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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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 Services Spectrum Cap	)	WT Docket No. 96-59
Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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REPLY COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA")[1] hereby submits its Reply Comments in the above captioned proceeding.[2]

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

2 In the Matter of 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket Nos. 98-205, 96-59 and GN Docket No. 93-252, *Notice of Proposed Rulemaking*, FCC 98-308 (rel. Dec. 10, 1998) ("Notice").

I. INTRODUCTION AND SUMMARY

Consistent with its authority under the Communications Act of 1934, as amended, the Commission should forbear from or repeal in its entirety the 45 MHz CMRS spectrum cap. As CTIA demonstrated in its initial Comments, the spectrum cap is not necessary to ensure just and reasonable or reasonably nondiscriminatory carrier practices nor is it necessary to protect consumers. CTIA requests, as did PCIA when it championed forbearance of the mandatory resale rule, that the Commission refrain from converting "the successes of the competitive marketplace into a rationale for retaining rather than removing regulation."[3] Competition within the CMRS market generally will provide a sufficient check on carrier conduct. Continued enforcement of a bright-line, inflexible spectrum cap is inappropriate, given the regulatory alternatives currently available such as the Commission's Section 310(d)[4] license transfer authority and the Federal antitrust laws. Thus, consistent with the public interest, the Commission should forbear from or repeal the spectrum cap.

While a diverse array of CMRS carriers supports CTIA's proposals,[5] several commenters raise concerns that removal of the cap will impair competition. Unfortunately, in their zeal to oppose the cap, certain commenters misrepresent the current state of competition in the CMRS market. Other commenters are concerned that a case-by-case approach to market power and

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3 See PCIA Reconsideration Petition at iv.

4 47 U.S.C. § 310(d).

5 See, e.g., Comments of the Rural Telecommunications Group at 5 (the spectrum cap is a significant factor in the reduced level of competition in rural markets); Comments of BellSouth Corporation at 6-16; Comments of AirTouch Communications, Inc. at 5-17; Comments of Radiofone, Inc. at 1-7.

concentration issues will impose substantial, inappropriate costs on both industry and government. These fears are unwarranted, as demonstrated below.

II. THE MOBILE COMMUNICATIONS MARKET IS CURRENTLY COMPETITIVE AND WILL REMAIN SO EVEN IF THE CAP IS REMOVED.

Several commenters claim that removal of the cap is premature at this time due to what they assert is an incipient level of competition in the mobile services market.[6] They assert that the cap is necessary to protect and promote competition. These claims reflect a fundamental misapprehension of the facts and the law. In fact, as the Commission recognizes, the CMRS market is currently competitive. Moreover, antitrust analysis supports removal of the 45 MHz CMRS spectrum cap, in direct contrast to commenter assertions that removal of the cap will thwart burgeoning competition.

A. The CMRS Market Is Competitive.

Notwithstanding the expressed concerns of certain CMRS carriers, the CMRS market is competitive. According to the Commission statistics, new entrants are providing service and aggressively building out their networks. Prices for new CMRS services have fallen and continue to fall. The transition to new, innovative services, including the introduction of digital cellular

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6 See, e.g., Comments of the Personal Communications Industry Association ("PCIA") at 4-12; Comments of The Telecommunications Resellers Association ("TRA") at 4; Comments of Telephone and Data Systems, Inc. at 3-4 (PCS and enhanced SMR deployment has not occurred in all markets; removing or altering the cap could adversely affect participants in the upcoming C-F Block auction, commencing March 23, 1999, as well as those PCS licensees who divested other CMRS interests due to the cap); Comments of Wireless One Technologies, Inc. at 2-4 (the spectrum cap is still necessary to ensure CMRS competition and is essential for the survival of small wireless carriers); Comments of Northcoast Communications, L.L.C. at 3-4; Comments of D&E Communications, Inc. at 5-9; Comments of MCI WorldCom, Inc. at 3, 5-6; Comments of Sprint PCS at 6-13.

service, is continuing at a strong pace. Customers have more choice than ever, of both service providers and types of service.[7]

Given these market circumstances, CTIA finds it puzzling that commenters such as PCIA -- contrary to previous assertions -- unabashedly declare that the CMRS market is not sufficiently competitive to support forbearance or repeal of the spectrum cap. It is hard to fathom what negative market developments have transpired in the last 20 months to make PCIA declare in its Comments to this proceeding that the mobile two-way voice market is not yet meaningfully competitive.[8]

In May, 1997, the "mobile services market" was "robustly competitive" enough for PCIA to petition for forbearance from the most fundamental of common carrier obligations, Sections 201 and 202.[9] In fact, according to PCIA just 20 months ago, "[g]iven the opportunities for market entry and the pervasive competition, it cannot be maintained that any CMRS provider -- including any broadband PCS carrier -- could obtain market power. Any attempt by a CMRS provider to act anticompetitively (and thus exercise market power) would be thwarted, given the

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7 Given these factual circumstances, the Commission should reject TRA's request to eliminate the sunset of the resale requirement. See TRA Comments at 9. Removal of the spectrum cap will not impair competition; therefore, there is no need to retain the resale rule, as TRA advocates, in an effort to promote competition.

8 Comments of the PCIA at 4.

9 47 U.S.C. § § 201, 202. Petition for Forbearance for the Broadband Personal Communications Services Alliance of the Personal Communications Industry Association, at 9, 10 (filed May 22, 1997); see id., at 19-20 (enforcement of Section 201 and 202 is not necessary to ensure that rates and practices are just and reasonable rates and not unjustly discriminatory given "the absence of market power and the presence of realistic alternatives").

alternatives available to the public to obtain competing services."[10] As recently as 5 months ago, PCIA similarly confirmed:

> [b]y any reasonable measure, CMRS is the most robustly competitive segment of the U.S. telecommunications marketplace. In every market in the country, at least nine companies have (or soon will have) licenses and strong economic incentives to serve all segments of the community. In every market in the country, prices for services are plummeting. In every market in the country, competition is extending its beneficial reach to all consumers -- individuals as well as businesses.[11]

Developments in the last 20 months do not support the notion that the market has gone from robust competition to lack of meaningful competition in the mobile two-way voice business; but, to the contrary, the last 20 months have brought unprecedented competition to the wireless industry.[12] Nor, as a factual matter, can a carrier lack market power for purposes of forbearance from Sections 201 and 202 or the mandatory resale requirements but have it for purposes of forbearance analysis regarding a spectrum cap.

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10 Id. at 16. To the extent that PCIA's claim that amendment of spectrum cap is premature is predicated upon its understanding that the 45 MHz cap was enacted "less than three years ago," PCIA Comments at 4, PCIA's factual assumption is incorrect. The 45 MHz cap was adopted in 1994, not June 21, 1996.

11 The Broadband Personal Communications Services Alliance of the Personal Communications Industry Association Petition for Reconsideration, WT Docket No. 98-100, at iii (filed Sep. 10, 1998) ("PCIA Reconsideration Petition"). This statement appears directly contrary to PCIA Comments at 15, stating that "[w]hile PCS competitors exist in some market, no market is yet truly competitive by any standard measure. . . ").

12 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*, 12 Communications Reg. (P&F) 623 (1998).

It is axiomatic that the Communications Act[13] and the Federal antitrust laws[14] are designed to protect and foster competition, not particular competitors. For this reason, commenters cannot legitimately claim (1) detrimental reliance on the Commission retaining the cap until the PCS licenses are built out or (2) that the Commission must protect smaller competitors from the threat of larger CMRS entities.[15] The public interest is not served by protecting inefficiency.[16] If a carrier is unable to compete successfully in the CMRS environment, this will be a function of its business plan (or the success of its rivals' business plans), not a result of the Commission's regulatory policies or other carriers' anticompetitive practices. If the Commission were to retain the cap to protect such carriers, consumers will not receive the full benefits of competition, including lower prices and the introduction of innovative services that stimulate demand for wireless services.

The CMRS market was sufficiently competitive five years ago for the Commission to forbear from significant regulatory burdens such as tariff filing requirements. Since that time, the CMRS market has evolved significantly, consistent with the Commission's predictions. Given

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13 Application of Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. For Transfer of Control, 11 FCC Rcd. 732, ¶ 56 (1995) ("the Commission's statutory responsibility is to protect competition, not competitors") (citing Hawaiian Telephone Co. v. Federal Communications Commission, 498 F.2d 771, 775-776 (D.C. Cir. 1974) (FCC acting contrary to statutory public interest mandate in approving applications where it considered competition "not in terms primarily as to its benefit to the public, but specifically with the objective of equalizing competition among competitors").

14 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("The antitrust laws, however, were enacted for 'the protection of competition, not competitors'") (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

15 See, e.g., Comments of PCIA at 10-12.

16 To the contrary, the public interest would be better served if the Commission permitted inefficient carriers to transfer their licenses to more efficient competitors.

these positive market developments, a decision not to trust the market at this time would be counterproductive. The Commission has every reason to believe that a forward-looking approach to market issues will meet with similar success here.

B. Sound Principles of Antitrust Law and Economic Theory Support The Removal Of The 45 MHz CMRS Spectrum Cap.

Notwithstanding the claims of some commenters,[17] removal of the spectrum cap will not result in a concentrated CMRS market that permits certain CMRS carriers to exercise unchecked market power. As CTIA has previously demonstrated, the Commission need not resort to a spectrum cap to prevent carriers from exercising market power.[18] The Crandall/Gertner Declaration[19] reaches a similar conclusion. Specifically, it notes that there is no basis for concern that eliminating the cap will lead to a reduction in competition.[20] The Sidak/Teece Declaration

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17 See, e.g., Comments of PCIA at 15 ("Should the Commission amend or eliminate the spectrum cap, it is clear that the same consumer dangers that led to the imposition of the cap, stifling of innovation and increased prices, would occur."); Comments of MCI WorldCom at 5-6.

18 Comments of CTIA at 5-10, 17-22.

19 Declaration of Robert E. Crandall and Robert H. Gertner, Attachment to Comments of Bell Atlantic Mobile, Inc. (January 25, 1999) ("Crandall/Gertner Declaration").

20 Id. at 4-17. The Crandall/Gertner Declaration attributes this to the following: (1) competition in wireless services is robust and increasing; (2) evidence demonstrates that when a firm increases the amount of spectrum it holds in a given area, there is no associated reduction in competition; (3) the exercise of market power is unlikely at levels above 45 MHz because foreclosure is unlikely, competition in the wireless industry is expected to increase in the future, and the likelihood of coordinated interaction (collusion) among wireless providers is unlikely. Among other things, collusion is unlikely because new entrant firms have little economic incentive to coordinate with more established carriers, the presence of heterogeneous service offerings (such as national rate plans versus local or regional plans and the availability bundled and unbundled service offerings), the various technical standards employed, and the lack of readily-available market information.

accordingly explains that the likelihood that the Commission, in the absence of a cap, will be unable to deter a single carrier (or a group of carriers acting collusively) from exercising market power is "close to zero."[21] Therefore, even under this "worst case scenario" where a carrier is able to exercise market power in the absence of a cap, the negative effect on consumer welfare would be transitory and small because the Commission and Federal antitrust authorities will likely detect and prevent harmful spectrum aggregation.[22]

The commenters who oppose CTIA's Petition mistakenly assume that if the Commission removes the spectrum cap, the market will regress and the positive competitive developments to date will be diminished. As CTIA demonstrated in its Comments, such a result is unlikely for a variety of reasons. Of paramount concern, these commenters apparently believe that removal of the spectrum cap will create a regulatory vacuum that will permit carriers to assert market

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21 Declaration of J. Gregory Sidak and David J. Teece on behalf of GTE Corporation, at 9, January 25, 1999, Attachment to Comments of GTE ("Sidak/Teece Declaration"). The Sidak/Teece Declaration lists a variety of reasons, including, among other things, (1) that competition in wireless is robust and expected to grow; (2) the provision of nationwide service and nationwide pricing plans that render such carriers insensitive to local price changes and provides consumers with readily-available lower-priced alternatives; (3) smaller rivals with the ability to absorb the first carrier's traffic, given current technology; (4) the relative ease of entry in wireless voice and data services; and (5) the unprofitability of warehousing spectrum, given foregone opportunity costs, the up-front costs associated with acquiring spectrum, and the speculative future benefits. Id. at 9-10, 23-24; see also Bruce M. Owen and Mark W. Frankena, Economists Inc. "An Economic Evaluation of the Federal Communications Commission's Commercial Mobile Radio Services Spectrum Cap," at 11-20, Table 1 to Comments of AT&T Wireless Services, Inc. ("Economists Inc.") (a spectrum cap distorts resource allocation and harms consumers by reducing achievement of economies of scope and scale, expansion of efficient firms, competition, and innovation).

22 Sidak/Teece Declaration at 24-26.

power.[23] This is far from the truth. CTIA does not believe -- nor did it advocate -- that the Commission simply abolish the cap without further action.[24] Rather, CTIA believes that the Commission should adopt a more tailored regulatory approach -- case-by-case determinations of market power and concentration. Under CTIA's proposed regulatory alternative, the Commission retains full authority, as do the Federal antitrust authorities, to police the market.[25] As noted below, CTIA is merely seeking a less intrusive form of regulatory oversight.[26]

Notably, neither PCIA nor other commenters provide any evidence documenting that CMRS carriers are exercising market power, i.e., the ability, whether acting alone or in concert with other firms, to raise prices or to restrict output. The mere fact that new entrants have not finished building out their networks[27] does not establish market power on the part of established carriers.

PCIA and other commenters fail to acknowledge that market share analysis is only a screening tool, and not a proxy for market power. Reliance upon market share or HHI thresholds

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23 See, e.g., Comments of PCIA at 7-8 ("Elimination of the cap and the cellular cross-ownership prohibition -- with nothing more -- would conceivably allow one or two companies to operate all cellular systems and all PCS systems in the same market.").

24 As Economists Inc. notes, at 25-26, there is no evidence to support the Commission's conclusion that the spectrum cap may have promoted competition in CMRS given that any "transaction that would have been likely to reduce competition would have been detected by the Commission and antitrust authorities relying on the principles and tools in the Merger Guidelines."

25 See also, Sidak/Teece Declaration at 27-28 (elimination of the 45 MHz cap will not permit wireless carriers to hoard spectrum given the Federal antitrust laws and remedies, including private suits for treble damages).

26 Spectrum ownership limits represent "old think." Today, the best economic learning considers the efficiency lost to society associated with too rigid a restriction on ownership.

27 See, e.g., Comments of PCIA at 6.

alone oversimplifies the analysis.[28] Market share and HHI thresholds are employed by Federal antitrust agencies largely as "screening tools that are used in the first instance to determine whether a proposed transaction warrants further scrutiny. Enforcement decisions by the antitrust agencies are not based on market shares and HHIs alone, much less solely on comparisons with threshold levels such as a market share of 35 percent or an HHI of 1800."[29] Given the interests at stake, and the possible effects on efficiencies, continued reliance upon a pure market share analysis -- as embodied in a 45 MHz spectrum cap -- is not appropriate.

Nor, as CTIA explained in its Comments, is market share easily determined. To rely on the number of subscribers as the indicator of market share[30] will overcount significantly the shares held by established cellular carriers. It fails to account adequately for the fact that new entrants have the capacity to absorb a rival carrier's customers if the rival were to raise prices.[31] It also

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28 United States v. General Dynamics Corp., 415 U.S. 486 (1974).

29 Economists Inc. at 8. Economists Inc. further notes that the current spectrum cap "would prevent many license transfers that would not raise competitive concerns based on the HHI thresholds in the Merger Guidelines. . ." Id.

30 See, e.g., Comments of PCIA at n. 17, 9-10, (claiming, among other things, (1) that cellular nationwide subscribership represents 71-87% of the two-way voice subscribers, well over CTIA's 35% threshold; and (2) that the market is not competitive by any standard measure); Comments of D&E Communications, Inc. at 6-7 (equating market share with the number of subscribers); Comments of Sprint PCS at 11-12 and Attachment A, John B Hayes, "CMRS HHIs From Customer Share Data," WT Docket No. 98-205, (Jan. 25, 1999).

31 As the Commission noted in finding AT&T non-dominant in the interstate, domestic, interexchange, market, "[i]t is well established that market share, by itself, is not the sole determining factor of whether a firm possesses market power. Other factors, such as demand and supply elasticities, conditions of entry and other market conditions, must be examined to determine whether a particular firm exercises market power in the relevant market. . .. 'market share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities.'" Motion of AT&T Corp. to be Reclassified a Non-Dominant Carrier, 11 FCC Rcd. 3271, at ¶ 68 (1995) (citations

underestimates the beneficial market effects produced by new entrants, including downward pressure on prices and innovative new service offerings.[32] For these reasons, it is an ineffective determinant of market power.[33]

The Commission should similarly reject TRA's unsubstantiated claim that lifting the spectrum cap will increase the need for additional regulatory oversight of the CMRS industry.[34] TRA's Comments reflect a fundamental misunderstanding of market analysis. Specifically, it claims that

> [i]n the interexchange market, the Commission was able to deregulate the dominant provider (AT&T) because of the number of competitors. The CMRS market, by contrast, is not yet characterized by such a multiplicity of networks and easy resale. As a result, removal of the spectrum cap would actually create a need for additional regulation and policing by the Commission in the CMRS market.[35]

TRA's reliance upon the number of additional competitors proves nothing. In fact, the long distance industry is currently more concentrated than the CMRS industry, notwithstanding "the

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omitted) ("AT&T Non-Dominant Order"). Existing entrants have sufficient capacity (supply) to foreclose inappropriate pricing practices from rivals.

32 The concerns raised here are similar to those that surfaced in the early stages of the cellular industry. In that case, some parties expressed concern that the wireline head start would deprive later entrants from prospering. This fear never materialized due in large part to the ingenuity of the new entrants and their clever marketing tactics. Thus, despite the assertion of MCI WorldCom, Inc., Comments of MCI WorldCom, Inc. at 4, cellular service has not been dominated by incumbent local exchange carriers.

33 As the Crandall/Gertner Declaration explains, "[c]urrent revenue shares are an inappropriate basis for measuring concentration because a firm's current share does not reflect its likely future competitive significance." Crandall/Gertner Declaration at 11.

34 TRA Comments at 12.

35 Id.

multiplicity of networks and easy resale."[36] In the Commission's most recently published statistics on long distance market share, based upon shares of toll revenues, AT&T has a 44.5% share, MCI has 19.4%, Sprint has 9.7%, WorldCom has 6.7% and all other long distance carriers have 19.8%. The HHI is 2508, a highly concentrated market.[37] Notably, in 1995, when AT&T was declared non-dominant for purposes of the interstate, domestic, interexchange market,[38] it had a 51.8% share and the HHI level was 3197.[39] These concentration thresholds are much higher than those the Commission determined applicable to the CMRS industry under the 45 MHz cap.[40] Applying TRA's logic, the CMRS industry should be permitted at least the same concentration levels enjoyed by the long distance industry, which would, at minimum, require the cap to be raised. As CTIA demonstrates below, a case-by-case approach to market power issues is more appropriate than merely lifting the cap.

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36 Id.

37 James Zolnierek, Katie Rangos, James Eisner, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, "Long Distance Market Shares: Third Quarter 1998," at 11, 16, December 1998 ("FCC Long Distance Market Share Report.). It is important to note that due to the maturity of the market, determining market share in the long distance industry presents less difficulty than in the CMRS market. Of course, the subsequent combination of MCI and WorldCom, permitted by the government, increases concentration levels over those reported.

38 Arguably, in making its determination, the Commission was relying upon AT&T's market share as of 1994, which was 55.2%. AT&T Non-Dominant Order, at ¶ 67, and n. 184.

39 See FCC Long Distance Market Share Report at 16.

40 Notably, the Commission has never determined that the number of subscribers is an appropriate measure of market share for the CMRS market. Nonetheless, the long distance thresholds are still considerably higher than those PCIA reported in its estimates of mobile two-way voice subscribers, Comments of PCIA, Exhibit A. Under the worst case as presented by PCIA, PCS has still has 9% of the subscribers, SMR has 4% and two cellular companies combined have 87%. This is significant considering that PCS service has only been operational for the last several years. In 1986, two years after divestiture, AT&T alone garnered a 81.9% share, MCI had 7.6% and Sprint had 4.3%.

III. A CASE-BY-CASE APPROACH TO MARKET POWER AND CONCENTRATION ISSUES IS A MORE EFFICIENT, EFFECTIVE ALTERNATIVE THAN A CAP ON SPECTRUM.

Several parties claim that substituting a bright-line rule with a case-by-case approach to market power and concentration issues is prohibitively expensive for the Commission and licensees.[41] Others argue that case-by-case determinations provide less regulatory certainty for licensees and investors than a bright line spectrum cap.[42] Contrary to these claims, a case-by-case determination of market power is more efficient and effective than continued reliance upon a spectrum cap.

A. Case-By-Case Determinations Of Market Power Are More Efficient Than Reliance Upon A Spectrum Cap.

Despite the contentions of PCIA and other commenters, a case-by-case approach to license transfer issues imposes no undue costs on the Commission or carriers. The Commission already is obligated to approve license transfers on a case-by-case basis. As part of that process, when necessary it could conduct a "quick look" antitrust analysis that would permit proponents of the transaction to demonstrate an absence of competitive problems and the presence of any relevant efficiencies.

As CTIA[43] and other commenters demonstrated, transition to a case-by-case approach is necessary to permit carriers to maximize productive and other efficiencies. To illustrate, the

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41 See, e.g., Comments of PCIA at 16-17; Comments of Wireless One Technologies, Inc. at 5-6 .

42 See, e.g., Comment of PCIA at 18; Comments of Chase Capital Partners at n. 2 ("case-by-case forbearance is a second-best alternative to specific rules that provide clear guidance to investors and licensees alike").

43 Comments of CTIA at 17-22.

Sidak/Teece Declaration notes that "the expected costs of retaining the spectrum cap are substantial,"[44] given that possibility that minimum efficient scale for certain firms may exceed the 45 MHz cap (especially if carriers offer bundled voice and data services), and given the expected social costs.[45]

The flip side to the issue raised by proponents of the cap is: why keep the cap? It is admittedly a crude instrument. As CTIA and other commenters have noted, the Commission has other less restrictive means of policing against market power and concentration issues. The only remaining reason for retention of the cap is likely administrative convenience.[46] While a cap will prevent carriers from having the occasion to file Section 310(d) license transfer applications or from engaging in transactions that trigger Hart Scott Rodino or other Federal antitrust law review, it does so at a cost -- the risk of lost efficiencies. Such a result would only be advisable if there were some basis to believe that the Federal government, including the Commission, would

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44 Sidak/Teece Declaration at 28.

45 Id. at 29-32. Sidak and Teece describe three types of efficiency losses that would likely arise if the cap were retained: (1) the misallocation of carrier resources across equipment and spectrum; (2) future competitive alliances would depend less on maximizing potential synergies and more on compliance with the cap, thereby retarding investment and innovation; and (3) preventing carriers from achieving economies of scale and scope that would otherwise result in lower prices to consumers. Id. at 32-35. In addition, the Crandall/Gertner Declaration notes that removal of the spectrum cap may also provide the Commission with valuable market information that could provide the Commission with insight on the most optimal uses of spectrum. Crandall/Gertner Declaration at 22.

46 A cap was probably justifiable as a matter of administrative convenience when the Commission was licensing broadband PCS. Now, though, the initial licensing process is largely completed. The bulk of the remaining licenses to be re-auctioned involve licenses reserved especially for entrepreneurs and small businesses. A spectrum cap is not needed to deter ownership concentration in these licenses. Moreover, C and F Block license applicants, even if they qualify as small businesses/entrepreneurs, are capped at holding no more than 98 C and F Block licenses nationwide. 47 C.F.R. § 24.710.

be burdened by the volume of work to the point that it would shirk its statutory responsibilities. In the absence of evidence that the Federal government will be overmatched or engage in malfeasance, there is no justification for an iron rule.

B. Case-by-Case Determinations Of Market Power Provide The Same Degree Of Regulatory Certainty As A Spectrum Cap.

Case-by-case determinations of market power provide the same degree of regulatory certainty as a spectrum cap. Notwithstanding commenter claims,[47] a spectrum cap affords no special guarantee of regulatory certainty to licensees or investors. Notably, the presence of a spectrum cap set at 45 MHz does not deter Federal antitrust authorities from engaging in their separate antitrust review. For those transactions triggering antitrust scrutiny, these Federal agencies conduct case-by-case determinations of market power and concentration, notwithstanding the Commission's cap.[48] Therefore, retention of a cap will do little to obviate uncertainties associated with the regulatory approval process.[49] Moreover, the telecommunications industry's success in attracting capital over the years -- notwithstanding the applicability of the Federal antitrust laws -- demonstrates that case-by-case determination of market power and concentration does not chill financial markets.

Nonetheless, if the Commission is concerned with issues of market certainty, it may rely upon processing thresholds or a safe harbor approach as opposed to an inflexible spectrum cap.[50]

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47 See, e.g., Comments of PCIA at 17.

48 Raising the cap to a higher threshold such as 70 MHz, see Comments of Omnipoint Communications, Inc. at 5, will not prevent separate antitrust inquiries..

49 See id., at 6.

50 See Comments of AT&T Wireless Services, Inc. at 13 ("To provide some measure of certainty and to foster administrative efficiency, . . . repeal of the cap should be accompanied by the adoption of a safe harbor that permits aggregations of 45 MHz or

Under this approach, any transfer or acquisition that would not raise concerns under the current cap (or a similar threshold) would be permissible, in effect a safe harbor. Acquisitions in excess of the safe harbor would require additional Commission scrutiny. This would permit carriers and the investment community some degree of certainty without impairing the benefits associated with a case-by-case approach.[51]

One final note: TRA's argument that the cap is necessary to increase the likelihood that wireless services will develop as competitors to wireline services[52] misses the point. If carriers lack the capacity to provide alternative local exchange service, there is no ability to compete. TRA provides no demonstration that less than 45 MHz of spectrum is sufficient to provide competitive local exchange service.[53]

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less."); Comments of BellSouth Corporation at 15 ("Recognizing that the Commission's resources are limited, the Commission could adopt a processing threshold instead of a spectrum cap. . . . Applications involving less than the specified number of MHz would continue to be processed as normal. The level at which any such threshold is pegged should not be a permanently fixed number of MHz, but should automatically adjust to the total amount of spectrum available for competing services and should take into account future spectrum needs.").

51 A safe harbor approach is strikingly similar to the proposal championed by DiGiPH PCS, Inc. While DiGiPH advocated that the spectrum cap be retained, in those cases where a carrier desired to exceed the threshold, DiGiPH allowed that the carrier should be permitted to demonstrate to the Commission on a case-by-case basis that the proposed transaction would not frustrate the underlying purposes of the spectrum cap (diversity and competition). Comments of DiGiPH PCS, Inc. at 5.

52 TRA Comments at 9-10.

53 Moreover, if as TRA seems to suggest, the relevant market for antitrust analysis includes local exchange service, CMRS carriers will have dramatically small market shares.

To summarize, opposing commenters have raised no issues that prevent the Commission from forbearing from or removing the 45 MHz CMRS spectrum cap. Thus, in accordance with the Communications Act, the Commission is obligated to act favorably upon CTIA's proposals.

IV. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission adopt the proposals made herein to forbear from or repeal in its entirety the 45 MHz CMRS spectrum cap.

Respectfully submitted,

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