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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

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PETITION FOR PARTIAL RECONSIDERATION

Ashton R. Hardy
Hardy and Carey, L.L.P.
111 Veterans Boulevard - Suite 255
Metairie, LA 70005
(504) 830-4646

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SUMMARY

Radiofone, Inc. (Radiofone), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, requests partial reconsideration of the Report and Order (Amendment of Parts 20 and 24 of the Commission's Rules), WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-278, released June 24 1996. Radiofone and its affiliates are the non-wireline cellular carriers in New Orleans, Baton Rouge and Houma-Thibodaux, Louisiana. Radiofone was a petitioner in Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752 (6th Cir. 1995). In that case, the Sixth Circuit held the cellular/PCS cross-ownership rule to be arbitrary and capricious. On remand in the Report and Order, the Commission eliminated the cellular/PCS cross-ownership rule. Radiofone applauds this decision

However, while eliminating the cellular/PCS cross-ownership rule, the Commission failed to modify the 45 MHz spectrum cap. The rules therefore continue to prohibit smaller cellular carriers like Radiofone from obtaining, or otherwise having an attributable interest in, 30 MHz PCS licenses. Radiofone requests the Commission to modify the cap so that Block A cellular carriers (i.e., those cellular carriers who are not affiliated with wireline telephone companies in the same market) may have an attributable interest in 30 MHz of broadband PCS spectrum, while Block B cellular carriers would remain subject to the 45 MHz spectrum cap. This modification would be consistent with the Commission's stated goals, and the mandate of the Cincinnati Bell decision; and would present a more realistic approach to the issue of horizontal market concentration.

Radiofone also requests the Commission to eliminate the "49% equity exception" for the F Block and instead adopt the C Block affiliation exclusion rule, 47 C.F.R. § 24.720(*l*)(11)(ii). Finally, Radiofone requests the Commission to count C Block licenses as "assets" for purposes of determining eligibility in the F Block auction.

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I. THE COMMISSION SHOULD MODIFY THE 45 MHz SPECTRUM CAP

In retaining the 45 MHz spectrum cap, the Commission stated that the cap would avoid excessive horizontal concentration, would promote and preserve competition in the CMRS marketplace, and would promote the diversity of ownership pursuant to Section 309(j) of the Communications Act of 1934, as amended (the Act). The antitrust analysis provided by the Commission to support the cap contains several flaws, as discussed below. The Commission should recognize that wireline telephone service is a competitor to PCS, cellular and SMR, and adopt a less restrictive alternative to the 45 MHz spectrum cap that would take into account the wireline telephone services provided by PCS, cellular and SMR providers. Radiofone therefore requests the Commission to modify the 45 MHz spectrum cap so that non-wireline cellular carriers can obtain, or otherwise have an attributable interest in, 30 MHz of PCS spectrum in their cellular service areas (and thereby have the opportunity to provide wireless local loop), while retaining the 45 MHz limitation for wireline cellular carriers.

A. The Commission's Antitrust Analysis Is Flawed

The Commission indicates that it has retained the 45 MHz CMRS spectrum cap in order to preserve competition in what it considers a highly concentrated market, as it sought to demonstrate in its analysis of the HHI figures it proffered. Despite prolonged Commission and court proceedings on the issues of competition and spectrum limits, the Commission proffered its HHI for the first time in its Report and Order, without the benefit of public comment on its analysis. Moreover, the Commission's analysis is seriously flawed. The Commission bases

its market share figures on a narrowly drawn market which excludes substantial mobile and wireline competition. A properly defined market would show much smaller market share figures, and consequently would have a much lower HHI. The Commission also ignored significant fringe competition which assures competitive performance of the market even if it is defined so as to exclude these competitors. Within the market as defined, the Commission erroneously assumed that percentage of spectrum is a valid proxy for market share, when in fact spectrum size does not realistically reflect either sales or capacity. Moreover, the Commission ignored the factors that assure effective competition even where the market is as concentrated as the Commission tries to portray.

Radiofone proposes herein an alternative limitation that will achieve the Commission's proper goal of avoiding injury to competition, but without unduly restricting the ability of cellular firms to expand naturally into the more technologically advanced PCS and wireless local loop.

1. The Commission Erred by Not Considering All Relevant Competing Communications Services

The Commission glossed over the first step in any antitrust analysis -- market definition. The Commission conclusorily stated that the product market was for "mobile two-way voice communications service." Report and Order, para. 97. The Commission further erred by limiting that product market to cellular, PCS and SMR services, without considering other communication services that compete with cellular, PCS and SMR. These other services offer consumers alternatives to the three services included in the market, and by doing so prevent the firms offering the three services from raising prices above competitive levels.

In determining which products are in the same market, it is not necessary that the products be perfect substitutes, or that they be equally attractive to consumers.[1] Indeed, the Commission has recognized the principle that products or services need not be perfectly interchangeable for there to be competition among them

> The Supreme Court reversed the lower court's conclusion [in Continental Can] that metal and glass containers each constituted a separate product market. The Court recognized that glass and metal containers have different characteristics which may prevent one or the other from a particular use, and that competition between glass and can companies is different than the competition between can companies themselves or between glass companies. The Court concluded, however, that the reasonable interchangeability of use standard established in Brown Shoe was not limited to "competition between identical products, the kind of competition which exists, for example, between the metal containers of one company and those of another or between the several manufacturers of glass containers."
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> . . . .
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> "Thus, though the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings competition between these two industries within [the Clayton Act]."

Third Report and Order (Implementation of Sections 3(n) and 332 of the Communications Act), 9 FCC Rcd 7988, 8025 (1994) (footnote omitted). However, the Commission failed to apply this principle to the present matter, and excluded from the market services which are competitive though not completely interchangeable

In this instance, there are many services which are not perfect substitutes for cellular, PCS and SMR, but which nonetheless are attractive substitutes for them for significant portions of the public. In this regard, it should first be noted that the three services which the

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[1] United States v. Continental Can Co., 378 U.S 441, 447-58 (1964) (glass jars and metal cans are in the same market although for many uses consumers will not view them as substitutes); Midwest Radio Co. v. Forum Publishing Co., 942 F.2d 1294 (8th Cir. 1991) (advertising in television, radio, daily and weekly newspapers, billboards, magazines, and direct mail are in the same market though certain types of advertising are clearly better adapted to certain media); Cable Holdings v. Home Video, Inc., 825 F.2d 1559, 1563 (11th Cir. 1987) (cable television, satellite television, video cassettes, and free over-the-air television are in the same market notwithstanding clear differences in content and attractiveness for some purposes); Frank Saltz & Sons v. Hart Shaffner & Marx, 1985-2 Trade Cases (CCH) ¶ 66,768 (S.D.N.Y. 1985) (low price and high price men's suits).

Commission includes in the market are not perfect substitutes for each other. For example, cellular service has traditionally been provided as analog mobile telephone service. SMR traditionally has supported dispatch mobile telephone services targeted to business users. Only recently has the Commission adopted rules which will permit SMR providers to offer cellular-like mobile telephone service. PCS likely will include mobile video, wireless local loop and high speed data service, without the burdens of an embedded mobile telephone infrastructure and customer base which affect other services. All three have differences in the size and frequency range of the spectrum allocation. Notwithstanding these important differences, PCS, cellular and SMR are -- properly -- included in the same product market.

An important and obvious competitive service is wireline telephone service. Most consumers of mobile communications services consciously decide to purchase such services as an alternative to complete reliance on wireline services, including home and office telephones and pay telephones. Pay telephone providers are making pay telephones more attractive alternatives to mobile telephones, by offering various alternative forms of payment which are more convenient than the traditional "pocket full of change" (e.g., credit cards, phone cards), and by making public telephones available in a wider variety of locations. There indisputably is a price point at which consumers will choose mobile telephones over reliance on pay telephones, or vice versa.

There are very few circumstances where a pay telephone is the only available communications system. Thus, the very fact that pay telephones are ubiquitous, and indeed are increasing in number despite the advent of CMRS, is conclusive proof that a substantial portion of the population chooses reliance on pay telephones rather than mobile communications services. That is, there is competition between the two alternatives which affects the price each can charge.

While pay telephones compete with CMRS for end users on the move, traditional wireline local exchange service may actually be replaced by cellular and PCS in some areas.

CMRS providers currently may offer mobile wireless local loop. The Commission has initiated a rulemaking to permit CMRS providers to offer fixed wireless local loop. Notice of Proposed Rulemaking (Amendment of the Commission's Rules to Permit Flexible Service Offerings in the CMRS), 11 FCC Rcd 2445 (1996), and in another context, is considering whether CMRS providers should be considered local exchange carriers. Notice of Proposed Rulemaking (Implementation of Local Competition Provisions in the Telecommunications Act of 1996), Docket No. 96-98, FCC 96-182, released April 19, 1996. In sum, there is no question that wireline telephone services compete with cellular, PCS and SMR.

Paging and narrowband PCS are other alternatives to cellular, PCS and SMR. Many consumers seek mobile communications for purposes that can be served by paging services, especially with the advent of two-way paging and narrowband PCS. If the price difference between paging and other mobile services decreases, some paging consumers will shift their purchases to mobile telephone service, and if the difference widens, some mobile telephone consumers will shift to paging or narrowband PCS.[2] This substitutability is already happening. Cellular and PCS providers are offering paging in conjunction with their voice services. Paging permits the end user to determine whether or not to accept a voice call and pay the higher per-minute rate for wireless voice services.

Satellite Based Mobile Radio is an alternative communication system that will soon provide an attractive alternative to cellular, PCS and SMR, especially for business users who need to communicate over long distances or from remote locations.

General Mobile Radio Service (GMRS) and General Wireless Communications Service (GWCS) also provide attractive alternatives for some users, primarily those who need to

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[2] The combination of ordinary paging and wireline telephone service can serve many of the functions of cellular or PCS, at a comparable cost. That combination is a viable alternative to cellular or PCS, and excluding it from the market distorts competitive forces. Narrowband PCS (i.e., advanced two-way paging) is likewise a substitute. A fleet of delivery vehicles, for instance, could utilize this service in lieu of cellular to receive delivery locations and confirm arrival.

communicate with co-workers in circumstances where confidentiality is not important. In some areas of the country, maritime radio can compete against the other mobile services.[3]

The fact that not every user will find each alternative attractive is not determinative. What is important is that enough users do find other attractive alternatives that the providers of cellular, PCS and SMR services could not profitably collude to increase prices without suffering an erosion of customers to other alternatives. Not all consumers would seek the same alternative, and some consumers might find no acceptable alternative, but the cumulative effect of the available alternatives would be sufficient to defeat a hypothesized collusive price increase.

The Commission recognized that partially overlapping services should be in the same product market notwithstanding that there is not perfect substitutability across all uses. Motorola, Inc., 10 FCC Rcd 7783, 7786 (1995). The Commission there stated:

> Consequently, we disagree with Clark's contention that 800 MHz SMR is a self-contained market; rather, as we concluded in the CMRS Third Report and Order, SMR service is one of many competitive wireless services striving to meet the needs of consumers who desire mobile communications. Although technical variations exist among wireless services, their functions frequently overlap with one another, or functional overlap can be created easily with moderate investment. For example, SMRs have the flexibility to offer interconnected voice or non-interconnected dispatch services and many choose to offer both. Cellular and PCS providers also have substantial flexibility to offer a multiplicity of wireless services. All CMRS providers are now permitted to offer dispatch service. For consumers, this results in a wide array of substitutable alternatives from which to choose

Id. (footnotes omitted). In the Third Report and Order, the Commission clearly acknowledged competition among the various services. It noted that although the competition was not complete and immediate, it was real:

> Our assessment of the commercial mobile radio services marketplace leads us to conclude that the types of competitive relationships described in Continental Can exist between reclassified private services and other existing commercial

[3] Some portion of the population will consider purchasing cellular or PCS service primarily for use on a boat. Such persons have a competitive alternative in maritime radio. While this may represent a relatively small segment of the population, it is one more competitive influence acting to restrain cellular and PCS providers from raising prices above competitive levels.

> services . . . .
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> With regard to all of these competitive relationships, "though the interchangeability of use may not be . . . complete and the cross-elasticity of demand [may] not [be] immediate[,]" we believe that reasonable conclusions and expectations regarding consumer demand and technological innovation support our conclusions regarding CMRS competition.

9 FCC Rcd at 8026 (footnotes omitted). Having reached this conclusion, the Commission could not reasonably exclude these other services from the market.

The FCC has also recognized in other proceedings that cellular, PCS and SMR compete with other forms of communications. For example, in the Motorola statement quoted above, the Commission refers to "many competitive wireless services" and "a wide array of substitutable alternatives." Words like "many" and "wide array" plainly denote more than the three alternative services to which the Commission has limited the market. Similarly, the question of market definition was addressed in Nextel Communications, Inc., 10 FCC Rcd 3361 (Wireless Tel. Bur. 1995). The FCC there stated:

> In the CMRS Third Report and Order, the Commission conducted an extensive market analysis of CMRS services to determine how best to protect and encourage competition among mobile service providers. The Commission determined that all CMRS services -- including paging, SMR, PCS, and cellular -- are actual or potential competitors with one another, and should therefore be regarded as substantially similar for regulatory purposes.

Id. at 3364-65 (footnotes omitted) (emphasis added). The Commission defined a broader market in Dial Page, Inc., 1 Comm. Reg. 1269 para. 21 (Wireless Tel. Bur. 1995) ("the Bureau . . . defined the relevant product market to include terrestrial CMRS -- cellular, SMR, paging, and broadband and narrowband PCS"). In an earlier decision, the Commission found an even broader product market. Nextel Communications, Inc., 10 FCC Rcd 10,450, 10,455 (Wireless Tel. Bur. 1995) ("the Bureau . . . found a product market of terrestrial CMRS -- cellular, SMR, 220 MHz, interconnected Business Radio Service, conventional dispatch, paging, and broadband and narrowband PCS offerings").

It is plain, therefore, that cellular, PCS and SMR compete with other services. The Commission nonetheless excluded these other services from the market, apparently because they

are not perfectly substitutable. The Commission addressed these competitive services as though product market definition is a bright line such that a product either is wholly in the market or exerts no competitive influence on it. But this is contrary to antitrust concepts, especially as expressed in the Horizontal Merger Guidelines, on which the Commission relies. There is a continuum of competitive influences, some of which are included in the product market, and some of which are recognized to exert a competitive influence though not in the market. See Weyerhaeuser Co., 106 F.T.C. 172, 289 (1985) ("While the definition of relevant markets requires the drawing of 'bright lines' for the inclusion and exclusion of goods and firms, our analysis should not ignore competitive influences at the margin, though outside the 'bright lines.'").[4]

Antitrust law thus requires the recognition of all significant competitive alternatives, either within the market or as fringe competitors. If these alternative services are included in the market, the HHI estimates must decline substantially. Alternatively, if they are included as fringe competitors, the HHI estimates will be unchanged, but the apparent competitive impact of any particular HHI will overstate the actual potential impact.

2. Market Shares Were Improperly Equated with Spectrum Allocations

Not only did the Commission improperly define the product market and ignore numerous competitive services at the fringes, it also improperly measured market shares within the product market as defined. The Commission assumed without discussion that market share is coextensive with spectrum capacity. Report and Order, para. 96. That is, a cellular carrier

[4] Compare, e.g., Guidelines § 1.11 (products are in the same product market if a change in relative prices would cause consumers to shift purchases) with § 1.522 (the potential for injury to competition is affected by the extent of the gap between products in the market and those on the fringes). See also United States v. Gillette, 828 F. Supp. 78 (D.D.C. 1993) (even if the market were properly defined as premium fountain pens, competition from less expensive fountain pens, other types of pens and other writing instruments not in the market precluded injury to competition).

with 25 of the 50 MHz allocated to cellular service prior to the PCS allocation was presumed to have a market share of 50%.[5] This underlying assumption is indefensible.

Market shares are normally based on sales, as the best indicator of a firm's role in the market. Guidelines § 1.41. Sales figures would show high shares for cellular service and minimal shares for providers of PCS and SMR services, which have not yet been fully deployed. Alternatively, market share can be based on capacity if that is a better indication of competitive strength. Guidelines § 1.41; see United States v. General Dynamics, 415 U.S. 486 (1974). Because PCS is still in its infancy, capacity is probably a better indicator of competitive strength than actual sales.

Capacity in this instance can be measured by the number of channels available or by the number of calls or consumers that can be accommodated. The shares would likely be different depending upon the type of measurement chosen.

Here, the Commission measured capacity as MHz of spectrum. That can be accurate only if each of the services allows the same number of calls or the same customer base per MHz of spectrum. But that is demonstrably not the case. Some technologies allow a greater number of simultaneous calls per MHz. Some technologies use each channel for a briefer time, and thus allow more customers for a service even if the number of calls per MHz is smaller. For example, two-way paging would very briefly occupy a channel. Paging service thus might have a low capacity for simultaneous use, but could nonetheless accommodate a large number of users relative to the number of channels because each use would be very brief. By contrast, voice communications would occupy a channel for a longer period of time. Systems which allow multiple simultaneous use of a channel, e.g., GMRS and GWCS, would accommodate a higher number of consumers relative to the number of channels available.

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[5] For reasons which remain obscure, the Commission ignored SMR spectrum in concluding that two cellular providers with 25 MHz each would have market shares of 50%. Report and Order, para. 98.

The Commission also errs in basing market shares on capacity without adjusting for the additional spectrum to be allocated in the near future.[6] That additional spectrum will reduce the market shares of the providers currently in the market, and consequently lower the HHI.

In short, it is simplistic to the point of distortion to equate spectrum size with market share. If the cap is to be imposed solely on the basis of purported market shares, it is essential that a more realistic estimate of market shares be used.

3. Other Competitive Influences Must Be Considered

The Commission relies too heavily on the HHI, even assuming the Commission has defined and measured a relevant market. The HHI was never intended to be a bright line test of competition. Rather, it is merely an analytic tool. The Department of Justice and Federal Trade Commission use HHI as "an aid to the interpretation of market data." Guidelines § 1.5. The Guidelines specifically disclaim the use of the HHI as definitive proof of undue concentration: "Although the resulting regions [of concentration] provide a useful framework for merger analysis, the numerical divisions suggest greater precision than is possible with the available economic tools and information." Guidelines § 1.5. One indication of the limited role of the HHI is that even where the HHI shows a market to be highly concentrated, the Guidelines recognize that some mergers will be presumed not to adversely affect competition. Guidelines § 1.51. And where there is a large increase in concentration in a highly concentrated market, the Guidelines nonetheless recognize that a presumption of injury to competition can be overcome by other factors, such as structural relationships that make

[6] Second Report and Order (Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use), Docket 94-32, FCC 95-319, released Aug. 2, 1995.

collusion difficult.[7] Guidelines § 1.51, 2-5. The limited role of HHI in the Guidelines is consistent with judicial treatment.[8]

Moreover, the Commission's reliance on the HHI to establish irrebuttable limits of concentration is contrary to the decision in Cincinnati Bell, and the will of Congress as expressed in the legislative history of the Omnibus Budget Reconciliation Act of 1993. The Sixth Circuit criticized the Commission's reliance on standards of the Financial Accounting Standards Board to establish a ban on licensing based on a 20% ownership standard. 69 F.3d at 759-60. The ownership standard was intended by the Board to be only presumptive, not a bright line demarcation as the Commission used it. Using the HHI as a bright line demarcation similarly distorts its usefulness. Congress warned the Commission to shun irrebuttable theories in favor of real-world analyses of competitive effects.

> The Committee does not intend that the Commission should apply any particular antitrust or other test in order to avoid concentration of licenses, but rather should apply a common sense approach. If a single licensee dominates any particular group of services, then the Commission should take that into account. The Committee does not intend that this objective dominate the Commission's decision-making when it adopts regulations to implement the competitive bidding process.

H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993).

As demonstrated below, the Commission's rejection of a case-by-case approach in favor of an irrebuttable presumption of competitive injury based solely on the HHI will exclude licensing under circumstances where no injury to competition is reasonably likely. For example, the Commission's assumption that high concentration automatically leads to

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[7] For example, where products or services in the market are heterogenous, collusion is much more difficult even in a highly concentrated market. Guidelines § 2.11. Here, the differences among the services -- bandwidth, cost of licenses, digital versus analog, voice and data, clarity -- would make collusion among cellular, PCS and SMR virtually impossible, irrespective of concentration.

[8] See, e.g., United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984); In the Matter of Echlin Mfg. Co., 105 F.T.C. 410 (1985) (HHI increased by 750 points to nearly 3000, but the acquisition was permitted because, inter alia, technological changes made market power unlikely to persist).

uncompetitive markets is wrong. There are many markets with naturally high levels of concentration which function competitively. For example, the economics of publishing a newspaper dictate that most cities in the United States have only a single daily newspaper. The HHI is therefore 10,000. Nonetheless, the newspapers in those one-paper cities typically function competitively, as can easily be demonstrated by the fact that newsstand and advertising prices are comparable to prices charged by newspapers in multiple paper cities. There are many reasons for this, such as competition from fringe competitors such as magazines, television and radio news, and other advertising media. Moreover, newspapers are solicitous of public opinion, and do not want to appear to be price-gougers. Similarly, mobile communications services would remain competitive even were the HHI as high as the Commission asserts. There is substantial competition from other forms of communications services, as noted above. Moreover, mobile communications services is a fledgling market which is facing entrenched wireline competition and will face numerous other forms of competition as technology develops. The competitors in the market comprehend that it would be contrary to their long-term interests to develop reputations as profiteers.

The Commission based the 45 MHz spectrum cap in part on the assertion that excessive concentration will result in less innovation and experimentation. Report and Order, para. 95. While that may be true as an abstract principle, it has no applicability to the product market as defined. Innovation cannot be limited by high concentration in any particular geographic market. There are hundreds of comparable geographic markets throughout the country, served by scores of innovative and technologically advanced competitors. There is no way that the competitors in any limited geographic market can hold back the new technology that is being developed, and that new technology would easily overwhelm any efforts to control competition.

The New Orleans cellular market is a good example. Under the Commission's HHI calculation, that market has an HHI of 5,000. However, Radiofone's interest in innovation is demonstrated by the experimental broadband PCS license obtained by its sister company,

Freeman Engineering Associates, Inc. (Freeman). Freeman used its experimental broadband PCS license to develop technologies to place calls to the PCS system from cellular and public switched telephone networks and vice versa, and to notify PCS users of incoming calls using paging frequencies, thereby making more efficient use of the spectrum. Thus, high concentration, by the FCC's standards, does not preclude innovation. Moreover, the technology developed by Freeman will be available in other geographic markets even if, as the Commission fears, concentration in those other markets is so high as to stifle innovation.

The Commission should also consider that the 45 MHz spectrum cap will unfairly impact cellular telephone companies. Cellular companies will be unable to use their cellular spectrum to offer the same scope of services as offered by PCS, and will lose customers. The inability to retain customers by offering technological improvements will be especially acute in this industry. It may be safely assumed that the current users of cellular telephones enjoy new technology and seek to remain on the cutting edge. These consumers -- who are something of pioneers in cellular use -- are particularly unlikely to remain with cellular telephones if cellular is unable to match PCS's technological advances. The threat to the future business of cellular providers was appreciated by the Court in Cincinnati Bell. The Court stated: "Indeed, at oral argument counsel for the FCC admitted that, given the uncertain nature of the future in the wireless communications market, Cellular providers foreclosed from obtaining Personal Communications Service licenses may ultimately be left holding the remnants of an obsolete technology." 69 F.3d at 764.[9]

Another very important factor assuring competitive performance notwithstanding the high concentration posited by the Commission is the overlapping geographic markets for cellular and PCS. The Commission assumes only three significant PCS competitors in any geographic area,

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[9] The Commission contends that cellular firms can provide additional services with the existing 25 MHz cellular license, or by acquiring one or two 10 MHz PCS licenses. Report and Order, para. 103. As to the former, the Commission is incorrect. Additionally, a 10 or 20 MHz license would still leave a cellular company at a significant disadvantage.

the A Block, B Block and C Block licensees. Thus, the Commission implicitly defined the geographic market as a Basic Trading Area (BTA). What this geographic market definition overlooks is that the A and B Block licensees will compete with other C Block licensees in neighboring BTAs within the same Major Trading Area (MTA), and with cellular licensees in Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs) outside the BTA but within the same MTA. Collusion in any geographic area (the anticompetitive danger normally associated with high concentration) would be greatly complicated and hindered by the other C Block licensees and the other cellular licensees. The A and B Block licensees would either have to include the other C Block and cellular licensees in the hypothesized collusion or discriminate in price among the various BTAs, MSAs and RSAs in the MTA. The first of these alternatives is highly improbable, just as collusion is unlikely in a market with low concentration because collusion becomes more difficult as the number of colluders increases. The second alternative is also unlikely. Unjustified price discrimination alienates customers and warns enforcement agencies of possible antitrust violations.[10]

In short, the Commission erred in defining the geographic market on a BTA basis, because C Block licensees in overlapping MSAs and RSAs will prevent anticompetitive conduct.

The Commission hypothesizes that incumbents will have an economic incentive to buy C Block licenses to deny them to potential competitors. Report and Order, para. 99. This argument can only make sense if the market is properly defined and if it is insulated from competition from fringe competitors. If other services are in the market, or if other services compete at the fringes, then the type of collusion the Commission seeks to avoid cannot happen. Any effort to restrict output or increase prices will simply send consumers to the many

[10] Sprint Spectrum charges uniform rates in Washington and Baltimore, though they are in different BTAs and MSAs. Different rates in the two cities would alienate customers. Moreover, higher rates in one city would alert antitrust enforcement agencies to the possibility of collusion in the city with higher rates.

alternative forms of communications.[11] The Commission's hypothesis also ignores the less restrictive alternatives to the 45 MHz spectrum cap that it already has in place: the competitive bidding process and the strict build-out requirements.

The Commission also asserts that the existing cellular providers already have technical expertise, customer bases, marketing operations, and antenna and transmitter sites. These will, the Commission asserts, give the cellular providers a competitive advantage. Report and Order, para. 101. The Commission does not explain what competitive advantage it has in mind, but apparently it is that the existing cellular providers will be able to bid higher amounts at auction than new entrants, while remaining profitable due to prior investment in cellular operations and economies of scale. Not only does the Commission have no basis for its fears, but its apprehension stands antitrust law on its head. The Commission is merely recognizing that there are efficiencies to be gained from combined cellular and PCS operations, just as there are efficiencies to be gained from combined wireline and cellular operations. Efficiencies are not something to be feared. They should be welcomed.[12] The Merger Guidelines specifically provide that efficiencies may be a beneficial result of higher concentration, and can be sufficient to prevent a challenge that might otherwise be lodged against an acquisition that increases concentration. Guidelines § 4.

4. The Spectrum Cap Will Inhibit Competition Against Wireline Telephone Companies

The cap will entrench wireline providers by assuring that no cellular or PCS provider will have the size or efficiencies necessary to mount an effective challenge to the market

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[11] See Cincinnati Bell, 69 F.3d at 760 ("[G]iven the high cost of obtaining a Personal Communications license, the strict build-out requirements for licensees, and the existence of at least two other large [PCS] providers in each market[,] . . . a business competing at a less than efficient level will soon be driven out of the marketplace ").

[12] See FTC v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991) (suggesting that an otherwise injurious acquisition can be beneficial if it creates efficiencies); FTC v. Owens-Illinois, Inc., 681 F. Supp. 27 (D.D.C.), vacated as moot, 850 F.2d 694 (D.C. Cir. 1988).

dominance of the wireline providers. The disparity in customer bases is shown by the 92.6% of penetration of telephone service in Louisiana,[13] compared to the less than 10% penetration for cellular service.[14]

It has become increasingly clear that competition in telephone service will lack true vigor for so long as the wireline services maintain their monopoly over local connections. Public policy, as recently expressed in the Telecommunications Act of 1996, calls for new competition in local wireline service. Primary candidates for such new competition include the cellular and PCS providers.[15] However, for so long as such providers are kept balkanized, they will be unable to compete effectively beyond the confines of CMRS.

B. The Commission Gave No Justification for Restricting Cellular Carriers to 20 MHz Instead of 30 MHz

The Commission arbitrarily determined that cellular carriers could hold only 20 MHz of PCS spectrum, without giving any justification for precluding cellular carriers from holding 30 MHz instead. The Commission stated: "By limiting current cellular licensees to an additional 20 MHz of spectrum . . . . the 45 MHz cap will help to level the playing field for all new entrants, while ensuring that incumbent providers are not placed at any disadvantage." Report and Order, para. 101. The Commission does not explain why incumbent cellular carriers would not be placed at a disadvantage, and why it departed from its previous determination that 20 MHz PCS licensees would be at a competitive disadvantage vis-à-vis 30

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[13] FCC, Telephone Subscribership in the United States, Table 2 (1996).

[14] Alan Stewart & Alan Pearce, PCS: First Find Your Market, Communications International, Oct. 1994, at 78 (BellSouth stating that "only about 7% of the population uses" cellular service); U.S. Cellular Market Exhibits Solid Growth, According to Dataquest, Business Wire, Mar. 25, 1996 (showing only a 32% growth in BellSouth's cellular service from 1994-1995), available in LEXIS, Curnws File.

[15] See Second Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 9 FCC Rcd. 2348, 2350 (1994) ("Efficient provision of wireless service . . . should create competition for existing wireline . . . service[].").

MHz PCS licensees. In allocating three 30 MHz blocks instead of two 30 MHz blocks and one 20 MHz block, the Commission stated:

> We also believe that limiting one licensee to 20 MHz could be a disadvantage for future competition. The ability to provide a complete package of mobile voice and data services could become a significant competitive advantage in the future. Such a package of wireless services, however, may require more than 20 MHz of spectrum.
>
> . . . .
>
> Increasing the third license from a 20 MHz block to a 30 MHz block appears to eliminate any competitive disadvantages stemming from the band plan. . . . This change should also reduce the difficulty faced by the [20 MHz] licensee in obtaining financing. We conclude, therefore, that three equal sized 30 MHz blocks will facilitate competition and the rapid deployment and implementation of the fullest range of PCS services and ensure that PCS is more fully competitive with other mobile radio services.

Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services), 9 FCC Rcd 4957, 4980-81 (1994) (footnote omitted)

Even if cellular carriers have "technical expertise, customer bases, marketing operations, and antenna and transmitter sites," Report and Order, para. 101, that does nothing to create 10 MHz of spectrum where it does not exist.

C. Alternative Proposal

There is a significantly less restrictive alternative available to the Commission that would prevent injurious concentration without crippling the cellular firms that want or need to expand into PCS. The 45 MHz spectrum cap should be imposed only on firms that provide both wireline and cellular service in the same market. In that way, any entity could operate two out of the three major communications services (wireline, cellular, 30 MHz PCS), but none could operate all three. Under the current rule, a firm like Radiofone which does not offer wireline service may operate only one of the three major services, either cellular or PCS.[16] A wireline provider can offer two of the three, wireline and either cellular or PCS.

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[16] Under present technology, the D, E and F Block licenses are of limited use. The important PCS licenses are the A, B and C licenses.

Under our proposed limitation, the HHI would still not exceed about 1800 (even assuming the market is defined as the FCC did in the Report and Order). In every market, a wireline company holds one of the cellular licenses. Thus, there are no markets in which each of the two cellular companies could buy a 30 MHz PCS license. Only the non-wireline cellular company could also own a 30 MHz PCS license. If one cellular firm buys a 30 MHz PCS license, and the wireline cellular provider does not buy any of the 10 MHz licenses, then the HHI would be 1807, which is in the range the Commission states is "acceptable." Report and Order, para. 100. If the hypothesized wireline cellular provider also acquires a 10 MHz PCS license, the HHI would be approximately 1960, which is not appreciably different from the "acceptable" range of 1800, and is less than the HHI that may be obtained under the 45 MHz spectrum cap with license combinations not considered by the Commission in Appendix A to the Report and Order.[17] Of course, for all of the reasons addressed herein, these HHI figures overstate the actual effect on competition.

Retaining the 45 MHz spectrum cap on the wireline cellular carrier would act as a trade-off to the inherent advantages the wireline carrier has over the non-wireline carrier. For example, every wireline telephone company can offer "one-stop shopping" for wireline telephone service, cellular and PCS. The FCC has recognized the competitive advantage that one-stop shopping provides. In reference to BellSouth, which is the wireline cellular carrier in Radiofone's cellular service areas, the Commission stated:

> [I]t will be quite a while before [PCS providers] pose any genuine competitive threat to an entrenched monopolist phone company such as BellSouth. For example, at this point no other company . . . can offer local telephone service in BellSouth's monopoly area and thus nobody can offer the "one-stop shopping" that BellSouth would like to offer. To that degree, [allowing BOCs to provide

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[17] The Commission's HHI calculations did not include the possibility that SMR operators may obtain PCS licenses. Under such scenarios, the HHI's under the 45 MHz spectrum cap are much higher than those calculated by the Commission. For example, a market consisting of a 30 MHz A Block licensee, a 30 MHz B Block licensee, a 25 MHz cellular licensee with a 10 MHz D Block license, a 25 MHz cellular licensee with 20 MHz from D and E Block licenses, and an SMR operator with a 30 MHz C Block license yields an HHI of 2052 and stays within the 45 MHz spectrum cap.

> "one-stop shopping"] . . . may well give BOCs a significant competitive advantage . . . .

Opposition of the FCC to BellSouth's Motion to Recall Mandate, at 10-11, BellSouth v. FCC, No. 94-4113, 95-3315 (6th Cir. July 29, 1996). And BellSouth has acknowledged its plans:

> [The] 10 MHz PCS licenses are the licenses that were viewed as ideal for integration with wireline local exchange company operations. As BellSouth . . . own[s] wireline local exchange companies, these licenses are extremely important in their attempt to compete with PCS licensees. Further, these 10 MHz PCS licenses can be used by BellSouth . . . to compete against cellular providers who already have a substantial head start.

Joint Opposition to Emergency Motion for Stay, at 16-17, National Telecom PCS, Inc. v. FCC, No. 96-3383 (3d Cir. July 19, 1996) (footnotes omitted). BellSouth therefore plans to use its wireline service and PCS to compete with other PCS licensees and cellular carriers in its wireline service areas. But BellSouth also has cellular operations in those same areas. If anyone has a headstart, it surely is BellSouth which was the first to provide monopoly wireline service and the first to provide cellular service in those areas. Retaining the 45 MHz spectrum cap for such wireline telephone companies while relaxing it slightly to give non-wireline cellular carriers an opportunity to compete in PCS would be consistent with the Commission's pro-competitive goals.

It should also be kept in mind that limiting the spectrum cap to wireline cellular carriers would not provide a safe harbor for non-wireline companies. Under Section 314 of the Act, the Commission would still retain its authority to block any individual license acquisition that appears likely to injure competition. 47 U.S.C. § 314. And, of course, competitors in the market, consumers, states, and other federal enforcement agencies would still be able to enforce the antitrust laws against any service provider or providers that monopolize or collude to injure competition.

D. Restricting the 45 MHz Spectrum Cap to Wireline Cellular Carriers Would Promote Diversity

By permitting non-wireline cellular carriers to obtain, or otherwise have an attributable interest in, 30 MHz PCS licenses, the FCC would be promoting the diversity of licenses as construed by the Sixth Circuit in Cincinnati Bell. There, the court stated:

> [I]f the FCC were truly concerned about diversifying ownership, the current rules are a curious way of going about it. Cellular providers are able to bid on every Personal Communications Service license in the country, except those population areas in which the Cellular licensee currently provided service. Of course, this simply allows the communications industry giants, those with the current infrastructure to bid nationwide on Personal Communications Service licenses, to purchase almost all of the new licenses. In the A and B Block auctions, the ninety-nine licenses issued by the FCC were awarded to just nineteen companies. AT&T, Nynex, Bell Atlantic, and Sprint were among the largest bidders, hardly a broad diversification of ownership. In fact, smaller companies such as Radiofone -- because the FCC's cross-ownership restrictions prevent them from doing so -- were unable to bid in the one geographic area in which they might be able to provide service, namely the area in which they already provide Cellular service.

69 F.3d at 764. Similarly, in the C Block auction and re-auction, the 493 licenses were won by approximately only 91 companies. Of those 91 companies, four won approximately 140 of the licenses, by spending a total of approximately $7 billion. The four companies soon will rank among the nation's largest companies. Thus, the PCS/cellular cross-ownership rule and the 45 MHz spectrum cap have still not resulted in a broad diversification of ownership.

The FCC's retention of the 45 MHz spectrum cap still prohibits cellular carriers from obtaining any of the 30 MHz PCS licenses in-market. By adopting Radiofone's suggested modification to the 45 MHz spectrum cap and permitting non-wireline cellular carriers to have attributable interests in 30 MHz PCS licenses in-market, the FCC would be allowing dozens of non-wireline cellular companies such as Radiofone to either bid on, obtain in the after-market, or manage 30 MHz PCS licenses "in the one geographic area in which they might be able to provide service, namely the area in which they already provide Cellular service." Id. Given that the 593 PCS licenses that have already been auctioned were won by only approximately 110 entities, adding dozens more potential bidders to the mix would promote diversity.

Instead of evaluating diversity by viewing the country as a whole, the Commission improperly measured diversity by counting the number of licensees in each market. The Commission stated that with the PCS/cellular cross ownership rule in place, there were three new PCS licensees to compete against the two cellular incumbents in each market. Report and Order, para. 102. Under this mathematical theory, if AT&T had won all of the A Block licenses, and Bell Atlantic had won all of the B Block licenses, and DCR PCS, Inc., NextWave Personal Communications, Inc., Omnipoint PCS Entrepreneurs, Inc., PCS 2000, L.P. and GWI PCS, Inc. had won all of the C Block licenses, the FCC would conclude that it had complied with the requirement to promote diversity, because there would be three 30 MHz PCS licensees and two cellular licensees in each market. This surely is not the result Congress intended.

In sum, by permitting non-wireline cellular carriers to have attributable interests in 30 MHz of PCS spectrum, the FCC would promote diversity by increasing the number of potential competitors across the nation

II. THE COMMISSION SHOULD ELIMINATE THE 49% EQUITY EXCEPTION FOR THE F BLOCK AND ADOPT THE C BLOCK AFFILIATION EXCLUSION

The Commission adopted the "49% equity exception" for the F Block, 47 C.F.R. § 24.709(b)(6), while declining to adopt the C Block affiliation exclusion, 47 C.F.R. § 24.720(*l*)(11)(ii), for the F Block. As discussed below, these decisions are inconsistent and adverse to the participation by entrepreneurs in PCS auctions.

The Commission's justification for adopting the "49% equity exception" was: (a) to reduce the likelihood of legal challenges; (b) to enhance the opportunities for a wide variety of applicants to obtain licenses; (c) to make the same equity structures available to both C and F Block applicants so that C Block participants will not be required to structure themselves differently in order to participate in the F Block auction; and (d) to continue equity structures that are familiar to the industry and the financial community. Report and Order, para. 24. All of these justifications support application of the C Block affiliation exclusion to the F Block.