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

AUG 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

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OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
TO THE PETITION FOR RECONSIDERATION
OF OMNIPOINT CORPORATION

The Cellular Telecommunications Industry Association ("CTIA")¹ hereby submits its Opposition to the Petition for Reconsideration filed by Omnipoint Corporation in this proceeding.²

Omnipoint objects to the Commission's well-reasoned and procompetitive decision to revisit and revise its cellular-

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including cellular, personal communications services, enhanced specialized mobile radio, and mobile satellite services.

² Omnipoint seeks reconsideration of the June 24, 1996 Report and Order, WT Dkt. No. 96-59, GN Dkt. No. 90-314, FCC 96-278, 61 Fed. Reg. 33859 (July 1, 1996) ("Order").

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PCS cross-ownership restriction in light of the remand and opinion of the Sixth Circuit Court of Appeals in Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752 (6th Cir. 1995). As is typical of such petitions, Omnipoint challenges the Order by taking issue with a handful of narrow issues, while ignoring the broader record on which the entire order solidly rests.³

Omnipoint does not take issue with the Commission's decision to retain the 45 MHz CMRS spectrum cap originally adopted in the CMRS Third Report and Order to "discourage anti-competitive behavior while at the same time maintaining incentives for innovation and efficiency."⁴ Rather, Omnipoint objects to the Commission's decision to remove the 10 MHz restriction on in-region cellular providers' acquisition of PCS spectrum.

As the Sixth Circuit found, there was no economic support for the cellular/PCS spectrum cap.⁵ On the other hand, as CTIA and others demonstrated, the 45 MHz CMRS

³ For example, on April 15, 1996, CTIA filed Comments supporting the Commission's efforts to revisit the cellular-PCS cross-ownership restriction. CTIA's Comments included a lengthy economic analysis, including "An Antitrust Analysis of the Market for Mobile Telecommunications Services" prepared for CTIA by Charles River Associates. Rather than burden the already voluminous record, CTIA requests that its April 15 Comments, and the Charles River Associates analysis be incorporated by reference into this phase of the proceeding.

⁴ CMRS Third Report and Order, GN Dkt. 90-314, 9 FCC Rcd at 8105.

⁵ Cincinnati Bell, 69 F.3d at 763.

spectrum cap that remain a part of the Commission's rules is more than sufficient to prevent undue market concentration and the noncompetitive conditions that result from such concentration. As the Order notes, the 45 MHz CMRS spectrum cap: (1) will result in a market that has a worst-case HHI below 1,900, a tremendous improvement over a two-or three competitor market; (2) establishes a market structure that guarantees at least six competitors which dramatically reduces the risk of coordinated interaction, and the anticompetitive consequences of such agreements; and (3) opens up more opportunities to enter the broadband CMRS market.⁶ Moreover, as CTIA previously observed in its April 15, 1996 Comments, there may be significant efficiencies associated with removal of the cellular-PCS cross-ownership ban that will benefit consumers.⁷

Against this background, Omnipoint objects to the Commission's application of the 1992 Department of Justice-Federal Trade Commission Horizontal Merger Guidelines to its analysis of the competitive effect of this revision to the Commission's PCS rules. As a threshold matter, the Merger Guidelines must be recognized for what they are: a description of the analysis applied by antitrust agencies under section 7 of the Clayton Act. While the Merger Guidelines provide valuable insights into how to measure

⁶ Order at ¶ 103, 11 FCC Rcd 7824, 7874 (1996).

⁷ It is well established that the nation's antitrust laws protect competition, not competitors. See, United States v. Brown Shoe, 370 U.S. 294, 320 (1962).

market concentration for merger analysis, they are not binding on the FCC in this rule making proceeding); they are not even binding on the antitrust agencies or Federal Courts in a merger case. This is especially true since this matter speculatively looks to the future market structure of an industry characterized by dynamic growth and technical innovation. However, as the FCC staff found, the PCS rules do pass muster under the Merger Guidelines, and they pass even without taking into consideration the additional capacity PCS licensees obtain by deploying more efficient digital technologies -- technologies that promise six times or more capacity than the installed analog systems used by cellular carriers and their customers.

The gratuitous swipes Omnipoint takes at cellular carriers can and should be dismissed. Spectrum had to be purchased by many cellular carriers in private transactions, while PCS spectrum was sold at public auction. Moreover, the FCC's rules permit out of region cellular carriers to participate in PCS, which underscores the frailties surrounding Omnipoint's concerns about improper cross-subsidies between competitive businesses. The other concerns may actually benefit consumers by permitting PCS licensees to capture efficiencies and offer more attractive, lower priced PCS services.

CTIA fully supports the Commission's decision to remove the 10 MHz cellular-PCS spectrum cap, and urges the Commission to reject the Omnipoint petition.

Respectfully submitted,



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August 28, 1996