

Comcast, the Commission would create a more equitable balance, leading to a more competitive wireless marketplace, if it were to liberalize the circumstances under which post-auction divestiture is allowed and eliminate the five year 35 MHz spectrum cap on cellular licensees.

In its *Memorandum Opinion and Order* on reconsideration of the *Second Report and Order* in this docket, the Commission sought to strike a balance between protecting the economic interests of new PCS entrants and realizing the competitive benefits of open entry by imposing the following restrictions on cellular carriers' participation in PCS:

- A cellular carrier (or any entity with a 20 percent or greater interest in a cellular carrier) is not initially permitted to have an attributable interest (more than 5 percent ownership) in a PCS license of more than 10 MHz in any area that overlaps with the cellular market by 10 percent or more.
- After January 1, 2000, cellular carriers may obtain an additional 5 MHz of PCS spectrum in-region to reach the 40 MHz spectrum cap that currently applies to all other PCS applicants.
- Cellular carrier-affiliated entities with a 20 percent or lesser geographic overlap are allowed to participate in auctions for new PCS spectrum, subject to certifying that they will divest any interests conflicting with the cellular/PCS cross ownership rules after the conclusion of an auction.

While applicable regulations for cellular carrier participation in designated entity applicants are somewhat more flexible, in effect these rules restrict cellular carriers to one 10 MHz Basic Trading Area ("BTA") license in any area where they currently operate.

As discussed below, these restrictions on cellular carriers are unnecessarily stringent and based upon economically questionable theories. Accordingly, McCaw supports the petitions for further reconsideration filed by CTIA and Comcast that seek to temper some of

the more draconian aspects of these provisions. In particular, McCaw believes the Commission should allow post-auction divestiture by *any* entity with conflicting ownership interests and should eliminate the five year restriction on cellular carriers obtaining the full 40 MHz of spectrum available under the cap. Each of these points is discussed briefly below.

As an initial matter, the post-auction divestiture provisions of the PCS rules should be modified to allow post-auction divestiture of *any* interests in violation of *any* cross-ownership rule and to eliminate the pre-auction certification requirement. Because the PCS attribution threshold is sufficiently low that an "affiliate" is under no obligation to discuss its PCS bidding plans with its investors, a cellular carrier or any other bidder may not know that an affiliated entity is also applying for PCS licenses in the same market area until after the initial FCC Form 175 is filed. Once the FCC Form 175 is filed, however, the anti-collusion rules prevent the entity and the affiliate from discussing means for avoiding conflicts with the cellular/PCS ownership limits or the spectrum cap. Consequently, applicants may unknowingly come into conflict with the cross-ownership and spectrum cap policies. A broad post-auction divestiture policy is necessary to ensure that applicants are not unjustly trapped by these conflicting policies and subjected to auction default penalties.

Extending post-auction divestiture opportunities thus has great potential benefits in limiting harsh penalties for unknowing violations of the Commission's rules. However, since licensees in unknowing violation are unlikely to plan ahead to certify to divest conflicting interests, the public benefits of liberalized post-auction divestiture will only be realized if the pre-auction certification to divest is standardized and signed by all licensees or -- as McCaw

suggests -- if the pre-auction certification requirement is eliminated. Since remaining in compliance with the Commission's rules is already a required certification, a specific requirement for a post-auction divestiture certification appears unnecessary in any event.

In addition, while McCaw continues to believe that any restrictions on the participation of cellular carriers in PCS are unwarranted, at a minimum, any entity certifying it will divest all interests in violation of the PCS/cellular cross-ownership limits should be permitted to participate in the auctions for new PCS spectrum.³ The Commission's *Memorandum Opinion and Order*, however, limits post-auction divestiture based on its view that:

[i]f afforded an unlimited opportunity to divest, cellular operators with significant areas of overlap could have incentives to use the bidding process to forestall licensing of new competitors in the market, because the cellular operator would be in control of both a cellular system and one of the three or four possible 30 MHz broadband PCS licenses.⁴

The Commission then determined that the appropriate breakpoint would be a geographic overlap of 20 percent.

As both CTIA and Comcast recognize, the selection of a 20 percent geographic overlap threshold is completely arbitrary and lacks any basis in the record or in economic theory. Comcast observes that, to the extent any opportunity exists to abuse the bidding

³ McCaw also concurs with Comcast that a ninety day divestiture period is unnecessarily restrictive since carriers may have to locate buyers, negotiate deals, file transfer of control applications, and await regulatory action to implement the required divestiture.

⁴ *Memorandum Opinion and Order* at ¶143.

process and delay entry, the degree of overlap is irrelevant "[s]ince the divestiture option *requires* that cellular operators divest within a mandatory, limited time frame."⁵ Thus, any speculative ability to delay the entry of new PCS entrants is definitionally limited by the divestiture period set by the Commission.

Second, the Commission's rationale that a cellular carrier "would be in *control* of both a cellular system and one of the three or four possible 30 MHz broadband PCS licenses" is irrational when control is not a prerequisite to having either an attributable cellular or PCS interest. For example, an entity with as little as a 20 percent interest in a cellular carrier and a five percent interest in a 30 MHz licensee would not be permitted to engage in post-auction divestiture, despite the fact that the entity controls neither competitor.

Finally, a cellular carrier's incentive to engage in the tactics the Commission fears is minimal and renders the potential for anticompetitive bidding wholly unrealistic. Under the Commission's theory, a cellular carrier would be bidding to protect its cellular market share. After the auction, however, the cellular carrier would be required, under the PCS/cellular attribution rules, to divest itself of the cellular interest it is supposedly engaging in anticompetitive behavior to protect. Thus, any such anticompetitive behavior would be completely irrational.⁶ Furthermore, CTIA correctly notes that, "[a]s the degree of overlap increases, the adverse consequences of attempting to 'game the system' . . . and thus the incentive[s] *not* to do so, increase."⁷

⁵ Comcast Petition at 8 (emphasis added).

⁶ The potential cost penalty of defaulting on a bid, in view of the speculative marginal gain of delaying entry, is so great as to defy logic.

⁷ CTIA Petition at 8 (emphasis added).

Under the circumstances, the Commission's limitation on post-auction divestiture is wholly inconsistent with the Commission's prior statements that its "goal in crafting these [cellular eligibility] regulations should not be to prevent anticompetitive behavior which may or may not materialize, but rather, to promote competition."⁸ In this instance, the Commission's regulation is primarily based on fears of anticompetitive behavior that are exceedingly unlikely to arise and, at the same time, limits competition by excluding "the benefits that the cellular industry has to offer PCS, . . . including capital, economies of scope, and experience and expertise in the provision of mobile communications services."⁹ Thus, it is not "necessary or appropriate to put any artificial overlap limit on post-auction divestiture."¹⁰

As a final matter, the Commission should allow cellular carriers to obtain up to the full 40 MHz spectrum cap in any region. Under the current regulations, cellular carriers, unlike any other PCS entrant, must wait until January 1, 2000, before obtaining more than 10 MHz of additional PCS spectrum in region. Even with the 25 MHz already authorized to cellular carriers, this caps cellular carriers at only 35 MHz of total spectrum for over five years. As recommended by CTIA, the Commission should eliminate this five year restriction "because the secondary market is infinitely more likely to produce an efficient allocation of the marginal 5 MHz of spectrum than the Commission."¹¹ Elimination of the five year

⁸ *Memorandum Opinion and Order* at ¶103.

⁹ *Id.*, ¶103.

¹⁰ CTIA Petition at 8.

¹¹ *Id.* at 6-7.

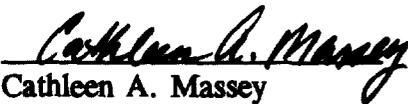
restriction would also enhance competition, "give[] a weaker PCS provider a greater range of exit strategies," and "increase [PCS spectrum's] initial value at auction."¹² Even if the Commission determines that some delay of eligibility for an additional 5 MHz is necessary to allow PCS providers to "rapidly begin service as strong competitors," McCaw concurs with CTIA that such purposes could be served by a much shorter restriction.

For the foregoing reasons, McCaw requests the Commission to grant in part the petitions for further reconsideration of CTIA and Comcast. Specifically, the Commission should allow any cellular carrier to participate in the auctions subject to post-auction divestiture of any interests that conflict with the PCS/cellular cross-ownership rules. Furthermore, any entity should be permitted, without a pre-auction certification, to divest interests in violation of *any* cross-ownership policy in a reasonable time after the auction. Finally, the Commission should grant cellular carriers access to up to the full 40 MHz spectrum cap by eliminating, or severely limiting, the five year restriction.

Respectfully submitted,

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¹² *Id.* at 7.