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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
1998 Biennial Regulatory Review –)	
Spectrum Aggregation Limits)	WT Docket No. 98-205
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 Commission's Rules – Broadband PCS)	WT Docket No. 96-59
Competitive Bidding and the Commercial)	
Mobile Radio Service Spectrum Cap)	
)	
Implementation of Sections 3(n) and)	
332 of the Communications Act)	GN Docket No. 93-252
)	
Regulatory Treatment of Mobile Services)	

COMMENTS OF GTE

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COMMENTS OF GTE

In accordance with Section 1.429(f) of the Commission’s Rules, 47 C.F.R.
§ 1.429(f), GTE Service Corporation and its below-listed affiliates¹ (“GTE”) respectfully
submit these comments in support of the Petitions for Reconsideration filed by

¹ GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., GTE West Coast Incorporated, and Contel of the South, Inc., GTE Communications Corporation, and GTE Wireless Incorporated.

BellSouth Corporation ("BellSouth") and the Cellular Telecommunications Industry Association ("CTIA") in the above-captioned matter on November 8, 1999.²

I. Introduction and Summary

BellSouth and CTIA seek reconsideration of the Commission's September 15, 1999, Report and Order retaining the CMRS spectrum cap and cellular cross-interest rules, with certain modifications.³ As discussed in detail below, GTE agrees that reconsideration is necessary for the following reasons:

- The Commission's decision to retain the CMRS spectrum cap is premised on an ill-defined and overly narrow market analysis that overstates the level of concentration and understates the level of competition in the CMRS marketplace;
- An accurate analysis of the state of CMRS competition makes plain that the spectrum cap is outdated and unwarranted;
- Retention of the spectrum cap will stifle the development of advanced wireless products and services in this country, injuring U.S. consumers and the U.S. economy;
- Relatedly, maintenance of the spectrum cap as applied to existing allocations for cellular, broadband PCS, and SMR operations and newly available spectrum in these services, such as the broadband PCS C and F block spectrum scheduled for reauction this July, cannot be reconciled with the Commission's decision declining to extend the cap to the 700 MHz band – indeed, as discussed by GTE in comments filed recently in connection with the C and F block reauction, enforcing the cap as applied to the C and F

² Petition for Reconsideration of BellSouth Corporation, WT Docket No. 98-205, *et al.*, (filed Nov. 8, 1999) ("*BellSouth Petition*"); Petition for Reconsideration of the Cellular Telecommunications Industry Association, WT Docket No. 98-205, *et al.* (filed Nov. 8, 1999) ("*CTIA Petition*").

³ 1998 Biennial Regulatory Review, *Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, FCC 99-244 (rel. Sept. 22, 1999) ("*Spectrum Cap Report and Order*").

block spectrum would create an anomalous situation for entities interested in bidding on either or both that spectrum and the 700 MHz spectrum because many view these allocations as largely interchangeable;

- Finally, although the record and available evidence call for outright elimination of the spectrum cap, GTE agrees with CTIA that, at a minimum, forbearance from enforcement of the cap is mandated under Section 10 of the Communications Act because the Commission did not make the showing necessary to justify retaining the spectrum cap rule.

GTE submits that revision of the *Spectrum Cap Report and Order* along these lines will serve the public interest by ensuring that an unnecessary and unduly burdensome regulatory constraint is eliminated, thereby permitting the CMRS marketplace to reach its full competitive and innovative potential.

II. Background

The Commission adopted the CMRS spectrum cap in 1994 as a means "to prevent licensees from artificially withholding capacity from the market."⁴ The cap applies to PCS, SMR, and cellular licensees and, in simple terms, limits the amount of spectrum that licensees with an attributable interest may hold in these services in any single geographic area.⁵

In December of 1998, the Commission issued a Notice of Proposed Rule Making ("*Notice*") seeking comment on whether it should "retain, modify, or repeal" the spectrum cap in light of marketplace developments.⁶ In particular, the Commission

⁴ Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, 9 FCC Rcd 7988, 8108 (1994) (Third Report and Order).

⁵ 47 C.F.R. § 20.6.

⁶ 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless

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observed that, since it last reviewed the spectrum cap in 1996, significant changes had occurred in the CMRS industry, including: deployment of digital wireless services; issuance of new licenses authorizing the use of additional CMRS spectrum; widespread provision of an expanded array of mobile services; enhanced competition from SMR, paging, wireless data, and other entities; and changes brought about by the implementation of the Telecommunications Act of 1996.⁷

GTE and numerous other commenters responding to the *Notice* agreed that these changes, and the trend toward nationwide and regional wireless pricing plans, rendered the spectrum cap outdated and unnecessary as a means for promoting competition. Numerous commenters also agreed that continued enforcement of the cap is contrary to the public interest because it prevents the CMRS marketplace from realizing a number of market efficiencies and hampers effective development of advanced wireless services, including the array of high-speed, high-bandwidth offerings that currently define Third Generation ("3G") mobile telecommunications systems.

Despite the strong evidence in the record, the Commission decided to retain the spectrum cap with a minor modification permitting the aggregation of a greater spectrum quantity (55 MHz as opposed to 45 MHz) in rural areas.⁸ BellSouth and CTIA

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Telecommunications Services, 13 FCC Rcd 25142, 25148 (1998) (Notice of Proposed Rule Making).

⁷ *Id.* at 25147.

⁸ The Commission also made minor adjustments to the spectrum cap attribution rules, including establishing a separate attribution benchmark for passive institutional

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have filed petitions for reconsideration of this decision.⁹ Both entities argue that the Commission's decision to retain the cap is premised on faulty reasoning and is contrary to the public interest. In addition, CTIA maintains that the Commission's refusal to grant its Petition for Forbearance cannot be sustained because the agency failed to meet its burden of demonstrating that continued enforcement of the cap is necessary under the criteria listed in Section 10. For the reasons that follow, GTE supports BellSouth's and CTIA's requests for reconsideration.

III. The Commission's Decision To Retain the CMRS Spectrum Cap Is Based on an Ill-Defined Market Analysis That Overstates the Level of Concentration and Understates the Level of Competition in the CMRS Marketplace

A. The Commission's Choice of Markets Is Not Adequately Explained and Significantly Skewed the Agency's Competitive Analysis

At the outset, GTE agrees with BellSouth that the Commission's failure to explain the market parameters used in its analysis of the CMRS marketplace constitutes a breach of the agency's obligation to articulate "a reasoned path from the facts and

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investors and amending the rules regarding ownership interests held in trusts in various respects.

⁹ Western Wireless Corporation and VoiceStream Wireless Corporation filed a "Joint Petition for Limited Clarification" seeking clarification of certain practical issues associated with the implementation of the rule changes increasing the cap to 55 MHz in rural areas. See Joint Petition for Limited Clarification of Western Wireless Corporation and VoiceStream Wireless Corporation, WT Docket No. 98-205, *et al.* (filed Nov. 8, 1999).

considerations before [it] to the decision . . . reached.”¹⁰ This failure is particularly egregious in this instance because the Commission's choice of markets seriously exaggerated the level of concentration that exists in the CMRS marketplace.

The Commission appears to have used the market for “interconnected mobile voice telephone services”¹¹ in conducting its competitive analysis. As BellSouth notes, however, the spectrum cap encompasses *all* CMRS services provided over cellular, broadband PCS, and SMR spectrum; the cap is not limited to interconnected voice services. Thus, in effect, although the Commission has found that all CMRS offerings provided over cellular, broadband PCS, and SMR spectrum are sufficiently competitive to warrant inclusion in the cap, it apparently does not believe all of these services warrant consideration when evaluating the level of competition in the CMRS marketplace for purposes of assessing the continued need for the cap. This discrepancy plainly does not pass muster as “reasoned decisionmaking.” Moreover, in addition to failing to include all services covered by the cap in its competitive analysis, the Commission refused to consider a number of offerings competitive with those services, such as mobile satellite service offerings, two-way messaging services, and other wireless data applications.¹² The end result is a significant understatement of the

¹⁰ *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1187 (D.C. Cir. 1996); see also *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 758 (6th Cir. 1995) (quoting prior decisions noting that an “agency must articulate a rational connection between the facts found and the choice made”).

¹¹ *Spectrum Cap Report and Order*, ¶ 46.

¹² See *id.* note 125.

degree of competition facing services included within the ambit of the CMRS spectrum cap.

The Commission's competitive analysis suffers from a similar flaw with respect to the geographic market used. Although the Commission never explicitly defined or otherwise discussed the relevant geographic market, its decision to retain the cap is premised to a large extent on Herfindahl Hirschman Index ("HHI") concentration levels calculated on the basis of cellular MSAs and RSAs.¹³ There are several flaws in this analysis. For example, the Commission does not appear to have contemplated the key consideration to be used in defining the relevant geographic market – namely, "the territories over which a particular . . . product is or could be marketed."¹⁴ Based on the extensive evidence in the record documenting the proliferation of nationwide and large regional marketing and pricing plans,¹⁵ one would have expected the use of a regional or nationwide geographic market or, at a minimum, an explanation why another market area was selected.

¹³ *Id.*, ¶¶ 35-37.

¹⁴ *Applications of 360° Communications Company, Transferor, and AllTel Corporation, Transferee, For Consent to Transfer Control of 360° Communications Company and Affiliates*, 14 FCC Rcd 2005, 2012 (Wireless Telecom. Bur.) (1998).

¹⁵ See, e.g., Reply Comments of GTE, WT Docket No. 98-205, at 11 and n.30 (filed Feb. 10, 1999) (discussing the trend toward nationwide service and pricing plans and listing other commenters noting this development). Unless otherwise noted, all comments and reply comments cited in this pleading were filed in WT Docket No. 98-205. Opening comments were filed on January 25, 1999; reply comments were filed February 10, 1999.

In addition, as BellSouth points out, the Commission's focus on cellular service areas "significantly skewed the . . . competitive analysis"¹⁶ upon which the agency's decision to retain the spectrum cap rests. In particular, BellSouth illustrates that the mere use of MTAs as opposed to MSAs and RSAs as the basis for performing an HHI analysis would have resulted in significantly reduced concentration figures.¹⁷ MSAs and RSAs are significantly smaller than MTAs, meaning that fewer carriers were included in the Commission's analysis, which in turn resulted in higher market share figures.¹⁸ BellSouth correctly observes that, "[b]y relying . . . 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."¹⁹ If the Commission had based its analysis on MTAs or larger geographic regions, the market share enjoyed by cellular carriers would have been divided among several more carriers and the HHI figures would have been significantly lower.²⁰

¹⁶ *BellSouth Petition*, at 7.

¹⁷ *Id.* at 7-8.

¹⁸ *Id.* at 8.

¹⁹ *Id.*

²⁰ See *BellSouth Petition*, at 7-8. GTE agrees with BellSouth that the overstated concentration figures reflected through an analysis based on MSAs and RSAs are particularly troublesome in view of the fact that, in many cases, MSAs and RSAs do not occupy 10 percent of the population in the relevant MTA and, therefore, the cellular holdings in such areas would not be deemed significant for purposes of applying the spectrum cap rule regardless of the cellular licensee's market share.

B. The Commission's Reliance on HHI Figures Ignores the Dynamic Nature of the CMRS Marketplace and Is Contrary To Precedent

Along these same lines, GTE agrees with BellSouth and CTIA that the Commission's reliance on HHI figures as the basis for retaining the spectrum cap is erroneous because it overlooks the dynamic nature of the CMRS marketplace. As both Petitioners point out – and as the Commission itself acknowledged – static market share data do not accurately depict competitive conditions in dynamic industries because they understate the future competitive significance of new entrants and overstate the risks of anticompetitive conduct.²¹ Despite recognizing this, and despite acknowledging reports indicating that new entrants account for at least 50 percent of new CMRS subscribers,²² the Commission based its decision to retain the spectrum cap on historical market share data. This approach, particularly in the context of an industry as vibrant as the CMRS marketplace, calls the Commission's entire analysis into question.

²¹ See *Spectrum Cap Report and Order*, at ¶¶ 39, 41; see also *BellSouth Petition*, at 10-3; *CTIA Petition*, at 6-8.

²² *Spectrum Cap Report and Order*, at ¶ 39. According to the *Spectrum Cap Report and Order*, analysts indicate that (1) new entrants accounted for more than 45 percent of new subscriber growth in the CMRS industry in the last two quarters of 1998, and (2) in 1999, combined PCS and digital SMR providers were expected to account for 54 percent of total net wireless subscriber additions, compared to 46 percent for cellular incumbents. *Id.*

In addition, this approach is starkly at odds with numerous prior decisions focusing on forward-looking measures of competition.²³ In previous decisions involving the CMRS spectrum cap, various mergers, and cable television horizontal ownership limits, the Commission has consistently stressed that an accurate measure of market concentration must “reflect the dynamic nature of the marketplace” and the impact of new competitors on the market shares of incumbent industry participants.²⁴ Without explanation, the Commission departed from this established precedent in its analysis of the CMRS marketplace and, as a result, subjected the CMRS industry to a higher competitive standard than other market sectors.

Indeed, rather than factoring forward-looking evidence of competition into its analysis, the Commission discounted information submitted by GTE and other commenters showing: (1) significant reductions in the prices charged to consumers;

²³ See *BellSouth Petition*, at 12-14; *CTIA Petition*, at 6-8.

²⁴ See, e.g., *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 – Horizontal Ownership Limits*, FCC 99-289, ¶ 30 (rel. Oct. 20, 1999) (including all multiple video programming distributors (“MVPDs”), as opposed to cable operators only, in assessing the level of competition in the cable industry because of “the past and expected future growth of non-cable MVPDs”); *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18048 (1998) (observing that, “[a]s the *Horizontal Merger Guidelines* make clear, . . . HHI analysis provides guidance . . . but is not meant to be conclusive[.]” and that, “[a] more complete measure of market concentration accounts for changing market conditions brought about by, among other things, new market participants”); *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, 11 FCC Rcd 7824, 7870 (1996) (finding HHI indices useful because the Commission “lack[ed] empirical data about the actual performance of a market that includes both cellular service and fully deployed broadband PCS”).

(2) the increasing trend toward nationwide service and pricing plans; (3) the ease with which customers are able to switch service providers; (3) steadily declining barriers to entry; and (4) economic characteristics of spectrum-based services that frustrate the exercise of market power. In opting to disregard this evidence, the Commission stated that, "the critical issue is whether these and other indicia of increased competition would be threatened by a reconsolidation of the industry."²⁵ The Commission thus not only premised its decision to retain the spectrum cap on static market data, it also based that decision on speculative concerns as opposed to marketplace realities.

Contrary to the Commission's "concern that competition in CMRS markets is not fully developed,"²⁶ GTE and numerous other commenters provided overwhelming evidence demonstrating that the CMRS marketplace is in fact vigorously competitive. As expected, competition in the CMRS industry has continued to thrive. A year ago, when initial comments and replies in this proceeding were filed, available estimates showed that three or more mobile telephone providers served markets representing 87 percent of the U.S. population and four or more carriers served markets representing 68 percent of the population.²⁷ As of last June, at least one new entrant was offering service in over 335 BTAs, with coverage representing 95 percent of the nation's total population.²⁸

²⁵ *Spectrum Cap Report and Order*, ¶ 40.

²⁶ *Id.*, ¶ 35.

²⁷ See, e.g., Comments of GTE at 7-8.

²⁸ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*,
(Continued...)

Of even greater importance, the Commission's *Fourth Annual CMRS Competition Report* indicates that, between June of 1998 and June of 1999, new entrants "added significantly to the levels of competition in BTAs where other new entrants were already in service."²⁹ In particular, the number of BTAs with four new entrants increased from 13 to 45, representing a change in coverage area population from 25 million to 82 million people. Furthermore, as of June 1999, 74 percent of the population had at least five mobile telephone operators providing coverage in some portion of the relevant market area as opposed to 54 percent a year earlier.³⁰

In fact, from December of 1997 to December of 1998, the CMRS marketplace witnessed the largest-ever, single-year gain in subscribership, with an increase from 55 million to 69.2 million.³¹ By June 1999, the number of subscribers had increased to 76 million.³² Based on heightened demand for wireless services, analysts have significantly accelerated projected wireless penetration rates. According to one report, market analysts for Lehman Brothers recently amended their original prediction of a 70

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Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC 99-136, at 19 (rel. June 24, 1999) ("*Fourth Annual CMRS Competition Report*").

²⁹ *Id.* at 19.

³⁰ *Id.* at 19-20.

³¹ *Id.* at B-2.

³² *BellSouth Petition*, at 10 (citing CTIA Semi-Annual Wireless Industry Survey, <<http://www.wow-com.com/wirelessurvey>>).

percent penetration rate by 2007 to indicate that this milestone is likely to be reached as early as 2002.³³

Just as the record generated in response to the *Notice* indicates that the CMRS marketplace was robustly competitive a year ago, these statistics show that the industry is even more competitive today. Moreover, the booming demand for wireless services means that carriers will further quicken already expeditious plans to roll-out service. As a result, more and more markets will be served by an increasing number of CMRS carriers in short order.

Finally, the Commission's conclusion that retention of the spectrum cap is necessary to preserve competition in the CMRS industry disregards evidence submitted by GTE and others illustrating that structural attributes of the CMRS marketplace make anticompetitive behavior illogical as an economic matter and virtually impossible. In particular, based on an economic study prepared by J. Gregory Sidak and David J. Teece, GTE showed that six market attributes serve as a check on the exercise of anticompetitive conduct in the CMRS marketplace and mitigate the continued need for the spectrum cap. Specifically, as outlined in GTE's comments:

- The growing trend toward nationwide service and pricing plans places a competitive check on all CMRS operators, including those offering more localized service;
- It is exceedingly difficult for any CMRS carrier to behave anticompetitively because exertion of market power in the CMRS industry requires domination of both spectrum and capacity-expanding equipment;

³³ Elizabeth V. Mooney, *Wireless Growth, New Services Bode Well for Tower Sector*, Radio Communications Reports, (Feb. 11, 2000).

- The limited spectrum requirements (10 MHz) necessary to compete in the existing market for wireless voice services means that the presence of even smaller firms restrains market power;
- Declining barriers to entry in the existing CMRS marketplace, including in particular, falling barriers to acquisition of adequate spectrum capacity, capital, and tower sites, act as a significant deterrent to anticompetitive behavior;
- The "durable" nature of spectrum deters unilateral exercise of market power because predatory pricing behavior cannot be sustained in the long run; and
- The high costs associated with efforts to warehouse spectrum make it impossible for any single carrier to corner the market.³⁴

In summary, GTE submits that that an analysis of the CMRS industry based on (1) accurately drawn product and geographic market definitions, (2) forward-looking competition, and (3) a complete picture of the market's attributes, makes plain that the CMRS spectrum cap is no longer necessary or appropriate. The Commission's characterization of the level of competition in the CMRS marketplace and its resultant conclusion that the spectrum cap should be retained in order to prevent "the competitive success . . . in these markets [from being] reversed"³⁵ simply cannot be reconciled with actual market conditions.

IV. Retention of the CMRS Spectrum Cap Will Thwart Effective Development of Innovative Wireless Technologies in This Country, Harming U.S. Consumers and the U.S. Economy

GTE also agrees with BellSouth and CTIA that reconsideration is warranted because retention of the spectrum cap will severely undermine the development and

³⁴ Comments of GTE at 11-18; Reply Comments of GTE at 10-15.

³⁵ *Spectrum Cap Report and Order*, ¶ 41.

deployment of advanced Third Generation ("3G") products and services in the United States. Such a result is clearly contrary to the public interest because it would prevent domestic mobile service providers from being able to respond to growing consumer demand for advanced, high-speed mobile connectivity and would place U.S. carriers at a significant disadvantage vis-à-vis their competitors in other parts of the world.

In their comments and replies responding to the *Notice*, GTE and numerous other parties explained that a failure to eliminate the spectrum cap is likely to impede the introduction of advanced technologies in the U.S., including the range of high-speed, high-bandwidth products and services currently envisioned under the 3G umbrella.³⁶ While the Commission acknowledged that "these possibilities are a concern," it declined to lift the cap "at the present time,"³⁷ noting that: (1) the record did not provide sufficiently concrete evidence regarding the amount of spectrum needed for 3G technologies or indicating exactly when that spectrum would be needed; (2) there are few markets in which carriers are approaching the spectrum cap limit; (3) alternatives to CMRS spectrum exist; and (4) no party had submitted a request for waiver seeking use of additional spectrum to implement a business plan including provision of 3G services.³⁸

The Commission's characterization of the record is not entirely accurate. First, the record *does* contain specific information documenting the amount of spectrum

³⁶ See, e.g., Reply Comments of GTE at 16-18 & n.55.

³⁷ *Spectrum Cap Report and Order*, ¶ 61.

³⁸ *Id.*, ¶ 61.

needed to offer advanced 3G services. In particular, as discussed in detail in GTE's opening comments, equipment vendors responding to the Commission's IMT-2000 Public Notice generally agreed that carriers require additional spectrum, in excess of the quantities permitted under the spectrum cap, in order to provide advanced 3G services.³⁹ GTE further explained that, although the bandwidth requirements for projected 3G technologies were still being studied, a minimum estimated bandwidth of 2 x 5 MHz would be needed to provide wireless Internet access at the near term projected data rate of 384 kbit/sec, while at least 2 x 15 MHz would be required for data rates exceeding 2 Mbit/sec.⁴⁰ More recently, in an *ex parte* letter filed September 1, 1999, BellSouth estimated that 70 to 90 MHz of CMRS spectrum – 25 to 45 MHz in excess of the 45 MHz cap applicable to urban areas and 15 to 35 MHz in excess of the 55 MHz cap applicable to rural regions – would be needed to satisfy demand for 3G services.⁴¹

Second, with respect to timing of plans for 3G deployment, it is widely known that 3G equipment is becoming available this year. In its *ex parte* letter, BellSouth

³⁹ Comments of GTE at 21-22 (noting that Motorola, Northern Telecom, and Lucent all agree that current allocations will not be sufficient to support expected demand for 3G services and quoting Motorola for the proposition that, “[a]bsent the removal or relaxation of this spectrum cap, many of these [existing PCS and cellular] licensees will not be able to participate in all of the 3G services under development.”).

⁴⁰ *Id.* at 22 (citing Comments of Bell Mobility, Report No. IN-98-48, at 3 (filed Sept. 30, 1998)).

⁴¹ Letter from Ben G. Almond, BellSouth Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission, WT Docket No. 98-205, at 2 (dated Sept 1, 1999) (“*BellSouth Ex Parte Letter*”); see also *BellSouth Petition*, at 15-16.

explained that interested carriers are likely to negotiate contracts with equipment vendors in mid-to-late 2000. As BellSouth points out, it is essential that carriers and manufacturers have regulatory certainty with respect to available spectrum for deployment of new services before they can make firm commitments pertaining to manufacturing and delivery of products and finalize plans for early roll-out.⁴²

Third, as proof of the pressing need for relief, AT&T Wireless and BellSouth recently filed requests for waiver of the spectrum cap so that these carriers can participate in the upcoming reauction of certain broadband PCS C and F block licenses without regard to the cap. Both companies indicate that their requests stem from the need for additional spectrum in excess of the cap necessary to deploy advanced 3G and broadband data services and to ensure their continued ability to meet demand for existing services.⁴³

Similarly, Bell Atlantic Mobile recently filed a Petition for Limited Forbearance from enforcement of the cap to permit it access to the C and F block spectrum available for reauction so that it can "respond to growing demand for existing and . . . new

⁴² *BellSouth Ex Parte Letter*, at 3.

⁴³ See *AT&T Wireless Services, Inc., Petition for Waiver of the CMRS Spectrum Cap Requirements of 47 C.F.R. § 20.6 for the PCS Frequency Blocks C and F Auction to Begin on July 20, 2000* (filed Feb. 15, 2000); *BellSouth Corporation, Petition for Waivers of the CMRS Spectrum Cap Requirements of 47 C.F.R. § 20.6 and the Eligibility Restrictions of 47 C.F.R. § 24.709 For the PCS Frequency Blocks C and F Auction to Begin July 26, 2000* (filed Feb. 17, 2000).

spectrum intensive technologies.”⁴⁴ In addition, as mentioned, based on similar concerns, GTE recently submitted comments urging the Commission not to apply the spectrum cap to the C and F block reauction.⁴⁵ As outlined in those comments, the C and F block spectrum – like other CMRS spectrum – is critical to the roll-out of advanced 3G services and is more compatible with 3G equipment being developed by European companies than other perceived homes for 3G, such as the 700 MHz band.⁴⁶

Significantly, in their pleadings asking the Commission not to extend the spectrum cap to the C and F block spectrum being reaucted, all of these parties highlight the fact that developments in the CMRS marketplace since the spectrum cap was originally adopted – including the explosion in demand for existing and advanced mobile communications capabilities – make the cap particularly ill-suited and outdated in today’s environment. This rationale is true not only in the context of the C and F block reauction but extends equally to all CMRS services covered by the cap. Moreover, as outlined in GTE’s C and F block comments, retaining the cap as applied to some CMRS spectrum (e.g., the C and F blocks and other CMRS allocations) but not as applied to other spectrum available for comparable operations (e.g., the 700 MHz and) puts potential bidders and other affected parties in an anomalous position that can

⁴⁴ Bell Atlantic Mobile, Inc., Petition for Limited Forbearance From The CMRS Spectrum Cap for the Reauction of Broadband PCS Licenses, at 9 (filed Feb 17, 2000) (“*Bell Atlantic Mobile Petition for Forbearance*”).

⁴⁵ See Comments of GTE, *Reauction of Certain C and F Block Broadband PCS Licenses*, DA 00-191, 00-145 (filed Feb. 22, 2000).

⁴⁶ *Id.* at 12.

only be explained by the fact that a regulatory requirement happens to apply in one instance but not in the other. This type of anomaly is precisely what Congress sought to avoid in directing that telecommunications policy be shaped by market forces as opposed to regulatory requirements.

Fourth, the “alternatives to CMRS spectrum” cited by the Commission as possible homes for 3G deployment are all fixed as opposed to mobile allocations and are all unworkable given existing technological capabilities. Initially, most of the listed services – namely, LMDS, DEMS, and 39 GHz – suffer from physical limitations because they are located at 24 GHz or higher. No spectrum above 3 GHz has been targeted internationally for 3G services precisely because these frequencies lack the propagation characteristics needed to provide mobility.⁴⁷ In addition, although the remaining band cited by the Commission, MMDS, is below 3 GHz, its utility is limited by the fact that it is used domestically by the Instructional Television Fixed Service (“ITFS”) for educational video programming. In short, the simple fact is that CMRS allocations are currently the most suitable and most logical location for 3G deployment in this country.

Moreover, the Commission’s approach does not fully consider the impact retention of the spectrum cap will have on U.S. consumers and the competitive viability of U.S. wireless operators in the global marketplace. It is widely acknowledged that the U.S. is “behind the curve” in terms of the development of 3G systems because it has

⁴⁷ In the international work attempting to establish 3G spectrum requirements, the 698-960 MHz, 1710-1885 MHz, and 2520-2670 MHz bands are being studied for possible use for 3G services, representing a total of approximately 557 MHz of spectrum.

not allocated any spectrum specifically for 3G.⁴⁸ The European Union, Finland, Germany, the United Kingdom, Japan, and numerous other countries have either begun auctioning spectrum specifically targeted for 3G, identified spectrum to be used specifically for 3G applications, or at least started this process.⁴⁹ The U.S., on the other hand, has made some spectrum (but not nearly enough) in the 700 MHz band available for 3G (and other) applications⁵⁰ but has, for the most part, left wireless providers to fend for themselves using existing allocations. Most CMRS carriers use their existing spectrum to meet spiraling demand for mobile voice service. As Bell Atlantic Mobile recently advised the Commission, "significant additional spectrum . . . will be needed to provide high-speed, wide-bandwidth technologies, multimedia, Internet access, imaging and other '3G' services."⁵¹

As a result of allocation policies in this country, "the U.S. lags far behind Asia and Europe"⁵² in the development of 3G wireless systems despite strong consumer demand for faster and more advanced wireless communications technology, including demand for superior voice quality and data services that support Internet access and

⁴⁸ See, e.g., Chuck Holt, *Girding for a Fight Over 3G Spectrum*, *Wireless Review* (Feb. 1, 2000).

⁴⁹ See *BellSouth Petition*, at 17-18 & n.55; *CTIA Petition*, at 8.

⁵⁰ That spectrum is currently occupied by television stations operating on channels 60-69, and will in all likelihood remain encumbered until 2006, undermining its present utility.

⁵¹ *Bell Atlantic Mobile Petition for Forbearance*, at 9.

⁵² Liane H. Labarba, *Jack of All Trades Gets a Partner: Service Providers find Alliances, Offer More*, *Telephony* (Feb. 7, 2000).

video and multimedia applications. Illustrating this point, a report issued recently by The Strategis Group estimates that, "[b]y 2006, the U.S. [will] have less than 14 million subscribers of 3G and 2.5G services, compared to Japan's nearly 40 million users."⁵³ If the FCC retains its existing rules restricting the provision of 3G services because of constraints such as the CMRS spectrum cap, analysts predict that U.S. launch of 3G services will lag behind other countries by as much as 2-4 years.⁵⁴

Significantly, the Commission itself has acknowledged that the spectrum cap is a constraint on effective 3G deployment. In particular, the Commission declined to extend the cap to the 700 MHz band (despite the fact that CMRS operations will be permitted in that band) because of the agency's "interest in facilitating the use of these bands for next generation applications that would benefit from . . . economies of scale provided by licensing on a national or large regional basis."⁵⁵ Removal of the spectrum cap as applied to existing broadband PCS, cellular, and SMR allocations is likewise essential to realize economies of scale necessary to facilitate introduction of 3G and other advanced wireless offerings in existing spectrum allocated for broadband PCS, cellular, and SMR services.

⁵³ *Id.*

⁵⁴ Matt Hamblen, *3G Wireless*, Computerworld (Feb. 21, 2000) (estimating that Japan will be the first country to launch an advanced 3G system in April of 2001, followed by Europe in 2002, with the U.S. launch occurring between 2003 and 2005).

⁵⁵ *Service Rules for the 746-764 and 776-794 MHz Bands, and Revision to Part 27 of the Commission's Rules*, FCC 00-5, at ¶ 52 (rel. Jan. 7, 2000).

V. Because the Commission Failed To Meet Its Burden of Proving that Retention of the Spectrum Cap Is Warranted, the Cap Should Be Eliminated In Its Entirety or, at a Minimum, the Commission Should Forbear From Future Enforcement

For the reasons outlined above, GTE submits that the Commission failed to meet its burden of proving that retention of the CMRS spectrum is warranted. In particular, the Commission has not established that the spectrum cap is necessary in light of the "meaningful economic competition"⁵⁶ that exists in the CMRS marketplace, nor has it demonstrated that the cap is the least restrictive means for promoting the goals identified in the *Spectrum Cap Report and Order*.⁵⁷ As a result, the cap should be eliminated without qualification.

Nevertheless, GTE agrees with CTIA that, at a minimum, the Commission should reconsider its refusal to grant CTIA's Section 10 Petition for Forbearance. Section 10 requires the Commission to forbear from applying any regulation or statutory provision if the agency finds that: (1) enforcement of the regulation or provision in question is not necessary to ensure that the relevant charges, practices, and classifications are "just and reasonable and not unjustly or unreasonably discriminatory;" (2) enforcement of the

⁵⁶ See 47 U.S.C. § 161; *see also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1418 (1994) (observing that Congress's 1993 amendments to Section 332 of the Communications Act "reflect[] a general preference in favor of reliance on market forces rather than regulation," and that Section 332(c) itself "places on [the Commission] the burden of demonstrating that continued regulation will promote competitive market conditions," and requires that the CMRS marketplace be "subject to only as much regulation for which the Commission . . . demonstrates a clear cut need.").

⁵⁷ See *Spectrum Cap Notice*, 13 FCC Rcd at 25133.

regulation or provision in question is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.⁵⁸ The Commission did not satisfy its affirmative obligation of showing that forbearance is inappropriate in the instant matter. In fact, as CTIA notes, the Commission "did little to address many of the matters raised by CTIA."⁵⁹

Had the Commission undertaken the analysis required under Section 10, it would have been clear that forbearance is statutorily mandated. There is simply no evidence that continued enforcement of the spectrum cap is needed to prevent discriminatory, unjust, or unreasonable behavior in the CMRS marketplace. The record demonstrates that the CMRS industry is highly competitive, the CMRS market structure is structurally resistant to discriminatory and anticompetitive conduct, and, as proof of these points, the record is devoid of any actual allegations or evidence of discriminatory or unreasonable carrier behavior.

Nor is there any evidence in the record showing that continued enforcement of the cap is necessary to protect consumers. Quite to the contrary, the record reflects that CMRS prices have continually been falling and subscribership is climbing at an unprecedented rate. Finally, rather than showing that continued enforcement of the cap is needed to serve the public interest, the record indicates that retention of the cap is deeply injurious to the public interest because it retards innovation, prevents carriers

⁵⁸ 47 U.S.C. § 160(a).

⁵⁹ *CTIA Petition for Reconsideration*, at 4.

from being able to offer advanced wireless services demanded by consumers, and prohibits efficient functioning of the marketplace.

Stated simply, the weight of the record favors elimination of or, at a minimum, forbearance from continued enforcement of, the CMRS spectrum cap. Proper application of the Section 10 forbearance test demonstrates that the Commission did not – and, indeed, could not – meet its burden of showing that continued enforcement of this rule is appropriate.

VI. Conclusion

For the reasons outlined above, GTE agrees with BellSouth's and CTIA's requests for reconsideration of the Commission's decision to retain the CMRS spectrum cap. The Commission's action is premised on an inaccurate depiction of the CMRS marketplace and is not supported by the weight of the record or actual market conditions. Moreover, retention of the cap is contrary to the public interest because, as shown in this proceeding and in the context of the C and F block reauction, it prevents effective development of advanced wireless products and services. In short, the Commission has not met its burden of proving that retention of the cap is necessary or

beneficial. Accordingly, the decision to keep the cap should be reconsidered without delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

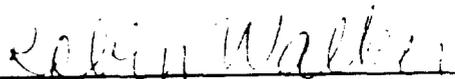
I, Robin Walker, hereby certify that on this 2nd day of March, 2000, a true copy of the foregoing "Comments of GTE" was served on the following persons via first class postage prepaid mail:

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