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

In the Matter of	)	
	)	WT Docket No. 96-59
Amendment of Parts 20 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 PCS Cross-Ownership Rule	)	GN Docket No. 90-314

DOCKET FILE COPY ORIGINAL

To: The Commission

OPPOSITION OF POCKET COMMUNICATIONS, INC. TO
PETITION OF RADIOFONE, INC. FOR RECONSIDERATION

POCKET COMMUNICATIONS, INC.

William R. Richardson, Jr.

WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Its Attorneys

August 28, 1996

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SUMMARY

Radiofone's proposal to eliminate or modify the CMRS spectrum cap fails to satisfy its substantial burden of demonstrating that the Commission should modify a rule not at issue in this proceeding. The Commission had compelling public interest reasons to establish the 45 MHz cap in order to promote the benefits of diversity and competition to cellular duopolists such as Radiofone, including the express mandate in the 1993 Budget Act to avoid excess concentration of licenses and disseminate those licenses among a wide variety of applicants.

While the Commission is not limited under the public interest standard to simply enforcing the antitrust laws, Radiofone's antitrust argument is also unsupported and unsupportable. As the Justice Department, the Commission, and others have consistently concluded, the relevant product market here is the mass market for real-time, two-way voice services supplied to mobile subscribers -- a market in which the Justice Department has found that "cellular duopolists have substantial market power" unaffected by paging, satellite, or landline phone providers. If anything, the Commission's HHI analysis understates the market power of cellular incumbents because, as Radiofone itself recognizes, market share is "normally based on sales" rather than capacity. The tremendous advantages cellular licensees enjoy in technical expertise, free spectrum unencumbered by microwave incumbents, subscriber penetration, and

established cell sites further consolidate their market position. Cellular licensees have also demonstrated that they are capable of offering services available from PCS providers.

Radiofone's alternative position, that the CMRS spectrum cap should be applied only to wireline cellular companies, misses the point of the spectrum cap to ensure three new 30 MHz broadband CMRS competitors in each market. Radiofone's concerns about discrimination and cross-subsidization by LECs are legitimate but unrelated to this point; the Commission is addressing those concerns through its CMRS interconnection and other proceedings in precisely the way that Radiofone (through its sister company, Freeman Engineering) has previously urged.

Finally, Radiofone's proposal to count C block licenses as F block assets should be rejected. Such a rule change would thwart legitimate reliance interests by small businesses structured so as to be eligible for both C and F block licenses. And it ignores the reality that C block licenses are "assets" that reflect substantial debt obligations to the U.S. government.

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OPPOSITION OF POCKET COMMUNICATIONS, INC. TO
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Pocket Communications, Inc. ("Pocket"), formerly known as DCR Communications, Inc., respectfully files this opposition to the Petition for Partial Reconsideration filed by Radiofone, Inc. ("Radiofone").

Introduction

While Radiofone also raises other issues,[1/] the

[1/] Radiofone urges the Commission to count C Block licenses as assets in the F Block auction. Its sole reason is that "[l]icenses are licenses and they should be counted as assets." Petition at 24. This argument ignores the significant reliance interests of those who obtained financing on the premise that C Block licensees would also qualify for F Block licenses, and the holding of Omnipoint Corp. v. FCC, 78 F.3d 620, 634 (D.C.
(continued...)

principal focus of its petition is its belated challenge to the 45 MHz spectrum cap. That challenge is not addressed to the proposals at issue in this proceeding, mistakenly rests solely on antitrust theory, and is clearly wrong in any event.

I. RADIOFONE'S PETITION FAILS TO CARRY ITS SUBSTANTIAL BURDEN OF SEEKING MODIFICATION WITH RESPECT TO A RULE NOT AT ISSUE IN THIS PROCEEDING.

In all respects relevant here, the Report and Order in this docket is the result of a remand required by Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752 (6th Cir. 1995). That remand involved the cellular-PCS cap (and attribution standards associated therewith). It did not involve the 45 MHz CMRS cap. The Sixth Circuit declined to strike down that cap, because "[t]his issue was not presented to the Court in Radiofone's initial petition." Id. at 765 n.6.

Nor did the Commission propose any changes in the 45 MHz CMRS cap in responding to the Sixth Circuit's remand. Its notice of proposed rulemaking sought comment only "on whether our PCS/cellular cross-ownership rule should be relaxed or retained" in light of "other spectrum caps" already in existence --

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[1/](...continued)
Cir. 1996), that accorded substantial weight to similar reliance interests. Radiofone also completely disregards the Commission's structuring of C Block licenses essentially as loans from the government. These license "assets" are thus associated with significant debt. See Reply Comments of DCR at 5 (Apr. 25, 1996) (citing Fifth Report and Order, 9 FCC Rcd at 5593).

including the 45 MHz CMRS cap. FCC 96-119 (released March 20, 1996), at ¶ 66. In other words, at issue in this proceeding was not whether the CMRS cap should be changed, but whether other ownership caps should be eliminated "in favor of the single 45 MHz CMRS spectrum cap." Id.

The 45 MHz cap was proposed and adopted in a wholly different proceeding. Implementation of Sections 3(n) and 332, 9 FCC Rcd 7988, 8100-17 (1994)("Third Report and Order"). Like multiple ownership rules in other services endorsed long ago by the Supreme Court,[2/] that cap was designed "to promote diversity and competition." Id. at 8100. It recognized "the possibility that mobile service licensees might exert undue market power or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum." Id. Over the oppositions of Radiofone and other cellular incumbents (see id. at 8101 & n.464), the Commission found that market share is most typically measured by revenue, but that even measured by spectrum capacity the potential for unacceptably high concentration required a CMRS cap. Id. at 8103 & nn.473, 477. Aggregation of spectrum, it predicted, would permit firms "unilaterally or in combination [to] include efficient competitors, reduce the quantity of service available to the public, and increase prices to the detriment of consumers." Id. at 8104. Moreover, the Commission

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[2/] See United States v. Storer Broadcasting, 351 U.S. 192 (1956); FCC v. NCCB, 436 U.S. 775 (1978).

was concerned that the absence of a CMRS spectrum cap could undermine the goals of the 1993 Budget Act, "such as the avoidance of excessive concentration of licenses and the dissemination of licenses among a wide variety of applicants." Id.

Although a party to those proceedings, Radiofone never sought judicial review of the CMRS 45 MHz cap adopted therein. The Commission did not propose to change that rule in this proceeding. In the order at issue here, the Commission noted that in its biennial review of regulations under the 1996 Act and in its annual reports on the state of competition in the CMRS market, "we will continue to evaluate the need for the 45 MHz spectrum cap in its present form."[3/] If Radiofone believes that changes in market conditions warrant further review of this rule before that time, it is incumbent on Radiofone to provide evidence in support thereof. It is well established that the Commission "normally possesses a generous measure of discretion respecting the launching of rulemaking proceedings." Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979).[4/] Asking the Commission to eliminate the CMRS cap on reconsideration of its decision to rely on that very rule to eliminate a different rule

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[3/] Amendment of Parts 20 and 24, 11 FCC Rcd 7824, 7876 (1996).

[4/] Accord, Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1223 (D.C. Cir. 1983).

requires at the very least a substantial showing.[5] Radiofone has clearly failed to provide one.

II. RADIOFONE'S ARGUMENT IGNORES THE PRINCIPAL PREMISES OF THE 1993 BUDGET ACT.

Most of Radiofone's argument is premised upon wholly unsupported arguments that essentially disagree with the Commission's definition of the relevant product market and the Commission's spectrum capacity measurement of market share for antitrust purposes. Although wrong for the reasons stated in part III below, this argument largely misses the point.

As noted above, the Commission's CMRS spectrum cap was intended to create new broadband competitors to cellular duopolists like Radiofone. Whether the existing cellular duopoly violates the antitrust laws is not the issue. Even before the 1993 Budget Act, it was well established that the Commission's public interest mandate under the Communications Act is not simply to enforce "the dictates of the antitrust laws."[6] For many years, for example, the Commission has imposed multiple

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[5] See United Church of Christ v. FCC, 911 F.2d 813 (D.C. Cir. 1990)(upholding denial of rulemaking to reinstitute antitrafficking policy "in light of petitioners' failure to provide relevant evidence of changed circumstances").

[6] United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc). See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 223-24 (1943). See also Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 6908, 6913 (1994).

broadcast ownership restrictions to promote competition and diversity even where the antitrust laws may not have prevented multiple ownership.[7] But as the Commission noted here, the 1993 Budget Act contained a special mandate to ensure that CMRS licensing both avoids excessive concentration of licenses and disseminates licenses among a wide variety of applicants. See Amendment of Parts 20 and 24, supra, 11 FCC Rcd at 7873.

The CMRS cap has achieved those purposes by creating three more 30 MHz competitors in every market.[8] Given these special statutory goals, striking the balance by "affirmatively promoting competition as well as preventing anticompetitive

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[7] Contrary to Radiofone's assertions, such rules do not amount to "irrebuttable presumption[s]." Petition at 12. Indeed, they have been upheld by the Supreme Court in reliance upon the availability of waivers given "adequate reasons." United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). The rules are legitimate predictive judgments by the expert agency about the "elusive concepts" of diversity and its effects, and "the possible benefits of competition do not lend themselves to detailed forecast." FCC v. NCCB, 436 U.S. at 796-97, citing FCC v. RCA Communications, Inc., 346 U.S. 86, 96 (1953).

[8] Of course, as the Sixth Circuit suggested, the Commission could have pursued diversity to the ultimate end of refusing to permit cellular incumbents like Radiofone to bid anywhere for 30 MHz PCS licenses. Radiofone can hardly be heard to argue that its failure to do so was arbitrary. But in any event, the Commission's decision was simply a balancing of these diversity concerns against the potential ability of cellular operators "to promote the early development of PCS" in light of their "expertise, economies of scope . . ., and existing infrastructures." Second Report and Order, 8 FCC Rcd 7700, 7744 (1993).

behavior"[9] was well within the Commission's mandate. Radiofone complains that limiting cellular carriers to 20 MHz in their markets is inconsistent with the Commission's prior view that a package of wireless services may require more spectrum than that. But Radiofone already has 25 MHz of valuable spectrum in the 800 MHz band, and it will now be able to obtain an additional 20 MHz of PCS spectrum under the Commission's newly liberalized rules. The Commission's concern about the need for more than 20 MHz was directed at Radiofone's "future competitors." See Petition at 18 (quoting 9 FCC Rcd at 4980-81). Allowing those new entrants sufficient capacity to compete with entrenched incumbents like Radiofone -- who received 25 MHz of cellular spectrum for free over ten years ago -- was certainly well within the Commission's statutory discretion.

III. RADIOFONE'S ANTITRUST ANALYSIS IS UNSUPPORTED BY ANY FACTS AND FUNDAMENTALLY WRONG.

Radiofone's suggestion that the Commission now abandon its established CMRS spectrum cap proceeds in any event from a total lack of any evidentiary support. Radiofone claims, for example, that "other communications services . . . compete with cellular, PCS and SMR" (Petition at 3) -- but it affords no factual support for the extent to which consumers view these other services as substitutes. Similarly, Radiofone disagrees

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[9] Third Memorandum Opinion and Order, 9 FCC Rcd 6908, 6913 (1994).

with measuring market share by MHz (id. at 10) -- but it offers no evidence based upon the kind of revenue data it admits form the traditional measure of market share. Radiofone also asserts that firms with market power "are solicitous of public opinion, and do not want to appear to be price gaugers" (id. at 13) -- without any evidence of the extent to which cellular duopolists compete on price or any other terms.

These failings are particularly significant because Radiofone's antitrust analysis is fundamentally at odds with those of the Department of Justice ("DOJ") and other experts, as summarized in the Commission's 1995 report on competitive market conditions in the CMRS industry. Implementation of Section 6002(B), 10 FCC Rcd 8844 (1995). DOJ's view has been that cellular service is its own relevant market (at least in the absence of broadband PCS service), and that "cellular duopolists have substantial market power." Id. at 8863 & n.114, 8866. This conclusion was buttressed with "extensive quotations from documents" in the files of certain cellular incumbents "that showed consciousness of their own power in the marketplace." Id. at 8867.[10/] Moreover, the Commission's determination to establish competition to cellular incumbents through new PCS entrants has already borne fruit. In the view of leading

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[10/] The Bell companies' evidence of "the success in each market of the [nonwireline] cellular company" may argue for regulatory parity between cellular incumbents, but it hardly disproves DOJ's conclusion that "two firm markets are not particularly competitive." See 10 FCC Rcd at 8867 & n.139.

industry observers, the prospect of new entry by PCS providers has created downward pressure on cellular prices, improved cellular phones and batteries, promoted new cellular data applications and better signal quality, and accelerated cellular conversion to digital technology. Id. at 8851-52 & nn. 33-34.

Radiofone's contrary analysis has three premises. Each is unsupported by evidence, and seriously flawed.

A. Other Services Are No Competitive Check On Cellular Prices.

Radiofone first asserts that cellular and PCS are but two services in a much larger product market. In fact, the Sixth Circuit has already upheld the Commission's ability to treat satellite based services differently. See Cincinnati Bell, supra, 69 F.3d at 765 n.5.[11/] Nor has the Commission held that paging and narrowband services are "significant competitive alternatives" to broadband PCS. Petition at 9. Indeed, as BellSouth's petition for reconsideration makes clear, in a number of recent proceedings -- on interconnection and resale, number portability, enhanced 911 service, and CMRS roaming -- the Commission has recognized that these services provide only

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[11/] As the Commission found in the Third Report and Order, satellite service is more likely to be complementary to, not competitive with, broadband service because it offers "ubiquitous, albeit more expensive, service." 9 FCC Rcd at 8111-12.

peripheral competition to broadband CMRS service.[12] Only broadband CMRS providers "compet[e] in the mass market for real-time, two-way voice services."[13]

Following review of a comprehensive record, the Commission has concluded with respect to paging and landline service that "the degree of cross-price elasticity [with cellular] has not been established."[14] Simply asserting without any evidence that "some" cellular subscribers will shift to these very different services "if the [price] difference widens" by some unspecified extent (Petition at 6) does not demonstrate substitutability. As the Commission concluded in the Third Report and Order, a variety of parties have agreed that these services are not in the same market as broadband CMRS, particularly in light of their limited capacity. 9 FCC Rcd at 8106 & n.481, 8111.[15]

12/ Petition for Reconsideration (July 30, 1996).

13/ Interconnection and Resale Obligations Pertaining to CMRS, FCC 96-284 (released August 15, 1996), at ¶ 12. See also Enhanced 911 Emergency Calling Systems, FCC 96-264 (released July 26, 1996), at ¶¶ 81-83.

14/ Implementation of Sections 3(n) and 332, 9 FCC Rcd 1411, 1470 (1994).

15/ Radiofone cites the Commission's statement in the Third Report and Order that "reclassified private services" can compete with "other existing commercial services." Petition at 7-8, quoting 9 FCC Rcd at 8026. This was a conclusion that some private services should be reclassified as CMRS. Thus, private carrier paging competes with common carrier paging, and wide area SMR competes with cellular and broadband PCS. Id. See also Motorola, Inc., 10 FCC Rcd 7783, 7786 n.47 (1995) (wider product

(continued...)

Equally unsupported is Radiofone's assertion that wireline telephone service is "[a]n important and obvious competitive service" for broadband CMRS, apparently because pay telephones are more convenient than they used to be. Petition at 5. Asserting that broadband CMRS service is purchased as an alternative to "complete" reliance on wireline services (id.) proves nothing more than the truism that cellular subscribers subscribe to cellular as well as wireline service. Whether or not "a substantial portion of the population chooses reliance on pay telephones" (id.) similarly does not prove anything about the substitutability of these services; it is consistent with the obvious fact that cellular service is currently priced so high that only 10% of consumers presently have it. See Implementation of Section 6002(B), supra, 10 FCC Rcd at 8845. In fact, contrary to Radiofone's suggestion (Petition at 6), Congress and the Commission have both concluded that CMRS providers are not to be treated as local exchange carriers under the 1996 Act.[16]

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[15] (...continued)
market in light of wide variety of Nextel's planned offerings); Nextel Communications, Inc., 10 FCC Rcd 3361, 3364-65 (1995) (relying on 45 MHz cap to approve Nextel acquisition with respect to 800 MHz SMR).

[16] See Implementation of Local Competition Provisions of the Telecommunications Act of 1996, FCC 96-325 (released Aug. 8, 1996), at ¶¶ 1001-06 ("no evidence that wireless local loops have begun to replace wireline loops for the provision of local exchange service").

B. Measuring Market Share by Spectrum Capacity Simply Understates Cellular Firms' Market Share.

Radiofone asserts that spectrum capacity is the wrong measure for market share, which is "normally based on sales." Petition at 10. The Commission itself agreed with this point in the Third Report and Order,[17] as did Pocket in its reply comments:

> "[I]t is not simply the amount of spectrum any one licensee controls that is relevant: cellular operators currently control large numbers of subscribers, and this is the relevant point in terms of the possibility of impeding the entry of new participants. Cellular duopolists currently control 100% of a not very competitive wireless market, command subscriber loyalty and name recognition, have no incentive to compete on price, technology or service in order to attract subscribers, and are well positioned to exclude any new entrant who tries to inject such competition."[18]

But Radiofone provides no data concerning its own sales revenue. Instead, it argues that because new PCS entrants will be "infan[t]" competitors, the Commission should disregard the sales data of cellular duopolists. Petition at 10. Particularly in light of the substantial entry barriers faced by new PCS competitors (including PCS auction prices, microwave relocation expenses, the cellular marketing headstart, and greater buildout

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[17] See 9 FCC Rcd at 8103 n.473.

[18] Reply Comments of DCR Communications, Inc. at 11 (emphasis in original).

costs for increased cell sites), this is a complete non sequitur. Pocket agrees that spectrum capacity does not accurately reflect cellular incumbents' market share, but that measure only understates their market power.

C. There are No "Other Competitive Influences."

In the final analysis, Radiofone's argument boils down to a complaint that those with market power -- such as a monopoly daily newspaper -- will not abuse it because they are "solicitous of public opinion" (Petition at 13), that cellular companies will be technological dinosaurs without obtaining PCS licenses in their own home markets, and that while their "technical expertise, customer bases, marketing operations, and antenna and transmitter sites" may enable them to bid higher at PCS auctions in order to suppress competition, these "efficiencies" are "not something to be feared," but to be "welcomed." Id. at 16. It is these arguments, and not the Commission's HHI analysis, that "stan[d] antitrust law on its head." Id.

Radiofone's assertion that cellular firms "may ultimately be left holding the remnants of an obsolete technology" (Petition at 14) consists of nothing but crocodile tears. As the Commission found,[19] it is cellular incumbents who have the technical expertise, the marketing headstart, the

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[19] See 11 FCC Rcd at 7873.

free spectrum unencumbered by microwave incumbents, and the established cell site leases.

Moreover, the argument about cellular licensees' "inability to retain customers by offering technological improvements" (id.) has clearly been overtaken by events. The day after Radiofone filed its petition, the Commission granted cellular licensees "maximum flexibility to provide fixed or mobile services."[20] They already had the ability to provide auxiliary services premised on the use of alternative cellular technologies, and the Commission revised its cellular rules three years ago "to state explicitly that cellular licensees may provide PCS-type services without prior notification, such as wireless PBX, data transmission and telepoint service."[21] This change was designed to allow cellular carriers "to respond more effectively to competition from PCS providers."[22]

Thus, Radiofone's protestations to the contrary notwithstanding, the Commission has found that -- precisely because of the impending PCS competition guaranteed by the spectrum cap -- cellular firms have added data and facsimile communications, begun the transition to digital technology,

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[20] Amendment of the Commission's Rules to Permit Flexible Service Offerings in re CMRS, FCC 96-283 (released Aug. 1, 1996).

[21] Second Report and Order. 8 FCC Rcd 7700, 7747 (1993).

[22] Id. at 7742.

improved signal quality, and more generally "beg[un] to offer packages that resemble expected PCS offerings."[23] With all of their other advantages, cellular incumbents hardly will be handicapped in their ability to compete simply because they cannot acquire additional 30 MHz PCS licenses in their home markets.

IV. RADIOFONE'S NEW PROPOSAL TO PROVIDE ITSELF WITH A LEG UP ON ITS WIRELINE CELLULAR COMPETITOR IS INCONSISTENT WITH THE PREMISES OF BOTH THE 1996 ACT AND THE CMRS CAP.

As an alternative, Radiofone now proposes that the 45 MHz spectrum cap apply only to local exchange carriers. Petition at 18-20. This proposal is flatly inconsistent with Radiofone's prior views, which were relied upon by the Commission in rejecting challenges to the eligibility of LECs for PCS licenses. As Radiofone notes, almost all LECs already "hol[d] . . . cellular licenses" in their markets. Id. at 19. Yet Radiofone's prior view was that "LECs should be eligible for PCS licenses" if the Commission applies "appropriate safeguards . . . to control the anticompetitive potential of common ownership of

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[23] Implementation of Section 6002(B), 10 FCC Rcd 8844, 8850-52 (1995). See also Amendment of Parts 20 and 24, supra, 11 FCC Rcd at 7874 & n.308 ("cellular carriers have been rapidly implementing digital and other new technologies").

the LEC and a PCS system" -- e.g., "reasonable and cost-based interconnection."[24]

That is precisely the approach that the Commission took in its PCS rules. Having urged the Commission to do so, Radiofone is in no position to argue otherwise now. Indeed, this has been the central premise of the Telecommunications Act of 1996 -- to promote competition by permitting LEC entry into other services subject to appropriate Commission safeguards. By including CMRS interconnection arrangements within the purview of those safeguards, and implementing more extensive CMRS interconnection requirements in its August 8 order, the Commission has sought to maintain the competitive benefits of permitting LECs to provide PCS service, while preventing them from discriminating against other CMRS providers.

The Commission is also currently considering what additional safeguards for LEC provision of PCS are appropriate, in light of the Cincinnati Bell requirement that it reexamine whether the BOC separate subsidiary requirement for cellular service continues to serve as "a necessary regulatory restriction." 69 F.3d at 768. In that proceeding, the Commission specifically seeks comment on the effect of the CMRS

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[24] Amendment of the Commission's Rules to Establish New Personal Communications Services, 8 FCC Rcd 7700, 7750 (1993) (citing comments of Freeman Engineering). Freeman Engineering is Radiofone's "sister company," which it cites as demonstrating its "interest in innovation." Petition at 13-14.

spectrum cap rules adopted here on the appropriate safeguards for LEC participation in CMRS service.[25] All of these proceedings are designed to do precisely what Radiofone's sister company earlier urged the Commission to do.

More fundamentally, however, the need for a CMRS cap has nothing to do with the special advantages of owning the local landline network. It relates to the need to ensure viable new entrants to the duopoly cellular market structure now in place. Radiofone has failed to demonstrate why ensuring that competition is not within the Commission's discretion.

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[25] Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provisions of Commercial Mobile Radio Services, FCC 96-319 (released Aug. 13, 1996), at ¶ 114.

Conclusion

For the foregoing reasons, Radiofone's petition should be denied.

Respectfully submitted,

POCKET COMMUNICATIONS, INC.

William R. Richardson, Jr.

WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Its Attorneys

August 28, 1996

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 1996, a copy of the foregoing Opposition of Pocket Communications, Inc. to Petition of Radiofone, Inc., for Partial Reconsideration was served by first class mail, postage prepaid, to the following:

Ashton R. Hardy
Hardy and Carey, L.L.P.
111 Veterans Boulevard - Suite 255
Metairie, LA 70005

William R. Richardson, Jr.