

1997-09-10

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

In the Matter of)	
)	
Application for Review of)	
BellSouth Wireless, Inc.)	
)	
Amendment of Parts 20 and 24 of the)	WT Docket No. 96-59
Commission's Rules - Broadband)	
PCS Competitive Bidding and the)	
Commercial Mobile Radio Service)	
Spectrum Cap)	

MEMORANDUM OPINION AND ORDER

Adopted: September 4, 1997

Released: September 10, 1997

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by BellSouth Wireless, Inc. ("BellSouth"),¹ seeking review of a Wireless Telecommunications Bureau ("Bureau") letter² denying BellSouth's Request for Waiver³ of the Commission's Commercial Mobile Radio Service ("CMRS") spectrum aggregation limit, 47 C.F.R. § 20.6(a). We also have before us a petition filed by BellSouth Corporation ("BellSouth Corp"), parent

¹ BellSouth Wireless, Inc., Request for Waiver in Auction No. 11 of the CMRS Spectrum Aggregation Limit in Section 20.6 of the Commission's Rules, Application for Review (filed Sept. 30, 1996) (BellSouth Application for Review).

² See Letter from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, to Mr. John Beasley, BellSouth Wireless, Inc., DA 96-1407 (Aug. 29, 1996) (Letter to BellSouth).

³ BellSouth Wireless, Inc., Request for Waiver of the CMRS Spectrum Aggregation Limit in Section 20.6 of the Commission's Rules (filed July 30, 1996) (BellSouth Waiver Request). This Waiver Request was filed in conjunction with BellSouth's Form 175 application to participate in the broadband PCS D, E and F block auction.

corporation of BellSouth Wireless, Inc., seeking reconsideration of the *Report and Order* in WT Docket No. 96-59 in which the Commission established the current spectrum aggregation limit.⁴ Because the arguments in both filings are similar, and the result of the relief requested would be the same for BellSouth, we will address both submissions in this Memorandum Opinion and Order. For the reasons discussed below, BellSouth's Application for Review and BellSouth Corp's Petition for Reconsideration are denied.

II. BACKGROUND

2. On July 30, 1996, BellSouth filed a request for waiver of Section 20.6(a) of the Commission's rules, 47 C.F.R. § 20.6(a). Under that provision, no licensee may hold attributable interests in broadband Personal Communications Services ("PCS"), cellular, or Specialized Mobile Radio ("SMR") services regulated as CMRS in excess of 45 MHz with significant overlap in any geographic area. At the time it filed its request, BellSouth held attributable interests in licensees of cellular radio stations in the southeastern United States and numerous 900 MHz SMR licensees throughout the entire United States.⁵ A waiver would have allowed BellSouth to bid on two 10 MHz licenses in the broadband PCS D, E & F block auction.⁶ According to BellSouth, a combination of its attributable interests in cellular (25 MHz), broadband PCS (potentially 20 MHz), and SMR regulated as CMRS (0.5 MHz or less) could cause it to exceed the 45 MHz CMRS spectrum aggregation limit, and that, if it did not receive a waiver, it would be precluded from pursuing its bidding strategy.⁷

3. Specifically, BellSouth stated that the 900 MHz SMR holdings of its affiliate, RAM Mobile Data USA Limited Partnership ("RAM Mobile"), should be excluded from the CMRS spectrum cap because it uses these holdings to provide only mobile data service and does not offer now, or intend to offer in the future, real time, two-way switched voice service.⁸ In its Waiver Request, BellSouth argued that the language of 47 C.F.R. § 20.6 including "SMR services regulated as CMRS" for the purposes of the spectrum cap should be interpreted to

⁴ BellSouth Corporation Petition for Reconsideration of *Report and Order* in WT Docket No. 96-59, FCC 96-278 (filed July 30, 1996) (BellSouth Corp Petition). This petition is one of several petitions for reconsideration filed in this docket. The other petitions will be addressed in a separate order.

⁵ BellSouth Waiver Request at 2-3.

⁶ BellSouth Waiver Request at 5-7. The broadband PCS D, E, and F block auction began on August 26, 1996, and ended on January 14, 1997.

⁷ *Id.* at 5.

⁸ *Id.* at 8.

mean only "covered" SMR services, as defined in 47 C.F.R. § 52.1(c).⁹ The definition of "covered" SMR services was adopted by the Commission in a proceeding unrelated to the spectrum cap,¹⁰ and there is no reference to "covered" service in Section 20.9, which lists the services regulated as CMRS. BellSouth noted that the Commission excluded "non-covered" SMR services from application of its CMRS resale policy and E911 obligations "because they do not compete substantially with cellular and broadband PCS providers."¹¹ BellSouth argued that because RAM Mobile's service similarly does not compete with cellular and broadband PCS, its holdings also should be excluded from the spectrum cap.¹² Furthermore, BellSouth argued that the Bureau should evaluate its request using a "good cause" standard. As RAM Mobile's service does not "compete substantially with cellular and broadband PCS," BellSouth argued that the public interest would be better served by permitting RAM Mobile and similarly situated entities to bid for and obtain broadband PCS blocks of spectrum.¹³

4. The Bureau denied BellSouth's Waiver Request, noting that BellSouth's request was premised on the mistaken assumption that the underlying purpose of the CMRS spectrum cap is to ensure voice transmission competition.¹⁴ The Bureau noted that in the *CMRS Third Report and Order*, the Commission established the spectrum cap because of concerns that

⁹ BellSouth cited Section 52.1(c) of the Commission's rules, which defines a covered SMR as:

either 800 MHz and 900 MHz SMR licensees that hold geographic area licenses or incumbent wide area SMR licensees that offer real-time, two-way switched voice service that is interconnected with the public switched network, either on a stand-alone basis or packaged with other telecommunications services. *This term does not include* local SMR licensees offering mainly dispatch services to specialized customers in a non-cellular system configuration, *licensees offering only data*, one-way, or stored voice services on an interconnected basis, or any SMR provider that is not interconnected to the public switched network.

BellSouth Waiver Request at 6, *citing* 47 C.F.R. § 52.1 (emphasis added).

¹⁰ See Telephone Number Portability, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352 (1996).

¹¹ BellSouth Waiver Request at 7. See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *First Report and Order*, CC Docket No. 94-54, FCC 96-263 (rel. July 12, 1996) ("*Resale I*"); Revision of the Commission's Rules to Ensure Compability with Enhanced 911 Emergency Calling Systems, *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 94-102, FCC 96-264 (rel. July 26, 1996) ("*E911*").

¹² BellSouth Waiver Request at 7.

¹³ *Id.* at 8-9.

¹⁴ Letter to BellSouth at 2.

excessive horizontal aggregation of spectrum by any one of several CMRS licensees could reduce competition by precluding entry by other service providers, and that licensees controlling too much CMRS spectrum could cause anticompetitive horizontal concentration in the services classified as CMRS.¹⁵ The Bureau further noted that the 45 MHz CMRS spectrum cap was set at a level where the efficiencies and economies of horizontal concentration would be in the public interest, but not so high as to create noncompetitive conditions.¹⁶ Furthermore, the Bureau acknowledged that although the Commission has distinguished between non-covered SMR and covered SMR in some contexts, it has not done so in the context of the spectrum cap.¹⁷ Finally, the Bureau advised BellSouth that it may seek relief from the spectrum cap through the divestiture provision contained in Section 20.6,¹⁸ which allows a party holding controlling or attributable interests in broadband PCS, cellular, and/or SMR licenses to apply for additional spectrum in those services that, if granted, would exceed the 45 MHz spectrum cap, provided that it subsequently divests sufficient spectrum to come into compliance with the cap.¹⁹ BellSouth filed an Application for Review of the Bureau's decision to deny its Waiver Request.

5. On the same day that BellSouth filed its Waiver Request, its parent, BellSouth Corp, filed a Petition for Reconsideration of the *DEF Report and Order*,²⁰ in which the Commission eliminated the cellular/PCS cross-ownership rule and retained the 45 MHz CMRS spectrum cap, in response to a remand from the U.S. Court of Appeals for the Sixth Circuit in *Cincinnati Bell Telephone Co. v. FCC*.²¹ In its petition, BellSouth Corp requests that the Commission modify Section 20.6(a) to state that only "covered SMR" services are included in the spectrum aggregation limit.²²

¹⁵ Letter to BellSouth at 2, *citing* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8100-10 (1994) (*CMRS Third Report and Order*).

¹⁶ Letter to BellSouth at 2.

¹⁷ *Id.*

¹⁸ 47 C.F.R. § 20.6.

¹⁹ Letter to BellSouth at 3.

²⁰ 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, *Report and Order*, 11 FCC Rcd 7824, 7869-76 (1996) (*DEF Report and Order*).

²¹ 69 F.3d 752 (6th Cir. 1995).

²² BellSouth Corp Petition at 2-3.

III. ARGUMENTS RAISED BY BELLSOUTH

6. In its Application for Review, BellSouth claims that its request was not given meaningful consideration as the Bureau failed to give it the "hard look" required under *WAIT Radio v. FCC*.²³ BellSouth further argues that the Bureau applied an incorrect standard in reviewing its Waiver Request, relying on Section 24.819(a),²⁴ instead of the "good cause" standard in Section 1.3.²⁵ BellSouth argues that by refusing to provide meaningful consideration of its request, the Bureau adopted an absolute "no waiver" policy in violation of the requirement to allow for waivers upon a showing of good cause.²⁶

7. BellSouth argues further that the Bureau misinterpreted Section § 20.6 which, it contends, was created to limit the amount of spectrum owned by those who provide services that are substantially similar and have the potential to compete with cellular and broadband PCS in the provision of cellular-type services, *i.e.*, real time, two-way switched voice services.²⁷ BellSouth reiterates its argument that good cause supports its Waiver Request because the 900 MHz SMR spectrum held by RAM Mobile is solely used for data-only transmission that does not and will not compete with cellular, PCS, or "covered-SMR" spectrum.²⁸

8. Likewise, in its Petition for Reconsideration, BellSouth Corp asserts that there are sound policy reasons for including only covered SMR in the spectrum cap.²⁹ BellSouth Corp contends that because non-covered SMR service does not offer real-time, interconnected voice service, such service does not compete with cellular and broadband PCS.³⁰ Further, as does BellSouth in its Waiver Request, BellSouth Corp cites instances in which the Commission has distinguished among various types of SMR services, and argues that the Commission should

²³ 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

²⁴ 47 C.F.R. § 24.819(a).

²⁵ 47 C.F.R. § 1.3.

²⁶ BellSouth Application for Review at 9.

²⁷ *Id.* at 11 (*citing CMRS Third Report and Order*, 9 FCC Rcd at 7996).

²⁸ *Id.*

²⁹ BellSouth Corp Petition at 4.

³⁰ *Id.* at 5.

distinguish between covered and non-covered SMR in applying the spectrum cap.³¹ Finally, BellSouth Corp contends that the technical difference between cellular, broadband PCS and covered SMR as compared to non-covered SMR provides a basis to treat non-covered SMR differently.³²

9. AT&T opposes the arguments made in BellSouth Corp's Petition for Reconsideration.³³ AT&T disagrees with BellSouth Corp's contention that non-covered SMR services, including those which offer data only, do not compete with cellular and broadband PCS services.³⁴ AT&T argues that BellSouth Corp ignores the fact that data services offered by non-covered SMR, broadband PCS, and cellular licensees are essentially the same.³⁵ AT&T argues that if the CMRS spectrum cap does not apply to data services offered as part of non-covered SMR services, the Commission also must exclude data services provided by cellular and broadband PCS licensees. AT&T argues that exempting only non-covered SMR services from the cap would contravene the Commission's regulatory parity objectives and would place cellular and PCS providers of data services at a serious competitive disadvantage.³⁶ In its reply comments, BellSouth Corp argues that the spectrum cap serves as a limit on an entity's ability to accumulate spectrum that has been dedicated to a particular purpose.³⁷ BellSouth Corp argues that non-covered SMRs have dedicated their spectrum to a "narrowband" service that is more like paging or narrowband PCS than cellular or broadband PCS, and covered SMRs have dedicated their spectrum to a service that is similar to cellular and broadband PCS.³⁸ BellSouth Corp further argues that, unlike non-covered SMRs, cellular and broadband PCS licensees do not dedicate their spectrum to data-only transmissions, but instead carry these services over the same spectrum used for voice services.³⁹ BellSouth Corp

³¹ BellSouth Corp Petition at 8. BellSouth Corp cites the CMRS Resale Proceeding, the Telephone Number Portability Proceeding and the E911 Proceeding. *See supra* notes 10 - 11.

³² *Id.* at 10.

³³ *See* Comments on Petition for Reconsideration of BellSouth Corporation, and Opposition to Petition for Reconsideration of Omnipoint Corporation, by AT&T Wireless Services, Inc., filed Aug. 28, 1996 (AT&T Comments).

³⁴ AT&T Comments at 2.

³⁵ *Id.*

³⁶ *Id.* at 3.

³⁷ Reply Comments of BellSouth Corporation, filed October 15, 1996 (BellSouth Corp Reply), at 2.

³⁸ *Id.*

³⁹ *Id.*

concludes that exempting cellular and broadband PCS providers who use their spectrum for purposes similar to those of non-covered SMRs would undercut the purpose of spectrum cap by allowing entities to accumulate more than 45 MHz of spectrum which has been designated for broadband use.⁴⁰

IV. DISCUSSION

10. After careful review of the facts, we find that the Bureau was correct in concluding that the circumstances presented here do not support BellSouth's request for a waiver of the CMRS spectrum cap. First, BellSouth contends the Bureau's denial of the Waiver Request does not meet the "hard look" standard required under *WAIT Radio v. FCC*.⁴¹ We disagree. Under this standard, the Bureau is required to give a waiver request a "hard look," in contrast to a perfunctory denial, by articulating with clarity and precision its findings and reasons for its decision.⁴² As reflected in the discussion below, the Bureau satisfied the "hard look" requirement by reviewing all of the facts presented, balancing those facts against the purposes underlying the CMRS spectrum aggregation limit, and considering alternative means through which BellSouth could find relief. The Bureau correctly concluded that the purpose of the spectrum cap rule was not to ensure competition only in voice transmission, but rather to prevent "excessive aggregation of spectrum by any one" CMRS licensee, which could otherwise confer excessive market power.⁴³

11. Second, BellSouth contends that the Bureau applied an incorrect waiver standard by applying the broadband PCS waiver rule, Section 24.819,⁴⁴ instead of the Commission's general waiver rule, Section 1.3.⁴⁵ We acknowledge that the Bureau should have applied

⁴⁰ *Id.* at 3.

⁴¹ 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁴² *Id.* at 1157.

⁴³ Letter to BellSouth at 2.

⁴⁴ A request for waiver of the broadband PCS rules must demonstrate either "that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that a grant of the waiver is otherwise in the public interest," or "that unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest." 47 C.F.R. §§ 24.819(a)(i) - (ii).

⁴⁵ Section 1.3 of our rules provides that "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3.

Section 1.3 instead of Section 24.819 to BellSouth's waiver request.⁴⁶ However, because the waiver standards in these two rules are so similar, the result would not have been different had the Bureau applied Section 1.3 instead of Section 24.819. Indeed, Section 24.819 is largely a codification of the general waiver standard set forth in *WAIT Radio*, by which the courts have consistently measured the rationality of waiver decisions under Section 1.3,⁴⁷ and as we have stated before, the Section 24.819(a) waiver standard is consistent with the Commission's general waiver standard.⁴⁸ Under the general waiver standard as set forth in *WAIT Radio*, the Commission may exercise its discretion to waive a rule where waivers are founded upon an "appropriate general standard," "show special circumstances warranting a deviation from the general rule," and "such deviation will serve the public interest."⁴⁹ Similarly, under Section 24.819, the Commission may grant a waiver of the broadband PCS rules where a showing is made "that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that a grant of the waiver is otherwise in the public interest," or "that unique facts and circumstances of a particular case render application of the rule inequitable, induly burdensome or otherwise contrary to the public interest."⁵⁰ Thus, for many of the same reasons the Bureau denied BellSouth's Waiver request under Section 24.819, we would deny it under Section 1.3. For instance, BellSouth has merely demonstrated that a waiver of the spectrum cap rule will permit it to acquire additional spectrum necessary to implement certain business plans.⁵¹ However, this fails to establish the existence of special circumstances that differentiate BellSouth from any other entity that might seek a waiver of the spectrum cap rule. Additionally, BellSouth has not shown that it pursued alternative means to comply with the spectrum cap, such as divestiture.

12. In any event, BellSouth fails to demonstrate that waiver of the CMRS spectrum cap under these circumstances serves the public interest. The purpose of the CMRS spectrum cap is to promote diversity and competition in mobile services, by recognizing the possibility that mobile service licensees might exert undue market power or inhibit market entry by other

⁴⁶ The Bureau evaluated the Waiver Request under Section 24.819 because the Waiver Request was submitted in conjunction with an application to participate in a broadband PCS auction.

⁴⁷ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio*, 418 F.2d at 1159).

⁴⁸ See *WirelessCo, L.P., PhillieCo, L.P., and Sprint Corp. Request for Limited Waiver of Section 24.204 of the Commission's Rules*, Order, 10 FCC Rcd 11111, 11113 n.35 (WTB 1995) ("the Section 24.819(a) waiver standard is consistent with the Commission's general waiver standard").

⁴⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C.Cir. 1990) citing *WAIT Radio v. FCC*, 418 F.2d at 1159 (D.C.Cir 1969).

⁵⁰ 47 C.F.R. Section 24.819(a)(i) - (ii).

⁵¹ Waiver Request at 5.

service providers if permitted to aggregate large amounts of spectrum.⁵² This excessive aggregation of spectrum could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents.⁵³ As the Bureau correctly pointed out, the CMRS spectrum cap achieves these ends by limiting the amount of spectrum an entity or its affiliates can acquire.⁵⁴ Despite BellSouth's contention to the contrary,⁵⁵ the underlying purpose of the spectrum cap was not limited to promoting competition in voice services only. The spectrum cap was instituted to promote competition and prevent undue concentration of licenses.⁵⁶ The spectrum cap is not limited to real time, two-way switched phone service; rather, it covers a variety of services within the definition of a CMRS.⁵⁷ We also agree with AT&T that providers of data-only transmission service are not limited to 900 MHz SMR.⁵⁸

13. Contrary to BellSouth's argument, the Bureau did not adopt a "no waiver" policy in disposing of the Waiver Request. BellSouth was not entitled to a waiver; as the District of Columbia Circuit court has observed, agency rules are presumed valid and "[a]n applicant for waiver faces a high hurdle even at the starting gate."⁵⁹ BellSouth believes that Bureau's "perfunctory treatment" of its Waiver Request means that a "no waiver" policy has been implemented.⁶⁰ Additionally, BellSouth argues that because the Bureau denied the waiver under the improper standard, "there is no specific ground given for denial."⁶¹ As has been discussed, the Bureau did apply the correct standard in evaluating BellSouth's waiver request, and it determined that in this case a waiver was not warranted. Consequently, no evidence of a blanket "no waiver" policy exists.

⁵² See *CMRS Third Report and Order*, 9 FCC Rcd at 8105.

⁵³ *Id.*

⁵⁴ Letter to BellSouth at 3.

⁵⁵ Application for Review at 11.

⁵⁶ See *CMRS Third Report and Order*, 9 FCC Rcd at 8105.

⁵⁷ See 47 C.F.R. § 20.3.

⁵⁸ AT&T Comments at 3.

⁵⁹ *Wait Radio* at 1157.

⁶⁰ Application for Review at 7.

⁶¹ Application for Review at 8.

14. The rationale for denying BellSouth's Application for Review applies equally to our disposition of BellSouth Corp's Petition for Reconsideration of the *DEF Report and Order*. BellSouth Corp places significance on the fact that some Commission proceedings have treated covered and non-covered SMR services differently for certain service rules.⁶² In particular, BellSouth argues that covered SMR services compete with broadband PCS and cellular services because they all provide two-way switched voice service interconnected to the public switched network, whereas non-covered SMR services, which provide data only, one-way, or stored voice services on an interconnected or local basis, do not so compete.⁶³ In the proceedings to which BellSouth refers,⁶⁴ the Commission distinguished between covered and non-covered SMR services because the rules at issue were designed to impact only two-way voice services interconnected to the public switched network.⁶⁵ Including non-covered SMR services in those rules would not have served any reasonable purpose. The Commission still concludes that SMR technology holds the potential to permit SMR operators to offer services that are nearly identical to those offered by both cellular and broadband PCS providers, and thus that all SMR services regulated as CMRS should be within the cap in order to guard against excessive spectrum aggregation.⁶⁶ Further, technological innovation may drive cellular, broadband PCS, and SMR services toward a convergence of similar service offerings designed to respond to consumer demand.⁶⁷ The anticipated convergence of data, voice, and other services recommends against changing our spectrum aggregation rule as BellSouth has requested; to do so would run the risk of allowing exactly what the spectrum cap was designed to prevent--an anti-competitive concentration of power in one competitor's hands. Thus, we agree with BellSouth Corp that the requirements of regulatory parity require similar services to be treated similarly. We also agree with AT&T that SMR spectrum

⁶² BellSouth Corp Petition at 8.

⁶³ *Id.* at 8-9.

⁶⁴ *Resale I*; Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462 (rel. Aug. 15, 1996) ("*Resale II*"); Telephone Number Portability, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352 (rel. July 2, 1996) ("*Number Portability*"); *E911*.

⁶⁵ For example, in the *Resale II* proceeding, the Commission concluded that roaming capability was not important to the competitive success of non-covered SMR providers. (*Resale II*, 11 FCC Rcd at 9471). Similarly, in the *E911* proceeding, the Commission concluded that consumers using cellular service for security reasons would most benefit from enhanced emergency calling service, and thus cellular competitors--broadband PCS and covered SMR--should also be subject to the *E911* rulemaking. (*E911* at ¶ 81).

⁶⁶ *CMRS Third Report and Order*, 9 FCC Rcd at 8108-9.

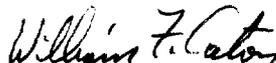
⁶⁷ *Id.* at 8021.

dedicated to data-only services should be treated like cellular or broadband PCS used for data-only services, and therefore, include both services in the Section 20.9 definition of CMRS spectrum.⁶⁸

15. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 1.115(g) of the Commission's rules, the Application for Review filed by BellSouth Wireless, Inc. IS DENIED.

16. IT IS FURTHER ORDERED that, pursuant to Sections 1.106(j) of the Commission's rules, the Petition for Reconsideration of the *DEF Report and Order* filed by BellSouth Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

⁶⁸ 47 C.F.R. § 20.9.