

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

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FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)
)
Amendment of the Commission's Rules)
Regarding Installment Payment Financing)
for Personal Communications Services (PCS))
Licenses)
_____)

WT Docket No. 97-82 /

SPRINT PCS REPLY COMMENTS

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Table of Contents

Summary of Reply Comments	ii
I. The Most Meaningful Step the Commission Can Take to Meet the Objectives of Section 309(j) Would be to Divide the 30 MHz Blocks into 10 MHz Blocks and Open Up the Bidding.....	4
II. The Commission Should Not Adopt Any Approach That Places BTAs in Different Tiers	7
III. A Reasonable Compromise Would be to Retain a Set-Aside for Half of the PCS Spectrum Originally Allocated to Designated Entities	8
IV. There Is No Basis for Increasing the Level of Bidding Credits	11
V. Conclusion	13

Summary of Sprint PCS Reply Comments

The evidence in this proceeding establishes the following:

1. At present, DEs control or have exclusive access to more than half of the original PCS licenses (48% of licenses had been set-aside with another 7% obtained in open auctions).
2. According to the FCC's data, service is being provided on only 3% of the set-aside licenses.
3. DEs successfully obtained over 140 of the nearly 1,000 D and E block licenses without any bidding credits.
4. Numerous firms are successfully competing in market using only 10 MHz of spectrum.

The law is also “well-settled” that “an agency must be able to explain its reasons for continuing to adhere to a particular policy when properly challenged in a specific case.” *Flagstaff v. FCC*, 979 F.2d 1566, 1571 (D.C. Cir. 1992). The PCS spectrum allocation plan that may have been appropriate in 1994 (before PCS was a service) is not an appropriate spectrum allocation plan in 2000.

The conclusions the Commission should draw from the foregoing are:

- (a) The most meaningful steps the FCC can take to ensure the rapid deployment of services and the efficient use of spectrum, while still promoting opportunities for DEs, would be to subdivide 30 MHz blocks into three 10 MHz blocks and open up the bidding.
- (b) The FCC should not group BTAs into different tiers, whereby the size of the BTA governs the type of favors extended to DEs. The assumptions underlying this “tiering” approach are flawed, and any lines that might be drawn would be inherently arbitrary and vulnerable to appellate challenge.

- (c) While the FCC would be fully justified in eliminating all favors for DEs (set-asides and bidding credits), a reasonable compromise that would promote all four of the statutory objectives would be the following:
- i. Retain the set-aside for half of the PCS spectrum originally allocated to DEs — that is, 20 MHz of the original 40 MHz. Even with such a reduction, DEs would still have exclusive access to 17% of all PCS spectrum and could also compete with other firms in acquiring additional PCS spectrum; and
 - ii. Retain the current level of bidding credits (15%/25%). This is no record evidence at all supporting any increase in these levels, and available economic testimony teaches that larger credits will only ensure that the re-auctioned licenses will not be awarded to those firms most valuing the spectrum and would result in the spectrum being underutilized.

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SPRINT PCS REPLY COMMENTS

Sprint Spectrum, L.P., d/b/a Sprint PCS ("Sprint PCS"), submits this reply to the comments filed in response to the *Notice of Proposed Rulemaking* ("NPRM").

"Small businesses" — like Leap Wireless International (which has a market capitalization in excess of \$1 billion and new cash reserves of \$300 million¹), TeleCorp and Tritel (which are merging in a \$5.3 billion deal to become the nation's ninth largest CMRS provider²), Cook Inlet (49% of which is owned by VoiceStream³), and Northcoast (which describes itself as a "very small business" while holding 49 PCS licenses and building systems in such places as Boston, Cleveland, Minneapolis, and New York⁴) — oppose any change in the DE eligibility rules that the Commission established six years ago. "Small business" interests contend that any change in the existing rules

¹ See, e.g., *Radio Communications Report*, "Leap Completes Smartcom Sale," at 49 (June 12, 2000)("Leap Wireless International Inc. completed the sale of its Chilean wireless venture, Smartcom PCS. . . . Leap received \$300 million in cash and notes . . .").

² See, e.g., *Mobile Communications Report*, "Telecorp and Tritel Combine PCS Holdings in \$5.3 Billion Deal" (March 6, 2000); *Radio Communications Report*, "TeleCorp, Tritel to Merge Properties in \$5.3 Billion Deal," at 49 (March 6, 2000).

³ See VoiceStream at 12 n.29.

⁴ See Northcoast at 1-2.

would be “arbitrary and capricious” and that the Communications Act does “not permit the compromises [that] the Commission suggests” in the *NPRM*.⁵

Of course, the Communications Act does *not* require use of set-asides for small businesses, much less set-asides for *one-third* of all PCS spectrum. Indeed, the PCS C and F blocks are the *only* radio licenses where set-asides have ever been utilized.⁶ Section 309(j) of the Act certainly requires the Commission to consider steps it can take to promote “disseminating licenses among a wide variety of applicants, including small businesses,” but the same statute further directs the Commission to take steps that promote “competition,” the “rapid deployment of new technologies, products, and services,” and the “efficient and intensive use of the electromagnetic spectrum.”⁷ In short, Section 309(j) directs the Commission to consider the *public* interest, *not* the interests of any one competitor, including individual “small businesses.”

Congress has given the Commission a difficult task: promote what experience has confirmed can be incompatible objectives (opportunities for small business vs. rapid deployment). Small business interests would have the Commission ignore completely the lessons that have been learned over the past six years. This, however, is a road that the Commission may not take. It is settled law that “changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so,”⁸ and that “[a]n agency must be able to explain its rea-

⁵ PCIA at 2 and 11.

⁶ See *NPRM* at ¶ 26.

⁷ 47 U.S.C. § 309(j)(3).

⁸ *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992). See also *Syncor v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997)(“[C]hanges in factual or legal circumstances may impose upon an agency the obligation to reconsider settled policy or explain its failure to do so.”); *Maier v. EPA*, 114 F.3d

sons for continuing to adhere to a particular policy when properly challenged in a specific case.”⁹

Set-asides are not necessary for small businesses to be successful in a spectrum auction. In fact, the PCS D and E auction results confirm that small businesses can compete successfully against large carriers for 10 MHz spectrum blocks *even without bidding credits*. Given these developments, the Commission would be fully justified in eliminating altogether both set asides and bidding credits.

Further, as a noted economist advised Congress earlier this year, “Consumer interests are best served by the entry of competitors. Given the significant scale economies [in the wireless industry], it is unlikely that true small businesses can provide this competition”:

On balance, the best policy may be to discontinue favors to designated entities, and to use spectrum caps to guarantee new entry where desirable and to prevent over-consolidation of spectrum.¹⁰

Sprint PCS does not propose such an approach, however, given that the Commission is not writing on a clean slate. A reasonable compromise that would promote all of four of the statutory objectives based on the facts as they exist today would be to reduce the amount of licensed PCS spectrum subject to a set-aside by half: from 40 MHz to 20 MHz. Even with such a reduction, small businesses would still have exclu-

1032, 1040 (D.C. Cir. 1997)(same); *Cincinnati Bell v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995)(“[W]here the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach.”).

⁹ *Flagstaff Broadcasting v. FCC*, 979 F.2d 1566, 1571 (D.C. Cir. 1992).

¹⁰ Peter Cramton, Professor of Economics, University of Maryland, “Lessons from the United States Spectrum Auctions,” Prepared Testimony before the Senate Budget Committee” (Feb. 10, 2000).

sive access to 17% of all PCS spectrum and they could additionally compete with other firms in acquiring additional PCS spectrum. With this approach, the Commission could have a high degree of confidence that at least 20 MHz of valuable PCS spectrum will be put to use rapidly, to the benefit of the American consumer.

I. The Most Meaningful Step the Commission Can Take to Meet the Objectives of Section 309(j) Would be to Divide the 30 MHz Blocks into 10 MHz Blocks and Open Up the Bidding

The most meaningful step that the Commission can take to ensure the rapid deployment of services and efficient use of spectrum, while still promoting opportunities for small business, would be to reconfigure available 30 MHz spectrum blocks into three 10 MHz blocks, and open up the bidding. As the Commission has recognized, “by increasing the number of available licenses through this reconfiguration . . . we will promote wider auction participation and license distribution in accordance with the goals of Section 309(j)” and “[s]maller bidders should find bidding for 10 MHz licenses more affordable.”¹¹ The experience with Auction No. 11, where entrepreneurs obtained 14% of all D and E block licenses, confirms that small business can compete against much larger firms for 10 MHz licenses — even where, as was the case with Auction No. 11, entrepreneurs were not afforded any bidding credits.¹²

There is widespread support among all commenters, both large and small, for reconfiguring the 30 MHz licenses into three 10 MHz blocks. For example, Radha Krushn Wireless Solutions “strongly supports” such a reconfiguration because it would

¹¹ *C Block Reauction NPRM* at ¶ 16.

¹² As Burst correctly points out (at n.10), the *NPRM* (at ¶ 40) incorrectly suggests that bidding credits were available in the D and E Auction No. 11. See *Broadband PCS Competitive Bidding*,

“allow the licenses to be awarded to wide variety of applicants, especially among small business and designated entities.”¹³ Similarly, Advanced Telecommunications Technology concurs that reconfiguration will make licenses “more affordable” to it, while extending to bidders like itself the “flexibility to aggregated adequate spectrum from their particular business plan within a market.”¹⁴ As Cook Inlet correctly observes:

[T]he value of one 30 MHz license may be so great that it is difficult for an entrepreneur to obtain, while a 10 MHz license may be more realistically within its reach.¹⁵

A handful a commenters opposes reconfiguration. For example, PCIA asserts that “10 MHz is simply not enough spectrum to construction a viable, competitive system in a market,” that “10 MHz blocks will not provide DEs with a meaningful opportunity to participate,” and that a “10 MHz license size dooms that licensee to inevitable failure.”¹⁶ These unsupported assertions are contracted by all available facts. North-coast Communications, which has already acquired nearly fifty 10 MHz licenses and is in the process of constructing its PCS systems, “agrees with the FCC’s conclusion that a 10 MHz license is a viable size to provide voice and certain data services. U S WEST Wireless, which serves over 600,000 customers using only 10 MHz licenses,¹⁷ is hardly “doomed to failure.” And in perhaps the most striking success story of all, in four short

11 FCC Red 7824, 7857 ¶ 71 (1996)(“We decline to extend installment payment plans or any other special provisions to small businesses bidding on the D and E blocks.”).

¹³ RK Wireless Solutions at 1-2.

¹⁴ Advanced Telecommunications Technology at 4-5. *See also* AirGate Wireless at 4.

¹⁵ Cook Inlet at 7-8.

¹⁶ PCIA at 17-18.

¹⁷ *See* www.uswest.com/about/index.html.

years Sprint PCS has become the nation's fourth largest wireless carrier using only 10 MHz or less of its available spectrum.¹⁸

Leap Wireless contends that DEs require a minimum of 20 MHz in order to provide third-generation ("3G") services, and it favors only a reconfiguration of 30 MHz blocks into one 10 MHz block and one 20 MHz block.¹⁹ Of course, reconfiguring the licenses into 10 MHz blocks would not preclude Leap from acquiring 20 MHz of spectrum if important to its business case.²⁰ To the contrary, as noted by U.S. AirWaves, a small business that apparently is also interested in acquiring 20 MHz of spectrum, a "10 MHz C block . . . reconfiguration could provide each auction participant with the flexibility to bid on amounts of spectrum tailored to its own distinct business needs."²¹

In summary, the record evidence is uncontroverted that viable businesses can be operated with 10 MHz of spectrum, that reconfiguring 30 MHz blocks into three 10 MHz blocks would increase opportunities for small businesses, and that such a reconfiguration does not preclude anyone, including small businesses, from obtaining more than 10 MHz in a market.

¹⁸ See *Telephony*, "To Thine Own be True" (Feb. 28, 2000) ("In most major metropolitan areas, Sprint PCS currently uses only about 7.5 MHz out of the 30 MHz it holds.").

¹⁹ See Leap at 14.

²⁰ Nor does 10 MHz preclude Leap, a CDMA operator, from deploying 3G. CDMA 3G "calls for operators to combine three of CDMAOne's current 1.25 MHz channels to transmit data" — that is, operate within a pair of 5 MHz channels. *Telephony*, "To Thine Own be True" (Feb. 28, 2000).

²¹ U.S. AirWaves at 5. See also U S WEST at 4 ("[T]here is nothing to prevent bidders from aggregating multiple 10 MHz C block licenses in a market to satisfy any need for a greater amount of spectrum.").

II. The Commission Should Not Adopt Any Approach That Places BTAs in Different Tiers

The Commission has requested comment on a proposal made by some parties to divide BTAs into two or more tiers, whereby fewer licenses would be set-aside in the more populous BTAs and more licenses would be set-aside in the more rural licenses.²² This approach has a certain appeal at first blush. After all, as the Commission correctly notes, DEs have had greater success in smaller markets than in larger markets.²³ Nonetheless, Sprint PCS strongly recommends that the Commission not adopt a tiered BTA approach.

There are several fatal flaws with any tiered approach, and Sprint PCS questions whether any tiered approach would survive appellate appeal. First, proponents justify tiering under the theory that more populous areas require more capital to build out and provide service. But this argument ignores the unassailable fact that the revenue opportunities in urban areas are also much greater (explaining why PCS A & B block licensees, like cellular carriers before them, focused their initial construction on the urban markets).²⁴ As TeleCorp/Tritel note, the argument in favor of tiering is “not only unfounded, it is ‘backwards’”:

[T]he most difficult places in which to compete are rural, sparsely populated markets, . . . not the population-dense markets for which PCS was created. This is especially so since recent meaningful re-

²² See *C Block Reauction NPRM* at ¶¶ 28-30.

²³ See *NPRM* at ¶ 30.

²⁴ “Both Tier 1 and Tier 2 market infrastructures require a very high fixed-cost investment, but Tier 1 markets, due to their higher populations, present the opportunity for much greater revenue streams to offset initial costs. The potential for greater returns may lead to increased financing and outside investment opportunities. Therefore, Tier 1 markets might allow entrepreneurs to generate business models that, as a whole, are both more favorable and more feasible than Tier 2 markets.” *NextWave* at 6.

ductions in equipment prices serve to offset significantly the advantages of incumbency.²⁵

According to U.S. AirWaves, which has an experienced management team, tiering would “significantly reduce the economic opportunities available to small business by artificially relegating them to the ‘backwaters’ of small niche markets,” would “undermine the ability of small businesses to obtain financing,” and would also “limit partnering opportunities.”²⁶

A second problem with tiering is finding a rational basis upon which to draw the lines separating BTAs in different tiers. For example, with a 2.5 million threshold, it is not apparent why small businesses should have more spectrum set aside in San Diego (1990 pop: 2,498,016), than in Pittsburgh (1990 pop: 2,505,839). Similarly with a one million threshold, it is not apparent why small businesses should have more spectrum set aside in New Haven (1990 pop: 978,311), than in Albany (1990 pop: 1,028,615).

In the end, Sprint PCS agrees with Verizon and others that any tiering plan that the Commission might adopt would be arbitrary.²⁷ Sprint PCS therefore recommends that the Commission not tier the BTAs in any fashion.

III. A Reasonable Compromise Would be to Retain the Set-Aside for Half the PCS Spectrum Originally Allocated to Designated Entities

Six years ago, the Commission decided to allocate one-third of the licensed PCS spectrum and 48% of the PCS licenses exclusively to entrepreneurs and to

²⁵ TeleCorp/Tritel at 4-5.

²⁶ U.S. AirWaves at 7-8. *See also* Leap at 15 (Tiering “is inherently arbitrary and needlessly discriminatory towards DEs.”).

²⁷ *See* Verizon at 3 and 10-14; U S WEST at 5.

allocate two-thirds of the spectrum and 52% of the licenses for open bidding. In developing this allocation plan, the Commission necessarily had to rely on its predictive judgment, as digital PCS technologies were new and there were no PCS systems in operation upon which to assess their ability to compete against incumbent cellular carriers.

Part of the Commission's allocation plan has been imminently successful. PCS A, B, D, and E block licensees have constructed their systems far more rapidly than most anticipated.²⁸ The infusion of this new competition has had an enormous beneficial effect on consumers: prices (service and handset) have fallen dramatically; and choices in providers, services, features, packages have increased exponentially. As a direct result of this new competition, the number of wireless customers has nearly doubled over the past three years alone — from 44 million in December 1996 to 86 million in December 1999.²⁹

In contrast, the record concerning C and F block licenses has been less than stellar. There were (and remain) the unfortunate bankruptcies. But even beyond the bankruptcies, service on C and F block licenses has not been forthcoming. As SBC notes, based on the Commission's data, less than 3% of the C and F block licenses are operational.³⁰ This track record is inconsistent with the statutory directive to promote

²⁸ Indeed, only last week Sprint PCS advised the Commission that it has satisfied the 5-year construction buildout requirements in all of its MTAs and already met its 10-year construction buildout requirements in 19 of its MTAs.

²⁹ See CTIA's Semi-Annual Wireless Industry Survey Results, www.wow-com.com/statsurv/survey/199912a.cfm.

³⁰ See SBC at 4.

both the “rapid deployment of new technologies, products and services” and the “efficient and intensive use of the electromagnetic spectrum.”³¹

Experience teaches one more important lesson. Specifically, the results of the D and E block auction confirm that small businesses can compete against large carriers for 10 MHz of spectrum. In that auction entrepreneurs acquired 141 of the 986 licenses even without the benefit of bidding credits.³²

Based on these facts, numerous commenters urge the Commission to eliminate the small business/entrepreneur set aside altogether.³³ Sprint PCS agrees that the Commission would be justified in taking such action. The results of prior auctions confirm that small businesses do not require set-asides to achieve success in an auction and that set-asides have not been successful in promoting the rapid deployment of new services and additional choices for the American consumer.

Nevertheless, a compromise may be in order. A reasonable compromise would be for the Commission to retain the set-aside for half of the PCS spectrum originally allocated to entrepreneurs — that is, 20 MHz of the original 40 MHz. Thus, if both the C and F blocks for a given market are available in the reauction, 20 MHz of this spectrum would be reserved for closed bidding, while the other 20 MHz of spectrum would be available in open bidding (in which small businesses could also compete). If only a C block for a given market is available in the re-auction, only 10 MHz would be set aside for a closed auction because the 10 MHz F block license was already obtained

³¹ 47 U.S.C. § 309(j)(3)(A) and (D).

³² See note 12 *supra*.

³³ See, e.g., BellSouth at 2-9; Nextel at 5-17; Verizon at 4-10; U S WEST at 4-5.

by a small business. Similarly, if only an F block license for a given market is available in the reauction, this license would be available in open bidding. And, if a disaggregated block of 15 MHz was returned to the FCC, that spectrum should be open to all bidders. Sprint PCS submits that this proposal promotes all four of the criteria specified in Section 309(j)(3) of the Communications Act, given the facts as they exist today

IV. There Is No Basis for Increasing the Level of Bidding Credits

The Commission has asked whether it should increase the level of bidding credits from the current 15%/25% to 25%/40% for the open reauction.³⁴ Not surprisingly, small business interests have enthusiastically supported this proposal.³⁵ In fact, Leap recommends that the Commission go further, by increasing bidding credits to 35%/45%.³⁶

The Commission must rest its decision based on available facts. The most relevant facts are the results of Auction No. 11, as this was the only PCS auction where small businesses and large carriers competed for the same PCS licenses. In this auction, small businesses obtained 141 of the 986 D and E block PCS licenses without any bidding credits. Thus, if the Commission were to base its decision on record evidence, it would be compelled to conclude that bidding credits are unnecessary for small businesses to enjoy success in future 10 MHz PCS open auctions.

³⁴ See *NPRM* at ¶ 41.

³⁵ See, e.g., *Advanced Telecommunications Technology* at 5; *AirGate* at 7; *Alaska DigiTel* at 6; *Burst* at 5; *Carolina PCS* at 5-6; *Northcoast* at 10-11; *OPM Auction Co.* at 11; *RK Wireless Solutions* at 3; *TeleCorp.* at 15.

³⁶ *Leap* at 19.

Bidding credits would also undermine the statutory and Commission objective of ensuring that radio licenses are awarded to those firms that value the spectrum the most:

As a general matter and consistent with Sections 309(j)(3)(A) and (D), we seek a bidding system that awards licenses to the eligible parties that value them the most [P]arties that value licenses the most should generally best serve the public and make rapid and efficient use of the spectrum.³⁷

Available economic evidence confirms that bidding credits, when made available to only some auction participants, will allocate licenses in an economically inefficient manner.³⁸ Suppose Bidder A values a license at \$99 and Bidder B values it at \$80. In a normal auction, Bidder A will win the license by paying up to \$99 and the economically efficient outcome is achieved. However, if Bidder B has a 25% bidding credit, Bidder B will win the auction by bidding \$100 but actually paying only \$75.

Assume further that Bidder C values a license at only \$70. If Bidder C enjoys a 40% bidding credit, it can win the auction by bidding \$107 but paying only \$64. Thus, the higher the bidding credits, the more likely it will be that the firm valuing the license the most will not receive it. As Professor Harris has observed, “[i]f bidding credits are large enough they can effectively shut non-credited bidders out of an auction, ex-

³⁷ *Competitive Bidding NPRM*, 8 FCC Rcd 7635, 7640-41 ¶ 34 (1993). See also *Competitive Bidding Second Report*, 9 FCC Rcd 2348, 2361 ¶ 70 (1994) (“[A]ward[ing] licenses to the parties that value them most highly will best achieve those [statutory] goals. Those parties are most likely to deploy new technologies and services rapidly, promote the development of competition for the provision of . . . services . . . and thus foster economic growth.”); *Third Report*, 9 FCC Rcd 2941, 2946 ¶ 12 (1994); *Fourth Report*, 9 FCC Rcd 2330, 2331 ¶ 6 (1994); *Fifth Report*, 9 FCC Rcd 5532, 5535 ¶ 5, 5541-42 ¶ 24 (1994).

³⁸ See Prof. Robert G. Harris, Walter A. Haas School of Business, U.C. Berkeley, “The Use of Bidding Preferences in the D, E, and F-Block PCS Auctions,” at 16-17 (April 15, 1996), Attachment A to U S WEST Comments, WT Docket No. 96-59 (April 15, 1996).

cluding them from winning any licenses because of their unwillingness to pay a premium over the economic price.”³⁹

Another problem with bidding credits is that they encourage activity that undermines the very objectives that the Commission is attempting to achieve. As Professor Cramton advised Congress recently:

[B]idding credits have serious potential problems. Gauging the right level of set-asides or bidding credits is extremely difficult. Also, it is nearly impossible to target the favor to the desired group. The creation of fronts, carefully constructed to satisfy the rules but circumvent their intent, has been a constant problem.⁴⁰

Based on the experience with Auction No. 11, the Commission would be fully justified in not extending any bidding credits in any open PCS reauction. Nevertheless, given the history of the C and F blocks, Sprint PCS does not oppose use of the current credit levels — 15% for a small business and 25% for a very small business — in the upcoming reauction. However, there is no basis whatsoever for increasing these levels to 25% and 40% respectively.

V. Conclusion

The experience gained over the past five years confirms that set-asides have not achieved the four objectives of Section 309(j). Based on its experience with the PCS auctions, the Commission would be entirely justified in removing set-asides alto-

³⁹ *Id.* at 17. Indeed, only two of the 255 original bidders in the C Block auction were not eligible to use the 25% bidding credit. Neither of these two bidders survived the auction, with one bidder withdrawing in Round 9 and the second withdrawing in Round 36.

⁴⁰ Peter Cramton, Professor of Economics, University of Maryland, “Lessons from the United States Spectrum Auctions,” Prepared Testimony before the Senate Budget Committee” (Feb. 10, 2000).

gether. However, a reasonable compromise would be to cut the initial set-aside allocation of 40 MHz in half, to 20 MHz.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anthony Traini, hereby certify on that on this 30th day of June 2000, I served a copy of the foregoing Sprint PCS Reply Comments by U.S. first-class mail, or by hand delivery as indicated with an *, to the following persons:

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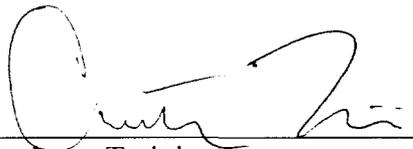
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