

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



In the Matter of )  
)  
1998 Biennial Regulatory Review )  
Spectrum Aggregation Limits for Wireless )  
Telecommunications Carriers; )  
)  
Amendment of Parts 20 and 24 of the )  
Commission's Rules — Broadband PCS )  
Competitive Bidding and Commercial )  
Mobile Radio Service Spectrum Cap )

WT Docket No. 98-205

WT Docket No. 96-59

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

**PETITION FOR RECONSIDERATION OF BELL SOUTH CORPORATION**

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## SUMMARY

BellSouth requests that the Commission reconsider its decision to retain the 45 MHz CMRS spectrum cap. The *Order* relies upon the DOJ's *Merger Guidelines* to support its competitive analysis, yet fails to explicitly define the relevant product and geographic markets as required therein. To the extent any product market is defined, it would appear the Commission has limited the market to interconnected mobile voice service. This would be inconsistent, however, with the FCC's previous conclusion that the spectrum cap covers a variety of CMRS services in addition to mobile voice service. To the extent any geographic market is defined, the use of cellular MSAs is inconsistent with the spectrum cap rule itself, which uses PCS license areas as a starting point to analyze whether a party holds too much spectrum.

Moreover, by dwelling on cellular MSAs, rather than PCS MTAs, the Commission's competitive analysis has been significantly compromised — virtually compelling a finding of high cellular concentration. If the Commission had done its competitive analysis on the basis of much larger MTAs, the result would have been a *much* lower level of concentration, due to the inclusion of a greater number of cellular and PCS participants. In this regard, BellSouth appends a spreadsheet to this petition calculating MSA-based versus MTA-based concentration in a hypothetical MTA containing four equal MSAs. This spreadsheet analysis reveals that when concentration is viewed within the MTA as a whole, concentration dips to an HHI of 1793, *below* the threshold at which DOJ considers a market to be highly concentrated.

In addition, the Commission's reliance upon historical rather than forward-looking market share is inappropriate for rapidly changing, dynamic markets like CMRS. The wireless industry has an annual growth rate exceeding 25 percent, and the majority of new subscribers use PCS or SMR rather than cellular service. Under these conditions, it was plain error for the Commission to base its market share assumptions on unadjusted historic data. Simply put, historical market share data understate the growing competitive significance of recent entrants. In keeping with DOJ's approach in the *Merger Guidelines*, market shares should be forward-looking, calculated using the best indicator of "future competitive significance." Not only is the *Order*'s reliance upon historic market share data a departure from the Commission's prior treatment of market shares and the *Merger Guidelines*, it is inconsistent with the Commission's recent decision regarding competition in the cable industry, wherein the Commission adjusted its cable horizontal ownership cap to "consider the dynamic nature of the communications marketplace."

Finally, BellSouth requests reconsideration given the adverse public interest repercussions of the *Order*, which could leave the United States behind countries in Europe and the Pacific Rim with regard to 3G wireless services. While the *Order* recognizes that regulatory certainty regarding the spectrum cap is critical to 3G investments, it leaves the cap largely in place, preferring instead to utilize a case-by-case waiver approach (pending the outcome of a future rulemaking which has not even begun). Unless reconsidered, the current "trial and error" waiver policy and the prospect of an uncertain future rulemaking will deprive U.S. carriers of the assurances they *need* to know that they will be able to acquire sufficient spectrum to deploy new services. As a result, it will be difficult for them to make firm commitments to vendors and to play a meaningful role in the selection of technologies, while competitors abroad — where 3G licensing is already underway — will not be so constrained.

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To: The Commission

**PETITION FOR RECONSIDERATION OF BELLSOUTH CORPORATION**

BellSouth Corporation (“BellSouth”), by its attorneys, hereby petitions the Commission to reconsider its *Report and Order*, FCC 99-244 (rel. Sept. 22, 1999), *summarized*, 64 Fed. Reg. 54654 (Oct. 7, 1999) (*Order*), in the above-captioned proceeding which retained the 45 MHz commercial mobile radio service (“CMRS”) spectrum cap.<sup>1</sup> For the reasons set forth below, BellSouth demonstrates that the competitive analysis used to justify retention of the spectrum cap is seriously flawed. BellSouth also requests reconsideration because retention of the cap could leave the United States substantially behind countries in Europe and the Pacific Rim with regard to third generation (“3G”) wireless services.

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<sup>1</sup>The CMRS spectrum cap provides that an entity may have an attributable interest in no more than 45 MHz of broadband Personal Communications Service (“PCS”), cellular radiotelephone service, and Specialized Mobile Radio (“SMR”) service spectrum regulated as CMRS with “significant overlap” in any geographic area. 47 C.F.R. § 20.6(a). A “significant overlap” occurs when at least 10 percent of the population of the PCS licensed service area is within the cellular geographic service area (“CGSA”) and/or SMR service area(s). 47 C.F.R. § 20.6(c)(1).

**I. THE FCC SHOULD RECONSIDER THE COMPETITIVE ANALYSIS USED TO JUSTIFY RETENTION OF THE SPECTRUM CAP**

The FCC's *Order* is flawed because it fails to adequately define the relevant product and geographic markets for purposes of assessing market concentration and prospects for entry in those markets. Moreover, the *Order*'s premise for maintaining the 45 MHz cap — that “the provision of CMRS remains highly concentrated among relatively few providers”<sup>2</sup> — is based upon an analysis of cellular metropolitan statistical areas (“MSAs”) and rural service areas (“RSAs”), whereas Section 20.6(c) applies the spectrum cap to PCS major trading areas (“MTAs”) and basic trading areas (“BTAs”). If the Commission had conducted its competitive analysis on the basis of MTAs, which would appear to be appropriate given that the spectrum cap rule is keyed to PCS licensing areas, the result would have been a much lower level of concentration. Finally, the Commission's reliance upon historical rather than forward-looking market share is inappropriate for rapidly changing markets like CMRS and is inconsistent with other Commission decisions.

**A. The *Order* Fails to Adequately Define the Relevant Product and Geographic Markets**

In establishing the analytic framework to be applied in determining whether to eliminate, modify, or sunset the CMRS spectrum cap, the Commission stated that it must consider the ease or difficulty with which competitors can enter CMRS markets, the prospects for long-term competition in CMRS markets, and the potential risk of reconsolidation in those markets.<sup>3</sup> To make these assessments, the Commission invoked the framework set forth in the U.S. Department of Justice's (“DOJ”) *Merger Guidelines*, including use of the Herfindahl-Hirschman Index (“HHI”).<sup>4</sup> The

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<sup>2</sup>*Order* at ¶ 27.

<sup>3</sup>*See id.* at ¶¶ 28-30.

<sup>4</sup>*See id.* at ¶ 28 (citing [1992] Department of Justice — Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) (“*Merger Guidelines*”)); *see also id.* at ¶¶

Commission has long relied upon the *Merger Guidelines* and the HHI as an initial means of measuring the significance of changes in market concentration.<sup>5</sup>

Consistent with the *Guidelines*, the Commission has previously stated that “We begin our competitive analysis by determining the relevant product and geographic markets.”<sup>6</sup> This is clearly the correct analysis; the *Guidelines* themselves provide that *any assessment of competitive effects cannot be made unless and until the relevant product and geographic markets have been defined.*<sup>7</sup>

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11, 35-39. The HHI is a tool often used by the Commission to determine when concentration in a market has reduced competition to an undesirable level. 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 96-59, GN Docket 90-314, *Report and Order*, 11 F.C.C.R. 7824, 7869-70 (1996) (*CMRS Spectrum Cap Report and Order*), recon. 12 F.C.C.R. 14031 (1997) (*BellSouth MO&O*), *aff'd sub nom. BellSouth Corp. v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999).

<sup>5</sup> See, e.g., *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation*, CC Docket No. 97-211, *Memorandum Opinion and Order*, 13 F.C.C.R. 18025, 18048 n.100 (1998); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133, *Third Annual Report*, 12 F.C.C.R. 4358, 4419-20 (1997); *Amendment of Parts 20 & 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WB Docket No. 96-59, *Report and Order*, 11 F.C.C.R. 7824, 7869-73, 7899-904 (1996).

<sup>6</sup>*Pittencrieff Communications, Inc. and Nextel Communications, Inc.*, DA 97-2260, *Memorandum Opinion and Order*, 13 F.C.C.R. 8935, 8943 (WTB 1997); see *Ameritech Corporation and GTE Consumer Services Incorporated*, DA 99-1677, *Memorandum Opinion and Order*, ¶ 9 (WTB rel. Aug. 20, 1999); *LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Second Report and Order* in CC Docket No. 96-149 and *Third Report and Order* in CC Docket No. 96-61, 12 F.C.C.R. 15756, 15768 (1997), recon., 12 F.C.C.R. 8730 (1997); *Non-Accounting Safeguards*, CC Docket No. 96-149, *Notice of Proposed Rulemaking*, 11 F.C.C.R. 18877, 18932 (1996); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 95-61, *Second Annual Report*, 11 F.C.C.R. 2060, 2122 (1995); see also *NYNEX Corporation and Bell Atlantic Corporation*, FCC 97-286, *Memorandum Opinion and Order*, 12 F.C.C.R. 19985, 20014 (1997); *MCI Communications Corporation and British Telecommunications plc*, GN Docket No. 96-245, *Memorandum Opinion and Order*, 12 F.C.C.R. 15351, 15368 (1997).

<sup>7</sup>*Merger Guidelines* at §§ 1.1, 1.2; see also Peter C. Wald, *Federal Trade Commission: Law, Practice and Procedure*, § 8.03[4] (1999).

In fact, in several places the *Order* appears to recognize the importance of the relevant market. For example, the *Order* states:

The *Merger Guidelines*, which provide a framework for evaluating prospects for entry into a particular market, deem a merger unlikely to create or enhance market power or facilitate its exercise, if entry *into the relevant market* “is so easy that market participants . . . could not profitably maintain a price increase above pre-merger levels.”<sup>8</sup>

The *Order* also recognizes that a broad or narrow definition of the relevant market has a significant bearing upon the outcome of the competitive analysis into whether to maintain or eliminate the cap:

Those favoring retention of a spectrum cap typically distinguish among the various wireless product markets [whereas] . . . . Commenters favoring elimination of the cap tend to define markets broadly . . . .<sup>9</sup>

Even in an earlier stage of the spectrum cap proceeding, the Commission stated that “the manner in which we define the product market will have an important bearing on decisions we make regarding application of a spectrum cap.”<sup>10</sup>

Nevertheless, the subject *Order* fails to explicitly make a determination regarding the proper product and geographic markets, which it must do in order to adequately support its outcome. For example, it implicitly selects a product market consisting of interconnected mobile voice telephone service, stating that “commenters appear to share the Commission’s view that our focus on competitive conditions in the market for mobile voice telephone services is appropriate.”<sup>11</sup> The Commission also cites to several recent large mergers in which DOJ concluded “mobile telephone

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<sup>8</sup>*Order* at ¶ 28 (quoting *Merger Guidelines* at § 3) (emphasis added) (footnote omitted).

<sup>9</sup>*Id.* at ¶ 24 (footnotes omitted).

<sup>10</sup>*Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Further Notice of Proposed Rulemaking*, 9 F.C.C.R. 2863, 2882 (1994).

<sup>11</sup>*See Order* at ¶ 46.

services constituted a relevant product market.”<sup>12</sup> The Commission never explicitly reaches any conclusion as to the relevant product market, however. Instead, it simply states that it rejects arguments for a broadly defined product market, finding no evidence to suggest that other service alternatives are capable of constraining competitive behavior.<sup>13</sup>

Although the Commission may define product markets narrowly if it deems necessary,<sup>14</sup> it must be explicit in its selection and provide a reasoned basis for its decision.<sup>15</sup> In this case, if the Commission has selected mobile voice telephone services as the relevant product market, its selection would appear to be at odds with its previous conclusion that “the CMRS spectrum cap is not limited to real-time, two-way switched [voice] telephone service, but covers a variety of services within the definition of CMRS.”<sup>16</sup> The Commission must reconcile a cap which includes within its scope CMRS services other than mobile voice service, with an apparent relevant product market limited solely to mobile voice services.

An even more significant flaw is that the *Order* never defines the relevant geographic market. The spectrum cap rule itself uses PCS license areas — MTAs and BTAs — as the starting point for analyzing whether a party holds too much spectrum in the PCS, cellular, and SMR bands. In fact, the cap applies to a “significant overlap” *within the PCS licensing area* — and not all cellular or SMR spectrum within the PCS license area may even be deemed “significant.” According to Section

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<sup>12</sup>*Id.*

<sup>13</sup>*See id.*

<sup>14</sup>*See Pittencrieff Communications, Inc. and Nextel Communications, Inc.*, 13 F.C.C.R. at 8945.

<sup>15</sup>*See* 5 U.S.C. § 706; *see, e.g., Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (“[R]easoned decisionmaking” requires “a process demonstrating the connection between the facts found and the choice made.”).

<sup>16</sup>*Order* at ¶ 13 (citing *BellSouth MO&O*).

20.6(c)(1), “significant overlap of a PCS licensed service area and CGSA(s) . . . or SMR service area(s) occurs when at least 10 percent *of the population of the PCS licensed service area . . . is within the CGSA(s) and/or SMR service areas.*”<sup>17</sup> In other words, a carrier’s cellular or SMR spectrum counts toward the spectrum cap only if the carrier is licensed to serve 10 percent or more of the population of the designated PCS service area. As a result, the rule would not consider 25 MHz of cellular spectrum to be “significant,” even if the entire MSA overlapped with the MTA, as long as the MSA’s population is less than one-tenth of the MTA’s population.

If the MTA is the relevant market, it would be rational to structure a rule in this way, because MTAs in particular tend to be very large, and often encompass many cellular and/or SMR service areas. Nevertheless, the Commission’s HHI analysis appears to be based exclusively upon concentration in cellular license areas, particularly MSAs.<sup>18</sup> As discussed in the following section, this results in a skewed competitive analysis. In so doing, the *Order* makes the illogical jump from finding MSA-level concentration to continuing to justify spectrum limits on an MTA basis. If the MSA were truly the relevant market, it would not be rational for the rule, without explanation, to condone holding 25 MHz of cellular spectrum excluded from the cap because of the small relative size of the MSA, as well as up to 45 MHz of MTA-wide spectrum, for a total of 70 MHz.<sup>19</sup> The Commission should correct this error on reconsideration.

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<sup>17</sup>47 C.F.R. § 20.6(c)(1) (emphasis added).

<sup>18</sup>See *Order* at ¶¶ 34-38.

<sup>19</sup>See also *infra* note 27.

**B. The Order Skews the Competitive Analysis By Focusing Upon Cellular Rather than PCS Licensing Areas**

As noted, the FCC's discussion of the economic and competitive effects of wireless licensing appears to be premised on an analysis of cellular MSAs and RSAs, and not upon typically larger PCS license areas, MTAs and BTAs, which are the starting point for any spectrum cap "significant overlap" analysis.<sup>20</sup> For example, the Commission relies upon Personal Communications Industry Association ("PCIA") statistics which show HHI levels in a representative sampling of eight of the nation's largest 200 MSAs to exceed the 1800 threshold at which DOJ considers a market to be concentrated,<sup>21</sup> and for the proposition that both cellular carriers have a combined market share exceeding 70 percent in the same 200 MSAs.<sup>22</sup> Likewise, the Commission cites to statistics submitted by John B. Hayes of Charles River Associates, on behalf of Sprint PCS, to support similar showings of ostensible concentration in the largest MSAs.<sup>23</sup> Finally, the Commission cites to recent DOJ showings of concentration in fourteen MSAs and RSAs.<sup>24</sup>

The focus on cellular MSAs, rather than PCS MTAs, appears to have significantly skewed the Commission's competitive analysis, virtually compelling a finding of high current concentration. If the Commission had done its competitive analysis on the basis of MTAs, the result might have

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<sup>20</sup>See *supra* note 17 and accompanying text.

<sup>21</sup>A market with an HHI below 1000 is considered unconcentrated. An HHI between 1000 and 1800 signifies a moderately concentrated market. An HHI above 1800 signifies a highly concentrated market and raises competitive concerns. See *CMRS Spectrum Cap Report and Order*, 11 F.C.C.R. at 7870.

<sup>22</sup>See *Order* at ¶¶ 35, 38; see also PCIA Reply Comments (Feb. 10, 1999) at 10-14 & Attachment A; PCIA *Ex Parte* (May 6, 1999), Attachment at 2; PCIA *Ex Parte* (Aug. 25, 1999) at 1 & Attachment.

<sup>23</sup>See *Order* at ¶ 36; see also Sprint PCS Comments (Jan. 25, 1999), Attachment A (John B. Hayes, CMRS HHIs from Customer Share Data); Sprint PCS *Ex Parte* (Aug. 13, 1999) at 1.

<sup>24</sup>See *Order* at ¶ 37 & n.98.

been a *much* lower level of concentration, due to the greater number of cellular and PCS participants in the larger area, which encompasses multiple cellular markets, as well as the smaller amount of market share for each cellular participant.

For example, for Broadband PCS A and B blocks, the licensing is done by MTAs, which contain a large number of cellular MSAs and RSAs. In many cases, those MSAs and RSAs do not even occupy 10% of the MTA's population and, thus, cellular holdings there are not deemed significant for purposes of the rule, even if the licensee has a high market share. By relying only upon studies at the MSA level, the Commission was able to show high concentration levels, with two cellular carriers holding the vast majority of market share and HHIs over 3000. If, on the other hand, the Commission had performed similar analyses of entire MTAs, it would have found the cellular market share divided among a larger number of players, with the MTA-wide A and B block PCS operators' shares more comparable to individual cellular licensees' shares, thereby resulting in a lower HHI.

To illustrate this point, in Attachment A, BellSouth sets forth a spreadsheet calculating MSA-based versus MTA-based concentration in a hypothetical MTA containing four equal MSAs.<sup>25</sup> Whether this hypothetical market is typical or not is irrelevant, because this model demonstrates the fundamental flaw in applying an MSA-based analysis to an MTA-based licensing scheme.

This spreadsheet analysis was designed to show HHI levels in excess of 3000 when viewing market concentration solely within each of the individual MSAs, with the two cellular carriers' market share totaling 75-80 percent. However, when concentration is viewed within the MTA as a whole, concentration dips to an HHI of 1793, *below* the threshold at which DOJ considers a market

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<sup>25</sup>The Commission has previously relied upon hypothetical models when conducting its HHI analysis regarding the spectrum cap. See *CMRS Spectrum Cap Report and Order*, 11 F.C.C.R. at 7870, 7899-904.

to be highly concentrated. The reason for this is simple: cellular and PCS ownership patterns across an MTA are not uniform. Given the fact that the spectrum cap is triggered by examining significant overlap within PCS-licensed service areas,<sup>26</sup> the Commission should have conducted its analysis on the basis of concentration within PCS MTAs, and not cellular MSAs. Thus, the Commission's rule, which imposes spectrum limits on an MTA basis for A and B block holders, for example, is not rationally connected to the Commission's findings.<sup>27</sup>

BellSouth also notes that the Commission's reliance upon PCIA's figures showing that in most of the nation's largest MSAs, the two cellular carriers have in excess of 70 percent of the subscribers, is highly misleading. First, the two cellular carriers are *competitors* — they do not hold spectrum in a block as a consortium. Thus, in any given MSA, neither should have more than 30-40 percent of the total subscribers on average. Second, the remaining 30 percent of subscribers use the services of non-cellular (*e.g.*, PCS or SMR) providers. Thus, in a typical market, for example, you could have one cellular provider with a 40% share, another with a 30% share, and a third PCS provider with a 30% share. While in many markets the remaining 30% might be shared by several non-cellular providers, the most recent data indicates that during 1999, combined PCS and digital SMR providers will account for *54 percent* of total net additions of wireless subscribers, versus only 46 percent for the cellular incumbents.<sup>28</sup>

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<sup>26</sup>47 C.F.R. § 20.6(c)(1); *see also supra* note 17 and accompanying text.

<sup>27</sup>Moreover, under the 45 MHz cap, an A block 30 MHz PCS holder can hold an additional 20 MHz of MTA-wide PCS spectrum. *Because of the non-attribution of under-10% MSA overlaps, however, the same company can also hold 25 MHz cellular licenses in MSAs covering less than 10% of the MTA's population.* As a result, it could hold 70 MHz in those overlapping markets, while a cellular licensee *not* holding an MTA license cannot hold more than two 10 MHz blocks in a BTA overlapping its cellular MSA.

<sup>28</sup>*Order* at ¶ 39.

Given the high sustained growth rate of the industry, this means rapidly falling market share for cellular carriers and increased market share for PCS/SMR licensees. The Cellular Telecommunications Industry Association (“CTIA”) estimates that the number of wireless subscribers is growing at 25.5 percent annually. From December 1998 to June 1999 alone, the number of subscribers grew from 69 million to 76 million.<sup>29</sup> More than half of these new subscribers will go to PCS or SMR carriers, rather than cellular providers. These constantly shifting balances highlight another fundamental flaw (discussed in the following section) with the Commission’s methodology: reliance upon historical, rather than forward-looking, market share.

**C. The Order’s Reliance Upon Historical Rather than Forward-Looking Market Share is Inappropriate for the Rapidly Changing CMRS Market**

In order to justify its retention of the spectrum cap, the Commission relies upon historical or static market share figures that are no more than a snapshot from a moment in time. Reliance upon historical data is inappropriate, however, given the fact that in a fluid and dynamic CMRS marketplace, market share figures are constantly changing. Rather, in keeping with DOJ’s approach in the *Merger Guidelines*, market shares should “be calculated using the best indicator of firms’ *future competitive significance*.”<sup>30</sup>

The Commission recognized the importance of forward-looking market shares in its *Order* when it cited to the economic analysis appended to Bell Atlantic’s comments by Brookings Institution economists Robert W. Crandall and Robert H. Gertner, noting that “Crandall and Gertner

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<sup>29</sup>CTIA *Semi-Annual Wireless Industry Survey*, <<http://www.wow-com.com/wirelessurvey>> (visited Nov. 5, 1999).

<sup>30</sup>*Merger Guidelines* at § 1.41 (emphasis added).

caution against using HHIs because the CMRS sector is such a dynamic industry.”<sup>31</sup> Likewise, Sprint PCS’ expert cautioned that:

[W]here competitors have entered markets recently and are expanding their share, such as in many wireless telephony markets, market share data will tend to understate the future competitive significance of recent entrants.<sup>32</sup>

Interestingly, the *Order* presents data which documents this concern, reporting that during 1999, new entrants will sign up more than half of all new subscribers.<sup>33</sup> The Commission further agrees that “[t]hese data provide important evidence that static measures of market share . . . do not fully describe competitive conditions in these markets. As a result of these findings, we recognize that conditions are changing rapidly.”<sup>34</sup>

Nevertheless, the Commission chose to leave the spectrum cap in place, basing its decision on an analysis of static market shares. It premised its decision on historical data as of January 1999. Yet there is a more than 25 percent annual growth rate in wireless subscribers — more than 7 million net subscribers were added in the first half of the year,<sup>35</sup> and a majority of those subscribers likely went with PCS or SMR, not cellular.<sup>36</sup> BellSouth submits that where there is a clear trend that market share distribution is shifting *rapidly, i.e.*, cellular carriers are decreasing and PCS carriers are

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<sup>31</sup>*Order* at ¶ 39 (citing Bell Atlantic Mobile, Inc. Comments (Jan. 25, 1999) at 17).

<sup>32</sup>Sprint PCS Comments (Jan. 25, 1999), Attachment A (John B. Hayes) at 5, *quoted in Order* at ¶ 39.

<sup>33</sup>*See Order* at ¶ 39.

<sup>34</sup>*Id.*

<sup>35</sup>*See CTIA Semi-Annual Wireless Industry Survey, supra note 29.*

<sup>36</sup>*See Order* at ¶ 39.

increasing, it is simply not reasoned decisionmaking to use static market shares without any correction to reflect this trend.

The Commission should reconsider this position. First, it is an unexplained departure from the Commission's prior treatment of market shares. In 1996, the Commission issued a *Report and Order* setting forth its economic justification for the imposition of the spectrum cap. At that time, the Commission stated:

We find the HHI to be useful in the present situation because *we lack empirical data about the actual performance* of a market that includes both cellular service and fully deployed broadband PCS, which is under construction in almost all markets. . . . In order to apply the HHI, a measurement of market share . . . is necessary. Allocated spectrum is an appropriate measurement of market share for the purpose of analyzing the need for a spectrum cap because it is a measure of a CMRS carrier's long-term capacity and is easily available to the Commission.<sup>37</sup>

The Commission has explained that “[b]y using allocated spectrum, rather than current productive capacity, as measures for market share, we examined conditions of *potential competition* in these markets, *rather than actual competition*.”<sup>38</sup> Elsewhere, the Commission has described its market share analysis as “tantamount to evaluating various states of *potential* competition in these markets.”<sup>39</sup>

Three years later, when competition is increasing almost on a daily basis and market projections forecast dramatic changes in the short and long-term, the Commission has now jettisoned its reliance upon forward-looking market shares in favor of historical performance data from one particular point in time, despite its recognition that doing so is problematic:

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<sup>37</sup>See *CMRS Spectrum Cap Report and Order*, 11 F.C.C.R. at 7870 (emphasis added).

<sup>38</sup>*Order* at ¶ 29 (emphasis added).

<sup>39</sup>*Vanguard Cellular Systems, Inc. and Winston, Inc. for Consent to Transfer of Control*, DA 99-481, *Memorandum Opinion and Order*, ¶ 19 (WTB rel. March 11, 1999) (emphasis added).

[W]e agree with commenters who argue that the use of historical or contemporaneous data on market performance potentially understates the potential competitive impact of new entrants in a dynamic industry and overstates the risks of anticompetitive conduct . . .<sup>40</sup>

The Commission must do better to justify a departure that has such a dramatic outcome upon whether or not the cap should be retained. By basing its conclusion that cellular carriers dominate the market on market share figures that are rapidly eroding as new entrants begin operations, the Commission locks them in as the targets of its regulation without good cause.

In addition, in a recent decision regarding competition in the cable industry, the Commission adjusted its cable horizontal ownership cap to “consider the dynamic nature of the communications marketplace.”<sup>41</sup> It did so by adjusting its market share calculus to include all multiple video programming distributors (“MVPDs”), and not just cable operators, within the cap, “[g]iven the past and expected future growth of non-cable MVPDs.”<sup>42</sup> Specifically, the Commission found that

We reject the argument that non-cable MVPDs should not be placed in the denominator . . . . Although we agree that cable is still dominant in the MVPD marketplace, non-cable MVPDs have a growing impact on that marketplace. *Inclusion of both cable and non-cable MVPD subscribers in the [market share] denominator will reflect the dynamic nature of the marketplace and the diminishing market power of cable operators as non-cable MVPDs increase their subscribership.*<sup>43</sup>

Given the similarly rapidly changing nature of wireless competition, the Commission should likewise adjust its CMRS spectrum cap market share calculation to consider forward-looking, and

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<sup>40</sup>*Order* at ¶ 41.

<sup>41</sup>*See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, MM Docket No. 92-264, *Third Report and Order*, FCC 99-289, ¶ 27 (Oct. 8, 1999) (quoting 47 U.S.C. § 533(f)(2)(E)).

<sup>42</sup>*Id.* at ¶ 30.

<sup>43</sup>*Id.*

not just historical, data regarding competition in the market. Such a result is necessary to “reflect the dynamic nature of the marketplace.”<sup>44</sup>

Finally, the Commission’s decision that retention of the spectrum cap is necessary because together both incumbent cellular carriers retain more than 70 percent of wireless subscribers in their cellular market areas is inconsistent with the Commission’s treatment of AT&T and the long-distance industry. In 1995, the Commission reclassified AT&T as nondominant in the provision of domestic long distance services, concluding that AT&T’s steadily declining market share for long distance service revenues — which fell from approximately 90 percent in 1984 to 55.2 percent in 1994 — suggested intense rivalry for market share among AT&T, MCI and Sprint, and supported the conclusion that AT&T lacked market power.<sup>45</sup> It is difficult to reconcile the fact that with 55 percent market share, AT&T was found to lack market power, yet the Commission’s *Order* seems to suggest that an incumbent cellular carrier with approximately 35 percent market share (half of 70 percent) could be found to possess market power, and thus justify retention of the cap. The Commission should reconsider this decision.

## **II. UNLESS RECONSIDERED, THE ORDER LEAVES U.S. CARRIERS AT A COMPETITIVE DISADVANTAGE REGARDING 3G SERVICES**

Reconsideration is also warranted given the adverse public interest ramifications associated with retaining the spectrum cap. As discussed below, the decision to leave the 45 MHz limit largely in place will leave the United States far behind Europe and Pacific Rim countries with regard to 3G wireless services, which are expected to provide consumers with wireless access to data, multimedia, internet, and many other services beyond today’s mobile phone and paging service.

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<sup>44</sup>*Id.*

<sup>45</sup>See *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Docket No. 95-427, 11 F.C.C.R. 3271, 3307 (1995), *recon.*, 12 F.C.C.R. 20787 (1997).

On the one hand, the Commission agrees that “regulatory certainty is critical to providing the industry with incentives to make investments, including in new technologies such as 3G service.”<sup>46</sup> At the same time, however, the *Order* declines to “address spectrum requirements for 3G and other advanced services” in this proceeding, proposing instead to initiate a separate spectrum allocation proceeding for 3G at some unspecified point in the future.<sup>47</sup> In that future allocation proceeding, the Commission commits to “consider whether any newly allocated spectrum should be included in the cap.”<sup>48</sup> In the meantime, the *Order* only will allow carriers who have “an immediate need” to access more CMRS spectrum to offer advanced services like 3G services to file waiver requests. However, to get the Commission to consider such a request, the company must lay open for public scrutiny its business plans and await lengthy processing.<sup>49</sup>

A waiver system, however, will not provide carriers and manufacturers with the regulatory certainty they need to make investments in new 3G services and technologies. The waiver process is a discretionary one, providing no guarantees as to outcome. No carrier knows this better than BellSouth; its 1996 request for a *de minimis* waiver of the spectrum cap to hold at most 0.5 MHz over the 45 MHz cap (for a total of 45.5 MHz), so that it could use 45 MHz for voice service despite its interest in a wireless data SMR, was denied by the Commission.<sup>50</sup> In contrast, major U.S. service

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<sup>46</sup>*Order* at ¶ 51.

<sup>47</sup>*Id.* at ¶ 63.

<sup>48</sup>*Id.*

<sup>49</sup>Carriers filing a waiver request must (1) clearly identify what new services would be provided if the cap were waived, and (2) demonstrate why those services cannot be provided without exceeding the cap. *See Order* at ¶ 82.

<sup>50</sup>*See BellSouth Wireless, Inc., Request for Waiver in Auction No. 11*, 11 F.C.C.R. 9970 (WTB 1996), *aff'd*, *Application for Review of BellSouth Wireless, Inc.; Amendment of Parts 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket 96-59, *Memorandum Opinion and Order*, 12 F.C.C.R.

providers of broadband 3G services are expected to need between 70 to 90 MHz of CMRS spectrum — 25 to 45 MHz more than the cap currently allows — although just how much depends on technology choice, penetration levels, and demand for 3G services.<sup>51</sup> To BellSouth's knowledge the Commission has yet to grant a permanent waiver of the 45 MHz spectrum cap to anyone, for any reason.<sup>52</sup> Given that fact, carriers would be justified in being skeptical of the Commission's waiver process. Furthermore, the prospect of a future proceeding at some unspecified date which promises only to "consider" whether to exclude 3G spectrum needs from the cap fails to provide industry with the critical certainty it needs to plan investments. Thus, the Commission's *Order* has done exactly what it said it would not do: it has created regulatory *uncertainty*.

As BellSouth previously noted in an *ex parte* filing, regulatory certainty is needed immediately, because carriers must begin making commitments now in order to bring 3G services to market quickly.<sup>53</sup> 3G equipment will become available by early 2000, meaning that contracts will

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14031 (1997) (*BellSouth MO&O*), *aff'd sub nom. BellSouth Corp. v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999).

<sup>51</sup>See Letter from Ben G. Almond, BellSouth, to Magalie Roman Salas, FCC, dated Sept. 1, 1999 ("*BellSouth 3G Ex Parte*").

<sup>52</sup>See *Poka Lambro PCS, Inc., Request for Waiver*, 11 F.C.C.R. 9913, *Letter* (WTB 1996) (denied); *New Wave LLC, Request for Conditional Authorization and Request for Waiver*, 1995 FCC LEXIS 8085 (WTB Jan. 16, 1996) (denied); *New England PCS, L.P., Request for Waiver*, 1995 FCC LEXIS 8085 (WTB Jan. 16, 1996) (denied); *Western PCS II License Corp., Request for Waiver* (filed July 11, 1997) (pending); *Western PCS I License Corp., Request for Waiver* (filed Jan. 29, 1998) (pending); *Triton Communications L.L.C., Request for Waiver* (filed July 17, 1998) (pending); *Cincinnati Bell Telephone Co., Petition for Waiver* (filed Dec. 6, 1996) (withdrawn); *Radiofone, Inc., Request for Waiver* (filed July 27, 1995) (rendered moot). Although the Commission has granted several temporary waivers, these grants have been either of limited duration or explicitly conditioned on the petitioner coming into compliance with the *Order* within 90 days of its release. See *Pioneer Telephone Ass'n, Inc., et al., Requests for Waiver*, DA 99-1823 (WTB Sept. 8, 1999); *Triton Communications L.L.C., Request for Waiver* (July 31, 1998); *Western PCS II License Corp., Request for Waiver*, 12 F.C.C.R. 11665 (WTB Aug. 4, 1997); *Western PCS I License Corp., Request for Waiver* (July 17, 1998).

<sup>53</sup>See *BellSouth 3G Ex Parte*, *supra* note 51.

have to be negotiated with vendors by mid-to-late 2000 to have access to equipment for an early roll-out. U.S. carriers will be competing against carriers from other nations in seeking to influence technology choices and to secure commitments from vendors. Unless the Commission's decision to retain the cap is reconsidered, the current "trial and error" waiver policy, and the prospect of a future rulemaking proceeding with an uncertain outcome, will deprive U.S. carriers of the immediate assurances they *need* to know that they will be able to acquire sufficient spectrum to deploy new services.<sup>54</sup> Accordingly, it will be difficult for them to make firm commitments to vendors and to play a meaningful role in the selection of technologies during the negotiations that will have to take place in early 2000, while their competitors from other nations will not be so constrained.

In fact, 3G licensing abroad is already placing the United States and its carriers at a competitive disadvantage. The European Union has mandated that its member states establish processes to license 3G systems within the next two months, and to commence operations of those systems no later than January 1, 2002. For example, in March 1999, Finland became the first country in the world to award 3G licenses, and 3G auctions are upcoming in Germany. The United Kingdom also expects to auction five 3G licenses in the second half of the financial year 1999-2000. While the U.K. intends to reserve the largest spectrum license (35 MHz) for non-incumbents, the remaining four blocks (one 30 MHz block and two 25 MHz blocks) will be open to incumbents. Assuming that a comparable amount of spectrum (*e.g.*, 25-30 MHz) will be needed for 3G services

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<sup>54</sup>The Commission has stated its waiver policy should suffice for carriers having an immediate need for additional spectrum. *See Order* at ¶ 82. While 3G spectrum needs are expected to be significant in the near future, the "immediate" need is not the spectrum itself, but assurance from the Commission that carriers will have *access* to that spectrum. As described, this assurance will enable carriers to timely begin negotiations with vendors, a precursor to any successfully offering of new 3G services.

in the United States by an incumbent 25 MHz cellular or 30 MHz PCS licensee, the Commission's 45 MHz spectrum cap ensures that the United States will lag behind.<sup>55</sup>

In short, without assurance *very soon* that the spectrum cap will be lifted by mid-2001 at the latest, U.S. carriers will be at a profound disadvantage in the negotiations needed for a quick rollout of 3G service. Accordingly, the Commission should reconsider its decision to retain the spectrum cap *now*, and make a firm decision that the cap will be lifted as of a date certain, even if that date is in the future.

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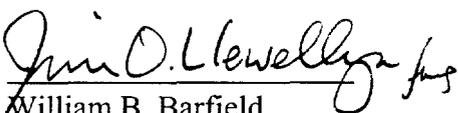
<sup>55</sup>A number of other countries have also begun public consultation processes or are contemplating the licensing of 3G spectrum in the near term, including: Australia, Austria, Belgium, Denmark, France, Germany, the Netherlands, New Zealand, Norway, South Africa, and Sweden.

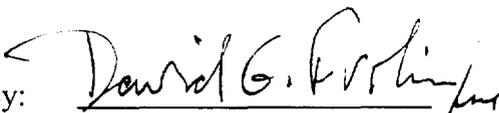
## CONCLUSION

Based on the foregoing, BellSouth requests that the Commission reconsider the retention of the 45 MHz CMRS spectrum cap.

Respectfully submitted,

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## ATTACHMENT A

Comparison of MSA-based vs. MTA-based analysis of CMRS concentration  
in hypothetical MTA containing four equal MSAs

	MSA 1		MSA 2		MSA 3		MSA 4		MTA	
	Customers	% Share	Customers	% Share						
Carrier A	<b>150,000</b>	<b>42.86</b>	0	0.00	<b>110,000</b>	<b>31.43</b>	<b>110,000</b>	<b>31.43</b>	370,000	26.43
Carrier B	<b>130,000</b>	<b>37.14</b>	<b>140,000</b>	<b>40.00</b>	0	0.00		0.00	270,000	19.29
Carrier C	0	0.00	<b>125,000</b>	<b>35.71</b>	<b>160,000</b>	<b>45.71</b>	10,000	2.86	295,000	21.07
Carrier D	0	0.00	0	0.00	30,000	8.57		0.00	30,000	2.14
Carrier E	20,000	5.71	0	0.00	20,000	5.71	0	0.00	40,000	2.86
Carrier F	35,000	10.00	80,000	22.86		0.00		0.00	115,000	8.21
Carrier G	0	0.00	0	0.00	30,000	8.57	60,000	17.14	90,000	6.43
Carrier H	15,000	4.29	0	0.00		0.00		0.00	15,000	1.07
Carrier I	0	0.00	5,000	1.43		0.00	<b>170,000</b>	<b>48.57</b>	175,000	12.50
Total	350,000		350,000		350,000		350,000		1,400,000	
HHI		3367.35		3400.00		3257.14		3648.98		1793.37

"Average" HHI, measured by MSA: 3418.37

HHI for the MTA: 1793.37

(**Boldface** entries represent market share of incumbent cellular licensees)