

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**REPLY COMMENTS OF WORLDCOM, INC.**

WorldCom, Inc. (“WorldCom”) hereby submits its Reply Comments in response to the Comments filed on the Commission’s *Notice of Proposed Rulemaking* in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The Commission’s spectrum aggregation limits for the Commercial Mobile Radio Service (“CMRS”) have been an essential ingredient for creating a vibrant and competitive mobile wireless industry. Spectrum aggregation limits are a minimally intrusive way to maintain competition among multiple CMRS competitors without requiring the imposition of behavioral rules and regulations. The benefits of effective competition in the CMRS market are apparent. The price of wireless services has steadily declined with the introduction of more CMRS providers, while the variety of service offerings and features, and the quality of service continues to increase. Numerous commenters in this proceeding agree that elimination or significant

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<sup>1</sup> *In the Matter of 2000 Biennial Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, *Notice of Proposed Rulemaking*, FCC 01-28 (rel. Jan. 23, 2001) (“*Notice*”).

modification of the Commission's spectrum aggregation limits would have a severe negative impact on competition in the CMRS marketplace.

The three largest incumbent CMRS carriers, with the support of their industry association, come to this proceeding with a single goal – to eliminate the Commission's spectrum cap rules because they are an impediment to their ability to reconsolidate the industry.<sup>2</sup> Absent such limits, these large CMRS incumbents would simply use their vast financial resources to acquire more spectrum through a variety of means (*e.g.*, auctions, takeovers, spectrum swaps and mergers), thereby eliminating many of their competitors and enhancing their market power. Once the field of competitors is reduced to just a few, these large CMRS incumbents will no longer have to compete as vigorously for the American consumer's mobile wireless business. Ultimately, customers will pay for such increased consolidation through higher prices and reduced service innovation.

The burden of proof rests squarely on those proposing to eliminate the spectrum cap rules and the large CMRS incumbents have failed to meet this burden. They have provided no empirical evidence or market data to substantiate their claims that the spectrum aggregation limits are preventing them from obtaining needed spectrum. In reality, there are few, if any, markets where CMRS carriers face spectrum exhaustion or are constrained from introducing advanced services because of the Commission's aggregation limits. Unable to substantiate their need for additional spectrum and the nexus between any such need and the Commission's rules, the large CMRS incumbents fall back on the argument that they should only be subject to

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<sup>2</sup> Hereinafter, these four parties – Verizon Wireless, Cingular Wireless, AT&T Wireless, and the Cellular Telecommunications & Internet Association – are referred to as the “large CMRS incumbents.”

Department of Justice (“DOJ”) enforcement of the antitrust laws to monitor any market reconsolidation. DOJ review, however, is no substitute for the Commission’s oversight of the structure of the CMRS market and cannot prevent certain types of market limiting behavior associated with spectrum auctions and spectrum swaps.

The large CMRS incumbents also claim that the Commission’s aggregation limits deprive them and the public of potential scope economies resulting from jointly offered voice services and other services (which they do not identify), and force them to inefficiently and excessively substitute other inputs for spectrum. Yet, at the same time, these carriers claim that smaller CMRS carriers with far less spectrum available to them can somehow be efficient and effective competitors once the spectrum aggregation limits are removed. The illogic of such an argument is apparent. If these smaller carriers do not need more spectrum to effectively compete and achieve scope economies then why do the large CMRS incumbents need more spectrum to be effective competitors?

There are no adequate substitutes for mobile spectrum. Because there is an absolute limit on the total amount of mobile spectrum available to CMRS carriers at any one moment in time, if one set of carriers (*i.e.*, the large CMRS incumbents) is allowed to accumulate more spectrum, then that can only mean that less spectrum is available to other carriers. As a result, smaller carriers either will be acquired by the large CMRS incumbents or will lack the spectrum needed to provide the full array of services provided by the large CMRS incumbents. The end result is that competitors will entirely exit the market or will cease to be effective competitors, except in niche markets, because they will only be able to offer a subset of services that consumers desire.

Consumers have benefited enormously from increased CMRS competition that developed, in important part, *because* the spectrum cap rules ensured there would be at least four effective competitors in the marketplace. This structural restriction continues to be needed precisely because competition in the context of a fixed amount of available mobile spectrum is inherently fragile and depends on that essential resource not being reconsolidated in a few large competitors. It is at best a risky public policy strategy to allow reconsolidation of that spectrum, without any prior showing of efficiency gains or other strong public policy justifications that might supercede the anticompetitive effects of fewer competitors. To the extent that a CMRS provider can demonstrate that the aggregation limits are having an adverse effect on its ability to provide advanced mobile services in a particular geographic area, the Commission has already stated that it would grant a waiver for that specific market. Such a case-by-case, market-by-market waiver process better serves the public interest than the wholesale elimination of the Commission's spectrum aggregation limits.

## **II. THE BURDEN OF PROOF UNDER SECTION 11 OF THE ACT RESTS SQUARELY ON THOSE PROPOSING TO ELIMINATE THE SPECTRUM CAP**

Verizon Wireless asserts that Section 11 of the Act establishes a presumption that the spectrum aggregation rules are no longer necessary, and places the burden of proof for retaining those rules on the Commission.<sup>3</sup> Verizon Wireless is incorrect. Section 11, which requires the Commission to conduct a biennial review of certain regulations, provides in relevant part as follows:

(a)(1) [the Commission] shall determine whether the [relevant] regulation is no longer necessary in the public interest as a result of

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<sup>3</sup> Verizon Wireless Comments at 5.

meaningful economic competition between providers of such service.

(b) Effect of Determination: The Commission shall repeal or modify any regulation it determines to be no longer valid in the public interest.<sup>4</sup>

The statute states that the Commission must find that a rule “is *no longer* necessary in the public interest” – making it clear that the Commission must affirmatively determine that a rule is *not* necessary.

Verizon Wireless does not, and indeed cannot, cite a single Commission decision to support its view. Certainly, the Commission’s *Report* and the *Staff Report* on the 2000 biennial regulatory review do not support Verizon Wireless’s assertion that the burden of proof for retaining a rule rests upon the Commission.<sup>5</sup> Verizon Wireless does quote statements of Commissioner Furchtgott-Roth and Chairman (then Commissioner) Powell regarding their views on the locus of the burden of proof.<sup>6</sup> WorldCom does not lightly dismiss these statements, but notes that both were separate statements beyond the precedential scope of the relevant Commission orders.

Moreover, Verizon Wireless is clearly incorrect in its implied assertion that Section 11 requires *de novo* review of the Commission’s regulations during each biennial

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<sup>4</sup> 47 U.S.C. § 161.

<sup>5</sup> *In the Matter of The 2000 Biennial Regulatory Review*, CC Docket 00-175, *Report*, FCC 00-456 (rel. January 17, 2001); Federal Communications Commission Biennial Regulatory Review 2000, CC Docket No. 00-175, *Staff Report* (rel. Sept. 18, 2000) (“*Staff Report*”).

<sup>6</sup> Verizon Wireless Comments at 5, 7.

review.<sup>7</sup> First, the very fact that the Act authorizes the Commission to “modify” rather than simply “repeal” the regulation indicates that the starting point of any such review must be the current regulation. Second, the Commission has repeatedly made it clear that *de novo* review is not the appropriate standard. For example, the Commission’s *Staff Report* on the 2000 biennial regulatory review stated that “this review attempts to build upon the work completed in the 1998 Biennial Regulatory Review, and to establish a foundation for future reviews,”<sup>8</sup> noting that “[t]he process is incremental....”<sup>9</sup> Further, the *Notice* in this proceeding fully analyzes the Commission’s 1998 biennial review of the spectrum cap rules and seeks to build upon that review by asking, among other things, whether competitive conditions have changed since the last review cycle.

### **III. THE ECONOMIC ARGUMENTS MADE BY THE LARGE CMRS INCUMBENTS ARE NOT SUPPORTABLE**

The large CMRS incumbents set forth a number of arguments in their Comments and associated declarations to support their view that the spectrum aggregation limits should be eliminated in their entirety. None of the arguments, however, are supported by any empirical evidence or sound economic theory.

#### **1. The Commission’s Spectrum Aggregation Limits Do Not Impede Carriers from Attaining Economies of Scope from the Joint Provision of Voice and other Services to the Detriment of American Consumers**

The large CMRS incumbents claim that the existing spectrum cap rules prevent

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<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Staff Report* at ¶ 11.

<sup>9</sup> *Id.*

them from providing voice and other services, thus denying carriers and consumers the benefits of economies of scope.<sup>10</sup> This argument is filled with logical and empirical holes. First, these carriers have not provided any concrete information on actual or projected demand for the other services they want to offer, or a timeline on when that demand is likely to develop. Second, even if the large CMRS incumbents could show real (as opposed to theoretical) economies of scope, they assume that the consumer benefits from these efficiencies are greater than the consumer losses from the elimination or weakening of competitors in the market. Third, as indicated below, the Commission already has a waiver process in place for allowing carriers that can demonstrate a need for more spectrum in any geographic area to exceed the spectrum aggregation limits. To date, no carrier has seriously tried to make such a showing.

## **2. Reducing the Number of Carriers in a Market Will Stifle Competition**

The large CMRS incumbents argue that the spectrum cap rules are no longer needed because there is “meaningful economic competition” in the CMRS market today.<sup>11</sup> Such competition, however, does not exist in a market free of substantial barriers to entry. It exists within the context of a fixed amount of an essential input -- spectrum -- and a specific structural control, the spectrum cap rules, explicitly intended not just to foster entry but to maintain competition by restricting the amount of spectrum that any individual carrier can control. The spectrum cap rules have been maintained and should continue to be maintained because CMRS competition is not irreversible and likely would not withstand reconsolidation.

The spectrum cap rules are particularly important to ensuring competition in the combined provision of voice and advanced services. If there are only two or three full-service

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<sup>10</sup> See e.g., CTIA Comments, Attachment at 29.

<sup>11</sup> See e.g., Verizon Wireless Comments at 8.

providers, the market could well revert to the oligopolistic structure that prevailed before the PCS spectrum was made available and five or six national competitors emerged – limited innovation, and little or no price competition. As Leap shows in its Comments, national price competition did not develop until there was a fifth nationwide carrier.<sup>12</sup> Moreover, if there are only two or three providers of advanced services, a vibrant wholesale market for such services is unlikely to develop, unlike the current market where WorldCom has many options as a reseller of CMRS services. As a reseller, WorldCom will need access to these offerings in order to be competitive.

Verizon Wireless's assertion that wireless firms can compete effectively with 10 MHz of spectrum must be examined carefully.<sup>13</sup> WorldCom submits that small carriers limited to 10 MHz would be at a distinct competitive disadvantage in attempting to compete head-on with the large CMRS incumbents providing voice and advanced services. Unless these smaller carriers found a niche market that the large carriers decided not to pursue, they would have to compete against the large incumbents, but without the scope economies that the large CMRS incumbents allege they would achieve if allowed to consolidate free of the spectrum cap and waiver process. If, in fact, the large CMRS incumbents' claims are correct regarding the demand for both voice and advanced services from one provider in a single device, then a CMRS carrier that lacks the spectrum to provide such state-of-the-art services will cease to be an effective competitor.

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<sup>12</sup> Comments of Leap Wireless, Declaration of Peter Cramton at ¶ 32.

<sup>13</sup> See *e.g.*, Verizon Wireless Comments at 12.

**3. In Reviewing Proposed Mergers Prudent Public Policy Dictates that the Commission Maintain the Spectrum Cap Rules and a Waiver Process**

The large CMRS incumbents claim that the spectrum cap rules prevent mergers that would not automatically raise competitive concerns based on the HHI thresholds in the DOJ Merger Guidelines. For example, AT&T Wireless states that “the market share and HHI thresholds that are employed by the antitrust agencies are primarily screening tools that are used in the first instance to determine whether a proposed transaction warrants further scrutiny. Enforcement decisions by the antitrust agencies are not based on market shares and HHIs alone, much less solely on comparisons with threshold levels such as a market share of 35 percent or an HHI of 1,800.”<sup>14</sup> Thus, the large CMRS incumbents argue that the spectrum cap rules and waiver process discourage mergers that might otherwise pass antitrust scrutiny.

This argument deflects attention from the critical fact that the CMRS market is unique and should be treated differently from other markets. The large CMRS incumbents completely neglect the fundamental fact that the total amount of spectrum available in the market is perfectly inelastic. No special analysis is required to determine how supply will respond to price increases. The reconsolidation of the industry sought by the large CMRS incumbents will reduce the relative availability of spectrum -- an essential input -- to all other competitors, and therefore will have anticompetitive effects. In this unique circumstance, it is in the public interest to have a spectrum cap in place that requires a carrier seeking reconsolidation to show through a waiver process that its desire to exceed the cap has public benefits that exceed the anticompetitive harm. A structural constraint -- in the form of a spectrum cap with a waiver process -- provides an efficient form of regulatory oversight.

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<sup>14</sup> See *e.g.*, AT&T Wireless Services, Inc. Comments at 8.

Any antitrust analysis begins with an analysis of the barriers to entry and how elastic or inelastic supply is – for example, by how much supply will increase if a party attempts to raise prices by five percent. The CMRS market is unique in that the surest way for supply of the most essential input to increase is for the government to make additional spectrum available. This is most definitively *not* a typical market situation. It is predictable that concentration beyond the level that would exist under the spectrum cap rules would tend to lessen competition and, indeed, that the competition that now exists is reversible with reconsolidation. It therefore makes perfectly good public policy sense to maintain the spectrum cap rules and a waiver process in which carriers can show that in a particular market spectrum aggregation would be in the public interest, rather than relying only on the antitrust laws, discussed *infra*, that require the government to show that the consolidation would lessen competition.

**4. Claims that the Commission’s Spectrum Cap Rules are Harming Domestic Competition and Hindering the Competitiveness of U.S. Carriers Internationally are Inaccurate and Misleading**

The large CMRS incumbents present data on the amount and concentration of CMRS spectrum held by a small number of carriers in Europe and Japan and argue that similar concentration should be allowed in the United States, claiming that similar aggregation of spectrum would not harm domestic competition and would foster the competitiveness of U.S. carriers internationally.<sup>15</sup> The data presented to support these claims are misleading and the arguments groundless.

First, the U.S. has been the international leader in, and its consumers the primary beneficiaries of, competitive telecommunications markets. If foreign countries develop a less competitive path, the U.S. should not necessarily follow suit. Second, the data presented are

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<sup>15</sup> See *e.g.*, CTIA Comments, Attachment, at 33-35.

misleading because while Europe already has allocated 3G spectrum; the U.S. has not. If the Commission were to allocate an additional 60 MHz of new mobile spectrum, the amount of spectrum available to individual carriers in Europe and the U.S. would be roughly equal, assuming a proportionate increase in the spectrum cap. Third, the data presented by CTIA are misleading in that population densities in Europe and Japan are far greater than in the U.S. and the relevant measure is spectrum per capita of population, not total spectrum. There are at most a handful of markets in the United States with population densities that compare to that in most of Europe and Japan. Moreover, if U.S. carriers can demonstrate a particular need for additional spectrum in those markets, they can use the Commission's waiver process to obtain the needed spectrum. To date, no U.S. carrier has seriously tried to make such a showing. Moreover, unlike in Europe where carriers can only provide 3G services in new spectrum, in the United States there are no restrictions on carriers providing advanced services in currently allocated CMRS spectrum.

In short, the claims by the large CMRS incumbents that spectrum limitations will harm them in international competition are unfounded. Wall Street analysts do not seem concerned that other countries have already allocated spectrum for 3G technology and licensed foreign carriers to provide such services. NTT DoCoMo, widely recognized as a leader internationally in advanced mobile wireless service offerings, announced earlier this month that it will delay its commercial launch of 3G service until October in order to ensure that the service is reliable and working properly. In covering this delay, Credit Suisse First Boston referred to the inevitable snags in introducing new technology, and concluded "it may turn out to be a positive that the U.S. is introducing technologies like GPRS and 1xRTT after some foreign

carriers do, in that the bugs can be worked out prior to U.S. launches.”<sup>16</sup> Likewise, Verizon Wireless itself recently stated that it is in no hurry to deploy 3G technology.<sup>17</sup> In any case, the alleged lack of spectrum in the United States for advanced services is relevant to the issue of allocating additional spectrum to CMRS, not to the issue of whether a spectrum cap on currently allocated spectrum should be maintained.

**5. The Large CMRS Incumbents are Unlikely to Promote Wireless Service as a Competitive Alternative to Wireline Service**

The large CMRS incumbents argue that if they had access to additional spectrum it would be possible to offer wireless telephone services as a competitive substitute for wireline service.<sup>18</sup> In reality, these carriers who seek additional spectrum are unlikely to do so because most of them are closely affiliated with the incumbent wireline local exchange carriers they say they intend to compete against. As a result, it is unlikely that they will aggressively cannibalize their existing wireline local markets. In any case, the argument that additional spectrum is needed for CMRS carriers to be able to compete with local wireline carriers is best addressed in the context of allocating additional spectrum, not in any review of the spectrum cap rules.

**IV. DOJ REVIEW IS NOT ADEQUATE TO PROTECT THE PUBLIC INTEREST**

Several commenters who support eliminating the CMRS spectrum cap rules argue that such limits are not necessary because DOJ review will prevent any anticompetitive conduct

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<sup>16</sup> *First Quarter Wireless Review*, Credit Suisse First Boston, May 1, 2001.

<sup>17</sup> In commenting on the deployment of 3G services Richard Lynch, Chief Technical Officer of Verizon Wireless, stated: “I’m in no hurry to do that. The applications and the customer demand need to catch up with our capabilities. The jury is still out on that.” *Wall Street Journal*, May 2, 2001 at p. C1.

<sup>18</sup> *See* CTIA Comments at 27.

by CMRS providers. Such DOJ review, however, is inadequate because it does not encompass the critical public interest considerations set forth above. In all events, the DOJ has no apparent jurisdiction over, and therefore would have no reason to review, critical spectrum transactions that could result in massive spectrum aggregation, including the purchase of spectrum at an FCC auction or the swapping of spectrum among CMRS carriers.

The DOJ does not review spectrum acquisitions made by CMRS providers at auction. Auctions are the Commission's sole method of distributing newly available spectrum. If the spectrum caps were removed and if new spectrum became available for CMRS services, that spectrum could be bought by carriers already holding large amounts of spectrum, without any DOJ review. Auctions are the responsibility of the Commission, and if an auction might result in a market structure that is anticompetitive, the Commission, as the expert agency in spectrum issues, is in the best position to prevent this from happening.

The DOJ also does not typically review spectrum swaps between carriers. Instead, such spectrum swaps are reviewed by the Commission under Section 310(d) of the Act. Commenters argue that the 45/55 MHz bright-line rule leads to uncertainty in such reviews. WorldCom submits that just the opposite is true: the bright line spectrum cap rules add certainty to the Commission's review process of spectrum swaps. WorldCom supports the proposal of Sprint PCS in its comments, that requests for waiver of the spectrum aggregation rules should be analyzed by the Commission in the context of its Section 310(d) review.<sup>19</sup>

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<sup>19</sup> Sprint Comments at 13.

## **V. THE SPECTRUM CAP WAIVER PROCESS PROVIDES SUFFICIENT RELIEF FOR CMRS PROVIDERS**

CTIA contends that the waiver process has provided little relief to carriers that need additional spectrum; however, it admits that very few waivers of the spectrum caps have been requested.<sup>20</sup> In fact, commenters could only point to three instances in which waivers were requested by CMRS providers. This is not much of a record from which to conclude whether or not the waiver process works. CTIA points to the fact that the Commission has only granted one permanent waiver of the spectrum caps. CTIA fails to acknowledge, however, that the few waiver requests that were denied clearly did not meet the Commission's waiver standard of showing a genuine need for additional spectrum in a specific geographic market. WorldCom is confident that, had the waiver applicants made such a showing, the Commission would have granted their requests.

CTIA and Verizon Wireless further argue that carriers are reluctant to request a waiver of the spectrum cap rules because this would require them to disclose sensitive business information to the Commission, which would then be available to the public. These carriers, however, have the option of requesting confidential treatment of the business information they submit with their waiver requests. The Commission has always been receptive to such requests for confidentiality when commercially sensitive information is submitted.<sup>21</sup>

Verizon Wireless raises a valid concern when it states that the time frame for the Commission's processing of waiver requests is uncertain and that it is possible for an application

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<sup>20</sup> CTIA Comments at 32-34.

<sup>21</sup> 47 C.F.R. 0.457(d) and 0.459.

to remain pending for some time before it is acted upon by the Commission.<sup>22</sup> As noted in its Comments, WorldCom shares this concern, but does not believe that this is a reason to abandon the waiver process. Instead, WorldCom urges the Commission to expeditiously grant any *bona fide* waiver request in which the applicant demonstrates a need for additional spectrum in a particular market.

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<sup>22</sup> Verizon Comments at 22.

## **VI. CONCLUSION**

In summary, the Commission's spectrum aggregation limits are in the public interest and must be retained in order to avoid the reconsolidation of the CMRS industry. Absent effective spectrum aggregation limitations, there is no doubt that the large CMRS incumbents will attempt to obtain more spectrum and reduce competition through mergers and acquisitions. As the Commission has previously recognized, there are real and quantifiable competitive benefits to having at least four nationwide CMRS providers in a market. Without any limits on the amount of spectrum that a carrier can aggregate in a given market, competition will inevitably be reduced to the detriment of the CMRS industry, consumers and the public interest.

Respectfully submitted,

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Dated: May 14, 2001