

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

In the Matter of)
)
)
2000 Biennial Regulatory Review) WT Docket No. 01-14
Spectrum Aggregation Limits for)
Commercial Mobile Radio Services)

COMMENTS OF VERIZON WIRELESS

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SUMMARY

Verizon Wireless commends the Federal Communications Commission (“FCC” or “Commission”) for its decision to reexamine existing regulations that limit the aggregation of broadband commercial mobile radio service (“CMRS”) spectrum. When the Commission released its first biennial review of the CMRS spectrum cap and the cellular cross-interest rules in 1999, there were compelling reasons for the Commission to repeal these rules. In 2001, the rationale for repealing these rules is even clearer. Recent marketplace changes make it even more obvious that these rules are no longer necessary for the Commission to achieve its goals of competition, innovation, and the rapid deployment of advanced services. In fact, these rules are having the opposite effect, by preventing efficient spectrum aggregation and impeding the very goals the Commission seeks to achieve.

The spectrum cap and cellular cross-interest rules are vestiges of the past that stand ever more isolated. In recent years, the Commission has allocated new spectrum for advanced services, including mobile services, to which these limits do not apply.

This policy – relying on market forces rather than economic regulation – is correct, but it puts in stark contrast the caps and cellular ownership limits, and has resulted in an arbitrary regulatory scheme, based on a carrier’s licensed spectrum rather than the services it offers. This is precisely the sort of market-distorting regulatory asymmetry that Congress directed the Commission to eliminate; instead the CMRS ownership limits perpetuate asymmetry.

Section 11 of the Communications Act imposes an affirmative obligation to eliminate or modify any rules “that are no longer necessary in the public interest.” It is not incumbent upon the industry to provide the rationale as to why these regulations should be repealed. Rather, the Commission must answer the fundamental question of why these regulations are necessary. The burden is by law on the Commission to justify the continued imposition of the spectrum cap and cellular cross-interest rules with evidence showing why the rules are necessary to achieve tangible benefits. The Act requires the Commission to start from the premise of no regulation and maintain rules only when current facts supply a clear need for doing so. The spectrum cap and cellular cross-interest rules cannot survive when they are measured against these principles.

Verizon Wireless believes that the spectrum aggregation rules are no longer “necessary in the public interest” and in fact, these rules have precisely the opposite effect than the Commission intends. They distort what otherwise is an intensely competitive wireless market.

The cap and cross-interest rules are not needed to prevent the loss of competitive CMRS markets. Verizon Wireless has commissioned a detailed report, attached to these Comments, prepared by two economists that shows that spectrum

ownership restrictions are not needed to guard against a market failure, foreclosure of competition or other competitive harm. Removing ownership restrictions will not undercut the market forces that clearly have benefited consumers. Market forces can and will preserve competition. No rational business entity would believe it could foreclose competition by aggregating spectrum, because the economic cost of doing so would be prohibitive. And if any entity attempted to foreclose CMRS competition, government and private remedies under the antitrust laws would be available to squelch those attempts.

The cap and cross-interest rules are no longer needed (if they ever were) to promote new entry. The rationale for the cap was to set aside PCS spectrum for non-cellular carriers so that new entrants would obtain spectrum. The cross-interest rule was intended to prevent consolidation of cellular in any one market -- *prior* to PCS and digital SMR. The Commission has achieved these goals with the rapid growth of market share for pure PCS and SMR carriers and the advent of a number of new national “hybrid” PCS/cellular carriers. Under Section 11 of the Act, there must be evidence that the rules are necessary *now*. These rules, however, have no current justification..

The costs of the spectrum aggregation rules far outweigh their purported benefits. Retention of the spectrum cap and cellular cross interest rule will impose significant economic costs. Rather than promote competition for local or advanced services, spectrum aggregation limits will only thwart carriers’ ability to offer these services. Carriers make investments in new technologies in response to consumers’ demand for new products and carriers’ own incentive to expand their revenues and distinguish themselves in the marketplace. Aggregation limits on spectrum will

discourage investment in the new spectrum-intensive technologies that wireless providers must deploy if they are to offer competitive services, such as local telephony, Internet access, and data services. These problems will grow increasingly acute, because CMRS providers with the largest need for spectrum, such as Verizon Wireless, will be constrained by the rules from meeting that need. The current rules distort the market for spectrum, undercut the goal of convergence of different services, and discriminate against certain CMRS providers, because they apply a restraint only against some but not all competitors, and only on some but not all spectrum. The claimed regulatory “benefits” of the spectrum aggregation limits—administrative efficiency and market certainty—are negligible and do not justify these costs.

Both spectrum aggregation rules must be repealed in their entirety. The Commission must stop tinkering with the spectrum cap and cellular cross-interest rules and simply repeal them. No different level of ownership limits or changes to the many complex attribution rules that the current rules employ will achieve any of the policies the Commission identifies.

Finally, this same analysis applies to the cellular cross-interest rule – it is not necessary to insure competition in CMRS. Like the spectrum cap rule, the cellular cross-interest rule was conceived during a time when only two cellular providers provided mobile telephony. Duopoly market structure – the entire premise for this rule – of course is gone. Many markets support multiple cellular, hybrid cellular/PCS, PCS and digital SMR providers. The cross-interest rule protects the consumer from a threat to competition that simply is not there. Worse, it perpetuates a glaring and unjustifiable inequity of regulation between cellular and other CMRS providers.

I. SECTIONS 11 AND 332 OF THE ACT REQUIRE REPEAL OR MODIFICATION OF THE SPECTRUM CAP AND CELLULAR CROSS-INTEREST RULES

Section 11 of the Communications Act requires the Commission to review its regulations, determine which of them are “no longer necessary in the public interest as the result of meaningful economic competition,” and then “repeal or modify” the unnecessary rules.¹ As one Commissioner has correctly noted, Section 11 establishes a presumption that a rule is no longer necessary: “The Commission must affirmatively determine that a rule is necessary in the public interest; otherwise, it must be repealed or modified.”² Thus, “a rule cannot merely be arguably ‘in the public interest’; it must actually be *necessary* in the public interest” in order to survive Section 11 review.³

The broad “public interest” at issue here is the promotion of competition in the provision of CMRS service, which Congress has established as “a fundamental goal for CMRS policy formation and regulation.”⁴ The spectrum cap and cross-interest rules were designed to further this goal by discouraging anticompetitive behavior while

¹ 47 U.S.C. § 161.

² Statement of Commissioner Harold W. Furchtgott-Roth, “*Report on Implementation of Section 11 by the Federal Communications Commission*,” at 4-5 (Dec. 21 1998) (“*Report on Implementation of Section 11*”) available at <http://www.fcc.gov/commissioners/furchtgott-roth/reports/sect11.html>; see Separate Statement of Commissioner Michael Powell, *In re: 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Report and Order*, WT Docket No. 98-205, 15 FCC Rcd 9219 (1999) (“*First Biennial Review Order*”) (“if we can meet the burden of showing that the cap is still necessary in the public interest, then we may keep it”) (emphasis in original).

³ Statement of Commissioner Harold Furchtgott-Roth, *Report on Implementation of Section 11* at 5 (emphasis in original).

⁴ *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fifth Report*, FCC 00-289, at 3 (rel. Aug. 18, 2000) (“*Fifth Report*”) (citing The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C. § 332(c) (“*1993 Budget Act*”).

preserving the incentives for innovation and efficiency that competition creates.⁵ The overarching question before the Commission is whether, “as a result of meaningful economic competition,” these rules are “no longer necessary” to promote the public interest in the competitive provision of CMRS, or, as stated in the Notice, “whether spectrum aggregation limits, including the cellular cross-interest rule, continue to promote procompetitive ends in today’s CMRS marketplace.”⁶

Furthermore, in the 1993 amendments to Section 332 of the Act, Congress imposed a framework that relies on competition rather than government intrusion to achieve public interest goals.⁷ In its first decision implementing those amendments, the FCC proclaimed, “We establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees that are classified as CMRS providers.”⁸ The Commission later affirmed that it bore the burden to justify any regulation as nonetheless consistent with the federal deregulatory paradigm:

In 1993, Congress amended the Communications Act to revise fundamentally the statutory system of licensing and regulating wireless (i.e., radio) telecommunications services. ... OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation, and *it places on us the burden of demonstrating that continued regulation will promote competitive market conditions*. ... Congress delineated its preference for allowing this emerging market to develop

⁵ The Commission’s oversight of CMRS must “ensure that the marketplace – not the regulatory arena – shapes the development and delivery of mobile services.” *Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order*, 9 FCC Rcd 7988, 8101 ¶ 240 (1994).

⁶ *In the Matter of 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Dkt. No. 01-14, *Notice of Proposed Rulemaking*, FCC 01-28 (rel. Jan. 23, 2001) (“*NPRM*”) at ¶ 13.

⁷ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b) (1993) (“OBRA”).

⁸ *In re Implementation of Section 3(n) and 332 of the Communications Act, Second Report and Order*, 9 FCC Rcd 1411, 1418 (1994).

*subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.*⁹

The 1996 Act reaffirmed Congress's specific deregulatory mandate for CMRS and extended that mandate to other services.¹⁰ Thus as a matter of law, proponents of deregulation do not have the burden to show why repeal of the spectrum cap is necessary; rather, the Commission must show why the cap and cross-interest rules are essential to achieve the goals the Notice sets forth.¹¹

A rule cannot be maintained based on facts that may have justified the rule at the time it was adopted. Rather, the Commission must develop a record of current facts that looks forward, not backward, to supply the requisite basis for imposing regulation. It must then limit any regulation to the minimum intrusion into the market that is needed to achieve the stated goals that it determines to be in the public interest.¹²

⁹ *Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers, Order*, 10 FCC Rcd 7025, 7031 (1995), *aff'd*, 78 F.3d 351 (2d Cir. 1996).

¹⁰ Telecommunications Act of 1996, Pub. L. No. 104-104 (1996). The 1996 Act establishes "a pro-competitive, de-regulatory national policy framework" that is intended to "promote competition and reduce regulation..." S. Conf. Rep. No. 230, 104th Cong., 1st Sess. 1 (1996).

¹¹ As then Commissioner Powell stated in his Separate Statement to the Notice in the 1998 Biennial Regulatory Review Spectrum Aggregation Limits: "I believe the burden should be on us, the FCC, to re-assess and re-validate the rule We must be prepared, if this is what the record evidence shows, to make a compelling and convincing case that the rule must be kept. If we cannot, or if the evidence in support of the rule is lacking, we must modify or eliminate it and rely on competitive market forces or other mechanisms, such as the antitrust laws."

¹² In another rulemaking, the Commission explained its duty to prove a clear need for any CMRS rule: "The resale rule, like all regulations, necessarily implicates costs, including administrative costs, which should not be imposed *unless clearly warranted*. We therefore conclude that our resale rule should be *narrowly tailored* to apply only to those services where, due to competitive conditions, its application will confer important benefits, and only for so long as competitive conditions continue to render application of the resale rule necessary." *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order*, 11 FCC Rcd 18455, ¶ 17 (1996) (emphasis added).

II. THE SPECTRUM AGGREGATION LIMITS ARE NO LONGER NECESSARY IN THE PUBLIC INTEREST AS A RESULT OF MEANINGFUL COMPETITION

Section 11 makes clear that the burden in this proceeding is on those who advocate retention of the spectrum cap and cellular cross-interest rules to show that they are still necessary. As set forth in the attached Declaration of Drs. Robert Gertner and Allan Shampine, any consideration of the structure of today's CMRS marketplace can lead to only one conclusion: that the "meaningful economic competition" has obviated any need for the spectrum aggregation limits. "Our findings may be summarized as follows. Given the current market structure and antitrust enforcement, there are no valid concerns of anticompetitive effect from eliminating the spectrum cap. The Commission has previously expressed concerns about "market foreclosure" and "coordinated interaction." Both are extremely unlikely for the following reasons:

- Since the majority of CMRS spectrum that is subject to the cap has already been auctioned, concerns about entrants being unable to obtain spectrum in auctions are now moot;
- Competition has continued to increase with national carriers assuming an even more prominent role. The presence of six national carriers makes it highly unlikely that competition could be foreclosed in any area since it is highly unlikely that national carriers would willingly sell enough of their spectrum in an area as to be unable to offer voice services;
- The huge rise in CMRS subscribership increases the ability of market participants to cover their fixed costs and decreases any chance of their being forced out of business;
- Antitrust authorities have shown both the inclination and ability to review spectrum issues; and
- Higher prices through coordinated interaction are unlikely because of the large number of competitors and the complexities of various pricing plans *Gertner Decl.* at ¶ 9.

A. Spectrum Aggregation Limits Are Not Necessary to Promote Competition in Today's CMRS Marketplace

"I cannot imagine any other industry segment that can better laud their state of economic competition as 'meaningful.'" ¹³ This was true at the time of the 1998 Biennial Review, and it is even more true today. The number of national carriers has grown, and the number of competitors in most markets has increased as well. Prices have continued to fall and demand has been stimulated even as carriers consolidate and accumulate spectrum. Competition is now well established for wireless voice services, thus obviating any need for regulations designed to promote competition. *Gertner Decl.* at ¶¶ 14, 15.

At the time of the 1998 Biennial Review, only three carriers had executed national strategies – AT&T Wireless, Sprint PCS and Nextel.¹⁴ This number has doubled. By August 2000, Verizon Wireless and VoiceStream had national footprints.¹⁵ The combination of SBC and BellSouth's wireless assets into Cingular Wireless recently created a sixth national operator.¹⁶ Each of the three hybrid cellular/PCS carriers is a strategic combination creating a nationwide digital network that can compete on equal footing with the national PCS carriers. One needs only look at the percentage of new customers that PCS competitors are capturing to see that effective competition exists and cellular carriers are not exerting monopoly power.¹⁷ As the Commission predicted, the

¹³ Separate Statement of Commissioner Michael Powell, *In re: 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket No. 98-205, 15 FCC Rcd 9219 (1999).

¹⁴ *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Dkt. No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988 ("Third Report") at ¶ 22; see also Merrill Lynch, *Wireless Pricing & Landline Substitution*, April 4, 2001 at 2. ("Merrill Lynch April 4th Report").

¹⁵ See *Fifth Report* at 10.

¹⁶ *Merrill Lynch April 4th Report* at 2.

¹⁷ See RCR Wireless News, *Year-end Carrier Subscriber Numbers*, Feb. 26, 2001 at 1.

market-driven trend of consolidation has intensified competition among nationwide wireless providers.¹⁸ While some regional carriers have repositioned themselves as national competitors, other regional operators such as US Cellular and Alltel have fortified their market positions by focusing on network deployment and converting to digital technologies.¹⁹

With increasingly competitive CMRS markets, larger percentages of the United States' population now have multiple wireless competitors from which to choose. In August 2000, the *Fifth Report* noted that new entrants had improved their coverage within and across areas: 88 percent of the U.S. population now has three or more operators offering service within their counties (as opposed to their BTAs), and 69 percent of the U.S. population lives “in areas with five or more mobile telephone operators competing to offer service.”²⁰

Subscribership has increased dramatically since 1998 as well. The Cellular Telephone Industry Association (“CTIA”) estimates that subscribership has increased from 69,209,321 at the end of 1998 to 97,035,925 at the end of 2nd quarter 2000 – a 40 percent increase in 18 months. As of the end of 1999 the majority of customers used digital service, and eighty percent of all mobile phones sold in 1999 were digital.²¹ Indeed, the majority of new subscribers for the last several years have chosen non-

¹⁸ *Fifth Report* at 10.

¹⁹ Morgan Stanley Dean Witter, *Wireless Telecommunications Services: Quarterly Data and Analysis*, Jan. 31, 2001 at 10 (“MSDW”).

²⁰ *Fifth Report* at 18.

²¹ *Id.* at 13-14.

cellular services,²² and the number of PCS subscribers has more than tripled since 1998.²³ This trend is likely to continue as new subscribers choose among the five or more (digital) carriers and existing analog customers migrate to digital. The large increases in subscribership increase the ability of market participants to cover their fixed costs and make it less likely that companies could be forced out. *Gertner Decl.* at ¶ 15.

An important part of the Commission's analysis leading to the retention of the spectrum aggregation limits in 1999 was that cellular had a large share of the wireless market. But cellular carriers' share of the nationwide wireless market based on total number of subscribers has since declined from 86 percent cited in the *1999 Order*,²⁴ to 75 percent less than a year later in August 2000.²⁵

Price and non-price competition have continued to intensify. National carriers have continued to introduce innovative new pricing plans, with an emphasis on "big bucket" pricing. The promotional packaging of cellular service in large buckets of weekday, night and weekend minutes has produced effective usage rates per minute of 1.3 to 5.8 cents per minute on monthly plans as low as \$20 per month.²⁶ This trend has driven subscriber growth and usage and has put wireless service within reach of most American consumers.²⁷ At these price and usage levels, wireless can become an

²² *Id.* at 22.

²³ *MSDW* at 10.

²⁴ *First Biennial Review Order* at ¶ 25, n. 72.

²⁵ *Fifth Report* at B-9.

²⁶ *Merrill Lynch April 4th Report* at 3, Table 1: "2000 Holiday Promotions." It is ironic to say the least that the ownership limits can penalize the very carriers that have been able, by reducing prices, to generate higher customer usage and thus need more spectrum capacity.

²⁷ Average usage per subscriber increased 43 percent from 159 minutes per month to 228 minutes per month between 1999 and 2000. *Merrill Lynch April 4th Report* at 7.

attractive alternative for traditional wireline telephony.²⁸ Furthermore, with digital infrastructure upgrades and wider network footprints, the quality of the minutes included in service offers has increased. Offers increasingly waive roaming and long distance fees for usage and/or offer larger home calling areas in which to use minutes.

Contrary to the Commission's assertion that the discipline of market forces would be tempered "by the reality that would-be market entrants must obtain spectrum rights, which in practical terms requires that they find willing sellers,"²⁹ the need for a nationwide footprint is driving many carriers to find ways to enter new markets. Wireless firms are competing effectively with 10 MHz of spectrum. This means that, even if one carrier were to amass more than 45 MHz, the remaining spectrum could support a substantial number of effective competitors, each with sufficient capacity to serve a large fraction of the market. The Commission need only look to the spectrum swaps it just approved for proof of this.³⁰ Cingular and VoiceStream – by any definition competitors, and thus presumably "unwilling" to sell to each other – recently traded spectrum so that they could gain 10 MHz footholds in critical markets. Market evidence indicates that incremental spectrum is extremely valuable and thus not likely to be warehoused for anti-competitive reasons.

²⁸ *Merrill Lynch April 4th Report* at 1 ("The bottom line is that we seem to be getting pretty close to that crossover point as some premium for mobility doesn't seem all that outlandish. And, for subscribers who actually use all of the minutes in certain buckets, some wireless price plans would actually imply a discount to landline service--which we think begins to look rather compelling.")

²⁹ *First Biennial Review Order* at ¶ 25.

³⁰ *WTB and IB Grant Consent for Assignment of Broadband PCS Licenses as Part of License Exchange Between Cingular Wireless, LLC and VoiceStream Wireless Corporation, Public Notice*, DA No. 01-821 (WTB/IB rel. March 30, 2001).

B. Spectrum Aggregation Limits Are Not Necessary to Prevent Consolidation

The Commission intends to consider “the potential competitive consequences of consolidation that may occur without spectrum aggregation limits” in determining whether the spectrum cap and cellular cross-ownership rules are no longer necessary,³¹ and this consideration appears to have been the overriding reason for the Commission to retain the rules when it conducted its 1998 review. But fear of the effects of future consolidation on competition cannot support a determination that the spectrum aggregation limits are “necessary” within the meaning of Section 11. Even if it could, it is clear that spectrum aggregation limits are not necessary to prevent anticompetitive consolidations in view of the current structure of the CMRS market and existing safeguards.

The spectrum cap and cross-interest rules cannot be retained on the grounds that they are “necessary” to guard against “potential” consequences of a consolidation that “may”—*or may not*—occur. To conclude otherwise would eviscerate Section 11 and thwart Congress’s goal of replacing regulation with competition wherever possible, for no matter how much “meaningful economic competition” is present, there will always exist some possibility that a carrier may attempt a consolidation with potential competitive consequences.³²

³¹ *NPRM* ¶ 13.

³² While not a direct result of its Biennial Review process, the Commission in 1999 took deregulatory action with respect to its broadcast ownership rules. Due in part to its recognition of the growth in the number and variety of media outlets in local markets, the Commission relaxed its TV duopoly and radio-television cross-ownership rules. See *Review of the Commission’s Regulations Governing Television Broadcasting; and Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd 12903 (1999).

Moreover, any consolidations involving spectrum aggregation are subject to Commission approval under Section 310(d) of the Act³³ and, where the consolidation is of sufficient size, to review by the Department of Justice (“DOJ”).³⁴ The existence of these alternative safeguards means that while the Commission may find spectrum aggregation limits to be convenient, it cannot, consistent with the ordinary and fair meaning of the statutory term, find that they are “necessary” to guard against the potential effects of possible future consolidations. This is particularly true given that any such consolidation is already subject to rigorous regulatory review.

Further, individuals and business entities can invoke an array of statutory and common-law actions against any party that is believed to be injuring competition. Flat ownership limits, by contrast, do not address these situations, because such situations would by definition occur *despite* compliance with any such limits. The Commission has pointed to the availability of private remedies as a reason to repeal regulation.³⁵ It should do so here as well. In fact, given this precedent, the Commission cannot maintain the CMRS spectrum cap and cellular cross-interest rule without demonstrating why these government and private remedies are inadequate to protect CMRS competition. Moreover, Drs. Gertner and Shampine demonstrate that, in the absence of a spectrum cap, the Commission’s two overarching concerns—“market foreclosure” and “coordinated interaction”—are unwarranted. With respect to market foreclosure,

³³ 47 U.S.C. § 310(d).

³⁴ 15 U.S.C. § 18 (1988) Mergers subject to section 7 are prohibited if their effect "may be substantially to lessen competition, or to tend to create a monopoly;" 15 U.S.C. § 1 (1988) Mergers subject to section 1 are prohibited if they constitute a "contract, combination . . . , or conspiracy in restraint of trade;" 15 U.S.C. § 45 (1988) Mergers subject to section 5 are prohibited if they constitute an "unfair method of competition."

³⁵ *E.g. Elimination of Unnecessary Broadcast Regulation*, 59 RR 2d 1500 (1986) (repealing rules regulating market conduct by broadcast stations based on finding that private remedies were sufficient to police any misconduct).

spectrum may be acquired via one of three routes: FCC auction, secondary market transactions, or acquisition of another carrier. Drs. Gertner and Shampine explain why none of these routes creates a likelihood of attempted market foreclosure:

- 1) Since the majority of CMRS spectrum subject to the cap has already been auctioned, concerns about entrants being unable to obtain spectrum in auctions are now moot;
- 2) Since the basis of CMRS competition has become national and empirical evidence reveals the tremendous value of a national footprint, it is highly unlikely that national carriers would willingly sell enough of their spectrum in an area as to be unable to offer voice services and remove themselves as effective competitors; and,
- 3) Mergers and acquisitions will remain subject to FCC antitrust review. *Gertner Decl.* at ¶ 19.

With respect to the possibility of coordinated interaction, Drs. Gertner and Shampine demonstrate that this is highly unlikely in view of the number of national competitors, sharpened price competition, and tremendous opportunities created by increased wireless subscriber growth that characterize the CMRS market today. *Gertner Decl.* at ¶ 20.

In reality, under current rules carriers could consolidate to four carriers in a market, each holding 45 MHz. “Instead a few carriers in each market have accumulated spectrum up to or near 45 MHz while many others have provided voice and basic data services using less spectrum.” *Gertner Decl.* ¶ 21.

C. The Cellular Cross-Interest Rule Is Unnecessary and Inequitable

Like spectrum caps, the cellular cross-interest rule was conceived when there was limited competition in the wireless marketplace. The rule, which substantially limits a carrier from owning interest in both A and B bands in a geographic area, was adopted in 1991, a full decade ago, when there were only two carriers in any geographic market. In

the competitive environment that exists today, this rule had lost any validity, and clearly is no longer necessary to insure competition in CMRS.

Worse, the cellular cross-interest rule is sharply asymmetrical. It is a prohibition on ownership of cellular spectrum that is in addition to the spectrum cap. PCS carriers are not prohibited by Commission rule from acquiring other PCS carriers in a market, and can thus acquire a full 45 MHz in a single band of spectrum. Cellular carriers cannot. The cross-interest rule creates an unjustified regulatory disparity between cellular CMRS providers and other non-cellular CMRS providers (PCS and SMR). The combination of these two rules further exacerbates the already existing regulatory disparity between mobile and fixed services, since fixed services are not subject to either a cap or cross-interest restriction. This can result in “distorted and inefficient allocations of spectrum between services and carriers.” *Gertner Decl.* ¶ 37.

Because the need to prevent concentration of CMRS spectrum no longer exists, as evidenced by the vigorous competition in the CMRS market, the cross-interest rule should be eliminated. Further, elimination of the rule would resolve a regulatory disparity between cellular and other CMRS carriers that is unique in the telecommunications industry.

III. THE COSTS THE SPECTRUM AGGREGATION LIMITS IMPOSE ON THE DEVELOPMENT OF ADVANCED SERVICES FAR OUTWEIGH THE PURPORTED BENEFITS OF “BRIGHT-LINE” RULES

In addition to reexamining whether the spectrum cap and cellular cross-interest rules are necessary to promote and protect competition, the Commission has invited comment on “spectrum management and other regulatory considerations” related to its spectrum aggregation limits, with particular attention to “the costs that our spectrum

aggregation limits may impose on the development of advanced wireless services, the possible benefits of standards that create ‘bright-lines’ for industry.”³⁶ While these considerations militate strongly in favor of eliminating the spectrum aggregation limits, they are not relevant to the inquiry required by Section 11. The costs associated with the bright-line rules at issue here far outweigh their purported benefits.

A. Regulatory Considerations Cannot Support Retention Of Rules No Longer Necessary As A Result Of Meaningful Competition

By requiring the Commission to eliminate or modify regulations that are no longer necessary in light of meaningful economic competition, Congress has already determined as a matter of public policy that the cost of FCC regulation outweighs its benefits if competition has rendered the regulation unnecessary. The substantial costs of spectrum aggregation limits and the purported regulatory benefits of bright-line rules exist irrespective of the presence or absence of “meaningful economic competition.” To retain the spectrum aggregation limits on the basis of such regulatory considerations would flout Section 11’s clear command and impermissibly substitute the Commission’s judgment for Congress’s public policy decision.

B. The Spectrum Aggregation Limits Impose Significant Costs On The Development Of Advanced Wireless Services.

Drs. Gertner and Shampine demonstrate that the spectrum cap imposes an uneconomic constraint on carriers’ use of the key input to wireless services. They show why the cap is increasingly binding for carriers that provide existing services, and why it can raise these carriers’ costs and diminish the quality of their services. And since

³⁶ *NPRM* ¶ 13.

advanced services are more bandwidth intensive than voice services, the spectrum cap also retards the deployment of advanced services. *Gertner Decl.* at ¶ 29.

As the Commission noted in its *Fifth Report*, an explosion in the growth of wireless data is expected over the next decade, much of which will be in mobile applications. The growth in wireless Internet access, the development of 3G mobile services and equipment, and ongoing research in the United States and in other countries that is aimed at improving wireless access to data services and mobile networking will further increase demand. All of the major carriers have announced plans for deploying data and advanced services. Existing wireless Internet and data offerings, limited as they are, are already attracting growing number of subscribers.

Broadband wireless services are, however, extremely spectrum-intensive. The provision of Internet services at speeds available through landline modems, for example, takes far greater amounts of bandwidth than voice applications. Wireless carriers have had to deploy most of their spectrum to meet the sharply increased demand for future mobile voice services, leaving little spectrum available for widespread deployment of other spectrum-intensive applications. While the Commission is considering reallocating additional spectrum for advanced mobile services,³⁷ it will be years before that spectrum is cleared of incumbent users and thus available for CMRS carriers' use. These services will require considerably more capacity than is available on existing CMRS networks.³⁸

³⁷ *In the Matter of Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, Notice of Proposed Rulemaking and Order*, FCC 00-455 (rel. Jan. 5, 2001).

³⁸ Many local exchange carriers have reported substantial changes in both the times of peak usage on their network and the duration of average calls resulting from the rapidly increasing access to the Internet over landline facilities. Persons log on and stay on for far longer than they spend on a voice call. These same changes will affect wireless carriers' ability to meet the growing needs for wireless services with their existing capacity.

The spectrum cap and cellular cross-interest rule limit CMRS carriers' ability to access additional spectrum to provide these spectrum-intensive new services. This practical obstacle created by ownership restrictions will grow even more severe as CMRS providers seek to provide even more advanced services such as high-speed access to the Internet. Even assuming continued progress in the capacity per MHz that technology makes possible, the limitations implied by the spectrum cap cannot help but constrain the rollout of new services in the U.S. *Gertner Decl.* at ¶ 31. The 120 MHz of spectrum licensed for PCS, for example, is completely subject to the cap. CMRS providers cannot acquire spectrum in that band if it, together with other capped spectrum they have, exceeds 45 MHz. *Gertner Decl.* at ¶ 34.

The combination of increasing traffic on wireless networks, together with the rapid growth of spectrum-hungry wireless data services, will likely constrain CMRS providers from competing effectively without acquiring considerably more spectrum capacity. The capacity of CMRS systems – even a CMRS system operating at the Commission's spectrum cap with the latest technology and small cells – is small compared with the total telecommunications demand in built-up areas.

The recent 1900 MHz auction has demonstrated the value of incremental spectrum. Ten MHz licenses generated \$16.9 billion in net high bids, averaging \$4.18 MHz / pop or roughly \$ 41 per person, demonstrating the critical need for new spectrum and the value of incremental spectrum to CMRS carriers. *Gertner Decl.* at ¶ 26.

The Commission noted in its previous review that few carriers had reached the cap.³⁹ As Drs. Gertner and Shampine discuss in their declaration, this is no longer the

³⁹ *First Biennial Review Order* at ¶ 26.

case. Many carriers, including Verizon Wireless, after grant of the C&F block licenses reach the cap or be at 35-40 MHz in many markets. *Gertner Decl.* at ¶ 39. In addition, cellular carriers that are close to the cap may also be constrained by the limited available options for reaching the cap. For instance, the cellular cross-interest rule, plus the overlapping nature of certain licenses (due to the varied types of geographic licensing schemes used by the Commission) can make it difficult to reach 45 MHz. *Gertner Decl.* at ¶ 40.

The cap disadvantages the very CMRS providers that have been the most successful, because to maintain growth of existing services and simultaneously offer 3G services will require more than 45 MHz in most areas, larger carriers are constrained in emerging markets. *Gertner Decl.* at ¶ 34. Furthermore a cap that stymies mass-market deployment of new services in urban areas will also slow deployment of technologies and markets in rural areas, no matter how high the rural spectrum cap. The perverse effect of the cap is thus that it will constrain Verizon Wireless and the other CMRS carriers that have been able to expand most rapidly through subscriber growth. That growth requires increased spectrum capacity. But the cap will restrict Verizon Wireless from acquiring the spectrum it anticipates will needed to meet future demands in its largest markets.

Vigorous competition requires a free and open market in which competitors can decide how to compete and differentiate themselves without being constrained by lack of available resources. Spectrum is the resource wireless carriers need to offer new services. In a free market, parties would acquire the types and amounts of spectrum that they need to offer the services they want to provide. They would pay for spectrum based on its perceived value for providing those services compared to other spectrum. A

wireless provider must also decide which amounts and types of spectrum will give it the resources it needs to serve its customers and differentiate its business in the competition for subscribers.

The Commission's more recent policy direction is not to impose spectrum caps on other bands, while itself correct, further undercuts the existing CMRS limits. The spectrum cap imposed only on a subset of spectrum available for mobile services, distorts the free market in spectrum by imposing external constraints on competitors' ability to use and combine different blocks of spectrum. For example, a wireless carrier may decide that PCS spectrum is the most cost-efficient and effective way to offer local loop service, but because of the cap it would be forced to acquire other less attractive spectrum, or to use only a limited amount of PCS spectrum to stay within the cap. Similarly, a cellular carrier may determine that the most efficient and effective way to offer advanced services is to acquire additional cellular spectrum, but here both the cap and cross-interest rule prohibit such action.

Retaining the cap will likely lead to a loss in consumer welfare, it may drive up the price of alternative spectrum blocks, making them more expensive for those wireless carriers that want to use those alternative blocks. These costs can result in delay of offerings of advanced services and increased consumer costs. *Gertner Decl.* at ¶¶ 42,43. Thus ownership restrictions impede an efficiently functioning market.⁴⁰ The cap forces spectrum constrained CMRS carriers to acquire spectrum outside their currently licensed bands. Thus carriers are forced to make choices to acquire new spectrum not on the basis

⁴⁰ *Third Report* at 8002.

of economic business and technical considerations, but regulatory fiat. *Gertner Decl.* at ¶ 11.

C. The Waiver Process Does Not Provide Sufficient Relief

The waiver process created in the *1999 Order* and the *Reconsideration Order*⁴¹ does not mitigate the harmful effect of the spectrum cap on the development of advanced services. The Commission required carriers requesting waivers to identify what additional services they would provide if the cap were waived, and why such services cannot be provided without exceeding the cap. Forcing carriers to divulge the advanced services that they plan to deploy obviously discourages use of the waiver process. Few carriers would disclose publicly such details to their competitors. *Gertner Decl.* at ¶ 48.

Even if a carrier were to request a waiver of the spectrum cap rule, the Commission must place it on public notice, which initiates a mandatory 30-day comment period. If a waiver is opposed, which in this competitive market is highly likely, there is significant additional time required for both the carrier and the Commission to address concerns raised in opposition. The Commission must evaluate and produce an order addressing these concerns before granting the waiver. However, the Commission is under no obligation to act in a timely manner. Thus timing and outcome both are uncertain and unpredictable.

The waiver process does not solve the problems with the cap, and worse, creates problems of its own. It inevitably injects uncertainty and substantial transactional delay. Carriers cannot formulate business plans, develop technologies, or secure financing for

⁴¹ *First Biennial Review Order* at ¶¶ 52, 82; *aff'd In the Matter of 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Memorandum Opinion and Order on Reconsideration*, WT Dkt. No. 98-205, 15 FCC Rcd 22072 (2000) at ¶¶ 5,7,12.

advanced services until they know how much spectrum they will be permitted to use. The waiver process withholds this information from carriers indefinitely. If the Commission is going to be consistent with its policy of promoting the rapid deployment of advanced services it can not require carriers to file waivers that require long waiting periods prior to approval of the underlying transaction.

No rule waiver process can, in any event, “cure” an underlying rule that is itself unsupportable. Because the cap cannot be justified as necessary regulation, it must be removed.

D. The Benefits Of The Spectrum Aggregation Limits As “Bright Line Rules” Are Negligible

In the *First Biennial Review Order*, the Commission determined that bright-line rules like the spectrum cap and cellular cross-interest rules “hold many benefits over alternative regulatory tools,” such as “administratively simple” review of CMRS acquisitions and market certainty.⁴² Examination of these purported benefits show that they are negligible, if not nonexistent.

The “administrative simplicity” in this case is generated by barring an entire class of license transfers, rather than reviewing them on a case-by-case basis as required by Section 310(d) of the Act. This is said to reduce the burdens placed on both the Commission and the industry.⁴³ Any “benefit” of administrative savings generated by an agency’s avoidance of reasoned decision making is, at best, questionable. Moreover, the notion that the spectrum cap confers a benefit on carriers by reducing the burden of

⁴² *NPRM* ¶ 30.

⁴³ *NPRM* ¶ 30.

securing approval of CMRS acquisitions makes no sense. Capping the amount of steel General Motors may purchase can be said to reduce the “burden” of acquiring steel. But it also reduces the firm’s ability to build automobiles. The waiver process, adopted to mitigate this effect, creates *additional* regulatory burdens on both the Commission and the carriers seeking waivers, negating the savings supposedly generated by eliminating Section 310(d) proceedings.

The only “market certainty” generated by the spectrum aggregation limits is that CMRS providers are unable to acquire the spectrum that will be necessary for existing and advanced services absent a waiver. This cannot rationally be characterized as a benefit. Moreover, as explained in the preceding section, the waiver process creates even more uncertainty than the processes the cap eliminates.

In any event, Congress left no room in the biennial review process for the Commission to retain rules premised on “administrative simplicity.” Unless the rule can be proven necessary, it should be repealed. The Commission thus could not base retaining the rules on speculation about administrative burdens resulting from repeal.

IV. THE CAP UNDERMINES THE COMMISSION’S GOALS BY DISCRIMINATING BETWEEN MOBILE SERVICES AND FIXED SERVICES

Apart from the obstacles it raises to the deployment of new services and the efficiency of wireless markets, the spectrum cap should be rescinded because it unjustifiably restricts ownership of spectrum used for only some but not other wireless services. Such unequal application of rules cannot be reconciled with the Commission’s goals of converging mobile and fixed services and allowing market forces, not regulation, to determine which carriers and services succeed.

Unequal Regulation of Competing CMRS Providers. The spectrum cap rule, Section 20.6, states that providers of cellular, certain PCS services and certain SMR services are subject to the cap. But Section 20.9(a) lists eleven different wireless services that are “regulated as commercial mobile radio services.” The Commission imposed the cap only on three of the eleven services on the ground that the other services either used small amounts of spectrum or were not likely to compete with cellular at that time. This rationale, however, no longer stands up. These services can deploy many of the new technologies that cellular, PCS and SMR carriers can deploy, directly competing with those carriers. For example:

-- Wireless mobile data, one of the fastest-growing industry sectors, is the subject of vigorous competition between many types of CMRS providers that hold licenses in a wide variety of spectrum blocks. Narrowband PCS providers, land mobile systems, nationwide paging, and many other mobile providers compete with cellular and broadband PCS providers, yet they are outside the cap. There is no logical reason to discriminate among these providers of functionally similar data services by applying a spectrum cap only to some.

-- Mobile satellite service, a futuristic mobile technology in 1994, is now becoming available to customers worldwide, and are marketed to compete with cellular and PCS for business and other customers. Enforcing a cap against terrestrial mobile services, but not against satellite-delivered mobile services, is logically and legally indefensible.

-- Wireless Communication Service licensees can provide an unlimited variety of mobile and fixed services. But again, this new service was not subject to any cap.

Unequal Regulation of Mobile vs. Fixed Providers. The arbitrariness of a CMRS spectrum cap becomes even more glaring when it is placed next to the Commission’s policy of flexible licensing of new services to provide fixed and/or mobile services. The Commission has encouraged cellular and broadband PCS carriers to begin offering fixed

services through wireless local loop technology.⁴⁴ As carriers move into these markets, the line between “mobile” and “fixed” will blur. Providers will seek to attract subscribers by offering them “one-stop shopping” for all of their communications needs, whether they are in a fixed location or on the move. This is clearly desirable because it fosters development of new competition, but regulation impairs, rather than fosters, this convergence.

As the fixed versus mobile distinction evaporates in the market, the legitimacy of any ownership limit that is confined only to three CMRS categories (as the cap is) or even more narrowly confined to cellular services providers (as the cross-interest rule is) also disappears. But the Commission has allocated spectrum to, and licensed, many new wireless services that are beginning to offer fixed wireless services armed with substantial spectrum, without being saddled with any limits on how much they can acquire. For example, LMDS (the local multipoint distribution service) was created to provide new fixed video and other wireless services to consumers, but it was not included in the spectrum cap; further, PCS and SMR spectrum is not subject to a cross-interest rule.

Regulatory symmetry is a basic principle in both the Communications Act and in Commission policy toward wireless services. Congress enacted Section 332 in part to abolish different regulatory regimes that had grown up around different mobile services, because it found, correctly, that disparate rules would distort markets and impair

⁴⁴ The Commission has found that permitting CMRS providers to offer fixed services “will stimulate wireless competition in the local exchange market, encourage innovation and experimentation in development of wireless services and lead to a greater variety of service offerings to consumers.” *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd 8965 (1997).

competition.⁴⁵ In its proceeding to implement Section 332, the Commission stated, “The broad goal of this action is to ensure that economic forces – not disparate regulatory burdens – shape the development of the CMRS marketplace.”⁴⁶ The spectrum cap and cellular cross-interest rule, however, do precisely what the Commission said it was directed by Congress to avoid: uneven regulation. Verizon Wireless does not see how the Commission can reconcile the current rules with Section 332.

V. BOTH OWNERSHIP RESTRICTIONS SHOULD BE ELIMINATED RATHER THAN MODIFIED.

While there is no basis to retain the spectrum cap and cellular cross-interest rule, the *NPRM* also asks whether modified rule, or alternative ownership limit, should replace it. Verizon Wireless opposes mere changes to the current rule that would leave in place limits on ownership or other interests in CMRS spectrum. Limits cannot be shown to achieve any of the goals the *NPRM* identifies for the evolution of wireless services. Like the current ownership restrictions, modified ownership restrictions would only continue to undermine those goals by distorting the market for spectrum and interfering with carriers’ ability to assemble the appropriate mix of spectrum to compete for customers and meet their customers’ needs. Leaving spectrum limits in place by tinkering with the current rules is no more justifiable than keeping the existing rules. Modified ownership restrictions would have the same inherent flaws and will just as clearly fail to promote the Commission’s CMRS policies.

⁴⁵ H. Conf. Rep. 103-213, 103d Cong., 1st Sess. 493 (1993) (goal of amendments to Section 332 was to ensure that, “consistent with the public interest, similar services are accorded similar regulatory treatment”).

⁴⁶ *Third Report* at 7994. The objective was “to create a level playing field for CMRS,” because consistent rules “will minimize the potentially distorting effects on the market of asymmetrical regulation.” *Id.* at 8004 (emphasis added).

VI. CONCLUSION

Verizon Wireless urges the Commission to repeal the spectrum cap and cellular cross-interest rule. Rather than adopt any other ownership limits, it should do what it said it should do (and what the law compels): Remove unnecessary, counterproductive rules. There are ample sanctions already in place that effectively protect competition. Ownership limits whether they are in the form of a spectrum cap or cellular cross-interest rules, are clearly not needed and for that reason alone cannot legally be maintained, nor can any modified rules be imposed. Continuing any restraint on spectrum ownership would only restrain a competitive industry's efforts to expand into new wireless markets, and would undermine the Commission's own goals for the future of CMRS.

Respectfully submitted,

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