

allocation of such additional spectrum for mobile voice and data services will have on the inputs used in calculating its HHI analysis.<sup>75</sup>

As discussed above and in greater detail in the attached White Paper, the Commission's spectrum cap is flawed because it is based only on a limited subset of allocated spectrum that can be used to provide mobile two-way services. The amount of available spectrum that can be used for this purpose has expanded, however, since the cap was first adopted. Accordingly, any analysis should be based on an estimate of *all* actual *and* potential supply capability:

If the goal is to provide a check on the exercise of market power, the Commission must consider the extent to which other spectrum could be used for two-way mobile wireless communications services.

. . .

Thus, in analyzing the "competitiveness" of the two-way mobile wireless market, the potential substitutability in supply of such spectrum is plainly economically germane.<sup>76</sup>

In other words, the Commission's analysis of possible concentration should be recalculated to reflect the larger amount of spectrum now available for two-way mobile applications.

According to the economists, then, the relevant product market should be defined to include *all* of the spectrum that has *currently been allocated* for two-way mobile communications, as well as any additional spectrum that is *likely* to be allocated for two-way mobile communications.<sup>77</sup> In addition to spectrum that has been currently identified for this purpose, *e.g.*, cellular, broadband PCS, and a maximum of 10 MHz of SMR spectrum,<sup>78</sup> this would include all additional SMR

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<sup>75</sup> See *NPRM* at ¶¶ 18, 35.

<sup>76</sup> See *White Paper* at 11-12.

<sup>77</sup> See *White Paper* at 16, 20-21.

<sup>78</sup> See 47 C.F.R. § 20.6(a), (b).

spectrum (9 MHz), as well as current spectrum allocations for MSS, WCS, 700 MHz (guard bands and Channels 60-69) and Big LEOs and proposed spectrum allocations at Channels 52-59 and MMDS/ITFS.<sup>79</sup> At a minimum, the economists believe the market should include all spectrum currently allocated for two-way mobile voice communications, and not just those services that arbitrarily have been included within the cap.<sup>80</sup>

The Commission has previously justified its spectrum cap with reference to measures of economic concentration by calculating the HHI that might be obtained under various combinations of licenses.<sup>81</sup> The Commission found that under the “worst-case” scenario, based upon only that spectrum included within the cap, an HHI of 1898 would be an acceptable level.<sup>82</sup> For purposes of calculating an HHI, the Commission included two cellular licenses, six broadband PCS licenses and one SMR license in the relevant market.

The attached economic study has recalculated the HHI under the two alternative product markets just discussed, yielding the following results:

- The first calculation includes *all* of the spectrum that has currently been allocated for two-way mobile communications, as well as additional spectrum that is likely to be allocated for two-way mobile communications. In this case, the study reveals that even under “worst-case” assumptions, carriers could aggregate up to **116 MHz** without causing the HHI in a market to exceed 1898.<sup>83</sup>

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<sup>79</sup> See White Paper at 21.

<sup>80</sup> See White Paper at 22.

<sup>81</sup> *Report and Order*, 11 F.C.C.R. at 7870-73.

<sup>82</sup> See *Id.* at 7899-04 (Appendix A).

<sup>83</sup> See White Paper at 16, 22-23. Proposed 3G spectrum in the federal government bands (1710-1850 MHz) was not included because of the uncertainly attendant to that spectrum.

- The second calculation includes only the spectrum that has currently been allocated for two-way mobile communications. In this case, the study finds that even under “worst-case” assumptions, carriers could aggregate up to **68 MHz** without causing the HHI in a market to exceed 1898.<sup>84</sup>

These numbers reveal that when recalculated to reflect market realities of available spectrum, the current CMRS spectrum cap can no longer be justified. As a result, these spectrum allocations have eliminated any “access-to-spectrum” barriers to entry (to the extent such barriers existed at all) faced by potential competitors, and thus have obviated the need to maintain a spectrum cap. Accordingly, the spectrum cap should be eliminated.

**D. The Cap Is Unnecessary Because “Meaningful” Competition in the Relevant Market As Defined by the FCC Has Satisfied the Spectrum Cap’s Purpose**

Section 11 of the Communications Act requires the Commission to eliminate or modify any regulation that applies to “the operations or activities of any provider of telecommunications service” if such regulation “is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.”<sup>85</sup> Accordingly, the Commission seeks comment on whether the CMRS spectrum cap is no longer necessary in the public interest as the result of meaningful economic competition, “e.g., to prevent harmful concentration of spectrum ownership or to ensure meaningful opportunities for broadband CMRS market entry.”<sup>86</sup> To make this assessment, the Commission asks what constitutes “meaningful economic competition,” how have competitive conditions changed since the *1998 Biennial Review Order*, and, if meaningful

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<sup>84</sup> See White Paper at 16, 21.

<sup>85</sup> 47 U.S.C. § 161(a)(1), (2).

<sup>86</sup> *NPRM* at ¶ 12.

competition exists, whether spectrum aggregation limits have served their purpose and are no longer in the public interest.<sup>87</sup>

Cingular demonstrates below that competitive conditions have changed since the *1998 Biennial Review Order* and that meaningful competition continues to exist and expand. Accordingly, the spectrum cap has served its purpose and should be eliminated.

### **1. There Is Robust Competition in the Marketplace**

In order to assess the existence of meaningful economic competition, it is necessary first to look at economic conditions within the relevant market. Cingular has advocated that the analysis should take into account all spectrum *which has the potential* to be used to provide mobile voice services, and the Commission now asks whether, in the increasingly converging marketplace, there remains any basis for subjecting cellular, broadband PCS and SMR spectrum to a cap.<sup>88</sup> As shown below, even if the Commission could justify selecting out only certain CMRS existing uses (*e.g.*, mobile voice) or services (*e.g.*, cellular, broadband PCS, and SMR) as the relevant product market definition of the relevant market, meaningful economic competition exists to warrant the elimination of the CMRS spectrum cap.

#### **a. Competitive Conditions in the Market for Mobile Voice Telephony Services**

The cap should be eliminated because the development of meaningful competition in the mobile voice market has satisfied the cap's purpose and justifies its elimination under Section 11. The spectrum cap is simply an unnecessary vestige of a different era in wireless communications.

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<sup>87</sup> *Id.*

<sup>88</sup> *See Id.* at ¶ 18 n.48.

Since the time the cap was first adopted in 1994, the mobile voice market has become even more competitive, and this has become even more apparent since the *1998 Biennial Review Order*. In this regard, the Commission notes in the *NPRM* that since it last reviewed the spectrum cap in September 1999, using data derived in part from its June 1999 *Fourth CMRS Competition Report*, CMRS markets “have continued to grow in size, range of service offerings, and the pace of technological advances.”<sup>89</sup>

For example, when the cap was first adopted in late 1994, the number of domestic mobile telephony (*i.e.*, voice) subscribers was approximately 25 million,<sup>90</sup> by 1998 when the Commission adopted the *Fourth CMRS Competition Report* this figure was approximately 69 million; the *Fifth CMRS Competition Report* released in August 2000 indicated that the number had risen to 86 million; and today, the Cellular Telecommunications and Internet Association (“CTIA”) reports that total subscribership has reached more than 113 million.<sup>91</sup> This represents a more than *sixty percent* increase in the number of wireless subscribers since the last biennial review proceeding and a more than *three hundred percent* increase since the cap was originally adopted. At the same time, the

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<sup>89</sup> *Id.* at ¶ 14; see generally *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to CMRS, Fourth Report*, 14 F.C.C.R. 10145 (1999) (“*Fourth CMRS Competition Report*”).

<sup>90</sup> See *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to CMRS, First Report*, 10 FCC Rcd 8844 (1995) (“*First CMRS Competition Report*”).

<sup>91</sup> Compare *Fourth CMRS Competition Report*, 14 F.C.C.R. at 10149-50 and *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to CMRS, Fifth Report*, 15 F.C.C.R. 17660, 17663-64 (2000) (“*Fifth CMRS Competition Report*”) with <http://www.wow-com.com/industry/stats/surveys> (last visited Apr. 13, 2001).

Commission has noted that “the average price of mobile telephony has fallen substantially since the *Fourth [CMRS Competition] Report*” — by as much as *twenty percent* according to one report.<sup>92</sup>

The number of mobile telephone operators has also increased substantially since the *Fourth CMRS Competition Report*. For example, the *Fourth CMRS Competition Report* indicated that approximately 57 percent of the U.S. population, or more than 153 million people, received coverage from the equivalent of five mobile telephone operators; the *Fifth CMRS Competition Report* indicated that the number had risen to 69 percent, or more than 172 million people; and today, approximately 182 million people are able to choose between at least five service providers.<sup>93</sup> Thus, since the *Fourth CMRS Competition Report*, which was based on data less than three years old, the number of Americans able to choose between five or more mobile telephone operators has risen by approximately *eighteen percent*.

Moreover, since the issuance of the *Fifth CMRS Competition Report*, the number of people who can now choose from at least three and in some cases up to eight wireless service providers has risen from 222 million, or 88 percent of the U.S. population, to nearly 245 million — a *ten percent* increase.<sup>94</sup> At the same time, relatively new entrants are acquiring subscribers at a faster rate than

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<sup>92</sup> See *Fifth CMRS Competition Report*, 15 F.C.C.R. at 17678 (citing the Strategis Group Inc., 2000).

<sup>93</sup> Compare *Fourth CMRS Competition Report*, 14 F.C.C.R. at 10150, n.17, 10164, n.92 and *Fifth CMRS Competition Report*, 15 F.C.C.R. at 17665 with Robert MacMillan, “Sen. Brownback Introduces 3G Wireless Bill,” Newsbytes.com (Apr. 5, 2001).

<sup>94</sup> Compare *Fifth CMRS Competition Report*, 15 F.C.C.R. at 17665 with Robert MacMillan, “Sen. Brownback Introduces 3G Wireless Bill,” Newsbytes.com (Apr. 5, 2001).

the “incumbent” cellular companies.<sup>95</sup> Lastly, there are now six nationwide or near-nationwide carriers offering mobile voice service in the United States,<sup>96</sup> as well as a large number of regional and local providers. The presence of nationwide competitors seeking standardized offerings across the country benefits those rural areas where the number of competing carriers is less, because of their need to offer ubiquitous coverage.

**b. Competitive Conditions in the Market for All Services Currently Subject to the Cap**

At times, the Commission has recognized that mobile telephony service is not the single factor by which competition in the CMRS industry should be measured. Consistent with the cap, consideration of competition in the CMRS marketplace includes a count of *all* cellular, broadband PCS, or SMR spectrum (up to 10 MHz) that is used for any service within the definition of CMRS. Consideration of *all* SMR service providers in the competition equation dramatically increases the number of operators offering CMRS services. An April 2001 search of the Commission’s wireless databases reveals that in many metropolitan areas the Commission has licensed several different SMR operators to provide CMRS services. In some of these areas as many as ten or more SMR providers are already competing to offer service.<sup>97</sup> When added to the multiplicity of PCS and

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<sup>95</sup> See *Fifth CMRS Competition Report*, 15 F.C.C.R. at 17681-82. In fact, Sprint PCS was recently cited as being the nation’s fastest growing wireless telephone provider. See, e.g., Suzanne King, “Sprint PCS Adds More Than 1 Million Subscribers; Stock Shoots Up,” *The Kansas City Star* (Apr. 6, 2001); “Report Shows Sprint PCS Gaining Market Share,” *RCR Wireless News* (Feb. 5, 2001); “The Surveys Say,” *CT Wireless* (Sept. 29, 2000).

<sup>96</sup> See *Fifth CMRS Competition Report*, 15 F.C.C.R. at 17669-71.

<sup>97</sup> Figures derived from data retrieved from the Federal Communications Commission Universal Licensing System (“ULS”) database. Computation of the number of operators currently providing service includes CMRS SMR licensees that count against the Commission’s existing

cellular service providers currently offering service in these areas, the consumer is faced with a choice among sixteen different CMRS service providers offering a vast array of communications services today and the possibility that additional competitors will arrive once their licensed facilities are operational.<sup>98</sup> Accordingly, the cap should also be eliminated because meaningful competition in the general CMRS marketplace has satisfied the cap's purpose and justifies its elimination under Section 11.

Moreover, the Commission eliminated its narrowband PCS cap last year because the industry was found to be highly competitive,<sup>99</sup> that cap was not necessary to prevent an undue concentration of licenses,<sup>100</sup> and retention of the aggregation limit might have precluded narrowband PCS licensees from obtaining enough spectrum to support new and innovative services.<sup>101</sup> These same factors warrant elimination of the 45 MHz CMRS spectrum cap.

## **2. Robust Competition Would Have Occurred Regardless of the Cap**

The robust competition described above would have occurred independent of the spectrum cap, further justifying its elimination. The primary input to the competitive nature of CMRS has

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spectrum cap. According to the ULS database ten or more CMRS SMR service providers are licensed to operate in the Jacksonville, Miami-Fort Lauderdale, Philadelphia-Wilmington-Trenton, Tucson, and Savannah Basic Trading Areas.

<sup>98</sup> Figures derived from data posted on the Federal Communications Commission auctions home page and ULS database indicate that there are currently four different PCS service providers and two different cellular licensees offering services in each of the BTAs with ten or more SMR service providers.

<sup>99</sup> *Narrowband R&O*, 15 F.C.C.R. at 10464-65.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

always been customer demand. As noted above, demand for basic wireless services as measured by subscriber growth has reached astronomical levels.<sup>102</sup> At the same time, demand is also increasing for new advanced services.<sup>103</sup>

In order to respond to this demand, carriers are paying previously unseen amounts to acquire spectrum. The high prices paid for licenses at auction are a natural impediment to any carrier who might contemplate the warehousing of spectrum to limit competition and drive up prices. Simply put, given the costs of acquiring the license in the first instance and then satisfying the FCC's build-out requirements, a carrier has significant incentives to get customers on its system to pay down these capital expenditures as soon as possible. This is the case irrespective of the spectrum cap. Moreover, because wireless service is not a necessity, the price a customer pays must be less than the utility that the customer receives from having wireless service in order for the carrier to get and keep customers. In this regard, carriers are constantly striving to decrease their costs, use spectrum efficiently, provide new services in response to customer demand, and increase the capacity of their systems to meet these demands.

Therefore, the spectrum aggregation limits have little or nothing to do with the development of competition and the deployment of spectrum efficient technologies. Rather, it is a matter of meeting customer demand and the need to recover capital expenditures attendant thereto, which results in natural barriers to possible anticompetitive practices by carriers. In addition, these customer desires and market forces have increased the stakes of responding to customer demand —

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<sup>102</sup> In fact, growth has always far outstripped projections. *See* Comments in ET Docket No. 00-258 of Cingular at 9-10 (Feb. 22, 2001).

<sup>103</sup> *See id.* at 4-6.

if a carrier is not providing the services and quality that a customer expects at prices which it believes represents fair value for the services received, the customer will take its business elsewhere.

**E. Elimination of the Cap Will Not Lead to Harmful Reconsolidation Because the Justice Department Already Conducts a Full Competitive Analysis**

In the *1998 Biennial Review Order*, the Commission expressed concern that eliminating the spectrum cap could lead to a “reconsolidation” of the broadband CMRS marketplace, causing adverse impacts on competition.<sup>104</sup> Accordingly, the Commission seeks comment on whether the cap is still needed today to prevent “potentially *harmful* reconsolidation,” particularly in light of competitive developments since the *1998 Biennial Review Order*.<sup>105</sup> The Commission also questions the implications of other agencies’ enforcement of antitrust laws upon the continued need for its spectrum aggregation limits, particularly the DOJ, noting that “[a]ntitrust laws may adequately focus on mergers that threaten to curtail actual competition *harming* consolidation.”<sup>106</sup> In this regard, the FCC asks what role it should continue to afford HHI calculations and anticompetitive analyses in general, and whether it can defer to DOJ in such matters.<sup>107</sup>

As a preliminary matter, Cingular takes issue with the notion that the elimination of the spectrum cap will trigger “harmful reconsolidation,” because this implies that the market was at some point previously consolidated. To the extent the cellular duopoly is viewed as a consolidated

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<sup>104</sup> *1998 Biennial Regulatory Review — Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket No. 98-205, *Notice of Proposed Rulemaking*, 13 F.C.C.R. 25132, 25151 (1998) (“*1998 Biennial NPRM*”).

<sup>105</sup> *NPRM* at ¶ 17 (emphasis added).

<sup>106</sup> *NPRM* at ¶ 20 (emphasis added).

<sup>107</sup> *See NPRM* at ¶¶ 18, 20.

market, this can certainly not be considered harmful because the FCC actually determined two cellular carriers was in the public interest.<sup>108</sup> In fact, the FCC originally proposed to limit the provisioning of cellular service to one carrier per market before it moved to the duopoly paradigm.<sup>109</sup> In any event, the limited number of initial cellular carriers was not a market failure requiring regulation to prevent its recurrence (*e.g.*, the CMRS spectrum cap), because the duopoly was specifically engineered by the FCC and provided a certain measure of competition. As the White Paper notes:

[T]he Commission warns of the dangers of “reconsolidation” when there has never been “consolidation” to begin with. . . . Notably, the extent to which the market was previously “consolidated” resulted from the Commission’s own decisions in allocation of spectrum licenses.<sup>110</sup>

Moreover, as the FCC appears to recognize in the *NPRM*, the inquiry is not whether *any* consolidation will occur in the absence of the cap, but whether that consolidation will be *harmful*. For example, as demonstrated throughout this document, carriers are currently facing a spectrum shortage to meet capacity needs and to begin the introduction of new advanced wireless services, such as 3G services. If sufficient amounts of additional spectrum are not made available promptly

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<sup>108</sup> See *Cellular Communication Systems, Report and Order*, 86 F.C.C.2d 469, 476 (1981), *recon.*, 89 F.C.C.2d 58 (1982), *further recon.*, 90 F.C.C.2d 571 (1982).

<sup>109</sup> See *Future Use of the Frequency Band 806-960 MHz*, Docket No. 18262, *Second Report and Order*, 46 F.C.C.2d 752, 760 (1974), *recon.*, 51 F.C.C.2d 945, *clarified*, 55 F.C.C.2d 771 (1975), *aff’d. sub nom. NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

<sup>110</sup> See White Paper at 5 n.5.

for such services, carriers may be forced to consider other options, including mergers.<sup>111</sup> While such non-action by regulators may lead to limited consolidation in the absence of a cap, it should not be harmful. To the contrary, the current cap could prevent such a potentially beneficial consolidation that would serve the public interest in promoting new services and exponentially more efficient spectrum use. Likewise, the Commission recognizes that “the consolidation of carriers into nationwide networks” has resulted in “beneficial service options for consumers.”<sup>112</sup>

Even if new spectrum is allocated, some consolidation may take place. There are barriers in place, however, to prevent harmful consolidation, thus obviating the need to maintain the cap. First, the market itself acts as a natural barrier to harmful consolidation. As Chairman Powell previously noted, the barriers to consolidation include seeking out and finding a willing seller, access to sufficient capital, and technical compatibility issues.<sup>113</sup> Moreover, a merger purely for anticompetitive purposes, such as spectrum warehousing, is unlikely given the high cost of spectrum. These factors, coupled with the fact that there are now six nationwide or near-nationwide competitors for mobile voice service,<sup>114</sup> make the prospect of harmful consolidation remote. Nevertheless, to the extent the threat remains, regulatory review acts as a final barrier to harmful consolidation.

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<sup>111</sup> A merged entity would be able to take advantage of economies of scope and scale to use its combined spectrum more effectively to service existing subscriber needs while initiating and/or developing new service offerings.

<sup>112</sup> See *NPRM* at ¶ 17.

<sup>113</sup> *Biennial Order*, 15 F.C.C.R. at 9296 (Separate Statement of Commissioner Michael Powell).

<sup>114</sup> See *NPRM* at ¶ 14.

Cingular agrees with the White Paper that FCC consideration of the anticompetitive consequences of a potential merger is duplicative of the review conducted by the DOJ, and that “[i]f a spectrum cap or an antitrust query are instruments primarily designed to address what amount to concerns about competition, DOJ would seem to us to possess a decided comparative advantage.”<sup>115</sup> A full antitrust analysis not only looks at the HHI analysis, but places it in context of a larger review. The current spectrum cap is set at an arbitrary level that is only revisited every two years, and therefore does not take into account intervening circumstances. The DOJ’s analysis clearly does look at the present day market conditions, as noted in the attached White Paper:

[C]ompetition policy — especially as it affects mergers or other forms of consolidation — should be left to competition authorities (in this case, DOJ) and applied based on the *actual* market conditions at the time of any proposed merger or consolidation.

Unlike the FCC, DOJ performs standard competition policy analysis when presented with specific mergers/combinations. Thus, it can consider the state of the market at the given point in time when a merger or consolidation is proposed.<sup>116</sup>

In contrast to DOJ’s approach, the FCC’s HHI analysis as applied to the spectrum cap context does not take into account the actual market conditions at the time of any proposed merger or consolidation. Therefore, it cannot account for the pro-competitive benefits that may accrue from consolidation. Even the Commission appears to have recognized the limitation of the HHI analysis, concluding that “an HHI analysis alone is not determinative and does not substitute for our more

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<sup>115</sup> White Paper at 3.

<sup>116</sup> White Paper at 18-19. The White Paper also points out that DOJ’s analysis is conservative because it only relies on subscribers rather than overall capacity in conducting its analysis. *Id.* at 11 n.20.

detailed examination of competitive considerations.”<sup>117</sup> Contrary to the FCC’s approach concerning the spectrum cap, the DOJ typically follows up with an in-depth market analysis if the HHI-based measurements of market concentration exceed the pertinent numerical thresholds.<sup>118</sup> For example, DOJ examines pro-competitive efficiencies, coordinated interaction, the ability to unilaterally affect the relevant market; ease of entry, *etc.*

In sum, DOJ focuses its analysis not upon an arbitrary spectrum limit, but upon market conditions. In light of the foregoing, the Commission should eliminate the spectrum cap and defer to the antitrust analysis conducted by DOJ on competitive issues, limiting its analysis instead to what is in the public interest.

#### **F. Elimination of the Cap Will Serve the Public Interest**

The Commission generally seeks comment on the costs that its spectrum aggregation limits may impose. The *NPRM* asks whether its aggregation limits impact the emergence of mobile Internet access and other data services and whether its regulations impede the introduction of innovative new technologies and services, including advanced wireless services such as 3G.<sup>119</sup> As shown below, spectrum aggregation limits adversely impact and negatively impede the creation and

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<sup>117</sup> *WorldCom, Inc. and MCI Comm. Corp.*, CC Docket No. 97-211, *Memorandum Opinion and Order*, 13 F.C.C.R. 18025, 18084 (1998); *cf.* 1998 *Biennial NPRM*, 13 F.C.C.R. at 25149 n.96 (1998) (“While HHIs generally are used by these [federal antitrust] authorities to determine the degree to which markets are concentrated, they are not necessarily regarded as dispositive on whether a post-merger market would be sufficiently competitive.”).

<sup>118</sup> *See* Merger Guidelines at §§ 2-5.

<sup>119</sup> *NPRM* at ¶¶ 13, 33.

introduction of new services, and therefore continued retention of the CMRS spectrum cap is contrary to the public interest.

The elimination of the spectrum limit on the aggregation of broadband CMRS spectrum will allow broadband providers to increase their non-voice offerings, including paging and mobile data. For example, existing broadband networks are generally configured to make optimal use of broadband spectrum allocations to provide mobile voice service, out of necessity. Most of the available spectrum used by broadband providers must be dedicated to ensuring that their primary voice systems operate efficiently to meet the needs of their voice subscribers. Some broadband CMRS carriers are providing collateral narrowband-like service offerings including paging and mobile data over their spectrum, and some have even dedicated spectrum to such services, as Cingular Interactive did for its interactive two-way mobile data service before any of the spectrum caps were adopted. Nevertheless, such collateral services cannot reach their full potential as competitors to narrowband services if the cap is maintained, because the spectrum used to provide such services counts against the spectrum cap.<sup>120</sup> The carrier that allocates spectrum for such narrowband offerings is disadvantaging itself *vis-a-vis* its competitors in the mobile voice market because the carrier, by virtue of the cap, has less spectrum available for its mobile voice products.

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<sup>120</sup> For example, Cingular Interactive uses SMR spectrum to provide a highly innovative two-way data-only service. The spectrum cap limits its ability to provide this kind of cutting-edge service, however, because spectrum dedicated to this service is deducted from the amount of spectrum Cingular uses to provide cellular and PCS phone service. Cingular has filed a waiver request to exclude 1.5 MHz of SMR spectrum used by Cingular Interactive for data-only service, which is currently pending. *See* Cingular Wireless LLC, Request for Waiver of the CMRS Spectrum Aggregation Limit in Section 20.6(a) of the Commission's Rules, DA 01-665 (Mar. 7, 2001).

As the Commission has previously recognized, “to the extent that incumbent licensees build networks coupled with CMRS spectrum that are targeted mainly to mobile voice users, opportunities for entry and development of competition in other services may be limited in the short to medium term.”<sup>121</sup> Elimination of the spectrum cap will allow broadband CMRS providers to acquire the spectrum they need to better compete in providing such narrowband-type services while continuing to meet the needs of their voice subscribers.

The CMRS spectrum cap also acts as an impediment to the development and introduction of new advanced services and technologies, including new 3G services.<sup>122</sup> In order to develop and deploy these services, while satisfying increasing capacity needs, carriers will need additional spectrum. Carriers are constantly striving to be more spectrally efficient, but new services place exponential demands on available capacity. There is simply a fundamental disconnect between the need for additional spectrum and an arbitrary limit on the amount of spectrum that can be held. As the attached White Paper notes, “[i]t is particularly ironic that the Commission should, on the one hand, artificially exacerbate spectrum ‘scarcity’ and, on the other, rely on it to justify regulation.”<sup>123</sup>

It is no coincidence that then FCC Commissioner Powell has previously cautioned:

[W]e speculate about possible anticompetitive effects and then adopt policies intended to protect new entrants and consumers from them. *Rather than protect these interests, however, we more often, in practical effect, handicap the market and postpone the arrival of competition and consumer choice.* Communications leaders must not

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<sup>121</sup> 1998 Biennial NPRM, 13 F.C.C.R. at 25155.

<sup>122</sup> See, e.g., Comments in ET Docket No. 00-258 of Cingular at 13-14 (Feb. 22, 2001); CTIA at 4 (Feb. 22, 2001).

<sup>123</sup> White Paper at 11 n.22.

give in to these fears so lightly, but instead must have the courage to trust the market. Besides, if feared anticompetitive conduct actually occurs, it usually can be addressed by the antitrust authorities.<sup>124</sup>

Yet, a handicapped market is precisely the effect of the spectrum cap, which artificially precludes carriers from acquiring sufficient spectrum to offer the advanced services sought by consumers and therefore distorts the competitive landscape.<sup>125</sup>

In fact, a bipartisan coalition in Congress has been urging the FCC for some time to eliminate the cap due to concerns that it will inhibit the growth of 3G services and leave the United States even further behind Europe and Asia.<sup>126</sup> The attached White Paper agrees, noting that “[t]he current spectrum cap places U.S. operators at a disadvantage in deploying 3G services, relative to other countries where operators have flexibility to aggregate more spectrum. As a result, the U.S. faces the risk of falling further behind in the deployment of modern wireless networks and in the use of two-way wireless communications applications.”<sup>127</sup> For example, the total amount of spectrum available for 1G, 2G, and 3G services in European countries is now between 250 MHz and 350 MHz, and some incumbents there have already reached aggregate amounts that significantly exceed

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<sup>124</sup> Commissioner Michael K. Powell, *Communications Policy Leadership for the Next Century*, 50 Fed. Comm. L. J. 529, 534-35 (May 1998) (emphasis added).

<sup>125</sup> See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, WT Docket No. 98-100, GN Docket No. 94-33, *Memorandum Opinion and Order on Reconsideration* 14 F.C.C.R. 16340, 16387 (“Regulations generally tend more to distort the competitive process, for such regulation attempts to pronounce appropriate conditions and pick winning business models rather than letting the competitive process determine them.”) (Separate Statement of Commissioner Michael Powell).

<sup>126</sup> See Patrick Ross, *FCC Again Will Consider Lifting Wireless Ownership Caps* (Jan. 24, 2001) available at <http://news.cnet.com/news/0-1004-200-4587314.html> (“Ross Article”).

<sup>127</sup> See White Paper at 6.

the FCC's cap.<sup>128</sup> Meanwhile, 3G spectrum has not even been allocated in the United States, a situation the White Paper describes as "alarming."<sup>129</sup> Given the demand for advanced services and the increasing competition in the wireless market, House Internet Caucus Co-Chair Rick Boucher (D-VA) has said that "the caps, frankly, don't make any sense."<sup>130</sup> Cingular agrees. For example, the major wireless providers in England have between 77 MHz and 85 MHz of spectrum.<sup>131</sup>

Finally, elimination of the cap will help to increase the efficient use of spectrum, especially by current licensees who are in the best position to invest in new technologies and services and make the most efficient use of additional spectrum, leading to a more robust assortment of service offerings. Existing carriers uniquely possess the technical and financial wherewithal to develop advanced services. Eliminating the cap would allow these carriers to make the most efficient, and cost-effective, use of spectrum, consistent with the Commission's policy to put spectrum in the hands of those who value the spectrum most.

### **III. AT A MINIMUM THE CAP SHOULD NOT APPLY TO NEW SPECTRUM ALLOCATIONS**

The Commission seeks comment on how to assess the treatment of newly allocated spectrum for spectrum cap purposes. While Cingular believes that the cap should be eliminated outright, at

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<sup>128</sup> *Id.* Prior to 3G auctions, European countries had about 180 MHz of spectrum allocated to CMRS; an additional 140-145 MHz of spectrum has now been earmarked for 3G services. *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> Ross Article (quoting Rep. Rick Boucher (D-VA)).

<sup>131</sup> Linda Mutschler, Wendy M. Liu, David Janazzo, and Naemah Lajoie, *Wireless Spectrum: How Much Do the US Carriers Have, and is it Enough*, Merrill Lynch, October 19, 2000, at 4. Wireless providers in Germany have aggregated up to approximately 70 MHz of spectrum and the top two wireless providers in Japan have 98 MHz and 86 MHz respectively. *Id.* at 5.

a minimum Cingular agrees that “newly available CMRS-suitable spectrum . . . should be excluded from the spectrum cap.”<sup>132</sup> The current scarcity of spectrum suitable for CMRS in the United States is unquestionable.<sup>133</sup> To address this need, the Commission notes the pendency of several initiatives to identify additional spectrum for CMRS. For example, Congress has directed the reallocation of certain spectrum suitable for mobile services now reserved for broadcast services,<sup>134</sup> and the Commission is exploring the possible use of several frequency bands below 3 GHz to support the introduction of new advanced wireless services, including 3G wireless systems.<sup>135</sup> Including any of these new allocations within the spectrum cap limitation would directly undercut the purpose of the additional allocation — to alleviate the CMRS spectrum scarcity issues faced by carriers.<sup>136</sup>

The availability of additional spectrum is essential to allow carriers both to meet current capacity demands resulting from dramatic increases in wireless subscribership, as well as to support the deployment of new and advanced wireless services, *e.g.*, 3G services. Clearly, it would make

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<sup>132</sup> See *NPRM* at ¶ 36.

<sup>133</sup> See, *e.g.*, *Allocation of Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Services*, ET Docket No. 00-258, *Notice of Proposed Rule Making*, FCC 00-455, at ¶ 27 (rel. Jan. 5, 2001); see generally *Promoting Efficient Use of Spectrum Through the Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Notice of Proposed Rulemaking*, FCC 00-402 (rel. Nov. 27, 2000); See also “Industry, FCC Mull Paths to Reaching Secondary Spectrum Market,” *Comm. Daily* (Jun. 1, 2000) (referring to statements by former Chairman William Kennard describing spectrum needs as “acute”).

<sup>134</sup> 47 U.S.C. § 337.

<sup>135</sup> See generally *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258, *Notice of Proposed Rulemaking*, FCC 00-455 (rel. Jan. 5, 2001).

<sup>136</sup> See *NPRM* at ¶ 26.

no sense to apply the CMRS spectrum cap to new spectrum allocations that can allow existing wireless carriers to satisfy these needs. Applying the cap to new blocks of spectrum would also place an arbitrary 45 MHz limit on the amount of spectrum available to new entrants, and would likewise prevent the new entrants from offering a full range of services. Indeed, Cingular has previously cautioned that it may not even be *possible* to provide the more spectrum-intensive high-speed Internet access and streaming video services to multiple subscribers on a commercial basis within 45 MHz of spectrum.<sup>137</sup> Accordingly, because application of the cap to new services would be contrary to the entire purpose of any allocation for expanded wireless service, it should not be applied.

#### **IV. THE CELLULAR CROSS-OWNERSHIP RULE SHOULD BE ELIMINATED**

In addition to seeking comment on spectrum cap issues, the Commission also asks whether to repeal the cellular cross-interest rule,<sup>138</sup> which generally restricts common ownership between the two cellular carriers in any given geographic area.<sup>139</sup> The rule was adopted at a time when the Commission specifically restricted the provisioning of mobile telephone service to two carriers. The FCC recognized that if it allowed common ownership of the sole carriers in a given market, there would be *no* competition. Today, however, there are at least *six* mobile telephony providers licensed

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<sup>137</sup> See Comments in ET Docket No. 00-258 of Cingular at 14 (Feb. 22, 2001).

<sup>138</sup> *NPRM* at ¶ 23; see 47 C.F.R. § 22.942.

<sup>139</sup> Specifically, Section 22.942 of the Commission's rules prohibits any entity from having a direct or indirect ownership interest of more than 5 percent in one cellular carrier when it has an attributable interest in another cellular carrier with an overlapping cellular geographic service area ("CGSA"). An attributable interest generally includes an ownership interest of 20 percent or more or a controlling interest. 47 C.F.R. § 22.942(d)(1), (2).

in virtually every major market. The vast majority of markets now have between three and eight licensees *providing* mobile telephony service. Other CMRS providers have the potential to add further competition in the mobile voice market, and the two cellular carriers face strong competition to their non-voice offerings from paging, narrowband PCS, and data-only providers.

The Commission recognized in its *1998 Biennial Review Order* that competition from other services had increased since the rule's adoption in 1991, and therefore relaxed the attribution standards to the current levels.<sup>140</sup> It decided to retain the rule at the time because of the market share the two cellular carriers still retained in most areas.<sup>141</sup> As the Commission now recognizes, however, “[t]he distinctions between cellular and PCS services appear to have decreased since our 1998 biennial review.”<sup>142</sup>

Moreover, continued retention of the rule would conflict with the Commission's regulatory parity mandate in Section 332 of the Communications act, which requires similar treatment for like services,<sup>143</sup> if the spectrum cap is eliminated. As shown above, the CMRS spectrum cap is no longer warranted and should be eliminated in the public interest. The Commission itself appears to recognize that, in a marketplace where carriers are building nationwide networks that combine different CMRS services, it can no longer “continue to make distinctions and compare competitive

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<sup>140</sup> See *1998 Biennial Order*, 15 F.C.C.R. at 9251-53.

<sup>141</sup> See *id.*

<sup>142</sup> *NPRM* at ¶ 23 (citing *Fifth CMRS Competition Report* at 15-16).

<sup>143</sup> 47 U.S.C. § 332.

differences between 'cellular carriers' and their competitors, e.g., 'PCS carriers.'"<sup>144</sup> Accordingly, the cellular cross ownership rule should be eliminated.

### CONCLUSION

For the foregoing reasons, Cingular respectfully requests that the CMRS spectrum cap and the cellular cross-ownership rules be eliminated.

Respectfully submitted,

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<sup>144</sup> See *NPRM* at ¶ 23.

# WHITE PAPER ON ELIMINATION OF THE SPECTRUM CAP

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## 1. THE COMMISSION'S SPECTRUM CAP IS FUNDAMENTALLY FLAWED

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### 1.1. POLICY SCREENS

One of the most fundamental principles of economics is that voluntary exchange is always mutually beneficial to the trading parties. As such, there is or should always be a public policy presumption in favor of “free trade” when it comes to crafting government regulations to promote economic welfare. The policymaker’s problem is how to differentiate between transactions that promise to enhance economic welfare and those that, on balance, stand a good chance of reducing it (*i.e.*, where, for example, there are important harmful “external effects”).

Specification of a useful “policy screen” entails balancing harms that derive from two types of potential mistakes: (1) a given policy screen may prevent beneficial transactions from occurring, *i.e.*, prevent good things from happening; and (2) a policy screen may *fail* to prevent transactions that give promise of reducing economic welfare on net, *i.e.*, fail to prevent bad things from happening.

A “strict” policy (*viz.*, a screen with a “fine mesh”) may rarely commit errors or mistakes of the second type, but may frequently commit errors of the first type. A “lenient” policy may, likewise, rarely commit errors of the first type, but more often commit errors of the second type. From the standpoint of designing an

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economically optimal policy, the challenge is to specify a policy screen (*viz.*, a mesh size) that balances the expected losses from commission of the two types of possible errors in attempting to differentiate the good from the bad.<sup>2</sup>

## 1.2. DISABILITIES OF A “SPECTRUM CAP” AS A COMPETITION POLICY SCREEN

The genesis of the FCC’s current spectrum cap was the Commission’s desire to promote competition in the supply of wireless telephone service by preventing incumbent cellular carriers in particular areas from acquiring the largest-bandwidth PCS licenses with overlapping footprints. Specifying a cap was a simple way to achieve this objective. It is important to recognize that, apart from its practical consequence in the initial setting, the Commission’s cap possessed only the most limited connection to the kinds of economic considerations germane for analysis of matters related to market concentration and the effective exercise of market power.<sup>3</sup> Indeed, whatever its initial connection to then prevailing market conditions, the connection between the Commission’s spectrum cap and current market conditions has plainly become even more tenuous as basic conditions of supply and demand have continued to evolve rapidly.

While conditions have changed and even greater changes are portended in the immediate future, the Commission’s spectrum cap continues to have the same practical consequence it possessed at its inception: It continues to limit *absolute* firm size (and any attendant ability to realize economies of scale and service scope) in order to limit concentration of ownership and size *relative* to the market (and any attendant ability to exercise market power).

The basic economic disability of a policy instrument that seeks to control relative market size by controlling absolute firm size is that there is a potential disconnect between absolute and relative size when market boundaries are changing—the denominator grows in manifold ways, but the numerator lingers on. This implies that, unless a spectrum cap specified in absolute terms is constantly adjusted, it will become increasingly restrictive compared to its initially calibrated level and to the economically optimal level that optimizes the perceived tradeoff between technical and allocative efficiencies.

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<sup>2</sup> Specification of an economically optimal policy also entails a reckoning of the implementation costs associated with different policies to figure their net payoffs relative to one another.

<sup>3</sup> In particular, underlying (or implicit in) the Commission’s “(bright) line-drawing” was a view that economic welfare would be enhanced by an increase in the number of competitors relative to the realization of economies of scale and scope by individual suppliers.

Please note that this does not constitute an argument against enforcing a competition policy that polices (and perhaps constrains) spectrum transactions to ensure economic welfare enhancement. To observe (as some have) that concentration of spectrum ownership is high (at least on some measures) may be an argument for competition policy enforcement, but it does not suffice to justify maintenance of what is, especially in light of actual and impending changes in market conditions, an economically arbitrary limit on permissible spectrum holdings.

It is interesting to observe that past attempts to justify maintenance of the Commission's ownership cap (or, more accurately, to rationalize its continued existence) have often rested upon what amount to antitrust merger analyses (*viz.*, specification of relevant product market, measurement of market shares, some assessment of demand and supply substitution, *etc.*). Finding that there is some competitive failing is supposed to compel the policy conclusion that maintenance of the spectrum cap is warranted, but that conclusion is a logical *non sequitur*. The putative existence of an actual or potential market failure *does not make an ownership cap the best remedy*. The specific identity of the best remedy is a matter of comparing the abilities and disabilities of different approaches.

One putative advantage of a cap is that it is cheap to implement—enforcement is presumably a simple matter of determining whether a limit is exceeded. Balanced against this ease of implementation are disabilities attendant upon the cap's failure to discriminate accurately between deals that promise to enhance economic welfare and those that do not. The cap approach does not permit investigation of potential tradeoffs and the competitive significance of different resource deployments and substitution opportunities; instead, simply accept that exceeding the specified limit is harmful, on net. It economizes on discovery costs, but may often or increasingly, as time passes, get the answer wrong. It is surely ironical that, in seeking to justify maintenance of the cap, recourse is made to precisely the kind of competitive analysis that, we would argue, should constitute the method for directly ascertaining whether a particular resource acquisition passes competitive muster.

In the latter regard, there is an issue of appropriate venue and “turf” protection. We think the question of where the persons who carry out a competition policy sit is less important than the question of what they do when they are there. In particular, the important point is not whether the DOJ, FTC or the FCC carry out an antitrust-style assessment of opportunities for competitive substitution in demand and supply in particular fact settings, but that someone do so rather than simply falling back on what must, given its nature and genesis, be an economically arbitrary cap standard.

If an antitrust query or a spectrum cap are instruments primarily designed to address what amount to concerns about competition, DOJ would seem to us to possess a decided comparative advantage, although what matters most is that whichever agency has a role performs the appropriate analysis.