

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

97-821

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
GTE Service Corporation)
)
Petition for Waiver of Eligibility Restrictions)
and Declaratory Ruling that the CMRS)
Spectrum Cap Does Not Apply to the Auction)
of PCS Frequency Blocks C and F Scheduled)
to Begin on July 26, 2000, or, Alternatively,)
for a Waiver of the Cap)
)

File No. _____

**PETITION FOR DECLARATORY RULING
AND/OR WAIVER**

**GTE Service Corporation and its
domestic telecommunications,
wireless, and long distance
companies**

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SUMMARY

GTE respectfully requests, pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, a waiver of the Designated Entity eligibility restrictions for the C and F Blocks, see 47 C.F.R. § 24.709, to participate in the C and F Block reauction scheduled for July 26, 2000.¹ GTE also requests a declaratory ruling, pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, that the Commercial Mobile Radio Service ("CMRS") spectrum cap, 47 C.F.R. § 20.6, does not apply to the forthcoming reauction. In the alternative, should the Commission not grant GTE's petition, GTE requests a waiver of the cap, pursuant to Section 1.3 of the Commission's Rules, to permit GTE to participate in the C and F Block reauction.

At its essence, the question confronting the Commission here is whether to allow some companies, but not others, to participate in the reauction, or whether to permit participation by all prospective bidders that may value this spectrum. GTE submits that there are no concerns with market power or competitive abuses that merit precluding non-Designated Entities from participating in the reauction. To the contrary, without relief from the eligibility set asides, carriers such as GTE will be unable to deploy the next generation wireless services in which the United States critically lags behind other nations.

GTE also submits that, if read in light of the circumstances surrounding its enactment and the competitive concerns informing it, the spectrum cap rule should not

¹ See Auction of C and F Block Broadband PCS Licenses: Notice of Auction Scheduled for July 26, 2000, Public Notice, DA 00-49 (January 12, 2000).

apply to this effectively new spectrum in the first place, and the Commission does not even need to waive its spectrum cap rule for purposes of this reauction. If the Commission were to disagree with this view, or if it prefers not to reach that question, it should alternatively waive the cap for this auction for all companies that would be affected by its application. The reasons why the cap should not apply in the first place constitute ample good cause for such a waiver if the Commission were to deem it necessary.

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To the Wireless Telecommunications Bureau:

**PETITION FOR DECLARATORY RULING
AND/OR WAIVER**

GTE Service Corporation and its below-listed affiliates (collectively "GTE")¹ respectfully request, pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, a waiver of the Designated Entity eligibility restrictions for the C and F Blocks, see 47 C.F.R. § 24.709, to participate in the C and F Block reauction scheduled

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, Contel of the South, Inc., GTE Communications Corporation, GTE Wireless Incorporated, and GTE Information Services.

for July 26, 2000.² GTE also requests a declaratory ruling, pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, that the Commercial Mobile Radio Service ("CMRS") spectrum cap, 47 C.F.R. § 20.6, does not apply to the forthcoming reauction. In the alternative, should the Commission deny GTE's petition, GTE requests a waiver of the cap, pursuant to Section 1.3 of the Commission's Rules, to permit GTE to participate in the C and F Block reauction.³

GTE is not the first or only company to seek relief from the spectrum cap (to the extent applicable) or other eligibility restrictions for the July 26, 2000 reauction. Nextel Communications, Inc. ("Nextel") and SBC Communications, Inc. ("SBC") seek waiver of the Commission's eligibility and bidding rules to allow non-Designated Entities to participate.⁴ AT&T Wireless Services, Inc. and BellSouth Corporation also have filed petitions requesting waiver of the CMRS spectrum cap limits, and they seek expedited

² See Auction of C and F Block Broadband PCS Licenses: Notice of Auction Scheduled for July 26, 2000, Public Notice, DA 00-49 (January 12, 2000).

³ Because the Commission's decision on this petition could significantly influence GTE's decision on whether to participate in the upcoming 700 MHz auction, GTE requests that the Commission address the issues raised herein on an expedited basis.

⁴ *Wireless Telecommunications Seeks Comment on Nextel Communications, Inc.'s Petition Regarding PCS C and F Block Spectrum, Extension of Filing Deadline for Comments to SBC Communications Inc.'s Request for Waiver*, Public Notice, DA 00-191 (February 3, 2000). See also GTE Comments in response to this Public Notice, filed February 22, 2000 (conditionally supporting the substance of the requests by SBC and Nextel that the Commission remove the C and F Block eligibility restrictions, urging the Commission to act in an expeditious way that will secure the procedural integrity of its actions, and requesting that the Commission confirm that the CMRS spectrum cap does not apply to this new auction).

consideration of their requests.⁵ In addition, Bell Atlantic Mobile, Inc. has filed a petition requesting limited forbearance from the cap or alternatively a waiver, and Sprint Spectrum L.P. d/b/a Sprint PCS has filed a request for waiver of Section 24.709(a) of the Rules provided the Commission grants the same waiver to SBC, Nextel or any other entity that does not qualify as an "entrepreneur" under that section.⁶

GTE provides cellular service as a 25 MHz cellular licensee in geographic markets spanning 20 states, including California, Texas, Illinois, and Florida, and provides additional CMRS services in several markets. If the Commission denies GTE's petition, it would inhibit GTE's participation in the reauction and potentially limit GTE's plans for growth and expanded offerings of wireless services in the United States.

I. THE COMMISSION SHOULD WAIVE THE DESIGNATED ENTITY ELIGIBILITY RESTRICTIONS

Under the Commission rule allowing suspension, amendment or waiver of Commission regulations for good cause, 47 C.F.R. § 1.3, GTE requests a waiver of the Designated Entity eligibility restrictions for the C and F Blocks, see 47 C.F.R. § 24.709, should the Commission decide to proceed by waiver rather than by rulemaking regarding this matter. The Commission specifically "may waive any provision of its rules

⁵ *Wireless Telecommunications Bureau Seeks Comment on AT&T Wireless Services, Inc., BellSouth Corporation and Bell Atlantic Mobile, Inc. Petitions Regarding CMRS Spectrum Cap Limits*, Public Notice DA 00-318 (February 18, 2000).

⁶ Sprint PCS Petition for Waiver, filed February 22, 2000.

if it determines that good cause has been shown and that a grant of the waiver would not undermine the policies embodied in the rule.”⁷

If associated with a confirmation that the CMRS spectrum cap does not apply or a waiver of the cap, and if effectuated even-handedly for all companies, such a waiver is supported by good cause. The removal of these restrictions will maximize the reauction's efficiency potential. At the same time, the Commission could encourage Designated Entities through a bidding credit program, ensuring that removal of the restrictions does not in the least undermine the underlying policy of the rule – promotion of small businesses and other Designated Entities.

II. THE COMMISSION SHOULD CONFIRM THAT THE CMRS SPECTRUM CAP DOES NOT APPLY IN THE REAUCTION OF C AND F BLOCK SPECTRUM

GTE has submitted extensive economic testimony showing that the CMRS spectrum cap is an anachronism in the competitive CMRS marketplace.⁸ Despite this evidence, the Commission recently decided to retain the 45 MHz spectrum cap and increase the cap to 55 MHz in rural areas.⁹ It is imperative, however, that the

⁷ *King Broadcasting Company*, 5 FCC Rcd. 3068 (1990); see also *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

⁸ See *In the Matter of 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket No. 98-205, Comments of GTE (filed Jan. 25, 1999), and Declaration of J. Gregory Sidak and David J. Teece attached thereto.

⁹ *1998 Biennial Regulatory Review of 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 Commission's Rules – Broadband PCS*

(Continued ...)

Commission confirm that the cap does not apply to spectrum such as the C and F Block spectrum as it did in connection with the 700 MHz auction.

The Commission imposed the spectrum cap essentially to preclude cellular licensees from access to the A and B Blocks of PCS spectrum. That goal, even if it were valid today (and GTE believes such precautions are totally unnecessary), has been achieved, with the A and B Blocks in the hands of robust and now established new entrants.

The factors that led the Commission to declare the cap inapplicable to the 700 MHz spectrum are equally pertinent here – the importance of the spectrum to the roll-out of third-generation (“3G”) technologies and services and the status of the frequencies as newly available spectrum. Likewise, the concerns that underlie the Commission’s retention of the cap in the *Spectrum Cap Order* are completely inapposite here even if they were valid for the spectrum already subject to the cap.

A. The C and F Blocks Are Particularly Well-Suited for 3G Wireless Services

The spectrum cap was promulgated based on the spectrum needs for second-generation wireless services. The C and F Block frequencies, however, represent spectrum that is well suited for the more spectrum intensive 3G wireless services – an area where the United States risks lagging behind other countries largely

Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap; Implementation of Section 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Report and Order, WT Dockets 98-205, 96-59; GN Docket No. 93-252, ¶ 22 (rel. Sept. 22, 1999) (“Spectrum Cap Order”).

because of spectrum availability constraints. The 45 MHz cap is plainly too restrictive a constraint to allow meaningful roll-out of such services.

While it is true that the Commission in its *Spectrum Cap Order* decided to retain the spectrum cap for the time being, the Commission acknowledged that the *Order* did not purport to analyze the cap's effect on the roll-out of 3G services. Indeed, the Commission expressly stated that it would consider the need for additional spectrum for 3G services in a future rulemaking and invited CMRS providers to request waivers if the spectrum cap adversely impacts their ability to roll out 3G or other advanced services.¹⁰ The importance of the 3G roll-out justifies the confirmation that the cap does not apply to the C and F Block auction. The Commission should facilitate the use of this spectrum for 3G applications, as it did for the 700 MHz spectrum in the *700 MHz Order*.¹¹

GTE notes in that respect that the PCS spectrum is far more compatible with 3G equipment developed by European companies than the 700 MHz frequencies. Moreover, while the 700 MHz spectrum is a step in the right direction, by the Commission's own admission, the 700 MHz spectrum is presently "encumbered and is

¹⁰ *Spectrum Cap Order*, ¶ 82. As explained below, GTE supports the ability of carriers to obtain a waiver of the spectrum cap, to the extent it applied, to participate in auctions of spectrum for 3G services. If the Commission proceeds by rulemaking, however, GTE suggests that the Commission include the spectrum cap issue as a subject of the rulemaking action.

¹¹ *Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for May 10, 2000: Comments Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues*, Report No. AUC-99-31-A, Public Notice, DA 00-43 (Jan. 10, 2000) ("*700 MHz Order*").

likely to remain so, to at least some extent, until 2006."¹² Making the reauctioned C and F Block spectrum available, without spectrum cap constraints, will further hasten the deployment of advanced services where the infrastructure and handset development is further along and the spectrum unencumbered, allowing carriers to more rapidly bring these advanced services to consumers.

B. The Commission Should Treat Reauctioned C and F Block Spectrum Like the 700 MHz Spectrum and Confirm that It Is Exempt from the Spectrum Cap

In deciding that the cap does not apply to the 700 MHz spectrum, the Commission explained:

*We believe that opening this spectrum to as wide a range of applicants as possible will encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure the most efficient use of the spectrum...Recognizing that the spectrum cap limits were set on the basis of the particular amount of spectrum (180 MHz) available at that time for CMRS, we indicated in the Spectrum Cap Report and Order that we would evaluate whether the cap should apply, or be adjusted, at the time that we made more spectrum available for CMRS. It has been our expectation that, as we made more spectrum available for CMRS services, we would either adjust the cap upward or refrain from including the new spectrum within the scope of the cap.*¹³

There is nothing to justify a different result here. Like the 700 MHz spectrum, the C and F Block frequencies too would be CMRS spectrum *newly* available

¹² 700 MHz Order, ¶ 52.

¹³ 700 MHz Order, ¶¶ 49-51 (emphasis added, footnote omitted).

to non-designated entity wireless companies should the Commission accept the Petitioners' request to remove the eligibility restrictions.

The Commission imposed the spectrum cap essentially to preclude cellular licensees from access to the A and B Blocks of PCS spectrum. While the C and F Block frequencies were nominally part of the 180 MHz in CMRS spectrum that the Commission considered when imposing the spectrum cap rule, and therefore the spectrum cap rule refers generically to "PCS,"¹⁴ closer inspection reveals a more complex picture, and shows that the C and F Blocks may not have been considered by the Commission as subject to the cap.

The 45 MHz cap was imposed when only a total of 140 MHz was effectively available to non-DE incumbents (an effective percentage of 32% of the total CMRS spectrum then available to these companies), because only Designated Entities were eligible for the 40 MHz of C and F Block spectrum. Moreover, this set aside was primarily intended as a mechanism to promote small businesses rather than to prevent anti-competitive warehousing.¹⁵ That is, the set-aside was based on a fundamentally different rationale than the spectrum cap. If the Commission were now to make the C and F Block spectrum newly available to non-Designated Entity wireless companies, it should not mechanically expand the same 45 MHz cap also to cover the newly available spectrum. This would in effect further depress the cap, making it a lower percentage (25% of 180 MHz) of the non-Designated Entity CMRS spectrum.

¹⁴ See 47 C.F.R. § 20.6(a).

¹⁵ See *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd. 5532, ¶¶ 12, 93-94 (1994).

III. THE COMMISSION SHOULD ALTERNATIVELY WAIVE THE SPECTRUM CAP

If the Commission were to disagree with GTE that the cap is inapplicable to the C and F Block auction, or if the Commission does not want to reach that question, the Commission can and should waive the CMRS spectrum cap, 47 C.F.R. § 20.6, under 47 C.F.R. § 1.3. Grant of the waiver would both be supported by good cause and not undermine the policies embodied in the rule.¹⁶

The good cause requirement is satisfied here: if the cap were deemed applicable and the Commission refused to waive it, GTE and several other companies would be effectively precluded from bidding for many of the C and F Block licenses.¹⁷ Ineligibility would bar companies such as GTE from access to additional spectrum that is sorely needed for satisfying exploding consumer demand and rolling out advanced services. It would also artificially narrow the circle of qualified bidders, compromising the efficiency-enhancing rationale for conducting an auction in the first place, because those companies valuing the spectrum the most might well be left out, ultimately depressing the proceeds from the auction. Nor is there any risk of "undermin[ing] the policies embodied in the rule." As shown above, even if there still were a valid

¹⁶ *King Broadcasting Company*, 5 FCC Rcd. 3068 (1990); see also *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹⁷ GTE could be effectively barred from participation in the auction for many of the licenses regardless of whether the Commission were to adopt Nextel's "breakdown" proposal for the C Block spectrum.

competitive rationale for precluding cellular licensees from the A and B Block PCS spectrum, there certainly is no such conceivable rationale supporting a similar restriction for the newly available C and F Block spectrum, and the Commission's concerns with spectrum warehousing are particularly inapposite.

A waiver is especially justified in the individual circumstances confronted by GTE. If the cap were to apply, GTE's 25 MHz cellular and other licenses, which span geographically a portion of the nation, would inhibit GTE's participation in the reauction more broadly (possibly also for spectrum outside these markets), and would hamper spectrum-intensive plans to roll out 3G services.

IV. CONCLUSION

GTE supports the parties that have filed waivers of the eligibility rules to participate in the C and F Block reauction. As long as applied even-handedly to all carriers, lifting the eligibility restrictions would permit the carriers that value the spectrum most to have access to it. For this reason, GTE submits its own request for waiver of the eligibility rules. GTE also believes that no waiver of the Commission's CMRS spectrum cap rule should be necessary for any carrier to participate in the upcoming C and F Block reauction because the cap should not apply to this spectrum. If, however, the Commission were to decide otherwise or does not want to reach that

question, GTE asks that a waiver of the spectrum cap rule be granted and applied even-handedly to all companies similarly affected.

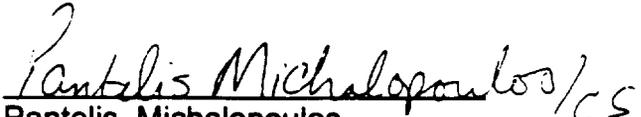
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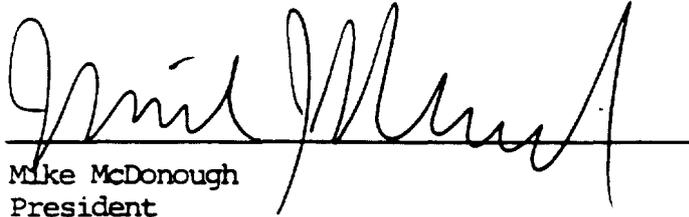
March 8, 2000


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DECLARATION

I, Mike McDonough, hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

A handwritten signature in black ink, appearing to read "Mike McDonough", is written over a horizontal line.

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Dated: March 8, 2000

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I, Colleen Sechrest, hereby declare that copies of the foregoing were sent this 8th day of March, 2000 by hand or first-class mail to the following:

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