re-evaluating the rule in the *CMRS Spectrum Cap Report and Order,* the Commission set out the economic arguments why a 45-MHz aggregation limit strikes an appropriate balance between the concern about undue market concentration and the benefits of spectrum aggregation.[193] No commenter has persuaded us that this economic analysis is not still valid. The current cap allows carriers to aggregate up to 45 MHz in a geographic area. This allows cellular carriers, who may be capacity constrained, to obtain up to an additional 20 MHz of PCS or SMR spectrum to provide expanded or enhanced services.[194] When the allocated spectrum is fully used, this aggregation limit allows for at least four mobile telephone service providers in each area. Such a market would have an HHI no greater than 2500 with four firms fully utilizing 45 MHz each.[195]

81. We further conclude that in major markets any alleged detriments of a 45 MHz spectrum cap cited by some commenters do not outweigh the benefits of a 45 MHz cap. We are not persuaded that the cap has constrained the ability of carriers to provide services.[196] As we noted above, there are very few markets in which carriers have spectrum up to the cap, and we have received only a handful of requests for waiver of the spectrum cap.[197]

82. Regarding the deployment of new, third-generation (3G) technologies, we will be initiating a proceeding in the near future to consider the allocation of spectrum for such services.[198] We believe that it is more appropriate to consider arguments relating to increasing the spectrum cap to provide additional spectrum for 3G or other advanced services in that allocation proceeding. At that time we will decide whether to include any newly allocated spectrum in the cap, and, if so, we will adjust the cap accordingly. We believe this is a better approach than the one suggested by some carriers of raising the cap now in anticipation of new 3G services being offered and 3G

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interested parties or through review by Commission staff.

[193] *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869-73 ¶¶ 95-101.

[194] To the extent that a carrier can demonstrate that it requires more than 45 MHz of broadband CMRS spectrum – 55 MHz in rural areas – in a particular geographic area ,we will consider waiving the spectrum cap for that carrier in that geographic area.

[195] This HHI is derived using allocated spectrum to measure market share. As discussed previously, revenues or subscribers may not be evenly distributed among market participants based on their allocated spectrum, so HHIs measured more appropriately may be higher. *See CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7872 ¶ 100.

[196] *See* Bell Atlantic reply at 10; GTE reply comments at 19. *But see* SBCW comments at 10; US West reply comments at 4.

[197] *See supra* at ¶ 26.

[198] *See* Commission Staff Seek Comment on Spectrum Issues Related to Third Generation Wireless/IMT-2000,*Public Notice*, DA 98-1703 (rel. Aug. 26, 1998). We also note that there is potentially more spectrum available for CMRS in addition to the planned 3G allocation. For example, in the *Channel 60-69 (Commercial) NPRM* the Commission sought comment on whether to allow mobile, as well as fixed, services in those bands. Service Rules for the 746-764 and 776-794 MHz bands, and Revision to Part 27 of the Commission's Rules, WT Docket 99-168, *Notice of Proposed Rulemaking*, FCC 99-97 (rel. June 3, 1999). That and other pending or contemplated proceedings may furnish additional sources of spectrum for 3G.

spectrum being allocated in the future.[199] However, some carriers assert that they have an immediate need to access additional existing CMRS spectrum to offer new services.[200] Therefore, to the extent that a carrier can credibly demonstrate that in a particular geographic area the spectrum cap is currently having a significant adverse affect on its ability to provide 3G or other advanced services, we will consider granting a waiver of the cap for that geographic area. We urge carriers requesting waivers to clearly identify what additional services they would provide if the spectrum cap were waived, and why such services can not be provided without exceeding the cap. In evaluating a waiver request the Commission will also take into account any potential adverse affects of granting the waiver, such as diminution of competition, as well as the potential benefits from the provision of advanced mobile services.[201]

83. We are also concerned that raising the cap to a higher level, as suggested by some commenters, could lead to unacceptable concentration of these markets. Adoption of a 90 MHz cap, as suggested by RTG, could lead to a market with only two competitors, both with 90 MHz. That would, in essence, re-institute the cellular duopoly that the Commission sought to eliminate by establishing PCS. As we have extensively documented, the introduction of new providers and the end of the cellular duopoly has led to substantial consumer benefits through reductions in the price of service and in new and enhanced services. We also reject Omnipoint's suggestion to raise the cap to 70 MHz, which would allow the re-concentration of the market to three carriers. While a third competitor in a market provides benefits relative to a duopoly, such a market would still be highly concentrated,[202] and would be less competitive than many markets are today. Even a 50 MHz cap or 55 MHz cap, while maintaining at least four competitors, could lead to excessive concentration in most markets. For example, while a 55 MHz cap would allow for four carriers, in practice such a cap could lead to only three significant players in a market if 165 MHz out of 180 MHz is used by the three carriers, leaving only 15 MHz of spectrum for a fourth competitor.

84. We find, however, that the economics of serving rural areas are different, and adopt a 55 MHz aggregation limit for those areas. For purposes of the spectrum cap rule, we define rural areas as Rural Service Areas (RSAs).[203] In the *NPRM*, we underscored our intention to secure the benefits of modern telecommunication services, including wireless services, for high-

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199 *See, e.g.,* AirTouch comments at 16; BellSouth comments at 10-11; GTE comments at 20-22.

200 *See, e.g.,* letter from Ben G. Almond, BellSouth, to Magalie Roman Salas, FCC, dated Sep. 1, 1999; letter from Thomas E. Wheeler, CTIA, to FCC Chairman and Commissioners, dated Sep. 3, 1999.

201 *See* 47 C.F.R. § 1.925 (1999) (63 Fed. Reg. 68904, 68926-27 (Dec. 14, 1998)).

202 A market with two CMRS providers with 70 MHz each would have HHIs ranging upwards from 3148. A market with three CMRS providers with 60 MHz each would have an HHI not lower than 3333.

203 RSAs are defined in 47 C.F.R. § 22.909(b). Other market designations used by the Commission for CMRS, such as Economic Areas (EAs), combine urbanized and rural areas, while MSAs and RSAs are defined expressly to distinguish between rural and urban areas.

cost and rural areas.[204] In such areas, competition among mobile phone service providers remains largely underdeveloped, and it appears that in many markets consumers are able to obtain facilities-based mobile phone services only from the two incumbent cellular carriers.[205] A 55 MHz aggregation limit in rural areas will permit carriers serving these areas to achieve economies of scope and will allow greater partnering between PCS and cellular in those areas, thereby helping to make competition in rural areas more vigorous.[206] Such partnering may enable carriers to reduce roaming charges that rural subscribers now incur when traveling to urban areas, and when urban residents travel to rural areas. Partnering may also allow further deployment of PCS and other broadband services to rural areas.[207] In addition, the economics of serving high-cost and low-density areas makes it is unreasonable to expect a large number of independent carriers to be viable.[208] As a result, the opportunity cost of rural spectrum rights is likely near zero, and the risks of anticompetitive conduct by foreclosing entry through the monopolization of spectrum are low.

85. We decline to adopt a market-by-market approach. As discussed in the *NPRM,* under such an approach, the spectrum cap would not be enforced in certain markets, such as those with five or more operational competitors, but would be in place for other markets.[209] Although a market-by-market approach may have initial appeal, as the commenters pointed out, there are potential difficulties in implementation, including determining the appropriate geographic area to use since each service uses different market areas. Moreover, even with specific guidelines, this approach would likely result in numerous and time-consuming case-by-case reviews of proposed consolidations. In addition, a market-by-market approach may lead to a "first mover" environment in which the first consolidation may be permitted, whereas subsequent ones would likely be blocked. This could lead firms to seek to consolidate rapidly lest they be blocked by prior consolidation of rival firms.

c. Attribution

86. Background. Under the CMRS spectrum cap, ownership interests of 20 percent or more (40 percent if held by a small business or rural telephone company), including general and limited partnership interests, voting and non-voting stock interests or any other equity interest are considered attributable.[210] Officers and directors are attributed with their company's holdings, as

[204] *NPRM,* 13 FCC at 25135 ¶ 5.

[205] BellSouth comments at 11; D&E comments at 2, 5, 6; Western Wireless comments at 4; TDS comments at 6.

[206] *See, e.g.,* BellSouth comments at 13; Bell Atlantic comments at 18-21; RTG reply comments at 2.

[207] *See, e.g.,* BellSouth comments at 8; Triton comments at 10; RTG reply comments at 5-6.

[208] *See, e.g.,* Chariton reply comments at 2; RTG reply comments at 1.

[209] *NPRM,* 13 FCC Rcd at 25164 ¶ 72.

[210] 47 C.F.R. § 20.6(d)(2). Ownership interests held through successive subsidiaries are calculated through use of a multiplier. 47 C.F.R. § 20.6(d)(8).

are persons who manage certain operations of licensees, and licensees that enter into certain joint marketing arrangements with other licensees.[211] Stock interests held in trust are attributable only to those who have or share the power to vote or sell the stock.[212] Debt does not constitute an attributable interest, nor are securities affording potential future equity interests (such as warrants, options, or convertible debentures) considered attributable until they are converted or exercised.[213] The attribution rules also set forth a four-pronged test for waivers of the attribution for investors with non-controlling, minority interests where the licensee is controlled by a single majority shareholder or controlling general partner.[214]

87. In the *NPRM*, we sought comment on whether we should modify any or all of the attribution criteria.[215] Specifically, we sought comment on whether to modify the 20 percent ownership benchmark and the effect that a 20 percent attribution standard has on the ability of CMRS providers to obtain capital.[216] We also sought comment on whether we should increase the benchmark as it applies to the amount of non-voting equity interest, or interest held by a limited partner and whether to continue to have a separate 40 percent attribution standard for investments held by small businesses or rural telephone.[217] Finally, we sought comment on whether we should retain or modify the waiver test for single majority shareholder situations.[218]

88. Only a few commenters specifically discussed possible modifications to the attribution rules. AT&T argues that current rules attributing equity ownership of 20 percent or more impose artificial barriers on competition by making it more difficult and costly to attract investment capital, which chills the timely roll-out of wireless services to unserved and

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211 47 C.F.R. § 20.6(d)(7), (9), (10).

212 47 C.F.R. § 20.6(d)(3).

213 47 C.F.R. § 20.6(d)(5).

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

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

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

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

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

47 C.F.R. § 20.6, note 3.

215 *NPRM*, 13 FCC Rcd at 25159 ¶ 59, 25160 ¶ 61.

216 *Id.* at 25159-60 ¶ 60.

217 *Id.*

218 *Id.* at 25161 ¶62.

underserved consumers.[219] It also contends that rules that make management agreements attributable deprive new entrants of management expertise.[220] AT&T thus asserts that the attribution rules should be changed so that investments up to *de facto* control would not be attributable.[221] Triton agrees that the attribution rules tend to discourage investment, and supports the replacement of the current standards with a control test.[222] Sonera requests that an otherwise unaffiliated entity should not be attributed with the holdings of a licensee with which it holds minority, insulated interests in another geographic area.[223] Chase requests that the Commission establish a rule that non-controlling interests held by institutional investors are not attributable.[224] Chase also suggests that the CMRS attribution rules more closely conform to the broadcast attribution rules by (1) not attributing ownership interests of limited partners who are not materially involved with the licensee's activities, (2) adopting a single majority shareholder exception, and (3) allowing a single entity to have both an attributable interest in one company and a non-attributable interest of up to 33 percent in a licensee in the same geographic area.[225]

89. Discussion. In reviewing the attribution benchmarks used with the spectrum cap, we make several changes to clarify the rules and to increase the availability of capital to CMRS carriers. We note that the change in the aggregation limit to 55 MHz for rural areas adopted today will increase the availability of capital to CMRS carriers serving rural areas independent of the changes we make to the attribution rules.

90. *Control and Influence.* Attribution rules address the ability of an investor to control or influence the actions of a licensee in ways that may dampen competition in a market. They represent a balance between our concerns about an investor's ability to influence a licensee in an anticompetitive manner and the need of licensees to attract capital to build their systems and provide service to consumers. The Commission has historically found that an investor can influence a licensee with less than a controlling interest.

91. We therefore decline to adopt the control standard suggested by AT&T and Triton. These proposals do not take into account the variety of ways that an investor can exert influence or control over a licensee. An individual or firm does not need actual operational control over (or to be in the management) of a licensee in order to exert influence over that

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219 AT&T comments at 12.

220 *Id.* at 11.

221 AT&T comments at 10.

222 Triton comments at 6; Triton reply comments at 1-2.

223 Sonera comments at 3. Sonera states that WTB staff have told Sonera and Aerial Communications that they would be attributed with the spectrum that the other holds in the Charlotte BTA because of a joint partnership they are both part of with a licensee in the Dallas BTA. *Id.* at 2.

224 Chase comments at 6-8.

225 Chase comments at 8-9 (citing *Roy M. Speer*, 11 FCC Rcd 18393 (1996)).

licensee. Further, our concerns about anticompetitive behavior are not limited to what influence the party may exert on the licensee, but also how another licensee may act in the market if it has a significant interest in one of the other providers in that market. A carrier may price its services differently if it has a substantial, yet non-controlling interest in another carrier in the same market. Under such circumstances, it may believe that it can recover some of the revenues it would otherwise lose by its actions through its partial ownership in the other carrier. That type of activity becomes even more fruitful to a carrier as its stake in the other carrier increases. Such actions would also restrict the competition between the two carriers and the resultant benefits to consumers from robust competition.

92. Another difficulty with use of a control test is the burden it would place on the Commission and industry. As we discussed in the context of the general spectrum cap rule, a bright-line test provides benefits to the Commission and industry, as well as the public. A control test, in contrast, would be highly inefficient and would not provide regulatory certainty. Under a control test, there are a multitude of variables that the Commission would have to weigh before a determination of non-control can be made. The Commission would have to engage in frequent case-by-case determinations of control that would be time-consuming, fact-specific, and subjective. We find that a bright-line attribution test avoids these administrative burdens.

93. Similarly, we decline to adopt an exception for insulated partners, as requested by Chase.[226] As we just discussed, a party with a significant non-controlling ownership interest may have the ability and incentive to act in an anticompetitive manner. Although the fact that a partner is insulated may have an effect on the ability of that partner to directly influence the licensee, it does not address our concerns regarding unilateral action by the limited partner.

94. We also will not adopt a single majority shareholder exception, but will maintain our test for waiving the attribution rules in situations where there is a single majority shareholder. The fact that there may be a single majority shareholder does not change the ability or motive for a party with a significant non-controlling interest to engage in anticompetitive behavior. The non-controlling owner may still have ability to influence the licensee and may still have the ability to engage in undesireable unilateral conduct by recouping revenues through its ownership of another carrier in the market. We do recognize, however, that there may be instances in which a non-controlling interest in a licensee may not provide any incentive or ability for anticompetitive conduct. In the *CMRS Spectrum Cap Report and Order,* the Commission adopted a four-pronged test to determine when the existence of a single majority shareholder mitigates the competitive impact of common ownership and the ability of the non-controlling interest holder to influence the licensee.[227] Under that test, if the non-controlling interest holder can show that there is an unaffiliated single majority shareholder, that the non-

[226] Chase comments at 8.

[227] *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7881-82 ¶ 120, 7886-87 ¶¶ 130-31.

controlling interest holder has no ability to influence the licensee, and that it is not likely to act in an anticompetitive manner, the Commission may waive the attribution rules.[228]

95. In balancing the need to facilitate capital flows to support deployment of service and our concerns about anticompetitive influences from cross-ownership interests, the Commission chose a 20 percent attribution level for broadband CMRS.[229] This is significantly higher than the benchmarks used by the Commission in other contexts. For example, the Commission recently upheld the use of a five percent benchmark for equity ownership in our broadcast attribution rules.[230] The Commission initially chose a 20 percent benchmark in recognition of the large capital requirements in deploying a CMRS system. The attribution level was set at 20 percent also to account for the Commission's policy in the early days of the cellular industry to encourage the formation of settlement groups--a historic anomaly that has no counterpoint in the PCS context. In light of this history, the Commission found that it would be unfair and unduly restrictive to use a five percent limit for the spectrum cap. None of the commenters have demonstrated why the Commission should alter this general equity benchmark at this time.

96. We also decline to adopt Triton's suggestions that we change the spectrum cap attribution rules to more closely conform to the broadcast attribution rules.[231] Although the spectrum cap attribution rules find their roots in the broadcast attribution rules, they differ, in some respects, due to the different policy concerns that led to their adoption. The primary basis for the spectrum cap attribution rules is the Commission's concern with potential anticompetitive conduct by CMRS carriers. In broadcasting and cable, the Commission also has concerns

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228 47 C.F.R. § 20.6 note 3.

229 *See, e.g.,* Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957 ¶ 119 (1994). *See also Third Memorandum Opinion and Order*, GN Docket No. 90-314, 9 FCC Rcd 6908 at n.64 (1994) (the attribution standard for cellular interests other than designated entities is set at 20 percent to account for our policy in the early days of the cellular industry to encourage the formation of settlement groups--a historic anomaly that has no counterpoint in the PCS context. Attributions levels are set higher for designated entities in accordance with our statutory mandate to promote opportunities in PCS for such entities); *Memorandum Opinion and Order*, GN Docket No. 90-314, 9 FCC Rcd 4957 at ¶¶ 107, 110 (1994) (The 20 percent ownership attribution standard for cellular operators was adopted, in part, because settlements during the initial phase of cellular licensing resulted in partial and often non-controlling interests in those licensees. In light of this history, it would be unfair and unduly restrictive to place the same 5 percent limit on cellular/PCS cross-ownership. For this reason, we decided to allow a 20 percent cellular ownership interest.); *Second Report and Order*, GN Docket No. 90-314, 8 FCC Rcd 7700 at ¶¶ 107-109 (1993) (settlements encouraged by the Commission during the initial phase of cellular licensing may have resulted in the creation of certain partial, often passive ownership interest in cellular licensees, and we were concerned that we not foreclose such partial owners from participating in PCS). The narrowband PCS rules use a 5 percent attribution level, with 10 percent permitted for institutional investors. *See* 47 C.F.R. § 24.101.

230 Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Dockets 94-150, 92-51, 87-154, *Report and Order*, FCC 99-207 (rel. Aug. 6, 1999) ¶¶ 8-15.

231 Triton comments at 8-9.

regarding programming diversity. As a result, certain cross-ownership interests that may be acceptable in broadcasting are inappropriate for CMRS markets. For example, in the broadcast context, the Commission may be less concerned with significant non-controlling ownership when there is a single majority shareholder in charge of programming decisions. In a CMRS setting, the same situation with a non-controlling but significant owner may still be able to leverage its ownership to act anticompetitively in the market.

97. Additionally, we decline to accept suggestions that we modify the attribution rules with respect to directors.[232] We already have discussed our concerns about the ability of non-controlling interests to achieve influence and the potential effects of the non-controlling interest on the market behavior of the licensee holding such interest. We find that common directors can lead to the same types of concerns. Directors, in general, may posses the ability and incentive to use their positions of authority and influence to coordinate behavior of the licensees on whose boards they sit, and can be a conduit to pass non-public information between the licensees on whose boards they sit.[233] The record in this proceeding specifically addressing director attribution is thin and certainly is not sufficient to justify any generally-applicable relaxation of our attribution rules in that regard. We would consider granting a waiver, however, in a particular case if the specific circumstances of a directorship allay the concerns that we have identified.

98. Finally, we address ownership interests linked through partnerships. Sonera requests that we clarify this issue and argues that the rules should not attribute overlapping spectrum interests held by otherwise unaffiliated entities solely because those entities each hold minority, insulated interests in the same licensee elsewhere.[234] As we discussed above, the attribution rules are meant to address multiple concerns. One of those concerns recognizes that a non-controlling interest holder may be able to influence the licensee. Even a limited partner has various avenues for influencing other partner(s), including the general partner, and may thereby direct the manner in which the license is operated. For those reasons, we attribute limited partnership interests.[235] Any partnership can provide the means for one licensee to influence the actions of its partner in another market where both have interests. In particular, either partner could seize on the goals of their partner in one market to influence the actions of its partner in the other market to anticompetitive effect. Of course, not all partnerships will provide an opportunity for exercising such influence. Consequently, we believe that it is most appropriate to evaluate these ownership relationships on a case-by-case basis.[236]

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[232] *See* AT&T comments at 10 n. 37; Chase comments at 6 (Chase only argues that directors from non-controlling institutional investors should not be attributed).

[233] For that reason, the broadcast and cable attribution rules also attribute directors. *See* 47 C.F.R. §§ 73.3555 note 2(h), 76.501 note 2(h).

[234] Sonera comments at 3.

[235] *See* 47 C.F.R. § 20.6(d)(6).

[236] Parties involved with joint ventures, even in other geographic areas, with another licensee in the same market

99. *Waiver Test.* The spectrum cap rule also includes a four-pronged test for waiving attribution for investors with non-controlling, minority interests where the licensee is controlled by a single majority shareholder or controlling general partner.[237] Although we retain the existing waiver test, and no parties specifically commented on the waiver test, we nevertheless find that it would be beneficial to parties that may seek such a waiver to discuss the analytical approach that we believe is appropriate for reviewing such a waiver request.

100. In considering whether a petitioner has met the second prong of the test, we will examine actual competitive conditions in the relevant markets at issue to determine whether an interest holder is likely to affect the market in an anticompetitive manner. In assessing competitive conditions in each relevant market, we believe that it is necessary to distinguish between spectrum that has merely been licensed, and spectrum that is currently in commercial use or will imminently be used to provide relevant services. In particular, we believe that relevant market participants consist only of those providers currently offering service and other licensees that have both announced plans to commence commercial operations and have declared their intentions of competing in the relevant product markets. Consequently, in arguing that its less-than-controlling minority interest should not be attributed, we expect petitioners to provide us with evidence documenting the carriers that are providing service in the relevant markets at issue or are anticipated to be providing service in a timely and sufficient manner in those markets.

101. Regarding the third prong of the test, in a situation involving a limited partner, we will look to the criteria set forth in the *Attribution Reconsideration Order* to determine whether the interest holder is involved in the licensee's operation and has the ability to influence the licensee on a regular basis.[238] Such criteria include a condition that the interest holder cannot communicate with the licensee on matters related to the day-to-day operations of the business

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should seek a determination from the Commission regarding whether such interests are permissible under the spectrum cap.

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

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

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

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

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

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

[238] *Attribution of Ownership Interests*, 97 FCC 2d 997, 1023 (1984); *see also Attribution Reconsideration Order*, 58 Rad. Reg. 2d 604, ¶ 44 n.60 (attribution criteria may be incorporated in the certificate of limited partnership).

and cannot be an employee of the partnership.[239] We also believe, however, that if the partnership agreement does not comply with the attribution criteria, the limited partner should be allowed to satisfy the third prong if it can show in other ways that it has no influence or control over the partnership.[240]

102. *Passive Institutional Investors.* Unlike our attribution rules for broadcast licensees and cable operators,[241] the current spectrum cap attribution rules do not distinguish between passive institutional investors and other investors. We find that allowing passive institutional investors to have a larger ownership interest in licensees should facilitate access to capital for licensees, and therefore we adopt a separate attribution benchmark for passive institutional investors. In connection with the broadcast and cable attribution rules, the Commission has found that passive institutional investors, such as banks or insurance companies, can have a greater interest in a licensee without incurring substantial risk that investors who should be counted for purpose of applying the ownership rules will avoid attribution. As the Commission has stated with regard to broadcast licensees:

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239 For a limited partner to be insulated under the attribution criteria, the partnership agreement should:

- specify that the exempt limited partner cannot act as an employee of the limited partnership if his or her functions, directly or indirectly, relate to the [ ] enterprises of the company;
- bar an exempt limited partner from serving, in any material capacity, as an independent contractor or agent with respect to the partnership's [ ] enterprises;
- restrict the exempt limited partner from communicating with the licensee or the general partner on matters pertaining to the day-to-day operation of its business;
- permit the exempt limited partner to vote on the admission of additional general partners, but empower the general partner to veto any such admission;
- either prohibit the exempt limited partner from voting on the removal of a general partner or limit this right to situations where the general partner is subject to bankruptcy proceedings . . . or is adjudicated incompetent by a court of competent jurisdiction,. . . or where there is a finding by an independent party that the general partner has engaged in malfeasance, criminal conduct or wanton or willful neglect;
- with the exception of permitting a limited partner to make loans to, or act as a surety for the business, bar the exempt limited partner from performing any services for the limited partnership materially relating to its [ ] activities; and,
- state, in express terms, that the exempt limited partner is prohibited from becoming actively involved in the management or operation of the [ ] business of the partnership.

Attribution Reconsideration Order, 58 Rad. Reg. 2d at 619-20 (notes omitted); *Attribution Further Reconsideration,* 1 FCC Rcd 802, 803 (1986).

240 *See* Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended, *Declaratory Ruling,* 103 FCC 2d 511, 520-21, n.43 (1985) (*Wilner & Scheiner*).

241 *See* 47 C.F.R. § 73.3555 note 2; 47 C.F.R. § 76.501 note 2.

> passive institutional investors generally invest funds on behalf of others, play passive investment roles, and are generally prohibited either by law or by fiduciary duties from becoming involved in the operation or control of the companies in which they invest. To ensure these institutional investors maintain a truly passive role in the affairs of the licensee, we require them to refrain from contact or communication with the licensee on any matters pertaining to the operation of its stations, and we prohibit such investors or their representatives from acting either as officers or directors of the licensee corporation.[242]

We find the same reasoning supports a separate attribution benchmark for passive institutional investors in CMRS licensees.

103. We establish the benchmark for passive institutional investors at 40 percent of the outstanding voting stock of a corporation. This is higher than the 20 percent benchmark recently adopted in the broadcast attribution rules,[243] but is an appropriate level for CMRS markets. We currently use a 40 percent benchmark for interest held by small companies and rural telephone companies,[244] as defined in our rules,[245] and believe that it is reasonable to treat passive institutional investors in a like manner. Institutional investors that choose not to comply with the requirements for a passive investment set out in the rule will still be able to hold up to 20 percent of the outstanding stock in a licensee without attribution under the general attribution benchmark.[246]

104. *Trusts.* In reviewing the attribution rules used with the spectrum cap, we find it appropriate to adjust our rule regarding the use of trusts. As we discussed above, in establishing the attribution rules we are concerned not only with instances in which a party with a less-than-controlling interest can influence a licensee to act in an anticompetitive manner, but also with interests that may lead the interest holder to act unilaterally in an anticompetitive manner. In re-evaluating our attribution rules, we find that the beneficiary maintains an economic interest in the licensee, as well as potentially other interests in the same market. These overlapping interests could provide it with incentives to undertake actions that may impinge on competition in the relevant market, since its actions can affect the benefits it receives from the trust.

105. "[A] voting trust, as commonly understood is a device whereby persons owning stock with voting powers divorce the voting rights thereof from the ownership, retaining the

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[242] *Attribution of Ownership Interests*, 97 FCC 2d at 1012-14 (footnotes omitted).

[243] Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Dockets 94-150, 92-51, 87-154, *Report and Order*, FCC 99-207 (rel. Aug. 6, 1999) ¶¶ 17-22.

[244] 47 C.F.R. § 20.6(d)(2).

[245] *See* 47 C.F.R. § 1.2110.

[246] 47 C.F.R. § 20.6(d)(2).

ownership to all intents and purposes and transferring the voting rights to trustees in whom the voting rights of all depositors in the trust are pooled."[247] In other words, ownership comprises at least two parts: control of the asset, in this case voting rights, and economic benefit from the asset. In a voting trust the grantor gives up the control aspect of ownership, but maintains the economic benefit. By using a voting trust, a grantor retains an economic ownership of the license, as it receives profits or losses from the operation of the system through the trustee.

106. Consequently, we will amend our attribution rules so that stock interests held in trust will be attributable to both the trustee and the beneficiary. We will grandfather any trust agreements that meet the requirements of the old rule that were in effect on September 14, 1999. For any trust agreements entered into beginning September 15, 1999, stock interests held in trust will be attributed to the trustee, grantor, and the beneficiary of the trust. Those interests will still be subject to the general attribution benchmark, so that if the stock interests in the trust are less than 20 percent of the stock of the company, they will not be attributable.[248]

107. We will still allow the use of trusts for the purpose of divesting an otherwise impermissible interest. A trust used for divestiture must be of short duration (no longer than six months) and the terms of the trust must be approved by the Commission prior to the transfer of the assets to the trust. We delegate authority to the Wireless Telecommunications Bureau to review proposed trusts to ensure that they comply with our rules.

d. Significant Overlap

108. Background. The CMRS spectrum cap prohibits a licensee from having more than 45 MHz of spectrum in broadband PCS, cellular or SMR services with significant overlap in a geographic area.[249] A "significant overlap" occurs when at least ten percent of the population of the PCS licensed service area is within the cellular geographic service area and/or SMR service area(s).[250] Therefore, a carrier's spectrum counts toward the spectrum cap if the carrier is licensed to serve 10 percent or more of the population of the designated service area.[251]

109. In the *NPRM*, we sought comment on whether a geographic overlap standard of greater than a 10 percent overlap should be adopted, and, if so, what would be a more appropriate

[247] 18A Am Jur 2d 928 (Corporations § 1124). *See also* 76 Am Jur 2d 43 (Trusts § 11).

[248] If either the trustee or the beneficiary hold stock outside of the trust, those holdings will be combined with the holdings of the trust to determine if the 20 percent threshold has been met.

[249] 47 C.F.R. § 20.6(c).

[250] *Id.*

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

standard. We also sought comment on whether to permit carriers in high-cost and under-served markets to have a greater than 10 percent population overlap, and how we should define high-cost and under-served markets for purpose of the significant overlap threshold. We also sought comment on whether, in the alternative, there is a mechanism for triggering the application of a spectrum cap in given geographic areas that might be superior to our current significant overlap standard.[252]

110. Few commenters specifically discussed the geographic overlap threshold. SBCW argues that the concerns that led to the creation of the ten-percent standard never materialized, and that it is more appropriate to eliminate the cap than to change the overlap provision.[253] It further argues that applying a different limitation to rural areas could result in uneven and unequal regulation.[254] Triton, on the other hand, suggests that the Commission increase the overlap standard in rural areas or increase the aggregation limit, or both, in order to facilitate access to capital for carriers serving rural areas.[255]

111. Discussion. We will not alter the 10 percent overlap threshold for the CMRS spectrum cap. The Commission has found a 10 percent standard to be an appropriate demarcation point for circumstances where an overlap raises competitive concerns in several contexts concerning wireless service.[256] In those decisions, as well as in the *CMRS Spectrum Cap Report and Order*, the Commission stated that the potential for the exercise of such market power was slight with a 10 percent population overlap, but was concerned that a greater overlap might lead to anticompetitive practices.[257] Neither of the parties that addressed this issue has shown that a greater attribution threshold would not raise competitive concerns given our retention of an aggregation limit. We also note that, as a general matter, it is preferable to have rules for wireless spectrum that are consistent to facilitate ease of compliance and administrative efficiency. Maintaining a 10 percent rule would be consistent with the threshold used in other areas.

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[252] *NPRM*, 13 FCC Rcd at 25157 ¶ 53.

[253] SBCW comments at 11.

[254] *Id.*

[255] Triton comments at 6.

[256] *See, e.g.*, Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Freqency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket 92-297, *Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking*, FC 97-82 (1997) (*LMDS Second Report and Order*) at ¶¶ 186-88; *recon. Second Order on Reconsideration*, FCC 97-323 (1997); Amendment of the Commission's Rules to Establish Competitive Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, *Report and Order*, 12 FCC Rcd 15668 ¶ 43 (1997) *recon.* FCC 99-102 (rel. June 30, 1999) *recons pending, appeal pending sub nom.* GTE of the Midwest Inc. v. FCC & USA, No. 98-3167 (6th Cir. filed Dec. 12, 1997).

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

112. We recognize, however, that there may be circumstances in which an overlap of 10 percent or greater would not raise competitive concerns, and may even facilitate the provision of new, enhanced or expanded services to consumers. To the extent that a party can show that in a particular context an overlap of 10 percent or greater would not adversely affect competition in the market at issue, we will consider a request for a limited waiver of the overlap threshold. Finally, as we discuss in other parts of this Order, we agree with Triton that steps are needed to facilitate access to capital for carriers serving rural areas. We believe, however, that the increase in the aggregation limit for rural areas to 55 MHz and the changes to the attribution rules adopted in this Order provide a more reasonable means to increase the availability of capital to carriers serving rural areas than altering the overlap threshold, which could allow for anticompetitive practices in substantial areas.

e. SMR Spectrum Aggregation Limits

113. Background. The spectrum cap requires that, in calculating the amount of attributable SMR spectrum an entity must count all 800- and 900-MHz channels located at any SMR base station inside the geographic area where there is significant overlap with PCS or cellular radio services. The rule also provides that all 800-MHz channels located on an least one of those identified base stations count as 50 kHz (25 kHz paired) and all 900-MHz channels located on at least one of those identified base stations count as 25 kHz (12.5 kHz paired). There is a limitation of 10 MHz of 800-MHz SMR spectrum to be attributed to an entity for purposes of determining compliance with the cap.[258]

114. In response to the *Third FNPRM* in GN Docket No. 93-252,[259] Advanced MobileComm, Inc. (AMI) requests that the Commission revise the language regarding the calculation of SMR spectrum in two respects. First, AMI argues that the 10-MHz limit on attribution of SMR spectrum was intended to apply to both the 800- and 900-MHz bands combined, not to the 800-MHz band alone. AMI cites pertinent portions of the *CMRS Third Report and Order,* which adopted section 20.6(b), that state the Commission's intention to attribute to an entity "a maximum of 10 MHz of SMR spectrum, including both 800- and 900-MHz spectrum, for the purposes of determining compliance."[260] Second, AMI asks that we clarify section 20.6(b) to remove any possible ambiguity concerning the multiple counting of SMR channels toward the spectrum cap in situations where a specific channel is licensed to the same licensee at more than one location within a relevant geographic area. AMI argues that in situations where an SMR licensee holds two or more licenses for the same frequency within a particular area, or obtains a wide area license and reuses the frequency within that market, this

[258] 47 C.F.R. § 20.6(b).

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

[260] *CMRS Third Report and Order,* 9 FCC Rcd at 8000 ¶ 17. *See also id.*, at 8114-15, ¶ 275.

spectrum should only be counted once for the purpose of determining compliance with the spectrum cap. No parties filing comments on the *NPRM* addressed this issue.[261]

115. Discussion. We agree with AMI that the wording of section 20.6(b) does not accurately reflect the Commission's intent in the *CMRS Third Report and Order,* and we will revise the language to clarify that the cap includes 800- and 900-MHz SMR spectrum combined. We are also revising section 20.6(b) of our rules to provide that any discrete 800- or 900-MHz channel shall be counted only once per licensee within the relevant geographic area, even if the licensee in question uses the same channel at more than one location.

f. Divestiture

116. Background. The spectrum cap limits the amount of attributable spectrum that a licensee may have in a geographic area. As a general matter, a licensee obtaining an attributable interest in spectrum, either through a transfer of control, assignment or other attributable event, that would cause it to exceed the aggregation limit, must divest sufficient interests prior to obtaining that additional interest so that it remains in compliance. The rule, however, sets out limited circumstances in which a licensee may have an additional 90 days from final grant of the license to come into compliance with the spectrum cap.[262] No parties addressed issues related to this divestiture provision in their comments.

117. Discussion. We are adopting several changes to the rule to clarify the divestiture provision. First, we clarify that a licensee must divest sufficient attributable interests to maintain compliance with the spectrum cap prior to consummation of the transaction or final grant of the assignment that would give them an attributable interest in excess of the cap, unless they qualify for the additional ninety-day divestiture period. Second, we also clarify that a licensee need meet only one of the three conditions set out in the rule to qualify for the additional ninety-day divestiture period. Third, in conjunction with our changes to the attribution rules regarding the use of trusts, we clarify that a licensee may use a trust for divestiture purposes if the trust is of limited duration (six months or less)[263] and the terms of the trust are approved by the Commission prior to the transfer of the assets to the trust. The applicant must not have any interest in or control of the trustee. The trust agreement must clearly state that there will be no communications with the trustee regarding the management or operation of the subject facilities, and must give the trustee authority to dispose of the license as the trustee sees fit. Consistent

[261] In the *NPRM,* the Commission stated that it was incorporating the records of several pending proceedings concerning the spectrum cap, including the *Third FNPRM,* and would resolve those proceeding in this Order. *NPRM,* 13 FCC Rcd at 25142 ¶ 19, 25146-47 ¶ 28.

[262] 47 C.F.R. § 20.6(e).

[263] If the license(s) are not transferred from the trust before the trust expires, the licenses will be cancelled.

with section 0.5(c) of the Commisison's rules,[264] we delegate authority to the Wireless Telecommunications Bureau to review proposed trusts to ensure that they comply with our rules.

C. CTIA Forbearance Petition

1. Background

118. On September 30, 1998, the Cellular Telecommunications Industry Association filed a Petition for Forbearance (CTIA Forbearance Petition). CTIA requests that the Commission use its authority under section 10 of the Act[265] to forbear from applying section 20.6 of the Commission's rules.[266] CTIA urges the Commission to rely upon a case-by-case determination of permissible levels of horizontal ownership as part of the section 310(d)[267] license transfer review.[268]

119. In the *NPRM*, we sought comment on the CTIA Forbearance Petition, particularly whether CTIA's arguments meet the standards of section 10 for forbearance from the spectrum cap.[269] Because we are reviewing the CTIA Forbearance Petition in the context of our comprehensive re-evaluation of the spectrum cap, we also sought comment on the advantages or disadvantages of forbearing from the cap rather than modifying, sunsetting, or eliminating it.[270]

120. The commenters that specifically addressed the forbearance issue generally took the same position that they did on whether to eliminate the spectrum cap. Commenters that support retention of a spectrum cap oppose forbearance and argue that CTIA has not met the requirements of section 10.[271] The commenters that oppose the cap generally support forbearance.[272] In contrast, BellSouth opposes the cap but does not support forbearance. It is concerned that forbearance will create uncertainty in the market, and argues that if there is an adequate case to forbear, the rule should be eliminated.[273] SBCW argues that if the Commission

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264 47 C.F.R. § 0.5(c).

265 47 U.S.C. § 160(a)(1-3).

266 *See* 47 C.F.R. §20.6.

267 47 U.S.C. 310(d) requires the Commission to find that a proposed license transfer or assignment would serve the public interest, convenience and necessity.

268 CTIA Forbearance Petition at 3.

269 *NPRM*, 13 FCC Rcd at 25163 ¶ 68.

270 *Id.* ¶ 69.

271 *See, e.g.,* MCI comments at 6-7; Sprint PCS comments at 15; TRA comments at 13; Wireless One comments at 5-6.

272 *See* Radiofone comments at 2-3; RTG comments at 6-9; Western Wireless comments at 12-13.

273 BellSouth comments at 18.

forbears from enforcement of the cap, it should also sunset the cap to lend certainty to forbearance.[274]

2. Discussion

121. Under section 10, we must forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if a three-pronged test is met. Specifically, section 10 requires forbearance, notwithstanding section 332(c)(1)(A),[275] if the Commission determines that:

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

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

(3) forbearance from applying such provision or regulation is consistent with the public interest.[276]

122. CTIA makes two arguments to support its claim that enforcement of the spectrum cap rule is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory. First, CTIA contends that the CMRS market is sufficiently competitive that market forces will restrain carriers from acting anitcompetitively.[277] Second, CTIA argues that principles of antitrust law and economics provide adequate protection against the possibility of excessive concentration that the spectrum cap was designed to safeguard against.[278]

123. As we have discussed above, upon review of the record in this proceeding, we find that enforcement of the spectrum cap continues to be in the public interest. Thus, we will not forbear from enforcement of the spectrum cap rule at this time. While CMRS markets are

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274 SBCW comments at 12.

275 47 U.S.C. § 332(c)(1)(A) (Commission may not forbear from applying sections 201, 202 and 208 to CMRS providers).

276 47 U.S.C. § 160(a)(1)-(3).

277 CTIA Forbearance Petition at 7-8; CTIA comments at 4-5.

278 CTIA Forbearance Petition at 9-17; CTIA comments at 5-10.

becoming more competitive, we do not find, for the reasons discussed above, that we can rely on market forces alone to constrain anticompetitive practices by CMRS carriers. The spectrum cap still plays an important role in protecting and promoting competition within CMRS markets, and ensuring that rates and practices of CMRS carriers are reasonable. We also do not find, as we discussed above, that reliance on case-by-case review under antitrust law and our section 310(d) authority are an adequate substitute for the spectrum cap. Particularly under circumstances where a party is transferring unbuilt spectrum or a system that is not operational or lacks customers, antitrust review can be especially burdensome. Similarly, reliance on review under section 310(d) would not bring to the Commission's attention many cross-ownership situations comprising less than control yet raising competitive concerns. Consequently, we find that the spectrum cap rule is necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.

124. CTIA also relies upon the competitive forces in CMRS markets to argue that the second prong of the section 10 forbearance standard is met.[279] CTIA argues that enforcement of the spectrum cap is not necessary for the protection of consumers.[280] CTIA contends that the Commission's section 310(d) authority is an appropriate vehicle for the Commission to effectuate the "ideal approach [which] is to judge spectrum combinations on a case-by-case basis taking into account all of the relevant variables bearing upon competition and efficiency, including the service area overlap, the populations in the respective service areas, and the quantity of spectrum currently allocated to and ... sought to be acquired by the licensee."[281] CTIA continues, "the bright-line, inflexible nature of the cap should yield to a more tailored, case-by-case approach."[282] CTIA considers this flexible approach to be less restrictive, and thus better able to serve consumers.[283]

125. We find the spectrum cap is necessary for the protection of consumers. As we discuss above in addressing the first prong of section 10, we find the spectrum cap is necessary to ensure that carriers do not act in a manner that could lead to the imposition of unreasonable rates or practices. Although CMRS markets are growing increasingly more competitive as more carriers enter the market, we do not find we can rely solely on market forces to protect consumers. Thus, we find the spectrum cap serves a necessary purpose in protecting consumers by promoting and protecting competition.

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[279] CTIA comments at 10, 1-14. *See also* Radiofone comments at 2; RTG comments at 8.

[280] 47 U.S.C. § 160(a)(2).

[281] CTIA Forbearance Petition at 19.

[282] *Id.*

[283] *Id.* at 18.

126. CTIA argues that the third prong of the section 10 forbearance standard is met because forbearance is consistent with the public interest.[284] CTIA argues that the public interest is better served by a case-by-case determination of permissible ownership structures.[285] According to CTIA, rigid ownership limitations endanger innovation and efficiency and outweigh the administrative burdens associated with reliance upon a case-by-case approach to market concentration issues.[286]

127. We find the spectrum cap serves the public interest. In evaluating whether forbearance is consistent with the public interest, the Commission considers whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers.[287] In making this assessment, the Commission may consider the benefits a regulation bestows upon the public, along with any potential detrimental effects or costs of enforcing a provision.[288] Unlike CTIA, we believe that a bright-line test serves the public interest in this circumstance. As the D.C. Circuit Court recently recognized, "[a] spectrum cap, unlike many other regulations, might actually require a bright-line rule to be effective."[289] A bright-line test provides both the Commission and industry with regulatory certainty in dealing with possible cross-ownership situations. As such, it reduces burdens placed on both the Commission and industry. It gives industry advance notice of which types of cross-ownership situations the Commission finds would be anticompetitive. Use of a case-by-case review would eventually lead to an understanding of which types of cross-ownership interests the Commission believes are anticompetitive, but would require the Commission and industry to expend significant resources in reviewing individual cross-ownership proposals before sufficient precedent would be set to establish the line. Under the spectrum cap rule, a party that believes its proposed cross-ownership interest would not be anticompetitive and would serve the public interest is still able to make its case to the Commission through a request for waiver of the cap. On balance, we find that our use of bright-line tools better serve the public interest than a case-by-case approach.

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284 47 U.S.C. § 160(a)(3).

285 CTIA Forbearance Petition at 21; CTIA comments at 17-21.

286 CTIA Forbearance Petition at 25; CTIA comments at 15-16.

287 47 U.S.C. §§ 160(a)(3), (b).

288 See Biennial Regulatory Review -- Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket 98-100, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-134 (rel. July 2, 1998) at ¶ 27, *reconsideration pending*.

289 *BellSouth v. FCC*, 162 F.3d at 1225.

V. OTHER ISSUES

A. Third FNPRM in GN Docket 93-252

128. Background. The spectrum cap only applies to spectrum for broadband PCS, cellular and SMR regulated as CMRS.[290] In 1995, the Commission issued the *Third FNPRM* in GN Docket No. 93-252,[291] in which the Commission examined whether the spectrum cap should be extended to all cellular, SMR, and broadband PCS providers regardless of whether they are classified as Private Mobile Radio Services (PMRS)[292] or CMRS providers.[293] The Commission questioned whether the applicability of the spectrum cap should turn on the CMRS/PMRS distinction, and proposed that the spectrum cap be revised to apply to all cellular, SMR, and broadband PCS licensees regardless of regulatory classification.[294] The Commission also sought comments on when to apply the spectrum cap to SMR licensees that were then regulated as PMRS providers but would be treated as CMRS carriers starting in August 10, 1996, the end of the period for reclassifying certain PMRS providers as CMRS carriers.[295]

129. Ten parties filed comments or reply comments in response to the *Third FNPRM*.[296] Several commenters support extending the spectrum cap to all cellular, SMR, and broadband PCS providers, regardless of their regulatory classification.[297] These commenters contend that including PMRS operators utilizing cellular, SMR, and broadband PCS channels

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290 47 C.F.R. § 20.6(a).

291 *Third FNPRM*, 10 FCC Rcd 6880.

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

293 *Third FNPRM*, 10 FCC Rcd at 6881 ¶ 3.

294 *Id.*

295 *Id.* at 6880 ¶ 1, 6882 ¶ 4. *See also* Omnibus Budget Reconcialiation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993); Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket 93-252, *First Report and Order*, 9 FCC Rcd 1056 (1994) (setting out transition for certain existing private carriers to CMRS status).

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

297 *See* GTE comments at 1-2; PacTel/PacBell comments at 1; PCS PrimeCo comments at 1; AirTouch comments at 1-2; McCaw comments at 1-3; RCA's reply comments at 1-3.

within the spectrum cap will assist in promoting the regulatory symmetry goals mandated by section 332.[298] AMTA and CTIA, however, oppose the Commission's proposal to expand the spectrum cap to include PMRS.[299] CTIA recommends that the Commission not impose additional limitations on CMRS providers who choose to provide their customers with supplemental and enhanced services through PMRS offerings.[300] AMTA argues that PMRS services are not fully competitive with CMRS offerings under the Commission's regulatory framework, because PMRS offerings cannot be offered to the public or a substantial portion of the public, or cannot include interconnection with the Public Switched Telephone Network (PSTN).[301] No parties filing comments on the *NPRM* addressed this issue.

130. Discussion. We find that such a rule change is unnecessary at this time.[302] Under the definitions of CMRS and PMRS contained in the statute and our regulations, mobile service that is the functional equivalent of CMRS will be treated as CMRS.[303] To the extent that a licensee provides service that is the functional equivalent of CMRS in the frequency bands included within the spectrum cap it will be treated as CMRS and thus subject to the cap. Therefore, we will not include PMRS under the spectrum cap.

B. Separate Cap for SMR

131. Background. Southern contends that the CMRS spectrum cap is inadequate to protect competition in the SMR services and should be replaced by a narrowly tailored, service specific limitation that would address the market power problem in the SMR service.[304] It cites to the Wireless Bureau's decision in *Pittencrieff* to show that dispatch service constitutes a distinct market and that Nextel is achieving market power in that market.[305] Southern requests that the Commission adopt a Presumptive SMR Spectrum Cap of 15 MHz of 800 MHz frequencies that are subject to auction or authorized for commercial use in any Economic Area

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298 *See* GTE comments at 2; and McCaw comments at 2.

299 AMTA comments at 4; CTIA comments at 2-3.

300 CTIA comments at 8-9.

301 AMTA comments at 4.

302 At the time the Commission issued the *Third FNPRM* the mobile telecommunications industry was in the midst of the transition to the new regulatory scheme for mobile services enacted in the Omnibus Budget Act Reconciliation Act of 1993. At that time certain carriers that had been previously treated as private service providers were undergoing reclassification to CMRS regulatory status. That transition has subsequently been completed. *See* Information for Part 90 Licensees Subject to Reclassification as Commercial Mobile Radio Service Providers on August 10, 1996 – Wireless Bureau Answers Frequently Asked Questions Reagrding CMRS Status, *Public Notice*, 11 FCC Rcd 9267 (1996).

303 47 U.S.C. § 332(d); 47 C.F.R. § 20.3.

304 Southern comments at 3.

305 *Id.* (citing In Re Applications of Pittencrieff Communications, Inc. and Nextel Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 8935 (WTB 1997) (*Pittencrieff*)).

(EA).[306] According to Southern, 15 MHz represents approximately 70 percent of the 800 MHz spectrum auctioned or scheduled for auction, and that limiting a single entity to no more than 15 MHz would ensure that the SMR market could benefit from competition.[307] Southern suggests that at a minimum the Commission should condition participation in future auctions upon acceptance by participants of this presumptive SMR spectrum cap.[308]

132. Nextel takes exception to Southern's proposal and argues that a separate spectrum cap for SMR service would inhibit the ability of SMR providers to compete with cellular and broadband PCS providers. Nextel states that Southern has mischarterized the findings in *Pittencrieff*, and that the Wireless Bureau actually found that the CMRS market, not solely the SMR market, is the appropriate product market for analysis.[309] Nextel contends that the ability of SMR providers to aggregate 800 MHz spectrum makes it possible for them to provide competition to cellular and broadband PCS, not only on a local basis but also in regional and national markets.[310] It argues that a separate 800 MHz SMR spectrum cap would place SMR providers at a significant competitive disadvantage to other broadband CMRS providers by restricting them to a limited amount of spectrum, and thus a limited system capacity.[311]

133. Discussion. We decline to adopt a separate spectrum cap for SMR services using 800 MHz frequencies. We find that the appropriate service(s) for a spectrum cap are all broadband CMRS, as CMRS carriers generally compete or have the potential to compete against each other. We can decide on a case-by-case basis under authority pursuant to section 310(d) whether a different market definition is appropriate in the context of a specific ownership situation.

C. Pending Petitions for Reconsideration

134. Background. As we set out in the *NPRM*, there are four petitions for reconsideration of previous Commissions Orders regarding the CMRS spectrum cap which are still pending.[312] With one exception, no parties filing comments on the *NPRM* addressed any of these petitions. In its comments on the *NPRM*, Omnipoint states that the successful buildout of

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306 *Id.* at 4.

307 *Id.*

308 *Id.*

309 Nextel reply comments at 9 (citing *Pittencrieff*, 13 FCC Rcd at 8945 ¶ 21).

310 *Id.* at 14.

311 *Id.* at 12.

312 Those four petitions are: a petition for reconsideration of the *CMRS Third Report and Order* filed by SMR Won; a petition for reconsideration of the *CMRS Fourth Report and Order* filed by McCaw Cellular; and, two petitions for reconsideration of the *CMRS Spectrum Cap Report and Order* filed by Omnipoint and Radiofone respectively. *NPRM*, 13 FCC Rcd at 25142-44 ¶¶ 20-24.

PCS systems and the level of competition in CMRS markets suggests that the re-imposition of the PCS/cellular cross-ownership rule would serve no useful purpose at this time, and thus its petition for reconsideration is largely moot.[313]

135. Discussion. In this Report and Order we have conducted a comprehensive review of the spectrum cap. For the reasons discussed herein, we find that the use of a spectrum aggregation limit for broadband CMRS services serves the public interest and advances the goals of the Commission including the promotion of competition, the protect of existing competition, and provision of new and enhanced services to consumers throughout the country. Given our thorough re-examination of the cap and our findings regarding its public interest benefit, we find the petitions for reconsideration to be moot and consequently dismiss them.

VI. PROCEDURAL ISSUES

A. Regulatory Flexibility Analysis

136. The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C.

B. Paperwork Reduction Act Analysis

137. This Report and Order has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, and does not contain any new or modified information collections subject to Office of Management and Budget review.

VII. ORDERING CLAUSES

138. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 11 and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 161 and 332, this Report and Order is hereby ADOPTED, and sections 20.6 and 22.942 of the Commission's Rules, 47 C.F.R. §§ 20.6, 22.942, ARE AMENDED as set forth in Appendix B, effective 30 days after publication of a summary in the Federal Register.

139. IT IS FURTHER ORDERED that, pursuant to sections 1, 2, 4, and 10 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154 and 160, the Petition for Forbearance filed by the Cellular Telecommunications Industry Association IS DENIED.

140. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration of the Third Report and Order in GN Docket No. 93-252 filed by SMR Won IS DISMISSED AS MOOT to the extent discussed herein.

[313] Omnipoint comments at 1-2 n. 2.

141. IT IS FURTHER ORDERED that the Petition for Reconsideration of the Fourth Report and Order in GN Docket No. 93-252 filed by McCaw Comunications, Inc. IS DISMISSED AS MOOT.

142. IT IS FURTHER ORDERED that the Petition for Reconsideration of the Report and Order in WT Docket No. 96-59 filed by Omnipoint Corporation IS DISMISSED AS MOOT.

143. IT IS FURTHER ORDERED that the Petition for Reconsideration of the Report and Order in WT Docket No. 96-59 filed by Radiofone, Inc. IS DISMISSED AS MOOT.

144. IT IS FURTHER ORDERED pursuant to section 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c), and sections 0.5(c), 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.5(c), 0.131, 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to review and approve proposals to hold ownership interests in broadband Personal Communications Service, cellular, and Special Mobile Radio services licenses regulated as Commercial Mobile Radio Services in a trust to ensure that the trust complies with the Commission's rules.

145. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this REPORT AND ORDER, including the final regulatory flexibility analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

PARTIES FILING COMMENTS IN WT DOCKET 98-205

A. Comments:

1. AirTouch (AirTouch)
2. America One Communications Inc. (America One)
3. AT&T Wireless (AT&T)
4. Bell Atlantic Mobile (Bell Atlantic)
5. BellSouth Corporation (BellSouth)
6. Cellular Telecommunications Industry Association (CTIA)
7. Chase Capital Partners (Chase)
8. D&E Communications, Inc. (D&E Communications)
9. Digiph PCS Inc. (Digiph)
10. GTE Service Corporation (GTE)
11. MCI Worldcom (MCI)
12. Northcoast Communications (Northcoast)
13. Omnipoint (Omnipoint)
14. Personal Communications Industry Association (PCIA)
15. Radiofone (Radiofone)
16. Rural Telecommunications Group (RTG)
17. SBC Wireless, Inc. (SBCW)
18. Sonera Ltd. (Sonera)
19. Southern Communications Services (Southern)
20. Sprint PCS (Sprint PCS)
21. Telecommunications Resellers Association (TRA)
22. Telephone and Data Systems, Inc. (TDS)
23. Triton Cellular Partners (Triton)
24. Western Wireless Corporation (Western Wireless)
25. Wireless One Technologies (Wireless One)

B. Reply Comments:

1. Bell Atlantic Mobile (Bell Atlantic)
2. BellSouth Corporation (BellSouth)
3. Cellular Telecommunications Industry Association (CTIA)
4. Chariton Valley Wireless Services (Chariton)
5. D&E Communications, Inc. (D&E)
6. GTE Service Corporation (GTE)
7. Nextel Communications, Inc. (Nextel)

8. Personal Communications Industry Association (PCIA)
9. Rural Telephone Group (RTG)
10. SBC Wireless, Inc. (SBCW)
11. Telephone and Data Systems, Inc. (TDS)
12. Triton Cellular Partners (Triton)
13. U.S. Small Business Administration (SBA)
14. US West Wireless (US West)
15. Western Wireless Corporation (Western Wireless)

C. Economic Analysis submitted by commenters

1. Economists, Inc. (Economists Inc.) (attachment to AT&T comments)
2. Declaration of Robert W. Crandall and Robert H. Gertner (Crandall & Gertner) (attached to Bell Atlantic comments)
3. Declaration of Dr. Charles L. Jackson (Jackson) (attached to Bell Atlantic comments)
4. Declaration of J. Gregory Sidak and David J. Teece (Sidak & Teece) (attached to GTE comments)
5. John B. Hays, CMRS HHIs from Customer Data (Hays) (attached to Sprint PCS comments)
6. Reply Declaration of Robert W. Crandall and Robert H. Gertner (Crandall & Gertner reply) (attached to Bell Atlantic reply comments)
7. Telecompetiton Market Data Report for PCIA, revised 1-1-99 (Telecompetition) (attached to PCIA reply comments)

APPENDIX B

FINAL RULES

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

1. Part 20 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 20 – COMMERCIAL MOBILE RADIO SERVICES

2. The authority citation for Part 20 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 160, 251-54, 303, and 332 unless otherwise noted.

3. Section 20.6 is amended to read as follows:

Sec. 20.6 CMRS spectrum aggregation limit.

(a) *Spectrum limitation.*
No licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS (see 47 C.F.R. § 20.9) shall have an attributable interest in a total of more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area, except that in Rural Service Areas (RSAs), as defined in 47 C.F.R. § 22.909, no licensee shall have an attributable interest in a total of more than 55 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any RSA.

(b) *SMR spectrum.*
To calculate the amount of attributable SMR spectrum for purposes of paragraph (a) of this section, an entity must count all 800 MHz and 900 MHz channels located at any SMR base station inside the geographic area (MTA or BTA) where there is significant overlap. All 800 MHz channels located on at least one of those identified base stations count as 50 kHz (25 kHz paired), and all 900 MHz channels located on at least one of those identified base stations count as 25 kHz (12.5 kHz paired); provided that any discrete 800 or 900 MHz channel shall be counted only once per licensee within the geographic area, even if the licensee in question utilizes the same channel at more than one location within the relevant geographic area. No more than 10 MHz of SMR spectrum in the 800 and 900 MHz SMR services will be attributed to an entity when determining compliance with the cap.

(c) *Significant overlap.*
(1) For purposes of paragraph (a) of this section, significant overlap of a PCS licensed service area and CGSA(s) (as defined in Sec. 22.911 of this chapter) or SMR service area(s) occurs when at least 10 percent of the population of the PCS licensed service area for the counties contained therein, as determined by the latest available decennial census figures as complied by the Bureau of the Census, is within the CGSA(s) and/or SMR service area(s).
(2) The Commission shall presume that an SMR service area covers less than 10 percent of the population of a PCS service area if none of the base stations of the SMR licensee are located within the PCS service area. For an SMR licensee's base stations that are located within a PCS service area, the channels licensed at those sites will be presumed to cover 10 percent of the population of the PCS service area, unless the licensee shows that its protected service contour for all of its base stations covers less than 10 percent of the population of the PCS service area.

(d) *Ownership attribution.*
For purposes of paragraph (a) of this section, ownership and other interests in broadband PCS licensees, cellular licensees, or SMR licensees will be attributed to their holders pursuant to the following criteria:

(1) Controlling interest shall be attributable. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(2) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or SMR licensee shall be attributed, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to at least 40 percent of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or SMR licensee if the ownership interest is held by a small business or a rural telephone company, as these terms are defined in Sec. 1.2110 of this chapter or other related provisions of the Commission's rules, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a small business.

(3) Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have an attributable interest only if they hold 40 percent or more of the outstanding voting stock of a corporate broadband PCS, cellular or SMR licensee, or if any of the officers or directors of the broadband PCS, cellular or SMR licensee are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(4) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2) of this section.

(5) Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until converted, except that this provision does not apply in determining whether an entity is a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in Sec. 1.2110 of this chapter or other related provisions of the Commission's rules.

(6) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(7) Officers and directors of a broadband PCS licensee or applicant, cellular licensee, or SMR licensee shall be considered to have an attributable interest in the entity with which they are so associated. The officers and directors of an entity that controls a broadband PCS licensee or applicant, a cellular licensee, or an SMR licensee shall be considered to have an attributable interest in the broadband PCS licensee or applicant, cellular licensee, or SMR licensee.

(8) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest. [For example, if A owns 20% of B, and B owns 40% of licensee C, then A's interest in licensee C would be 8%. If A owns 20% of B, and B owns 51% of licensee C, then A's interest in licensee C would be 20% because B's ownership of C exceeds 50%.]

(9) Any person who manages the operations of a broadband PCS, cellular, or SMR licensee pursuant to a management agreement shall be considered to have an attributable interest in such licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(i) The nature or types of services offered by such licensee;
(ii) The terms upon which such services are offered; or
(iii) The prices charged for such services.

(10) Any licensee or its affiliate who enters into a joint marketing arrangements with a broadband PCS, cellular, or SMR licensee, or its affiliate shall be considered to have an attributable interest, if such licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(i) The nature or types of services offered by such licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(e) *Divestiture.*

(1) Divestiture of interests as a result of a transfer of control or assignment of authorization must occur prior to consummating the transfer or assignment, except that a licensee that meets the requirements set forth in paragraph (e)(2) shall have 90 days from final grant to come into compliance with the spectrum aggregation limit.

(2) An applicant with:

(A) controlling or attributable ownership interests in broadband PCS, cellular, and/or SMR licenses where the geographic license areas cover 20 percent or less of the applicant's service area population;

(B) attributable interests in broadband PCS, cellular, and/or SMR licenses solely due to management agreements or joint marketing agreements; or

(C) non-controlling attributable interests in broadband PCS, cellular, and/or SMR licenses, regardless of the degree to which the geographic license areas cover the applicant's service area population,

shall be eligible to have its application granted subject to a condition that the licensee shall come into compliance with the spectrum limitation set out in paragraph (a) within ninety (90) days after final grant. For purposes of this paragraph, a "non-controlling attributable interest" is one in which the holder has less than a fifty (50) percent voting interest and there is an unaffiliated single holder of a fifty (50) percent or greater voting interest.

(3) The applicant for a license that, if granted, would exceed the spectrum aggregation limitation in paragraph (a) of this section shall certify on its application that it and all parties to the application will come into compliance with this limitation. If such an applicant is a successful bidder in an auction, it must submit with its long-form application a signed statement describing its efforts to date and future plans to come into compliance with the spectrum aggregation limitation. A similar statement must also be included with any application for assignment of licenses or transfer of control that, if granted, would exceed the spectrum aggregation limit.

(4) (A) Parties holding controlling interests in broadband PCS, cellular, and/or SMR licensees that conflict with the attribution threshold or geographic overlap limitations set forth in this section will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the conflicting licensee (see Secs. 24.839 of this chapter (PCS), 22.39 of this chapter (cellular), 90.158 of this

chapter (SMR)) by which, if granted, such parties no longer would have an attributable interest in the conflicting license. Divestiture may be to an interim trustee if a buyer has not been secured in the required period of time, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the license as it sees fit. Where parties to broadband PCS, cellular, or SMR applications hold less than controlling (but still attributable) interests in broadband PCS, cellular, or SMR licensee(s), they shall submit a certification that the applicant and all parties to the application have come into compliance with the limitations on spectrum aggregation set forth in this section.

(B) Applicants that meet the requirements of paragraph (e)(2) must tender to the Commission within ninety (90) days of final grant of the initial license, such an assignment or transfer application or, in the case of less than controlling (but still attributable) interests, a written certification that the applicant and all parties to the application have come into compliance with the limitations on spectrum aggregation set forth in this section. If no such transfer or assignment application or certification is tendered to the Commission within ninety (90) days of final grant of the initial license, the Commission may consider the certification and the divestiture statement to be material, bad faith misrepresentations and shall invoke the condition on the initial license or the assignment or transfer, cancelling or rescinding it automatically, shall retain all monies paid to the Commission, and, based on the facts presented, shall take any other action it may deem appropriate.

Note 1 to Sec. 20.6: For purposes of the ownership attribution limit, all ownership interests in operations that serve at least 10 percent of the population of the PCS service area should be included in determining the extent of a PCS applicant's cellular or SMR ownership.

Note 2 to Sec. 20.6: When a party owns an attributable interest in more than one cellular or SMR system that overlaps a PCS service area, the total population in the overlap area will apply on a cumulative basis.

Note 3 to Sec. 20.6: Waivers of Sec. 20.6(d) may be granted upon an affirmative showing:

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

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

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

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

3. Subpart H, of Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Subpart H – Cellular Radiotelephone Service

4. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 222, 303, 309, and 332.

5. Section 22.942 is amended to read as follows:

Sec. 22.942 Limitations on interests in licensees for both channel blocks in an area.

(a) *Controlling Interests.* A licensee, an individual or entity that owns a controlling or otherwise attributable interest in a licensee, or an individual or entity that actually controls a licensee for one channel block in a CGSA may have an direct or indirect ownership interest of 5 percent or less in the licensee, an individual or entity that owns a controlling or otherwise attributable interest in a licensee, or an individual or entity that actually controls a licensee for the other channel block in an overlapping CGSA.

(b) *Non-Controlling Interests.* A direct or indirect non-attributable interest in both systems is excluded from the general rule prohibiting multiple ownership interests.

(c) *Divestiture.* Divestiture of interests as a result of a transfer of control or assignment of authorization must occur prior to consummating the transfer or assignment.

(d) *Ownership attribution.*
For purposes of paragraphs (a) and (b) of this section, ownership and other interests cellular licensees will be attributed to their holders pursuant to the following criteria:

(1) Controlling interest shall be attributable. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(2) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee shall be attributed.

(3) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2) of this section.

(4) Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until converted.

(5) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(6) Officers and directors of a cellular licensee shall be considered to have an attributable interest in the entity with which they are so associated. The officers and directors of an entity that controls a cellular licensee shall be considered to have an attributable interest in the cellular licensee.

(7) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest. [For example, if A owns 20% of B, and B owns 40% of licensee C, then A's interest in licensee C would be 8%. If A owns 20% of B, and B owns 51% of licensee C, then A's interest in licensee C would be 20% because B's ownership of C exceeds 50%.]

(8) Any person who manages the operations of a cellular licensee pursuant to a management agreement shall be considered to have an attributable interest in such licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(i) The nature or types of services offered by such licensee;
(ii) The terms upon which such services are offered; or
(iii) The prices charged for such services.

(9) Any licensee or its affiliate who enters into a joint marketing arrangements with a cellular, licensee, or its affiliate shall be considered to have an attributable interest, if such licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(i) The nature or types of services offered by such licensee;
(ii) The terms upon which such services are offered; or
(iii) The prices charged for such services.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*Notice*) in WT Docket No. 98-205.[1] The Commission sought written comments on the proposals in the *Notice*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis for the Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.[2]

A. Need for and purpose of the action

The Report and Order in this docket concludes CMRS spectrum cap and cellular cross-interest rules continue to be an appropriate and effective tools to promote and protect competition in CMRS markets. The recent and rapid growth of competition in these markets – resulting from Commission decisions to allocate spectrum for PCS and assign licenses subject to the spectrum cap (thereby assuring multiple providers in most markets) – has been a great success. The Commission finds that undue consolidation of CMRS ownership would jeopardize the continued realization of these benefits. The Commission concludes that the public interest is better served by the continued use of a bright-line test of spectrum ownership rather than by exclusive reliance on case-by-case review of proposed ownership arrangements. The Commission finds that it is not sufficient to rely solely on case-by-case review of CMRS transactions, whether through the Commission's section 310(d) transfer of control process or antitrust review, to protect and promote competition in CMRS markets. Therefore, the Commission concludes that the spectrum cap and cellular cross-interest rules continue to play an important role in guiding the development of competition and services in CMRS markets.

Although the Commission concludes in the Report and Order that the spectrum cap and cellular cross-interest rules should be retained, it finds that the rules can be modified to allow certain additional cross-ownership interests without significantly increasing the risk of undue market concentration or anticompetitive behavior by licensees. Consequently, in the Report and Order the Commission makes the following modifications to the spectrum cap and cellular cross-interest rules: (1) adopts a 55 MHz spectrum aggregation limit for licensees serving rural areas, defined as Rural Service Areas (RSAs); (2) allows up to 40 percent investment for passive institutional investors (as opposed to 20 percent for other investors); and (3) amends the cellular cross-interest

[1] 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, *Notice of Proposed Rulemaking*, 13 FCC Rcd 25132 (1998).

[2] Pub. L. No. 104-121, 110 Stat. 847 (1996), Title II of the CWAAA is the "Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), *codified at* 5 U.S.C. § 601 *et seq.*

rule to allow a cellular investor to have a limited non-controlling interest in the other cellular license in the same market. Finally, the Commission states that it will reevaluate the continuing need for these rules as part of our year 2000 biennial review.

Finally, for the reasons outlined above, the Commission finds that enforcement of the spectrum cap continues to be in the public interest, and therefore denies a request to forbear from enforcing the spectrum cap filed by the Cellular Telecommunications Industry Association pursuant to Section 10 of the Communications Act, as amended.[3]

B. Issues raised in response to the IRFA

The Commission sought comment generally on the IRFA. No comments were submitted specifically in response to the IRFA.

C. Description and estimates of the number of small entities to which the rules adopted in this Report and Order will apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.[4] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[6] Nationwide, there are 275,801 small organizations.[7] "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."[8] As of 1992, there were 85,006 such jurisdictions in the United States.[9]

In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.[10] Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in

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3 47 U.S.C. § 160.

4 5 U.S.C. §§ 603(b)(3), 604(a)(3).

5 5 U.S.C. § 601(6).

6 5 U.S.C. § 601(4).

7 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

8 5 U.S.C. § 601(5).

9 U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

10 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[11]

The rule changes adopted in this Report and Order will affect all small businesses that currently are or may become licensees of the broadband PCS, cellular and/or specialized mobile radio (SMR) services. The Commission estimates the following number of small entities may be affected by the proposed rule changes:

Cellular Licensees. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[12] According to the Bureau of the Census, only twelve radiotelephone firms from a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[13] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Trends in Telephone Service* data, 732 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service (PCS) services, which are placed together in the data.[14] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 732 small cellular service carriers that may be affected by the policies adopted in this Report and Order.

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity"for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[15] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than $15 million for

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[11] 15 U.S.C. § 632.

[12] 13 C.F.R. §121.201, SIC code 4812.

[13] *1992 Census,* Series UC92-S-1, at Table 5, SIC code 4812.

[14] *Trends in Telephone Service,* Table 19.3 (Feb. 19, 1999).

[15] *See* 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; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket 90-314, Report and Order, 11 FCC Rcd 7824, 7850-52 (paras. 57-60) (1996); *see also* Section 24.720(b) of the Commission's Rules, 47 C.F.R. §24.720(b).

the preceding three calendar years.[16] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[17] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.[18] Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

SMR Licensees. Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a "small entity" in the context of 900 MHz SMR has been approved by the SBA.[19] Approval concerning 800 MHz SMR is being sought. The rules adopted in this *Reconsideration* may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the policies adopted in this Report and Order.

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16 *See Id.* at 7852 (para. 60).

17 *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (paras. 114-20) (1994).

18 FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (released Jan. 14, 1997).

19 *See* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the use of 200 Channels Outside the Designated Filing Areas in the 896-911 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, *Second Order on Reconsideration and Seventh Report and Order,* 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking,* 11 FCC Rcd 1463 (1995).

The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this *Reconsideration* includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions adopted in this Report and Order.

D. Reporting, recordkeeping, and other compliance requirements:

The rules adopted in this Report and Order pose no additional reporting, record keeping or other compliance measures.

E. Steps taken to minimize burdens on small entities and significant alternatives considered

In the Report and Order, the Commission concludes that retention of the CMRS spectrum cap and cellular cross-interest rules serves the public interest. The Commission concludes that the benefits of these bright-line tests in addressing concerns about increased spectrum aggregation continue to make these approaches preferable to exclusive reliance on case-by-case review under section 310(d). By setting bright lines for permissible ownership interests, the rules benefit the public, the telecommunications industry and the Commission by providing regulatory certainty and facilitating more rapid processing of transactions.

The Commission finds that the CMRS spectrum cap and cellular cross-interest rule promote regulatory efficiency, both by speeding the processing of transfers of control and assignment of licenses and by conserving the resources of the Commission and of interested parties. Moving from the spectrum cap and cross-interest rules to case-by-case review inevitably would lengthen the review process. The Commission recognized the concerns raised by several commenters about the burdens on the resources of the Commission and of interested parties that are inherent in case-by-case determinations regarding permissible ownership structures. For example, case-by-case analysis is especially expensive and time-consuming for small businesses, which often do not have the requisite resources.

F. Report to Congress

The Commission shall send a copy of the Report and Order, including a copy of this Final Regulatory Flexibility Analysis, in a report to Congress pursuant to Section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). In addition, the Commission shall send a copy of this Report and Order, including this Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Regulatory Flexibility Analysis will also be published in the Federal Register.

Statement of Commissioner Harold W. Furchtgott-Roth

In the Matter of 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, GN Docket No. 93-252, *Report and Order*.

This Commission scarcely adopts an order on wireless matters these days that doesn't tout the remarkable growth of competition in this nation's wireless markets. Today's Report and Order is no exception.[1] Yet today's decision -- to leave largely intact several provisions of our CMRS regulatory framework -- runs the risk of paying mere lip service to these significant competitive trends. While parts of the Report and Order are modest steps in the right direction, and for that reason I support them, I must also dissent because I believe much more significant regulatory relaxation is justified.

Evidence supporting the increasingly bright CMRS competitive landscape continues to accumulate.[2] Yet, in today's decision, the Commission perpetuates largely unchanged its 45 MHz CMRS spectrum cap and cellular cross interest rules. These provisions have as their purported goals the promotion and protection of competition, and the prevention of undue concentration of CMRS spectrum. In my view, however, the facts and the data simply do not support the retention of these rules. I would have preferred that we simply eliminate them. Competition in the wireless sector is flourishing, and I continue to have great faith in the Department of Justice's ability to root out and protect consumers from anticompetitive behavior should it arise.

I share Commissioner Powell's view, as expressed in his separate statement in this proceeding, that there are several parts of this item that are worthy of support. First, today's action raises the cap in rural areas to 55 MHz, which should help accelerate the spread of wireless innovation to these areas.[3] Second, the Commission makes explicit the availability of

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1 As today's order acknowledges, CMRS "prices are falling, usage is expanding, and service options are growing. In some cities, as many as seven independent facilities-based providers are now competing for business in mobile voice markets." Report and Order at ¶ 23.

2 *See, e.g.,* Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993 - Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fourth Report, FCC 99-136 (rel. June 24, 1999) at 63 (noting that the mobile telephony market continues to make "steady competitive progress," and highlighting the results of one study showing that the average price per minute of mobile telephone service has declined over 40% between the end of 1995 and the end of 1998).

3 I would, however, note the irony that we have chosen to relax our rules in rural areas– which generally have not benefited from the entry of additional competitors to the two cellular incumbents– while other areas of the

waivers of the spectrum cap where carriers can demonstrate that the cap is seriously impeding their ability to roll out advanced services, including 3G services.

Finally, I welcome the commitment that we make today to review the spectrum cap and cellular cross interest rules as part of our year 2000 biennial regulatory review, under Section 11 of the Communications Act, as amended.[4] At the same time, however, I must continue to point out that the Commission's 1998 biennial review (of which this order is a part) was not as thorough as I believe it should have been.[5] I look forward to working with my colleagues on the Commission to ensure that our year 2000 biennial review is as thorough and effective in eliminating unnecessary regulation as Congress intended when it crafted Section 11.

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country that have benefited from entry by PCS and SMR providers remain subject to the rule. Better to raise the cap to 55 MHz in all areas, or better still eliminate it altogether.

[4] 47 U.S.C. § 161 (a).

[5] *See* my report, Implementation of Section 11 by the Federal Communications Commission (Dec. 21, 1998), which can be found on the FCC web site at http://www.fcc.gov/commissioners/furchtgott-roth/reports/sect11.html.

Separate Statement of Commissioner Michael Powell

Re: 1998 Biennial Regulatory Review—Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, WT Docket No. 96-59, GN Docket No. 93-252, *Report and Order*

When we commenced this proceeding in November of last year, I thought it was an excellent opportunity for the Commission to review whether market conditions justify continued prospective, prophylactic regulation of the wireless telecommunications industry. Here, we carry out part of the mandate from the 1996 Telecommunications Act to review our ownership rules every two years.

The Act, in section 11, further mandates that we repeal or modify any regulation that is "no longer necessary in the public interest as the result of meaningful economic competition." 47 U.S.C. §161 (emphasis added). At the time we adopted the Notice of Proposed Rulemaking, I applauded this effort to take a sober and realistic look at the CMRS ownership limitations in light of the current and foreseeable competitive environment in the wireless market.[1] I was expecting – in view of the public interest guidance in section 11 and the optimistic outlook for competition in the CMRS industry – a repeal or significant modification of the spectrum cap; at least a sunset. Truthfully, this item before us today is not what I expected.

I cannot imagine any other industry segment that can better laud their state of economic competition as "meaningful." Prices are down and falling. Innovation, churn and penetration are up and still climbing. And, as this item points out, the newer PCS licensees are adding more new customers than the incumbent cellular carriers. All of this seems pretty "meaningful" to me. Yet, as the record in this proceeding reveals, there are still some lingering concerns left over from the vestiges of the original cellular duopoly, which – if you measure market share in terms of subscribers – still has the lion's share. So, despite the positive state of competition in this segment, I had thought back when we started this review that, if *we* can meet the burden of showing that the cap is still necessary in the public interest, then we may keep it. I also said that this cap should not last forever, but if we do nothing this time, we would have to review it again.

Well, this time we are not doing much to modify or eliminate the rule and I do not necessarily agree with all of the findings and competitive analysis in the item. For example, I think that the barriers to "reconsolidation" (including searching for and finding a willing seller, capital constraints, technical compatibility issues, and FCC and antitrust review) are pretty high. Thus, I do not think that elimination of the cap will result in massive consolidation at the local level immediately. However, I believe that the Wireless Bureau has presented an economic

[1] *See* 1998 Biennial Regulatory Review-Spectrum Aggregation Limits for Wireless Telecommunications Carriers, *Notice of Proposed Rulemaking*, 13 FCC Rcd 25132 (1998) (Separate Statement of Commissioner Michael Powell).

analysis that does the best job possible of explaining why the rule should stay in place for the time being. The item meets the burden by clearly recognizing that, "at this time," there are a few good reasons left for leaving the cap in place at least a little longer, including our continued, important role as the public's spectrum manager.

Most importantly, in the spirit of compromise, the item recognizes three things that I find somewhat comforting in my decision today to support this item:

First, we expect to make available "in the near future" additional spectrum for the provision of third generation (3G) wireless services and other advanced mobile wireless services. I strongly encourage the prompt completion of any allocation and licensing proceedings, in coordination with international developments, so that carriers in the U.S. may offer our citizens such advanced, whiz-bang services very soon.

Second, since some carriers are likely to have spectrum needs that cannot wait for additional allocations, I am also encouraged by this Order's invitation to carriers that are spectrum-constrained to seek waivers of the cap. Such waivers must be processed quickly and granted when carriers show that the spectrum cap adversely affects their ability to provide 3G or other advanced services. While this process may tend to make our bright line a little blurry, it is important to give carriers the opportunity to make their case for more spectrum immediately.

Third, I am pleased that our re-evaluation of this ownership rule will once again commence next year as part of the year 2000 biennial review. I hope that we can coordinate this review with our spectrum allocation activities and related proceedings, as well as next year's report to Congress on CMRS competition. I also hope we can explore a little better the meaning of "meaningful competition," which Congress intended to replace regulation.