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FEDERAL COMMUNICATIONS COMMISSION
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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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REPLY TO OPPOSITION OF POCKET COMMUNICATIONS, INC.

Radiofone, Inc. (Radiofone), by its attorneys, and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby replies to the Opposition of Pocket Communications, Inc. (Pocket) to Radiofone's Petition for 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 [hereinafter Report and Order]. In its Petition, Radiofone requested the Commission to modify the 45 MHz spectrum cap contained in Section 20.6 of the Commission's Rules so that cellular carriers that do not provide wireline services in their cellular service areas would be able to obtain 30 MHz of broadband PCS spectrum in their cellular service areas. Radiofone demonstrated that this modification would be consistent with the Commission's stated goals and the mandate of Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752 (6th Cir. 1995) [hereinafter Cincinnati Bell I], and would present a more realistic approach to the issue of horizontal market concentration. Radiofone also requested the Commission to consider Block C licenses as assets for purposes of the F Block auction. In its Opposition, Pocket presents a flawed antitrust analysis concerning the 45 MHz spectrum cap, and offers no new arguments concerning the counting of C Block licenses as assets.

I. Pocket's Antitrust Analysis Concerning the 45 MHz Spectrum Cap Is Flawed

Pocket makes several assertions concerning Radiofone's antitrust analysis, but those assertions are flawed.

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First, Pocket asserts that Radiofone's analysis of market definition is inconsistent with the analysis of the Department of Justice ("DOJ") because "DOJ's view has been that cellular service is its own relevant market." Pocket Opp'n at 8. This argument supports Radiofone's position. If cellular is its own relevant market, then it makes no sense to calculate market shares on a combined cellular, PCS and SMR market. On the contrary, if cellular is its own market, then the acquisition of a PCS license by a cellular provider does not increase concentration in either the cellular or PCS markets. The primary basis for the 45 MHz spectrum cap is eviscerated if cellular is a market of its own.

Second, Pocket argues at length that CMRS is properly a separate market from the other communications services discussed in Radiofone's Petition. Pocket Opp'n at 9-11. At bottom, however, all Pocket really argues is that the various communications services are not perfect substitutes -- a premise Radiofone does not dispute. Products or services need not be perfect substitutes to be in the same market. Further, even if the services are in separate markets, they still provide sufficient competition to limit market power. Radiofone Pet. at 4-5. In this instance, the services excluded from the market by the Commission are not perfect substitutes for cellular, PCS or SMR. Nonetheless, they compete with them for various segments of the consuming public. As a result, either they must be included in the market, or they must be taken into account in evaluating the significance of market concentration. The Commission did neither of these. The Commission found substantial competition, in this and other proceedings, but completely ignored the impact of that competition. Radiofone Pet. at 7-8.

Third, Pocket incorrectly states that Radiofone has contradicted itself by objecting to capacity as a measure of market shares because sales are the normal measure. Pocket Opp'n at 12. Radiofone made no such argument. Radiofone <u>agreed</u> with the Commission that capacity is a better measure of shares than sales, but disagreed with the use of spectrum

allocation as a proxy for capacity. Radiofone Pet. at 9-11. Pocket offers no support for the use of spectrum allocation as a valid measurement of capacity.[1]

Fourth, Pocket criticizes Radiofone for not disclosing its own sales revenue. Pocket Opp'n at 12. This argument illustrates Radiofone's point. There may hypothetically be a market where a cellular carrier has such a large market share that its acquisition of a 30 MHz PCS license would injure competition. That is a decision that the Commission may address on a market-by-market basis under the authority in 47 U.S.C. § 314. Radiofone does not object to a market-by-market analysis of competitive effects. What Radiofone objects to is a blanket prohibition covering all markets. As to the Commission's blanket prohibition, Radiofone's sales in its markets are utterly irrelevant.

Fifth, Pocket asserts that there are barriers to entry. Pocket Opp'n at 13. However, they are counterbalanced by the extensive regulatory control which helps assure competitive functioning.

Finally, Pocket undertakes to dictate the services which Radiofone should provide using its cellular spectrum. Pocket Opp'n at 13-15. However, it is not Pocket's place to decide how Radiofone will use the frequencies to which it is assigned. Thus, Pocket's assertions concerning the use of cellular frequencies should be dismissed.

II. Radiofone's Proposal Is a Less Restrictive Alternative

Pocket erroneously asserts that Radiofone's Petition is procedurally defective. None of the reasons Pocket offers in support of its contention has any merit.

Pocket asserts that the Notice of Proposed Rulemaking in this proceeding addressed changes to the PCS/cellular cross-ownership rule. Pocket makes a logical leap to conclude that Radiofone therefore may not request reconsideration of the 45 MHz spectrum cap. Pocket Opp'n at 2-5. However, as Radiofone demonstrated in its Comments in this proceeding, the

[1] Even if spectrum allocation were a valid measure of capacity, it appears that additional spectrum will be made available for PCS use, thereby lowering the apparent HHI. See Teledisc Asks FCC to Freeze 18-GHz Proceeding, Communications Daily, Aug. 29, 1996, at 3.

Commission's proposed changes to the PCS/cellular cross-ownership rule and the 40 MHz PCS cap, and the Sixth Circuit's decision in Cincinnati Bell I all necessitated a review of the 45 MHz spectrum cap. Additionally, the Commission re-justified the 45 MHz spectrum cap in the Report and Order. There, the Commission stated that it was "maintaining" and "continu[ing]" the 45 MHz spectrum cap. Report and Order, paras. 94-95. Pocket totally ignores these statements in the Report and Order. Thus, contrary to Pocket's claims that Radiofone is requesting the Commission to institute a rulemaking, Pocket Opp'n at 4-5, Radiofone is simply requesting reconsideration of a rule that the Commission decided to retain and re-justified in the Report and Order. Radiofone's request to reconsider the 45 MHz spectrum cap therefore is procedurally proper.

Additionally, Radiofone specifically noted that its proposal is a "less restrictive alternative" that the Commission failed to consider when it re-justified the 45 MHz spectrum cap. The Commission must consider such less restrictive alternatives pursuant to Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 48 (1983) (alternatives should be addressed), and Telocator Network of America v. FCC, 691 F.2d 525, 537 (D.C. Cir. 1982) (demanding FCC to consider reasonably obvious alternatives). See also Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 761 (6th Cir. 1995) (FCC must consider less restrictive alternatives).

Pocket also erroneously asserts that Radiofone's affiliate, Freeman Engineering Associates, Inc. (Freeman), previously stated that local exchange carriers should be eligible for PCS licenses. Pocket Opp'n at 15-16. Simply put, Freeman said no such thing. Freeman's comments addressed interconnection for PCS. Freeman Comments, Docket No. 90-314, filed Nov. 9, 1992, at 7-8. Freeman requested the Commission to require cost-based rates for interconnection. Id. at 8. In the alternative, Freeman "urged that LEC's be barred from providing PCS services in their own landline areas, so that discrimination against the non-LEC provider will not take place." Id. (emphasis added). Thus, Freeman's comments reflect

that Freeman, like Radiofone, is concerned about the possibility for anti-competitive behavior of wireline carriers holding cellular and PCS licenses.[2]

In sum, the Commission correctly decided to review the 45 MHz spectrum cap in the Report and Order. Radiofone's proposal simply requests the Commission to consider an alternative to the 45 MHz spectrum cap that is less restrictive.

III. Pocket's Assertions Concerning the Counting of C Block Licenses as Assets Have No Merit

Pocket responds in a footnote to Radiofone's request that C Block licenses be counted as assets for F Block purposes. Pocket Opp'n at 1 n.1. Pocket's response is no more than a reiteration of arguments it previously made in this proceeding, and a repetition of statements made by the Commission in the Report and Order. Thus, Pocket's response should be dismissed.

CONCLUSION

Pocket's assertions concerning Radiofone's request to modify the spectrum cap do nothing to undercut Radiofone's competitive analysis and its other justifications for modifying the 45 MHz spectrum cap. Its footnote opposition to counting C Block licenses as assets was a repetition of arguments already heard by the Commission.

For the foregoing reasons, Radiofone respectfully reiterates its request that the Commission: (a) modify the 45 MHz spectrum cap so that cellular carriers, that do not provide wireline service in their cellular service areas, may obtain, or otherwise have an attributable interest in, 30 MHz of PCS spectrum; (b) eliminate the 49% equity exception for the F Block; (c) adopt the C Block affiliation exclusion for the F Block; and (d) count C Block licenses as assets for F Block eligibility purposes.

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[2] Pocket notes Freeman's interest in innovation. Pocket Opp'n at 15 n.16. Radiofone's history of innovation in wireless services is described in Attachment A.

Respectfully submitted,
RADIOFONE, INC.

By: _____

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Attachment A

RADIOFONE
DECADES OF GROWTH, INNOVATION AND PROGRESS IN LOUISIANA

1958	Larry and Don Garvey start the first beep paging service in New Orleans and only the second in the country.
1959	Garvey's pioneer the second selective signaling system in the country which allows individual paging receivers to receive a unique beep.
1960	Mobile telephone service is added to paging service and the name Radiofone is born.
1968	Radiofone is first RCC in country to initiate direct dial paging which allows beepers to be dialed from the telephone network.
1970	Radiofone installs one of the earliest direct dial tone and voice systems in the country.
1972	Radiofone establishes the first IMTS direct dial mobile telephone system in the Southeast.
1976	Radiofone installs the first fully automatic trunked portable telephone system in the United States with number identification and call billing.
1978	Radiofone installs second wide area system in the United States allowing customers to have local numbers in various cities without the expense of long distance charges.
1981	Radiofone forms a manufacturing subsidiary to manufacture fully automatic mobile telephone switching equipment.
1984	Radiofone installs the first nonwireline cellular telephone system in the Southeastern United States. Radiofone is the only cellular system in the U.S. to be built as originally engineered.
1986	The Small Business Administration of New Orleans selects Radiofone to receive "The Most Innovative Company in the State of Louisiana" Award for 1985.

CERTIFICATE OF SERVICE

I, Ashton R. Hardy, a member of the firm of Hardy and Carey, L.L.P., certify that on this 11th day of September, 1996, I have caused one copy of the foregoing to be sent via first class U.S. Mail, postage prepaid the following:

William R. Richardson, Jr.
Wilmer, Cutler & Pickering
2445 M Street, NW
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Ashton R. Hardy