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

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

COMMENTS OF AT&T WIRELESS SERVICES, INC.

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AT&T Wireless Services, Inc. ("AT&T") hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

The Commission's spectrum cap on commercial mobile radio services ("CMRS") and the accompanying attribution rules were originally designed to protect nascent competition in wireless markets.[2/] As AT&T demonstrated in its 1998 Biennial Review comments,[3/] with competition in the provision of wireless services a reality,[4/] the wireless marketplace has

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1/ 2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services, Notice of Proposed Rulemaking, WT Docket No. 01-14 (rel. Jan. 23, 2001) ("Notice").

2/ Originally adopted in 1994 as a "restriction on the amount of PCS spectrum a cellular licensee or other entity could obtain," the cap reflects concerns for a bygone day. See Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 7988, 8100-8117 (1994) ("CMRS Third Report and Order").

3/ In the Matter of 1998 Biennial Regulatory Review; Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, Comments of AT&T Wireless Services, Inc. (filed Jan. 25, 1999).

4/ See, e.g., 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, 15 FCC Rcd 17660 (2000) ("Fifth Annual Report").

outgrown the need for rigid, structural regulation. The Commission nonetheless retained the cap, out of an unsubstantiated fear that a repeal would "threaten reversal of the trends towards falling prices, improved service quality, product innovation, and product differentiation."[5/]

The case for abandoning the outdated spectrum aggregation limits has grown even stronger in the two years since the Commission last examined the issue. As the Commission itself reports, most consumers now have a choice of at least five facilities-based CMRS providers,[6/] there are six carriers offering virtually nationwide service;[7/] and cellular carriers compete hotly with broadband PCS and SMR services for new customers.[8/] There can no longer be any doubt that continued enforcement of the cap is not necessary to prevent market concentration. The Commission also has recognized that the spectrum cap hinders carriers' ability to offer innovative new services, such as 3G services.[9/]

In the face of these market developments, the Commission should eliminate the CMRS spectrum cap. Far from protecting competition, the spectrum cap introduces substantial market inefficiencies that impede the growth and development of wireless services called for in the

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5/ Notice ¶ 6.

6/ Fifth Annual Report at 17665. This represents an increase in competition since 1998, when consumers generally had a choice of at least four providers. CMRS Third Report and Order at 3; see also Notice ¶ 10 ("Since [the Commission] last reviewed spectrum aggregation limits in September 1999, CMRS markets have continued to grow in size, range of service offerings, and the pace of technological advances").

7/ Fifth Annual Report at 17655.

8/ Notice ¶ 14.

9/ See 1998 Biennial Regulatory Review, Report and Order, 15 FCC Rcd 9219 ¶ 82 (1999). While the Commission has indicated its willingness to consider waiving the spectrum cap in order to allow a provider to offer 3G services, this has not proved to be a viable option in practice. To gain a waiver the applicant must disclose sensitive business plans, for instance, and meet other burdens. Id. More generally, the waiver process provides no certainty to carriers and

Communications Act.[10] Likewise, the attribution rules used to determine whether a person holds an interest in spectrum in excess of the cap deprives new entrants of access to capital and management expertise that could otherwise help them to compete effectively in the marketplace. Contrary to the suggestion in the Notice,[11] there is no evidence of any relationship between continued retention of the spectrum cap and the growth of competition in the wireless market.

At best, to the extent consideration of spectrum aggregation by the Commission is a surrogate for a review of competitiveness of the wireless marketplace, it duplicates the competitive analyses already performed by the antitrust agencies. Such a review is unnecessary and introduces delay and uncertainty into transactions between wireless carriers. Eliminating this duplicative evaluation would still allow the Commission to fulfill its obligation to ensure that acquisitions comply with the Communications Act and the FCC's rules and policies, and are otherwise in the public interest. If the Commission felt that a particular acquisition raised issues of competitive harm, it could express those views informally to the antitrust agencies through the ex parte procedures already in place.

If the Commission determines to continue to review the competitive effects of spectrum acquisitions, then it should create a "safe-harbor" that permits the acquisition of up to 45 MHz of spectrum in any given market. For aggregations in excess of 45 MHz, the competitive effects of acquisitions and transfers of CMRS licensees can be evaluated on a case-by-case basis using the

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does not permit them to engage in the kind of long-term planning necessary for the deployment of advanced services.

[10] See Bruce M. Owen and Mark W. Frankena, "An Economic Evaluation of the Federal Communications Commission's Commercial Mobile Radio Services Spectrum Cap" (Jan. 1999), attached hereto at Exh. 1 ("Economists Inc."). The purpose of the Act is to encourage the "rapid, efficient, Nation-wide" availability of radio communications service. 47 U.S.C. § 151.

analytical tools employed by the antitrust agencies. Such a policy would promote the expansion of wireless services in a competitive marketplace without sacrificing an appropriate measure of certainty or administrative efficiency.[12/]

I. THE SPECTRUM CAP IS NOT NECESSARY TO PROMOTE COMPETITION

The spectrum cap was adopted to ensure that wireline monopolists would not stifle competition in wireless markets. Today the rule is not only unnecessary, but also counter-productive. By preventing carriers from obtaining sufficient spectrum to realize economies of scale and scope, for example, the spectrum cap may actually raise the costs of offering wireless services and prevent carriers from effectively meeting consumer demand.

A. There Is No Public Interest Rationale for Retention of the Spectrum Cap.

As the Commission recognizes, "Section 11 of the Communications Act imposes an affirmative obligation to eliminate or modify any of [the Commission's] rules for telecommunications services, such as the spectrum aggregation limits applicable to CMRS, if any such rule is determined to be no longer in the public interest."[13/] Congress designed the Telecommunications Act of 1996 to promote market competition and reduce the need for regulation.[14/] Thus, retention of the cap is unauthorized unless the Commission specifically establishes its continued necessity.[15/]

11/ Notice ¶ 16.

12/ AT&T seeks repeal of the spectrum cap rule pursuant to the Commission's biennial review process, for the reasons set forth herein, rather than forbearance from enforcement of the rule under section 10 of the Communications Act.

13/ Notice ¶ 11.

14/ Id.

15/ Id., citing 47 U.S.C. § 161.

The Notice posits two possible public interest justifications for retention of the spectrum cap despite the robust competition in the CMRS market: an alleged correlation between competition and the existence of the spectrum cap itself, and the promotion of diversity.[16/] Neither merits retention of the spectrum cap.

1. The Existence of the Spectrum Cap Does Not Enhance Competition.

The Commission's assertion that the spectrum aggregation limits have "contribute[d] to the rise of competition and resulting benefits to consumers"[17/] is completely unsupported. Merely because competition has increased and prices have dropped during the period when the cap was in effect does not suggest a causal link between the two facts, and the Commission presents no analysis in support of its assumption. It is equally likely that more competitors have entered the market and prices have fallen because of the increased interest in and demand by the public for traditional and advanced mobile services.[18/] Contrary to the suggestion in the Notice, therefore, there is no "correlation between the number of competitors maintained by current spectrum aggregation limits and the growth and maintenance of competition that has produced the benefits to consumers."[19/] The mere assertion by the Commission of a relationship between

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16/ The Commission also mentions without elaboration that spectrum aggregation limits might serve the goal of promoting market entry. Notice ¶ 20. Promoting market entry in the abstract is not necessarily an appropriate goal of public policy. For example, economic inefficiency is just as likely to arise from excessive entry as from excessive concentration. Even if the spectrum cap promoted market entry -- and it may not -- without further evidence that the additional entry is needed to protect competition, not competitors, continued retention of the rule is not justified. See Economists Inc. at 11.

17/ Notice ¶ 16.

18/ While the Commission suggests that the opposite is true -- that more customers subscribe to wireless services because prices have fallen -- it again presents no support for this assertion. Notice ¶ 15.

19/ Notice ¶ 16. Further, while the Commission credits the cap with keeping at least four competitors in every market, Notice ¶ 7, it has not presented any antitrust analysis suggesting the two occurrences is an insufficient justification for continued retention of restrictive regulation.

2. The Spectrum Cap is Not Needed to Promote Diversity.

The Commission's alternative justification for the spectrum cap -- that it "furthers the goal of diversity of ownership that [the Commission is] mandated to promote under section 309(j) of the Communications Act"[20] -- is again not a basis for continued regulation. Through section 309(j) of the Act, Congress encouraged the Commission to diversify the ownership of licenses in order to "promot[e] economic opportunity and competition" and "ensur[e] that new and innovative technologies are readily available to the American people."[21] As discussed below, however, the spectrum cap imposes significant costs on the market that in fact may actually *reduce* competition and the development and deployment of new technologies and services.

B. The Spectrum Cap Imposes Costs On The Market.

The spectrum cap has one clear consequence: it prevents the accumulation of wireless spectrum in excess of 45 MHz -- 55 MHz in rural areas -- by any individual competitor.[22] But there is nothing inherently beneficial to this outcome. As a general matter, consumers are not made worse off whenever one firm is larger or more efficient than its competitors.[23] The

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that the optimal number of competitors needed to protect competition was or is four or more. Retention of additional competitors is not, alone, a useful public goal justifying retention of the rule. See n.16, supra.

[20] Notice ¶ 7.

[21] 47 U.S.C. § 309(j)(3)(B).

[22] 47 C.F.R. § 20.6(a).

[23] See Economists Inc. at 13.

Commission itself has recognized that the acquisition of spectrum may allow efficiencies that would otherwise not be available.[24/] In other contexts, in fact, the Commission has endorsed spectrum aggregation in order to enhance offerings to downstream consumers.[25/] By limiting the amount of CMRS spectrum that a single competitor may acquire, the cap automatically prevents consumers from benefiting from potential economies of scale and scope that may arise when firms have access to increased spectrum.[26/]

First, the spectrum cap interferes with the ability of firms in the market to efficiently allocate resources, to the detriment of consumers, both by prohibiting potentially beneficial transactions that are not likely to create or enhance market power,[27/] and by prohibiting transactions in which the pro-competitive effects on balance outweigh any anticompetitive harm.[28/] While the spectrum cap was intended to serve as a "simplified version" of the

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[24/] In the Matter of Amendment of Parts 20 and 24 of the Commission's Rules, Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, 11 FCC Rcd 7824, 7869 ¶ 95 (1996) ("CMRS Spectrum Cap Report and Order").

[25/] See, e.g., In re Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing the Use of Frequencies Affecting Multichannel Multipoint Distribution Service, 5 FCC Rcd 6410, 6411 ¶ 9 (1990) (MDS channels will provide "a more significant benefit to the public if used collectively . . . than if used individually by multiple operators . . . ."); In the Matter of Amendment of Parts 22 and 24 of the Commission's Rules, Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap, 11 FCC Rcd 7824, 7875 ¶ 105 (1996) (elimination of cross-ownership rules will foster "enhanced opportunities to compete"); In the Matter of Revision of the Rules and Policies for the Direct Broadcast Satellite Service, 11 FCC Rcd 9712, 9724 ¶ 31, 9733 ¶ 55 (1996) (rejecting permanent ban on firms holding spectrum at two full-CONUS locations).

[26/] Economies of scale arise out of the declining marginal cost of expanded output. Economies of scope arise from the efficiencies of producing (or consuming) services in a bundle rather than separately. See Economists Inc. at 13-15. If competitors cannot achieve these efficiencies, they could actually have a reduced incentive to expand output. See infra.

[27/] See Economists Inc. at 1, 3, 7-11.

[28/] See id. at 11-21.

Herfindahl-Hirschmann Index ("HHI"),[29/] the spectrum cap actually prevents transactions that would not raise concerns even under traditional HHI analysis under the 1992 Merger Guidelines.[30/] There is, in fact, virtually no relationship between the spectrum cap and the 1992 Merger Guidelines or traditional enforcement of competition policy.[31/]

Second, a firm that is limited to 45 MHz or even 55 MHz may be prevented from attaining economies of scale and scope that would be available to it if it had access to additional spectrum.[32/] Such economies were in fact the reason the Commission limited the number of cellular licenses available in markets initially.[33/] Further, allowing firms to attain economies of scale and scope does not necessarily result in a reduction in the number of companies offering telecommunications services.[34/] Indeed, failure to exploit such economies could in fact foreclose competition and lead to higher costs.[35/]

[29/] CMRS Spectrum Cap Report and Order, 11 FCC Rcd at 7870 ¶ 96.

[30/] See Economists Inc. at 9-10.

[31/] The reason for this disconnect is that an antitrust analysis is not meaningful outside the context of a particular proposed transaction. For example, there cannot be an examination of the relevant "market" in the abstract; such an exercise requires an analysis of what is "relevant" to a particular merger or acquisition. For this reason, the Commission cannot use a Clayton Act-type analysis to arrive at a justification for spectrum caps, and the continued use of HHI calculations is unhelpful. See Economists Inc. at 5-6 (how to define market depends on facts in markets covered by licenses being transferred and varies in each case).

[32/] See id. at 9-10.

[33/] CMRS Third Report and Order at 8109-10 ¶ 263 (finding that the spectrum cap will enable wireless carriers with 40 MHz of spectrum "to obtain additional spectrum so they have incentives . . . to take advantage of . . . economies of scale and scope").

[34/] See Economists Inc. at 12.

[35/] See id.

Third, the cap causes inefficient use of substitutes for cellular, broadband PCS, and SMR spectrum, distorting a firm's use of inputs and increasing production costs.[36/] An efficient firm that may otherwise be able to use additional spectrum in low-density areas of the country is prevented from doing so under the spectrum cap.[37/] While the Commission credits the spectrum cap with promoting innovation, because firms have been forced to find ways to get more output from limited spectrum,[38/] there is nothing economically efficient about arbitrarily limiting one input and forcing users to "innovate" by adjusting other inputs -- in this case, more expensive transmission and receiving hardware.[39/]

In fact, the cap reduces firms' incentives to reduce prices, increase quality, and innovate, because those firms are less likely to be able to make additional sales in markets where they are at or near the spectrum cap already.[40/] For a firm that is already using its full complement of CMRS spectrum in a number of geographic markets, it makes particularly little sense to invest in innovations that are intended to supplement regional or national service offerings if it would require more than 45 Mhz in those areas.[41/] If additional spectrum is required to implement the enhanced services, they will be unavailable in markets where that firm is already at or near the spectrum cap. Further, because the spectrum cap is constant regardless of the market's population, the cap limits providers' ability to offer enhanced services in more populated markets, where available spectrum is needed to satisfy customers' needs for traditional voice

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36/ See id. at 15-17.

37/ See id. at 17-18.

38/ See Notice ¶ 32.

39/ See Economists Inc. at 13-14.

40/ See id. at 19-20.

41/ See id.

service. The most populated markets, however, are the areas where it is most likely that investment in broadband services will attract a sufficient customer base to make the investment worthwhile.

Finally, the spectrum cap may have the effect of inhibiting the ability of domestic carriers to compete with foreign carriers, who generally are not subject to such rules.[42/] Foreign carriers will therefore be able to develop broadband, advanced, or "third generation" services more quickly and efficiently than their domestic counterparts. This, in turn, may permit these carriers to control technology choices and prevent others from achieving economies of scale and scope.

C. Wireless Markets Are Not Prone To Anticompetitive Effects Appropriately Targeted By Structural Regulation.

Mergers and other transactions involving the acquisition of CMRS spectrum in excess of the cap do not always result in levels of market concentration that raise initial concerns under traditional standards of competition policy.[43/] Indeed, there is no evidence that the accumulation of any particular "amount" of spectrum causes harm to competition.[44/] For that reason, spectrum caps are an undesirable alternative to case-by-case analysis.

In fact, there is compelling evidence that wireless markets are not particularly susceptible to the exercise of market power -- either through anticompetitive collusion or through the

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[42/] For example, wireless carriers in many European and Asian countries hold at least 60 MHz of spectrum for second generation services. In Japan, spectrum holdings are capped at 86 MHz, and in the United Kingdom, at 90 MHz. Futher, many countries, including Australia, Brazil, China, and Taiwan, have no spectrum cap at all.

[43/] See Economists Inc. at Tables 1 and 2.

[44/] The fact that wireless spectrum is a "basic resource . . . needed and used by all wireless service providers . . . ." does not by itself justify the caps. Cf. Third Report and Order at 8100 ¶ 239. The Commission has the burden of demonstrating that limits on this input benefit consumers in the output market.

pernicious unilateral conduct.[45] These markets contain numerous well-capitalized actual and potential competitors, which have observed that consumer demand for wireless telecommunications services is rising every year. Importantly, wireless "spectrum" is not a relevant market from the consumer's perspective. At most, spectrum is an "input market" into cellular and other wireless telecommunications services. From a consumer perspective, the only valid reason for rationing spectrum is that it might expand the availability of products and services in the output market. However, nowhere has it been demonstrated that limiting the availability of this "input" creates additional supply in the "output" market.

Moreover, it would be relatively easy for existing competitors to add capacity in response to any price increase. Under these conditions, firms cannot profitably reduce output (fix prices, allocate markets, or engage in any other form of traditionally condemned activity) independently or in concert. For these reasons, no wireless provider could sustain a price increase for any significant period of time.[46]

For these reasons, the Commission cannot reasonably rely on the predictive value of its market concentration models to justify the imposition of "per se" rules barring the aggregation of more than 45 MHz of spectrum in a given non-rural geographic market. Such a rule ignores the rapidly evolving nature of the market, the ability of firms to enter or expand output relatively

[45] Compare CMRS Third Report and Order at 8101 ¶ 240 (predicting that aggregation of spectrum would confer market power). Importantly, the Commission's predictive concerns were specifically directed towards the local, incumbent wireline monopolists. See id.

[46] Two important characteristics of the market underscore this conclusion. First, the vast majority of costs involved in providing service are fixed costs (cell sites, towers, etc.). Variable costs in the output market are close to zero. Thus, the cost of adding additional subscribers is nearly negligible. Competitors therefore have a direct economic incentive to maximize output. Second, technological innovation in this market can provide demonstrable cost and quality advantages, giving competitors a substantial incentive to invest in new technologies that can

easily in order to defeat an attempted price increase, and other pertinent factors. To provide some certainty and to foster administrative efficiency, however, the Commission should retain a 45 MHz spectrum "safe harbor" below which a transaction will not trigger further review.

II. THE SPECTRUM CAP IN COMBINATION WITH THE ATTRIBUTION RULES DISTORTS EFFICIENT BUSINESS ARRANGEMENTS

The Commission's attribution rule for CMRS providers was adopted to provide guidance regarding whether an investment in another spectrum-holder would be subject to the 45 MHz spectrum cap.[47/] The attribution level was set at twenty percent because the Commission was concerned that such an interest, held by a single entity, could create the possibility of de facto control.[48/] However, experience demonstrates that the costs of the rule have outweighed its putative benefits. In the event that the Commission does not repeal the spectrum cap, AT&T respectfully requests that the "twenty percent" rule be repealed and that investments up to de facto control be permitted without attribution.

Conservative attribution rules, setting a ceiling lower than de facto control, create a disincentive to invest in new wireless services. The fast-growing wireless industry depends on the availability of investment capital.[49/] New investment ensures that market participants can innovate and provide consumers with the best products and services possible. Rules that make

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expand output. See generally Economists Inc.

[47/] CMRS Spectrum Cap Report and Order at 7880 ¶ 117. See 47 C.F.R. § 20.6(d).

[48/] CMRS Spectrum Cap Report and Order ¶ 118. Officers and directors convey an attributable interest as well. 47 C.F.R. § 20.6(d)(7). There is no basis, however, for attributing control to officers and directors in the absence of actual control over the licensee.

[49/] Implementation of Sections 3(n) and 332 of the Communications Act , Second Report and Order, 9 FCC Rcd 1411, 1421 ¶ 22 (1994) (finding that "[t]he continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry").

management agreements attributable deprive new entrants of management expertise. Such regulations do not serve the public interest. The affiliation rules are a clear example, since they prevent the formation of otherwise efficient combinations of investors as the market may demand.

The current rules limit investment for two reasons. First, they set an arbitrary ceiling on outside investment in a wireless licensee that may not rise to the level of "control" but is nonetheless deemed attributable and therefore precluded. Second, the interplay between ownership limits and restrictions on management interests imposes substantial transactions costs on licensees who are interested in providing capital and management expertise to new entrants on a non-controlling basis.

AT&T has had direct experience with these untoward effects. In an effort to facilitate the rapid buildout of its wireless PCS network in a number of underpopulated markets nationwide, AT&T joined with other investors to help three companies become AT&T affiliates.[50/] None of the minority investors in these companies can exercise de facto control over the ventures,[51/] but each investor's interest is attributable under the rules nonetheless. Thus, the ventures are prevented by operation of the Commission's rules from participating in auctions or otherwise acquiring new spectrum or entering new markets -- even if it would be efficient to do so -- despite the fact that no minority investor could otherwise prevent it. The rules thus impose artificial barriers on competition and make it more difficult and costly to attract investment capital.

[50/] Specifically, AT&T invested in Triton PCS, Inc., Telecorp PCS Inc., and Tritel PCS, Inc.

[51/] AT&T holds a minority equity interest in each of these firms, and has one vote on the management committee. Other investors have similar arrangements.

In this manner, the rules chill the timely roll-out of wireless services to unserved and underserved consumers. Such an outcome hardly serves the public interest. Reduced investment limits technological innovation as well. While innovation is important in many industries, it is critical in the high-technology wireless telecommunications business. Technology is the driving force behind today's highly competitive wireless marketplace. Investments in new technology benefit consumers by providing them with lower prices, new features, advanced capabilities, and more reliable service. Congress, the Commission, industry, and consumers agree that competition in the wireless marketplace serves as the catalyst for lower prices, increased choices, and technological innovation. The rule inadvertently discourages the technological improvements that drive consumer satisfaction. Partial ownership or an interest in management, contrary to the Commission's fears, neither reduces competition nor effectuates de facto control. Accordingly, the Commission should eliminate its burdensome rule and rely upon a case-by-case control test instead.[52/]

[52/] "De jure" control may be evidenced by ownership of 50.1 percent or more of an entity's voting interest. See In the matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, 12 FCC Rcd 12545, 12691-92 (1997). "De facto control" can be determined on a case-by-case basis after considering all of the specific circumstances. See id. at 12691-2. See also Intermountain Microwave, 24 Rad. Reg. (P&F) 983 (1963); In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 447 (1994); In re Application of Stereo Broadcasters, 55 FCC 2d 819, 821-22 (1975).

III. THE COMMISSION SHOULD UNDERTAKE CASE-BY-CASE REVIEWS OF WIRELESS MERGERS AND ACQUISITIONS WITHOUT DUPLICATING THE COMPETITION ANALYSES ALREADY PERFORMED BY THE ANTITRUST AGENCIES

Whatever the benefits of the spectrum cap during the initial licensing of CMRS, continued enforcement of the cap in today's competitive environment is unnecessary and actually disserves the public interest. Repeal of the spectrum cap would enable carriers and consumers to realize the benefits of scale and scope economies that are not possible today without creating a risk of anticompetitive conduct.

To the extent consideration of spectrum aggregation by the Commission is a surrogate for a review of competitiveness of the wireless marketplace, it duplicates the competitive analyses already performed by the antitrust agencies.[53/] Such a review is unnecessary and introduces delay and uncertainty into transactions between wireless carriers. Eliminating this duplicative evaluation would still allow the Commission to fulfill its obligation to ensure that acquisitions comply with the Communications Act and the FCC's rules and policies, and are otherwise in the public interest.

In particular, the Commission should focus its efforts on issues for which it has unique responsibility and expertise and which are not addressed by the antitrust regulators.[54/] These would include consistency of the merger with specific provisions of the Communications Act,

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[53/] Notably, the antitrust agencies have not looked to spectrum holdings to assess market power. See, e.g., United States v. SBC Communications, Inc. and Ameritech Corp., Civil No. 99-0715, Competitive Impact Statement at 6 (evaluating market power of merging parties by reference to subscribers or wireless lines served); United States v. Bell Atlantic Corp. *et al.*, Civil No. 1:99CV01119, Competitive Impact Statement (Dec. 22, 1999) at 12 (same).

[54/] In re Application of Ameritech Corp., Transferor and SBC Communications Inc., Transferee, Memorandum Opinion and Order, 14 FCC Rcd. 14712, 14739 ¶ 50 (1999) ("competition in the compliance by the parties with FCC rules and policies, the technical and financial qualifications of the acquiring party, and foreign ownership issues.

The Commission could continue to voice any concerns it had regarding the competitive impacts of a proposed transaction by conveying them informally to the antitrust agency reviewing the transaction. This informal consultation is already allowed by the ex parte rules,[55/] and occurs on a regular basis. Such an approach would best conserve scarce resources, and avoid unnecessary duplication of efforts.

If the Commission determines that it should continue to review the competitive effects of spectrum acquisitions, then to provide some measure of certainty and to foster administrative efficiency, repeal of the cap should be accompanied by the adoption of a safe harbor that permits aggregations of 45 MHz or less. Such a presumption would ensure that these aggregations are not subject to greater scrutiny that they are under current rules.[56/] For acquisitions in excess of the safe harbor, the Commission could examine the competitive effects of the transaction using the analytical tools developed by the antitrust agencies.[57/] This policy would introduce the

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telecommunications industry is shaped not only by antitrust rules, but also by regulatory policies that govern interaction among industry participants").

55/ 47 C.F.R. § 1204(a)(5).

56/ Amendment of Parts 30 and 24 of the Commission's Rules, 11 FCC Rcd 7824, 7869 ¶ 95 (1996) (spectrum cap adopted to "discourage anti-competitive behavior . . . ." and "promote competition . . . ."). Aggregations above 45 MHz would be subject to review under HHI thresholds or similar mechanisms, which themselves are presumptions that would be explored through more detailed review of particular transactions.

57/ In reviewing license transfers under the "public interest" standard of sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a), 310(d) the Commission has adopted a test that encompasses implementation of the pro-competitive, de-regulatory objectives embodied in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at scattered sections of 47 USC ("1996 Act"). See Applications of NYNEX Corp. and Bell Atlantic Corp., 12 FCC Rcd 19985, 19987 ¶ 2 (1997) ("Bell Atlantic/NYNEX") (referencing Department of flexibility necessary for wireless carriers to be able to compete effectively and give them the incentives necessary to foster new investment in wireless services and facilities, while avoiding the confusion of two market reviews under disparate standards.

CONCLUSION

For the foregoing reasons, the Commission should eliminate the spectrum cap and attribution rules.

Respectfully submitted,

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Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, reprinted at 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992)).

An Economic Evaluation of the Federal Communication Commission's Commercial Mobile Radio Services Spectrum Cap

I. Executive Summary

This paper assesses the economic merits of the Federal Communication Commission's (Commission) spectrum cap as a means of preventing entities from acquiring market power that would give them the ability and incentive to raise prices and reduce quality for wireless telecommunications services. The Commission's expressed concern is that the acquisition of an attributable interest in more than 45 megahertz (MHz) of the approximately 189 MHz of spectrum that is subject to the cap would give an entity the ability and incentive to raise prices for wireless services above competitive levels both by reducing its output of wireless services below competitive levels and by withholding spectrum from incumbent competitors and new entrants that would use additional spectrum to expand output in response to an anticompetitive price increase.

This paper has three principal findings. First, the spectrum cap prevents many types of spectrum license transfers that would be unlikely to have an adverse effect on competition in markets in which shares are based on MHz of spectrum. Second, a spectrum cap distorts resource allocation and harms consumers by reducing achievement of economies of scale and scope, expansion of efficient firms, innovation and competition. Third, the Commission can attain its important goal of protecting consumers from market power without the distortionary effects of a cap by relying on case-by-case evaluation of license transfers using the tested competition policy principles and tools that apply to virtually all industries. These principles and tools are set out in the U.S. Department of Justice and Federal Trade Commission Merger Guidelines.

Based on these findings, this paper concludes that the Commission's spectrum cap is unnecessary and should be repealed.

The Commission has argued that the cap is useful because it reduces uncertainty: "A cap is a bright line test that provides entities who are making acquisitions with greater assurance than a case-by-case approach that if they fall under the cap, the Commission will approve the acquisition." (Third Report and Order, GN Docket No. 93-252, August 9, 1994, para. 250.) However, this point supports a safe harbor rather than a cap. The Commission could adopt a safe harbor policy that it would not challenge acquisitions that would give an entity an attributable interest in 45 MHz or less, while dealing with transactions that would give an entity more than 45 MHz on a case-by-case basis.

II. Description of the Spectrum Cap

Commercial Mobile Radio Service (CMRS) and other spectrum licenses are used by entities that supply mobile telephony, paging and messaging, dispatch, and mobile data services. Two Commission rules--the CMRS spectrum cap and the cellular cross-interest rule--limit the extent to which a single entity can have interests in multiple CMRS licenses in the same geographic area. This paper focuses on the spectrum cap.[1]

The Commission's spectrum cap prevents a single entity from acquiring attributable interests in licenses for cellular telephone services, broadband Personal Communications Services (PCS), and Specialized Mobile Radio (SMR) services

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[1] The Commission's cellular cross-interest rule prohibits any entity from having a direct or indirect ownership interest in licenses for both 25 MHz cellular channel blocks in overlapping cellular service areas, although an entity may have interests of 5 percent or less in licenses for both channel blocks.

that collectively exceed 45 MHz of spectrum in the same geographic area.[2] An entity is considered to have an attributable interest in a license in which it has an ownership interest of 20 percent or more[3] or in which it has certain other types of interests.[4] Two licenses are considered to be in the same geographic area if they cover 10 percent or more of the population of the same Major Trading Area (MTA) or Basic Trading Area (BTA).

Approximately 189 MHz of spectrum is subject to the cap. The spectrum that is subject to the cap includes 50 MHz of cellular spectrum, 120 MHz of broadband PCS spectrum, approximately 14 MHz of 800 MHz SMR spectrum,[5] and 5 MHz of 900 MHz SMR spectrum.[6] Given the 189 MHz total, the 45 MHz cap prohibits a single entity from having an attributable interest in 24 percent or more of the spectrum in an MTA or BTA that is subject to the cap.

III. The Spectrum Cap Prevents License Transfers that Are Unlikely to Reduce Competition

The spectrum cap prevents many types of spectrum license transfers that are unlikely to have an adverse effect on competition in markets for which shares

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[2] The spectrum cap does not apply to SMR licenses that are regulated as "private" rather than "commercial" services. However, the Commission has proposed extension of the cap to include private SMR services. See Notice of Proposed Rulemaking, WT Docket No. 98-205, November 19, 1998, para. 28.

[3] For a designated entity, the attribution threshold is 40 percent rather than 20 percent.

[4] Other interests that are deemed attributable interests include management and joint marketing agreements that give an entity significant influence over price or non-price terms for services supplied using a license.

[5] There is 21.5 MHz of 800 MHz SMR spectrum, consisting of 10 MHz of "upper" 800 MHz, 4 MHz of "lower" 800 MHz, and 7.5 MHz of "General Category" SMR spectrum. The discussion in this paper assumes that the 7.5 MHz of General Category SMR spectrum is regulated as "private" rather than "commercial" service and hence is not subject to the cap.

[6] However, at most 10 MHz of SMR spectrum counts toward the 45 MHz limit for any one entity.

are based on MHz of spectrum. In order to explain this fact, this paper provides a brief review of the role of the Merger Guidelines and of the competition policy enforcement standards that apply to mergers and acquisitions.

A. Competition Policy Standards

The Merger Guidelines specify that one should begin an analysis of a merger or acquisition by delineating relevant markets and computing the effects of the acquisition on market shares and concentration. Concentration is measured by the Herfindahl-Hirschman Index (HHI), which is the sum of the squared shares of sellers in the market.

The Guidelines in effect specify a safe harbor for horizontal mergers or acquisitions that leave HHIs in relevant markets below 1,000. The Guidelines indicate that the antitrust agencies may investigate further acquisitions that would raise the HHI in a relevant market by over 100 to a post-acquisition level between 1,000 and 1,800, but in practice such acquisitions typically raise few concerns about market power and are seldom challenged.

The Guidelines further indicate that there is a rebuttable presumption that acquisitions that would raise the HHI by over 50 to a post-acquisition level above 1,800 will reduce competition. However, while the Guidelines designate a market with an HHI over 1,800 as "highly concentrated," the antitrust agencies do not seek to prevent all mergers and acquisitions that would increase HHIs to a level above 1,800. Enforcement decisions are not based on HHIs alone, and following further investigation it is unusual for the federal antitrust agencies to oppose or for courts to enjoin acquisitions that would increase HHIs by less than 200 or leave post-acquisition HHIs below 2,000.[7]

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[7] See M. B. Coate, "Economics, the Guidelines and the Evolution of Merger Policy," Antitrust Bulletin, Winter 1992, pp. 997-1024; M. B. Coate, "Merger Enforcement at the Reagan/Bush FTC," in M. B. Coate and A. N. Kleit, eds., The Economics of the Antitrust Process, Kluwer,

In addition to considering HHIs, competitive analyses of mergers and acquisitions may also take into consideration the market share of the merged firm in order to evaluate the potential for this firm alone to exercise market power as a dominant firm. However, post-acquisition market shares below 35 percent generally do not raise significant concerns beyond those raised by HHIs.

B. Relevant Markets for Analysis of the Spectrum Cap

Commission documents that address the spectrum cap generally are based on an implicit assumption that there is a relevant product market for spectrum that includes, at a minimum, a total of 180 MHz of spectrum. The candidate relevant product markets appear to include:

- Market with 180 MHz: 50 MHz of cellular spectrum, 120 MHz of broadband PCS spectrum, and the 10 MHz of contiguous "upper 800 MHz" SMR spectrum. This market is used by the Commission in the numerical analysis of the spectrum cap in Appendix A of Report and Order, WT Docket No. 96-59, June 21, 1996. One problem with the market with 180 MHz is that it excludes approximately 9 MHz of SMR spectrum that is subject to the cap. However, the SMR spectrum attributable to any one entity for purposes of applying the cap is limited to 10 MHz.

- Market with 189 MHz: The same spectrum that is in the market with 180 MHz plus the 4 MHz of "lower 800 MHz" SMR spectrum and the 5 MHz of 900 MHz SMR spectrum. This is essentially the spectrum that is subject to the cap. This 189 MHz figure is cited by the Commission, but not explicitly adopted as a market, in the discussion of the spectrum cap in the Third Report and Order, GN Docket No. 93-252, August 9, 1994, para. 258.

1996, Chapter 7; R. J. Gilbert, Testimony, Application of Wisconsin Electric Corp. et al., Public Service Commission of Wisconsin, Docket 6630-UM-100, 1996.