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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

SPRINT PCS REPLY COMMENTS

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Sprint Spectrum L.P., d/b/a Sprint PCS (“Sprint PCS”), hereby replies to the comments filed in response to the above-captioned Notice of Proposed Rulemaking.

INTRODUCTION AND SUMMARY

As expected, the comments fall among predictable lines, with most interested parties adopting an “all or nothing” approach on each side of the issue. Cellular incumbents (large and small) assert that they are capacity constrained and need more spectrum, a situation they contend can be solved in part by lifting the cap.¹ On the other side, new entrants want the cap retained to preclude incumbents from becoming too large and to facilitate their ability to obtain spectrum in additional areas in the post-auction, secondary market. Resellers also support the cap because it maximizes the number of facility-based carriers with which to deal.

The proposal put forth by Sprint PCS seeks to address concerns raised by most parties to this proceeding and represents a rational phase-out of the spectrum cap that will

¹ Many commenters acknowledge that if the cap is lifted there will be industry consolidation. *See* CTIA at 37 (Antitrust review “will ensure against anticompetitive consolidation.”); AT&T Wireless at 15 (FCC should eliminate cap and instead undertake “case-by-case reviews of wireless mergers”).

enable carriers to acquire additional spectrum at the same time as enhance the prospects of robust competition. Specifically, Sprint PCS recommends that the Commission take the following steps immediately before removing the cap in its entirety:

1. Adjust the cap to provide for an "AMPS" credit. 1G analog AMPS is spectrally inefficient compared to 2G and 3G digital technologies, yet there are numerous public benefits to having carriers maintain AMPS for a transitional period (*e.g.*, TTY service, emergency services, ubiquitous roam-ing). Sprint PCS therefore proposes that a carrier committing to maintain AMPS service for a definite period of time (*e.g.*, five years) would be given an immediate exemption from the cap based on the amount of capacity it devotes to AMPS. This would immediately address capacity arguments raised by various incumbents and preserve an important service capability.
2. Increase the cap level in the 3G-allocation proceeding. Even parties favoring retention of the cap recognize that the cap must be increased prior to the 3G auction.² Realistically, the Commission cannot intelligently increase the cap until it determines how much additional spectrum it will make available for CMRS and what 3G band plan it will adopt (*e.g.*, 10 MHz or 15 MHz slices). At such time the cap should be increased proportionately to make it possible for carriers to increase their spectrum holdings.³
3. Forbear from conducting a Section 310(d) review of mergers that do not implicate the cap. Given that the purpose of the cap is to guarantee a minimum number of service providers in each market, there is no reason for the Commission to conduct its own review (in addition to DOJ review) of mergers that do not implicate the cap. By definition, mergers that do not implicate the cap cannot materially affect competition in a particular geographic area.
4. Clarify that the Commission will entertain cap waiver requests as part of its Section 310(d) review process. No purpose is served by requiring a licensee to secure a waiver of the spectrum cap before it may even apply for a transfer of control under Section 310(d); the two issues can be handled concurrently.

² See, *e.g.*, Leap at 14; WorldCom at 12-13; TDS at 7. In this regard, Sprint PCS agrees with the analogy: "A hat that fits an infant is unlikely to continue to fit the child as the child grows." Strategic Policy Research (Cingular Attachment) at 8.

³ A proportional increase will ensure competitive entry by preventing one or two incumbents from acquiring all available spectrum. As Sprint PCS discussed in its initial comments, once the 3G auction has closed and additional competitive entry has occurred, the Commission should remove the cap entirely.

As discussed below, if the Commission adopts Sprint PCS' proposal, the Company would also support the immediate elimination of the cellular cross-interest rule⁴ in Metropolitan Statistical Areas ("MSAs") but not in Rural Cellular Areas ("RSAs").

In contrast to the "all or nothing" approaches adopted by most parties, Sprint PCS submits that its proposal represents a rational way in which to phase-out the spectrum cap on a reasonably expeditious basis. Carriers seeking cap relief will obtain such in a reasonable period of time, if not immediately. Those concerned about the competitive impact of cap removal can be assured that market entry opportunities will not be foreclosed. Ultimately, the public benefits from this approach.

I. THE CELLULAR INCUMBENTS HAVE FAILED TO PROVIDE EVIDENCE TO SUPPORT THEIR CLAIM OF BEING AT OR NEAR SPECTRUM CAPACITY

The arguments that opponents of the cap make in their comments are essentially the same as those made unsuccessfully two years ago during the 1998 Biennial Review. Moreover, the arguments are based on generalities rather than specific facts. The Commission found these unsupported generalizations insufficient in the past,⁵ and they do not become more persuasive because they are repeated.

The principal argument that the cellular carriers advance is that the spectrum cap inhibits further competition because CMRS carriers are capacity constrained. Yet, no party offers specific evidence regarding such capacity shortages. There are very few markets where carriers are at authorized cap levels today, and there will be very few markets where carriers will be at authorized levels even when the reaucted licenses (Auc-

⁴ See 47 C.F.R. § 22.942.

⁵ See, e.g., *First Biennial Review Spectrum Cap Order*, 15 FCC Rcd 9219, 6247-48 ¶ 61 (Sept. 22, 1999); *First Biennial Review Spectrum Cap Reconsideration Order*, 15 FCC Rcd 22072 ¶ 10 (Nov. 8, 2000).

tion No. 35) are issued. And if any carrier was truly capacity-constrained, one would have expected that carrier would have accepted the Commission's repeated invitation to submit a waiver request.⁶ Yet, as WorldCom notes, there have been very few requests to waive the cap.⁷ In any event, if the Commission adopts the Sprint PCS proposal to allow for an AMPS credit, cellular carriers claiming they are capacity constrained would be able to obtain immediate relief from the cap without putting at risk the important public benefits of AMPS service.

The assertion that CMRS carriers are capacity constrained and therefore need additional spectrum is not only unsupported, but also is rebutted by evidence in the record which suggests that the data services that carriers will support over the next several years (*e.g.*, short message services, wireless web) will use less network capacity than is needed to support a voice call. Further, the 3G technologies that carriers are beginning to deploy will offer dramatic improvements in capacity over today's 1G and 2G technologies.⁸

The cellular carrier argument is problematic even if one were to ignore the facts. Assuming *arguendo* that CMRS carriers are capacity constrained, the solution is not to permit two capacity constrained carriers to merge. The combination of two capacity constrained carriers is likely to result in one large capacity constrained carrier. Such a merger would not solve the capacity shortage problem, but rather, it would remove a competitor from the market. The real solution is to allocate additional spectrum to

⁶ See *First Biennial Review Spectrum Cap Order*, 15 FCC Rcd at 9248 n.155, 9255 n.193, 9256 ¶ 82, and 9273 ¶ 127. See also Separate Statement of (then) Commissioner Powell, 15 FCC Rcd at 9297 ("I am also encouraged by this Order's invitation to carriers that are spectrum-constrained to seek waivers of the cap."); Separate Statement of Commissioner Furchtgott-Roth, 15 FCC Rcd at 9294-95 ("[T]he Commission makes explicit the availability of waivers of the spectrum cap where carriers can demonstrate that the cap is seriously impeding their ability to rout out advanced services, including 3G services.").

⁷ WorldCom at 7.

⁸ See Mark Kelly Declaration (Leap Attachment) at 12-15 ¶¶ 31-37 and 19 ¶ 48.

CMRS and then adjust the cap so that carriers at or near the limit can acquire additional spectrum.

In summary, cellular incumbents have *at most* made a case for the allocation of additional spectrum to CMRS. They have not demonstrated that the complete and immediate removal of the cap is the best means to relieve a still undocumented capacity shortage.

II. THE FCC SHOULD HAVE A ROLE IN THE REVIEW OF PROPOSED COMBINATIONS THAT IMPLICATE SPECTRUM MANAGEMENT POLICIES

As noted above, it is generally expected that the CMRS industry will undergo further consolidation if the spectrum cap is removed.⁹ AT&T's response is that the Commission need not worry about mergers because it would be "relatively easy for existing competitors to add capacity in response to any [resulting] price increase."¹⁰ Of course, if it were as easy to add capacity as AT&T claims, there would be absolutely no reason to abrogate the cap (or to allocate additional spectrum to CMRS); carriers could meet their service requirements simply by "adding capacity."

Other incumbents take a different approach. They contend that the Commission need not worry about mergers because the DOJ can perform any needed antitrust re-

⁹ See, e.g., Merrill Lynch, "Wireless Spectrum: the Spectrum Cap," at 1 (May 2, 2001) ("We think that relaxation or elimination of the spectrum cap and cross-interest rules would be perceived as a positive by investors as it could facilitate consolidation going forward."); *RCR Wireless News*, "Spectrum-Cap Changes Could Slice Wireless Pie," 14 (April 23, 2001) ("[I]f caps are lifted, [consolidation] would be a likely outcome," statement reportedly made by Elliot Hamilton, senior vice president for the Strategis Group); *id.* ("Without a limit to the amount of spectrum a carrier can control, many expect the result to be a consolidation within the wireless industry. Instead of six to eight national carriers mixed with small rural players, the wireless industry could contract to a few supercarriers, with smaller ones trying to make a living on the fringe.")

¹⁰ AT&T at 11.

view.¹¹ According to these carriers, the CMRS market is no different than any other competitive market.¹²

Sprint PCS agrees that the Commission need not duplicate the review that anti-trust agencies perform — and it is for this reason that Sprint PCS has proposed that the Commission forbear from undertaking any Section 310(d) review of proposed mergers not implicating the cap. Sprint PCS cannot agree, however, that the CMRS market is like all other markets, including other telecommunications markets. Notwithstanding CTIA's arguments to the contrary,¹³ the fact remains that there is very limited opportunity for *de novo* entry into the CMRS market. The Commission concluded less than two years ago that entry into the CMRS markets is “not easy” and that the barriers to entry are “significant.”¹⁴ Additional entry is possible *only if* (1) the Commission makes additional CMRS spectrum available, *and if* (2) a new entrant is successful in acquiring the additional spectrum that is auctioned.¹⁵ In this regard, the facts that existed two years ago are largely the same today.

More fundamentally, Congress has determined that the Commission bears a special responsibility for CMRS markets. It has specifically charged the Commission to adopt spectrum management policies that will “promot[e] economic opportunity and competition,” “avoid excessive concentration of licenses,” and “disseminat[e] licenses

¹¹ See, e.g., Cingular at 30-34; CTIA at 37-45; Verizon Wireless at 14.

¹² See, e.g., Marius Schwartz/John Gale Paper (CTIA Attachment) at 12 (“The appropriate standard for retaining the cap, we believe, is whether the [CMRS] industry is so different from any of the many other industries that are subject to normal antitrust scrutiny of consolidations rather than per se prohibitions. We see no such compelling difference.”).

¹³ See CTIA at 14 (CMRS “entry barriers are now minimal.”). Compare DOJ Merger Guidelines at § 3 (“[E]ntry is . . . easy if entry would be timely, likely and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.”).

¹⁴ First Biennial Review Spectrum Cap Order, 15 FCC Rcd at 9234-35 ¶ 31.

¹⁵ See *id.* 9233 ¶ 28.

among a wide variety of applicants.”¹⁶ Given this explicit statutory mandate, the Commission cannot abdicate all responsibility for the structure of the CMRS market, as some urge. The structure of the CMRS market — both today and tomorrow — is part and parcel of the Commission’s core spectrum management responsibilities.

A spectrum cap also enhances the Commission’s ability to fulfill other spectrum related responsibilities, including the Congressional objective that the Commission foster the “rapid deployment of new technologies, products and services for the benefit of the public” and the “efficient and intensive use of the electromagnetic spectrum.”¹⁷

Thus, DOJ and the FCC have very different responsibilities. DOJ’s charge is to stop proposed mergers/acquisition that would “substantially lessen competition.”¹⁸ In contrast, the Commission’s statutory directive is to “*promote . . . competition,*” “*avoid excessive concentration of licenses,*” and foster the “rapid deployment of new technologies, products and services for the benefit of the public” and the efficient use of spectrum.¹⁹

III. IF THE COMMISSION ADOPTS SPRINT PCS’ CAP PROPOSAL, IT SHOULD IMMEDIATELY ELIMINATE THE CELLULAR CROSS-INTEREST RULE IN MSAs, BUT NOT IN RSAs

Cellular carriers urge the Commission to eliminate the cellular cross-interest rule because it has “lost any validity.”²⁰ As Cingular observes, the rule was adopted “at a

¹⁶ 47 U.S.C. § 309(j)(3)(B).

¹⁷ 47 U.S.C. § 309(j)(3)(A) and (D). Maintaining the cap until after the 3G auction concludes will ensure that additional 3G spectrum can be put to use quickly because the cap removes post-auction challenges that one carrier has acquired too much spectrum.

¹⁸ See Section 7 of the Clayton Act, 15 U.S.C. § 18.

¹⁹ 47 U.S.C. § 309(j)(3)(B)(emphasis added).

²⁰ Verizon Wireless at 16.

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 in virtually every major market.²¹

Incumbent cellular carriers remain dominant in the market, including urban areas, and especially in connection with roaming services.²² Nevertheless, in most MSAs, consumers do have a choice of five or more mobile carriers.²³ Accordingly, Sprint PCS agrees that the Commission may eliminate the cross-interest rule as applied to MSAs — so long as it phases out the overall spectrum cap in the manner Sprint PCS has proposed.²⁴

Rural cellular carriers are mistaken in asserting that the cross-interest rule in rural areas is “unnecessary and redundant” and constitutes “obsolete regulatory baggage.”²⁵ In fact, most rural cellular carriers still enjoy effective duopoly status in their service areas.

²¹ Cingular at 40-41 (emphasis in original).

²² Cellular carriers still serve the bulk of most mobile customers, and enjoy effective duopoly power in the provision of roaming services. *See, e.g., Fifth Annual CMRS Competition Report*, 15 FCC Rcd 17660, Table 3 (2000), Sprint PCS Comments, WT Docket No. 01-193, at 4-9 (Jan. 5, 2001).

²³ *See Fifth Annual CMRS Competition Report*, 15 FCC Rcd at 17666 and Tables 9A-9G.

²⁴ Sprint PCS cannot support the elimination of the cellular cross-interest rule in MSAs if the FCC abrogates the spectrum cap immediately and without regard to pending 3G allocations and auctions. Absolute removal of the cap *and* the cross-interest rule concurrently would enable the two dominant providers in each market to join forces and collude, including arrangements that the FCC would not necessarily review, given that Section 310(d) applies only to transfers of control.

²⁵ Independent Cellular Coalition at 5 and 6. There is also no basis for their additional unsupported assertion that the cellular cross-interest rule “only serves to inhibit the introduction of new technologies, including digital service.” RTG/OPASTCO at 8. Even ignoring that rural carriers may now acquire up to 55 MHz of spectrum in their service areas, the fact remains that a 25 MHz cellular license provides ample spectrum in rural areas to provide a robust set of services using any technology. By point of comparison, Sprint PCS currently supports its services in New York City using only 15 MHz of spectrum. If Sprint PCS, the nation’s fourth largest and fastest growing CMRS carrier, can provide its voice, data, and wireless web services in the most densely populated area of the country using 15 MHz of spectrum, a rural carrier armed with “only” a 25 MHz cellular license certainly has ample spectrum to provide any service it desires (1G, 2G, and/or 3G).

According to the Commission's most recent data, PCS new entrants do not yet serve 68 percent of the nation's territory.²⁶ Thus, if the Commission were to remove the cross-interest rule in rural areas, the two rural cellular carriers could merge (*without implicating the 55 MHz rural cap*) and enjoy a complete monopoly in their service territories. In short, rural carriers could achieve the very monopoly position that the cross-interest rule was designed to prevent.²⁷

Sprint PCS agrees with TDS, a smaller cellular carrier, that there is "no conceivable situation in which the public would be better served in a given market by having a monopoly cellular provider than by having competition in the provision of cellular service:

[T]here are still cellular markets, particularly in rural areas, in which no PCS carrier has initiated service. In such markets, a prohibition on a cellular monopoly is still a valuable competitive safeguard, as it was in 1991.²⁸

Such a monopoly would harm not only consumers in rural areas, but also consumers throughout the country, as a merged cellular company would also enjoy a monop-

²⁶ See *Fifth Annual CMRS Competition Report*, 15 FCC Rcd at 17689. It is not surprising that even in light of an unprecedented pace of network construction, new entrants have less coverage than incumbent cellular carriers. Not only do cellular carriers have a very significant head-start in building their networks, but the process of siting facilities to deploy wireless networks has become substantially more difficult in recent years. See Sprint PCS Reply Comments, WT Docket No. 01-193, at 9-24 (Feb. 5, 2001).

²⁷ Equally baseless is the assertion that "the Commission has a statutorily-mandated duty under Section 332 . . . to establish and maintain regulatory symmetry." Independent Cellular Coalition at 6. To be sure, Congress has established regulatory symmetry as an important goal for the CMRS industry. However, Congress also recognized that "market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services" and it therefore gave the FCC "some degree of flexibility to determine which specific regulations should be applied to each carrier." H.R. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993). See also *id.* at 494 ("[D]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section.").

²⁸ TDS at 8.

oly in the provision of roaming service. Therefore, Sprint PCS opposes removal of the cellular cross-interest rule in RSAs at this time.

CONCLUSION

For the foregoing reasons, Sprint PCS recommends that the Commission take actions consistent with the positions set forth above and in its initial comments. After taking the immediate steps outlined by Sprint PCS herein, the Commission should adjust the cap prior to the 3G auction and allow the cap to sunset once 3G licenses are issued.

Respectfully submitted,

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