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

In the Matter of	)	
	)	
1998 Biennial Regulatory Review-- Spectrum Aggregation Limits for Wireless Telecommunications Carriers	)	WT Docket No. 98-205
	)	
Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap	)	
	)	
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
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: November 19, 1998 **Released: December 10, 1998**

Comment Date: January 25, 1999
Reply Comment Date: February 10, 1999

Comments and Reply Comments to be filed in WT Docket No. 98-205

By the Commission: Commissioners Furchtgott-Roth, Powell, and Tristani issuing separate statements.

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APPENDIX A: Initial Regulatory Flexibility Analysis

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking we undertake a comprehensive review of the 45 MHz Commercial Mobile Radio Services (CMRS) spectrum cap as part of our biennial review of the Commission's regulations.[1] We seek comment on whether the Commission should repeal, modify or retain the 45 MHz spectrum cap. In addition, we seek comment on a petition, submitted by the Cellular Telecommunications Industry Association (CTIA),[2] to forbear from enforcement of the CMRS spectrum cap pursuant to section 10 of the Communications Act of 1934, as amended (the Act).[3]

2. The CMRS spectrum cap, set out in section 20.6 of the Commission's rules,[4] governs the amount of CMRS spectrum that can be licensed to a single entity within a particular geographic area. Pursuant to section 20.6 of the Commission's rules, a single entity may acquire attributable interests in the licenses of broadband Personal Communications Service (PCS),

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[1] *See* 47 U.S.C. § 161.

[2] Petition for Forbearance of the Cellular Telecommunications Industry Association, filed Sept. 30, 1998 (CTIA Forbearance Petition).

[3] 47 U.S.C. § 160.

[4] 47 C.F.R. § 20.6.

cellular, and Specialized Mobile Radio (SMR) services that cumulatively do not exceed 45 MHz of spectrum within the same geographic area.[5] The CMRS spectrum cap was originally adopted in 1994 as a restriction on the amount of PCS spectrum a cellular licensee or other entity could obtain.[6] At that time, most parts of the country received mobile voice services from two cellular providers. Thus, the purpose of the CMRS spectrum cap was to provide an expedited means of ensuring that multiple service providers would be able to obtain spectrum in each market and thus facilitate development of competitive markets for wireless services.[7] In this proceeding, we examine whether the current rule continues to further the public interest, or whether circumstances have changed so as to warrant a modification or repeal of the CMRS spectrum cap.

3. This proceeding is part of our comprehensive review of existing Commission regulations to determine whether our rules continue to make economic and regulatory sense,[8] pursuant to section 11 of the Communications Act.[9] In the Telecommunications Act of 1996 (1996 Act),[10] Congress sought to enhance competition in local and other telecommunications markets and recognized that the achievement of that goal would lessen the need for regulation of the telecommunications industry. For that reason, Congress charged the Commission with reviewing its regulations applicable to providers of telecommunications services on a biennial basis to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[11] If we find that a regulation is no longer in the public interest, we have an affirmative obligation to repeal or modify that regulation.[12] Commenters in this proceeding are requested to discuss how their comments relate to section 11.

4. As part of the 1996 Act, Congress also granted the Commission the regulatory flexibility to forbear from applying any regulation or any provision of the Communications Act to a telecommunications carrier.[13] Under section 10 of the Communications Act, we must forbear from applying any regulation or provision of the Act to a telecommunications carrier or service,

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[5] 47 C.F.R. § 20.6.

[6] Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8100-8117 (1994) (*CMRS Third Report and Order*).

[7] *CMRS Third Report and Order* at 8104-5.

[8] *See* FCC Staff Proposes 31 Proceedings As Part of 1998 Biennial Regulatory Review, *News Release*, Rep. No. GN 98-1 (rel. Feb. 5, 1998).

[9] 47 U.S.C. § 161.

[10] Telecommunication Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act).

[11] 47 U.S.C. § 161(a)(2); *see also* section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[12] 47 U.S.C. § 161(b).

[13] 47 U.S.C. § 160(a).

or class of telecommunications carriers or services, in any or some of its geographic markets if a three-pronged test is met.[14] On September 30, 1998, CTIA filed a petition requesting that the Commission forbear from enforcing the CMRS spectrum cap.[15] We request that interested parties submit empirical and analytical support regarding CTIA's contention that forbearance from enforcement of section 20.6 of our rules is warranted because the statutory requirements triggering exercise of our forbearance authority have been satisfied.[16] Should the record of this proceeding support exercise of our forbearance authority, we will consider forbearance from enforcement of section 20.6 as one option for resolution of our overall review of the cap in this proceeding, but not to the exclusion of other options such as elimination or modification of section 20.6.

5. We follow several principles in considering whether an existing regulation is still necessary or if it would be appropriate to eliminate or modify that regulation. First, we believe that trusting in the operation of market forces generally better serves the public interest than regulation. The Commission should consider imposition of regulation when there is an identifiable market failure and imposition of the regulation would serve the public interest because it is targeted to correct that failure. Even in those situations, the Commission should endeavor to craft narrowly any regulation to impose only the minimum restraint on the market necessary to achieve the public interest. Second, we seek to foster vigorous competition in all telecommunications markets. For years we have attempted to facilitate competition in CMRS markets. We are also committed to bringing competition to local telecommunications markets generally, consistent with the central Congressional mandate of the 1996 Act.[17] In this regard, we wish to ensure that there are no regulatory impediments to the evolution of wireless carriers into more effective competitors vis-à-vis the local wireline telephone companies. Third, we seek to secure the benefits of modern telecommunication services, including wireless services, for all areas of our Nation. We are committed to ensuring that rural and other areas presently under-

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[14] 47 U.S.C. § 160.

[15] *See* CTIA Forbearance Petition. The CTIA Forbearance Petition was filed subsequent to the announcement in February that the Commission intended to initiate the proceeding we begin today on the CMRS spectrum cap. *See* News Release, FCC Staff Proposes 31 Proceedings As Part of 1998 Biennial Regulatory Review, Rep. No. GN 98-1 (rel. Feb. 5,1998).

[16] *See* Biennial Regulatory Review -- Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket 98-100, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-134 (re. July 2, 1998) (*PCIA Forbearance Order*); *reconsideration pending.*

[17] *See* 47 U.S. C. §§ 251-261 (Development of Competitive Markets); Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. (1996); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd.*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996) (*Local Competition First Reconsideration Order*), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996) (*Local Competition Second Reconsideration Order*), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, FCC 97-295 (rel. Aug. 18, 1997) (*Local Competition Third Reconsideration Order*), *further recon. pending, cert. granted sub nom, AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 879 (1998).

served by telecommunications providers are not left behind by the telecommunications revolution,[18] and we see many indications that wireless technology has a significant role to play in serving under-served and high-cost areas.[19] Finally, we wish to ensure that our regulation promotes, rather than impedes, the introduction of innovative services and technological advances. Commenters are requested to explain how the proposals they make relate to these principles.

6. Consistent with our goals of removing unnecessary regulations and ensuring that remaining regulations serve the public interest, this proceeding will re-evaluate the need for spectrum aggregation limits. The CMRS spectrum cap was first established four years ago. Since that time, CMRS markets and the wireless telecommunications industry in general have changed considerably.[20] We seek to determine here if those changes have affected the need for the CMRS spectrum cap, and what, if any, type of spectrum aggregation limits are appropriate at this time.

II. EXECUTIVE SUMMARY

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[18] *See* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, 9035 (1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997) (*Universal Service Order*), appeal pending in *Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997); Federal-State Joint Board on Universal Service, *Order on Reconsideration*, CC Docket No. 96-45, 12 FCC Rcd 10095 (rel. July 10, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, *Report and Order and Second Order on Reconsideration*, 12 FCC Rcd 18400 (1997), as corrected by Federal-State Joint Board on Universal Service, Errata, CC Docket No. 96-45, DA 97-2477 (rel. Dec. 3, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12444 (1997); Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45, 97-160, *Third Report and Order*, 12 FCC Rcd 22485 (1997), as corrected by Federal-State Joint Board on Universal Service, *Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, CC Docket No. 97-21, *Report and Order and Second Order on Reconsideration in CC Docket 97-21*, 12 FCC Rcd 22423 (1997); Federal-State Joint Board on Universal Service, CC Docket No. 96-24, *Third Order on Reconsideration*, 12 FCC Rcd 22801 (1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, *Fourth Order on Reconsideration*, 13 FCC Rcd 5318 (1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA 98-158 (rel. Jan 29, 1998), appeal pending in *Alenco Communications, Inc., et al. v. FCC and USA*, No. 98-60213 (5th Cir. 1998); Federal-State Joint Board on Universal Service, *Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45*, FCC 98-120 (rel. June 22, 1998); Federal-State Joint Board on Universal Service, *Order and Order on Reconsideration*, CC Docket No. 96-45, FCC 98-160 (rel. July 17, 1998).

[19] *See, e.g., Universal Service Order*; Federal-Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress,* 13 FCC Rcd 11501 (1998). *See also* Western Wireless Corporation Comments on Model Platform Development, CC Docket 96-45, filed Aug. 28, 1998 (expressing interest in providing universal service, and discussing Western's sponsorship of a wireless cost model being developed by HAI Associates).

[20] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Services, *Third Report,* FCC 98-81 (rel. June 11,1998) *(Third Annual CMRS Competition Report).*

7. In this Notice of Proposed Rulemaking, we solicit comment on whether we should repeal, modify, or retain the CMRS spectrum cap. We also seek comment on the petition to forbear from enforcement of the CMRS spectrum cap filed by CTIA on September 30, 1998. We focus our discussion of whether to repeal, modify, or retain the spectrum cap by looking at the competitive changes in the CMRS market, reexamining the goals that the spectrum cap was initially designed to achieve, and seeking comment on whether there are less restrictive measures, or additional public interest goals we should consider in determining whether to eliminate or modify the spectrum aggregation limits. Additionally, we seek comment on how our analysis may differ in the context of markets with many wireless competitors, as opposed to markets, for example, in rural or high-cost areas, where few or no PCS providers may have initiated service, and whether we should consider the rule on a market-by-market basis.

8. We identify and discuss several different options for addressing CMRS spectrum aggregation issues. Specific options raised for comment, in addition to retaining the current CMRS spectrum cap, include:

- Expanding the allowable amount of geographic overlap between a licensee's various broadband CMRS holdings;
- Increasing the amount of spectrum that a single entity may hold beyond 45 MHz;
- Altering the ownership attribution rules associated with the spectrum cap;
- Forbearing from enforcing the CMRS spectrum cap pursuant to our authority under section 10 of the Act;
- Establishing a sunset for the CMRS spectrum cap; and,
- Eliminating the CMRS spectrum cap and relying on a case-by-case analysis pursuant to sections 308(b) and 310(d) of the Communications Act in assessing the potential competitive effects of a proposed spectrum holding by a particular entity within a geographic area.

9. We also seek comment on whether we should retain, modify, or repeal the cellular cross-ownership rule.[21] That rule was adopted when cellular licensees were the predominant provider of mobile voice services. We seek comment on whether the introduction of new competitors in wireless telecommunications markets changes the need for this rule.

[21] 47 C.F.R. § 22.942.

III. BACKGROUND

A. History of the CMRS Spectrum Cap

10. As discussed *supra,*[22] the CMRS spectrum cap was established in the *CMRS Third Report and Order* as part of the implementation of the deregulated CMRS regime enacted by the Omnibus Budget Reconciliation Act of 1993.[23] Prior to the adoption of the CMRS spectrum cap, the Commission had imposed service specific limitations on licensees' ability to aggregate broadband PCS spectrum.[24] In replacing discrete PCS/cellular ownership rules, the Commission explained that an overall spectrum cap for CMRS would add certainty to the marketplace without sacrificing the benefits of pro-competitive and efficiency-enhancing aggregation.[25] The Commission found that if licensees were to aggregate sufficient amounts of spectrum, it would be possible for them, unilaterally or in combination, to exclude efficient competitors, to reduce the quantity or quality of services provided, or to increase prices to the detriment of consumers. The Commission concluded that the imposition of a cap on the amount of spectrum that a single entity can control in any one geographic area would limit its ability to increase prices artificially.[26]

11. To perform a spectrum cap analysis, a threshold determination must first be made regarding whether the CMRS offerings under consideration are serving markets that substantially overlap. The Commission adopted a simple formula for this assessment: a determination of whether the overlap between geographic service areas or licensed contours contains 10 percent or more of the market's population.[27]

12. Assuming a 10 percent population overlap, the rule next requires a determination of whether there is common attributable ownership. For purposes of the spectrum cap, equity

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[22] *See supra* section I.

[23] *CMRS Third Report and Order*, 9 FCC Rcd at 7992 (*citing* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993)).

[24] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd. 7700, 7728 ¶ 61 (1993) (*Broadband PCS Second Report and Order*) (limited broadband PCS licensees to 40 MHz of the total spectrum allocated to broadband PCS); Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4984 ¶ 67 (1994) (revised the latter rule to allow cellular licensees to increase their holding of PCS spectrum from 10 MHz to 15 MHz after January 1, 2000).

[25] *CMRS Third Report and Order*, 9 FCC Rcd. at 8100-8107.

[26] *Id.* at 8104 ¶ 248.

[27] 47 C.F.R § 20.6(c). Whereas broadband PCS is licensed in major trading areas (MTAs) or basic trading areas (BTAs), cellular service is defined by the cellular geographic service area (CGSA). SMRs can be licensed in economic areas (EAs), MTAs or by contour. The Commission also decided that because SMR spectrum is not altogether available in a contiguous block, and the largest possible block of contiguous SMR spectrum is 10 MHz, the maximum attributable SMR spectrum for purposes of the CMRS spectrum cap would be 10 MHz. *CMRS Third Report and Order,* 9 FCC Rcd at 8113-14 ¶ 275.

ownership of 20 percent or more was deemed attributable.[28] The Commission also stated that in determining when cellular, broadband PCS and SMR licenses are held indirectly through intervening corporate entities, a multiplier would be used to determine attributable ownership levels, consistent with application of the broadcast attribution rules.[29]

13. The Commission found that by creating a cap on broadband PCS, SMR, and cellular licenses, the result accomplished would "prevent licensees from artificially withholding capacity from the market."[30] The Commission found that a 45 MHz cap provided a "minimally intrusive means" for ensuring that the mobile communications marketplace remained competitive and preserved incentives for efficiency and innovation.[31]

14. In the *CMRS Fourth Report and Order*, the Commission further clarified that certain business relationships could give rise to attributable ownership interests for purposes of the CMRS spectrum cap. First, the Commission held that resale agreements will not be considered attributable interests because resellers can neither exercise control over the spectrum on which they provide service nor reduce the amount of service provided over that spectrum.[32] Second, the Commission found that management agreements that authorize managers of cellular, broadband PCS or SMR systems to engage in practices or activities that determine or significantly influence the nature and types of services offered, the terms on which services are offered, or the prices charged for such services, give the managers an attributable interest in that licensee.[33] Finally, the Commission also concluded that joint marketing agreements that affect pricing or service offerings will be attributable.[34]

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[28] The Commission decided to use a 40 percent attribution for small businesses, rural telephone companies, and businesses owned by minorities and/or women, as it had done in the PCS/cellular cross-ownership rule. *CMRS Third Report and Order*, 9 FCC Rcd at 8114-5 ¶ 276-8.

[29] *Id.* at 8114-15 ¶ 277.

[30] *Id.* at 8108 ¶ 258.

[31] *Id.* at 7988 ¶ 16.

[32] Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252,, *Fourth Report and Order*, 9 FCC Rcd. 7123, 7124 ¶ 10 (1994) (*CMRS Fourth Report and Order*).

[33] *Id.* at 7128 ¶ 25.

[34] *Id.* at 7129-30 ¶ 30.

15. The Commission reaffirmed the basic tenets of the CMRS spectrum cap in the *CMRS Spectrum Cap Report and Order* and provided additional economic rationale for its use.[35] That proceeding was initiated, in part, in response to the Sixth Circuit's remand of the Commission's PCS/cellular cross-ownership rule.[36] In *Cincinnati Bell,* the court found that the Commission had not provided adequate economic justification for limiting cellular providers to only 10 MHz of PCS spectrum.[37] In light of the court's ruling in *Cincinnati Bell*, the Commission sought comment on whether it should eliminate the PCS/cellular cross-ownership rule and the 40 MHz PCS spectrum cap in favor of the single 45 MHz CMRS spectrum cap.[38]

16. In the *CMRS Spectrum Cap Report and Order*, the Commission found that the use of the single 45 MHz CMRS spectrum cap had advantages over maintaining three separate caps because it would give providers more flexibility to respond to changing marketplace demands.[39] The Commission also provided additional economic analysis supporting the CMRS spectrum cap.[40] Specifically, the Commission provided an analysis of the potential market concentrations using the Herfindahl-Hirschman Index (HHI), and found that a 45 MHz spectrum cap was necessary to prevent CMRS markets from becoming highly concentrated.[41] The Commission found that such a spectrum cap was needed to ensure competition, and that it would adequately address concerns about anticompetitive behavior in the CMRS market.[42] The Commission also stated that it would continue to evaluate the need for the CMRS spectrum cap under the biennial review provisions of the Act.[43]

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[35] 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 96-59, GN Docket 90-314, *Report and Order*, 11 FCC Rcd. 7824, 7864-87 (1996) (*CMRS Spectrum Cap Report and Order*) *appeal pending sub nom. Cincinnati Bell Tel Co. v. FCC*, No. 96-3756 (6th Cir), *recon.* 12 FCC Rcd 14031 (1997) (*BellSouth MO&O*) *appeal pending sub nom. BellSouth Corporation v. FCC*, No. 97-1630 (D.C. Cir).

[36] *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7825 ¶ 1 *(citing Cincinnati Bell Telephone Company v. FCC*, 69 F.3d 752 (6th Cir. 1995)).

[37] *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d at 764.

[38] Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Implementation of Sections 3(n) and 332 of the Communications Act, WT Docket No. 96-59, GN Docket No. 93-252, *Notice of Proposed Rulemaking*, 11 FCC Rcd 15052, 15080-81, ¶ 66. In addition to the PCS/cellular cross-ownership restriction, in the *Broadband PCS Second Report and Order* we also limited PCS licensees to acquiring 40 MHz of spectrum allocated to broadband PCS. *Broadband PCS Second Report and Order*, 8 FCC Rcd. 7700, 7728, ¶ 61.

[39] *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7875 ¶ 105.

[40] *Id.* at 7869-73 ¶¶ 94-100.

[41] *Id.* at 7869-73 ¶¶ 96-100.

[42] *Id.* at 7875 ¶ 104.

[43] *Id.* at 7875-76 ¶ 106, *citing* 47 U.S.C. § 161(a)(2).

17. In addition to reviewing the general structure of the CMRS spectrum cap in the *CMRS Spectrum Cap Report and Order*, the Commission also reconsidered the ownership and geographic attribution provisions of section 20.6. In *Cincinnati Bell*, the court found the 20 percent attribution standard used in the PCS/cellular cross-ownership rule to be arbitrary on the grounds that it did not bear a reasonable relationship to whether a party with a minority interest in a cellular licensee actually has the ability to control that licensee.[44] In light of the court's determination, in the *CMRS Spectrum Cap Report and Order* the Commission revisited the use of a 20 percent attribution standard and found it appropriate for use in the CMRS spectrum cap.[45] Although the Commission did not alter the 20 percent ownership attribution standard in the *CMRS Spectrum Cap Report and Order*, it did adopt a four-prong test under which it would review requests for waiver of the attribution standard.[46] The Commission also eliminated the 40 percent attribution threshold for ownership interests held by minorities and women, but maintained it for small businesses and rural telephone companies.[47] In considering changes to the geographic attribution standard, the Commission declined to alter the 10 percent overlap definition because it found "that an overlap of 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the cellular operator is slight."[48] In addition, the Commission expanded the divestiture provisions by allowing parties with non-controlling, attributable interests in CMRS licenses to have an attributable or controlling interest in another CMRS application that would exceed the 45 MHz spectrum cap so long as they followed our post-licensing divestiture procedures.[49]

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[44] *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d at 759-61.

[45] *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7879-86 ¶¶ 117-30.

[46] The Commission stated that it would "consider requests for waivers of the CMRS spectrum cap that make an affirmative showing that an otherwise attributable ownership interest should not be attributed to its holder because:

"■ The interest holder has less than a 50 percent voting interest and there is an unaffiliated single holder of a 50 percent or greater voting interest;

"■ The interest holder is not likely to affect the local market in an anticompetitive manner;

"■ The interest holder is not involved in the operations of the licensee and does not have the ability to influence the licensee on a regular basis; and

"■ Grant of a waiver is in the public interest because the benefits of such common ownership to the public outweigh any potential anticompetitive harm to the market."

CMRS Spectrum Cap Report and Order, 11 FCC Rcd at 7887 ¶ 131.

[47] *Id.* at 7828 ¶ 4, 7880 ¶ 117.

[48] *Id.* at 7876 ¶ 107.

[49] *Id.* at 7886 ¶ 130. The post-licensing divestiture procedures are found at 47 C.F.R. § 24.204(f).

18. Subsequently, the Commission held, in the context of a request to waive the cap, that the CMRS spectrum cap is not limited to real time, two-way switched phone service, but covers a variety of services within the definition of CMRS.[50] BellSouth had filed a request for waiver of section 20.6, arguing that certain of its SMR interests should not be attributed because those networks did not compete with two-way switched voice service, but instead provided only mobile data service.[51] It also filed a separate petition for reconsideration of the *CMRS Spectrum Cap Report and Order,* asking that the Commission reconsider its decision to include all SMR services within the CMRS spectrum cap, and arguing that data-only services should not be included since they do not compete with broadband PCS or cellular services.[52] In the *BellSouth MO&O*, the Commission denied both BellSouth's waiver request and petition for reconsideration, concluding that SMR technology holds the potential to permit SMR licensees to offer services that are nearly identical to those offered by broadband PCS and cellular, and thus all SMR services regulated as CMRS should be included in the CMRS spectrum cap to guard against excessive spectrum aggregation, which could confer excessive market power.[53]

B. Pending Proceedings Regarding the CMRS Spectrum Cap

19. There are several proceedings pending before the Commission which deal with different aspects of the CMRS spectrum cap. Because we intend for this proceeding to be a comprehensive re-evaluation of the CMRS spectrum cap, we plan to consolidate these outstanding issues in this proceeding. We therefore incorporate into this proceeding the record of the pending proceedings on the CMRS spectrum cap set forth below.

20. Petitions for Reconsideration of *CMRS Third Report and Order*. In its petition for reconsideration of the *CMRS Third Report and Order*, SMR Won argued that attributable SMR spectrum for purposes of the spectrum cap should be capped at less than 10 MHz, because such a cap would promote further monopolization of the 800 MHz SMR market.[54] Nextel and Motorola opposed SMR Won's petition, contending that the cap is appropriate because SMR

[50] *BellSouth MO&O*, 12 FCC Rcd at 14039 ¶ 12.

[51] *See* 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 filed its waiver request as part of its short form application to participate in the D, E, and F block auction.

[52] BellSouth Corporation Petition For Reconsideration of *Report and Order* in WT Docket 96-59 (filed July 30, 1996).

[53] *BellSouth MO&O*, 12 FCC Rcd at 14037 ¶ 10, 14040 ¶ 14.

[54] SMR Won, Petition for Partial Reconsideration, GN Docket No. 93-252, filed Dec. 1, 1994, at 17; SMR Won, Reply to Opposition to Petition for Partial Reconsideration, filed Jan. 30, 1995, at 9. SMR Won also requested that the Commission reconsider certain other aspects of the *CMRS Third Report and Order*. Fourteen other parties filed petitions for reconsideration which do not address the CMRS spectrum cap. Those petitions are pending.

spectrum is not available in a contiguous block on an exclusive use basis like broadband PCS and cellular spectrum.[55]

21. Petitions for Reconsideration of *CMRS Fourth Report and Order*. In its petition for reconsideration of the *CMRS Fourth Report and Order,* McCaw Cellular argues that the joint markets and management attribution rules contained in section 20.6 are more properly addressed through enforcement of the antitrust laws than through Commission rules.[56] According to McCaw, the use of the phrase "significantly influence" in those rules raises serious implementation and interpretation questions.[57] No oppositions or comments were filed regarding McCaw's petition.

22. Petitions for Reconsideration of *CMRS Spectrum Cap Report and Order*. Three parties filed petitions for reconsideration of the Commission's actions regarding the CMRS spectrum cap in the *CMRS Spectrum Cap Report and Order*.[58] As we discussed above, the Commission has already acted on the petition for reconsideration filed by BellSouth. Two other petitions, filed by Omnipoint and Radiofone, are still pending.

23. In its petition for reconsideration of the *CMRS Spectrum Cap Report and Order*, Omnipoint requests that the Commission reinstate the PCS/cellular cross-ownership restriction. Omnipoint argues that the economic analysis used by the Commission to justify elimination of the PCS/cellular cross-ownership rules was flawed, that in-region cellular operators possess enormous market advantages over start-up providers, and, therefore, it is appropriate to treat cellular operators differently for purposes of broadband PCS ownership and control.[59] AT&T Wireless, Bell Atlantic NYNEX Mobile, CTIA, and Radiophone oppose Omnipoint's petition. They argue that Omnipoint does not document any anticompetitive harm in allowing cellular operators to have up to 20 MHz of PCS, and that in light of the *Cincinnati Bell* remand the Commission acted properly in eliminating the PCS/cellular cross-ownership rule.[60]

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[55] Nextel Communications Inc, Opposition to Petitions For Reconsideration, GN Docket 93-252, filed Jan. 20, 1995, at 18; Motorola, Comments, GN Docket 93-252, filed Jan. 20, 1995, at 7.

[56] McCaw Cellular Communications Inc., Petition for Reconsideration, GN Docket No. 93-252, filed Jan. 3 1995, at 3.

[57] *Id. at* 4.

[58] Four other parties -- Devon Mobile Communications, Harvey Leong, the National Association of Black Owned Broadcasters, Inc, and National Telecom PCS, Inc. -- filed petitions for reconsideration which only deal with issues other than the CMRS spectrum cap, *i.e.,* issues concerning the D-, E- and F-block PCS auction. Those petitions are pending.

[59] Omnipoint Corporation, Petition For Reconsideration, WT Docket 96-59, filed July 31,1996; Omnipoint Corporation, Reply, WT Docket 96-59, filed Sept. 10, Omnipoint Corporation, Reply, WT Docket 96-59, filed Oct. 11, 1996.

[60] AT&T Wireless, Opposition to Petition for Reconsideration of Omnipoint Corporation, WT Docket 96-59, filed Aug. 28, 1996, at 4; Bell Atlantic NYNEX Mobile, Inc., Opposition to Petitions for Reconsideration, WT Docket 96-59, filed Aug. 28, 1996, at 5-6; Cellular Telecommunications Industry Association, Opposition, WT

24. In its petition for reconsideration of the *CMRS Spectrum Cap Report and Order*, Radiofone suggests applying the CMRS spectrum cap only to the wireline cellular licensee in a given geographic area.[61] Radiofone argues that allowing the non-wireline cellular licensee to have a 30 MHz PCS license (in addition to the 25 MHz cellular license), while continuing to restrict the wireline cellular licensee to a 45 MHz restriction, would act as a trade-off to the inherent advantages that the wireline carrier has over the non-wireline carrier.[62] Bell Atlantic NYNEX Mobile, Omnipoint, Pacific Bell Mobile Services, and Pocket Communications oppose Radiofone's petition. Bell Atlantic NYNEX argues that Radiofone's proposal discriminates against B-block (wireline) cellular licensees and that the Commission has already considered and rejected claims that wireline carriers had an unfair head start in establishing cellular service.[63]

25. Waivers. As discussed above, in the *BellSouth MO&O,* the Commission denied BellSouth's request that its SMR data service not be included in the CMRS spectrum cap.[64] Most of the other requests for permanent waiver of section 20.6 have dealt with the significant overlap provision of the rule.[65] Poka Lambro PCS, Inc. (Poka Lambro) filed two separate requests, arguing that waiver of the spectrum cap was appropriate because its overlap only "slightly" exceeded the Commission's 10 percent threshold.[66] The Wireless Telecommunications Bureau denied both of Poka Lambro's requests, reasoning that there was no evidence to suggest that Poka Lambro would be unable to suppress competition for CMRS service if a waiver was granted, and that Poka Lambro's situation was specifically contemplated by the rules.[67]

Docket 96-59, filed Aug. 28, 1996, at 3-4; Radiofone, Inc., Opposition to Petition for Reconsideration of Omnipoint Corporation, WT Docket 96-59, filed Aug. 28, 1996, at 7.

[61] Radiofone, Inc., Petition for Partial Reconsideration, WT Docket 96-59, filed July 31,1996. Radiofone also requested that the Commission reconsider certain rules regarding the D-, E-, and F-block PCS auction and licensing.

[62] *Id.* at 19; Radiofone, Inc., Reply to Opposition of Bell Atlantic NYNEX Mobile Inc.; Reply to Opposition of Omnipoint Corporation; Reply to Opposition of Pacific Bell Mobile Services; and Reply to Opposition of Pocket Communications, Inc., WT Docket 96-59, filed Sept. 11, 1996.

[63] Bell Atlantic NYNEX Mobile, Inc, Opposition to Petitions for Reconsideration, WT Docket 96-59, filed Aug. 28, 1996, at 8-9. Other parties argue that cellular operators already have a competitive advantage, hat Radiofone has not demonstrated that the 20 MHz of PCS frequencies allowed under the CMRS spectrum cap is insufficient for a cellular licensee to provide broadband PCS. *See* Omnipoint Corporation, Opposition, WT Docket 96-59, filed Aug. 28, 1996, at 2-5; Pacific Bell Mobile Services, Opposition, WT Docket 96-59, filed Aug. 28, 1996, at 3.

[64] *BellSouth MO&O*, 12 FCC Rcd at 14037-39 ¶¶ 10-12.

[65] *See* 47 C.F.R. § 20.6(c).

[66] *See* Federal Communications Commission Long Form 600 application filed by Poka Lambro on May 22, 1996 in the C block auction, and Federal Communications Commission Short Form application, Ex. E filed by Poka Lambro on July 30, 1996 in the D, E, and F block auction.

[67] Letter to Mickey Sims, President, Poka Lambro PCS, Inc. from David Furth, Chief, Commercial Wireless Division, dated March 14, 1997.

26. Western Wireless Corporation (Western) has filed two separate requests seeking a permanent waiver of the ten percent significant overlap threshold requirement set forth in section 20.6(c). One of Western's requests concerns an approximately 19 percent population overlap of its B-block broadband PCS license for the Denver Major Trading Area (MTA) and various cellular markets in the Denver MTA.[68] The other concerns an approximate 12 percent population overlap of Western's holdings in the A-block broadband PCS license for the Oklahoma City MTA and its A-block cellular licenses for Oklahoma Rural Service Areas (RSAs) 7 and 8.[69] Western contends that divestiture of its licenses (or portions thereof) could impair its competitiveness relative to its larger regional rivals, and thereby thwart its efforts to provide better service at lower rates.[70] Western also argues that waiving section 20.6 will promote the purpose of the underlying rules and advance the public interest by facilitating prompt introduction of broadband PCS service throughout the MTA and allowing continued public access to Western's existing cellular infrastructure and expertise without compromising the spectrum cap's purpose of deterring anticompetitive practices.[71]

27. Triton Communications L.L.C (Triton) filed a request for a permanent waiver of the CMRS spectrum cap as applied to holdings of Triton and Telecorp PCS, Inc. (Telecorp) based on investment interests that Chase Capital Partners holds in Triton and Telecorp.[72] Triton seeks a waiver of an approximately 12 percent population overlap in ten counties in Mississippi in which the Telecorp licenses for the B-block Memphis MTA and the F-block Memphis BTA overlap Triton's licenses for Mississippi Rural Service Areas 1, 3 and 4.[73] Triton argues that the waiver would serve the public interest because it would allow for investment in a rural cellular

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[68] Request of Western PCS II Licensee Corporation for Waiver of Section 20.6 of the Commission's Rules (filed July 11, 1997, amended Sept. 8, 1998) (*Denver Request*). The Wireless Telecommunications Bureau has extended the deadline for Western to come into compliance with section 20.6 pending the release of an order resolving Western's request for a permanent waiver in the Denver MTA. *See* Western PCS II License Corporation; PCS Station KNLF244 Denver Colorado MTA (Market No. 22B) Request for Waiver of Section 20.6 of the Commission's Rules, File No. CWD 96-14, *Order*, 12 FCC Rcd 11665 (CWD/WTB 1997); Letter to Louis Gurman, counsel for Western Wireless, from Steven E. Weingarten, Chief, Commercial Wireless Division, dated Oct. 5, 1998 (enlarged extension to include cellular license added in amendment to waiver request).

[69] Request of Western PCS I Licensee Corporation for Waiver of Section 20.6 of the Commission's rules (filed Jan. 29, 1998) (*Oklahoma Request*). The Wireless Telecommunications Bureau has extended the deadline for Western to come into compliance with section 20.6 pending the release of an order resolving Western's request for a permanent waiver in the Oklahoma City MTA. *See* Letter to Louis Gurman, counsel for Western Wireless, from Steven E. Weingarten, Chief, Commercial Wireless Division, dated July 17, 1998.

[70] *Denver Request* at 15; *Oklahoma Request* at 12.

[71] *Denver Request* at 15; *Oklahoma Request* at 12.

[72] Request of Triton Communications L.L.C. for Waiver of Commission Rule Section 20.6 (filed July 17,1998) (*Triton Request*). The Wireless Telecommunications Bureau has extended the deadline for Triton to come into compliance with section 20.6 pending the release of an order resolving Triton's request for a permanent waiver in the Memphis MTA. *See* Letter to James F. Rogers, counsel for Triton Communications, from Steven E. Weingarten, Chief, Commercial Wireless Division, dated July 31, 1998).

[73] *Triton Request* at 3.

provider and thus encourage the provision of CMRS service to rural populations.[74] The Western and Triton waiver requests are pending, and will be dealt with separately from this proceeding.[75]

28. Third FNPRM. In the *Third FNPRM* in GN Docket No. 93-252,[76] the Commission examined whether the CMRS spectrum cap should be extended to all cellular, SMR, and broadband PCS providers regardless of whether they are classified as Private Mobile Radio Services (PMRS)[77] or CMRS providers.[78] In that proceeding the Commission questioned whether the applicability of section 20.6 should turn on the CMRS/PMRS distinction.[79] It noted that services provided by PMRS providers may be viewed as competitive alternatives to CMRS, and thus excluding them from section 20.6 might provide a competitive advantage to PMRS providers.[80] For those reasons, the Commission proposed to amend section 20.6 to apply to all cellular, SMR and broadband PCS licensees regardless of regulatory classification.[81] Ten parties filed comments or reply comments in response to the *Third FNPRM*.[82] Most commenters

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[74] *Id.* at 6.

[75] *See* Wireless Telecommunications Bureau Seeks Comment on Western PCS I Licensee Corporation Request for Waiver of Section 20.6 of the Commissions Rules, *Public Notice*, DA 98-1559 (rel. Aug. 5, 1998); Wireless Telecommunications Bureau Seeks Comment on Triton Communications Request for Waiver of Section 20.6 of the Commissions Rules, *Public Notice*, DA 98-1626 (rel. Aug. 13, 1998); Wireless Telecommunications Bureau Seeks Comment on Western PCS II Licensee Corporation Request for Waiver of Section 20.6 of the Commissions Rules, *Public Notice*, DA 98-2017 (rel. Oct. 7, 1998);

[76] Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Further Notice of Proposed Rulemaking,* 10 FCC Rcd 6880 (1995) (*Third FNPRM*).

[77] PMRS is defined as a mobile service that is neither a commercial mobile radio service nor the functional equivalent of a service that meets the definition of commercial mobile radio service. PMRS includes, but is not limited to, not-for-profit land mobile radio and paging services that serve the licensee's internal communications needs as defined in Part 90; mobile radio service offered to a restricted class of eligible users; 220-222 MHz land mobile service and automatic vehicle monitoring systems that do not offer interconnected service or that are not-for-profit; Personal Radio Services under Part 95; Maritime Service Stations under Part 80; and Aviation Service Stations under Part 87. *See* 47 C.F.R. § 20.3.

[78] Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Further Notice of Proposed Rulemaking,* 10 FCC Rcd 6880 (1995) (*Third FNPRM*).

[79] *Third FNPRM,* 9 FCC Rcd at 6881 ¶ 3.

[80] *Id.*

[81] *Id.* at 6881-82 ¶ 4.

[82] Comments were filed on June 5, 1995, by Advanced MobileComm, Inc.; AirTouch Communications, Inc.; American Mobile Telecommunications Association, Inc.; CTIA; GTE Service Corporation (GTE); McCaw Cellular Communications, Inc; Nextel Communications, Inc.; Pacific Telesis Mobile Services and Pacific Bell Mobile Services (PacTel/PacBell); and PCS PrimeCo, L.P. (PCS PrimeCo). Rural Cellular Association (RCA) filed Reply Comments on June 26, 1995.

supported extending the CMRS spectrum cap to PMRS providers of SMR, cellular and broadband PCS service.[83]

29. CTIA Forbearance Petition.[84] On September 30, 1998, the Cellular Telecommunications Industry Association filed a Petition for Forbearance (CTIA Forbearance Petition). CTIA requests that the Commission use its authority under Section 10 of the Act[85] to forbear from applying section 20.6 of the Commission's rules.[86] CTIA urges the Commission to rely upon a case-by-case determination of permissible levels of horizontal ownership as part of the Section 310(d)[87] license transfer review.[88]

IV. DISCUSSION

A. Overview

30. The Commission last reviewed the CMRS spectrum aggregation limits in 1996.[89] Since that time, there have been several developments that have significantly affected CMRS markets. Perhaps the most notable of these are the changes brought about by the deployment of digital wireless services to mass market consumers. When the CMRS spectrum cap was initially adopted, mobile voice markets in most areas of the county consisted of only two cellular carriers. Since then, however, we have issued new licenses authorizing the use of additional CMRS spectrum. In many areas of the country, broadband PCS auction winners have also pursued the opportunities presented by newer digital technologies and have begun to provide an expanded array of mobile services. Cellular and broadband PCS providers, in turn, have also begun to encounter competition from a nationwide SMR company whose capabilities have been enhanced by acquiring new spectrum rights and its own digital strategy. Competition is also emerging from providers of paging services, data services, wireless e-mail and other non-voice services. Beyond CMRS markets, there have also been profound changes in related telecommunications markets as the Commission implemented the Telecommunications Act of 1996. While we are encouraged by these developments, we recognize, however, that this emerging competition is not

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[83] *See, e.g,* GTE comments at 1-2; PacTel/PacBell comments at 1; PCS PrimeCo comments at 1, RCA reply comments at 1-3.

[84] We discuss the CTIA Forbearance petition in greater detail *infra* at section IV.C.4.

[85] 47 U.S.C. § 160(a)(1-3). Section 10(c), 47 U.S.C. § 160 permits the Commission to forbear from the application of virtually any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or a class of carriers or services.

[86] *See* 47 C.F.R. §20.6

[87] 47 U.S.C. 310(d) requires the Commission to find that a proposed license transfer or assignment would serve the public interest, convenience and necessity.

[88] CTIA Forbearance Petition at 3.

[89] *See CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7864-87.

uniform across the country. In some areas, consumers' choices regarding wireless services continue to be limited.

31. Section 11 of the Communications Act requires that we review regulations "that apply to the operation or activities of any provider of telecommunications service" and "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[90] In light of the mandate in section 11 and the developments in the marketplace since 1996, we seek comment in this Notice on whether we should retain, modify, or repeal the CMRS spectrum cap. Specifically, we first reassess the spectrum cap, and then set out for comment possible modifications and other alternatives to the option of retaining the existing cap.

B. Reassessment of the CMRS Spectrum Cap

32. Background. The CMRS spectrum cap was designed to "discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency."[91] The Commission found that the CMRS spectrum cap would "further [ ] the public interest by promoting competition in CMRS services, allowing review of CMRS acquisitions in an administratively simple manner, and lend [ ] certainty to the marketplace."[92] In its reaffirmation of the cap in the *CMRS Spectrum Cap Report and Order*, the Commission also found that the cap "furthers the goal of diversity of ownership that we are mandated to promote under section 309(j)" of the Communications Act.[93] The Commission also found that a 45 MHz spectrum cap most effectively accomplished our goals by preventing cellular licensees from gaining too great a competitive advantage over new entrants in mobile wireless markets.[94] Therefore, it decided that a "single 45 MHz CMRS cap [would] give both cellular and PCS providers more flexibility to participate in a more competitive marketplace" and counteract the superior competitive position held by cellular carriers.[95]

33. Generally, we conduct our assessment of the competitive nature of relevant markets in large part by measuring market concentration. Concentration is typically calculated based on market shares, which may be computed using capacity, production, or sales information. Therefore, in the *CMRS Spectrum Cap Report and Order*, the Commission relied to a significant degree on measurements of market concentration known as "Herfindahl-Hirschman Indices"

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[90] 47 U.S.C. § 161.

[91] *CMRS Third Report and Order*, 9 FCC Rcd at 8105 ¶ 251.

[92] *Id.*

[93] *CMRS Spectrum Cap Report and Order,* 11 FCC Rcd at 7873 ¶ 102 (*citing* 47 U.S.C. § 309(j)).

[94] *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd. at 7873 ¶ 101.

[95] *Id.* at 7875 ¶ 105.

(HHI's), computed in that instance using assigned spectrum as a proxy for the market capacity of individual firms.[96]

34. As discussed in our *Third Annual CMRS Competition Report*,[97] although the evolution of the CMRS sector is still at an early stage, signs of competition are clear. In particular, progress has been made towards competitive mobile voice markets in many areas. In the wake of our licensing of broadband PCS spectrum, entry by those firms has become a reality in many local markets throughout the United States, and further entry is continuing. Consequently, we observe price and service rivalry in many markets. Cellular firms, too, are making substantial investments to provide digital service. In addition, we note that certain non-voice services, including paging and data services, also are beginning to provide competition in some markets. And although there are local variations, on average prices are falling markedly, service quality is improving, and new services are becoming available.[98] Mobile voice markets continue to grow at a significant rate, and technological progress, too, is ongoing. We recognize, however, that these competitive developments have not yet occurred in all markets.[99]

35. Discussion. We begin our reassessment of the spectrum cap by examining whether it has advanced the major policy goals for the cap as discussed above. Generally, we believe that the spectrum cap has been useful in promoting competition in mobile voice services, given that these services were largely available from only two cellular companies in each locality prior to our broadband PCS auctions. The 45 MHz limit was originally devised as the Commission prepared for its auction of broadband PCS spectrum, in response to concerns that incumbent cellular providers had incentives to impede the development of competing networks to preserve their competitive position. Under constraints imposed by the CMRS spectrum cap, the Commission awarded broadband PCS licenses that are now, or will soon be, competing directly with these cellular providers. In many localities, significant new entry into mobile voice services has already occurred. Moreover, we expect that competition will develop further as remaining broadband PCS licensees complete the initial phases of their network buildouts. We believe that the aggregation limit helped to promote the likely emergence of at least three new competitors in each market. In at least several markets, mobile voice services are now being offered by seven or more competitors.[100] The competitive evolution of these markets may be traced directly

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[96] *CMRS Spectrum Cap Report and Order*, Appendix A, 11 FCC Rcd at 7899; HHIs are routinely employed by federal antitrust authorities in their preliminary reviews of mergers and acquisitions. Typically, antitrust authorities follow up with in-depth market analysis if the HHI-based measurements of market concentration exceed certain numerical thresholds. These practices are codified in the *Merger Guidelines*. Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569 (*Merger Guidelines*). While HHIs generally are used by these authorities to determine the degree to which markets are concentrated, they are not necessarily regarded as dispositive on whether a post-merger market would be sufficiently competitive.

[97] *Third Annual CMRS Competition Report* at 2-4, 63-64.

[98] *Id* at 2-4.

[99] *Id.* at 63.

[100] As of October 7, 1998, seven cellular, broadband PCS and digital SMR licensees are operating in Jacksonville, Tampa, Phoenix and Tucson. PCS Week, "PCS Week's Active PCS Systems List" (October 7, 1998).

to our decisions to auction additional spectrum well-suited to the provision of mobile communications, and to impose limits on the extent to which firms were permitted to aggregate spectrum in these auctions. We invite comment on our assessment that the existing spectrum aggregation limit to date may have promoted competition in mobile voice markets. We also invite comment on how evidence of emerging competition should be factored into our assessment of whether the current cap should be eliminated, relaxed or redefined. In particular, what weight should these factors be given relative to HHI calculations or similar measures of concentration of ownership or control? Parties should provide discussion or analysis supporting their views. We also seek comment on the following issues and how they relate to the question of whether to retain, modify, or repeal the spectrum cap: (1) what are the relevant product markets?;[101] (2) what are the relevant geographic markets?; and, (3) what are the relevant measures of market capacity (assigned spectrum, operational spectrum, subscribers, revenues, traffic/minutes of use, etc.)?

36. We note that the extent to which services are presently available in individual markets varies considerably. In no market have all of the licensed broadband PCS providers begun offering service, and in a number of localities, service is not yet available from any new entrant.[102] For purposes of assessing the competitive nature of individual markets and calculating market shares, the *Merger Guidelines* limit market participants to firms that currently produce or sell the relevant product and those described as "uncommitted entrants."[103] Hence, for purposes of conducting our analysis of competition in wireless markets, we seek comment on whether we should limit our assessment of market participants to only current suppliers and any other firms that have announced intentions to commence operations, declared their intentions to offer the relevant product, and will imminently begin soliciting business. Particularly in smaller towns and rural markets, cellular incumbents continue to hold competitive advantages vis-à-vis market entrants that are not very different from those existing when the cap was originally conceived and implemented. Hence, our spectrum aggregation limits may well continue to be useful to promote competition in at least certain areas.[104] We invite comment on these assessments. We also solicit comment on whether we should apply the CMRS spectrum cap on a market-by-market basis.

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[101] Possible examples include mobile voice, mobile data, paging/messaging, wireless voice telephony (including both fixed and mobile services), mobile telecommunications (including both voice and data services), wireless telecommunications, all telecommunications, etc.

[102] *Third Annual CMRS Competition Report* at Figure 2.

[103] Firms qualify as uncommitted entrants if their market entry is "likely to occur with one year and without the expenditure of significant sunk costs of entry and exit. .... The competitive significance of supply responses that require more time or that require firms to incur significant sunk costs of entry and exit [is considered separately under] entry analysis." *Merger Guidelines* at 1.32 *See also* Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, File No. NSD-L-96-10, *Memorandum Opinion and Order,* 12 FCC Rcd 19985, 20051 ¶ 130-31 (1997)

[104] We recognize that competition for important mobile communication services may emerge from operators using bands other than CMRS, including satellite.

37. We also believe that with respect to mobile wireless services, the spectrum cap has served the purpose of constraining undesirable erosion of existing competition through mergers or acquisitions in major markets, where competition among multiple carriers is most advanced.[105] For cellular and SMR incumbents especially,[106] and perhaps for the early A- and B-Block broadband PCS entrants as well, we believe that incentives exist for operational carriers to explore in-market merger options. Hence, it appears likely that our spectrum aggregation limit has been of some value in inhibiting competition-eroding spectrum consolidation. We invite comment on these assessments. We also seek comment on the potential for consolidation of CMRS markets if we relax or eliminate the spectrum cap, and whether such consolidation would harm or benefit consumers. We request that commenters provide empirical evidence on the harms or benefits of consolidation in CMRS markets.

38. We also invite comment on whether there are existing disciplinary factors in the marketplace that may independently minimize the likelihood that any single entity would achieve an anticompetitive level of ownership of CMRS spectrum in a particular geographic area. For example, are there dis-economies of scale that will limit the size to which firms will grow, and thus tend to ensure that the CMRS sector will assume a competitive structure even in the absence of a spectrum cap? Is it possible that capital markets will not finance attempts by individual firms to acquire spectrum in amounts or construct systems of sizes that would threaten competition? Commenters arguing that such factors lessen or eliminate the need for our current spectrum cap should, where possible, provide specific quantifiable examples of dis-economies, or of points at which various types of costs or risks associated with owning or controlling additional wireless spectrum outweigh potential benefits. Because we note that many licensees have not accumulated as much as 45 MHz of CMRS spectrum, we also seek comment on whether access to capital effectively disciplines market consolidation.

39. We also seek comment on whether the convergence and substitutability of other telecommunications networks, including wireline, cable, private wireless, and satellite networks among others, should affect the application or public interest considerations underlying the spectrum cap. It is important that commenters addressing this issue supply detailed analysis, identify all underlying assumptions, and provide factual support for any projections.

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[105] It will be more difficult to ascertain whether our existing aggregation limit has protected competition in wireless markets other than mobile voice services. In large measure, competition in other markets is just beginning to emerge. Hence, there may be less competition to protect. Furthermore, the spectrum being devoted to other wireless services tends to be relatively modest, such that our existing cap would not pose a constraint on a merger between two firms engaged in supplying only these services. We seek comment on whether the 45 MHz spectrum limit has been effective, or may become effective in the future, in protecting competition in wireless markets other than mobile voice service.

[106] Cellular incumbents, however, are also precluded from merging their interests within a common geographic area under our cellular cross-ownership restrictions.

40. We also note that the Commission has scheduled an auction for March 1999, that will include licenses for operation on C and F block frequencies,[107] and that there are certain restrictions on the sale of entrepreneur block licenses (C and F blocks).[108] We believe that our entrepreneur block rules will help ensure that this spectrum was and will be assigned in a manner that promotes rather than inhibits competition.[109] We invite comment on whether these rules are sufficient to prevent undesirable spectrum consolidation. We also solicit views on any relationship between this proceeding, including the timing of our final decision, and the successful completion of the upcoming C block auction.

41. In two pending requests for permanent waiver of the spectrum cap, Western Wireless has argued that the CMRS spectrum cap impairs the realization of potential economies of scope or scale.[110] The potential for economies of scale arises in connection with spectrum holdings when the unit costs of providing service decline as the carrier's spectrum holdings increase. Additional spectrum lessens a carrier's need to engage in spectrum reuse and allows for wider spacing between tower sites using any particular frequency. Economies of scope may arise if a firm can offer new products or services by leveraging existing assets to do so. For example, it may be possible for an incumbent cellular firm to offer additional services in a particular area at lower cost than would be possible for a *de novo* entrant, because existing facilities could be used at little or no incremental cost to furnish the second service.

42. With respect to economies of scope, we envision several scenarios that might support arguments for relaxing spectrum aggregation limitations to accommodate consumer needs. We anticipate that arguments will be made that wireless providers could offer additional services of significant value to the public (*e.g.*, high-speed mobile data services) by acquiring spectrum in excess of our current 45 MHz limit, and that such flexibility would therefore be in the public interest. Specifically, we anticipate the argument that if they were not subject to the cap, existing providers would be able to furnish new services at lower cost relative to new entrants because incumbents can capitalize on existing facilities (*e.g.*, towers) or other assets (*e.g.*, brand name recognition, established customer base). We invite comment on these scenarios, or any others that we have not anticipated, where economies of scope may provide a rationale for relaxing our spectrum aggregation limit. We invite comment generally on the concepts of economies of scope and scale and their relationship to spectrum aggregation limits.

43. In re-assessing the CMRS spectrum cap, we also seek comment on whether there are other efficiency benefits or progress toward other public interest goals that would flow from

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[107] C Block PCS Spectrum Auction Scheduled for March 23, 1999, *Public Notice*, DA 98-2318 (rel. Nov. 12, 1998); Additional Information Regarding Broadband PCS Spectrum Included in the Auction Scheduled for March 23, 1999; Comment Sought on Auction Procedural Issues, *Public Notice*, DA 98-2337 (rel. Nov. 19, 1998).

[108] *See* 47 C.F.R. § 24.709.

[109] FCC Report to Congress on Spectrum Auctions, Report, WT Docket No. 97-150 (rel. Oct. 9, 1997).

[110] Request of Western PCS II Licensee Corporation for Waiver of Section 20.6 of the Commission's Rules (filed July 11, 1997, amended Sept. 8, 1998) (*Denver Request*); Request of Western PCS I Licensee Corporation for Waiver of Section 20.6 of the Commission's rules (filed Jan. 29, 1998) (*Oklahoma Request*).

changes in the cap that might counterbalance concerns about possible anticompetitive effects resulting from increased geographic concentration of ownership. For example, might a relaxed cap allow efficient deployment of third-generation wireless services that would be prevented under the present cap? Or, might a relaxed cap facilitate provision of fixed wireless services by CMRS firms, perhaps as universal service providers? What, if any, impact would altering the cap have on the provision of wireless services to under-served areas? Would an enforceable commitment to provide such service in high-cost or low-income areas override anticompetitive concerns? We explore certain of these issues below.

44. *Service in rural areas.* As we discussed previously,[111] one of the principles that we will employ in evaluating the continuing need for the CMRS spectrum cap is ensuring that rural and under-served areas enjoy the benefits of modern telecommunications services. In that regard, we seek comment on whether the CMRS spectrum cap has facilitated the ubiquitous provision of wireless services.

45. We recognize that many rural and certain other markets have not yet seen the development of competition in the mobile wireless service markets to the degree that is evident in urban areas.[112] Throughout most of the nation, including rural/high-cost areas, the Commission licensed two cellular carriers.[113] Most cellular carriers now provide coverage throughout the entirety of their licensed service areas. As a result, cellular providers offer coverage spanning about 90 percent of the nation's territory,[114] and 98 percent of the population[115] based on where they reside. Hence, cellular coverage is relatively ubiquitous. By contrast, rural localities have witnessed limited entry by the new digital carriers. As of June, 1998, about 40 percent of the nation's BTAs did not have access to service from either a PCS or digital SMR provider.[116] More recent evidence indicates that about 22 percent of the nation's population does not currently have access to service from any of these carriers.[117] Moreover, in some outlying areas, coverage may be available but only along interstate and other major highways. Consequently, the available information suggests that many of the nation's residents living in rural and other high-cost areas

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[111] *See supra* section I.

[112] *Third Annual CMRS Competition Report* at 18 and Figure 4.

[113] There are exceptions. In Alaskan tribal areas, for example, more than two entities have been authorized to provide service in some rural service areas. There are also numerous sparsely or unpopulated areas where coverage is not available.

[114] For a coverage map, see <www.fcc.gov/wtb/cellular/cel_cov.html>.

[115] Donaldson, Lufkin & Jenrette, The Wireless Communications Industry (Spring 1998) at Table 4.

[116] *Third Annual CMRS Competition Report* at 18 and Figure 4. Our data with respect the 273 BTAs where coverage from new entrants has been initiated indicated only that coverage was available somewhere within the BTA. Accordingly, these measures of geographic and population coverage from PCS and other digital carriers were overstated. *Id.* at n.88.

[117] Paul Kagan Associates, Wireless Market Stats, "PCS Pops Coverage Up 50% in 1998," Oct. 31, 1998 at 14.

do not yet have meaningful competitive alternatives to the incumbent cellular carriers. However, we invite more data specifically concerning competition in high-cost and rural markets to form a reliable basis for evaluating our policy options with respect to these markets.

46. We seek comment on whether the relative lack of competition in certain rural and other markets suggests that there is a continuing need for the CMRS spectrum cap in those areas. Commenters should address whether the cap be should be retained, at least in those areas until increased competition begins to emerge. On the other hand, we recognize that the cap may affect the ability of a CMRS provider to attain certain economies of scale and scope. Spectrum may be made newly available for commercial use through partitioning agreements, but the economics of offering service to these lower-density populations may nevertheless limit the extent of competitive, facilities-based entry.[118] Thus, we seek comment on whether the existing spectrum cap may impede delivery of potentially lower-cost service to rural customers as economies of scope go unrealized. In particular, should we permit more concentration of spectrum in rural markets, perhaps allowing for leveraging of existing facilities? We seek comment on the extent to which the current 45 MHz aggregation limit may be thwarting the realization of potential economies, and solicit evidence on the magnitude of any such savings or efficiencies in particular market settings.

47. *Advancement of competition in local markets.* Another principle that we will use in our re-evaluation of the cap is the facilitation or competition in local telecommunications markets. Consequently, we seek comment on how the spectrum cap affects wireless providers' ability to enter into and compete in markets other than mobile voice service. In large measure, the development of competition involving other applications for wireless spectrum depends primarily on market-driven decisions by consumers and firms regarding the most valued uses for this spectrum. Because current demand for non-voice wireless services (mobile data, voice dispatch, messaging) seems to be met using far less spectrum than that used to provide existing voice and data services, it may not be necessary to be concerned about the adequacy of entry opportunities into these markets. But we also note that while spectrum itself may be highly fungible, networks often cannot be readily or economically reconfigured to furnish services for which they were not originally designed.[119] Hence, if existing networks are optimized to provide a particular service (such as mobile voice), and if most of the available spectrum must be dedicated so that these systems operate efficiently, a 45 MHz spectrum limit may not be able to

[118] We note that while we allow a licensee to partition or disaggregate its license subject to review by the Commission, the licensee is under no obligation to do so. *See* Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order*, 11 FCC Rcd 21831 (1996).

[119] To cite several examples, some cellular carriers have encountered challenges upgrading to digital technologies while continuing to offer analog services. Also, cellular and broadband PCS carriers have apparently not progressed significantly in their ability to offer group conferencing *(i.e.*, dispatch) services, despite the apparent commercial success of one digital SMR company that competes largely on the basis of this capability. Applications of Pittencrieff Communications, Inc. and Nextel Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 8935, 8940 ¶ 10 (WTB 1997). Technological obstacles facing mobile voice carriers have also resulted in rather slow acceptance of their two-way mobile data services. Application of Motorola, Inc. and American Mobile Satellite Corporation for Consent to Transfer Control of Ardis Company, *Memorandum Opinion and Order*, 13 FCC Rcd. 5182, 5187 ¶ 7 (WTB 1997).

simultaneously ensure that adequate competition will develop in the provision of both mobile voice services and other wireless services that consumers may wish to obtain. In other words, to the extent that incumbent licensees build networks coupled with CMRS spectrum that are targeted mainly to mobile voice users, opportunities for entry and development of competition in other services may be limited in the short to medium term. We thus seek comment on the extent to which existing networks are capable of economically supporting the delivery of wireless services other than fixed or mobile voice and paging/messaging. In particular, we invite comment on the technical and economic feasibility of offering dispatch, high-speed Internet, and other two-way data services over existing cellular, broadband PCS, and SMR network platforms. We also invite views on the extent to which any limitations on currently installed networks may be eased in the foreseeable future as newly available technologies are adopted. Finally, we note that one of the primary goals of the Telecommunications Act of 1996 is to promote competition in the local telecommunications market. In that light, we seek comment on the more general issue of whether an aggregation limit would be useful for promoting competition in emerging wireless services. For example, we are especially interested in views on whether the current spectrum cap is enhancing or impeding the provision of wireless services as a competitive alternative to wireline services.

48. *Development and deployment of new technologies and services.* We also wish to ensure that any spectrum aggregation limits promote, rather than impede, the introduction of new services and technologies. In that regard, we seek comment on whether the spectrum cap serves as a barrier to firms that wish to offer additional services or to adopt advanced network technologies. We share the concerns expressed by CTIA[120] about any possible impediments that may be imposed by the spectrum cap on the plans of CMRS providers to expand the array of wireless services that they will be able to offer. Specifically, some wireless carriers are examining technical options related to third-generation wireless networks that may provide a platform for delivering high-speed mobile data services.[121] Other companies are contemplating the use of wireless spectrum to offer local exchange services. Hence, we seek comment on whether the current aggregation limit poses an obstacle to the introduction of more advanced network technologies. We also seek comment on whether the existing spectrum limit constitutes a significant constraint on firms' abilities to offer wireless local loop or high-speed mobile data services, either on a stand-alone basis or bundled with mobile voice services. In particular, we invite comment on the extent to which companies are able to acquire and use spectrum outside of CMRS bands to achieve these goals. We also invite comment on the possible use of our

[120] CTIA Forbearance Petition at 12, 22-27.

[121] The Commission recently sought comment on the issue of third-generation mobile wireless communications in the context of its work with the International Telecommunication Union. *See* Commission Staff Seek Comment on Spectrum Issues Related To Third Generation Wireless/IMT-2000, *Public Notice*, DA-98-1703 (rel. Aug. 26, 1998). Sprint PCS stated that it could provide IMT-2000 services within the existing 45 MHz CMRS spectrum cap. AT&T Wireless Communications, Bell Atlantic Mobile, BellSouth, and CTIA favored elimination of the spectrum cap while U.S. West supported raising the cap but not eliminating it. They and others, including Airtouch Communications, Bell Mobility, Motorola, Personal Communications Industry Association, SBC Wireless, Telecommunications Industry Association, and the Universal Wireless Communications Consortium commented that the existing spectrum cap would inhibit existing PCS licensees from using higher data rates that would be needed for providing some third generation IMT-2000 services.

waiver process to consider petitions for supplemental spectrum that may be needed to launch new wireless services.

C. Modifications and Alternatives to Existing CMRS Spectrum Cap

49. There are a number of options available for consideration when evaluating the geographic aggregation of CMRS spectrum by licensees. These options range from retaining the current CMRS spectrum cap to eliminating the general rule pertaining to geographic aggregation of CMRS spectrum, and instead relying on case-by-case analysis under our authority to review assignment of licenses and transfers of control pursuant to section 310(d) of the Act. Another option would be to modify the existing cap by either expanding the allowable geographic overlap, increasing the 45 MHz limitation, amending the attribution rules associated with the spectrum cap, or some combination thereof. In conjunction with retaining or modifying the spectrum cap, we could also establish a procedure for sunsetting the cap. We could also, as CTIA has requested, forbear from enforcing the spectrum cap under our authority in section 10 of the Communications Act. We discuss various alternatives to retaining the existing spectrum cap in turn. Proponents of the alternatives to the current cap should explain why the current cap is no longer in the public interest and should support their assertions with specific data and analysis.

1. Modification of Significant Overlap Threshold

50. The CMRS spectrum cap prohibits a licensee from having more than 45 MHz of spectrum in broadband PCS, cellular or SMR services with significant overlap in a geographic area.[122] A "significant overlap" occurs when at least ten percent of the population of the PCS licensed service area is within the cellular geographic service area and/or SMR service area(s).[123] Therefore, a carrier's spectrum counts toward the spectrum cap if the carrier is licensed to serve 10 percent or more of the population of the designated service area.[124]

51. In the *CMRS Spectrum Cap Report and Order*, the Commission was concerned about the potential for existing cellular operators to exercise undue market power over the fledgling broadband PCS and SMR services. It found that a potential for the exercise of such market power was slight with a 10 percent population overlap.[125] The Commission was also concerned that a threshold above 10 percent might lead to anticompetitive practices.[126] We seek comment on the effect of recent changes in CMRS markets, particularly concerning the emergence of broadband PCS carriers as competitors to cellular operators, on the rationale for

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[122] 47 C.F.R. § 20.6(c).

[123] *Id.*

[124] If the significant overlap is between 10 and 20 percent, the divesture provision of the CMRS spectrum cap allows the licensee up to ninety days from the final grant of license that causes the licensee to exceed the 45 MHz limit, to come into compliance with section 20.6. 47 C.F.R. § 20.6(e).

[125] *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7876 ¶ 107.

[126] *Id.*

a 10 percent overlap threshold. We also seek comment on the public interest benefits of increasing the threshold and whether those benefits outweigh any potential for anticompetitive concentration of ownership or control of CMRS licenses.

52. As we noted previously, we have received requests for a waiver of the 10 percent geographic overlap restriction. In its request, Poka Lambro argued that "permitting it, a small business, and its parent, a rural telephone company, to both operate in the [same] BTA will serve the public interest by allowing it to bring advanced telecommunications to rural areas." Western contends that divestiture of its markets (or portions thereof) could impair its competitiveness relative to its larger regional rivals, and therefore thwart its efforts to provide better service at lower rates.[127] Western also argues that waiving section 20.6 will promote the purpose of the underlying rules and advance the public interest by facilitating prompt introduction of broadband PCS service to the public in rural areas and allowing continued public access to Western's existing cellular infrastructure and expertise without compromising the spectrum cap's purpose of deterring anticompetitive practices.[128]

53. We seek comment on whether a geographic overlap standard of greater than a 10 percent overlap should be adopted. If so, we seek comment on what would be a more appropriate standard of geographic overlap and why. We seek comment on whether a greater overlap may facilitate anticompetitive behavior. We also seek comment on what degree of a permissible geographic overlap could promote anticompetitive conduct. In addition, we seek comment on whether we should permit carriers in high-cost and under-served markets to have a greater than 10 percent population overlap, and how we should define high-cost and under-served markets for purpose of the significant overlap threshold. We also seek comment on whether there is a need to allow a greater overlap in high-cost and under-served areas if we adopt our proposal to allow for a higher cap in rural areas. In addition, we seek comment on whether a separate geographic overlap standard for rural areas may be in the public interest by possibly encouraging a greater number of service options and better service quality. In the alternative, we solicit comment on whether there is a mechanism for triggering the application of a spectrum cap in given geographic areas that might be superior to our current significant overlap standard.

2. Modification of 45 MHz Limitation

54. The CMRS spectrum cap allows a single entity to control up to 45 MHz of broadband PCS, cellular, and SMR spectrum in a geographic area.[129] As we discussed previously, the Commission adopted the 45 MHz spectrum aggregation limit prior to the auctioning of the broadband PCS spectrum. In the *CMRS Third Report and Order* the Commission explained that 45 MHz was an appropriate cap because it would prevent excessive concentration by a single licensee, but still allow PCS operators 40 MHz of spectrum to obtain additional spectrum so that they would have incentives to offer other services and take advantage of new innovation or

[127] Denver Request at 15; Oklahoma Request at 12.

[128] Denver Request at 15; Oklahoma Request at 12.

[129] 47 C.F.R. § 20.6(a).

economies of scale.[130] The Commission also noted that a 45 MHz cap would allow an SMR operator with 5 MHz or less to acquire both a 30 MHz and a 10 MHz broadband PCS license in the same area.[131]

55. We seek comment on whether a 45 MHz CMRS spectrum limitation is appropriate given increased competition in the CMRS marketplace. For instance, the vast majority of the broadband PCS licenses have been assigned and there are broadband PCS licensees providing service in competition with cellular carriers and each other in many markets. An expansion of non-voice offerings has also contributed to increasing competition among CMRS services. In particular, we seek comment on what would be an appropriate spectrum aggregation limitation in light of current and future prospects for competition in CMRS markets.[132] We request that commenters provide analytical support for any limitation that they propose.

56. Another option would be to raise the 45 MHz limitation when competition in relevant markets reaches a particular level. For example, one possible option would permit licensees to exceed the 45 MHz limit as long as a certain number of competitors would remain in a market after the assignment. We seek comment on such an option. How many competitors in a market would be sufficient to allow a licensee to exceed the 45 MHz limitation? Would the same number of competitors be required for wireless services other than mobile voice? How would we identify qualifying competitors? Should we only consider facilities-based competitors? Should we consider other factors in addition to the number of facilities-based carriers in a given market in determining when to lift the restriction? We seek comment on whether there should be any restraints on how much spectrum a licensee could obtain under such an option.

57. A similar option would be to allow the cap to be raised/exceeded in rural or under-served areas. We recognize that broadband PCS providers holding licenses covering low-density, rural, or high-cost areas, face significant economic challenges since it may be difficult for these areas to profitably support a large number of independent facilities-based competitors. Consequently, users of mobile communications services in rural areas may not be able to enjoy the same degree of competition now emerging in urban markets that may be needed to bring desired improvements in service and pricing.[133] We seek comment on the benefits that may be obtained by allowing licensees serving rural, high-cost areas to hold more than 45 MHz of broadband CMRS spectrum in those areas. We also seek comment on how we should define those areas. One possibility would be to use rural service areas, or RSAs. Another option would be to use high-cost areas as defined in our universal service proceeding. We seek comment on

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[130] *CMRS Third Report and Order*, 9 FCC Rcd at 8109-8110 ¶ 263.

[131] *Id.*

[132] If the cap were increased to 50 MHz it would allow 30 MHz PCS licensees to acquire more than one 10 MHz block. An increase to 55 MHz would allow mergers between firms with significant overlaps in their respective cellular and 30 MHz PCS properties. A 60 MHz limitation would allow a single entity to control in the same geographic area (1) two 30 MHz PCS systems (2) one 30 MHz PCS system and three 10 MHz PCS systems, or (3) one 30 MHz PCS system, a cellular system, and a 5 MHz SMR system.

[133] We include herein the clients of metropolitan systems who demand access to network services while roaming in rural areas.

these possible determinations of rural/under-served areas. Commenters that suggest other definitions for rural or under-served areas are requested to precisely set out their proposed definition, and explain the type and number of areas that would come within that definition.

58. We also seek comment whether the partnerships anticipated under this option would result in meaningful convergence in service quality and rates between urban and rural subscribers. Furthermore, we solicit views on whether any claimed efficiencies of scope are likely to be commercially significant in magnitude for operators in rural markets. We also invite comments on whether this option would discourage broadband PCS carriers from extending their digital network buildouts beyond urban and suburban centers.

3. Modification of Ownership Attribution Thresholds

59. Another option for relaxing the CMRS spectrum cap would be to modify the attribution criteria. Generally, a controlling interest in a licensee, in whatever manner exercised, including negative control, is considered an attributable interest.[134] Under the CMRS spectrum cap, ownership interests of 20 percent or more (40 percent if held by a small business or rural telephone company), including general and limited partnership interests, voting and non-voting stock interests or any other equity interest are considered attributable.[135] Officers and directors are attributed with their company's holdings, as are persons who manage certain operations of licensees, and licensees that enter into certain joint marketing arrangements with other licensees.[136] Stock interests held in trust are attributable only to those who have or share the power to vote or sell the stock.[137] Debt does not constitute an attributable interest, nor are securities affording potential future equity interests (such as warrants, options, or convertible debentures) considered attributable until they are converted or exercised.[138] We seek comment generally on whether we should modify any or all of these attribution criteria. We ask commenters to provide reasoning and factual support for their positions.

60. We first seek comment on whether we should modify the 20 percent ownership benchmark. The Commission chose a 20 percent attribution level for broadband CMRS in order to increase the availability of capital investment.[139] Similarly, the Commission uses a 40 percent

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[134] 47 C.F.R. § 20.6(d)(1).

[135] 47 C.F.R. § 20.6(d)(2). Ownership interests held through successive subsidiaries are calculated through use of a multiplier. 47 C.F.R. § 20.6(d)(8).

[136] 47 C.F.R. § 20.6(d)(7).

[137] 47 C.F.R. § 20.6(d)(3).

[138] 47 C.F.R. § 20.6(d)(5).

[139] *See e.g.*, Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957 ¶ 119 (1994). *See also Third Memorandum Opinion and Order*, GN Docket No. 90-314, 9 FCC Rcd. 6908 at n. 64 (1994) (the attribution standard for cellular interests other than designated entities is set at 20 percent to account for our policy in the early days of the cellular industry to encourage the formation of settlement groups--a historic anomaly that has no counterpoint in the PCS context. Attributions levels are set higher for designated entities in accordance with our statutory mandate to promote opportunities in PCS

attribution level for broadband CMRS licenses held by small businesses and rural telephone companies to allow for additional investment in such CMRS providers.[140] We seek comment on the effect that a 20 percent attribution standard has on the ability of CMRS providers to obtain capital. We seek comment on the public interest benefits of increasing the 20 percent attribution standard. We also seek comment on what level we should set an attribution standard. Commenters proposing a different standard should provide analytical support for their proposals. Our goal is to identify situations where a minority ownership interest may comprise actual control of a company or may provide a dis-incentive for full competition. We do recognize, however, that setting an attribution limit too low may limit the availability of capital investment. We note that attribution rules for other services typically apply much lower ownership benchmarks of 5 \to 10 percent than the current 20 percent we use for the CMRS spectrum cap.[141] We seek comment on whether we should increase the benchmark as it applies to the amount of non-voting equity interest, or interest held by a limited partner. We also seek comment on whether we should continue to have a separate 40 percent attribution standard for licenses that are held by small businesses or rural telephone companies or whether this standard should also be modified.

61. We also seek comment on whether any of the other provisions in our ownership attribution criteria should be modified. Are there any situations where an entity can acquire effective control over another entity that is not adequately contemplated under our attribution standards? Alternatively, are there situations proscribed by our attribution rules that are inhibiting competition? We request that parties be as specific as possible in identifying which, if any, attribution standards should be changed and in explaining the rationale and public interest benefits that might accompany such a change in our rules.

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for such entities); *Memorandum Opinion and Order*, GN Docket No. 90-314, 9 FCC Rcd. 4957 at ¶¶ 107, 110 (1994) (The 20 percent ownership attribution standard for cellular operators was adopted, in part, because settlements during the initial phase of cellular licensing resulted in partial and often non-controlling interests in those licensees. In light of this history, it would be unfair and unduly restrictive to place the same 5 percent limit on cellular/PCS cross-ownership. For this reason, we decided to allow a 20 percent cellular ownership interest.); *Second Report and Order*, GN Docket No. 90-314, 8 FCC Rcd. 7700 at ¶¶ 107-109 (1993) (settlements encouraged by the Commission during the initial phase of cellular licensing may have resulted in the creation of certain partial, often passive ownership interest in cellular licensees, and we were concerned that we not foreclose such partial owners from participating in PCS.) The narrowband PCS rules, use a 5 percent attribution level, with 10 percent permitted for institutional investors. *See* 47 C.F.R. § 24.101.

[140] *See CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7880 ¶ 117; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253; Amendment of the Commission's Cellular PCS Cross-Ownership Rule, GN Docket No. 90-314; Implementation of Sections 3(n) and 332 of the Communications At Regulatory Treatment of Mobile Services, GN Docket No. 93-252; *Sixth Report and Order*, 11 FCC Rcd 136, 162-64 ¶¶ 50-52 (1995).

[141] We note that both broadcast and cable use a 5 to 10 percent attribution level. In the broadcast multiple ownership context, any interest amounting to 5 percent of more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper is attributable, except for certain passive investors that can hold up to 10 percent without being considered attributable. However, broadcast licensees can acquire up to 33 percent of non-voting equity in another licensee in the same market. 47 C.F.R. § 73.3555, n. 2. *See also* 47 C.F.R. § 76.501, n. 2; 47 C.F.R. § 76.503(f); 47 C.F.R. § 76.504(h); 47 C.F.R. § 21.912(c), n. 1.

62. In the *CMRS Spectrum Cap Report and Order,* the Commission adopted a four-prong test to qualify for a waiver of our ownership attribution standards in response to concerns raised by the court in *Cincinnati Bell.*[142] The test was established to allow licensees with non-controlling minority investors and potentially conflicting CMRS ownership interests to seek waivers of the spectrum cap rule where the licensee is controlled by a single majority shareholder or controlling general partner.[143] This waiver test is based on the use of a 20 percent attribution standard. We seek comment on waiver test in general, and whether we should retain the waiver test if we modify the 20 percent attribution standard.

4. Forbearance From Enforcing the CMRS Spectrum Cap

63. Forbearance represents another option for addressing spectrum aggregation concerns in CMRS. CTIA has petitioned the Commission to forbear from enforcing the spectrum cap pursuant to our authority under section 10 of the Act. Under forbearance, the spectrum cap would continue to remain a codified rule, but the Commission would refrain from enforcing it. However, the Commission could at a later date, upon re-evaluation, determine that it would be in the public interest to again enforce the CMRS spectrum cap if forbearance seemed to be no longer warranted. Alternatively, the Commission could later decide to eliminate the rule. In contrast, if we were to eliminate the spectrum cap in this proceeding, as discussed below,[144] we would remove the rule.

64. Under section 10, we must forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if a three-pronged test is met. Specifically, section 10 requires forbearance, notwithstanding section 332(c)(1)(A),[145] if the Commission determines that:

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[142] *CMRS Spectrum Cap Report and Order,* 11 FCC Rcd at 7887 ¶ 131.

[143] "Waivers of § 20.6(d) may be granted upon an affirmative showing:

"(1) That the interest holder has less than a 50 percent voting interest in the license and there is an unaffiliated single holder of a 50 percent or greater voting interest;

"(2) That the interest holder is not likely to affect the local market in an anticompetitive manner;

"(3) That the interest holder is not involved in the operations of the licensee and does not have the ability to influence the licensee on a regular basis; and

"(4) That grant of a waiver is in the public interest because the benefits to the public of common ownership outweigh any potential anticompetitive harm to the market."

47 C.F.R. 20.6, note 3.

[144] *See infra* section IV.C.6.

[145] 47 U.S.C. § 332(c)(1)(A) (Commission may not forbear from applying sections 201, 202 and 208 to CMRS providers).

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[146]

65. To satisfy the first prong of section 10, that enforcement of the spectrum cap is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory, CTIA relies on statements that the CMRS market is competitive.[147] CTIA also argues that principles of antitrust law and economics provide adequate protection against the possibility of excessive concentration that the spectrum cap was designed to safeguard against.[148]

66. Addressing the second prong of the section 10 forbearance standard, CTIA seeks to show that enforcement of the spectrum cap is not necessary for the protection of consumers.[149] CTIA contends that the Commission's section 310(d) authority is an appropriate vehicle for the Commission to effectuate the "ideal approach [which] is to judge spectrum combinations on a case-by-case basis taking into account all of the relevant variables bearing upon competition and efficiency, including the service area overlap, the populations in the respective service areas, and the quantity of spectrum currently allocated to and . . . sought to be acquired by the licensee."[150] CTIA continues, "the bright-line, inflexible nature of the cap should yield to a more tailored, case-by-case approach."[151] CTIA considers this flexible approach to be less restrictive, and thus better able to serve consumers.[152]

67. CTIA argues that the third prong of the section 10 forbearance standard is met because forbearance is consistent with the public interest.[153] In evaluating whether forbearance

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[146] *Id.*

[147] CTIA Forbearance Petition at 7-8.

[148] *Id.* at 9-17.

[149] 47 U.S.C. § 160(a)(2).

[150] CTIA Forbearance Petition at 19.

[151] *Id.*

[152] *Id.* at 18.

[153] 47 U.S.C. § 160(a)(3).

is consistent with the public interest, the Commission considers whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers.[154] In making this assessment, the Commission may consider the benefits a regulation bestows upon the public, along with any potential detrimental effects or costs of enforcing a provision.[155] CTIA argues that the public interest is better served by a case-by-case determination of permissible ownership structures.[156] According to CTIA, rigid ownership limitations endangers innovation and efficiency and outweighs the administrative burden associated with reliance upon a case-by-case approach to market concentration issues.[157]

68. We seek comment on the CTIA Forbearance Petition, particularly whether CTIA's arguments meet the standards of section 10 for forbearance from the spectrum cap. In regard to the third prong of the test and in connection with the above questions regarding the re-assessment of the rule under section 11, it would be useful for commenting parties to consider and comment upon: (i) the original purpose of the particular rule in question; (ii) the means by which the rule was meant to further that purpose; (iii) the state of competition in relevant markets at the time the rule was promulgated; (iv) the current state of competition as compared to that which existed at the time of the rule's adoption; (v) how any changes in competitive market conditions between the time the rule was promulgated and the present might obviate, remedy, or otherwise eliminate the concerns that originally motivated the adoption of the rule; and (vi) the ultimate effect forbearance may have on consumers.[158]

69. If the Commission, upon review of the record, finds that the requirements set out in section 10 have been satisfied, and thus the Commission has authority to forbear from the CMRS spectrum cap, we seek comment on the advantages or disadvantages of forbearing from the cap rather than modifying, sunsetting, or eliminating it.

70. If we forbear from enforcing the CMRS spectrum cap, we seek comment on what step the Commission should take next regarding the cap. Should we subsequently, in this or another proceeding, develop a factual record on what happened to CMRS markets without the spectrum cap to confirm that our conclusions about the need for the cap were correct?

5. Sunset CMRS Spectrum Cap

71. If we conclude in this proceeding that we should retain a CMRS spectrum aggregation limit, we recognize that at some point market conditions may change such that the rule can be eliminated. In circumstances where the Commission could foresee the necessary

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[154] 47 U.S.C. §§ 160(a)(3), (b).

[155] *PCIA Forbearance Order* at ¶27.

[156] CTIA Forbearance Petition at 21.

[157] *Id.* at 25.

[158] *PCIA Forbearance Order* at ¶ 115.

change in market conditions, it has established sunsets for rules or, alternatively, specified when the Commission will re-evaluate the rule.[159] We seek comment on the public interest benefits of establishing a sunset date for the CMRS spectrum aggregation limit in all or some markets. In particular, we seek comment on the market conditions that should be present before we sunset the cap. We also seek comment on when these market conditions are likely to be generally present. We also seek comment on whether we should set a date certain for elimination of our spectrum aggregation limit, or if instead, we should review the continuing need for such a restriction at a pre-set date, *e.g.,* as part of the next biennial review process.

72. One alternative to a uniform date for sunsetting the CMRS spectrum aggregation limit in all or some markets, would be to sunset the cap in selected markets based on the competitive concerns in the particular markets in question. We seek comment on whether it would be in the public interest to sunset the CMRS spectrum cap on a market-by-market basis, and if so, what criteria should be considered in determining whether to sunset the cap in a particular market. One approach may be to sunset the cap when a certain number of competitors are present in a market. We seek comment on this approach and what level of competition should exist before we sunset the cap in a particular market.

73. Another option would be to review certain types of proposed transactions involving the aggregation of CMRS spectrum under our section 310(d). Under this approach, any transfers in connection with a merger or acquisition where both parties have directly competing operational wireless services in the same geographic market, would no longer be prohibited under the spectrum cap. Instead, parties to these transactions involving a combination of more than 45 MHz would be obligated to affirmatively demonstrate that the transaction is in the public interest. This would generally include a competitive analysis to evaluate whether the interests of consumers in relevant markets are threatened. All other transactions, including those involving overlapping licenses but where build-out is not complete and service is not operational, would continue to be subject to compliance with the CMRS spectrum cap. We seek comment on this approach.

6. Eliminate CMRS Spectrum Cap

74. A final option for dealing with CMRS spectrum aggregation concerns would be to eliminate the CMRS spectrum cap and consider broadband CMRS spectrum ownership issues on a case-by-case basis. The Commission currently reviews mergers and other transactions under sections 214(a) and 310(d) of the Communications Act.[160] We seek comment on whether elimination of the CMRS spectrum cap, and reliance on case-by-case determinations of ownership issues, would serve the public interest. We request that commenters provide facts and detailed analysis supporting their position. We also seek comment on the likelihood that anticompetitive behavior would result from elimination of the cap, and request that commenters identify what type of anticompetitive behavior is likely and establish causality between elimination of the cap and that behavior.

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[159] For example, the separate affiliate requirements for incumbent local exchange carrier provision of in-region broadband CMRS will no longer be effective after January 1, 2002. *See* 47 C.F.R. § 20.20(f).

[160] 47 U.S.C. § 310(d).

75. CTIA argues that we should forbear from our spectrum aggregation limits because the Commission's obligation to review license transfers under our public interest standard provides a sufficient basis for evaluating the aggregation of spectrum in connection with mergers and acquisitions.[161] Indeed, CTIA contends that a case-by-case review offers the prospect for superior policy over a "one-size-fits-all" approach such as is embodied in our policy of a spectrum aggregation limit.[162] We note that our public interest review allows for a balancing of pro-competitive and detrimental effects of a merger, and permits us to condition approval on restructuring a transaction to meet any concerns that we may have. However, we also recognize that our resources are limited. Accordingly, we seek comment on whether we should rely exclusively on our section 310(d) authority to protect against anticompetitive effects.

76. CTIA argues that the CMRS marketplace has evolved to the point where the CMRS spectrum cap is no longer necessary, and cites the Commission's *Third Annual CMRS Competition Report* to demonstrate the increase in the level of competition in CMRS markets.[163] In the *Third Annual CMRS Competition Report*, we note that much of the deployment of new mobile telephone networks is still concentrated in urban and suburban areas and that more rural areas are still waiting for deployment of new networks.[164] We are concerned about the potential impact on the development of competition in areas that currently have few competitors if we rely solely on a case-by-case analysis of ownership issues. We seek comment, including empirical evidence, whether CMRS markets are sufficiently competitive to allow for removal of the CMRS spectrum cap. We ask commenters to address any significant changes in CMRS markets and telecommunications markets in general that would directly support elimination of the CMRS spectrum cap.

77. CTIA argues that any administrative burdens are outweighed by the potential risk to efficiency and innovation imposed by the cap.[165] We seek comment regarding the administrative burden that would presumably be placed on the Commission's limited resources by reviewing ownership issues on a case-by-case basis.

78. Finally, we note that other Federal and state authorities may be able to monitor anticompetitive conduct in wireless markets. We invite comment on the extent to which these authorities, given their resources and broad responsibilities, would be able to effectively monitor the competitive effects of smaller mergers and corporate acquisitions (those not meeting Hart-Scott-Rodino thresholds).[166] We also note that these authorities operate under laws that permit intervention only where markets are tending toward becoming monopolized. They have much

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[161] CTIA Forbearance Petition at 3.

[162] *Id.* at 20. CTIA contends that the Commission should use the *Merger Guidelines* an appropriate standard for review of licensing decisions under the Communications Act.

[163] CTIA Forbearance Petition at 7-8 *citing Third Annual CMRS Competition Report at 63.*

[164] *Third Annual CMRS Competition Report* at 63.

[165] CTIA Forbearance Petition at 4-5.

[166] *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18.

more limited legal authority when a merger or acquisition threatens to impede the development of competition where such competition does not yet exist or is in its infancy.[167] We seek comment on the ability that Federal and state authorities have under antitrust laws to protect competition in cases where competition may not yet be adequately developed.

D. Cellular Cross-Interest Rule

79. Section 22.942 of the Commission's rules prohibits any person from having a direct or indirect ownership interest in licenses for both cellular channel block in overlapping cellular geographic service areas (CGSAs).[168] A party with a controlling interest in a license for one cellular channel block may not have any direct or indirect ownership interest in the license for the other channel block in the same geographic area. A party may, however, have a direct or indirect ownership interest of five percent or less in the licenses for both channel blocks.[169] Divestiture of interests as a result of an assignment of authorization or transfer of control must occur prior to the consummation of the transfer or assignment.[170]

80. The cellular cross-interest rule was adopted in 1991.[171] At that time cellular licensees were the predominant providers of mobile voice services. In adopting the cross-interest rule the Commission stated that "in a service where only two cellular carriers are licensed per market, the licensee on one frequency block in a market should not own an interest in the other frequency block in the same market."[172] Consequently, "[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems" the Commission adopted restrictions on a party's ability to hold ownership interests in both cellular licenses in the same geographic area.[173]

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[167] Regarding market's infancy, *see Third Annual CMRS Competition Report* at 32 ("broadband PCS sector is in its early stages of development...") and 63 ("progress towards a truly competitive mobile telephone marketplace ... is still in its early stages ...").

[168] 47 C.F.R. § 22.942.

[169] 47 C.F.R. § 22.942(a).

[170] 47 C.F.R. § 22.942(b).

[171] Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket Nos. 90-6, 85-388, *First Report and Order and Memorandum Opinion and Order On Reconsideration,* 6 FCC Rcd 6185, 6628-29. When the rules was first adopted in was codified at 47 C.F.R. § 22.902(b)(5). The rule was subsequently moved, without revision, to 47 C.F.R. § 22.942. Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket 92-115, *Report and Order*, 9 FCC Rcd 6513, 6574 (1994).

[172] *First Report and Order and Memorandum Opinion and Order On Reconsideration,* 6 FCC Rcd at 6628 ¶ 103.

[173] *Id.* ¶ 104.

81. As we have discussed previously, the current mobile voice marketplace includes multiple providers in many areas. In addition to two cellular providers, many markets also have one or two operating broadband PCS providers, with other broadband PCS providers in various stages of deployment of their systems, and a digital SMR system. Given the changes in mobile voice markets, and the fact that many markets no longer comprise primarily cellular duopolies, as in 1991 when the rule was adopted, we seek comment on whether we should retain, modify, or repeal section 22.942.

82. We note that we do not have any such service-specific restrictions for either broadband PCS or SMR. In eliminating the separate spectrum cap for broadband PCS in the *CMRS Spectrum Cap Report and Order*, the Commission found that the CMRS spectrum cap provided sufficient protection from potential anticompetitive behavior by licenses.[174] We seek comment on whether the CMRS spectrum cap provides sufficient protection from anticompetitive behavior by cellular licenses in the same market. We note that the primary effect of removing the cellular cross-ownership rules while maintaining the CMRS spectrum cap would be to remove the more restrictive ownership restrictions in the cellular cross-ownership rules in favor of the attribution provisions in the spectrum cap rule. Commenters should also address whether we should eliminate the cellular cross-ownership rule if we decide to eliminate the CMRS spectrum cap.

83. At the same time, we recognize that there are some markets where no PCS provider has yet initiated service.[175] Where the structure of these markets has not changed significantly, we ask whether the original purpose of the rule may still be served by its application. Namely, where cellular licensees are still the predominant providers of mobile voice services, we ask whether the cellular cross-interest rule may still be necessary to "guarantee the competitive nature of the cellular industry and to foster the development of competing systems."[176] Thus we seek comment on whether we should modify the cellular cross-ownership rule so that it does not apply in certain circumstances. One possibility would be to have the rule apply only in markets where there are a limited number of competitors to the cellular providers. We seek comment on what would be an appropriate threshold for determining in which markets the rule would not apply. We note that applying the rule in this fashion may result in essentially eliminating the rule in urban areas, where broadband PCS providers have generally already built out and are providing service, while maintaining the rule in rural areas, where broadband PCS providers may not be as far along in the deployment of their systems. We seek comment on the potential effects of such an application of the cellular cross-ownership rule.

84. We also seek comment on whether we should relax the current attribution rules related to this rule. For example, should we allow an entity that controls the cellular A block to have some interest in the cellular B block in the same market? Further, should we relax the current limit on what a non-controlling interest holder may have in each cellular license in a

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[174] *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869.

[175] *See supra.* at paras. 36, 45.

[176] Amendment of Part 22 of the Commission's Rules to provide for the filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, CC Docket Nos. 90-6, 85-388, *First Report and Order and Memorandum Opinion and Order On Reconsideration,* 6 FCC Rcd 6185, 6628-29.

given market? Commenters are asked to address the competitive and public interest implications of their proposals.

V. CONCLUSION

85. In this proceeding, we seek comment on whether our present CMRS spectrum cap furthers the public interest and encourages competition, consistent with spirit of the Act. We also seek comment on whether we should consider retaining, forbearing from, eliminating, or modifying our present cap. In particular, we seek comment on the petition filed by CTIA requesting forbearance from applying the CMRS spectrum cap. We also seek comment on whether we should retain, modify, or repeal the cellular cross-interest rule.

VI. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

86. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared the Initial Regulatory Flexibility Analysis (Appendix A) of the possible impact on small entities of the proposals set forth in this document. Written public comments are requested on the Initial Regulatory Flexibility Analysis. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on the *NPRM*, and must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this *NPRM*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act, *see* 5 U.S.C. § 603(a).

B. *Ex Parte* Rules -- Permit-But-Disclose Proceedings

87. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1201, 1203, and 1.1206(a).

C. Comment Dates

88. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before **January 25, 1999,** and reply comments on or before **February 10, 1999.** Comments and reply comments should be filed in WT Docket 98-205. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

89. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. Comments and reply comments should be filed in WT Docket No. 98-205. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

90. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W.; TW-A325; Washington, D.C. 20554.

91. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to the Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, Room 700, 2100 M Street, N.W., Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (WT Docket No. 98-205), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

D. Initial Paperwork Reduction Act of 1995 Analysis

92. This *Notice of Proposed Rulemaking* does not contain a proposed information collection.

E. Ordering Clauses

93. IT IS ORDERED that, pursuant to the authority of sections 1, 4(i), 10, 11, 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 160, 161, 303(g), and 303(r), this NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

94. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this NOTICE OF PROPOSED RULEMAKING, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[177] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the rules proposed in the Notice of Proposed Rulemaking (Notice) in WT Docket No. 98-205. Written public comments are requested on the IRFA. Comments on the IRFA must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines for comments on the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.

A. Need for, and objectives of, the proposed rules:

As part of its biennial regulatory review, pursuant to section 11 of the Communications Act,[178] the Commission solicits comment on whether we should retain, modify, or eliminate the commercial mobile radio service (CMRS) spectrum cap.[179] In this Notice, the Commission also seeks comment on the petition to forbear from enforcement of the CMRS spectrum cap filed by the Cellular Telecommunications Industry Association on September 30, 1998.[180] The discussion in the Notice is focused on whether to retain, modify, eliminate or forbear from enforcing the spectrum cap by looking at the competitive changes in the CMRS market, reexamining the goals that the spectrum cap was initially designed to achieve, and seeking comment on whether there are less restrictive measures, or additional public interest goals we should consider in determining whether to eliminate or modify the spectrum aggregation limits. Additionally, the Commission seeks comment on how our analysis may differ in the context of markets with many wireless competitors, as opposed to markets, for example, in rural or high-cost areas, where few or no broadband Personal Communications Service (PCS) providers may have initiated service, and whether we should consider the rule on a market-by-market basis. The Notice sets forth several different possible modifications or alterations to the cap and seeks comments on them, as well as other options that commenters may suggest. Specific issues raised for comment include: (1) expanding the allowable amount of geographic overlap between a licensee's various broadband CMRS holdings; (2) increasing the amount of spectrum that a single entity may hold beyond 45 MHz; (3) altering the ownership attribution rules associated with the spectrum cap; (4) forbearing from enforcement of the CMRS spectrum cap pursuant to our authority under section 10 of the

[177] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[178] 47 U.S.C. § 161.

[179] 47 C.F.R. § 20.6.

[180] Petition for Forbearance of the Cellular Telecommunications Industry Association, filed Sept. 30, 1998.

Act;[181] (5) establishment of a sunset for the CMRS spectrum cap; and, (6) elimination the CMRS spectrum cap and reliance on a case-by-case analysis of the potential competitive effects of a proposed spectrum holding pursuant to section 310(d) of the Communications Act . The Commission also solicits comment on whether we should retain, modify, or repeal the cellular cross-ownership rule.[182]

B. Legal basis:

The proposed action is authorized under sections 1, 4(i), 10, 11, 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 160, 161, 303(g) and 303(r).

C. Description and estimate of the number of small entities to which rules will apply:

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.[183] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[184] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[185] Nationwide, there are 275,801 small organizations.[186] "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."[187] As of 1992, there were 85,006 such jurisdictions in the United States.[188]

In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.[189] Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant

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[181] 47 U.S.C. § 160.

[182] 47 C.F.R. § 22.942.

[183] 5 U.S.C. §§ 603(b)(3), 604(a)(3).

[184] 5 U.S.C. § 601(6).

[185] 5 U.S.C. § 601(4).

[186] 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[187] 5 U.S.C. § 601(5).

[188] U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

[189] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[190]

The Notice could result in rule changes that, if adopted, would affect all small businesses that currently are or may become licensees of the broadband PCS, cellular and/or specialized mobile radio (SMR) services. To assist the Commission in analyzing the total number of affected small entities, commenters are requested to provide estimates of the number of small entities that may be affected by any rule changes resulting from the Notice. The Commission estimates the following number of small entities may be affected by the proposed rule changes:

Cellular Radiotelephone Service. The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[191] The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 1000 or more employees.[192] The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, is the most recent information available. This document shows that only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[193] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. The Commission assumes, for purposes this IRFA, that all of the current cellular licensees are small entities, as that term is defined by the SBA. In addition, the Commission notes that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. The most reliable source of information regarding the number of cellular service providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS). The report places cellular licensees and Personal Communications Service (PCS) licensees in one group. According to the data released in November 1997, there are 804 companies reporting that they engage in cellular or PCS service.[194] It seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees; however, the Commission is unable at this time to estimate with greater precision the number of cellular service carriers qualifying as small business concerns under the SBA's definition. For

[190] 15 U.S.C. § 632.

[191] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[192] U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce (radiotelephone communications industry data adopted by the SBA Office of Advocacy) (SIC Code 4812).

[193] U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

[194] FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997).

purposes of this IRFA, the Commission estimates that there are fewer than 804 small cellular service carriers.

Broadband PCS. The broadband PCS spectrum is divided into six frequency blocks designated A through F. The Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years.[195] This definition of "small entity" in the context of broadband PCS auctions has been approved by the SBA.[196] The Commission has auctioned broadband PCS licenses in blocks A through F. Of the qualified bidders in the C and F block auctions, all were entrepreneurs. Entrepreneurs was defined for these auctions as entities, together with affiliates, having gross revenues of less than $125 million and total assets of less than $500 million at the time the FCC Form 175 application was filed. Ninety bidders, including C block reauction winners, won 493 C block licenses and 88 bidders won 491 F block licenses. For purposes of this IRFA, the Commission assumes that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees, are small entities.

Specialized Mobile Radio (SMR). The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to firms that had revenues of no more than $15 million in each of the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes for purposes of this IRFA that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 900 MHz SMR band, and recently completed an auction for geographic area 800 MHz SMR licenses. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. There were 10 winning bidders who qualified as small entities in the 800 MHz auction.

D. Description of reporting, record keeping and other compliance requirements:

The Notice proposes no additional reporting, record keeping or other compliance measures.

[195] *See* 47 C.F.R. § 24.720(b)(1).

[196] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd. 5532, 5581-84 (1994).

E. Steps taken to minimize the significant economic impact on small entities, and significant alternatives considered:

The CMRS spectrum cap was established in 1994 in the *CMRS Third Report and Order*,[197] and was reaffirmed in the *CMRS Spectrum Cap Report and Order*.[198] Since that time, there have been several developments that have significantly affected CMRS markets. Through this notice the Commission, as part of the Commission's biennial regulatory review pursuant to section 11 of the Act,[199] seeks to develop a record regarding whether the CMRS spectrum cap continues to make regulatory and economic sense in the current and foreseeable wireless telecommunications markets. Likewise, the Commission seeks comment on whether there continue to be a need for the cellular cross-interest rule. We request comment on whether retention, modification, elimination or forbearance from enforcement of the CMRS spectrum cap is appropriate with respect to small business that are licensees of the broadband PCS, cellular and/or SMR services. We also request comment on whether retention, modification or elimination of the cellular cross-interest rule is appropriate with respect to small businesses that are cellular licensees.

F. Federal rules which overlap, duplicate, or conflict with these proposed rules:

None.

[197] Implementation of Sections 3(n) and 332 of the Communications Act, *Third Report and Order*, 9 FCC Rcd 7988, 8100-8117 (1994) (*CMRS Third Report and Order*).

[198] 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 96-59, GN Docket 90-314, *Report and Order*, 11 FCC Rcd. 7824, 7864-87 (1996) (*CMRS Spectrum Cap Report and Order*) *appeal pending sub nom. Cincinnati Bell Tel Co. v. FCC*, No. 97-3756 (6th Cir), *recon.* 12 FCC Rcd 14031 (1997) (*BellSouth MO&O*) *appeal pending sub nom. BellSouth Corporation v. FCC*, No. 97-1630 (D.C. Cir).

[199] 47 U.S.C. § 161.

Separate Statement of Commissioner Harold W. Furchtgott-Roth

In re: Notice of Proposed Rulemaking

1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers

I support adoption of this NPRM. In my view, any reduction of unnecessary regulatory burdens is beneficial. To that extent, this item is good and I am all for it. This item should not, however, be mistaken for complete compliance with Section 11 of the Communications Act.

As I have explained previously, the FCC is not planning to "review *all* regulations issued under this Act . . . that apply to the operations or activities of any provider of telecommunications service," as required under Subsection 11(a) in 1998 (emphasis added). *See generally 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, 13 FCC Rcd 6040 (released Jan. 30, 1998). Nor has the Commission issued general principles to guide our "public interest" analysis and decision-making process across the wide range of FCC regulations.

In one important respect, however, the FCC's current efforts are more ambitious and difficult than I believe are required by the Communications Act. Subsection 11(a) -- "Biennial Review" -- requires only that the Commission "*determine* whether any such regulation is no longer necessary in the public interest" (emphasis added). It is pursuant to Subsection 11(b) -- "Effect of Determination" -- that regulations determined to be no longer in the public interest must be repealed or modified. Thus, the repeal or modification of our rules, which requires notice and comment rule making proceedings, need not be accomplished during the year of the biennial review. Yet the Commission plans to complete roughly thirty such proceedings this year.

I encourage parties to participate in these thirty rule making proceedings. I also suggest that parties submit to the Commission -- either informally or as a formal filing -- specific suggestions of rules we might determine this year to be no longer necessary in the public interest as well as ideas for a thorough review of all our rules pursuant to Subsection 11(a).

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Separate Statement of Commissioner Michael Powell

Re: *1998 Biennial Regulatory Review—Spectrum Aggregation Limits for Wireless Telecommunications Carriers*

This is yet another excellent opportunity for the Commission to review whether market conditions justify continued prospective, prophylactic regulation of the wireless telecommunications industry. Indeed, in the 1996 Telecommunications Act, Congress explicitly and unabashedly directed the FCC to review our ownership rules, such as the CMRS spectrum cap, every two years and to repeal or modify any regulation that is "no longer in the public interest as a result as the result of meaningful economic competition." I therefore support this Notice of Proposed Rulemaking initiating the review. It is indeed time to take a sober and realistic look at the CMRS ownership limitations in light of the current and foreseeable competitive environment in the wireless market.

Ownership rules have a long history in telecommunications regulation. At various times, we have justified these rules out of concern over possible competitive harms that might befall consumers (monopoly prices and restricted output). In mandating that we review these ownership rules, Congress was primarily concerned that we adjust or eliminate these rules if, as is anticipated by the Telecommunications Act, sufficient robust competition develops. We have a duty to take a hard look at our ownership rules in light of the current state of competition and to ask and answer whether in light of significant changes in competitive conditions these rules are still valid. In this regard, I want to briefly address three important points as we commence this review:

First, who has the burden? Frankly, I believe the burden should be on us, the FCC, to re-assess and re-validate the rule under either Section 11's biennial review or Section 10's forbearance authority. All of the burden in this and similar proceedings should not be shouldered by those who advocate the rule's demise. In addition to seeking comment here on a variety of options and assessments, we must also seek out information on our own as we do in our annual report to Congress on the state of CMRS competition. We must be prepared, if this is what the record evidence shows, to make a compelling and convincing case that the rule must be kept. If we cannot, or if the evidence in support of the rule is lacking, we must modify or eliminate it and rely on competitive market forces or other mechanisms, such as the antitrust laws. We cannot continue to sit back and struggle over getting rid of another ownership restriction because its opponents have failed to show why the rule is no longer "in the public interest."

This brings me to my second point: what is the "public interest" in this context? I have recently been advocating a more precise public interest standard in a variety of contexts including mergers and broadcasting regulation. Here, however, this is particularly achievable without a great deal of effort on my part because Congress itself has provided us guidance in both Section 10 and Section 11 of the Act by enunciating competitive principles that should discipline the broad, wavering discretion that has been used. Specifically, in Section 10, Congress said that in assessing a forbearance petition, like the CTIA petition before us today, the Commission shall consider whether forbearance will promote competitive market

conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest. Thank you, Congress.

Similarly, as I mentioned, Section 11(a)(2) directs the Commission to determine whether a regulation is no longer necessary in the public interest as the result of "meaningful economic competition." Thus, upon a finding of meaningful economic competition, absent extraordinary circumstances, it is incumbent upon this Commission to remove or modify applicable rules. As interested parties help in this re-assessment and consider the options put forth in this item, I encourage commenters to address this standard. While "meaningful economic competition" has not been previously defined (and may even prove as dynamic as the "public interest" standard itself), that alone should not preclude its functioning as a meaningful standard in this biennial exercise. Commenters should focus on the economic tools necessary to determine whether "meaningful economic competition" exists such as relevant geographic and product market designations (and how such designations are dynamic or static), HHI assessments and other empirical indicators of concentration or competition.

Within the context of Section 11 proceedings, Congress has again marked a trail for the Commission to follow and we should follow it. By doing this we will provide clarity to the market, and foster growth and innovation as a result of that clarity and discover for ourselves the courage, ability and evidence to find that certain rules are no longer necessary. Within the context of wireless this is also important because of its freedom from the legacy of monopoly regulation, its current and foreseeable competitive state, and because of its potential to compete with wireline services and help bring the advantages of local competition to consumers.

Finally, my last point concerns some of the specifics of this item, which I believe presents a number of options in a very neutral fashion for our consideration. If we can meet the burden of showing that the rule is still necessary in the public interest, then we may keep it. If we find that more surgical changes are necessary, then we should make them. If there are circumstances where it makes no sense to enforce the spectrum cap, then we should identify such circumstances and forbear. However, one thing is clear to me. This cap should not last forever. If we do nothing this time, we have to review it again in another two years. But, I am more intrigued by and interested in at least establishing a firm sunset date for this prophylactic ownership restriction.

I thank the Wireless Bureau staff for their hard work on this item and I look forward to hearing from all interested parties.

Separate Statement of Commissioner Gloria Tristani

In the Matter of 1998 Biennial Review -- Spectrum Aggregation Limits for Wireless Carriers Notice of Proposed Rulemaking

Today we act upon our recognition, over six months ago, that many wireless markets are showing great evidence of healthy competition.[200] In this Notice of Proposed Rulemaking, we initiate a broad discussion of how two of our central spectrum aggregation and ownership limits -- the 45 MHz commercial mobile radio services (CMRS) spectrum cap,[201] and the cellular cross-interest rule[202] -- operate within the evolving wireless marketplace.

While I agree that these rules are ripe for review, we must assess their continued relevance in a market-specific context. Scarcely a week goes by without the announcement of a second, third, or fourth PCS provider initiating service in one of our major metropolitan markets. Yet the rash of new entrants tapers dramatically as we look beyond our urban centers to our rural communities. As the Notice indicates, roughly forty percent of our nation's Basic Trading Areas (BTAs) do not have coverage from either a PCS or digital SMR carrier. This equates to more than one-fifth of our citizens. For these consumers, the cellular duopoly that was uniform at the time we adopted both the cross-interest rule and the spectrum cap, still prevails. Furthermore, this may not change even as carriers satisfy their coverage requirements under the FCC rules, as 30 MHz licensees need serve only 2/3 of their licensed population, and 10 MHz licensees only 1/4, at the end of their license term.[203]

Simple economics suggests -- and experience bears witness -- that carriers will seek to cover more populous areas, where the fixed costs of network infrastructure will be proportionally less per subscriber. But our citizens in rural areas do not have proportionally less interest in receiving the benefits of wireless technology. The Communications Act directs the Commission to ensure that the benefits of telecommunications are available, "so far as possible, to all the people of the United States,"[204] and to help rural areas in particular.[205] I take this mandate seriously, and so I will be keenly interested in evidence and analysis of the effect of these rules on the provision of needed services in rural and high cost areas.

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[200] Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Third Report, FCC 98-81 (rel. June 11, 1998) (Third Annual CMRS Competition Report).

[201] 47 C.F.R. § 20.6 (1997).

[202] 47 C.F.R. § 22.942 (1997).

[203] 47 C.F.R. § 24.203(a), (b) (1997).

[204] 47 U.S.C. § 151.

[205] *See, e.g.,* 47 U.S.C. §309(j)(3)(A), (B); 47 U.S.C. § 254(b)(3); 47 U.S.C. §254(h).