services with only minimal upfront investment,[83] and created wholesale platforms that allow companies to instantly provide privately branded nationwide wireless services at wholesale rates that individual companies would not be able to obtain on their own.[84] The barriers to entry will continue to be lowered in the future; mobile equipment manufacturers are developing 3G switching equipment and base stations that will enable them to be shared between providers, thereby significantly lowering providers' total equipment costs.[85]

The reduction in entry barriers that once concerned the Commission is fully evidenced by the progress of the "new" entrants. The investment totals and population coverage discussed earlier amply demonstrate that these firms have successfully established themselves as significant providers of service, not bare licensees with plans of providing service.[86] This circumstance eradicates any prior concern expressed by the Commission that an incumbent carrier might have valued spectrum more than possible entrants as an entry-deterring strategy; the facts show that no such strategy was undertaken and entry has indeed occurred. In other words, there is no basis for a presumption that an acquisition of spectrum in excess of 45 MHz in

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83 Elizabeth V. Mooney, *Boston Markets Prepaid Architecture to Smaller Markets*, RCR Radio Communications Report, Sept. 27, 1999, at 1.

84 Lynette Luna, *Unified Signal Offers Resale Solution*, Radio Communications Report, Sept. 18, 2000, at 1.

85 Joanne Taafe, *Outsourcing: The In Word For 3G Operators*, Communications Week International, Oct. 23, 2000, at 1.

86 For example, Nextel reported that capital expenditures for domestic operations in 2000 totaled $2.98 billion. Nextel Communications Investor Relations, News Release, Nextel Reports Record Year 2000 Financial Results, at 2 (Feb. 16, 2001) <www.nextel.com>. Sprint PCS reported that capital expenditures for 2000 were $3.05 billion. Sprint Media Relations, Press Release, Sprint Announces Record Fourth Quarter, Yearly Results, at 2 (Feb. 1, 2001) <http://144.26.116.29/PR/PR_CDA_PressReleases_detail/1,1579,2206,00.html>.

a given area is anticompetitive. Rather, the acquisition of additional spectrum more likely reflects a beneficial increase in efficiency.

Moreover, in light of the continuing applicability of antitrust standards, the Commission's concern for re-consolidation and the perceived opportunity and incentive for coordinated behavior is simply counterfactual. In considering its ownership cap here, the Commission must take heed of the decision of the U.S. Court of Appeals for the D.C. Circuit only last month reviewing the Commission's ownership rules for the cable industry.[87] In reversing the FCC's 30% limit on the number of customers a multiple cable system operator can serve, the Court found that the FCC could not justify its rule on theoretical concerns alone. Like the spectrum cap, the Commission had tried to justify its cable ownership rule based on a stated concern for the risk of collusion in concentrated cable markets:

> The only justification that the FCC offers in support of its collusion hypothesis is the economic commonplace that, all other things being equal, collusion is less likely when there are more firms. [citation omitted] This observation will always be true, although marginally less so for each additional firm; but by itself it lends no insight into the question of what the appropriate horizontal limit is.[88]

Here, too, the decision to retain the spectrum cap as a means of securing against coordinated behavior rests only on 'economic commonplace.'[89] Further, theory alone here, unlike the

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87 Time Warner Entertainment Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001). The Court reviewed the rules under the "intermediate scrutiny" test required of burdens on speech. While this standard requires greater justification than statutory APA requirements, the basis for the Court's ruling in this regard was the absence of any record evidence beyond "conjectural risk."

88 Id. at 1132-33.

89 See First Biennial Review Order ¶30 (discussing economic article speculating risk of collusion based on number of market participants.).

concentrated markets reviewed in Time Warner Entertainment, would not support the cap. The facts on this record indicate that coordination among CMRS providers would be futile and thus unlikely.

The judicial admonition that the agency cannot simply estimate the right level of expansion by any one firm is echoed by a much stronger economic insight that the government should not even attempt to dictate the "right" level. As pointed out by Drs. Schwartz and Gale, "the 'correct' size distribution of competitors will vary across industries depending on factors such as technology and product offerings, and the raw number of competitors is a highly imperfect—and at times misleading—indicator of the strength of competition."[90] It is not simply, as shown above, that the spectrum cap and associated rules are unneeded. These rules are more than simply superfluous; they carry substantial costs, as discussed in Section IV, below.

IV. THERE ARE SUBSTANTIAL COSTS TO RETAINING THE CAP.

A. Substantial Efficiency Losses Are Created By Operation Of A Cap.

As catalogued by Drs. Schwartz and Gale, numerous commentators have observed that substantial efficiency losses are produced by the spectrum cap.[91] The Notice recognizes that there are likely significant economies of scale and scope.[92] Also, *see* Moreton and Spiller, "What's in the Air: Interlicense Synergies in the Federal Communications Commission's Broadband Personal Communication Service Spectrum Auctions," 41 J. Law & Econ. 677, 708 (1998) (finding "considerable evidence for local synergies and some evidence of global

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90 Schwartz and Gale at 11.

91 See id. at 28-31.

92 Notice at ¶34.

synergies among wireless licenses'). Especially looking forward to new uses of the spectrum, minimum efficient scale for at least some firms predictably exceeds the spectrum cap.[93]

The possible substitution of wireline telephone service with wireless service likely will require additional spectrum.[94] Also, combining voice and high-speed data services over a wireless platform will demand substantial bandwidth likely not available under the current cap.[95] Scope efficiencies also exist with respect to providing these new services and existing voice applications over the same network.[96] By allowing carriers to share much of the same infrastructure (e.g., backhaul, power supply, antennas, back office operations, billing and collection), joint provisioning can reduce the overall costs of producing and providing these services—*provided there is sufficient bandwidth.*

In contrast to other industrialized countries, the U.S. spectrum cap materially limits wireless carriers. The U.S. has approximately 189 MHz of spectrum allocated to wireless services, while the U.K. has 365 MHz, Germany has 306 MHz, Japan has 234 MHz, and Italy has 263 MHz.[97] U.S. carriers on average have somewhere between 25 and 45 MHz of frequency

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93 See generally, Sidak, Singer and Teece, supra.

94 Id. at 1660-62. See W. Beckwith, *Cutting the Cord: removing the CMRS Spectrum Cap to promote Wireless-Landline Convergence and Wireless Alternatives in the Local Loop*, 7 CommLaw Conspectus 369 (1999); Merrill Lynch 2001 Report at 35 ("There's little question, given some of the price plans presented that pricing is now getting down to a level where substitution of wireless for landline is becoming more of a reality.").

95 See Sidak, Singer and Teece, at 1663-66.

96 Industry developments demonstrating the trend toward wireless data applications are summarized in a recent Credit Suisse report describing its three-day conference on wireless issues. Credit Suisse First Boston Corporation, *The Wireless Review* Issue No. 82 (February 27, 2001).

97 See Merrill Lynch 2001 Report at 71.

(with Nextel at 19 MHz of frequency). As Merrill Lynch observes, "this is significantly less than the incumbent operators in the other countries .... We think that this... highlights the fact that the US really does need more frequency allocated to wireless. In fact, even adding in the 30 MHz in the 700 MHz band, the total amount of spectrum allocated in the US would be only 219 MHz—still less than all of the other countries listed." This disparity is displayed in the following table.

Global Wireless Frequency Allocations					
	US	*UK*	*Germany*	*Japan*	*Italy*
Wireless Spectrum Allocation	*189 MHz*	*365 MHz*	*306 MHz*	*234 MHz*	*263 MHz*
Population	*281*	*59*	*82*	*127*	*57*
Wireless Subscribers (2000)	*110.5*	*40*	*51*	*58*	*41*
Penetration	*39%*	*68%*	*63%*	*46%*	*72%*
# of National Carriers Per Country	*6*	*5*	*6*	*3*	*6*
Average Frequency By Carrier	*32*	*73*	*51*	*78*	*44*
Carrier 1	*33-45 MHz*	*82 MHz*	*61 MHz*	*86 MHz*	*62 MHz*
Carrier 2	*35-45-MHz*	*77 MHz*	*61 MHz*	*98 MHz*	*62 MHz*
Carrier 3	*25-35 MHz*	*85 MHz*	*70 MHz*	*50 MHz*	*49 MHz*
Carrier 4	*25-35 MHz*	*85 MHz*	*65 MHz*	*N/A*	*29 MHz*
Carrier 5	*25-35 MHz*	*35 MHz*	*25 MHz*	*N/A*	*30 MHz*
Carrier 6	*19 MHz*	*N/A*	*25 MHz*	*N/A*	*30 MHz*

Merrill Lynch 2001 Report, Table 39 at 71. The contrast strongly suggests that the U.S. policy, as manifested in the cap (as well as the shortage of spectrum generally allocated for wireless use), fails to sufficiently account for scale and scope efficiencies in the provision of these services.

One of the significant trends which the Commission has expressly acknowledged is "the continued effort of carriers to build nationwide footprints."[98] The reason for this trend is well understood:

> [O]perators with larger footprints can achieve economies of scale and increased efficiencies compared to operators with smaller footprints. Such benefits permit companies to introduce and expand innovative pricing plans such as digital-one-rate type ("DOR") plans, reducing prices to consumers. Analysts have drawn similar conclusions, predicting that the current consolidation will intensify competition among nationwide wireless providers.[99]

The spectrum cap precludes many affiliations among service providers across geographic markets that would otherwise capture these efficiencies—to the benefit of both large and small carriers. For example, the attribution rules impair smaller CMRS providers' access to one of the likeliest sources of capital—larger CMRS providers—and also inhibit smaller CMRS firms from forming nationwide affiliations with larger firms to provide seamless coast-to-coast service offerings that would significantly reduce roaming and other costs. See discussion at Section V.D., infra. The presence of substantial synergies across geographic areas is also important to understanding another possible source of efficiency losses imposed by the cap. Drs. Schwartz and Gale give the example of a service provider that desires to introduce a new service requiring 10 MHz of additional spectrum, but that is already utilizing 40 MHz in a few of its licensed service areas with its existing offerings. Although that provider has spectrum available in other of its service areas for the new service offering, the spectrum cap nonetheless forces the firm to

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98 Fifth CMRS Report at 17669.

99 Id. See also Merrill Lynch 2001 Report at 25 (describing economies associated with national footprints including ability to offer broader range of services and reduced roaming expenses.).

forego the efficiencies otherwise obtainable through nationwide offerings. This means that the introduction of the new service will be less efficient or perhaps not offered at all.[100]

As recognized by Sidak , Singer and Teece, supra, the regulatory constraint on spectrum can also produce a misallocation of resources between equipment and spectrum. Currently, wireless service providers in high-traffic areas are forced to put substantial resources into equipment that permits frequency reuse (i.e., cellularization); the optimal mix of spectrum and equipment could look materially different. The potential misallocation of resources results in productive inefficiency.[101]

In turn, the inefficiencies created by the spectrum cap retard investment and innovation. By making the provision of new services costlier than it might otherwise be absent regulatory distortion, firms are less likely to invest as quickly (or at all). This slows the rate at which advanced services can be brought to consumers, including both new broadband services as well as wireless services that may substitute for and compete with existing wireline services. Especially as wireless services are being priced ever closer to wireline prices, the loss of this potential competition for the wireline local loop is particularly costly. Thus, the inefficiencies impose costs not only on consumers of traditional mobile wireless services, but on would-be consumers of advanced wireless services.

The FCC's spectrum policy can demonstrably affect the efficient provision of service. The early history of mobile wireless service in fact reflects the costs of the agency's decision to

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100 Schwartz and Gale at 17. See also Bruce M. Owen and Mark W. Frankena, *An Economic Evaluation of the Federal Communications Commission's Commercial Mobile radio Services Spectrum Cap*, at 14, submitted with Comments of AT&T Wireless Services, Inc. in WT Dkt. No. 98-205 (filed Jan. 25, 1999).

101 See Sidak, Singer and Teece, at 1665-66.

allocate less than sufficient spectrum. Cellular service was delayed for some years while the agency struggled to develop a licensing scheme. Very quickly after cellular spectrum was licensed, the unmet demand for mobile services became evident, requiring once again the allocation of more spectrum to meet that demand. At Congress' prompting, the FCC moved thereafter to allocate additional spectrum, in larger blocks, to PCS. Once again, the Commission finds itself pressured to keep its spectrum management policies apace with consumer demand for these and new innovative services.

B. The Administrative And Compliance Costs Of The Cap Are Substantial.

In the First Biennial Review Order, the Commission asserted that a bright-line approach to spectrum aggregation was preferable to a case-by-case review. The Commission assumed that "setting bright lines for permissible ownership interests [ ] benefit[s] the public, the telecommunications industry, and the Commission by providing regulatory certainty and facilitating more rapid processing of transactions."[102] Furthermore, the Commission believed that the use of bright line rules would lessen the burden on the resources of it and interested parties, noting that case-by-case analysis would be expensive and time-consuming.[103] In the Notice, the Commission asks whether any developments in the past year should lead it to alter its decision that a bright line approach remains preferable to exclusive reliance on a case-by-case review under Section 310(d).[104] As shown below, the spectrum cap's 'benefits' of administrative simplicity and predictability are at best tenuous. The complexities and nuances of

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102 First Biennial Review Order at ¶50.

103 Id. ¶53.

104 Notice ¶38.

determining whether an entity has an attributable interest in a licensee and if so, determining whether the licenses with which an entity is attributed "significantly overlap," render compliance with the CMRS spectrum cap quite costly and time-consuming. Further, the waiver process has not provided material relief.[105]

Attribution difficulties. The first step in ascertaining whether the spectrum cap is implicated is determining whether one entity has an attributable interest in another under any one of ten attribution criteria—ranging from corporate stock interests above a certain threshold and general partnership interests to the existence of a management agreement or joint venture arrangement, under certain circumstances. This is a highly nuanced and fact-specific analysis. The Commission recognized this in the context of joint venture arrangements by advising licensees to seek a declaratory ruling before entering into joint ownership agreements to ascertain whether the particular arrangement would cause attribution.[106] Parties seeking to enter into management agreements are likely to encounter similar issues requiring subtle and uncertain analysis.[107] The difficulties and costs of ascertaining attribution increase when one has to

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105 Application for Review of BellSouth Wireless, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd. 14031 (1997), affd. BellSouth Corporation v. FCC, 162 F.3d 1215 (D.C. Cir. 1999) (In one of the very few requests for a permanent waiver of the spectrum cap, the Commission denied BellSouth's request notwithstanding its conceded *de minimis* nature.). See discussion of waiver process, infra.

106 First Biennial Review Order ¶98. See also Applications of Aerial Communications Inc. and VoiceStream Wireless Holding Corporation, Memorandum Opinion and Order, 15 FCC Rcd. 10089, n.77 (2000) ("Aerial/VoiceStream") ("we evaluate whether individual joint ventures create attributable interests under the spectrum cap rule on a case-by-case, fact-specific basis.").

107 Under the Commission's spectrum cap attribution rules, a manager has an attributable interest in a licensee if the manager or any of its affiliates has authority to make decisions or otherwise engage in practices or activities that determine or significantly influence the nature or types of services offered, the terms upon which service is offered, or the prices

consider not only whether the parties to the transaction will raise an attribution issue, but whether the license holdings of any affiliates of one party could be attributed to the other.[108] Given the tax advantaged nature of partnerships, the fact that the lottery-based cellular licensing scheme resulted in a great number of cellular licensees with fragmented ownership structures,[109] and the fact that the PCS control group rules encouraged similar ownership structures for designated entities,[110] the cost of determining whether one has an attributable interest in a given licensee can be substantial.

Geographic Overlap. Once attribution is sifted through, the parties must determine whether there is a significant overlap of spectrum to implicate the cap. Because the spectrum subject to the cap is licensed on a variety of different geographic bases, it is not easy to determine whether a particular overlap meets the definition of "significant." Often, the parties must hire consultants or engineers to map out the service area, determine the population, and make a determination as to whether an overlap is "significant." As described above, this process is not limited solely to the markets related to the contemplated transaction. For example, if a PCS licensee and SMR licensee want to enter into a joint venture in Market A, they must

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charged for service. See 47 C.F.R. §20.6(d)(9). The potential ambiguous issues here are numerous.

108 First Biennial Review Order ¶98. Further, if the contemplated transaction is relatively small, it may be difficult to get the other party to provide full disclosure of competitively-sensitive or confidential information regarding the existence of any such arrangements it may have in every other market where the parties both hold spectrum. In any event, regulation that actually requires exchanges of such information between competitors hardly seems to be good public policy.

109 PCS Second Report and Order ¶107.

110 47 C.F.R. §§24.709(b)(5)-(6).

ascertain whether they have significant overlaps of spectrum in every other market where either they or their affiliates hold licenses. This can add considerable time and expense to any proposed transaction.

It should also be emphasized that even once a regulatee has incurred these costs in order to ensure its compliance, it enjoys no safe harbor. In the First Biennial Review Order, the Commission explained that there may be circumstances in which parties comply with the spectrum cap but the transaction is nonetheless found to "raise competitive concerns."[111] In a decision arising after that Order, the Wireless Bureau provided that its assessment of a merger transaction would not end with a finding that the spectrum cap rules were satisfied; it would consider whether the proposed transaction would produce competitive effects that do not violate the spectrum cap rules but that are nonetheless harmful.[112] Because parties cannot rely on the spectrum cap rules to determine whether their transactions are permissible, it is difficult to see how the current rules can be thought of as "bright line."

Waiver Process. Finally, as a practical matter, the theoretical availability of a waiver has not yielded significant relief. This is not surprising because of the costs and uncertainties inherent in any waiver process. In order to provide the Commission with the specific factual data required to obtain a waiver, parties are forced to divulge specifics of their business plans (including especially where they perceive future demand will be most significant) to their competitors and the public well in advance of even knowing if they will be permitted to

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111 First Biennial Review Order ¶56 n.138.

112 Applications of SBC Communications Inc. and BellSouth Corporation, WT Dkt. 00-81, *Memorandum Opinion and Order*, DA 00-2223, ¶24 (rel. Sept. 29, 2000) ("SBC/BellSouth Order").

consummate the underlying transaction. The possibility of a waiver is often too uncertain to justify undertaking the complex and expensive planning and negotiation of transactions that, absent the cap and the need to obtain a waiver, would produce benefits to consumers. The cap therefore chills benign transactions notwithstanding the legal availability of waivers.

The actual waiver history of the spectrum rules does not give any comfort in this regard. There is only one instance in which a permanent waiver of the spectrum cap rules has been granted, involving a modest and highly qualified waiver of the overlapping director attribution rule.[113] The Commission has acted upon a small number of requests for temporary waivers; the vast majority have been requests for temporary authority pending divestiture.[114] The Commission's denial of BellSouth's request for a waiver of the spectrum cap (seeking permission to exceed the cap by 1.5 MHz) was upheld on appeal notwithstanding its conceded *de minimis* nature,[115] making clear that the cap is not so much a "bright line" as it is a *hard line*.

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113 See Aerial/VoiceStream ¶23 n.60. In granting a waiver from attribution by common directors, the Wireless Bureau based its decision on the fact that the common director would represent only one of 17 Board members, and would be insulated from certain affairs of the licensee. In a footnote, the Bureau noted that an increase in the number of common directors from one to two would require another waiver.

114 In addition, the Commission dismissed as moot a series of waiver petitions, some of which had been pending for two and a half years, after the institution of rule changes that had made the requested waivers unnecessary. See, e.g., Western PCS II License Corp., Request for Waiver of Section 20.6 of the Commission's Rules in the Denver MTA, *Order*, 14 FCC Rcd 19345 (WTB/CWD 1999); United States Cellular Corp. Petition for Waiver of Section 22.942 of the Commission's Rules, *Order*, 12 FCC Rcd 19343 (WTB/CWD 1999).

115 Application for Review of BellSouth Wireless, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd. 14031 (1997), affd. BellSouth Corporation v. FCC, 162 F.3d 1215 (D.C. Cir. 1999). Recently, Cingular Wireless filed a request for waiver of the spectrum cap with respect to approximately 1.5 MHz of 900 MHz SMR spectrum on the basis, inter alia, that the 1.5 MHz by itself is insufficient to provide a competitive CMRS service in the hands of a third party. See Wireless Telecommunications Bureau Seeks Comment on

C. The Spectrum Cap Will Defeat the Initiatives of the Secondary Markets Proceeding.

Finally, continued adherence to the spectrum cap rules is starkly inconsistent with the Commission's rationale for encouraging the development of secondary markets for radio spectrum. As the Commission has opined, "the best way to realize the maximum benefits from the spectrum is to permit and promote the operation of market forces in determining how spectrum is used."[116] In the context of secondary markets, reliance on market forces to direct the distribution of spectrum resources is "the most effective way" of increasing spectrum efficiencies and promoting the growth of wireless services and uses.[117] Because regulatory intervention distorts market forces, a "major focus" of the Commission's efforts to promote the development of secondary markets is "to remove, relax or modify our rules and procedures [in order] to eliminate unnecessary inhibitions on the operation of secondary market processes and to promote flexibility and fungibility (exchangeable or substitutable) in the use of spectrum."[118] Thus, the Commission's adherence to the artificial regulatory limitations imposed by spectrum caps stands in contradistinction to its reliance on market forces and competition in the development of a secondary market for spectrum resources.

Cingular Wireless LLC's Request for Waiver to Exclude 1.5 MHz of SMR Spectrum from the CMRS Spectrum Cap, Public Notice, DA 01-665 (rel. Mar. 14, 2001).

116 Principles for Promoting the Efficient Use of Spectrum By Encouraging the Development of Secondary Markets, Federal Communications Commission, *Policy Statement*, FCC 00-401, ¶8 (rel. Dec. 1, 2000).

117 Id. ¶10.

118 Id. ¶19.

V. ANTITRUST REVIEW AND SECTION 310(D) SECURE ANY REMAINING CONCERNS.

In the preceding sections, it has been shown that the spectrum cap is no longer necessary to achieve its initial purposes, and further, that the cap now unequivocally undermines the Commission's goal of permitting licensees to achieve efficiencies. These circumstances plainly warrant removal of the cap. In making this choice, the Commission can be completely confident that consumer interests will be protected: antitrust review, along with FCC prior approval procedures under Section 310(d), will ensure against anticompetitive consolidation.

It is important to note that the Commission's decision to impose the spectrum cap ab initio stemmed from competitive analysis borrowed directly from the Department of Justice and Federal Trade Commission Merger Guidelines.[119] This is hardly surprising: the economic discipline that girds the antitrust laws necessarily provides the same foundation for the FCC's industry analysis. While there may be other considerations which the Commission may also need to allow for beyond antitrust (*e.g.*, diversity of voices in content services), the FCC also has numerous other, more appropriate tools by which to assure these goals are also achieved.

Because the principal goal of the cap is to establish a competitive, efficient market structure for wireless services, that competitive goal can be fully served by relying upon the antitrust laws. As discussed below, there is simply no legitimate difference between the FCC's competitive concerns and those voiced and enforced under the antitrust laws.

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119 First Biennial Review Order ¶28 (citing [1992] Department of Justice - Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH).

A. There Is No Distinction Between The FCC's Competitive Concerns And Those Enforced Under The Antitrust Laws.

The competition analysis used by the FCC in its review of consolidation in the telecommunications industry (as distinct from its review under other social policies)[120] has constituted "classic antitrust analysis, applying the same principles, precedents and guidelines as those employed by the antitrust authorities…."[121] As then-Commissioner Powell expanded a few months later, "there are no meaningful differences in the [competitive] analysis among the agencies."[122]

Similarly, the Department of Justice has expressed its view that enforcement of the antitrust laws to telecommunications mergers suffices to ensure competition:

> We believe the antitrust laws are adequate to the task of protecting competition with respect to all mergers, including telecommunications mergers. We believe they strike the right balance in allowing us to stay out of the way of pro-competitive or innocuous mergers, while giving us full authority to challenge anticompetitive mergers when we find them.[123]

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120 Other social policies, such as diversity, are "distinct from our competition goal." Review of the Commission's Regulations Governing Television Broadcasting, *Report and Order*, 14 FCC Rcd. 12903, ¶20 (1999).

121 See Opening Statement of Michael K. Powell, Commissioner, FCC Before the Senate Committee on Commerce, Science and Transportation, at 5 (May 26, 1999).

122 See Opening Statement of Michael K. Powell, Commissioner, FCC Before the Subcommittee on telecommunications, Trade and Consumer Protection of the House Committee on Commerce on the Telecommunications Act of 2000 (March 14, 2000) at 4 (explaining also FCC's continuing role as expert agency on communications policies outside antitrust statutes).

123 See Statement of Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the House Committee on the Judiciary Concerning Consolidation in the Telecommunications Industry, at 8 (June 24, 1998).

The Commission's First Biennial Review Order, in deciding to maintain the spectrum cap, appears to have misapprehended the scope of the antitrust laws and their relation to the FCC's competitive concerns. The Report there stated that the Sherman and Clayton Acts serve only to prohibit mergers that reduce competition between actual competitors.[124] This is simply a mistake of law. The Clayton Act was in fact passed to extend the prior reach of the Sherman Act. Amended in 1950 to further extend the reach of our nation's competition policy, the Clayton Act, and specifically Section 7, prohibits any merger or acquisition—horizontal, vertical or conglomerate—that "tends to substantially lessen competition." It is established law that the Clayton Act was designed to block transactions that threaten competition without a full-fledged Sherman Act violation being proved. As the Supreme Court explained, a "keystone" to the 1950 Clayton Act amendment was

> its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency....*
>
> > * That §7 of the Clayton Act was intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act was explicitly stated in the Senate Report on the original Act. S.Rep. No. 698, 63d Cong., 2d Sess. 1.*** This theme was reiterated in congressional consideration of the amendments adopted in 1950, and found expression in the final House and Senate Reports on the measure.***[125]

Given this breadth to the Clayton Act, it is simply incorrect to view the nation's competition laws as somehow inadequate to protecting competition in telecommunications.

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124 First Biennial Review Order ¶57.

125 Brown Shoe Co. v. United States, 370 U.S. 294, 317-18, n.32 (1962) (citations omitted).

The relationship between the FCC's "public interest" authority and the antitrust laws is closely analogous to the relationship between Section 5 of the Federal Trade Commission Act and the antitrust laws. Like the FCC, the FTC's reach under Section 5, which prohibits "unfair methods of competition," extends beyond competition policy to other policy areas such as protecting consumers against fraudulent or deceptive practices irrespective of the competitive effects of those practices.[126] The FTC may pursue these other policies, but where it purports to act on competition policy, then it follows standard antitrust analysis. As Areeda and Hovenkamp have pointed out, "insofar as sound policy condemns or permits given conduct under the Sherman or Clayton Acts, then sound policy requires the same result" under the broader regulatory scheme.[127] To borrow from their analysis, then, "to say that §5 [or the public interest standard of the Communications Act] is not limited by the other statutes is no excuse for sloppy thinking or a failure to show whether, how, and the degree to which any peculiarities of §5 proceedings [or FCC proceedings] call for a divergence from Sherman Act analysis of antitrust policies and their application to the particular case."[128]

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126 See FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986) ("the standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws but also practices that the Commission determines are against public policy for other reasons....").

127 Philip E. Areeda, Herbert Hovenkamp, and Roger D. Blair, Antitrust Law: *An Analysis of Antitrust Principles and Their Application*, ¶302h1 (Vol. II, Second Ed., 2000). As they explain, it makes little sense to describe the FTC's competition authority as one that follows either "the letter or...the spirit of the antitrust laws" because "the spirit and letter of the antitrust laws are identical."

128 Id. ¶302h6. See also General Foods, 103 F.T.C. 204, 365 (1984) ("While Section 5 may empower the Commission to pursue those activities which offend the 'basic policies' of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed....") (rejecting arguments that

In other words, the Commission should conclude that it is highly unlikely that mergers and acquisitions permitted by the Clayton Act would somehow be problematic under the competitive policies of Communications Act. The rigorous analysis of the antitrust laws, reflected in case law and the Merger Guidelines should suffice here. As discussed in the next section, the actual history permits no other conclusion.

B. The Department's Review Under Hart-Scott-Rodino And The Clayton Act Have In Fact Secured Against The FCC's Concerns In The Wireless Industry.

The Department of Justice has reviewed the competitive effects of a large number of mergers involving wireless properties; in each case the Commission reviewed these same transactions and found no competitive concerns beyond those identified and resolved by antitrust settlement. For example, in United States v. SBC Communications Inc. ("Cingular"),[129] the Justice Department allowed the joint venture of SBC's and BellSouth's wireless properties subject to a consent decree requiring the divestiture of certain properties in specified geographic areas in which the parties' cellular and/or PCS businesses overlapped. Using market shares and HHIs computed on the basis of the number of subscribers,[130] the Department identified 16 areas

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challenged conduct should be found to violate Federal trade Commission Act even though such conduct would not violate the Sherman Act.).

129 65 Fed. Reg. 56926 (Sept. 20, 2000).

130 The Department has consistently used subscriber data to compute market shares -- not the amount of spectrum licensed. In United States v. SBC Communications, Inc. and Ameritech Corp., 64 Fed Reg. 23099 (Apr. 29, 1999), the Department explained:

> The United States has used subscriber data here to estimate market shares because those data are more readily available. In some contexts, however, other measures of market share may provide a more precise indication of market concentration or a firm's competitive significance. The use of subscriber data here is

of overlap requiring divestiture.[131] Like several other wireless consent decrees in recent years, the judgment required extensive divestiture procedures, including the establishment of a trustee, behavioral safeguards to prevent collusion, and government supervision of the actual sale to ensure a competitively healthy purchaser, all supported by the contempt powers of the federal district court.[132] Moreover, the Department's decree, like several others, duly respected the FCC's concurrent authority to approve the license transfers and allowed for alteration of the antitrust decree terms in order to accommodate the FCC's exercise of authority under Section 310(d).[133]

The FCC's consideration of these transactions reflects the agency's own judgment that the DOJ antitrust review had been more than adequate to secure the Commission's competitive concerns. In the SBC/BellSouth Order, for example, the Bureaus explained that all three areas of

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> reasonable, given that measuring market share in other ways would not affect the Department's conclusions. The market shares of SBC and Ameritech would also be very high if measured in a variety of dimensions other than subscribers or lines served, such as revenues or volumes of traffic handled.

Id. at 23107 n.4. Note that *none* of the alternative measures includes spectrum capacity or any other single input of production.

131 See Cingular, 65 Fed Reg. at 56926.

132 See id.; United States v. SBC Communications, Inc. and Ameritech Corp. ("SBC-Ameritech"), 64 Fed Reg. 23099 (Apr. 29, 1999); United States v. Bell Atlantic Corp.("Bell Atlantic-GTE-Vodaphone"), Proposed Final Judgment and Competitive Impact Statement , 65 Fed Reg. 505 (Jan. 5, 2000). See also United States v. AT&T Corp and Tele-Communications, Inc., Proposed Final Judgment and Competitive Impact Statement, 64 Fed Reg. 2506 (Jan. 14, 1999) (trustee arrangement devised to permit rational divestiture of TCI's 23% interest in Sprint PCS).

133 See Cingular at 56935 (timing of divestiture to be extended if FCC authority has not been granted by deadline). SBC-Ameritech, 64 Fed Reg. at 23109-10 (same) ; Bell Atlantic-GTE-Vodaphone, 65 Fed Reg. at 517 (same).

overlap were required to be remedied by the DOJ consent decree.[134] In fact, the applicants there had already filed for and obtained FCC approval for two of the three required divestitures prior to the FCC's consideration of the main application to approve the joint venture.[135] With respect to the remaining MTA, the Bureau granted a temporary waiver of the spectrum cap, relying upon the divestiture safeguards in the DOJ Decree.[136] The Order described these safeguards, including the requirement that the overlapping properties be run independently and as economically viable and active competitors, that management would be separated and that a compliance officer would be established to ensure the separation of the properties.[137]

In fact, FCC reliance on the remedies provided in DOJ consent decrees involving overlaps of wireless properties is commonplace.[138] See Vodafone AirTouch plc and Bell Atlantic Corp., *Memorandum Opinion and Order*, 15 FCC Rcd 16507 (WTB 2000); Ameritech Corp. and SBC Communications, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 14712, ¶¶ 519-25 (1999) (approving merger after explaining that wireless overlaps would be cured and divested pursuant to antitrust consent decree); Tele-Communications, Inc. and AT&T Corp.,

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134 SBC/BellSouth Order ¶10.

135 Id. ¶21.

136 Id. ¶23.

137 Id.

138 And at times, the very fact of Justice prosecutorial efforts has caused would-be merger applicants to abandon their proposed wireless transactions, making FCC action entirely moot. See U.S. Department of Justice Press Release, *Fox Paine Restructures One of Its Two Alaskan Telecommunications Acquisitions to Address Justice Department's Antitrust Concerns*, at 1 (rel. May 7, 1999) (describing abandonment of would-be transaction between Fox Paine Capital Fund and Century Telephone due to anticompetitive effects in Fairbanks).

Memorandum Opinion and Order, 14 FCC Rcd 3160, ¶¶95-112 (1999) (finding DOJ Consent Decree satisfactorily addressed competition and spectrum cap issues with regard to overlapping wireless interests and addressing only terms of divestiture trust).[139]

In Bell Atlantic-GTE, the Commission extensively discussed the competitive consequences of the combination of the merger parties' wireline properties and then only briefly addressed the horizontal overlaps of the wireless properties. Noting overlaps in 19 cellular service markets, and PCS/cellular overlaps in 77 other markets, the Commission was nonetheless able to wholly defer to the Justice Department's antitrust enforcement efforts. Those efforts had produced a Consent Decree that required "the divestiture of one wireless business in any market in which the companies' licenses overlap, *even in cases in which the Commission's rules are not implicated.*"[140]

Thus in Bell Atlantic-GTE, the Commission's spectrum aggregation rules were actually underinclusive of what antitrust enforcement could produce. There, overlaps were eliminated "without regard to the size or nature of the current interests. In addition, where our spectrum aggregation rule would permit the parties to keep a 25 MHz cellular license and 20 MHz of PCS spectrum in the same market, the Revised Consent Decree only permits the merged entity to keep 10 MHz of the PCS spectrum if it retains the cellular license."[141] It is readily apparent from this

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139 It should be noted that FCC action on these wireless matters is so routine as to permit action by the Wireless Telecommunications Bureau on delegated authority, notwithstanding that these orders can require the divestiture of hundreds of millions of dollars in assets. No doubt this reflects the agency's deference to the antitrust enforcement action which preceded its own in these cases.

140 GTE Corp. and Bell Atlantic Corp., *Memorandum Opinion and Order*, 15 FCC Rcd 14032, ¶383 (2000) (footnote omitted) (emphasis added).

141 Id. ¶388 (footnote omitted).

review that the spectrum cap rules can frequently "talk past" sound antitrust analysis. As described, it can be both *over*inclusive (and thereby disrupt benign arrangements that actually would produce efficiencies) as well as *under*inclusive (i.e., fail to achieve greater dispersal of licenses where efficiency is not put at risk). Moreover, the Commission still has the opportunity to consider the license transfer pursuant to its authority in Section 310(d), discussed below.

C. Section 310(d) Provides Additional Assurance That Transactions Will Be In The Public Interest.

Section 310(d) requires that control of wireless licenses cannot be transferred without prior FCC approval finding the transfer to be in the public interest. Independent of any ownership rule, the FCC can and must exercise its authority to review and approve these transactions consistent with the public interest. While industry-specific ownership rules have sometimes given substance to the amorphous "public interest" standard, it is absolutely clear here that the rules in question have outserved their proposed utility. Moreover, to the extent the Commission feels the need for a 'safety net' to ensure that competitive structures are maintained, Section 310(d) can serve precisely that purpose.

Section 310(d) is of course narrower than the spectrum cap and its attribution rules because the statute by its terms covers only transactions involving the acquisition of control. That reach should be deemed to be more than sufficient, especially once the underlying basis for regulatory interference in deals not offending the Clayton Act has dissipated, as it has here. In sections 309 and 310, Congress has expressly set forth the basis for public interest review of license transfers and assignments and the intended bounds of FCC authority. The statutory scheme carefully lays out the definitions for transfers of control and the distinctions between "substantial" and "insubstantial" transfers. On this record, there is no basis for second guessing those legislative findings.[142]

D. The Commission Has In Place Other, Less Burdensome Means Of Promoting Diversity Of Licensees.

Finally, the cap is not needed to address diversity concerns. In adopting the current spectrum cap, the Commission pointed to Section 309(j) of the Act, [143] reflecting congressional concern that the Commission's newly acquired auction authority not result in all licenses being held by only a few. Section 309(j) requires the Commission to design competitive bidding systems that "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[144] In the Notice, the Commission requests comment on whether the spectrum cap serves as the best guarantee that new entrants and Designated Entities obtain the spectrum needed to gain access to the market.[145]

As an initial matter, it should be noted that Section 309(j) imposes obligations on the Commission as to the means by which it uses competitive bidding to assign licenses; it does not require that the Commission impose a spectrum cap for that purpose, nor does it require that the

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142 See also Cincinnati Bell, supra, (reversing 20% CMRS attribution as arbitrary and without justification to define or distinguish between ownership levels of economic significance).

143 See Remand Order ¶102 (1996).

144 47 U.S.C. §309(j)(3)(B).

145 See Notice ¶22.

Commission pursue the goals of Section 309(j) beyond the initial assignment of licenses.[146] Nonetheless, to the extent that the Commission determines that the requirements of Section 309(j) are relevant to its decision whether to retain the spectrum cap, the spectrum cap has not in fact created any opportunities for new entrants and Designated Entities, and its elimination would do nothing to harm other, more targeted and effective efforts by the Commission to provide such opportunities; indeed, the elimination of the spectrum cap may in fact benefit the entities Section 309(j) was enacted to assist.

The Commission has implemented targeted and effective means of disseminating licenses to a large number of providers pursuant to Section 309(j). Specifically, the Commission has set aside spectrum exclusively for Designated Entities, with 89 small, minority- or women-owned businesses obtaining C Block licenses in the original auction and 93 small, minority- or women-owned businesses obtaining F Block licenses. To further promote diversity of ownership, the Commission capped the number of C and F Block licenses any one designated entity could obtain at 98, or 10 percent of the total number of C and F Block licenses.[147] As the Commission

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146 The Commission has acknowledged that Section 309(j) "does not require the Commission to ensure that licenses actually are granted to small businesses but, rather, requires only that these small businesses be given the opportunity to *participate* in the provision of spectrum-based services." Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266 at ¶22 (Aug. 29, 2000) (emphasis in original) ("C/F Block Sixth Report and Order"), citing Melcher v. FCC, 134 F.3d 1143, 1154-55 (D.C. Cir. 1998).

147 47 C.F.R. § 24.710 (2000). The cap was subsequently eliminated by the FCC as no longer necessary based on its determination that it had "already achieved its objective of disseminating the C and F block licenses among a variety of entrepreneurs," and that its restructuring of the C block reauction licenses and its elimination of the eligibility restriction for some of the reauctioned C block licenses would enhance diversity. C/F Block Sixth Report and Order ¶55 (2000).

explained in the Remand Order, "[w]e set aside one third of broadband PCS spectrum for small businesses and we believe this fulfills our obligation under Section 309(j)."[148]

The Commission also has used bidding credits to ensure a wide dissemination of licenses. As a result of the Commission's deployment of Designated Entity bidding credits, the Commission has been able to report large numbers of such businesses becoming licensees.[149] Bidding credits have also created opportunities for Designated Entities in wireless services *not* subject to a spectrum cap.[150] Spectrum caps are, quite plainly, not necessary for the success of rules specifically designed to provide opportunities to Designated Entities.

In contrast, the spectrum cap does nothing in and of itself to create opportunities for Designated Entities or to ensure a wide dissemination of licenses; indeed, it may even harm such interests. The cap neither promotes nor requires that any specific type of business hold CMRS spectrum, it merely limits the amount of spectrum in which any one entity may have an attributable interest in a given geographic area. To the extent that the acquisition by a larger provider of an ownership interest in a Designated Entity is prohibited by the spectrum cap, the spectrum cap limits or denies Designated Entities access to capital from one of the most likely sources—other market participants.[151] The spectrum cap also can inhibit Designated Entities' ability to form nationwide affiliations with other carriers to provide seamless coast-to-coast service offerings, affiliations that would otherwise significantly reduce their roaming and other

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148 Remand Order ¶72.

149 <www.fcc.gov/wtb/auctions>.

150 Id. These services include, *inter alia*, PCS narrowband, WCS, IVDS and LMDS.

151 Merrill Lynch 2001 Report at 26-27, 75-76.