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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

WT Docket No. 96-59

DOCKET FILE COPY ORIGINAL

GN Docket No. 90-314

REPLY TO OPPOSITION OF BELL ATLANTIC NYNEX MOBILE, 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 to Petitions for Reconsideration filed by Bell Atlantic NYNEX Mobile, Inc. (BANM) to the extent that it opposes 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, or otherwise have an attributable interest in, 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.

BANM's Opposition supports Radiofone's demonstration that a cellular carrier that obtains 30 MHz of PCS spectrum and that is not the wireline service provider may not behave anti-competitively. BANM's Opposition, however, provides regulatory parity arguments that are irrelevant to Radiofone's proposal and are inconsistent with BANM's position on the 45 MHz spectrum cap. BANM further erroneously asserts that Radiofone's Petition is procedurally defective. However, Radiofone's proposal simply presents the Commission with a less restrictive alternative to the 45 MHz spectrum cap, and court precedent requires the

Commission to consider such alternatives. In short, BANM's Opposition demonstrates its opportunism in opposing rule changes that would have made PCS opportunities available to Bell Atlantic and NYNEX if they had not made the precipitous decision to merge.

These issues are discussed below.

I. **Radiofone's Proposed Change to the 45 MHz Spectrum Cap Distinguishes Between Wireline Carriers and Non-wireline Carriers**

BANM notes that the Block B cellular licensee ultimately may not be a wireline carrier and that the Block A cellular licensee may be a wireline carrier. BANM essentially argues that Radiofone's proposed change to the 45 MHz spectrum cap should not be based on a Block A/Block B distinction. BANM Opp'n at 8-9. Radiofone agrees. Radiofone's requested change to the 45 MHz spectrum cap should distinguish between cellular carriers who provide wireline service in their cellular service areas, and cellular carriers who do not provide wireline service in their cellular service areas. To the extent that Radiofone's reference to "non-wireline cellular carriers" may be interpreted to refer only to Block A licensees, Radiofone clarifies that its references to "non-wireline cellular carriers" means cellular carriers who are not wireline carriers. Thus, under Radiofone's proposal, cellular carriers who are also wireline carriers in their cellular service areas would be subject to the 45 MHz spectrum cap, and cellular carriers who are not wireline carriers in their cellular service areas would be able to obtain, or otherwise have an attributable interest in, 30 MHz of PCS spectrum in their cellular service areas. Thus, for example, a wireline carrier that no longer holds a cellular license would be able to obtain 45 MHz of PCS spectrum, while an entity that is not a wireline carrier and that obtains a cellular Block B license from a wireline carrier would not be hampered by the spectrum cap, under Radiofone's proposal. In short, under Radiofone's proposal, it is irrelevant whether a cellular license is a Block A license or a Block B license; the relevant question is whether the holder of the license is a wireline carrier in the cellular service area.

BANM asserts that Radiofone's proposal is contrary to the Commission's decision that the wireline/non-wireline distinction between the cellular frequencies was for initial licensing

purposes only. BANM Opp'n at 8-9 & n.14. However, that assertion is inapposite. Radiofone's proposal has nothing to do with the licensing for and operation of the relevant cellular systems. Radiofone's proposal relates only to the appropriate spectrum aggregation limits the Commission should place on entities that hold the cellular licenses. In fact, the benefits of Radiofone's proposal can be achieved without drafting rules that focus on cellular carriers. Radiofone's proposed spectrum aggregation limits can just as easily be expressed in terms of wireline carriers (i.e., telephone companies). Such a formulation of the rules would provide that wireline carriers that hold attributable interests in cellular licenses in their telephone service areas are subject to the 45 MHz spectrum cap in those cellular service areas, whereas other entities may obtain, or otherwise hold attributable interests in, 30 MHz of PCS spectrum. Thus, contrary to the suggestion of BANM, Radiofone's proposal does not target cellular licenses or wireline services. Instead, it appropriately focuses on the competitive concerns engendered by the combination of the two.

II. Non-Wireline Cellular Carriers with 30 MHz of PCS Spectrum Cannot Exercise Market Power

BANM makes an admission that supports Radiofone's position by rebutting Omnipoint's argument that the Commission should revert to the previous prohibition of cellular/PCS cross-ownership. BANM states: "The Commission correctly found that given a cellular carrier's ability to acquire at most only up to 20 MHz out of the 120 MHz of total PCS spectrum, cellular carriers cannot capture enough market share to have any plausible anti-competitive effect." BANM Opp'n at 5. Radiofone seeks only the ability to acquire 30 MHz of PCS spectrum. Surely, if acquisition of 20 MHz would leave a cellular provider (even one that offers wireline service in its cellular service area) with so little market power that there could not be any plausible anti-competitive effect, it cannot seriously be argued that acquisition of 30 MHz would give a non-wireline cellular carrier anti-competitive market influence that would warrant a blanket prohibition preventing such a carrier from obtaining 30 MHz of PCS spectrum.

III. BANM's Regulatory Parity Arguments Are Inapposite

BANM next argues that Congressional and Commission policy requires "regulatory parity among similarly situated CMRS providers." BANM Opp'n at 9-10. This argument founders for two reasons. First, Section 332 of the Communications Act of 1934, as amended, requires only: (a) that those services classified as CMRS must be treated as common carriers subject to portions of Title II of the Communications Act; and (b) as interpreted by the Commission in the Second Report and Order, 9 FCC Rcd. 1411, 1418 (1994), that the technical requirements applicable to providers of substantially similar common carrier services must be comparable. Regulatory parity does not require that entities who operate cellular and wireline systems in the same area be regulated the same as entities who operate only cellular systems. Because Radiofone's proposal distinguishes among the entities that operate cellular systems and does not affect the technical and operational regulations applicable to cellular systems, Radiofone's proposal is consistent with regulatory parity goals.

Second, even if we assume, for the sake of argument, that BANM is correct in its interpretation of the term "regulatory parity," it would not apply to wireline versus non-wireline cellular carriers because they are not similarly situated. It is undisputed that wireline carriers that also provide cellular service have competitive advantages that make it rational to impose a limitation on them not equally imposed on non-wireline cellular providers. That is, the spectrum cap should not be applied to exclude competition except to the minimum extent needed to prevent injury to competition. Radiofone has shown that common cellular and PCS ownership is unlikely to injure competition; thus, the FCC should not impose an across-the-board prohibition. Common wireline, cellular and PCS ownership likely will injure competition; a narrowly focused spectrum cap to prevent such injury is not unjustified discrimination.

Finally, BANM's assertions concerning regulatory parity are inconsistent with its support of the 45 MHz spectrum cap. BANM Opp'n at 7. Under the 45 MHz spectrum cap, SMR providers that have cellular licenses can obtain almost 20 MHz of PCS spectrum, whereas SMR providers that do not have cellular licenses can obtain almost 45 MHz of PCS spectrum.

If Radiofone's proposal unlawfully discriminates among cellular carriers, as BANM suggests, then the 45 MHz spectrum cap also unlawfully discriminates among SMR providers.¹ BANM cannot have it both ways; it cannot oppose Radiofone's proposal on discrimination grounds while supporting the 45 MHz spectrum cap.

In sum, regulatory parity goals are not inconsistent with Radiofone's proposed change to the 45 MHz spectrum cap. BANM's assertions in this regard must be dismissed.

IV. Radiofone's Proposal Is a Less Restrictive Alternative

BANM erroneously asserts that Radiofone's Petition for Partial Reconsideration is procedurally defective. Neither of the reasons BANM offers in support of its contention has any merit.

First, BANM asserts that the Notice of Proposed Rulemaking in this proceeding addressed changes to the PCS/cellular cross-ownership rule. BANM makes a logical leap to conclude that Radiofone therefore may not request reconsideration of the 45 MHz spectrum cap. BANM Opp'n at 8. However, as Radiofone demonstrated in its Comments in this proceeding, the 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 decided to "maintain" and "continue" the 45 MHz spectrum cap, and provided new justification for it in the Report and Order. Thus, Radiofone's request to reconsider the 45 MHz spectrum cap is procedurally proper.

Second, BANM erroneously asserts that Radiofone's proposal cannot be advanced in a petition for reconsideration. However, Radiofone specifically noted that its proposal is a "less restrictive alternative" that the Commission failed to consider. The Commission must consider such less restrictive alternatives pursuant to Motor Vehicle Mfrs. Ass'n v. State Farm Mutual

¹ Just as the present cap assumes that PCS and cellular will compete, it must be revised to reflect that PCS will compete with wireline local loop service. See MCI Buys PCS Time from NextWave in Major Wireless Move, Communications Daily, Aug. 27, 1996, at 2 (stating that MCI is buying 10 billion minutes of airtime and will attempt to provide wireless local loop services).

Auto. Ins. Co., 463 U.S. 29, 48 (1983), and Telocator Network of America v. FCC, 691 F.2d 525, 537 (D.C. Cir. 1982). See also Cincinnati Bell I, 69 F.3d at 761 (FCC must consider less restrictive alternatives).

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.

V. BANM's Opposition Is Pure Opportunism

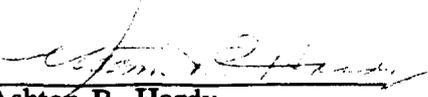
BANM's Opposition shows that Bell Atlantic and NYNEX regret their decision to merge. If the two entities had remained separate, and if Radiofone's proposed change to the 45 MHz spectrum cap were granted, Bell Atlantic would be able to obtain cellular and 30 MHz PCS licenses in New York, and NYNEX would be able to obtain cellular and 30 MHz PCS licenses in Maryland. Now that BANM cannot take advantage of Radiofone's proposal, it opposes the proposal in order to limit competition. BANM's Opposition therefore is nothing more than pure opportunism. The Commission's decision on Radiofone's Petition should not be affected by the fact that Bell Atlantic and NYNEX made the precipitous business decision to merge before the Commission issued its decision on remand from Cincinnati Bell I.

CONCLUSION

BANM'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.

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 services 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.

Respectfully submitted,
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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:

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