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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) GN Docket No. 93-252
332 of the Communications Act)
)
Regulatory Treatment of Mobile)
Services)

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McCAW CELLULAR COMMUNICATIONS, INC.
PETITION FOR RECONSIDERATION

McCaw Cellular Communications, Inc. ("McCaw")¹ hereby seeks reconsideration of the Commission's Fourth Report and Order in the above-captioned docket.² The Commission decided in the *Fourth Report and Order* to "attribute towards the spectrum limitations management agreements and joint marketing agreements between licensees that confer the ability to determine or significantly influence price or service offerings,"³ and *not* "treat resale agreements as attributable interests for the purpose of applying CMRS multiple- and cross-ownership rules."⁴ While McCaw concurs with the Commission's treatment of resale agreements, the definitional lines drawn with respect to management and joint

¹ McCaw is a wholly owned subsidiary of AT&T Corp.

² FCC 94-270 (Nov. 18, 1994) ("*Fourth Report and Order*"). A summary of this order was published at 59 Fed. Reg. 61828 (Dec. 2, 1994).

³ *Id.*, ¶ 3.

⁴ *Id.*, ¶ 7.

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marketing arrangements reach too broadly. For the reasons stated below, that action should be reconsidered.

Regarding management agreements, the new rule adopted by the *Fourth Report and Order* provides that a person or entity providing management services to a licensee in the broadband personal communications service ("PCS"), cellular service, or specialized mobile radio ("SMR") service and that "has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence, (1) the nature or types of services offered by such licensee; (2) the terms upon which such services are offered; or (3) the prices charged for such services" shall be deemed to have an attributable interest in such licensee for purposes of the overall commercial mobile radio service ("CMRS") and PCS spectrum caps.⁵ The Commission adopted this policy despite substantial opposition in the record. Indeed, the *Fourth Report and Order* specifically recognizes that "[a]ll but two of the commenters contend that making management agreements attributable interests is inappropriate and contrary to the public interest."⁶

⁵ See new Sections 20.6(d)(9), 24.204(d)(2)(ix), *Fourth Report and Order*, App. D at 24.

⁶ *Fourth Report and Order*, ¶ 13. The *Fourth Report and Order* asserts that most commenters did not "address whether there are relationships that do not rise to the level of control that should be considered attributable interests because they may affect competition." *Id.*, ¶ 19. McCaw believes that this assessment mischaracterizes the record before the Commission. Many of the comments made the point that, if the management arrangement does not otherwise rise to the level of a *de facto* transfer of control, there were no public policy reasons (including the promotion of competition in the CMRS marketplace) to attribute to the manager the interest of the licensee.

McCaw believes that the *Fourth Report and Order* takes an overly restrictive and protective view of the CMRS marketplace. To the extent that the Commission's concerns about competitive effects have any validity, they are properly addressed under the antitrust laws enforced by the Department of Justice ("DoJ"). McCaw recognizes that DoJ made an *ex parte* filing in this docket that supports some restraints upon a narrow class of agreements between competitors that potentially restrain competition.⁷ At the same time, however, DoJ has also recognized that "[s]ome types of non-equity relationships, including some joint marketing and management agreements (which in form can vary widely), may have important procompetitive characteristics."⁸ It is precisely DoJ's expertise, in fact, to determine whether particular arrangements fall into the range of permissible or impermissible conduct.

Attempting to duplicate DoJ's enforcement of the antitrust laws in the Commission's regulations does not appear to provide any public interest benefits. Instead, as discussed below, the regulations appear to engender confusion and may well have a chilling effect upon those management agreements and joint marketing arrangements that "have important procompetitive effects." McCaw believes that licensees are aware of their obligations under the antitrust laws and that the FCC need not premise its regulations on the unsupported possibility that licensees will intentionally violate the antitrust regulations. Instead, the FCC should, as it has done in its regulations governing bidder collusion, base its own regulations

⁷ *Ex Parte* Comments of the United States Department of Justice, GN Docket No. 93-252 (filed Sept. 26, 1994).

⁸ *Id.* at 5.

on more narrowly tailored means for detecting, preventing, and punishing anticompetitive conduct and defer to DoJ in the overall enforcement of antitrust obligations.⁹

In this regard, McCaw has been able to discern no public interest reason for the Commission to attribute to a management entity the operations of a CMRS licensee where the management arrangement does not amount to a *de facto* transfer of control. Rather, non-equity arrangements falling in the management services category that do not rise to the level of control should not be attributed for purposes of the Commission's various spectrum caps.

The fact that the Commission's determination should be reconsidered is underscored by the practical issues arising out of the action taken in the *Fourth Report and Order*. Initially, the scope of activities that could be attributed appears to be excessively broad, since attributable activities include the ability to determine or *significantly influence*: (1) the nature or types of services offered by the licensee; (2) the terms upon which such services are offered; and (3) the prices charged for such services. The use of the phrase *significantly influence*, particularly with reference to the types of service offerings, raises serious implementation and interpretation questions. Significantly influencing the nature or types of services would seem to encompass almost any sort of discussion between the licensee and the management entity regarding the nature of the service offerings to be made by the licensee. Similar concerns present themselves with respect to terms of service and prices. Neither

⁹ See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket 93-253, ¶ 50 (Aug. 15, 1994) (stating that, "[w]hile we intend to rely primarily on the antitrust laws to prevent bidding collusion, we believe that the anticollusion rules in the *Second Report and Order* will provide an important additional tool that will enable the Commission to detect, prevent, and punish collusion").

licensees, nor management entities, nor other interested parties will be able to assess what activities will lead to attribution and what activities will not. Indeed, the uncertainty will open the way for litigious parties to seek to delay license awards by making arguments based on these rules.

As a related matter, the Commission generically states the applicable standards, but does little to explain the content of those standards. McCaw expects that the Commission will be confronted with numerous fact-specific cases seeking guidance on what activities are attributable and what activities are not. This line drawing will consume substantial Commission resources, and inevitably delay the grant of CMRS licenses, particularly in PCS. The effect will be a delay and even diminution in the level and quality of CMRS competition.

Finally, to the extent that there may be any validity to the potential for competitive harm in the context of management agreements, no similar justification would appear to support restraints on joint marketing arrangements. For example, the Commission states that "[t]he goal of these [attribution] limitations is to ensure that a single entity will not have the ability to influence or control a large portion of the available wireless spectrum and thereby undermine competitive pricing for wireless services."¹⁰ Joint marketing arrangements, however, do not provide the type of "influence or control" over *radio spectrum* that could

¹⁰ *Fourth Report and Order*, ¶ 3.

potentially be implicated in an overinclusive management agreement.¹¹ Nonetheless, the Commission has adopted a similar test for determining that certain categories of joint marketing arrangements also should be treated as attributable interests for purposes of applying the CMRS and PCS spectrum caps. Consistent with the analysis above, McCaw believes that the Commission is inappropriately extending its jurisdiction and is being exceedingly overprotective with respect to the rights of individual licensees. Moreover, the enumeration of the standard will, as with the management agreement statement, lead to numerous interpretation issues that will only serve to delay Commission action on applications as well as enforcement requests.

The record in this proceeding simply does not support the action taken in the *Fourth Report and Order* with respect to the attribution of certain types of management and joint marketing arrangements. Rather than promote competition, the Commission's stated goal, the new policies will only serve to complicate licensing issues and thus will delay the entry of new competitors into the CMRS marketplace. Sufficient mechanisms exist without imposition of the new rule sections to ensure that competition in the CMRS industry will be robust, without the distortions created by the *Fourth Report and Order* rules.

¹¹ Indeed, McCaw notes that resellers have been exempted from the spectrum caps based on a finding of "the inability of resellers to exercise substantial influence or effective control over the spectrum on which they provide service or to reduce the amount of service provided over the radio spectrum." *Id.*, ¶ 10.

For the reasons stated above, the Commission should reconsider and remove the rules adopted in the *Fourth Report and Order* with respect to the attribution of management and joint marketing arrangements.

Respectfully submitted,

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