the commencement of PCS service could severely cripple the new PCS industry.

The Commission is expected to begin licensing PCS in early 1995 following late-1994 auctions, but widespread service will not commence until the fall of 1996 due to the

^{11/} In the broadcast context, the Commission distinguishes between active and passive investments. This distinction has been the subject of numerous administrative proceedings and has delayed the licensing of certain broadcast stations for years.

18-month build-out period. During the construction period, PCS licensees will have substantial expenses while their cellular rivals will continue to enjoy duopoly profits. In the first year of PCS operation, PCS market share is projected at 6.3% for three providers, compared to 13.1% for two cellular providers and 2.5% for ESMR.^{12/} Business plans forecast that PCS will not have a positive cash flow until the sixth year of operation. Given the time necessary to establish viable and profitable PCS services, the Commission's goal of fostering competition will not be attained if cellular providers can acquire up to 40 MHz of spectrum before January 1, 2000.

C. The Commission Should Maintain Its Post-Auction Divestiture Policy.

APC supports the Commission's policy of permitting post-auction divestitures only for those cellular operators falling below the 20% benchmark within 90 days of the license grant.^{13/} Order at ¶¶ 144-146. The 20% benchmark is a

^{12/} This projection is based on a DSS market study that assumes a price drop in wireless services and a PCS inauguration date of January 1996. See Letter from Anne V. Phillips to Byron Marchant, Gen. Docket 90-314, dated September 15, 1993.

^{13/} As the Commission has acknowledged, APC has supported limits on post-auction divestitures throughout the reconsideration proceeding. See Letter to Honorable Reed E. Hundt, from E.Y. Snowden, Gen. Docket 90-314, PP Docket 93-253, dated June 2, 1994; Letter to Mr. Donald H. Gips, from E.Y. Snowden, Gen. Docket 90-314, PP Docket 93-253, dated May 27, 1994.

sensible balancing of various considerations and reflects the fact that an unlimited post-auction divestiture policy could substantially delay the inauguration of PCS. CTIA Petition, pp. 7-8; Comcast Petition, pp. 7-9.

Cellular operators with substantial in-region interests have every incentive to acquire 30 MHz MTAs and certify that they will divest their attributable cellular interests within the required time period. Despite the mandatory divestiture rule, in-region cellular providers would have reason to abuse the auction procedures in order to forestall competition and preempt new PCS competitors. If this were permitted, independent entrants would avoid the auctions entirely.^{14/} Competition and auction revenues would suffer.

On the other hand, cellular operators exceeding the 20% benchmark have greater incentive to establish PCS operations and divest their cellular holdings. They have less to gain by risking penalties and forfeitures for violating the Commission's PCS and auction rules. Therefore, the 20% benchmark strikes a fair balance between deterring abuse and

^{14/} Comcast suggests that the Commission impose fines and forfeitures to ensure that cellular holdings are divested within the required time period. Comcast Petition, pp. 8-9. Fines and forfeitures, however, are no substitute for providing competitive services to the American public, and some cellular providers may decide to pay the fines rather than facilitate competition. Additionally, the imposition of fines and forfeitures will consume Commission resources.

allowing in-region cellular providers to bid for more than 10 MHz of PCS spectrum.

APC also believes that cellular holdings should be divested within 90 days of the license grant. This will provide cellular operators with sufficient time following the completion of the auction to identify a buyer and consummate the transaction, particularly since many unsuccessful bidders may be interested in purchasing cellular holdings. Additionally, the PCS application processing procedures and 40-day public notice requirement will provide extra time (in addition to the 90 day post-licensing period) for negotiating and structuring the divestiture. If the Commission were to extend the post-auction divestiture period, it could substantially delay the inauguration of PCS.

II. THE COMMISSION SHOULD NOT ESTABLISH A GUARD BAND IN THE UPPER PORTION OF THE 1970-1990 MHz BAND.

The Commission does not need to establish a guard band in the upper portion of the 1970-1990 MHz band in order to protect auxiliary broadcast operations from interference. While APC appreciates the concerns expressed by MSTV and eight Joint Parties, these concerns are in fact adequately taken care of by various features of the rules the Commission adopted to protect against interference to auxiliary broadcast services. The attached engineering statement contains technical information explaining why a guard band is not necessary. See Exhibit 2.

**III. THE COMMISSION SHOULD NOT MODIFY CERTAIN ASPECTS OF THE
TECHNICAL PCS RULES.**

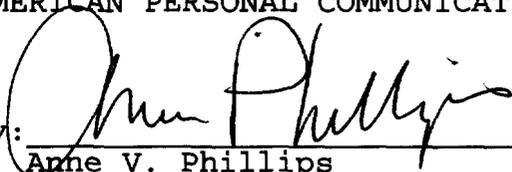
The attached engineering exhibit explains why the Commission should not adopt the technical amendments proposed by Celsat and ArrayComm/SCI. See Exhibit 2.

CONCLUSION

The Commission's rules, as amended by the Order, establish an equitable regulatory structure for the emerging PCS industry. The petitions for reconsideration or clarification do not establish any basis for modifying these rules or enhancing cellular participation in PCS. Nor is there a need to establish a guard band in the upper portion of the 1970-1990 MHz band or to adopt the other technical proposals discussed in Section III. For these reasons, APC respectfully requests that these aspects of the petitions for reconsideration or clarification be denied.

Respectfully submitted,

AMERICAN PERSONAL COMMUNICATIONS

By: 

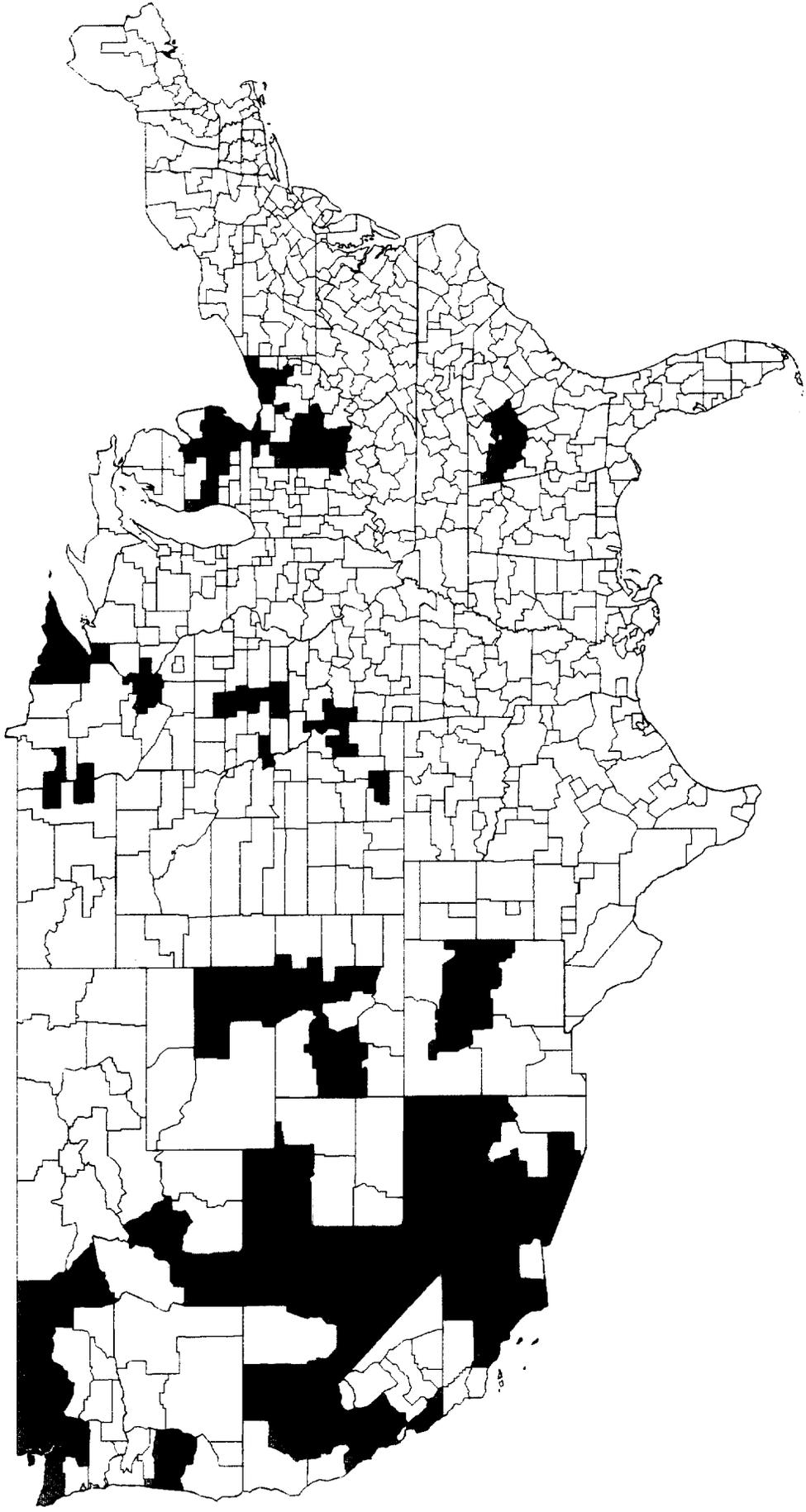
Anne V. Phillips
Vice President, External Affairs

J. Barclay Jones
Vice President for Engineering

AMERICAN PERSONAL COMMUNICATIONS
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 296-0001

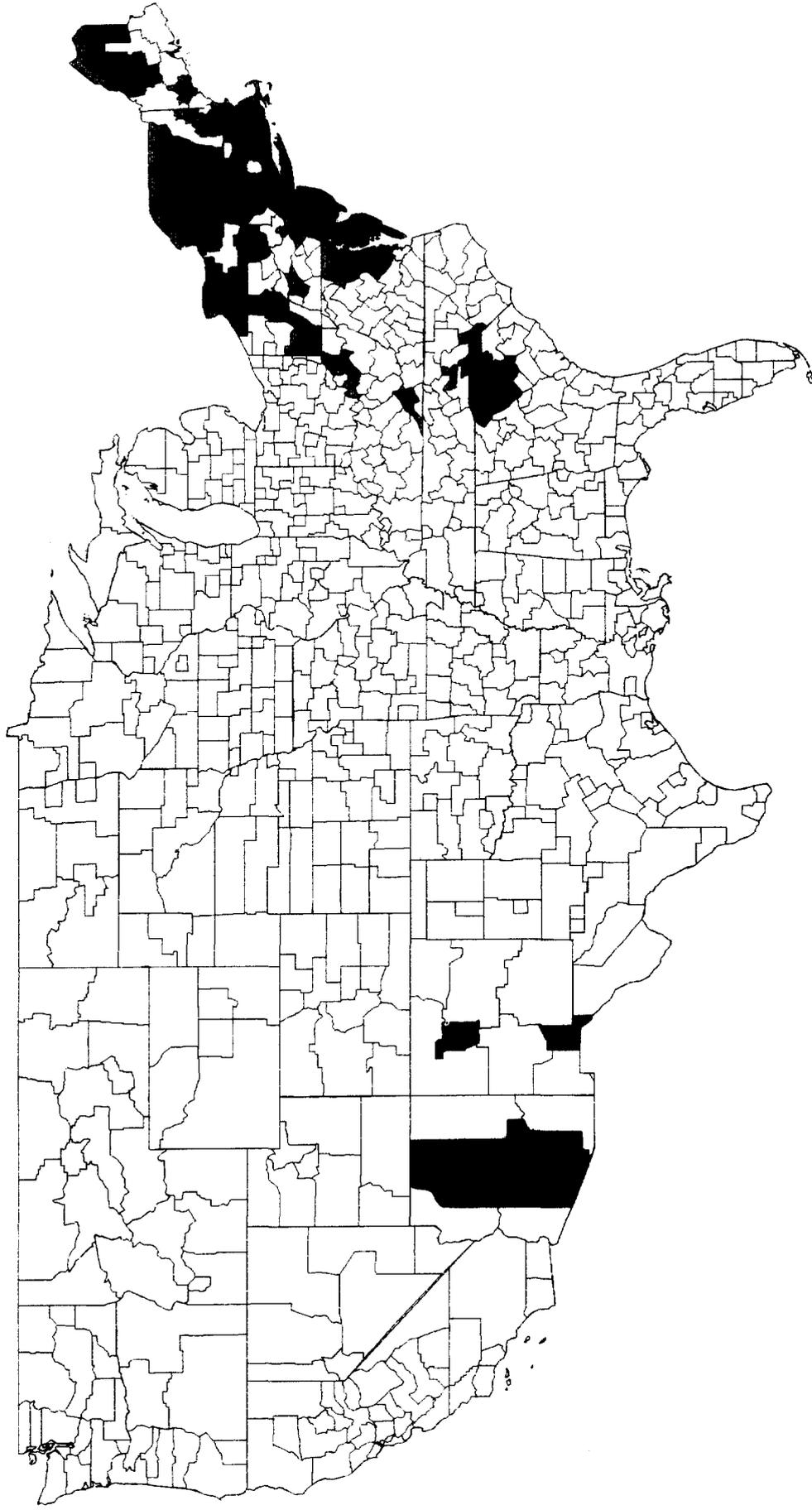
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AIRTOUCH/US WEST



AIRTOUCH/US WEST Current Cellular Ownership Exceeding 20%
■ AirTouch and U.S. West (327)

NYNEX/BELL ATLANTIC



NYNEX/BELL ATLANTIC Current Cellular Ownership Exceeding 20%
■ NYNEX and Bell Atlantic (262)

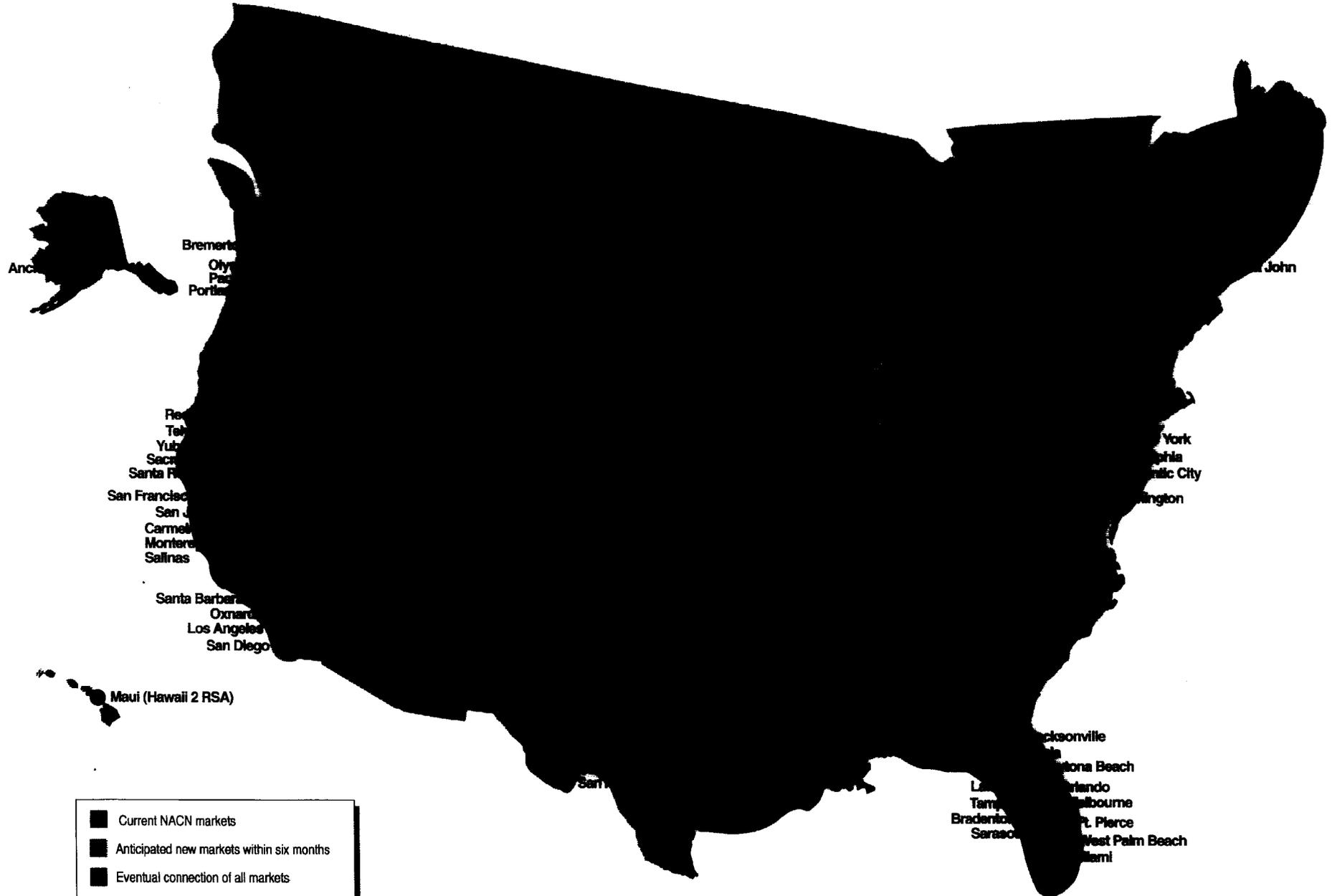
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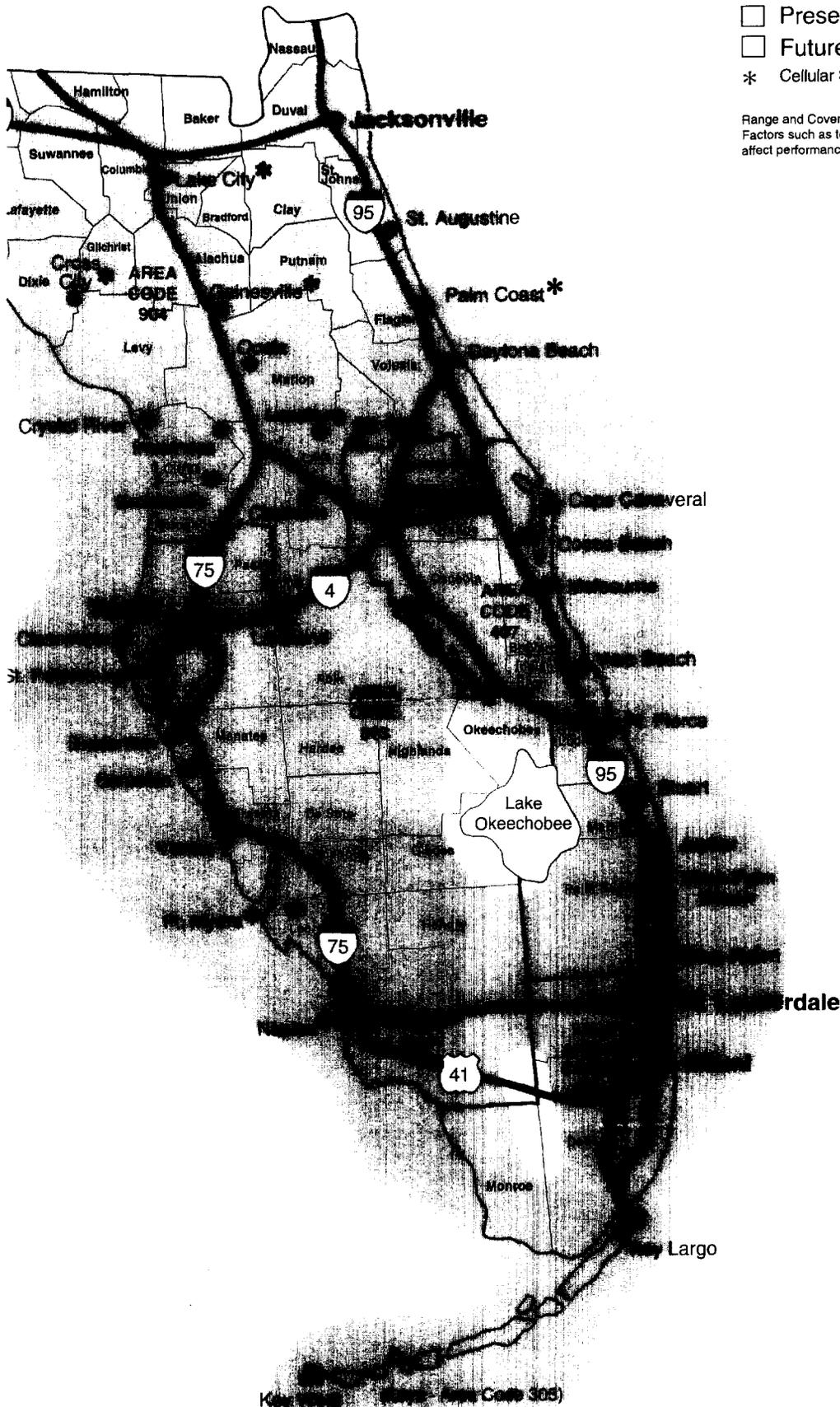


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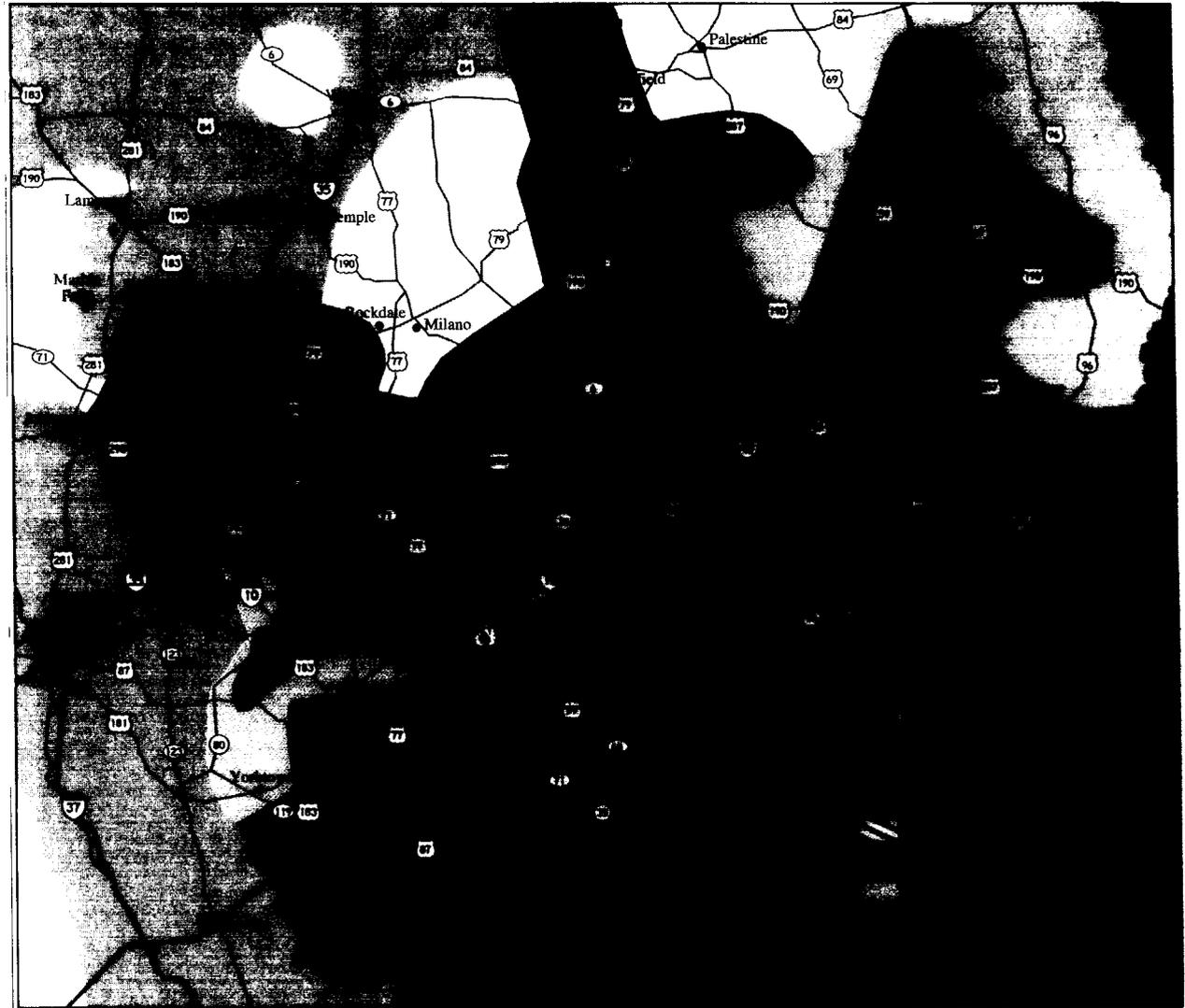
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