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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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COMMENTS OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits its comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[2] The spectrum cap has not only unambiguously outlived its stated purposes, it now threatens to substantially impede further competitive development of commercial mobile radio services. Review of future transactions under traditional antitrust analysis—our nation's fundamental economic policy[3]—will amply suffice to protect consumer welfare.

CTIA commends the Commission for its recognition, as reflected in the Notice, that sometimes the best thing the agency can do is to undo its own work. This insight is unfortunately somewhat novel in the history of FCC ownership regulation. Since the 1940s, the

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

2 2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, *Notice of Proposed Rulemaking*, FCC 01-28 (rel. Jan. 23, 2001) ("Notice").

3 Carnation Co. v. Pacific Westbound Conference, et al., 383 U.S. 213, 218 (1966).

FCC has promulgated a broad variety of ownership limitations governing its licensees, but its ability to reform and repeal these rules in timely response to changed circumstances has too often reflected near-paralyzing inertia. In fact, the Commission in the past has eliminated ownership restrictions only when specifically commanded by an Act of Congress to do so.[4]

This Commission is presented here with the watershed opportunity to remove, on its own initiative, an ownership restriction that no longer serves the purposes for which it was promulgated. Its actions here can demonstrate that it has the flexibility and insight not only to enter the field but also to appropriately withdraw from it.

I. INTRODUCTION AND SUMMARY.

The Commission's rules limiting CMRS spectrum holdings were introduced as a corollary to its PCS licensing decisions. In designing blocks of spectrum of 30 MHz and lower,

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4 See Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) 47 C.F.R. § 73.3555, *Order*, 11 FCC Rcd 12368 (1996) (eliminating the limits on national radio station ownership, eliminating numerical limits of group television station ownership, and modifying the national audience reach rule for television stations, in each case as directed by the 1996 Act); Implementation of Sections 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996; Cable Television Antitrafficking, Network Television, and MMDS/SMATV Cross Ownership Rules, *Order*, 11 FCC Rcd 15115 (1996) (eliminating the broadcast/cable cross-ownership rule, and amending the MMDS/SMATV cross-ownership rule, as directed by the 1996 Act); Telephone Company-Cable Television Cross-Ownership Rules, 11 FCC Rcd 14639 (1996) (implementing legislative repeal of the cross-ownership rule and video dialtone policies).

The one minor instance in which the FCC acted on its own merely underscores the point. In 1995, the Commission removed a rule promulgated in 1946 that had prohibited a network from acquiring a station in markets where the number of existing stations was small. Regulations Governing Television Broadcasting, 10 FCC Rcd 4538 (1995). The Order recited the fact that the rule was initially promulgated at a time when there were six stations total in the country, noted that "the television market has undergone enormous change," and that in any event the rule had never been invoked successfully to prevent any transaction. Id. ¶8. Nevertheless, it took the agency nearly half a century to reconsider and eliminate the restriction.

the Commission had to make some initial estimate of what amounts of the new spectrum might be sufficient to commence a business. The cap and companion limits were designed to ensure that new entrants other than the cellular incumbents would obtain PCS spectrum, thereby increasing competition for CMRS services. Anxious also that this licensing scheme not be undone in the early post-auction phases, when new entrants were only beginning their development, the Commission continued operation of the cap to guard against reconsolidation.

Circumstances have altered dramatically since the spectrum cap was adopted; CMRS competition today is robust. Moreover, while the Commission early on could speculate that its cap did not impose efficiency losses, it is now clear that these risks are in fact substantial. As analyzed fully by Drs. Marius Schwartz and John M. Gale in the attached economic analysis entitled "Are Spectrum Limits Needed to Preserve Competition?" the CMRS business at this stage is indistinguishable from the many other industries subject only to case-by-case antitrust scrutiny of their consolidations. The CMRS business is well beyond any transition phase of protecting "nascent" competition. Given this, the overhanging per se prohibition of the spectrum cap cannot be justified.[5]

The policy approach detailed by Drs. Schwartz and Gale is in full accord with the Commission's obligations under Sections 11 and 332 of the Communications Act and Section 202 of the 1996 Act, which in combination create a strong presumption in favor of relying on market forces and removing regulation. Here, the spectrum cap is not only unnecessary, it actually threatens to be a net drain on the development of competition in the CMRS business. In light of the fact that CMRS consolidations will be subject to antitrust scrutiny and the

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[5] Professor Marius Schwartz and Dr. John M. Gale, Are Spectrum Limits Needed to Preserve Competition? at 7-8, 35 (April 13, 2001) ("Schwartz and Gale").

Commission's review under Section 310(d), the Commission can and must remove the spectrum cap.

II. THE FCC'S REVIEW OF THE CMRS SPECTRUM CAP SHOULD BE GUIDED BY THE LEGISLATIVE PRESUMPTION IN FAVOR OF MARKET FORCES AND DISFAVORING REGULATION.

The general directive of Section 11 to review and eliminate unnecessary regulation of telecommunications services exhibits the broader legislative policy of the 1996 Act in favor of market forces and against regulatory intervention where it is not demonstrably necessary.[6] As described in the Notice, Section 11 of the Communications Act mandates that the Commission evaluate its regulation of telecommunications services on a biennial basis to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[7] The section further removes any discretion on the part of the agency to continue such rules, making the elimination of such regulations obligatory.[8]

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6 See, e.g., 1998 Biennial Regulatory Review - Spectrum Aggregation Limits for Wireless Telecommunications Carriers, *Notice of Proposed Rulemaking*, 13 FCC Rcd. 25132, ¶5 (1998) ("the operation of market forces generally better serves the public interest than regulation. The Commission should consider imposition of regulation when there is an identifiable market failure and imposition of the regulation would serve the public interest because it is targeted to correct that failure.").

7 47 U.S.C. § 161(a)(2). See H. Conf. Rep. No. 104-458 at 185 (1996) reprinted in 1996 U.S.C.C.A.N. 124, 199 (directing the Commission to review all of its regulations, "determine whether any of these regulations are no longer in the public interest because competition between providers render the regulation no longer meaningful...[and] eliminate the regulations that it determines are no longer in the public interest.").

8 47 U.S.C. § 161(b) (requiring that the Commission "shall repeal or modify" those regulations.).

The Notice seeks comment on "the relation between 'public interest' and 'meaningful economic competition.' "[9] The Notice also seeks comment on what constitutes "meaningful economic competition" and whether it now exists.[10] Section III.B of these Comments discusses at length how and why CMRS competition commands repeal of the spectrum cap, but it is important for the Commission to acknowledge that Section 11, let alone any technical interpretation of that section, is not the sole guide in this proceeding. Rather, the combined commands of Section 11, Section 332, and Section 202 of the 1996 Act, along with general principles of administrative law, dictate removal of the CMRS spectrum cap.

Section 11 and its standard for retaining FCC regulations codify a specific manifestation of the Commission's broader obligations under general principles of the Communications Act and administrative law to ensure the continuing public interest viability of its rules. Thus, whatever the precise requirements for deletion pursuant to Section 11 may be, that section does not impose any special burden on those seeking elimination of a particular regulation. In fact, the Commission's broader obligations to ensure the public interest viability of its rules predate and subsume the standard articulated in Section 11, as explained below. In other words, "meaningful economic competition" is a sufficient—but not necessary—condition for eliminating a particular regulation.

The Communications Act expressly confines the Commission's general rulemaking authority to matters "that serve the public interest."[11] Where the factual predicate underlying the

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9 Notice ¶12.

10 Id.

11 Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) (citing § 303(r)).

public interest justification for a rule no longer exists, the very power of the Commission to maintain or enforce such a rule is called into question.[12] Under such circumstances, the agency's failure to repeal its regulation is unlawful, for "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."[13]

In Geller v. FCC, for example, Appellant had petitioned the FCC to revisit certain cable television regulations which had been expressly adopted to facilitate passage of copyright legislation. Geller had argued that these regulations no longer served the public interest after Congress' adoption of such legislation and should, therefore, have been rescinded. In finding the Commission acted arbitrarily in refusing to revisit the viability of the rules, the court concluded that the agency could not sit idle in the face of evidence that the original public interest justification for the rule "had long since evaporated."[14] Once alerted "to the possibility that the regulations ... lacked a nexus with the public interest" because their initial objective had been

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[12] See id. ("Even a statute depending for its vitality upon a premise extant at the time of enactment may become invalid if subsequently that premise disappears. It can hardly be supposed that the *vitality* of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continuing operation.") (emphasis added and internal citations omitted); Maier v. EPA, 114 F.3d 1032, 1040 (10th Cir. 1997) ("[C]hanges in factual or legal circumstances may impose upon the agency an obligation to reconsider settled policy or explain its failure to do so.") (citing Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992)); Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 767 (6th Cir. 1995) ("[W]here the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach.") (citing Bechtel).

[13] Alltel v. FCC, 838 F.2d 551, 561 (D.C. Cir. 1988) (quoting HBO v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977)).

[14] Geller, 610 F.2d at 980.

accomplished, the Commission was statutorily obligated to conduct a re-examination of these rules.[15]

Section 11, then, codifies this obligation by ensuring a biennial inquiry to relax and remove regulations that are no longer necessary. Moreover, when read in conjunction with Section 202 of the 1996 Act and Section 332 of the Communications Act, Section 11 here commands that there be compelling justification for retention of the spectrum cap—justification that simply cannot be found. While Section 11 requires review of all regulations of "telecommunications services," Section 202(h) expressly and specifically targets "all of [the FCC's] ownership rules" for biennial review.[16] It requires the Commission to determine whether "any of such rules are necessary in the public interest as the result of competition."[17] If not, the Commission is again mandated to repeal or modify such regulation.

Section 332 similarly endorses these principles in the specific context of CMRS. Long before Congress acted to enable competition in wireline services, it enacted Section 332 to target specifically the wireless industry as a market far better served by competition, not regulation.[18]

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15 Id. at 979-80.

16 Although Section 202 generally addresses ownership rules in the context of the broadcast industry, its plain language requires that the Commission review "all" of its ownership rules. *Cf.* 1998 Biennial Regulatory Review, *Report and Order*, 15 FCC Rcd 9219 at n.1 (1999) ("First Biennial Review Order"); 1998 Biennial Regulatory Review, *Notice of Proposed Rulemaking*, 13 FCC Rcd 25132, ¶3 n.11 (1998).

17 Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12.

18 The predecessor to Section 332 (codified at section 331 at the time) was first enacted in 1982, Communications Amendments Act of 1992, Pub. L. 97-259, § 331, 96 Stat. 1087, 1096 (1982) and precluded burdensome regulation of private land mobile services. Section 332 was amended in 1993, Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, § 6002(b)(A), 107 Stat. 312, 393-96 (1993) to require deregulation as appropriate with respect to all CMRS. The 1996 Act amended the section once again.

In adopting and thereafter amending Section 332, Congress established the overarching goal of "promoting opportunities for economic forces—not regulation—to shape the development of the CMRS market."[19] Section 332 specifically grants the Commission authority to deregulate in the public interest.[20] As part of its "public interest" calculus, Section 332(c)(1)(C) expressly obligates the Commission to consider the effect that its regulatory actions would have on "competitive market conditions," including whether forbearance will "enhance competition" among CMRS providers.[21] Further, Congress expressly prohibited state regulation of CMRS entry and rates, allowing for rate regulation only upon specific demonstration (never successfully made) that "market conditions . . . fail to protect subscribers. . . ."[22]

The legislative disfavor of unnecessary regulation of CMRS set forth in Section 332, and of unnecessary ownership regulation found in Sections 11 and 202, unambiguously guide this

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19 Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Third Report and Order*, 9 FCC Rcd 7988, ¶29 (1984) ("CMRS Third Report and Order").

20 47 U.S.C. § 332(c)(1)(A).

21 Id. at § 332(c)(1)(C). See CMRS Third Report and Order, ¶42 n.62 (noting that the third prong of the forbearance test *requires* the Commission to consider the effect of competition in the CMRS marketplace) (emphasis added); Implementation of Sections 3(n) and 332 of the Communications Act, *Second Report and Order*, 9 FCC Rcd 1411, ¶125 (1994); see also H. Conf. Rep. 103-213 at 491 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1180 ("The purpose of this provision [332(c)(1)(C)] is to recognize that *market conditions* may justify differences in the regulatory treatment of some providers of commercial mobile services.") (emphasis added).

22 47 U.S.C. § 332(c)(3). The Commission's forbearance authority under Section 332 is of course distinct from its general forbearance power. See Section 10, 47 U.S.C. § 160. However, the Commission is obligated to consider the effect on competition in either case. Id. at Section 10(b), 47 U.S.C. § 160(b).

proceeding. In combination, they create a strong presumption in favor of market forces, free of the distortions created by regulatory interference.[23]

III. THE SPECTRUM CAP HAS OUTLIVED ITS PURPOSE.

A review of the initial policy objectives that prompted the Commission's introduction of the spectrum cap shows that it is no longer needed to serve those objectives. As set forth more completely below, the principal policy objective articulated for promulgation of the spectrum cap was to achieve a competitive market structure.[24] In establishing this goal, the Commission was simultaneously concerned that its drive for multiple entry not sacrifice efficiencies.

Increased competition in the provision of CMRS, as well as the reduction of entry barriers and the maturation of the CMRS business, render the 45 MHz spectrum cap wholly unnecessary to prevent harmful concentration. Instead, the 45 MHz spectrum cap actually puts at risk further competitive development of the CMRS business by preventing spectrum acquisitions that would improve efficiency.

A. The Public Interest Rationale For The Cap Has Been To Create A Competitive Market Structure Without Disrupting Efficiency Gains.

In the early 1990s, mobile radio service was primarily the province of two cellular licensees authorized in each local service area. The 45 MHz spectrum cap set forth in 47 C.F.R. § 20.6 has its origin in the Commission's decision to make 120 MHz of spectrum available for

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23 The economic policy analysis supporting this legal principle is provided at length in the attached analysis of Drs. Schwartz and Gale.

24 See CMRS Third Report and Order ¶248. As a secondary matter, the Commission also acknowledged its obligations under 309(j)(3) of the Act to have utilized a form of competitive bidding procedures that would promote a diverse distribution of licenses. Id. As discussed in Section V.D infra, the Commission has used far more targeted regulatory tools to achieve the general policies represented in 309(j)(3), making the cap wholly irrelevant to these goals.

personal communications services and nearly triple the amount of spectrum available for the provision of mobile radio services.[25] In the PCS Second Report and Order, the Commission adopted a 40 MHz ownership cap on PCS spectrum, along with an eligibility rule limiting cellular licensees to one 10 MHz PCS license overlapping with their cellular service areas.[26] These limitations introduced the opportunity for substantial new competitive entry in the CMRS business.[27] The Commission articulated its desire to "promote competition" by "provid[ing] consumers with as many competitive choices as possible."[28] Significantly, the Commission sought to balance its desire for multiple entry with the need to avoid disrupting the efficient provision of CMRS. Specifically, the Commission recognized that "participation by cellular operators in PCS offers the potential to promote the early development of PCS by taking advantage of cellular providers' expertise, economies of scope between PCS and cellular service, and existing infrastructures," and thus cellular participation in PCS would actually "foster a competitive market environment...."[29]

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25 See Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, 8 FCC Rcd 7700, ¶¶3-13, 54 (1993) ("PCS Second Report and Order").

26 See id. ¶105.

27 See Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, ¶103 (1994) ("PCS Second Report and Order Recon.").

28 Id.

29 PCS Second Report and Order ¶104. See PCS Second Report and Order Recon. ¶103.

The 45 MHz spectrum cap was thereafter adopted as a complement to the cellular eligibility rule and PCS ownership limit[30] (which were eventually replaced entirely by the 45 MHz cap alone). It was similarly premised on the Commission's belief that it could derive a specific numerical limit that would satisfactorily balance the concerns for harmful concentration with efficiency concerns. As characterized by the Commission, the 45 MHz cap would serve "as a minimally intrusive means of ensuring that the mobile communications marketplace remains competitive and retains incentives for efficiency and innovation…."[31] In its absence, the Commission feared that licensees might acquire market power by aggregating enough spectrum to permit them to "unilaterally or in combination exclude efficient competitors, reduce the quantity of service available to the public, and increase prices to the detriment of consumers."[32] The cap would prevent these harms "without sacrificing the benefits of pro-competitive and efficiency-enhancing aggregation."[33]

The Commission appeared confident that it could promulgate a "properly designed cap," noting that "[i]f a cap is set high enough, or only restricts acquisitions in limited segments of the spectrum, the risk of efficiency losses will be reduced."[34] On remand from the Sixth Circuit's

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30 See CMRS Third Report and Order ¶63 (The 45 MHZ cap "supplements the caps adopted for cellular service and for PCS (i.e., those caps may not be exceeded either.)".

31 Id. ¶238.

32 Id. ¶248. The Commission also stated that the 45 MHz cap furthers the statutory goal expressed in Section 309(j) of the Act to avoid the "excessive concentration of licenses and the dissemination of licenses among a wide variety of applicants." Id.

33 Id.

34 Id. ¶251.

reversal of the cellular eligibility rule,[35] the FCC eliminated the service-specific ownership limitations and retained the 45 MHz cap.[36] In retaining the spectrum cap, the FCC specifically once again acknowledged the trade-off between efficiency and concentration:

> Up to a point, horizontal concentration can allow efficiencies and economies that would not be achievable otherwise, and can therefore be pro-competitive, pro-consumer, and in the public interest. At some point, however, horizontal concentration starts to work against those goals.....[37]

The Commission estimated the cross-over point in the trade-off described above using the HHI; indeed, the FCC referred to the 45 MHz cap as a "simplified HHI."[38] The FCC reasoned that without the 45 MHz cap, the HHI for CMRS could approach 5,000 (a duopoly), because (1) there are barriers to entry, including the need for spectrum, the expense of obtaining spectrum, and the high cost of constructing and operating new communications systems, and (2) because licenses are assigned using competitive bidding, cellular operators will have an "advantage" in that cellular operators are likely to value such licenses more than new entrants.[39] The FCC argued that "[t]he value of the PCS licenses to the incumbent providers would be their continued economic rents (profits in excess of economic costs), which could be higher than the anticipated profits of any new entrant into a more competitive market. Incumbent firms may thus be willing

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35 See Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752 (6th Cir. 1995).

36 See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824 (1996) ("Remand Order").

37 Id. ¶95.

38 Id. ¶96.

39 See id. ¶99.

to pay even more for the chance to impede entry than for the chance to compete vigorously against new entrants."[40]

On the other hand, with the 45 MHz cap, the FCC estimated the CMRS HHI would be closer to 1900 or lower. Just above the "moderately concentrated" range of the Merger Guidelines, this HHI was acceptable to the Commission because (1) other services had partial cross-elasticity with CMRS; (2) the most likely market structure following the PCS auctions included six competitors, thus substantially reducing the risk of collusion; (3) more spectrum would likely be made available in future auctions and would be at least theoretically available through partitioning and disaggregation; and (4) the FCC had created opportunities for small businesses, etc. through other means.[41]

The Commission established the cap as more than a bidding rule, the need for which would expire once the spectrum had been auctioned. The cap would be remain in place with the stated going-forward purpose of preventing the reconsolidation of the CMRS business through subsequent transfers. This could occur, in the Commission's view, due to entry barriers, such as the cost of acquiring spectrum and the cost of building and developing networks, and the fear that cellular providers may value spectrum more than new entrants as a means of protecting their existing market position. In the First Biennial Review Order, the Commission reaffirmed these concerns, finding that the 45 MHz spectrum cap could not be lifted at that time because entry barriers remained,[42] because PCS entrants were only in the early stages of entry, and because

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40 Id.

41 See id. ¶100.

42 First Biennial Review Order ¶31.

market concentration levels were still high.[43] Expressing concern for the possibility of coordinated behavior under those conditions, the FCC declined to risk reconsolidation at that time.[44]

Things have changed. As discussed below, entry barriers are now minimal, the "new" PCS and SMR entrants are established, robust competitors, and the CMRS business is performing at a pace that other sectors of the economy can only envy. Retaining an overhanging constraint on spectrum acquisitions in these circumstances is no longer justified.[45]

B. Today's CMRS Industry Is Structured And Is Performing Competitively, Making The Cap Unnecessary.

In setting the spectrum cap, the Commission has undertaken the virtually impossible task of trying to predict how much concentration is too much—i.e., to pinpoint for all CMRS markets where efficiency stops and where market power begins. The Commission should rescind from any attempt to draw one line for all markets and all circumstances. As demonstrated below, the CMRS business has significantly evolved; it is robustly competitive with substantially reduced entry barriers. In these circumstances, the antitrust laws and the FCC's authority to review transfers of control of CMRS licenses are sufficient to prevent undue concentration. In other words, the CMRS spectrum cap has served its stated purpose, and is now a net drain on the further competitive development of the CMRS business.

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43 See id. ¶35.

44 Id. ¶¶39-40.

45 CTIA notes that the analysis presented herein also supports lifting the cellular cross-interest rule. See 47 C.F.R. § 22.942.

1. **The CMRS Business Is Competitive.**

The Chairman of the FCC has described CMRS as "the most competitive and dynamic segment of the telecommunications industry."[46] There can be no real debate on this point: in recent years, the Commission has repeatedly found the provision of mobile wireless services to be competitive, yielding ever decreasing costs and prices and ever expanding innovation and services.[47]

Numerous new competitors have been added to each market, increasing consumer choice and, as described below, driving down costs to consumers. In its annual CMRS report to Congress last year, the Commission estimated that, by the end of 1999, there were 222 million Americans with a choice of 3 or more CMRS providers; 172 million who could choose between

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46 See Policy and Rules Concerning the Interstate Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, as amended; Petitions for Forbearance , CC Dkt. No. 96-61, Statement of Commissioner Michael K. Powell (rel. Jan. 29, 1999) (Dissenting from order extending rate integration and rate averaging rules to CMRS.).

47 See generally Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Services, *Fifth Report*, 15 FCC Rcd 17660, 17663-64 (2000) ("Fifth CMRS Report")(noting continuing decline in prices, increases in service offerings and increased competition levels); Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, *Fourth Report*, 14 FCC Rcd 10145, 10207 (1999) (noting the industry's steady competitive progress); Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, *Fourth Memorandum Opinion and Order*, 15 FCC Rcd. 17442, ¶68 (2000) (noting the "highly competitive nature of the wireless market"); Opening Statement of Commissioner Michael K. Powell Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce, at 5 October 26, 1999 (noting that the 2000 Biennial Review would aggressively focus on the wireless industry "as an area where competition has clearly emerged and where most regulation has become unnecessary"); First Biennial Review Order, Separate Statement of Commissioner Powell ("I was expecting - in view of the public interest guidance in section 11 and the optimistic outlook for competition in the CMRS industry - a repeal or significant modification of the spectrum cap.").

5 or more carriers, and 87 million with 6 or more choices.[48] These numbers continue to grow impressively, with nearly 245 million Americans as of June 2000 able to choose among 3 or more competitors; nearly 182 million consumers able to choose among 5 or more competitors; and more than 105 million consumers who can choose among 6 or more competitors.[49]

Drs. Schwartz and Gale, in addition to reviewing the competitiveness of the CMRS business on a national level, analyze these data on an MSA basis. They report that 92% of the people living in the top 100 MSAs have a choice of 5 or more competitors while more than 50% of the people in the top 100 MSAs have a choice of 6 or more CMRS providers.[50] The competitive snapshot provided by Drs. Schwartz and Gale on a BTA basis is similarly impressive; more than 70% of the U.S. population reside in BTAs served by 5 or more CMRS providers, while more than 80% of the U.S. population resides in BTAs served by 4 or more providers.[51]

As a result of the entry of these new competitors, concentration levels in the CMRS business have declined sharply since the 45 MHz spectrum cap was adopted. Drs. Schwartz and Gale calculate HHIs for the CMRS business in the top 100 MSAs based on the amount of CMRS spectrum owned by CMRS providers; Drs. Schwartz and Gale also calculate HHIs based on the

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48 Fifth CMRS Report at 17664-65.

49 CTIA, Wireless Industry Indices at 11 ("CTIA June 2000 Report").

50 Schwartz and Gale at 24.

51 Id. at 24-25. Note that BTAs in which there are fewer than four CMRS providers are quite small, and only BTAs with an average population less than 118,000 have fewer than 3 CMRS providers on average.

amount of spectrum "built out" by CMRS providers.[52] The HHIs based on the amount of spectrum owned by CMRS providers in the top 10 MSAs range from 1263 to 1641[53] and lie comfortably within the "moderately concentrated" level set forth in the DOJ Merger Guidelines. Limiting the HHI calculation to that spectrum actually "built out" by a CMRS provider, the HHIs in the top 10 MSAs range from 1705 to 2050. As Drs. Schwartz and Gale observe, many other industries reflect comparable levels or higher but are nonetheless subjected only to general antitrust analysis and not per se rules.[54]

From a national perspective, the number of nationwide CMRS providers in the U.S. has increased from 3 to 6 in the last year.[55] Combined, these 6 national CMRS providers accounted, in 2000, for 74.6% of wireless subscribers with the largest single share of subscribers at 24.9%.[56] The percentage of the U.S. population to which these 6 CMRS providers offer service today ranges from 48% for VoiceStream to 79% for Sprint PCS, with 4 of the 6 national CMRS service providers covering in excess of 73% of the U.S. population.[57] The licensed service areas of these national providers reach at least 89% of the U.S. population, with the licensed areas of 4 of them

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52 See Schwartz and Gale at 23, Table 2.

53 See id.

54 Id.

55 See Merrill Lynch, Linda J. Mutschler, Nacemah Lajoie, David Janazzo, Wendy Liu, "The Next Generation V" at 22 (Mar. 9, 2001) ("Merrill Lynch 2001 Report") (The six national SMRS service providers are AT&T Wireless, Cingular Wireless, Nextel Communications, Sprint PCS, Verizon Wireless and VoiceStream Wireless). The report *pro forma* includes PowerTel in the numbers provided for VoiceStream.

56 See id.

57 See id. (The population coverage percentages for each national CMRS provider are: AT&T Wireless—76%, Cingular Wireless—63%, Nextel Communications—74%, Sprint PCS—79%, Verizon Wireless—73%, and VoiceStream Wireless—48%).

extending to 97% or more of the U.S. population.[58] The smallest of these national CMRS service providers in terms of share of subscribers and population covered by its present service offerings—VoiceStream—has licenses for 97% of the U.S. population and has agreed to be acquired by Deutsche Telekom.[59]

Whether viewed on a local or national basis, innovation in and expansion of pricing and service options are also strongly exhibited. In 1999, CMRS providers began offering low cost "buckets" of minutes for a flat monthly fee, which has driven down prices as well as effective per-minute rates and has been credited as a key factor in the increasing subscriber growth.[60] All distance pricing has led to large amounts of long distance traffic moving onto wireless networks. National advertising and pricing plans also bring the benefits of robust competition to the smallest CMRS local markets, where only smaller numbers of firms may actually be offering service. Because national firms price and advertise nationally, their services are either available in those smaller markets and/or pressure market participants to lower their rates.[61]

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58 See id. (The licensed population coverage percentages for each national CMRS provider, including the results of the recent C Block re-auction, are: AT&T Wireless—98%, Cingular Wireless—90%, Nextel Communications—100%, Sprint PCS—100%, Verizon Wireless—89%, and VoiceStream Wireless—97%.). Paul Kagan Associates reports similar information as of December 4, 2000. See Schwartz and Gale at Table 1.

59 The application explains that the merger will allow VoiceStream to rapidly increase its build-out, thereby extending its service to more of the U.S. population and increasing its share of U.S. wireless subscribers. See Application of VoiceStream Wireless Corporation, Transferor and Deutsche Telekom AG, Transferee For Transfer of Control, IB Docket No. 00-187 at 18-19 (filed Sept. 18, 2000).

60 Merrill Lynch 2001 Report at 30.

61 Schwartz and Gale at 25.

With the decline in rates, substitution of wireless service for traditional wireline telephone service is becoming closer to a reality.[62] One regional provider has begun offering unlimited local usage for a flat monthly fee of approximately $30.[63] CMRS providers also have introduced prepaid service plans in order to make wireless service more affordable to consumers. As of mid-2000, CTIA reported that there were over six million prepaid wireless subscriptions in the U.S.[64]

CMRS providers have launched new, innovative services including a diverse array of wireless data services. All of the 6 national CMRS providers offer mobile Internet services today.[65] Consumers will be able to access a variety of information, transaction, communications, and entertainment sites on the Internet from their wireless handsets.

Consumers have embraced the dramatic performance of the wireless industry. Total wireless subscribership in the U.S. rose from approximately 86.1 million subscribers at the end of 1999 to 97 million by mid-year 2000.[66] According to a study by Legg Mason, by the end of

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62 Merrill Lynch 2001 Report at 35. For example, as wireless usage has increased, both pay phone and calling card revenues have declined.

63 See Credit Suisse First Boston, Cynthia M. Motz, Bradford K. Neuman, Steven D. Glik, Sherryn M. Kinsey, *The Wireless Review*, Issue No. 84, at 3 (Mar. 6, 2001).

64 CTIA June 2000 Report at 14.

65 See Merrill Lynch 2001 Report at 50.

66 See CTIA June 2000 Report at 13.

2000, there were 111 million wireless subscribers in the U.S.[67] This represents compound annual growth over the past 15 years of approximately 50 percent.[68]

CTIA also estimates that total service revenues (excluding equipment) exceeded $24.6 billion for the year ending June 2000. Cumulative capital investment from June 1985 until June 2000 is in excess of $76.6 billion. All of this translated directly into creating new jobs and new services. CTIA estimates that the wireless industry (services sector only) employs approximately 159,000 people. According to estimates of the Communications Workers of America, employment in the wireless industry will grow more than 2 ½ times by the year 2008.[69] While the wireless industry currently employs 31 percent of the number employed by the local wireline industry, by 2008 wireless employment will be approximately 60 percent of the wireline total.[70]

These gains have brought with them declining costs to consumers. According to the U.S. Department of Labor's Bureau of Labor Statistics, the price of mobile telephone service declined by 31 percent between the end of December 1997 and the end of February 2001.[71] Drs. Schwartz and Gale report that the U.S. Department of Commerce US City Average Price Index for Cellular Services dropped from 100 in December 1997 to 71.1 in December 2000; the most

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67 See Elizabeth V. Mooney, *Carriers Stocks Underpriced*, RCR Wireless News, Feb. 12, 2001, at 1 (citing study by Legg Mason).

68 Id.

69 Communications Workers of America, SBC and the Telecommunications Industry, at 16 (Nov. 2000) <http://www.cwa-union.org/telecombarg/members/doc/sbc-2000/ industry.pdf> (visited Mar. 29, 2001).

70 Id.

71 <http://stats.bls.gov:80/cpihome.htm>.

recent report places the index at 68.9.[72] It is estimated that the average monthly bill for mobile wireless customers declined 7.6 percent between September 1999 and September 2000; "big bucket" plans declined further, with 600 minute plans decreasing by 10.6 percent and 150 minute plans decreasing by 9.3 percent.[73]

Of course, competition in the provision of these services is not limited to users of broadband CMRS spectrum. As the Commission has acknowledged, other services have some demand cross-elasticity with cellular, broadband PCS and SMR.[74] These services include paging, narrowband and unlicensed PCS, 220 MHz service, air-ground service, maritime service, satellite-based mobile services, General Mobile Radio Service, General Wireless Communications Service, interconnected private radio systems, CD radio and other low-end services, government radio systems, resellers, and some wired local exchange service. Collectively, these services put competitive pressure on cellular, PCS and SMR not accounted for by broadband CMRS.

Given all of these facts, the motivating concern underlying the adoption of the 45 MHz spectrum cap—that one or two CMRS providers could "unilaterally or in combination exclude efficient competitors, reduce the quantity of service available to the public, and increase prices to the detriment of consumers,"[75]—simply is an unrealistic risk in the CMRS business. And, as

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72 See Schwartz and Gale at Table 5.

73 See Mark Sheehan, *Wireless Service Keeps Getting Cheaper . . . If You Talk More*, Wireless Insider, Nov. 20, 2000, at 1 (citing a survey by EconOne Research, Inc.).

74 See Remand Order ¶100.

75 CMRS Third Report and Order ¶248.

discussed below, the reduction or elimination of entry barriers and the maturation of the CMRS business assure that this competitive market dynamic is self-sustaining.

2. The Barriers To Entry Once Identified By The FCC Have Been Reduced Or Eliminated.

The stated purpose of the decision to retain the 45 MHz spectrum cap even after significant amounts of spectrum have been licensed is to prevent the re-consolidation of the CMRS business. In 1999, the Commission expressed its concern that much of the licensed spectrum for new entrants had not yet been built and that there remained high entry barriers. These conditions do not exist today.

The entry barriers feared by the Commission have been substantially reduced or eliminated. The Commission can take official notice of the fact that the PCS spectrum available at auction has long-since been purchased across a large number of firms.[76] Multiple new entrants have not only acquired and paid for spectrum, they also have made great strides in rolling out their service. For example, VoiceStream has constructed a network covering 48% of the U.S. population, while Sprint PCS has constructed a network covering 79% of the U.S. population, capturing 3.5% and 8.6%, respectively, of U.S. wireless subscribers in the process.[77]

Significantly, the cost of constructing wireless networks has declined since the 45 MHz cap was adopted. For example, the cost of tower siting has been reduced, partially as a result of the growth of independent tower management companies that collocate antennas from competing

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76 See C and F Block Broadband PCS Spectrum Auction Scheduled For December 12, 2000, Public Notice, DA 00-2259, at 2 (rel. Oct. 5, 2000)(C, D, E, and F Block licenses were auctioned and/or reauctioned between May 1996 and April 1999).

77 See Merrill Lynch 2001 Report at 22.

CMRS providers on common towers.[78] According to one independent tower company, there were fewer than 5,000 independently owned towers in December 1998; by June 2000, there were more than 35,000.[79] Rather than spending approximately $180,000 to construct a tower, a carrier can rent antenna space for approximately $1,500 per month.[80] By leasing antenna space, licensees can avoid the approximately $800,000 total capital investment per cell site that is common in the industry.[81]

Manufacturers of CMRS equipment have realized and passed along economies of scale, thus reducing the price of wireless switches, antennas, handsets, and other equipment. According to the Bureau of Labor Statistics, the Producer Price Index for cellular and other wireless voice grade services shows that the costs these carriers pay to suppliers have declined 13 percent between June 1999 and February 2001.[82] Moreover, technology has been introduced that can reduce the overall start-up costs to CMRS providers. For example, companies have introduced equipment that allows new entrants and small market providers to offer prepaid

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78 Sidak, Singer, and Teece, *Mixed Signals: Academic and Industrial Perspectives on the Telecommunications Act of 1996: A General Framework for Competitive Analysis in Wireless Telecommunications*, 50 Hastings L.J. 1639, 1655 (Aug. 1999)("Sidak, Singer and Teece").

79 See *Introduction to American Tower Corporation*, dated November 20, 2000 <http://media.corporate-ir.net/media_files/NYS/AMT/presentations/atc_intro_1100/index.htm> (visited Mar. 28, 2001).

80 *Concealed Towers Reveal Business Model*, Mobile Phone News, June 21, 1999, at 2.

81 CTIA June 2000 Report at 118.

82 <http://stats.bls.gov:80/cpihome.htm>.