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Federal Communications Commission
Office of the Secretary

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

In the Matter of 1998 Biennial Regulatory Review-- Spectrum Aggregation Limits for Wireless Telecommunications Carriers Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap	WT Docket No. 98-205

To: The Commission

COMMENTS
OF
WESTERN WIRELESS CORPORATION

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SUMMARY

As shown by Western Wireless Corporation ("Western") in these comments, and as the record in this proceeding will demonstrate, the 45 MHz CMRS spectrum cap is neither necessary nor an effective means to promote competition in the CMRS (specifically, the mobile, two-way voice) marketplace. Accordingly, the Commission should eliminate the spectrum cap in its entirety, and rely on a case-by-case determination of the public interest for mergers, acquisitions or other applications that involve significant aggregation of spectrum in a geographic area. Alternatively, the Commission should forbear immediately from enforcing the spectrum cap. The Commission should also forbear from enforcing the cellular cross-ownership rule, and should rely on case-by-case review of applications requesting significant cross-ownership interests.

In the NPRM, the Commission cites increasing evidence that the mobile voice market is rapidly becoming competitive, and that consumers are reaping the benefits of lower prices, improved coverage and increased service options that competition brings. Western supplements this showing by demonstrating that the spectrum cap has made no discernible contribution to this pro-competitive trend. Specifically, Western currently holds cellular and PCS spectrum in excess of the cap in the Denver and Oklahoma City MTAs (and is prosecuting waiver requests regarding these holdings). Nevertheless, each of these markets is highly competitive, and Western's spectrum holdings clearly confer no real-world market power. In each market, Western offers the largest footprint than any other digital mobile voice provider and provides service to rural areas uncovered by any other digital provider-- indeed, in two years of operation, it has already exceeded its ten-year coverage benchmark in Denver, and has nearly met the benchmark in Oklahoma City. Likewise, Western's pricing in

these markets is competitive-- indeed, in Denver, Western's prices have been consistently lower than its competitors since it launched service.

Aggregation of spectrum in excess of the present cap has readily discernable benefits: it allows carriers to take advantage of economies of scale and scope; and it will facilitate introduction of new services and advanced technologies, including wireless local loop, high-speed data, and "3G" services which may not be technically feasible under a 45 MHz cap. By contrast, maintaining the cap may deter existing providers from expanding their services and coverage, especially in rural areas.

The Commission rightly seeks to stimulate digital mobile voice service build-out in rural areas, however, maintaining the spectrum cap will not promote, and may thwart, this objective. Slow growth in rural areas is due not to spectrum aggregation, but to sound business practice and regulatory rules that focus efforts on urban areas before focusing on less populated rural areas. Rather than rely on the spectrum cap, which was not designed to promote and, as shown herein, does may discourage service in rural areas, the Commission should take affirmative steps to encourage wireless systems to serve these areas. Eliminating the spectrum cap will allow increased economies of scope, but the Commission should also modify its universal service rules to create positive incentives for wireless coverage of rural and high-cost areas and, more importantly, should immediately eliminate existing disincentives for wireless carriers.

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To: The Commission

COMMENTS
OF
WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western"), by its attorneys and pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding (released December 10, 1998), hereby submits its comments with respect to the NPRM. In support hereof, the following is respectfully shown:

I. STATEMENT OF INTEREST

Through its operating subsidiaries, Western holds licenses throughout the western United States for cellular radio, PCS , microwave, LMDS and one-way paging facilities. Western's combined cellular and PCS licenses, along with its 49.9 percent investment with Cook Inlet Regional, Inc. and other investors in Cook Inlet Western Wireless PV/SS PCS, L.P. ("Cook/Western"), a "designated entity" licensee, covered approximately 72 million people in 1997

and well over 60 percent of the continental United States' geographical area. Western owns and operates cellular systems in 18 western states, serving over 89 primarily Rural Service Area ("RSA") and small MSA markets with an aggregate population of about seven million persons.[1/]

With the February 1996 launch of its Honolulu PCS system, Western became the first auction-awarded PCS licensee to commence commercial operation in the United States; in June 1996, Western became the second such licensee when its Salt Lake City PCS system became operational. Western has since introduced commercial PCS in the Portland, El Paso/Albuquerque, Oklahoma City, Des Moines/Quad Cities and Denver MTAs, and the Phoenix BTA.

On June 5, 1997, as a 49.9 percent limited partner in Cook/Western, Western was part of the launch of the Tulsa C Block system, the first major market to commence commercial PCS operations under the FCC's "designated entity" program. Cook/Western also holds the C Block PCS licenses for thirteen other BTAs. Another Western subsidiary, Western PCS BTA I Corporation, purchased 100 D and E Block PCS licenses for roughly $62 million in the 10 MHz auction that concluded in January 1997. Previously, Western expended $144 million to purchase six of its seven MTA licenses in the A and B Block auction. Additionally, through the Cook/Western partnership, Western has an interest in F Block licenses for seven other BTAs. On October 31, 1997, Western PCS BTA I Corporation acquired D and E Block PCS licenses for eight additional markets.

Western is presently prosecuting waiver requests involving its Block B PCS license for the Denver MTA and its Block A license for the Oklahoma City MTA. The comment cycle for both requests has concluded and the requests are ripe for disposition by the Commission. Conclusions

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[1/] In terms of geographic coverage, Western's PCS licenses are considerably more extensive than its cellular interests.

reached by the Commission in this rulemaking may well influence or control the outcome of the pending waiver requests.[2]

As shown above, pursuant to its extensive broadband PCS and cellular license holdings, Western has constructed and is operating multiple CMRS communication systems throughout the western United States. It is presently prosecuting two requests to waive the existing 45 MHz CMRS spectrum cap codified in Section 20.6 of the Rules. Reflecting its dynamic approach to achieving scale economies and cost efficiencies, Western may seek to acquire other PCS and cellular license interests in the near term. For these reasons, Western has a vital stake in the instant review of Section 20.6.[3]

II. SUMMARY OF WESTERN'S POSITION IN THIS PROCEEDING

For the reasons stated below, Western recommends that the Commission should:

- eliminate or forbear immediately from enforcing the 45 MHz CMRS spectrum cap set forth in Section 20.6 of the Rules;[4]

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[2] The NPRM's determination (at ¶27) that Western's waiver requests "will be dealt with separately from this proceeding" is assumed to mean that the requests will be resolved in one or more decisions that are distinct from the report and order the Commission will issue to conclude this proceeding.

[3] Western has publicly announced that it is considering a functional division between its cellular and PCS operations, which could result in a spin-off of Western's PCS operations to an independent corporation. At present, Western has merely requested a ruling regarding the tax consequences attending this action— there is no guarantee Western will receive a favorable ruling or, if received, that a spin-off will be implemented. Were a spin-off implemented, economies of scope may be achievable through a degree of common management between the cellular and PCS corporations that the existing spectrum cap rule presently forbids. Because the rule has outlived its usefulness, it should be removed as an impediment to the efficient allocation of human and financial capital.

[4] Should the Commission determine that it lacks authority to invoke its forbearance authority under Section 10 of the Act in a Section 11 biennial review proceeding, Western advocates modifying the language of the spectrum cap rule pursuant to Section 11(b) in accordance with the principles stated above. *Compare* 47 U.S.C. §§160 and 161 (1996).

- notwithstanding the foregoing, allow interested parties (and the Commission itself) to show, by specific and credible evidence, that a proposed grant, assignment or transfer of control of a specific CMRS license will confer excessive market power on the grantee, assignee or transferee, thereby justifying enforcement of the cap in this case; should such a showing be made, the prospective grantee, *etc.* will have the right and opportunity to rebut the showing; should the Commission determine that the party opposing the grant, *etc.* has met its burden then it will enforce the spectrum cap rule according to its existing terms and conditions; and

- consistent with the instant proposal for the 45 MHz CMRS spectrum cap, forbear from enforcing the cellular cross-ownership rule unless an interested party (or the Commission) can show, by specific and credible evidence, that the acquisition of a particular cross-ownership interest will confer excessive market power on the entity seeking to acquire the cross interest; the prospective acquirer will be able to rebut the showing and the Commission will have to determine whether the party opposing the acquisition has met its burden.

Regarding the 45 MHz CMRS spectrum cap, the approach preferred by Western incorporates and unifies the forbearance and case-by-case analysis options listed in the NPRM (at ¶8). The other options suggested by the NPRM require derivation of alternate (albeit relaxed) quantitative standards, which are inherently arbitrary and insufficiently robust to accommodate rapidly changing conditions in the CMRS marketplace. By harmonizing the spectrum cap and cellular cross-ownership rules, Western's approach recognizes certain existing disparities between the two rules noted by the NPRM (at ¶82), while providing some protection for markets, primarily rural, where mobile voice service is provided exclusively by cellular carriers.

The rationale for these positions is set forth below.

III. INCREASING COMPETITION IN THE CMRS MARKET PLACE APPEARS UNRELATED TO THE SPECTRUM CAP RULE

In this section, Western will show that competition among broadband wireless service providers is intense and increasing dramatically, and that the spectrum cap has made no discernible contribution to this pro- competitive trend. Indeed, on balance, the cap may deter existing providers from expanding their services and coverage, especially in rural areas, where such expansion is certainly needed.

A. CMRS Competition Is Healthy Irrespective Of The Spectrum Cap

Western agrees with the Commission's assessment of emerging competition in mobile voice markets. At the time of the Commission's 1998 report on CMRS competition,[5] there were "at least three mobile telephone providers in each of the 50 largest Basic Trading Areas ("BTAs") and 97 of the 100 largest BTAs."[6] As a result of this competitive environment, prices have dropped dramatically during the past two years, mobile telephone usage has skyrocketed, and new services have been introduced.[7]

Rather than expand upon the record presented by the Commission, Western herein documents the competitive state of Denver, CO and Oklahoma City, OK MTAs where it currently holds

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[5] *Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Services,* ("Third Report"), 12 CR 623 (1998) ("Third CMRS Competition Report").

[6] 12 CR at 625. This trend has continued since the Third CMRS Competition Report was issued. NPRM at ¶¶35-45.

[7] 12 CR at 625. Illustrating the advent of new services, Western is currently upgrading many of its cellular facilities to provide digital service and is introducing wireless local loop in designated markets.

spectrum exceeding 45 MHz pending action on its requests for waiving the cap.[8] In both these markets, Western's CMRS spectrum holdings have had no anti-competitive effects, but have facilitated expansion of service into BTAs presently unserved by any other PCS or SMR carrier.

Denver MTA-- In its Denver Waiver Request, as amended, Western showed that the population overlap between its MTA license and its cellular holdings is 13.6%,[9] and that the Herfindahl-Hirschman Index ("HHI") of the MTA, including its cellular holdings and interim operating authority for an additional RSA, is 1627, well below the 1900 level deemed presumptively competitive by the Commission.[10] More important, Western documented the following:

- At the time Western commenced PCS operations in April 1997, it faced direct wireless competition in the Denver MTA from incumbents AirTouch Cellular, AT&T Wireless, Nextel and Sprint (which launched its PCS service a few weeks prior to Western); since that time U.S. West has also joined the fray;

- Western's had already met its ten-year coverage benchmark at the time its Denver Waiver Request was filed, and currently covers over 80 percent of the MTA population; its coverage area far exceeds that of its two current PCS competitors, Sprint and U.S. West, and it is currently the only PCS carrier providing service to the

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[8] *See* Request of Western PCS II Corporation for Waiver of Section 20.6 of the Commission's Rules, File No. CWD96-14 (filed July 11, 1997, amended September 8, 1998) ("Denver Waiver Request"); Request of Western PCS I License Corporation for Waiver of Section 20.6 of the Commission's Rules, File No. 98-89) (filed January 29, 1998) ("OK City Waiver Request").

[9] Although the population overlap increases to 16.9 percent if Western's Interim Operating Authority ("IOA") for Wyoming RSA 4 is included, Rule 20.6 fails to indicate if IOA territory must be included in spectrum cap calculations. Were Western's presence to expand over time into cellular unserved area and the full market population rather than the CGSA population used to calculate the overlap, the overlap percentage increases to 17.33 percent when the IOA is included. In the fall of 1998,Western filed an application proposing to acquire the permanent, non-wireline cellular license for Wyoming RSA 4.

[10] The Commission's use of HHI and other theoretical assessments of market concentration to assess competitive conditions is useful where evidence of actual competition is lacking. As is apparent with respect to Denver and Oklahoma City, however, the Commission may now avail itself of real-word data in assessing competitive conditions, and should utilize HHI on a secondary basis where such data is available.

Cheyenne, WY and Pueblo, CO BTAs;

- Western's pricing has been consistently lower than its PCS and cellular counterparts;[11]

- Western's PCS pricing is uniform across the entire MTA (*i.e.*, irrespective of where overlap in excess of the cap exists); likewise, its cellular pricing is indistinguishable from prices offered in demographically comparable cellular markets; and

- Due in no small part to Western's price and coverage leadership, prices in Denver have significantly declined and consumers have greater choice.[12]

Oklahoma City MTA-- In its OK City Waiver Request, Western showed that the population overlap between its MTA license and its cellular holdings is 11.63%, only slightly above the 10% threshold, and that the HHI concentration level of the MTA is 1563, which is well within the acceptable range. Subsequently, Western analyzed its coverage and pricing, and the real-world competitive status of the MTA, as follows:

- After less than two years of operations, Western's PCS system covers between 59% and 60% of the MTA population, easily surpassing the five-year build-out requirement imposed by Section 24.203(a), and almost satisfying the ten-year requirement;

- Western is providing service to all or substantially all of the population in three BTAs within the MTA for which it holds licenses; its PCS competitors serve only minor portions of these BTAs and provide far less coverage than Western elsewhere in the MTA;

- The OK City market is currently supporting five wide-area mobile voice carriers--Southwestern Bell Corporation, AT&T Wireless, Nextel, Sprint and Western;
- Western's pricing has been consistently competitive with its cellular, PCS and SMR counterparts;

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[11] Indeed, after two months of operation, Western already covered roughly seventy percent of the MTA population, and was undercutting its competitors' rates by as much as twenty percent.

[12] Further documentation of the cited data was filed as Exhibits 1 and 2 to Western's Reply Comments with respect to the Denver Waiver Request (File No. CWD 96-14).

- As with Denver, Western's PCS pricing is uniform across the entire MTA (*i.e.*, irrespective of where overlap in excess of the cap exists); and its cellular pricing is substantially similar to demographically comparable cellular markets it serves; and

- As has been the case in Denver, wireless voice prices have significantly declined and consumers have greater choice than before Western and other PCS carriers launched service.[13/]

Review of these market conditions illustrate that the spectrum cap has no ongoing role in assuring that mobile voice markets become and/or remain competitive. The Commission's objective to "consider imposition of regulation when there is an identifiable market failure" (NPRM at ¶5) clearly will be served by eliminating or curtailing the applicability of the spectrum cap here, where the market is healthy and thriving.

B. Increased Spectrum Aggregation Has Practical Benefits, The Corresponding Harms Are Merely Theoretical

The Commission is rightfully concerned that the spectrum cap may preclude carriers from offering new wireless services and/or expanding existing operations to high-cost areas. Western agrees that, as presently enforced, the cap deters carriers from realizing potential economies of scale and scope. As the Commission notes (NPRM at ¶¶41-43), CMRS licensees have numerous opportunities to achieve economies of scale and scope that result in tangible consumer benefits. In its Denver Reply Comments (at 22), Western notes that, in cellular/PCS overlap areas, it and its affiliates achieve cost savings from joint use of transmitting facilities, physical plant, technical staff and expertise, local and regional contacts (*i.e.*, for interconnection, zoning and contractors) and

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[13/] Further documentation of the cited data was filed as Exhibits 1 and 2 to Western's Reply Comments with respect to the Denver Waiver Request (File No. CWD 96-14).

access to the resources and managerial expertise offered by a common corporate parent.[14] These efficiencies helped Western to accomplish its ten-year coverage requirement in the Denver MTA during in its first year of operation and its five-year coverage benchmark in the Oklahoma City MTA in less than two years of operation. Strictly enforcing the cap may interfere with this rapid deployment of networks or, where no such delay in deployment occurs, may result in no increase in the number of independent carriers serving a particular market or region.[15]

Western is currently studying the spectrum requirements and economic costs associated with various services it plans to offer, or may offer in the future using its cellular and/or PCS spectrum, particularly in rural, high-cost areas. While providing many of these services, particularly "3G" wireless, will require significant additional study,[16] Western is actively pursuing provision of universal service using PCS spectrum in licensed rural areas.[17] Western has also commenced

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[14] It is important to note that, while certain economies of scope exist due solely to aggregation of spectrum (which may remain fallow for some time), many of Western's efficiencies have been achieved due to common operations on its spectrum.

[15] To take Denver as an example, because Western already exceeds its ten year coverage requirement, the partitionee who hypothetically acquires the spectrum Western is compelled to divest could warehouse that spectrum for years with impunity under Rule 24.714(f)(ii) ("the partitionee must only satisfy the requirements for 'substantial service,' as set forth in §24.16(a), for the partitioned license area by the end of the original ten-year license term of the [selling] licensee.") Therefore, compelling Western to divest 10 of its 55 MHz in the Denver MTA may result in no increase in the number of wireless carriers serving the Denver MTA's rural areas because, as economists have noted, a partitionee in this situation may have a valid economic rationale (*i.e.*, to promote efficiency) for withholding its service from the market. Gregory L. Rosston and Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, Federal Communications Law Journal (Vol. 50, December 1997) at 87, 94 (n.20).

[16] Preliminary analysis suggests that, absent additional spectrum resources, Western will be unable to provide both high-speed (or even lower-speed) two-way data services and two-way voice operations in markets with substantial voice traffic.

[17] Western has advocated wireless as a viable, low-cost technology for provision of two-way voice service to under-served and high cost areas. *See* Western's Comments on Model Platform

(continued...)

providing wireless local loop in rural areas where it has available PCS or cellular spectrum.[18] As the Commission recognizes in the NPRM (at ¶¶43, 46-48), questions exist regarding spectrum requirements and technical compatibility for the provision of such services using spectrum currently devoted to two-way mobile voice. Although Western is moving forward with its provision of wireless local loop, the prospect of conflicts between this service and the spectrum requirements of mobile voice service remains.

C. Eliminating The Cap, Or Forbearance With The Possibility Of Individual Case Analysis, Represent Optimal Outcomes

The foregoing shows that, to date, the spectrum cap has proven superfluous as a stimulant for competition in the CMRS marketplace while imposing real costs on carriers striving to develop viable businesses. Vigorous competition is already the norm in most MTAs, and is rapidly becoming the norm in other markets.[19] Moreover, as discussed below, there is no evidence to support the proposition that continuing to restrict spectrum aggregation as mandated by the cap will facilitate service to rural, high-cost areas. These are valid and compelling reasons for eliminating

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[17] (...continued)
Development, CC Docket No. 96-45, filed August 28, 1998 (expressing interest in providing universal service and discussing Western's sponsorship of a wireless cost model under development).

[18] Specifically, Western has filed applications seeking eligible telecommunications carrier designation in thirteen states, and has announced initiation of wireless residential service in Regent, North Dakota. *See* Reply Comments of Western Wireless Corporation on Second Recommended Decision of the Joint Board, CC Docket No. 96-45 (filed January 8, 1999), at 11.

[19] Based on 1997 data, which is now more than one year obsolete, the Commission concluded that "substantial progress has been made towards a truly competitive mobile telephony marketplace" and that "the mobile telephone market is well on its way to becoming dynamic and competitive." Third CMRS Competition Report,12 CR 623, 624 & 632 (1998). Based on its own experience, Western believes that trend of increasing competitiveness continued in 1998. Accordingly, adjusting for the lag inherent in preparing and releasing the Third CMRS Competition Report, Western is confident that the Commission will determine that the present mobile telephony market is indeed "truly competitive.

the spectrum cap rule outright.

Western also notes that, in establishing the local multipoint distribution service ("LMDS") and crafting eligibility rules for these authorizations, the Commission refused to deny eligibility to incumbent CMRS carriers, limit the quantity of LMDS spectrum these carriers could acquire or count LMDS spectrum towards the CMRS spectrum cap, notwithstanding the tremendous bandwidth capacity associated with LMDS licenses.[20/] The Commission viewed its rejection of limitations on CMRS carriers potential LMDS spectrum holdings as pro-competitive, designed to spur CMRS incumbents to offer fixed wireless, basic exchange services to compete with incumbent LECS.[21/] Promoting such competition is also a stated objective of the instant proceeding (NPRM at ¶¶5 and 43) Western is already using CMRS spectrum to provide wireless local loop service. Applying the pro-competitive rationale of the LMDS proceeding here militates in favor of either eliminating the spectrum or forbearing from its enforcement in all but the most compelling cases.

Western concedes the possibility, however remote, that a particular carrier could, in an individual market, acquire sufficient CMRS spectrum to allow it to exert "excessive market power" by unilaterally restricting output and raising prices.[22/] This attempted monopolization would, in Western's view, create an immense market opportunity that alternate carriers would rush to fill,

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[20/] *In the Matter of Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 12 FCC Rcd 12545 (1997); *aff'd*, Melcher v. FCC, 134 F.3d 1143 (D.C. Cir. 1998).

[21/] *Id.* at ¶183. The Commission did impose eligibility restrictions on incumbent wireline local exchange carriers for LMDS spectrum, however.

[22/] BellSouth Wireless, Inc. (Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap), 12 FCC Rcd 14031 (1997).

quickly restoring the market's competitive *status quo*. Candidates for taking advantage of this opportunity include the following services: 220 MHz SMR, dispatch, one-way and two-way data, fixed services including wireless local loop, mobile satellite service (which enjoys an expansive bandwidth allocation),[23] Local Multipoint Distribution Service, millimeter wave radio services in the 18 and 39 GHz bands, the venerable but still much utilized two-way channels known as IMTS (improved mobile telephone service) and, perhaps, interactive video and data service ("IVDS"), whose mobile capability is the subject of a pending rulemaking.[24] In addition, existing regulatory mechanisms such as antitrust enforcement and the Commission's existing authority under Sections 308(b) and 310(d) of the Communications Act are formidable deterrents to such a monopolization strategy.

These protections notwithstanding, the Commission may decide that its public interest mandate requires forbearance from enforcing, rather than outright elimination of, the spectrum cap rule. Should the Commission reach this conclusion, it may wish to allow interested parties (including the Commission itself) to show, by specific and credible evidence, that a proposed grant, assignment or transfer of control of a specific CMRS license will confer excessive market power on

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[23] Indeed, the Commission continues to allocate additional spectrum for wireless land mobile services. *See, e.g., Mobile Satellite Service, Allocation of Government Spectrum in the 36-51.4 GHz Bands*, IB Docket No. 97-95 (Report and Order released 12/23/98). According to the Third CMRS Competition Report (Appendix G), 12 CR at 703-04, five mobile satellite carriers that propose to offer mobile voice service via hand held telephones hold FCC licenses. Two of these carriers, AMSC and Iridium, are already providing service and a third is expected to commence service this year. In addition, the Commission is reviewing nine requests to provide new mobile satellite service in the 2 GHz band. Each of these licensed and pending carriers represents an actual or potential competitor to existing cellular, PCS and digital SMR carriers.

[24] *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking* in WT Docket No. 98-169 (Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service), FCC 98-228, released September 17, 1998.

the grantee, assignee or transferee, thereby justifying enforcement of the cap.[25] Although Western believes that consumers will best be served by eliminating the spectrum cap rule, forbearance coupled with individual case analysis is an acceptable alternative.

IV. TO PROMOTE COMPETITION IN RURAL AND HIGH-COST AREAS, THE COMMISSION MUST ADOPT POSITIVE INCENTIVES

As shown above, there is scant evidence to indicate that the spectrum cap has promoted ownership diversity or new carrier entry in rural and high-cost areas except, arguably, at the initial PCS auctions where cellular carrier participation was constrained. Although rural areas should enjoy the benefits of competing wireless services, including digital services like PCS, the spectrum cap is an awkward tool for promoting this objective because there is no evidence that the slow pace of PCS build-out in rural areas has been caused by a dearth of spectrum for would-be operators.

Although the Commission established a regulatory regime for PCS that encourages development of wide-area, regional systems (MTA licensees) and local systems covering both urban and rural areas (BTA licensees), sound business practice, financial common sense and the Commission's own rules compel operators to build capital-intensive PCS infrastructure in urban areas before focusing on less populated rural areas. For licensees intent on developing viable, competitive PCS businesses, it is axiomatic that construction and operation must begin where demand is most concentrated. Moreover, the Commission's rules mandating that minimum coverage benchmarks be met by all PCS licensees require MTA licensees to serve at least one-third of their licensed area population within five years of receiving a license, and two-thirds of the population

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[25] Should such a showing be made, the prospective grantee, assignee or transferee will have a co-equal rebuttal right; should the Commission determine that the objecting party has met its burden, then it will enforce the spectrum cap rule according to its existing terms and conditions.

within ten years.[26] The Commission's Rules therefore direct MTA-wide PCS licensees like Western to focus on the most densely populated (*i.e.* urban) portions of their markets, while requiring no further expansion of coverage. Thus, even carriers like Western who meet their coverage benchmarks almost immediately, lack incentives to expand into many low-population density areas. It is, likewise, unclear whether outlying areas of rural BTAs will be adequately served by licensees that have yet to initiate service.[27] The Commission thus has two rational courses of action at its disposal: (1) it can refrain from action pending further licensing and initiation of service by C, D, E, and F-block PCS licensees;[28] or (2) it can take steps to affirmatively encourage existing and new licensees to serve rural, high-cost areas.

The Commission's concern that the benefits of digital wireless service be brought to rural areas must be tempered by its expressed intent to rely on the marketplace, and its obligation not to compel carriers to operate at a loss. Thus, it is vitally important that the Commission immediately adopt affirmative incentives to stimulate investment in rural areas by wireless carriers. Rather than enforcing the spectrum cap, which will not promote (and was not designed to promote) investment in rural PCS systems, the Commission should modify its universal service rules to create positive incentives for wireless coverage of rural and high-cost areas and, more importantly, should

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[26] *See* Section 24.203(a) of the Rules.

[27] In the NPRM (at ¶46), the Commission explicitly acknowledged the unique problems of high-cost and rural areas-- "the economics of offering service to these lower-density populations may nevertheless limit the extent of competitive, facilities-based entry"-- and affirmed the importance of economies of scope in supporting delivery of lower-cost services like PCS.

[28] The delays and problems associated with the BTA licensing process, in particular the large number of defaults and litigation associated with the C-Block auctions, should not be used to hamstring carriers who have paid for their licenses and are bringing the benefits of digital wireless service to the public.

immediately eliminate existing disincentives for wireless carriers.[29]

Specifically, in comments filed earlier this month in the Commission's ongoing Universal Service proceeding,[30] Western recommends that the Commission:

- clarify and/or modify its rules to confirm that CMRS carriers are entitled to interstate access charges in the same manner as incumbent local exchange carriers ("ILECs"), and eliminate its bar against CMRS carriers filing access tariffs;
- eliminate inconsistencies between Part 36 and Part 54 rules to ensure that non-ILEC universal service providers can obtain immediate funding and can base support on the same updated information as ILECs;
- adopt a universal service cost model accounting for the forward-looking costs of wireless technology;[31]
- carefully monitor state universal service certification proceedings to ensure competitive neutrality and, if necessary, preempt anti-competitive state policies; and
- decline to adopt minimum local usage offered by universal service providers in rural and/or other high-cost areas.

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[29] The Commission recently issued a Further Notice of Proposed Rule Making ("FNPRM") which, *inter alia*, seeks comments on how its universal service rules may be modified to further encourage wireless telecommunications providers (and cable operators) to provide universal service. *See Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rule Making in CC Docket No. 96-45 (released October 26, 1998). Western is actively participating in this proceeding, and has filed comments urging the Commission to adopt positive incentives to promote wireless as a universal service platform in rural/high-cost areas. Western will also file comments in response to the FNPRM identifying barriers to a wireless carrier's entry into the universal service market, such as the availability of sufficient spectrum to provide the supported services.

[30] Further Notice of Proposed Rule Making ("FNPRM") in *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed rule Making in CC Docket No. 96-45 (released October 26, 1998). Western filed its "Comments of Western Wireless Corporation on Further Notice of Proposed Rulemaking" on January 11, 1999.

[31] As the Commission notes in the instant NPRM, Western has commissioned such a study, which it expects to file on or about January 26, 1999.

V. EXCEPT IN COMPELLING CASES, THE COMMISSION SHOULD FORBEAR FROM ENFORCING THE CELLULAR CROSS-OWNERSHIP RULE

The competitive advantages enjoyed by the cellular duopoly are rapidly being eroded by the advent of PCS and digital SMR competition. Attributes such as the cellular headstart, brand recognition, and market experience are declining in significance over time. In short, the reasons animating the cellular cross-ownership rule are receding as CMRS competition intensifies.

For these reasons, Western advocates harmonizing enforcement of the cross-ownership and spectrum cap rules. Accordingly, the Commission should forbear from enforcing both restraints absent a compelling showing by specific and credible evidence that a deviation from either rule's requirements will cause a carrier or entity to acquire "excessive market power."

VI. CONCLUSION

For the foregoing reasons, the Commission should eliminate or forbear from enforcing the CMRS spectrum cap as set forth herein.

Respectfully submitted,

WESTERN WIRELESS CORPORATION

By: _____

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January 25, 1999

CERTIFICATE OF SERVICE

I, Lilly A. Whitney, a secretary in the law offices of Gurman, Blask and Freedman, Chartered, do hereby certify that I have had, on this 25th day of January, 1999, copies of the foregoing "COMMENTS OF WESTERN WIRELESS CORPORATION" mailed by U.S. first class mail, postage prepaid, to the following:

Michael F. Altschul, Vice President, General Counsel
Randall S. Coleman, Vice President for Regulatory Policy and Law
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036

* Paul D'Ari, Chief
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Commercial Wireless Division
Wireless Telecommunications Bureau
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