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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of)	
1998 Biennial Regulatory Review)	WT Docket 98-205
Spectrum Aggregation Limits for)	
Wireless Telecommunications Carriers)	
)	
Cellular Telecommunications Industry)	
Association's Petition for)	
Forbearance From the 45 MHz)	
CMRS Spectrum Cap)	
)	
Amendment of Parts 20 and 24 of the)	WT Docket No. 96-59
Commission's Rules—Broadband PCS)	
Competitive Bidding and Commercial)	
Mobile Radio Service Spectrum Cap)	
)	
Implementation of Sections 3(n) and)	GN Docket No. 93-252
332 of the Communications Act)	
)	

To: The Commission

**OPPOSITION OF THE PERSONAL COMMUNICATIONS INDUSTRY
ASSOCIATION TO THE PETITIONS FOR RECONSIDERATION**

The Personal Communications Industry Association ("PCIA")¹ hereby
opposes the Petitions for Reconsideration of the Cellular Telecommunications

¹ PCIA is an international trade association established to represent the interests of both the commercial and private mobile radio service communications industries and the fixed broadband wireless industry. PCIA's Federation of Councils includes: the Paging and Messaging Alliance, the Broadband PCS Alliance, the Site Owners and Managers Association, the Association of Wireless Communications Engineers and Technicians, the Private Systems Users Alliance, the Mobile Wireless Communications Alliance, and the Wireless Broadband Alliance. As the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 MHz and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of FCC licensees.

Industry Association ("CTIA") and BellSouth Corporation ("BellSouth") in the above-captioned proceeding.²

PCIA fully supports the Commission's periodic review of its 45 MHz spectrum aggregation limit ("spectrum cap") for cellular, PCS and SMR licensees.³ As PCIA noted in its comments, such reviews "can ensure that regulations do not remain in place which, while necessary at the time of adoption, become outdated and thus create barriers to a competitive marketplace."⁴ PCIA also noted that the spectrum cap is only a temporary measure for facilitating the growth of local, mobile voice alternatives to the incumbent cellular operators. PCIA concluded that PCS market share will reach a point where the cap may no longer be necessary, but the Commission will then need to decide how it will maintain a sufficient number of independent local networks to ensure consumer choice.⁵

PCIA also noted in its comments that the spectrum cap need not serve as a barrier to innovation and technological advancement. For example, as the Commission makes additional spectrum available for advanced 3G voice and data operations, the cap could be raised proportionately or not apply at all to these newly-allocated bands. In fact, PCIA did not oppose the Commission's decision not to apply the spectrum cap to the 700 MHz band.⁶ PCIA also fully supports a waiver process that allows a carrier to demonstrate that the spectrum

² Report and Order in WT Docket No. 98-205, FCC 99-244 (rel. September 22, 1999) ("Spectrum Cap Order")

³ 47 C.F.R. §20.6.

⁴ PCIA Comments at 4.

⁵ PCIA Comments at 7, 13-14.

cap is preventing it from providing a particular market from receiving a particular innovation or service.

PCIA's position on the spectrum cap is clear:

The cap has not demonstrably hindered development of new technology or services in any way. [Commentors] argue that new spectrum must be made available to meet the demand for wireless services. PCIA agrees. PCIA believes that the spectrum cap should not limit the ability of any carrier to participate in these new and exciting markets. The cap should remain for now only with regard to existing broadband, two-way spectrum (consisting of PCS, cellular and SMR spectrum).⁷

PCIA stands ready to work with CTIA, BellSouth and others when the Commission again considers the spectrum cap rule as part of its 2000 Biennial Review. PCIA hopes that commentors in that proceeding will be responsive to the concerns raised by the Commission in the Spectrum Cap Order; specifically, the still highly concentrated nature of local CMRS markets and the Commission's concern that eliminating the spectrum cap could result in even further consolidation and fewer independent choices for consumers.⁸ Commentors should also assist the Commission with specific evidence as to how the spectrum cap is impeding the immediate rollout of advanced, 3G services or impacting the ability to offer current voice service.⁹

⁶ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, First Report and Order in WT Docket No. 99-168, FCC 00-5 (rel. January 7, 2000) at ¶149.

⁷ PCIA Reply Comments at 5.

⁸ Spectrum Cap Order at ¶¶20, 25.

⁹ PCIA is particularly concerned that CTIA, BellSouth and others have chosen not to heed the Commission's call for specific evidence as to how the spectrum cap is impeding the implementation of 3G services. PCIA and BellSouth have made only the most cursory of showings of harm caused by the cap. CTIA Petition at 8; BellSouth Petition at 14. The Commission noted that the record in this proceeding did not "provide any concrete evidence regarding the amount of spectrum that will be needed for 3G technologies or exactly when carriers will need access to that spectrum." Spectrum Cap Order at ¶161. The Petitioners do not take up this challenge. Likewise, several companies are currently seeking waivers of the

Unfortunately, neither the CTIA nor BellSouth petitions provide the Commission with any justification for lifting the spectrum cap at this time. The CTIA petition is long on rhetoric but short on the market data necessary to reverse the Commission's decision. BellSouth, at this late date, urges the Commission to recalculate market concentration based upon larger MTA service areas, assuring lower Herfindahl-Hirschman Index (HHI) findings. BellSouth's petition ignores the reality that consumer choice is based upon locations where cellular and PCS licenses overlap—in the cellular MSAs. Moreover, BellSouth confuses the Commission's justification for retaining the rule— general market concentration in areas of cellular/PCS overlap—with the mechanics of the rule itself. Nor can BellSouth explain why the Commission should rely on a concentration analysis that encompasses multiple cellular markets when consumers do not typically make choices outside of their local market. Finally, the BellSouth petition incorrectly assumes that the Commission's analysis is based solely on market share and that a lowering of HHI levels will necessarily undermine the Commission's justification for retaining the cap.

The Commission should deny these petitions and re-evaluate the need for the spectrum cap as part of its next Section 10 Biennial Review.

spectrum cap in order to participate in an upcoming C and F Block reauction. Wireless Telecommunications Bureau Seeks Comment on AT&T Wireless Services, Inc., BellSouth Corporation and Bell Atlantic Mobile, Inc. Petitions Regarding CMRS Spectrum Cap Limits. DA 00-318 (rel. February 18, 2000) While PCIA will respond more fully to these specific waiver requests in the context of that proceeding, it notes that these companies have not heeded the Commission's explicit guidance to provide it with credible evidence that the cap limits their ability to offer 3G services in a particular geographic area so that the Commission can consider a waiver for that carrier in that specific area. Spectrum Cap Order at footnote 155, ¶182.

I. CTIA RAISES NO NEW EVIDENCE JUSTIFYING RECONSIDERATION OF THE RULE

CTIA misses an opportunity to present market data to the Commission that demonstrates that the Commission's concern over concentration in the two-way, mobile voice market is misplaced. Instead, CTIA merely re-argues the points raised in its comments. What is particularly surprising is CTIA's extensive, but selective, quoting of Commissioner Powell to the effect that the Commission has not met its burden of retaining the cap in such a competitive mobile marketplace.¹⁰ Unless CTIA is reading a different decision, Commissioner Powell, a spectrum cap skeptic when the proceeding began, actually voted in favor of retaining the spectrum cap. In fact, Commissioner Powell based his decision upon a careful review of the market data presented in the proceeding by PCIA and others.

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.¹¹

Commissioner Powell concluded that “[t]he 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.”¹² PCIA agrees wholeheartedly with Commissioner

¹⁰ See, e.g., CTIA Petition at 4, 5 and 11.

¹¹ Spectrum Cap Order, Concurring Statement of Commissioner Michael Powell.

¹² Id.

Powell that retaining the spectrum cap, at least for now, is tolerable for three reasons: first, the Commission is moving forward with allocation and assignment actions that will make more spectrum available for 3G services; second, carriers can seek expedited waivers of the spectrum cap if they require additional spectrum to offer advanced services; and third, re-evaluation of the cap will take place as part of the upcoming biennial review.¹³

Only one aspect of the CTIA petition requires further mention. CTIA decries what it believes is the double standard applied to the wireless industry in assessing competitive developments and standards. It suggests that the cable and telephone industries have a lesser standard to meet in showing the trend toward competitive markets.¹⁴ CTIA asks the Commission to ignore the fundamental distinction between these industries and spectrum-based operations: the difficulty of market entry into the CMRS industry.

Unlike cable or telephone operators, at least in the post-1996 Telecom Act environment, government still controls entry into the wireless business. As the Commission recognized, entry into the mobile radio business is more difficult than other telecommunications markets because of the need to obtain a governmentally-granted spectrum license. "This and other barriers...limit the ability of firms to respond with adequate certainty, timeliness and sufficiency to undermine anticompetitive behavior over the near term."¹⁵

With the spectrum cap first put into place at a time when the Commission was attempting to break the near 100 percent local market share of the cellular

¹³ Id.

¹⁴ CTIA Petition at 6. See, also, BellSouth Petition at 13-14.

duopoly, CTIA fails to explain why the Commission should no longer be concerned when the two cellular incumbents in almost all markets still have in excess of 70 percent of the customers.¹⁶ Rejecting CTIA's attempt to focus its attention on competition in national wireless markets, the Commission properly recognizes that CMRS competition occurs at the local level and that "control of excessive spectrum by any single market participant would be a matter of serious concern."¹⁷

II. BELLSOUTH'S ARGUMENTS ON THE MEASUREMENT OF MARKET CONCENTRATION ARE UNTIMELY AND MISPLACED

Only two aspects of the BellSouth petition require extensive comment here.¹⁸ First, at this late date, BellSouth urges the Commission to restructure Section 20.6 to reflect cellular/PCS/SMR overlap on the basis of MTA's rather than MSAs.¹⁹ Without going to the merits of BellSouth's argument, this suggestion is entirely too late for consideration in the context of a Petition for Reconsideration. BellSouth has had several opportunities, going back several years, to raise the perceived discrepancy in the overlap rule. The Commission severely limits the new facts and arguments that can be raised in a petition for

¹⁵ Spectrum Cap Order at ¶28.

¹⁶ Spectrum Cap Order at 14, 19.

¹⁷ Id. at ¶45. Both CTIA and BellSouth mistakenly suggest that the Commission's view of competition is based solely upon a narrow view of market shares and HHI levels. CTIA Petition at 7; BellSouth Petition at 2. The Commission, however, clearly states that it is committed to ensuring that the absolute number of independent licensees does not decrease in local markets. See, e.g. Spectrum Cap Order at ¶¶42-45. The Petitioners also ignore the clear public interest benefits that the increasing number of local wireless options has created. Spectrum Cap Order at ¶¶20-58.

¹⁸ In addition, BellSouth mistakenly claims that the Commission failed to make a determination of the appropriate product market for its competitive analysis. BellSouth Petition at 4. While BellSouth apparently reads some ambiguity in paragraph 46 of the Spectrum Cap Order, no reasonable reader would conclude that the Commission did not identify the interconnected mobile voice telephone service as the market under review. Spectrum Cap Order at ¶46.

reconsideration in order to reach finality in the process.²⁰ BellSouth fails to explain why it did not raise its concern when the spectrum cap rule was first adopted several years ago or in the course of this proceeding. This untimely criticism is better raised when the Commission invites comment on spectrum caps in the near future.

Second, BellSouth now urges the Commission to calculate cellular concentration, through HHI's, on the basis of much larger PCS MTAs, rather than smaller cellular MSAs. BellSouth suggests that this recalculation, which it admits would significantly lower the Commission's HHI findings, is necessary to conform to the mechanics of Section 20.6 calculations.²¹ This attempt to dilute concentration findings must be rejected.

The Commission has never suggested that its concentration findings should be linked to the mechanics of implementing the rule. Rather, the HHI levels are but one means of directly measuring the dominance of the incumbent cellular operators in the very geographic areas where their operations overlap with new PCS operators. It is in the smaller cellular areas where consumers will be faced with the choice of the two cellular incumbents and new PCS services. BellSouth admits that its alternative goes well beyond the geographic scope of consumer's shopping habits. "If the Commission had done its competitive analysis on the basis of MTAs, the result might have 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

¹⁹ BellSouth Petition at 5-6.

²⁰ See 47 C.F.R. §1.429(b).

amount of market share for each cellular participant.²² BellSouth needs to explain why the Commission should look at concentration beyond the local cellular market in which a consumer makes its mobile telephone choice.²³

Notwithstanding its attempt to dilute the Commission's concentration findings, BellSouth mistakenly believes that if it can convince the Commission to re-calculate the HHI's, it will have undermined the justification for keeping the spectrum cap. BellSouth's argument ignores the multiple reasons for the Commission's retention of the cap. First, the Commission retains the cap because of its concern that spectrum aggregation could result in consolidation among current or future CMRS competitors resulting in fewer choices for consumers.²⁴ It then recognizes that the incumbent cellular carriers have in excess of 70 percent of customers in almost all markets.²⁵ The Commission finds that the cap has not constrained these or other carriers from offering either voice or advanced services.²⁶ The Commission then acknowledges that the cap is necessary in a still-developing market where market entry is not easy and PCS competitors have not yet begun operations.²⁷ The Commission explains that the spectrum cap is a legitimate means of promoting competition, and limiting consolidation—at a time when the PCS sector remains in its early stage of

²¹ BellSouth Petition at 7.

²² Id. at 7-8 (underline added).

²³ See, e.g., Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, Section 1.21: General Standards on Geographic Market Definition.

²⁴ Spectrum Cap Order at ¶¶20 and 30.

²⁵ Id. at ¶25.

²⁶ Id. at ¶26.

²⁷ Id. at ¶31.

development.²⁸ The Commission also notes that the increase in local mobile carriers guaranteed by the spectrum cap has been the catalyst for lower consumer prices, modernization of networks and product innovation.²⁹ Rather than fixating on market shares, the Commission correctly identified a variety of factors that underlie its decision.³⁰

III. CONCLUSION

The Commission should deny these petitions for reconsideration. They present no justifications for further modifying the spectrum cap at this time. The Commission should invite these and other interested parties to present evidence of changed market conditions in its next biennial review.

Respectfully submitted,

**PERSONAL COMMUNICATIONS INDUSTRY
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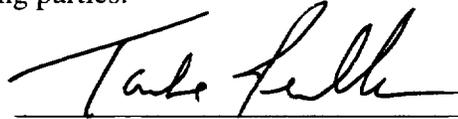
²⁸ Id. at ¶¶33-34. PCIA notes that the Commission viewed HHI levels as just one measurement as to the state of PCS development.

²⁹ Id. at ¶¶43-44.

³⁰ The Commission sets out a similar litany of public interest findings to substantiate its retention of the cellular cross-interest rule. Spectrum Cap Order at ¶¶70-76.

CERTIFICATE OF SERVICE

I, Taube Pecullan, hereby certify that a copy of the Opposition Of The Personal Communications Industry Association To The Petitions For Reconsideration was served via hand delivery* or by mail to the following parties:



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