Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 VERIZON WIRELESS

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TABLE OF CONTENTS

Page

SUMMARY 1

I. THE INITIAL COMMENTS CONFIRM THAT THE SPECTRUM AGGREGATION LIMITS ARE NO LONGER NECESSARY IN THE PUBLIC INTEREST 3

II. PROPONENTS OF THE SPECTRUM AGGREGATION LIMITS FAIL TO PROVIDE A LEGALLY COGNIZABLE BASIS FOR KEEPING THEM 8

A. Proponents of Spectrum Aggregation Limits Fail to Make the Legal Case to Support Their Retention 10

B. Leap Does Not Demonstrate a Lack of "Meaningful Competition" 15

C. HHI Measures Do Not Support Keeping a Blanket Cap 17

III. THE COMMENTS CONFIRM THAT SPECTRUM AGGREGATION LIMITS CREATE MARKET DISTORTIONS 20

A. Spectrum Aggregation Limits Create Market Inefficiencies 21

B. The Spectrum Cap Constrains CMRS Carriers 23

C. Partial Repeal or "Half" Measures Further Distort the Market 25

IV. CONCLUSION 27

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SUMMARY

The initial comments filed in this proceeding confirm that the Commission must repeal the CMRS spectrum cap and cellular cross-interest rules ("spectrum aggregation limits") not only as a matter of policy, but as a matter of law.

The majority of commenters and virtually all of the evidence submitted with the comments confirm the conclusions of Verizon Wireless in its comments and supporting economic analysis that "meaningful competition" exists in the CMRS market, that the spectrum aggregation limits are, as a result, "no longer necessary in the public interest," and that retention of the limits will thwart the Commission's policies of fostering cross-service competition and technological innovation.

The few commenters that oppose repeal rely on conclusory assertions that are factually and legally deficient. They fail to show how these rules are necessary today to achieve *any* of the Commission's policy objectives. Arguments that might have made sense in 1994, when there were few competitors and the Commission had not yet auctioned PCS spectrum, make no sense today, in view of the completion of the PCS

auctions and the fierce and widespread competition among national and regional CMRS providers. None meets the applicable statutory standard for retaining the rules. Assertions that the limits are necessary because a carrier someday might propose a transaction that might result in an arguably harmful concentration of spectrum—a transaction that by definition would be subjected to Commission and Department of Justice ("DoJ") scrutiny—are absurd. Since it will always be possible to conceive of a transaction that raises competitive issues, under this theory, competition would *never* be sufficiently meaningful to allow repeal—a clear violation of the statute and Commission policy.

Only two commenters offer economic information that they believe support retention of the spectrum aggregation limits—Sprint PCS ("Sprint") and Leap Wireless International, Inc. ("Leap"). As Drs. Gertner and Shampine demonstrate in their attached Reply Declaration to these Reply Comments, the updated Herfindahl-Hirschman Index ("HHI") measurements submitted on behalf of Sprint say little more than that the CMRS market is significantly *less* concentrated today than it was two years ago. Sprint's economist does not show why these measurements support flat prohibitions on spectrum holdings. Leap's comments are a hodgepodge of irrelevant or undocumented speculation, incorrect claims about its competitors, and assertions that are belied by Leap's contrary statements to the Securities and Exchange Commission ("SEC").

The record also does not support tinkering with the cap to preserve some limit on CMRS spectrum ownership or to change only the underlying attribution rules. The very few parties that suggest such approaches do not show why they would not suffer from the same problems that afflict the current rule. Tinkering with the spectrum aggregation

limits that already affect CMRS licensees unequally would only result in arbitrary regulatory disparities. Only the repeal of both rules will fulfill the Commission's obligation under Section 11 and its own stated policy to rely on market forces where competition exists, as it clearly does in CMRS.

I. THE INITIAL COMMENTS CONFIRM THAT THE SPECTRUM AGGREGATION LIMITS ARE NO LONGER NECESSARY IN THE PUBLIC INTEREST

The vast majority of commenters agree with Verizon Wireless that the spectrum cap and cellular cross-interest rules are no longer necessary as a result of meaningful competition, nor are they necessary to achieve the other public policy goals identified by the Notice,[1] and thus should be repealed as Section 11 requires.

First, the comments demonstrate that meaningful competition in the CMRS market has obviated any need for the spectrum cap and cellular cross-interest rules – precisely the situation in which Congress directed the Commission to remove such rules. CMRS competition stands as one of the Commission's greatest competitive success stories. The record strongly demonstrates that CMRS competition is highly dynamic and increasingly national in scope: wireless subscribership has nearly tripled since 1995, prices have declined substantially, six national carriers have emerged, and pricing and packaging have become more complex as the range of wireless products expands.[2] The

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[1] *See gen. In the Matter of 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Dkt. No. 01-14, *Notice of Proposed Rulemaking*, FCC 01-28 (rel. Jan. 23, 2001) ("NPRM").

[2] Comments of Sprint PCS ("Sprint Comments") at 1-6, Schwartz and Gale Declaration ("Schwartz and Gale Decl.") attached to Comments of the Cellular Telecommunications & Internet Association ("CTIA Comments") at 2-28, Comments of AT&T Wireless Services, Inc. ("AT&T Comments") at 2, 10-11,

number of national competitors alone exceeds the number that even the staunchest detractors say is necessary for keen price competition.[3] Add to these carriers the many regional CMRS providers and non-traditional wireless service providers, and the number far exceeds the number of competitors in many other services that are not subject to rigid ownership limits.

With so many viable competitors and marketing niches, market foreclosure is highly unlikely, particularly for national carriers that have demonstrated through their actions 1) the tremendous value of incremental increases in spectrum to accommodate their technological and customer needs and 2) a willingness and an ability to voluntarily swap licenses that enable more complete national footprints, introducing more head-to-head competition among national carriers. *Gertner and Shampine Reply Decl.* at ¶ 17. Market foreclosure is made even less likely by the huge rise in CMRS subscribership. *Id.* at ¶ 6. Additionally, CMRS market developments eliminate any legitimate concern about price coordination among competitors.[4] As Drs. Gertner and Shampine explain, the presence of six national carriers increases the difficulty of coordinating behavior, and

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Comments of Cingular Wireless LLC ("Cingular Comments") at 23-28, Comments of Nextel Communications, Inc. ("Nextel Comments") at 1, Rural Telecom Group, *et al.* ("RTG Comments") at 5, Comments of Verizon Wireless ("Verizon Wireless Comments") at 8, Gertner and Shampine Declaration attached to Verizon Wireless Comments ("Gertner Decl.") at 4, Comments of WorldCom, Inc. ("'WorldCom' Comments") at 5

[3] Declaration of Peter Cramton ("Cramton Decl.") attached to Comments of Leap Wireless International, Inc. ("Leap Comments") at 15.

[4] The Commission has previously relied on market forces in the context of the spectrum cap rule in rural areas. In 1999, as a result of the 1998 Biennial Review, the Commission increased the amount of spectrum that could be aggregated in rural areas to 55 MHz. *1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers,* WT Docket 98-205, *Report and Order,* 15 FCC Rcd. 9219, 9256-9257 (1999) ("Biennial Order") *recon., Memorandum Opinion and Order on Reconsideration,* 15 FCC Rcd. 22072 (2000). This change was made despite the Commission previous finding in 1994 that "[i]t would be preferable to have additional competitors serve these customers rather than to license more than 40 MHz of spectrum to one entity." *Amendment of the Commission's Rules to Establish New Personal Communications Services,* GEN Docket No. 90-314, *Second Report and Order,* 8 FCC Rcd. 7700 (1993), *recon., Memorandum Opinion and Order,* 9 FCC Rcd 4957, 4983 (1994).

blurred product definitions and increasingly complex pricing would confound carriers' ability to attempt to coordinate pricing or to enforce participation in a cartel. *Id.* at ¶¶ 6, 14. Furthermore, commenters suggest that cross-elasticities exist such that there is substitutability between CMRS services and other wireless and wireline services,[5] thus making such behavior even more difficult.

Not only Verizon Wireless, but nearly all commenters and the supporting economic analyses, emphasize the "strong growth and competitive development" of mobile telephony,[6] the "robust competition" [7] in CMRS markets, and the "substantially reduced entry barriers."[8] Like Verizon Wireless, these parties therefore conclude that the "case for abandoning the outdated spectrum aggregation limits has grown even stronger in the two years since the Commission last examined the issue."[9]

Second, the comments confirm that the cap and cross-interest rules are not necessary to prevent harmful consolidation of CMRS markets. As most commenters agree, the robust competition that now exists in the marketplace will discipline any attempts to foreclose competition.[10] There are as many as six or more competitors licensed to serve each geographic area, many of which are national providers. Prices to subscribers continue to fall, and increasingly innovative service and price plans are

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[5] Cingular Comments at 27-28, AT&T Comments at 2, Coalition of Independent Cellular Carriers Comments ("Coalition Comments") at 3-5, CTIA Comments at 21, White Paper on Elimination of the Spectrum Cap, J. Haring, H.M. Shooshan, III and K.M. Pehrsson (Apr. 12, 2001) ("White Paper") attached to Cingular Comments at 13.

[6] Comments of Chadmoore Wireless Group, Inc. ("Chadmoore Comments") at 2.

[7] Cingular Comments at 24.

[8] CTIA Comments at 14.

[9] AT&T Comments at 2, *see also* Cingular Comments at 25, CTIA Comments at 22, 24.

[10] AT&T Comments at 11, Cingular Comments at 32, CTIA Comments at 21, Verizon Wireless Comments at 11, Gertner Decl. at ¶ 18.

available to consumers.[11] In their initial declaration, Drs. Gertner and Shampine concluded that "[g]iven the current market structure and antitrust enforcement, there are no valid concerns of anti-competitive effect from eliminating the cap;"[12] the economic declarations submitted on behalf of AT&T and Cingular reach similar conclusions.[13] Furthermore, the sole economist who argues against repeal asserts that the spectrum cap is required in order to preserve competition and prevent consolidation that may result from future CMRS *auctions*.[14] Not only is this argument irrelevant because the FCC has already auctioned the vast majority of the CMRS spectrum that falls under the cap, but any future auctions would take place in an environment where there is already strong competition.[15]

Third, the record demonstrates that retaining the ownership rules is unnecessary to protect competition because other far less rigid and overbroad safeguards already exist. Actions that aggregate spectrum are subject to antitrust review as well as both

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[11] Verizon Wireless Comments at 9, 11.

[12] *Gertner Decl.* at ¶ 9.

[13] Economists Incorporated Paper ("Economists Paper") attached to AT&T Comments at 25-26, White Paper at ¶¶ 18-19.

[14] Cramton Decl. at ¶¶ 35-36.

[15] Professor Cramton in his support of Leap's comments suggests that bidding in Auction 35 for the New York market proves that incumbent carriers will use auctions to exercise market power and foreclose competition. Cramton at ¶ 61. In fact, it proves only that there was vigorous bidding. Obviously, considering the price of spectrum, bidding simply to foreclose competition would be imprudent. In any event, Professor Cramton also got his underlying facts wrong. Cingular had already announced, and the Commission recently consented to, its acquisition of 10 MHz of spectrum in New York from Voicestream *See Cingular Wireless LLC and VoiceStream Wireless Corporation Seek FCC Consent for Assignment of PCS Licenses*, WT Docket No. 01-10, *Public Notice*, DA 01-135 (placing on public notice) (rel. Jan. 18, 2001) ("Cingular VoiceStream Swap"); *Public Notice*, DA 01-821 (consenting to the swap) (rel. Mar. 30, 2001), so no matter how high the bidding went it would not have kept Cingular from entering the New York market. And, according to Leap's CTO, and Professor Cramton's co-declarant, 10 MHz is ample spectrum to offer wireless service. *See gen.* Declaration of Mark Kelley, Chief Technical Officer ("Kelley Decl.") attached to Leap Comments at ¶ 30.

government and private remedies.[16] The record establishes that these mechanisms protect the competitive goals of the spectrum cap and do so more narrowly, without the arbitrary limits and far-reaching impacts of the cap or cellular cross-interest prohibition.[17]

Fourth, commenters show that other market-based constraints on carriers undercut any incentive or ability to "corner the market" through spectrum aggregation, and thereby foreclose potential anticompetitive behavior. The high market value for spectrum, the gross number of market participants (i.e., an efficient potential secondary market for spectrum), and the increasing marketing and roaming cost-side importance for CMRS providers to maintain "national" network footprints, make it virtually impossible to foreclose competition in any given geographic area.[18] Furthermore, in today's market, the cost of hoarding valuable CMRS spectrum is prohibitive. *Gertner and Shampine Reply Decl.* at ¶¶ 15-18. Importantly, carriers' recent actions provide evidence that there are strong incentives to sell or swap spectrum with a competitor, even where those swaps introduce additional head-to-head competition among national carriers.[19]

Fifth, even if CMRS carriers were permitted by antitrust authorities to consolidate their holdings, it would not likely lead to a loss in consumer welfare. If a CMRS provider is willing to pay enough to purchase a potential entrant's spectrum holdings, there is no reason *a priori* to believe that this is inefficient. *Gertner and Shampine Reply*

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[16] CTIA Comments at 41, White Paper 18-19.

[17] CTIA Comments at 5, 12-15, 41-45, Cingular Comments at 33-34, White Paper at 18-20.

[18] Cingular Comments at 29, 32.

[19] For example, the FCC recently consented to a license swap in which Cingular traded to VoiceStream 10 MHz in the New York, Detroit and St. Louis markets in return for 10 MHz in the Los Angeles and San Francisco markets. *See* Cingular VoiceStream Swap. Also, Sprint and AT&T have recently entered into a substantial spectrum swap including, among other markets, San Francisco, Houston, Austin, Miami, Atlanta and Cleveland. *See* Application for Consent to Assignment of Licenses, FCC Form 603, Exh. 1, ULS File No. 0000439918.

Decl. at ¶ 20. Within a competitive market, the presumption must be that market forces will allocate spectrum more efficiently than regulation. Particularly in a dynamic market like CMRS that is experiencing rapid growth and technological change, consolidation may be essential to the successful launch of new mass-market services, particularly ones that capitalize on network effects.[20] *Id.* at ¶¶ 37, 40. Furthermore, as Leap points out, through its affiliations AT&T Wireless has already effectively acquired access to spectrum well beyond the cap in certain markets,[21] yet prices continue to fall.

II. THE PROPONENTS OF THE SPECTRUM AGGREGATION LIMITS FAIL TO PROVIDE A LEGALLY COGNIZABLE BASIS FOR KEEPING THEM

In order for the spectrum cap and cellular cross-interest rules to survive, the Commission must find that they remain necessary today to achieve their original public interest purposes.[22] In other words, the Commission must examine the spectrum aggregation limits "in the modern context, and either validate or eliminate them."[23]

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[20] *See* Economists Paper at 19.

[21] Cramton Decl. at ¶ 58, Table 4.

[22] Verizon Comments at 5.

[23] Michael K. Powell, Chairman, FCC, *Press Statement Dual Network Report and Order* (rel. April 19, 2000). Chairman Powell's statement was made in connection with a proceeding that reinforces the case for repeal of the spectrum aggregation limits. On April 19, 2001, based on the biennial review of its regulations, the FCC found that significant changes had taken place in the video marketplace since the 1996 Act, and concluded that it could eliminate the part of the "dual network rule" that does not permit major networks to own other, smaller networks. The FCC found that that rule was no longer in the public interest and that elimination of the rule will likely promote competitive efficiency. *FCC Eliminates the Major Network/Emerging Network Merger Prohibition from Dual Network Rule, Press Release* (rel. Apr. 19, 2001).

The Commission's 2000 biennial review of international telecommunications tariffs illustrates the proper application of Section 11,[24] and its analysis there should drive the same result here: removal of outdated regulation. In that proceeding, the Commission reviewed all rules relating to international telecommunications services to determine if international tariffs were no longer necessary in the public interest "as a result of meaningful economic competition."[25] The Commission found that there had been "a substantial increase in the level of competition in the international interexchange marketplace, to the benefit of consumers."[26] Further, in light of an increasingly competitive marketplace, it found that detariffing international interexchange services would serve to promote further the pro-competitive goals of the 1996 Act and foster increased competition.[27]

In its 1998 biennial review of its international settlements policy,[28] the Commission determined that the international settlements policy was not needed on routes where "competitive forces exist which can constrain [a dominant foreign carrier's] exercise" of market power[29] and repealed it on those routes "as it is no longer necessary

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[24] *See gen. In the Matter of 2000 Biennial Regulatory Review, Policy and Rules Concerning the International Interexchange Marketplace*, IB Docket No. 00-202, *Report and Order*, FCC 01-93 (rel. Mar. 20, 2001) ("Detariffing Order").

[25] 47 U.S.C. § 161(a)(2).

[26] Detariffing Order at 6.

[27] *Id.* at 7.

[28] *In re 1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements; Regulation of International Accounting Rates; Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket No. 98-148; CC Docket No. 90-337 (Phase II); IB Docket No. 95-22, *Report And Order and Order On Reconsideration*, FCC 99-73, 14 FCC Rcd. 7963 (1999) ("International Settlements Policy R&O").

[29] International Settlements Policy R&O, *supra* note 28, ¶ 53. The Commission found that "a reasonable threshold for concluding that the ability of a dominant carrier to exercise its foreign market power is constrained by the existence of market forces is where rates to terminate traffic in the foreign market are at least 25 percent below the benchmark level." *Id.* at ¶ 55.

in the public interest."[30] The Commission specifically rejected a more stringent standard because it would have "unnecessarily limit[ed] the routes for which the international settlements policy would be lifted."[31]

These Section 11 decisions underscore three important aspects of Section 11: (1) a rule is "no longer necessary in the public interest" where "competitive forces" exist that can perform the rule's function, (2) such a rule is by definition no longer in the public interest and must be repealed, and (3) proposals that would unnecessarily limit the effect of the repeal must be rejected.[32] The factual record on which repeal was found justified in these cases showed competition no stronger than the competitive CMRS market. Given that precedent, it would be arbitrary for the Commission to keep the CMRS ownership limits.

A. Proponents of Spectrum Aggregation Limits Fail to Make the Legal Case to Support Their Retention

Commenters who urge the Commission to retain the spectrum cap or cellular cross-interest rules generally raise three principal arguments: the spectrum aggregation limits were necessary when they were adopted and that no showing has been made to justify their removal; various regulatory considerations require retention of the limits; and the limits are necessary to guard against the potential harms of future spectrum concentration. None constitutes a sufficient legal basis for retaining the rules.

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[30] International Settlements Policy R&O, *supra* note 28, ¶ 2.

[31] International Settlements Policy R&O, *supra* note 28, ¶ 59.

[32] Section 11 is thus consistent with "the Commission's objectives of maintaining a regulatory regime that takes into account the current state of telecommunications markets" and its "desire to ensure that our rules are narrowly tailored to apply only in circumstances where their benefits clearly outweigh any harmful effects." International Settlements Policy R&O ¶ 6.

Telephone and Data Systems, Inc. ("TDS") cites the history of the spectrum cap and asserts that there is "no good reason" to repeal it because the "large national carriers . . . have failed thus far to demonstrate how *the public* will be benefited by allowing them to increase their wireless spectrum."[33] Leap similarly argues that the cap should remain in place because "no carrier has ever demonstrated a genuine need for additional spectrum."[34] These assertions are not only inaccurate,[35] they are irrelevant to a Section 11 analysis. First, the burden in a Section 11 review is on those who would have the Commission retain rules to *show why they continue to be necessary*.[36] Second, Congress has already determined that removal of unnecessary regulations will benefit the public.[37] This policy choice is not subject to debate. Thus, the *only* question before the Commission is whether or not the spectrum aggregation limits remain necessary to promote or protect competition.[38] Whether carriers have a "genuine need" for more spectrum that would provide some "benefit" is an issue that has no bearing on Section 11 analysis given Congress' determination that maintaining unnecessary regulations is contrary to public policy.

The regulatory considerations that several commenters raise as support for

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[33] TDS Comments at 2, 7 (emphasis in original).

[34] Leap Comments at 8, 20.

[35] The results of auction no. 35 provide all the response that is warranted to Leap's silly claim. Leap may not need more spectrum – it apparently is not using even the spectrum it has. *See Wireless Telecommunications Bureau Seeks Comments on Leap Wireless International, Inc.'s Request for Waiver and Extension of Broadband PCS Construction Requirements, Public Notice,* DA 01-1172 (rel. May 8, 2001) ("Leap Petition).

[36] *See* 47 U.S.C. § 161; *see also* Verizon Wireless Comments at 5.

[37] Section 11 was enacted as part of The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The dual purposes of the 1996 Act are "to promote competition and reduce regulation." *Id.* at Preamble.

[38] 47 U.S.C. § 161(a)(2).

retention of the spectrum cap are similarly irrelevant. Sprint strains credulity by asserting that retaining a regulatory constraint such as the spectrum cap "facilitates regulatory forbearance."[39] WorldCom asserts that the cap "further[s] the Commission's policies favoring CMRS resale."[40] Leap argues that the cap produces "significant" public benefits and that it is "efficient."[41] These claims, however, lack any factual support, and are meritless as well as irrelevant. Commenters asserting such claims also fail to explain why removing the cap would undermine competition.

Finally, a few commenters claim that despite the overwhelming evidence of meaningful economic competition in the CMRS market, the Commission must retain the spectrum aggregation limits in order to prevent the "potential" anticompetitive effects of hypothetical future carrier combinations. WorldCom alludes to "signs" of consolidation that "could" jeopardize the current competitiveness of CMRS, and warns that elimination of the spectrum cap "could very well" lead to aggregation that "could" reduce competition by precluding entry by new service providers.[42] TDS asserts that the cap must be retained to guard against the "possibility" of anti-competitive "abuses" created

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[39] Sprint Comments at 7. Sprint suggests that "with the cap, the Commission can be confident that the CMRS market will remain competitive" – thus the Commission will be more likely to forebear from applying other regulations to CMRS. This is predicated solely on the notion that an absence of a cap will lead to less competition, which Verizon Wireless' economists show to be highly unlikely. *Gertner and Shampine Reply Decl.* at ¶¶ 19-22. Retaining a regulation such as the spectrum cap in order to increase opportunities for regulatory forbearance is like failing to distribute a disease vaccine in order to preserve the opportunity to cure individual cases.

[40] WorldCom Comments at 8. The Commission, of course, has no policy that "favors" resale – only a rule that prohibits restrictions on resale. 47 C.F.R. § 20.12(b).

[41] Leap Comments at 8, 30-31. The efficiency touted by Leap is administrative efficiency, not economic efficiency. While conservation of administrative resources is a worthy goal, we cannot help but note that the FCC is expending considerable resources on this docket, and petitions to waive the cap – resources that could be deployed to more productive use if the cap was simply repealed.

[42] WorldCom Comments at 6-7.

by the mere "existence" of national wireless carriers.[43] Leap cautions that removal of the spectrum cap "may" encourage carriers to foreclose new entry and cause the benefits created by the current level of competition "could" diminish or disappear.[44]

Mere speculation as to possible future competitive problems cannot support a determination that the spectrum cap is "necessary." In the International Settlements Policy R&O, the Commission refused to preserve an unnecessary rule merely because "certain unusual circumstances" might arise in which "the Commission may be required to take appropriate remedial action."[45] The Commission should reject such arguments here as well.

In any event, WorldCom, TDS and Leap provide *no* facts to support their claim that removal of the spectrum cap will lead to consolidation that will have anti-competitive effects.[46] The only declarations that address the issue are those of Drs. Gertner and Shampine, Messrs. Haring, Shooshan and Pehrson (White Paper), and Economists, Inc., all three of which show that the cap is *not* necessary to prevent

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[43] TDS Comments at 6.

[44] Leap Comments at 10.

[45] International Settlements Policy R&O, *supra* note 28, ¶ 30:

> We recognize that in certain unusual circumstances a foreign carrier that otherwise would appear to lack market power might possess some ability unilaterally to set rates for terminating U.S. traffic due to government policies or collusive behavior in the foreign market. In such cases, the Commission may be required to take appropriate remedial action. Nevertheless, on balance, we find that the procompetitive benefits of removing the ISP for arrangements with foreign carriers that lack market power far outweigh the potential harm from such arrangements.

[46] While Professor Cramton's declaration on behalf of Leap says many things, it does not say that the spectrum cap is necessary to prevent future concentration. It only states that the cap is "the only suitable response to excessive concentration in an ascending auction." Cramton Decl. at ¶ 12. Since there is little or no CMRS or PCS spectrum left to be auctioned, Professor Cramton's declaration provides no support for Leap's contention.

potential anticompetitive effects of future spectrum consolidations.[47] Moreover, the assertion that the mere possibility, however remote, of a potentially problematic consolidation renders the spectrum aggregation limits "necessary" within the meaning of Section 11 is simply not in accord with the ordinary and fair meaning of the term.

The Commission's authority under Section 310(d) of the Act[48] and the availability of both public and private enforcement of the antitrust laws, provide another reason why spectrum aggregation limits cannot be considered "necessary" to guard against the potential effects of possible future consolidations.[49] Leap argues that these safeguards are insufficient because a carrier can attempt to circumvent Section 310(d) review by entering into a joint venture with a second carrier and exercising influence without acquiring a controlling interest.[50] Such speculation, again unsupported by any facts, is in any event unwarranted because the Commission already has ample authority under its *de facto* control standards to police such conduct.

Leap's economist also dismisses antitrust review and enforcement by the Department of Justice and Federal Trade Commission as inadequate. He claims that they "will typically allow mergers that reduce *potential* competition."[51] What he means by the term "potential" competition is unclear. The DoJ focuses on "uncommitted entrants" and would certainly examine mergers involving licensees whose markets are not yet built out.

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[47] In fact, Professor Cramton highlights in his declaration attached to the Leap Comments that AT&T Wireless has through its affiliations already effectively acquired access to spectrum in excess of the 45 MHz cap. Cramton Decl. at ¶ 58, Table 4. Yet we continue to see prices falling and consumers benefiting from a wide range of wireless products. The fact undermines Leap's arguments about the causal effects of the cap.

[48] 47 U.S.C. § 310(d).

[49] Verizon Wireless Comments at 14.

[50] Leap Comments at 31-32.

[51] Cramton Decl. at ¶ 60.

Gertner and Shampine Reply Decl. at ¶ 21. Competition in the CMRS market is robust, and the agencies charged with execution of the antitrust laws have full authority to intervene against anti-competitive transactions.

B. Leap Does Not Demonstrate a Lack of "Meaningful Competition"

Leap Wireless submits the declaration of Professor Cramton as economic support for the proposition that CMRS competition is so un-"meaningful" that the spectrum cap remains "necessary."[52] Leap's reliance on Professor Cramton's declaration, however, is misplaced. Leap tries to convert Professor Cramton's narrowly-drafted assertions about the certainties purportedly necessary for successful spectrum *auctions* into support for indefinite retention of the spectrum cap. But Leap expediently ignores the fact that the Commission has *already* auctioned CMRS spectrum subject to the cap. The Commission has thus achieved its original purpose for the cap, that is, to keep incumbent CMRS providers from barring new entrants and foreclosing competition by purchasing all PCS spectrum. Leap's key assertion – that ownership limits are a valid *auction* tool to promote *entry*, even if valid, is simply irrelevant. The relevant question, which Leap does not answer, is why the cap is necessary in the secondary market context.

Despite its claims in this proceeding that the spectrum cap must be retained because "the CMRS marketplace lacks meaningful competition,"[53] in Leap's March 2, 2001 proxy statement filed with the SEC, the company warned potential investors that "[t]he wireless telecommunications industry generally is very competitive and competition is increasing."[54] Leap also claims in this proceeding that the advent of third

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[52] *See gen.* Cramton Decl.

[53] Leap Comments at 6.

[54] Leap Wireless Proxy Statement (FORM DEF 14-A), "Risk Factors," March 2, 2001. C-19, p. 80.

generation ("3G") services provide "no reason to raise the cap" because 3G applications are no more than "rhetorical fog and vaporware," and because it is unclear "that consumers will ever *want* to download graphs and watch video clips on their mobile phones or handheld devices."[55] Yet the proxy statement shows that Leap Wireless actually considers its rivals' development of 3G services and their appeal to consumers to be a material risk to Leap Wireless' business:

> We may compete in the future with companies who offer new technologies and market other services, including cable television access, landline telephone service and Internet access, that we do not currently intend to market. Some of our competitors offer these other services together with their wireless communications service, which may make their services more attractive to customers.[56]

Leap's statements in support of retaining the spectrum cap cannot be reconciled with its statements to potential investors. It is likely that Leap's communications with its investors reflect Leap's actual views, and its comments here are simply anti-competitive rhetoric. In any event, Leap's differing views of the CMRS market depending on its audience undermines its credibility in this proceeding.

Leap's pleading is also internally inconsistent. While claiming that there is no "meaningful competition" in CMRS markets, it boasts about its so-called "Leap Effect," or the precipitous decline in prices that allegedly corresponds with the incremental market entry by a fifth carrier.[57] Leap's self-serving claim notwithstanding, notably absent from Professor Cramton's is any evidence of a causal relationship between Leap's market entry and a price decline. A valid comparison would statistically compare prices

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[55] Leap Comments at 21-22.

[56] Leap Wireless Proxy Statement (FORM DEF 14-A), "Risk Factors," March 2, 2001. C-20, p. 81.

[57] Leap Comments at 9.

before and after the dates of Leap's entry in selected markets, and further compare these prices to those in markets where Leap did not enter. And even a valid comparison, if therewere one, would only establish a correlation, not causality as Professor Cramton suggests. Using Professor Cramton's insufficient comparison, "[o]ne could just as easily conclude that Leap has caused urban sprawl." *Gertner and Shampine Reply Decl.* at ¶ 11. Other data Cramton cites (e.g., AT&T's reduction in prices) proves, in fact, that competition is robust – precisely why no cap is needed.

C. HHI Measures Do Not Support Keeping a Blanket Cap

In the 1998 Biennial Review of the spectrum aggregation limits, over the opposition of many parties, the Commission considered traditional antitrust enforcement HHI concentration measures based on subscriber counts. In this docket, the Commission again asks about the HHI. Why the HHI is a proper or even relevant analytical tool is not explained – particularly given the Commission's failure to use it in relaxing other types of ownership limits.[58]

In any event, Sprint's economist, Dr. John Hayes, submitted updated HHI data that in fact provide further evidence of the rapid development of competition in the CMRS market.[59] He nevertheless cautions the Commission, however, to "remain vigilant,"[60] and Sprint points to Dr. Hayes' HHI analysis as a reason to retain the

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[58] Elsewhere the Commission has recognized that markets may be competitive enough to warrant repeal or relaxation of its rules without reliance on specific market share or HHI data. *See e.g. Review of the Commission's Regulations Governing Television Broadcasting; and Television Satellite Stations Review of Policy and Rules, Report and Order,* 14 FCC Rcd. 12903 (1999), in which the Commission relaxed its TV duopoly and radio-television cross-interest ownership rules, in part due to its recognition of the growth in the number and variety of media outlets in local markets.

[59] Declaration of John B. Hayes ("Hayes Decl.") attached to Sprint Comments at ¶ 16.

[60] Hayes Decl. at ¶ 20.

spectrum cap.[61] Dr. Hayes seems to suggest that HHI analysis would lead to a result where the Commission might consider competitive issues on a case-by-case basis.[62] One could just as easily use his analysis to assert that the cap was *no longer* necessary and that a case-by-case analysis, properly performed by DoJ, was the appropriate economic approach. *Gertner and Shampine Reply Decl.* at ¶ 41. As Drs. Gertner and Shampine explain in their reply declaration, and others state in their comments,[63] the ambiguity of the HHI's meaning, relevance and execution makes it inherently unreliable in this context.

First, the HHI fails to measure changes in CMRS markets.[64] In particular, the HHI does not account for the fact that the level of profitability in an industry affects entry incentives and thus the competitiveness of the industry. In the short run, a competitive industry may have positive economic profits. These profits attract entry that instigates price competition. The concentration measure cannot reflect this effect, which is critical to any analysis of a dynamic industry such as telecommunications. *Gertner and Shampine Reply Decl.* at ¶ 36. Additionally, continued or even increased concentration may be due entirely to pro-competitive factors. If a firm introduces an innovative new service that dramatically expands the total market, for example, the market's HHI measure would increase even though other competitors might not lose any customers. In other words, where the economic pie gets bigger, one competitor could take a bigger slice

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[61] Sprint Comments at 6.

[62] Hayes Decl. at ¶¶ 19-20.

[63] *See gen.* AT&T Comments and Cingular Comments.

[64] Under the Horizontal Merger Guidelines, data concerning market concentration and market shares must be interpreted in light of "reasonably predictable effects of recent or ongoing changes in market conditions." Section 1.521.

without reducing others' portions. Even when a firm takes share from its competitors, however, consumers will be better off despite the increased concentration if the firm gains share because of superior quality or innovation. *Id.* at ¶ 37.

Second, Dr. Hayes' HHI measurements are based on subscriber counts that omit the effects that price competition has had on the market—effects which would be revealed if, for example, the HHI were calculated based on revenue shares. *Gertner and Shampine Reply Decl.* at ¶ 34. This is a particularly serious omission in view of the structural CMRS market changes documented throughout the record, including the comments of Dr. Hayes.[65] Furthermore, basing the HHI calculations on subscribers rather than revenues or minutes of use ("MOUs"), fails to recognize that new entrants' subscribers produce greater average revenues per unit ("ARPUs") and higher MOUs. The HHI calculation thus would differ greatly if the market were defined in terms of revenues or total MOUs.

Third, for the HHI measurement to provide support for retention of the spectrum cap, the relevant market must be properly defined, and the market being measured must be congruent with that which falls under the spectrum cap; this is not the case with the only HHI calculations that have been placed in the record. As Drs. Gertner and Shampine explain, the cap applies to spectrum used to provide only a portion of services within the relevant product markets. *Gertner and Shampine Reply Decl.* at ¶¶ 35, 38. Dr. Hayes' HHI calculations define the market more broadly than the spectrum cap regulation; he includes all "mobile telephony providers."[66] The market definition could

[65] Hayes Decl. at ¶ 16.

[66] Hayes Decl. at ¶ 8.

be even broader, however, because CMRS services compete with a number of other wireless services, such as two-way paging services, high-speed mobile data services, and Mobile Satellite Service.[67] Thus, there is an increasing divergence between the static spectrum cap regulation and the increasingly broad applicable CMRS market. The comments of Messrs. Haring, Shooshan, and Pehrsson on behalf of Cingular Wireless aptly refer to this in their comments as the "incredible shrinking cap."[68]

The HHI calculations on the record support neither the spectrum cap as it exists today nor a reformulation of it based on a product market properly defined by demand substitution. Snapshots of properly defined HHI analyses over time may tell something about relative changes in the market, all other things being equal, but using those snapshots to draw conclusions about the competitiveness of the dynamic CMRS market—and prescribing regulation on that basis—is no more predictive than using tarot cards to pick lottery numbers.

III. THE COMMENTS CONFIRM THAT SPECTRUM AGGREGATION LIMITS CREATE MARKET DISTORTIONS

Section 11 requires repeal of a rule where, as here, it is no longer necessary as a result of meaningful competition. Pursuant to legislative intent and Commission precedent, a rule that is no longer necessary is, by definition, no longer in the public

[67] Even if the Commission were to determine that these products were not part of the relevant market, under Section 1.522 of the Horizontal Merger Guidelines market concentration becomes less of a concern when demand substitutes outside the relevant market, as a group, are close substitutes for the products and locations within the relevant market.

[68] White Paper at 4.

interest.[69] Even in the absence of Section 11, however, the spectrum aggregation limits would warrant repeal in view of their lack of public benefits and substantial economic cost.

A. Spectrum Aggregation Limits Create Market Inefficiencies

In light of the CMRS market developments, it is clear that the spectrum cap and cellular cross-interest rules threaten to introduce costly distortions into the CMRS market. *Gertner and Shampine Reply Decl.* at ¶¶ 42-43. The comments demonstrate that spectrum, only some of which falls under the cap, has become a critical input to an array of voice, narrowband, and broadband service applications.[70] Even if the aggregation limits applied consistently across all like services and spectrum, however, they would be wholly unnecessary to promote competition. These limits distort the input decisions of carriers that are the most successful in attracting customers and developing new services. These are the very firms that may be using all of their available spectrum and so are unable to increase their output efficiently or to offer advanced services. *Gertner and Shampine Reply Decl*. at ¶ 33. The cellular cross-interest rule is even more egregious, as it applies to only a subset of CMRS carriers covered by the cap. Under this rule, A-side cellular carriers could not even acquire disaggregated spectrum from B-side carriers even if the B-side carriers were to remain viable, ongoing businesses, a situation that would likely be permitted under antitrust guidelines.

Professor Cramton argues that the spectrum cap encourages the efficient use of spectrum by forcing carriers to deploy technology that conserves spectrum.[71] He asserts

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[69] *See* International Settlements Policy R&O, *supra* note 28, ¶ 2

[70] Coalition Comments at 3-5, White Paper at 4-10, Nextel Comments at 6, Leap Comments at 1-3.

[71] Cramton Decl. at ¶¶ 20, 26.

that this forced conservation leads to lower prices and that absent the spectrum cap "incumbent carriers would have a smaller incentive to use spectrum efficiently."[72] But he confuses the *intensity* of use with the *efficiency* of use. An artificial increase in the intensity of spectrum usage (such as that caused by government regulation) inefficiently raises firms' costs, and ultimately prices to consumers, beyond socially efficient levels. Wireless firms have fully-internalized the scarcity of spectrum, and thus, all things being equal, will substitute between spectrum and capital to the efficient level; however, the spectrum cap artificially truncates this trade-off and ultimately will lead to inefficiently higher prices. *Gertner and Shampine Reply Decl.* at ¶ 27.

The record leaves no doubt that the spectrum cap is binding carriers and producing unintended business consequences.[73] Lehman Brothers recently underscored this point by touting a key advantage they perceive for "greenfield" competitors like Sprint PCS: "[Sprint's network] is fairly new, and hence not 'loaded to the gills' with a decade's worth of subscribers."[74] Only in the perverse world of the spectrum cap could a voracious existing subscriber base be seen as a comparative *dis*advantage. The technical and allocative efficiency of CMRS markets is best fostered without an arbitrary and capricious limit on use of a key input: spectrum.

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[72] Cramton Decl. at ¶¶ 20-21.

[73] AT&T Comments at 12-14, CTIA Comments at 26-35, *Gertner and Shampine Reply Decl.* at ¶ 33.

[74] Lehman Brothers, "U.S. Spectrum Auction Guide." (Feb. 14, 2001) at 20.

B. The Spectrum Cap Constrains CMRS Carriers

Only Leap quarrels with claims that the spectrum cap binds the largest CMRS providers.[75] Leap's chief technical officer claims that carriers need only deploy more spectrum efficient technologies to avoid being constrained by the 45 MHz cap.[76]

At the outset, the Commission should note that Leap has admitted that it cannot even put to use the spectrum it already has.[77] It is ironic to say the least for Leap to attack other carriers' needs for new spectrum. In any event, Leap is wrong. Attached to these reply comments is a declaration of Verizon Wireless' Executive Vice President and Chief Technical Officer, Richard J. Lynch. Mr. Lynch refutes these assertions and explains how even carriers deploying the most efficient technology available will need additional spectrum above 45 MHz to meet the need for emerging wireless services.

As Mr. Lynch states in his declaration, Verizon Wireless continues to deploy in its network the most spectrum-efficient technologies and exploits every opportunity to improve its spectrum efficiency. *Lynch Decl.* at ¶¶ 11-20. Verizon Wireless is aggressively migrating its analog customers to digital service using CDMA technology – the most efficient mobile technology available. *Lynch Decl.* at ¶ 17. This transition is most evident in our highest density markets, where we are likely to become most spectrum-constrained. In just two to three years, Verizon Wireless expects to reduce analog minutes of use of the network to one or two percent. *Lynch Decl.* at ¶ 17. This transition is, however, dependent on construction of digital capability, including, but not

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[75] Kelley Decl. at 27.

[76] Kelley Decl. at 3-4.

[77] *See* Leap Petition.

limited to acquiring cell sites, a reality Leap casually ignores. And, the need to support even minimal analog use still requires 5 to 10 MHz of spectrum. *Lynch Decl.* at ¶ 19.

Contrary to Leap's assertions, despite efforts to use the most spectrum-efficient technology, Verizon Wireless and other CMRS carriers face capacity constraints that are the result of increased (and more bandwidth-intensive) usage of their networks. The number of wireless subscribers continues to grow at a rapid rate. The effect of this growth on the network is compounded by the fact that MOUs are growing at an even faster rate. *Lynch Decl.* at ¶ 22.

Mr. Kelley suggests that the narrow bandwidth applications of today provide a good proxy for what kinds of services the consumer of tomorrow will want. We disagree. While the future is uncertain, it seems clear that wireless providers will need to support much higher bandwidth applications. In fact, Mr. Kelley admits that his analysis excludes high quality advanced services because "these applications are really not available on wireless systems today."[78] But that is, obviously, an illegitimate premise since other carriers *do* plan to offer such services, which offerings Leap acknowledges in its SEC filings to be a competitive risk.[79]

Verizon Wireless anticipates that the growth in mobile data services will place an increasing demand on the network. Data services represented less than two percent of network usage at the end of 2000, but we expect it to represent a far greater proportion of network usage in a just few years. *Lynch Decl.* at ¶ 24. The demand for mobile data also is being fueled by a critical mass of consumers who are comfortable with wireless

[78] Kelley Decl. at ¶ 38.

[79] Leap Proxy Statement at C-20, p. 81.

devices, a universal acceptance of email and wireline Internet applications, and the improved technology to support the increased usage and higher data rates. *Id*. at ¶ 25.

Leap's view of CMRS is static and reflects its role as a niche provider. While Leap may not be interested in making the investment required to offer advanced technologies, Verizon Wireless is. Given the real spectrum constraints that the most successful carriers will face, leaving the spectrum cap in place will only ensure that Leap's vision of the future will become a reality. Consumers will have very limited access to high bandwidth mobile devices, and the most successful wireless carriers to-date will find it difficult to offer the highest bandwidth services.

Technology and market forces should determine which carriers are in the best position to deploy wireless data in the most efficient and economical manner. There is no reason to believe that if carriers are permitted to acquire more than 45 MHz that the "existing wireless voice carriers" would also dominate 3G.[80] On the contrary, Leap's view seems to be that those carriers that are currently most successful should not be permitted *as a matter of public policy* to offer advanced services at all. While keeping other competitors in check may serve Leap's private interest, it certainly does not benefit competition or the public.

C. Partial Repeal or "Half" Measures Further Distort the Market

Several commenters suggest ways for the Commission to modify the spectrum aggregation limits instead of, or in the absence of their full repeal. AT&T requests that, in the event that the Commission does not repeal the spectrum cap, "the 'twenty percent' rule be repealed and that investments up to *de facto* control be permitted without

[80] Kelley Decl. at ¶ 53.

attribution [for spectrum cap purposes]."[81] TDS would have the Commission retain the spectrum cap, but modify the cellular cross-interest rule to raise "from 5 to 20 percent, the ownership interest which an individual or entity controlling a cellular licensee may have in its cellular competitor" and to permit waiver of the rule in circumstances where there is a "single majority shareholder."[82] Sprint, on the other hand recommends that cellular carriers that agree to continue to provide analog service for some pre-determined period (e.g., five years), "be immediately granted an exception from the spectrum cap based on the amount of capacity they are willing to devote to AMPS service."[83]

These parties do not show why such small changes would not suffer from the same problems that afflict the current rule. Such "fixes" to spectrum aggregation limits that already affect CMRS licensees unequally would only result in a further distortion of the wireless marketplace. Most of these "small" changes would benefit only a single carrier, or a small group of carriers and would not be necessary if the Commission were to repeal the cap and cross-interest rules in their entirety, as the facts and legal precedent show it should.[84]

Sprint's request to raise the cap by some small amount for cellular carriers because of the requirement that they provide analog service, improperly ties the cap to totally different regulatory issues. As Sprint itself notes, the Commission has said that it will address this issue in another proceeding.[85] If the analog requirement should be

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[81] AT&T Comments at 12, Sprint Comments at 9-10, TDS Comment at 7-11.

[82] TDS Comments at 7.

[83] Sprint Comments at 10.

[84] *See gen.* International Settlements Policy Report and Order, where the Commission rejected proposals that unnecessarily limited the effect of a rule's repeal under Section 11.

[85] *See* Sprint Comments at 9, n. 31.

changed, it should be dealt with there. Linking the two together would only regulation *more* complex. For example, how would the Commission monitor actual use of analog? What if a carrier reduced analog use in a cellular MSA and sought to acquire a 10 MHz PCS license in a partly overlapping BTA market? Such a rule change would destroy any value in such a simple rule. Only the repeal of the spectrum aggregation limits would fulfill this Commission's obligation under Section 11 and its own stated policy to rely on market forces where competition exists, as it clearly does in CMRS.

IV. CONCLUSION

Verizon Wireless urges the Commission to repeal the spectrum cap and cellular cross-interest rule. Rather than adopt any other ownership limits, it should do what it

said it should do (and what the law compels): remove unnecessary, counterproductive rules. The record is clear that meaningful competition exists in the CMRS marketplace. Under Section 11, and under the Commission's policy to rely on competitive market forces, these ownership limits must be repealed.

Respectfully submitted,

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