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Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of the Commission's Rules)
to Establish Part 27, the Wireless)
Communications Service ("WCS"))

GN Docket No. 96-228

To: The Commission

PETITION FOR RECONSIDERATION

BellSouth Corporation ("BellSouth"), by its attorneys, hereby petitions the Commission to reconsider its *Report and Order*, FCC 97-50 (released February 19, 1997) ("*WCS Order*"), in the above-captioned proceeding.¹ For the reasons set forth below, BellSouth requests that the Commission reconsider its decision not to count any holdings of Wireless Communications Service ("WCS") spectrum against the Commercial Mobile Radio Services ("CMRS") spectrum cap.

I. THE COMMISSION SHOULD RECONSIDER ITS DECISION NOT TO COUNT THE HOLDINGS OF WCS SPECTRUM AGAINST THE CMRS SPECTRUM CAP

In the *WCS Order*, the Commission concluded that it will not count the holdings of WCS spectrum at 2.3 GHz against the CMRS spectrum cap. According to the Commission, the decision was based upon a balancing of the potential benefits and costs. Specifically, the Commission found

¹ On March 31, 1997, the Commission announced that it has adopted a *Memorandum Opinion and Order* amending certain of its rules in response to two petitions for expedited reconsideration in this proceeding. See *Wireless Telecommunications Action — FCC Acts on Petitions for Reconsideration of WCS Report and Order and On Request for Stay of April 15th WCS Auction* (Rpt. No. WT 97-15), *FCC News Release*, Mar. 31, 1997 ("*News Release*").

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that applying the CMRS spectrum cap may exclude many existing CMRS providers to the detriment of consumers who might otherwise benefit from the economies of scope these providers would bring.² Although the Commission also concluded that application of the cap to WCS spectrum is not necessary to guard against excessive concentration in the CMRS market or the accumulation of undue market power since the out-of-band emission limits will make mobile operations in the WCS spectrum technically infeasible,³ this conclusion seems less viable in light of the Commission's recent announcement that it will now allow "considerably more permissive" out-of-band emission limits for WCS mobile operations.⁴

BellSouth reiterates the position raised in its comments in this proceeding that to the extent that WCS spectrum is used to provide CMRS, which seems even more likely as the result of the Commission's newly adopted more permissive emission limits for WCS mobile operations,⁵ that spectrum should be counted towards the 45 MHz CMRS spectrum cap. Accordingly, BellSouth believes the Commission should reconsider its decision not to count the holdings of WCS spectrum against the CMRS spectrum cap. As noted previously by the Commission, the CMRS spectrum cap was imposed out of concern that "excessive aggregation [of spectrum] by any one or several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents."⁶ In fact, in a ruling issued August 29, 1996, BellSouth was denied a waiver to exceed the 45 MHz cap by 0.5 MHz based on attribution of its non-controlling interest in RAM Mobile Data USA Limited Partnership because:

² See *WCS Order* at ¶¶ 87-91.

³ See *id.* at ¶ 89.

⁴ *News Release* at 2.

⁵ See *supra* note 1.

⁶ *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Third Report and Order*, 9 F.C.C.R. 7988, 8101 (1994).

[T]he 45 MHz CMRS spectrum cap was established after a thorough analysis by the Commission and was set at a level where the efficiencies and economics of horizontal concentration would be in the public interest, but not so high a level as to create noncompetitive conditions.⁷

The spectrum cap then must apply to any WCS spectrum used for CMRS to ensure that CMRS spectrum is not excessively concentrated, thereby deterring competition. The statement that “there is little likelihood” of anticompetitive consequences “at least in the near term” because of the out-of-band emission limits being adopted for WCS equipment⁸ is insufficient to mitigate against the future potential for a reduction in competition, particularly now that the Commission has adopted “an alternative, less stringent out-of-band emission limit” which makes mobile operations in the WCS spectrum bands increasingly likely.⁹

BellSouth also seeks reconsideration or clarification that WCS spectrum that is used to provide CMRS and is leased pursuant to a franchise arrangement will be deemed attributable to the franchisee for purposes of the CMRS spectrum cap. Specifically, BellSouth’s comments urged the Commission to address the issue of how WCS spectrum that is “franchised” will be treated for purposes of the CMRS spectrum cap. In the *WCS Order*, the Commission noted that “BellSouth and SNET Mobility believe . . . that the Commission’s proposals for the leasing or franchising of spectrum should be subject to license control requirements *and, if CMRS is provided, that the attribution to lessees and franchisees of such interests should be applied for purposes of the CMRS spectrum cap.*”¹⁰ Nevertheless, the Commission simply concludes that WCS licensees “will be allowed to use management and operational arrangements to permit others to use portions of their

⁷ Letter from Kathleen O’Brien Ham, Chief, Auctions Division, WTB, to John Beasley, BellSouth Corporation, DA 96-1407, at 2 (released Aug. 29, 1996).

⁸ See *WCS Order* at ¶ 89.

⁹ See *News Release* at 2.

¹⁰ *WCS Order* at ¶ 95 (emphasis added).

spectrum and geographic service areas,”¹¹ without addressing BellSouth’s concerns regarding how this relates to the spectrum cap.¹² Accordingly, BellSouth seeks reconsideration or clarification of this issue to make clear that spectrum that is leased pursuant to a franchise arrangement will be deemed attributable to the franchisee for purposes of the spectrum cap, just as spectrum is attributable to a system manager in the case of a management agreement,¹³ even if the franchisee does not have “control” of that spectrum for other purposes.

¹¹ *WCS Order* at ¶ 97.

¹² A carrier that has 45 MHz of attributable spectrum should not be permitted to evade the spectrum cap by “leasing” additional spectrum that it is not otherwise permitted to use. While the franchisee of the leased spectrum may not have “ultimate control and responsibility” for the operation of the facilities used on the leased spectrum, it will be using that spectrum as part of a service offering that competes with other CMRS providers. By leasing that spectrum from the licensee, the franchisee is effectively aggregating that spectrum together with its existing spectrum in excess of the 45 MHz cap. Such a company would, as a result, be able to employ over 45 MHz of spectrum in offering CMRS to the consuming public. The leased spectrum can be used for the franchisee’s service and not for any other competitor’s service. This has the same adverse effect on competition as holding a direct license for the spectrum.

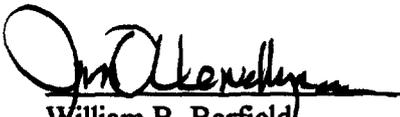
¹³ *See* 47 C.F.R. § 20.6(d)(9).

CONCLUSION

For the foregoing reasons, BellSouth urges the Commission to declare that any WCS spectrum used to provide CMRS will count toward the 45 MHz CMRS spectrum cap.

Respectfully submitted,

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April 2, 1997

CERTIFICATE OF SERVICE

I, Phyllis Martin, do hereby certify that I have, on this 2nd day of April 1997, served via hand delivery a copy of the foregoing BellSouth "Petition for Reconsideration" in GN Docket No. 96-228 upon the following:

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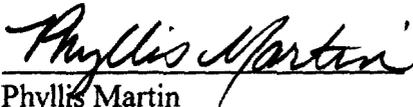
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