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April 25, 1996

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APR 25 1996

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

**Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554**

DOCKET FILE COPY ORIGINAL

In the Matter of:

Amendment of Parts 20 and 24 of Commission's)
Rules -- Broadband PCS Competitive Bidding and)
the Commercial Mobile Radio Service)
Spectrum Cap)

WT Docket No. 96-59

Amendment of Commission's Cellular PCS)
Cross-Ownership Rule)

Gen. Docket No. 90-314

Dear Mr. Caton:

Enclosed are an original and eleven copies of the Reply Comments of Cincinnati Bell Telephone Company in the above referenced proceeding. A duplicate original copy of this letter and attached Reply Comments is also provided. Please date stamp this as acknowledgment of its receipt and return it. Questions regarding these Reply Comments may be directed to Ms. Amy Collins at the above address or by telephone on (513) 397-1333.

Sincerely,

Cheryl N. Campbell

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APR 25 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of Amendment of Part 20)	WT Docket No. 96-59
and 24 of the Commission's Rules --)	
Broadband PCS Competitive Bidding and)	
the Commercial Mobile Radio Service)	
Spectrum Cap)	
)	
Amendment of the Commission's Cellular)	GEN Docket No. 90-314
PCS Cross-Ownership Rule)	

REPLY COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

Cincinnati Bell Telephone Company ("CBT") hereby submits its reply comments to the Commission in response to the Notice of Proposed Rule Making, FCC 96-119, adopted and released March 20, 1996, in the Matter of Amendment of the Commission's Cellular PCS Cross-Ownership Rule. In its initial comments, CBT suggested that the Commission adopt appropriate rule amendments to 47 C.F.R. 24.204(d)(ii), incorporating a single majority shareholder exception to the cellular attribution rules. A number of other commentors have proposed relaxing the attribution rule so that only majority or controlling interests are attributable, a number have suggested leaving the rule as it is,¹ and a few commentors have suggested making the rule more onerous.² CBT submits these reply comments to demonstrate why its proposal is the best course of action.

¹Those who advocate the status quo with respect to the attribution rule are DCR Communications, Inc. (pp. 14-15); Vanguard Cellular Systems, Inc. (p. 6); WPCS, Inc. (p. 7); North Coast Mobile Communications, Inc. (pp. 17-18); Telephone and Data Systems, Inc. (pp. 3-4); Conestoga Wireless Company (p. 4).

²Mountain Solutions (p. 12); Telephone Electronics Corporation (p. 15).

On November 9, 1995, the Sixth Circuit Court of Appeals granted CBT's Petition for Review, declaring that the cellular attribution rule was arbitrary and capricious.³ As a result of that decision, the Commission does not have the option of keeping the rule the same, absent some new justification or evidence in support of the rule that had not been advanced before. No commentor has presented any new reason for a 20% attribution rule and no one has introduced any evidence that would support such a rule. Therefore, it would be out of the question for the Commission to simply reissue the same rule.

As to those who proposed lowering the attribution rule to 10%, there is no support for doing so. Those parties acknowledge that the Commission must offer economic support for any attribution standard that it adopts, but that "process would be time consuming, difficult and ultimately subject to judicial review." If a 20% percent standard was arbitrary and capricious, a 10% standard would be even more so. The only justification provided for a 10% attribution rule was that the Telecommunications Act of 1996 defined "affiliate" using a 10% standard. However, there is nothing in the Telecommunications Act of 1996 that remotely suggests this standard should be applied for attribution purposes in PCS licensing. Furthermore, the very commentors who suggested a 10% attribution rule stated: "Because Congress may be arbitrary and capricious if it wishes to be, the use of a statutory benchmark should prevent further court challenge." This is an admission that the 10% standard would be arbitrary and capricious. Because Congress has not mandated that the 10% rule be applied to PCS, if the FCC were to adopt such a rule, it would clearly be acting arbitrarily and capriciously.

³ Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752 (6th Cir. 1995).

The remaining commentators who addressed the attribution rule advocated either the abolition of the rule, or a rule whereby only majority or controlling interests would be deemed controlling, or some variation on that theme.⁴ CBT suggests that the better alternative would be to create a majority exception to the attribution rule, rather than limiting the initial attribution standard to majority ownership or control.

CBT suggested specific language that the Commission add to the cellular attribution rule (and any other parallel rules necessary to render the rules consistent with the Sixth Circuit's opinion). This rule would continue to treat an equity interest of more than 20% as attributable, except where there is a single majority shareholder or controlling general partner. This simple rule change would address CBT's objections to the Commission's earlier rulemakings, which led to the Sixth Circuit decision, and would remove the arbitrary treatment the earlier attribution rule afforded CBT. CBT urges the Commission to implement such rule as soon as possible to be applicable to all PCS licenses, whether they encompass 30 MHz or 10 MHz of bandwidth.

The original purpose of the cellular attribution rule was to prevent an entity from controlling an excessive amount of wireless spectrum. The old rule went too far because it

⁴Alltel Corporation (p. 8)(advocating that any non-controlling interest of 49% or less would be non-attributable); AT&T Wireless Services, Inc. (p.10)(advocating attribution standard based on control, whether control is de jure (greater than 50%) or de facto (able to control)); GTE Service Corporation (p. 12)(eliminate bright-line standard in favor of control test); U S West (p.1 n.1)(replace 20% standard with controlling interest standard); BellSouth (pp. 11-12)(limit attributable interests to those of 50% or greater ownership or voting interest or controlling general partner interest); Western Wireless Corporation (pp. 20-24)(de jure or de facto control should be benchmark for attribution); Roseville Telephone Company (pp. 9-11)(attribution should be based on actual control with a presumption that limited partnership holdings and minority equity holdings where there is a single majority owner are not attributable).

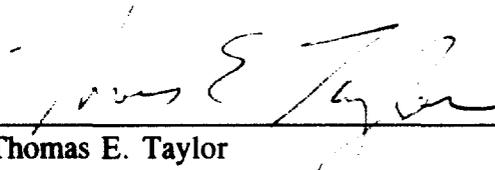
assumed that entities holding an attributable cellular interest had the capability to control or significantly influence the business of the cellular licensee even when they clearly did not. A minority owner or limited partner does not have any control when there is a single majority owner or general partner. Proponents of an attribution rule that only treats majority interests as attributable go too far in the other direction. There could be situations where there is no single majority owner, but there is one person or a group of persons who had the ability to control the cellular licensee. In such a case, it may be appropriate for the Commission to look more closely at the actual control in determining which ownership interests should be deemed attributable.⁵ Persons who do not control cellular licensees, however, ought to be free to participate in PCS.

The single majority shareholder exception satisfies the Commission's concern that determination of control be a simple process capable of quick administrative determination. Where there is one entity (or group of affiliated entities) that controls a majority of a cellular licensee, whether it be through stock interests in a corporation or general partner interests in a limited partnership, it is simple to determine who controls the cellular licensee. The Commission's choice of a 20 percent bright line test for control provided no opportunity for a non-controlling minority owner holding more than 20 percent of the equity to demonstrate that it had no control. A single majority shareholder exception to the rule would not only create that opportunity, but would also be simple to administer.

⁵A de facto control standard is not in accordance with the Commission's stated desire to have a standard that is simple to administer without case by case determinations of actual control. CBT's proposed bright-line rule with a bright-line majority control exception satisfies both Commission goals of easy administration and diversification of PCS licensees.

Finally, GTE, while agreeing the 20% attribution rule must be relaxed, suggested that the rule change should only apply prospectively. CBT agrees that the new attribution rule has to apply to all future PCS activities, including the auctioning and issuance of licenses not yet issued and also any ownership changes with respect to existing licenses. However, CBT believes that prospective application alone may not be sufficient. The old attribution rule was defective from the start, such that the licensing that took place under the old rule is of questionable validity. The Commission should not make any changes to the rules that would preclude any person aggrieved by the old rule from obtaining appropriate redress. CBT was not allowed to participate in the auction as it would have been allowed had the Commission heeded CBT's warnings and either adopted the rule proposed by CBT prior to the A and B Block auction. Now that the Sixth Circuit has declared the eligibility rules invalid for the very reason that the rules had excluded CBT from the auction, the Commission should not do anything to jeopardize any remedies that may be available as a result.

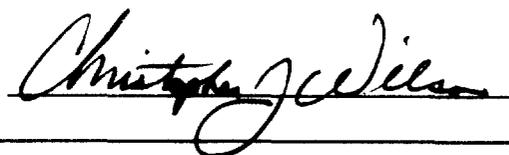
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Comments of Cincinnati Bell Telephone Company was served by first class mail, postage prepaid, upon the parties listed below this 25th day of April, 1996.



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