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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of | ) | |
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| 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 | ) | |

To: The Commission

REPLY COMMENTS OF
TELEPHONE AND DATA SYSTEMS, INC.

Telephone and Data Systems, Inc., on behalf of itself and its subsidiaries, Aerial Communications, Inc. ("Aerial") and United States Cellular Corporation ("USCC") (collectively "TDS"), by its attorneys, submits its reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), released December 10, 1998 in the above-captioned proceeding.[1]

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[1] Cross-references to the full names of the commentors who are referenced in these Reply Comments are shown in the Certificate of Service attached hereto.

## Introduction

TDS agrees with the numerous commentors including America One, D&E Communications, DiGiPH, MCI, Northcoast, PCIA, Sprint PCS, TRA and Wireless One that the elimination or modification of Section 20.6 of the Commission's rules ("Spectrum Cap rules") would be premature at this time. These companies, from the perspective of a broad cross-section of new facilities-based providers, resellers and potential new entrants in the wireless industry, confirm that the wireless telephony industry remains highly concentrated in many parts of the country, that the Commission's efforts to maximize competitive entry, particularly on PCS spectrum, have not been completed, and that the new PCS entrants require both regulatory certainty and additional time to implement their business plans so that the Commission's primary goals, competitive delivery, diverse services, rapid deployment and wide-area coverage, can be achieved. The Section 11 Biennial Review process furnishes additional opportunities for review of the Commission's rules in 2000. The Commission can revisit these matters at that time.

In the following sections of these Reply Comments, TDS opposes the claims of AT&T Wireless, AirTouch, BAM, BellSouth, CTIA and GTE that the Spectrum Cap rules should be eliminated, modified or forborne. In many parts of the country, meaningful economic competition as contemplated in Section 11 of the Communications Act of 1934, as amended (the "Act") does not yet exist in the market for mobile telephony. The goals which motivated the Commission to adopt its Spectrum Cap rules remain valid, effective and substantially unfulfilled. The regulatory burdens claimed to result from the operation of these rules are speculative or not germane to these proceedings. The record in these proceedings does not support grant of the CTIA Petition for Forbearance under Section 10(a) of the Act.

While other commentors did not address harmonizing the attribution standards in Sections 20.6 and 22.942 of the Commission's rules, TDS continues to support retention of Section 22.942 subject to such modification to replace the attribution standards in Section 22.942 with those in Section 20.6(d). This parity of regulatory treatment will avoid unnecessary regulatory burdens and transactional disruptions and continue to meet the Commission's pro-competitive goals.

## Discussion

### 1. Meaningful Economic Competition as Contemplated in Section 11 of the Act Does Not Exist in Many Parts of the Country for Mobile Telephony.

From the Commission's own records, as supplemented in the record by numerous commentors in addition to TDS, the Commission has ample basis to conclude that nationwide "meaningful economic competition" does not yet exist.[2] The analysis of the current level of concentration/competition in the mobile telephony market provided in the Comments of Sprint PCS demonstrates the highly concentrated nature in even major metropolitan markets.[3] In addition, the Commission's Third Annual CMRS Competition Report, Figure 4, "Estimated Broadband PCS Service Rollouts: Number of PCS Operators in Each BTA with Some Level of Coverage,"[4] confirms that there are substantial areas of the U.S. which do not have PCS coverage. Licensees of

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[2] Section 10(a)(2) of the Act.

[3] See Comments of Sprint PCS, Attachment A, "CMRS HHIs From Customer Share Data."

[4] 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 98-91 (released June 11, 1998) ("Third Annual CMRS Competition Report").

broadband PCS spectrum are just beginning to deploy systems or have yet to do so. Spectrum auctions of broadband PCS spectrum involving approximately 450 BTA licenses are scheduled to commence next March. These early attempts to launch PCS networks validate that the Commission's Spectrum Cap rules have begun to foster competitive entry opportunities. They do not demonstrate that "meaningful economic competition" has emerged.

The claims of AirTouch, BAM, BellSouth, SBC, Omnipoint and Western, with respect to the current state of competition in the wireless telephony market are unsupported, misleading or ignore meaningful benchmarks for review of industry concentration. The following is submitted in response to these claims:

-- The fact that there may be a third provider in some BTAs which were previously cellular duopoly markets is not evidence of nationwide meaningful economic competition as implicitly claimed by AirTouch (Comments, p. 6) and BellSouth (Comments, pp. 6-7).

-- The "trend of increasing competitiveness" claimed by Western (Comments, p. 10, Fn. 19) and the similar claim by Omnipoint that there is "tremendous wireless competition" (Comments, p. 2) are not supported on any empirical basis.

-- The SBC argument that "...spectrum assigned to the various carriers" (Comments, p. 6) should be analyzed should be viewed as attempt to avoid serious "economic" analysis.

-- BAM makes a somewhat similar argument except that it proposes to substitute the number of potential and actual providers in each market to demonstrate that "meaningful economic competition" exists. (Comments, p. 16 citing Decl. ¶ 17). TDS strongly disagrees with this conclusion and with BAM's related claim that "...the two common measures of concentration -- those based on 'revenue share' or 'capacity share' -- are inappropriate." (Comments, Decl. ¶ 31).

Analysis of the relative market share and other indicators of market concentration referenced in the Comments of Sprint PCS and in the Commission's Third Annual CMRS Competition Report amply rebut the foregoing claims.

2. The Commission's Spectrum Cap Rules Are Still Needed To Foster the General and Specific Public Interest Goals Which Motivated Their Original Adoption.

The arguments of AT&T Wireless, AirTouch, BellSouth, SBC and others for elimination or significant modification of the Spectrum Cap rules under the Section 11 Biennial Review standards misinterpret or otherwise fail to address the Commission's goals in adopting them. As discussed here, the original purposes of the Commission's Spectrum Cap regulatory structure are still valid. The consumer benefits anticipated by the Commission in adopting these rules are beginning to be achieved demonstrating their effectiveness. These rules maintain a reasonable balance of licensing options for incumbents and new entrants which in the absence of "meaningful economic competition" is amply justified to meet Congressionally mandated goals.

As described in the Commission's decisions regarding its Spectrum Cap rules, these rules were adopted as an integral element of a complex regulatory structure to foster the achievement of numerous goals for the expanding wireless industry.[5] In its Broadband PCS Reconsideration Order, the Commission identified four primary goals including "...competitive delivery, a diverse array of services, rapid deployment and wide-area coverage."[6] In that decision the Commission set limits "...on the total amount of spectrum that can be acquired by new entrants and by incumbent cellular

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[5] Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, GN Dkt No. 90-314, 9 FCC Rcd 4957 (1994) ("Broadband PCS Reconsideration Order") and 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 Dkt. No. 96-59, GN Dkt. No. 90-314, *Report and Order*, 11 FCC Rcd 7824 (1996) ("CMRS Spectrum Cap Report and Order").

[6] Broadband PCS Reconsideration Order, at 4959.

providers...[to ensure] that there will be a significant number of competitors in each area."[7] These rules were also directly responsive to Congressional objectives in Section 309(j) of the Act to promote competition and to ensure that PCS licenses are disseminated to a wide variety of applicants.

In its Broadband PCS Reconsideration Order, the Commission repeatedly states its goal "...to maximize the number of opportunities for viable competitors to emerge."[8] It also made clear that its Spectrum Cap was adopted to serve the dual function of prohibiting excessive spectrum aggregation by incumbent cellular licensees as well as by new entrants so as to maximize competitive opportunities.[9]

The following excerpt from the Commission's Broadband PCS Reconsideration Order also demonstrates that, contrary to the assertions of the commentors requesting elimination or modification of the Spectrum Cap rules, the goal of these rules is not limited to preventing anti-competitive behavior:

> "...we remain convinced that restrictions on in-market cellular providers are necessary to achieve our goal of maximizing the number of new viable and vigorous competitors. In reaching this conclusion we do not assume that in-market cellular providers will engage in illegal anticompetitive behavior. We agree with the assertion of Dan Kelley of Hatfield Associates that our goal in crafting these rules should not be to prevent anticompetitive behavior which may or may not materialize but rather to promote competition...We conclude that the public interest would be best served by maximizing the number of viable new entrants in a given market."[10]

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7 Id. at 4960.

8 Id. at 4979, 4998-4999, 5009 and 5011.

9 Id. at 4983-4984.

10 Id. at 4998-4999.

Subsequent decisions including the Commission's CMRS Third Report and Order and its Spectrum Cap Report and Order confirm that its Spectrum Cap rules are among the most effective mechanisms available to promote economic opportunity in the post-auction market and disseminate licenses among a wide variety of applicants.[11]

The continuing validity of the Commission's goals to maximize new entry is also confirmed in the Commission's Third Annual CMRS Competition Report. This Report describes its "...strong commitment to maximize the number of viable new entities providing wireless services, thereby increasing competition in the marketplace." (p. 5). This Report also confirms the effectiveness of the Commission's current regulatory structure in stimulating new entry in the broadband PCS sector which the Commission describes as "early stages of development." (p. 4 and pp. 32-33).

Contrary to the claims of the commentors advocating elimination or modification of the Commission's Spectrum Cap rules, these rules have been effective and efficient in maximizing new CMRS entry in response to Congressionally mandated goals. Meaningful economic competition as contemplated in Section 11 of the Act does not yet exist but shows signs that it could emerge as the wireless industry matures. Maintaining the current Spectrum Cap rules to provide regulatory certainty for numerous PCS licensees while their businesses mature is necessary to afford them a fair opportunity to compete.[12]

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[11] Spectrum Cap Report and Order, at 7873-7874.

[12] In response to the claims of burdens imposed by the Commission's Spectrum Cap rules, TDS submits the following: (1) The capacity constraints claimed by AirTouch (Comments, p. 16), AT&T Wireless (Comments, p. 7) and BAM ( Comments, pp. 25-27) are not a credible basis for concern here. As Sprint PCS confirms in its Comments, there is no current evidence that any provider is using as much as 45 MHZ total spectrum in any single market.

(continued...)

3. The Arguments of CTIA and Others for Forbearance From Enforcement of the FCC's Spectrum Cap Fail to Meet the Statutory Standard for Grant of Forbearance.

TDS agrees with MCI, PCIA, Sprint PCS, TRA and Wireless One that CTIA's Petition fails to make the required demonstrations as required by the statutory three-part standard in Section 10(a) of the Act. Forbearance from enforcement of the spectrum cap will not "enhance" opportunities for robust competition, will not expand statutorily mandated diversity of ownership and will not otherwise assure consumer benefits beyond those already being experienced under the current rule. In the absence of any empirical and new analytical support in the comments of CTIA, SBC and Radiofone, the CTIA Petition For Forbearance should be denied.

4. The Changes in the Commission's Cellular Cross-Interest Rules Proposed by TDS will Support the Commission's Pro-Competitive Goals While Removing Unnecessary Regulatory Burdens.

In response to the relatively few commentors who proposed possible repeal or modification

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[12](...continued)
Speculation about possible circumstances where any licensee might at some future date need more than 45 MHZ of combined cellular, PCS and ESMR spectrum is an inappropriate basis for elimination or modification of the Spectrum Cap rules. (2) The allocation of spectrum for Third Generation/IMT-2000 services is being considered in pending proceedings in ET Dkt. No. 95-18. In subsequent stages of that proceeding licensing issues, including possible exemption of such spectrum from Spectrum Cap requirements, will be addressed. Contrary to the claims of AirTouch (Comments, p. 16), BAM (Comments, p. 24-25), BellSouth (Comments, p. 10) and GTE (Comments, pp. 19-22), it is neither necessary nor desirable to resolve such matters here, prior to completion of that proposed allocation. (3) The claims of BellSouth (Comments, pp. 5-6) regarding service in rural areas are also not credible. The Commission has adopted channel plans, expanded maximum power and diversified service area options for PCS licensees precisely to address the unique low population density character of such rural areas. In the absence of any empirical showing that 45 MHZ should not be considered adequate for a licensee to deploy competitive service in rural areas, such arguments should be rejected.

in general of the Commission's cellular cross-interest rule,[13] Section 22.942, TDS supports retention of Section 22.942 for the same reasons as it supports retention of Section 20.6. TDS also supports modification of Section 22.942 in one respect, however, that is to modify the attribution standards of Section 22.942 to have them coincide with those in Section 20.6. While other commentors did not choose to address harmonizing the attribution standards in Sections 20.6 and 22.942, it is clearly consistent with the Section 11 Biennial review procedures to adopt such a change. This reasonable balance of ownership options proposed by TDS does not create opportunities for significant influence through cross-interest relationships and preserves appropriate incentives for intra-market competition. This result can be readily achieved if the attribution thresholds in Section 20.6(d) of the Commission's rules are incorporated into Section 22.942 of the Commission's rules. Based on the Commission's extensive experience with its Spectrum Cap rules, the parity of regulatory treatment achieved by this change will avoid unnecessary regulatory burdens and transactional disruption at the same time reasonably meeting the Commission's pro-competitive goals.

## Conclusion

The Commission has ample justification to retain its Spectrum Cap rules while the wireless telephony industry continues to mature. Competitive service offerings are emerging but need time to fulfill their early promise. PCS licensees who are just beginning to deploy networks or are still in the pre-operational planning stages of their implementations require regulatory certainty under the Commission's Spectrum Cap rules. The bright-line standard of these rules also will provide important guidance for bidders in the upcoming PCS auctions. While the standards for elimination

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[13] RTG, SBC and Western.

or modification of the Spectrum Cap rules under Section 11 Biennial review or under Section 10(a) forbearance procedures have not been met, there will be opportunity for the Commission to revisit these matters in 2000 when the wireless telephony industry has had time to mature. TDS supports undertaking such a review at that time. The area of the Commission's rules which should be modified at this time would be to modify Section 22.942 to include the same attribution standards as those in Section 20.6(d).

Respectfully submitted,

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February 10, 1999

CERTIFICATE OF SERVICE

I, Judy Norris, a legal secretary in the law firm of Koteen & Naftalin, L.L.P., hereby certify that on the 10th day of February, 1998, copies of the foregoing "Reply Comments of Telephone and Data Systems, Inc." were deposited in the U.S. mail, first-class, postage prepaid, addressed to:

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