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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits its reply comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

The record in this proceeding strongly supports elimination of the cap. Designed initially to ensure that CMRS spectrum would be licensed to more firms than the two cellular incumbents, the cap has now outlived its stated objectives. There is unanimity that the

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

2 2000 Biennial Regulatory 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").

competitive provision of CMRS services is robustly serving consumer interests with decreasing prices and expanding innovation. Eliminating the cap cannot reverse this trend.

Sound public policy, as well as the legal requirements of the Communications Act as amended, requires that rules be retained only for as long as they continue to serve the public interest. As CTIA has consistently demonstrated, the cap is unnecessary, and it should be repealed on that basis alone. However, the cap is also affirmatively harmful. It inhibits, if not prohibits, transactions that would permit market participants to capture economies of scale and scope that would redound to the benefit of consumers. Such consequences are not in the public interest. Accordingly, the Commission must repeal the spectrum cap.

This Commission has declared its intention to 'get out of the way' of efficient market outcomes. It should clearly do so here.

II. THE SPECTRUM CAP IS NOT NEEDED TO PROTECT COMPETITION.

A. Consolidation Cannot Be Equated With Competitive Harm.

The consensus of the record in this proceeding establishes that the CMRS business is robustly competitive.[3] For example, Verizon Wireless observes that the number of national carriers has doubled, that 88 percent of the U.S. population has three or more operators offering

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[3] See e.g., Nextel Comments at 1 (noting that the CMRS marketplace is "increasingly competitive"); Chadmoore Comments at 2 (the "mobile telephony market has experienced strong growth and competitive development" and "consumers have benefited from declining prices, rapidly expanding coverage areas, new service packages and technological innovation"); Coalition of Independent Cellular Carriers Comments at 7 ("wireless telephony has evolved into a mass consumer product, not easily susceptible to price increases...").

service within their counties, and that the number of PCS subscribers has tripled since 1998.[4] Cingular Wireless notes that the number of wireless subscribers has risen 60% since the first biennial review proceeding, and that new entrants are acquiring customers at a faster rate than cellular companies.[5]

Even opponents of eliminating the spectrum cap acknowledge that CMRS competition has increased dramatically. Sprint PCS, advocating transitional retention of the cap, observes that there are six national CMRS providers, 69% of Americans have a choice of five or more providers, prices have fallen dramatically, and consumers have benefited as a result.[6] While Leap describes the CMRS markets as "imperfectly competitive," it concedes that "the CMRS marketplace is *more* competitive than it has been in the past," that "new and highly innovative carriers" have entered the CMRS business, and that this entry has "produced significant benefits to the public."[7] WorldCom maintains that "the CMRS marketplace is more competitive today than it was just a few years ago," noting that the price of mobile telephone service declined by 11.3% between the end of January 1999 and the end of January 2000.[8]

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4 Verizon Wireless Comments at 9-11; see also AT&T Wireless Comments at 2; TDS Comments at 5 (noting the "spectacular growth of PCS and ESMR service during the nineties").

5 Cingular Wireless Comments at 25, 26-27.

6 Sprint PCS Comments at 4.

7 Leap Comments at 5-6, 8.

8 WorldCom Comments at 5-6.

Nonetheless, proponents of the spectrum cap argue that absent the cap the CMRS industry will inevitably consolidate and the benefits that competition has brought will be lost.[9] These fears are premised on two fundamental errors. They assume, but cannot demonstrate, that any consolidation necessarily is anticompetitive, and that those consolidations that truly are anticompetitive cannot be prevented through Section 310(d) and antitrust review.[10]

As a matter of economic theory and reality, consolidation can be procompetitive, anticompetitive or competitively neutral. As the DOJ/FTC Guidelines explain:

> A merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured. Mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis.***
>
> While challenging competitively harmful mergers, the Agency seeks to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral.[11]

One cannot equate consolidation with competitive harm. The FCC acknowledged this principle when it adopted the 45 MHZ spectrum cap by stating that "[u]p to a point, horizontal concentration can allow efficiencies and economies that would not be achievable otherwise, and can therefore be pro-competitive, pro-consumer, and in the public interest."[12] In the Fifth CMRS

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9 See id. at 6-7; see also Leap Comments at 8.

10 WorldCom Comments at 2, 6-7; Leap Comments at 7-8, 10-12; Sprint PCS Comments at 6.

11 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines at 1.0, 0.1 ("Merger Guidelines").

12 Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, ¶95 (1996).

Report, the Commission reaffirmed its judgment that competition can not only coexist with consolidation, but that competition can actually be increased by consolidation.[13]

The spectrum cap, as an initial licensing mechanism, was used to ensure that entrants other than the cellular incumbents had the opportunity to obtain sufficient spectrum to enter and successfully compete. As stated by Drs. Schwartz and Gale, this device may have been justified prior to the PCS auctions, but it can no longer be useful in the present circumstances of the CMRS business.[14] Although spectrum cap proponents believe that repealing the cap poses numerous dangers, such as "warehousing," forestalling entry, reducing output and raising price, etc., these contentions are all variations on the same erroneous theme: that whole classes of transactions can be presumed to necessarily decrease CMRS competition. But whether a specific acquisition reduces competition can only be assessed through a complete examination of the level of concentration in the relevant market, competitors' ability to expand output, and ease of additional entry, among other factors. The simple yet key point is that the potential risk from excessive concentration is a familiar antitrust concern, hardly confined to CMRS, and that such risks are routinely evaluated in merger review by both the FCC and federal antitrust agencies by taking into account the totality of market circumstances.

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13 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Fifth Report*, 15 FCC Rcd 17660, 17670 (2000) ("Fifth CMRS Report").

14 Professor Marius Schwartz and Dr. John M. Gale, Are Spectrum Limits Needed to Preserve Competition? at 9, submitted with CTIA Comments, WT Docket 01-14 (filed April 13, 2001) ("Schwartz and Gale"); see also AT&T Wireless Comments at 2; Verizon Wireless Comments at 13-15; Cingular Wireless Comments at 23-24.

This analysis is echoed by the analysis of Dr. John B. Hayes, submitted by Sprint PCS in support of its comments.[15] Dr. Hayes states that "[g]iven the clear and steady downward trend [in concentration in the CMRS industry] that has occurred since 1998,...[I would] need to conduct a more extensive analysis of the specific CMRS markets involved in a particular merger or acquisition before I could draw firm conclusions about the likely competitive effects of the transaction."[16] Similarly, Economists, Inc. on behalf of AT&T Wireless explain, "there is virtually no relationship between the Commission's spectrum cap and the Merger Guidelines standards or competition policy enforcement practices."[17] As AT&T explains further, "an antitrust analysis is not meaningful outside the context of a particular proposed transaction."[18]

B. The Cap Should Not Be Retained To Arbitrarily Preserve Any Particular Number Of Competitors, Nor To Protect The Interests Of Any Particular Competitors.

As noted above, the comments generally reflect the reality of the vibrant state of competition in the CMRS business. However, those commenters that support the spectrum cap are not satisfied. They claim that the cap has resulted in more competition in the CMRS business, but not enough to justify removing the cap.[19]

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15 John B. Hayes, "CMRS HHIs From Customer Share Data: An Update," ¶19, Attachment 1 to Sprint PCS Comments, WT Docket No. 01-14 (filed April 13, 2001) ("Hayes").

16 Id.

17 "An Economic Evaluation of the Federal Communications Commission's Commercial Mobile Radio Services Spectrum Cap," at 10, submitted with AT&T Wireless Comments, WT Docket No. 01-04 (filed April 13, 2001).

18 AT&T Wireless Comments at 8 n.31.

19 Leap observes that the CMRS business "is far from optimally competitive in any absolute sense." Leap Comments at 6. This is hardly an instructive analysis of the state of competition in the CMRS business, as the same criticism could be leveled at virtually

As an initial matter, it would be erroneous to conclude that the cap caused the present competitive status of the CMRS business to come into existence.[20] Competitive entry into the CMRS business was made possible by the Commission's allocation of 120 MHz of PCS spectrum with the cap serving essentially as an eligibility requirement to ensure that new entrants could acquire the spectrum. The number of competitors, however, is not determined by the spectrum cap, as Drs. Gertner and Shampine observe:

> the spectrum cap currently is not the determinant of the number of participants in the market. Current carriers could consolidate to four carriers each holding 45 MHz. In fact, this has not happened. Instead, a few carriers in each market have accumulated spectrum up to or near 45 MHz while many others have provided voice and basic data services using less spectrum. Consumers now have more choices at lower prices despite these asymmetric spectrum holdings. There is no reason to believe that removal of the spectrum cap would change this pattern.[21]

It is therefore far from inevitable that the number of competitors will fall below four absent the cap.[22] And, importantly, such consolidations are subject to review by the FCC and the federal antitrust agencies.[23]

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every market in the U.S. Few if any markets could be described as "perfectly competitive," and almost no markets suffer under a government-imposed limit on inputs. Moreover, as described below, this criticism also is irrelevant.

20 See WorldCom Comments at 5; Sprint PCS Comments at 3-5; Leap Comments at 5.

21 Robert H. Gertner and Allan L. Shampine, "Declaration of Robert H. Gertner and Allan L. Shampine," ¶21, submitted with Verizon Wireless Comments, WT Docket No. 01-14 (filed April 13, 2001) ("Gertner and Shampine").

22 Moreover, contrary to Leap's, WorldCom's and Sprint PCS's suggestion, (Leap Comments at 12-13 and Attachment 1, Declaration of Peter Cramton, ¶8 ("Cramton"); WorldCom Comments at 8; Sprint PCS Comments at 3) the spectrum cap also is not sufficient to guarantee four competitors in every geographic market; indeed, there are small local markets served by fewer than four competitors, for lack of interest. In such

The Commission should not retain the cap until some specific arbitrary event has occurred. Leap, WorldCom and Sprint PCS each suggest different measures for when the Commission should determine that the CMRS business is "competitive enough" to justify removal of the cap. Each of these yardsticks is flawed in its own right as discussed below, but they share a common flaw. Specifically, whatever the degree of competition in the CMRS business, repealing the cap would theoretically allow more consolidation than would be possible with the cap. If antitrust review and the Commission's Section 310(d) review could somehow not be trusted to prevent anticompetitive consolidations, then—according to this reasoning—it would *never* be safe to repeal the cap, no matter how competitive the CMRS industry is prior to repeal.[24]

1. Leap's Suggested Measures For Sufficient Competition Should Be Rejected.

Leap makes the most glaring attempt to promote a numerological threshold that must be reached before the cap could be removed by stating that "[a]s the Commission has recognized, economists have found that 'the probability of cartel behavior is 100 percent for up to four

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cases, the cap fails to ensure four competitors, yet may prevent one of the existing competitors from using spectrum that otherwise lies idle.

23 In conducting such antitrust review, the agencies recognize that there is nothing magical about four, or indeed any other number, of competitors. Some industries are fiercely competitive with as few as two main competitors, while others exhibit more sluggish competition despite the presence of many small firms. The Commission should reject Leap's and Dr. Cramton's suggestion that the Commission consider the spectrum cap "as a well-priced insurance policy, which guarantees the existence of a fourth competitor in each geographic market of the country." Cramton ¶8; see also Leap Comments at 12-13; WorldCom Comments at 9. The decision to lift the cap should not depend upon the presence of any arbitrary number of competitors.

24 See also Verizon Wireless Comments at 13.

competitors.'"[25] If this claim were true, it should cause us to overhaul our entire antitrust system. The reality, of course, is that the economics profession has reached no such conclusion,[26] and the evidence cited consists of a single theoretical paper from 1973. It is a useless gauge to measure the competitiveness of the entire CMRS industry and must be rejected.[27]

Dr. Cramton and Leap also argue that entry by small carriers such as Leap has delivered significant price reductions, ignoring all other sources of competition.[28] Leap essentially insists

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25 Leap Comments at 6.

26 See generally Carl Shapiro, "Theories of Oligopoly Behavior," Handbook of Industrial Organization, Volume I, ed. by R. Schmalensee and R.D. Willig, Elsevier Science Publishers B.V., (1989) at 329-414 ("Certainly, game theory does not *predict* the collusive outcome; it simply indicates that such an outcome is supportable as a noncooperative equilibrium." Id. at 379, emphasis in original); Alexis Jacquemin and Margaret E. Slade, "Cartels, Collusion, and Horizontal Merger," Handbook of Industrial Organization, Volume I, at 415-473 ("... it is necessary to analyze the particular circumstances of an industry in an attempt to determine the feasibility of collusion." Id. at 449.); Richard Schmalensee, "Inter-Industry Studies of Structure and Performance," Handbook of Industrial Organization, Volume II, ed. by R. Schmalensee and R.D. Willig, Elsevier Science Publishers B.V., (1989) at 951-1009 ("The relation, if any, between seller concentration and profitability is weak statistically, and the estimated concentration effect is usually small. The estimated relation is unstable over time and space and vanishes in many multivariate studies." Id. at 976).

27 Leap makes a similar argument for regulation by numerology by asserting that AT&T's one-rate nationwide pricing plan did not change until the fifth nationwide one-rate entrant. Leap Comments at 9, 11; Cramton ¶32. Dr. Cramton makes no effort to explain the comparability of these plans in terms of, for example, the applicability of roaming or long distance charges; both Sprint PCS's and Bell Atlantic's (Verizon's) offering apparently were limited in this regard. This lack of comparability broadens the field of possible responsive plans considerably (e.g., given the roaming charges on other plans, certain regional plans might have been more responsive); Dr. Cramton makes no apparent effort to identify any such response. These points and other factors would need to be accounted for, at a minimum, to assess the relevance of the timing of AT&T's price decrease.

28 Leap Comments at 8-9; Cramton ¶23, ¶27.

that the cap remain until a new, or incremental, entrant in a market would not have a significant effect on prices.[29] Leap's "evidence" of the effect of its entry on prices does not withstand scrutiny.

Leap claims that its entry in certain markets with its flat rate local plan drove down the wireless price offered by the incumbent landline operator by 37.4%.[30] To support this claim, Dr. Cramton supplies wireless price data for a 1000 minute local plan from the incumbent landline operator in the ten "Leap markets" that are among the top 100 MSAs. Dr. Cramton supplies prices for the fourth quarter of 1998 and the first quarter of 2001.[31] There are a number of facts that contradict the claim that Leap's entry caused these effects on wireless prices.

Perhaps most importantly, a significant price drop for wireless service during the last 27 months is not unique to markets where Leap has entered. Using data from the U.S. Department of Labor, which is included in Dr. Cramton's report,[32] the price index for cellular telephone service dropped from 91.7 in December 1998 to 68.7 in March 2001.[33] This indicates that there was a 25% drop in wireless service prices throughout the country during the period, establishing plainly that factors other than Leap's entry caused the lion's share of the observed price

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29 Leap Comments at 11.

30 Id. at 2, 8-9.

31 Cramton ¶23.

32 Id. ¶34.

33 Department of Labor, Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers, Cellular Telephone Services, <www.bls.gov/cpihome.htm>.

decline.[34] Moreover, Leap is claiming to have affected prices in ten specific markets since December 1998 when Leap did not enter eight of those markets until November of 2000. In fact, Leap's earliest entry into any of the "Leap markets" was not until June 1999.[35] Using data from *Wireless Week* for Charlotte (the only "Leap market" available), Verizon's average rate for local airtime minutes in a 1000 minute plan had dropped to its current level of 7¢/minute by the February 7, 2000 survey,[36] which is long before Leap's entry in December 2000.

Although Leap claims its entry caused the observed price reduction, it simultaneously maintains that its wireless offering is substantially different from—and therefore would not be expected to be a close substitute for—the plans on whose prices it is claiming to have had a large effect. While Leap's base plan includes only local calling and no roaming or long distance, the rival plans that Leap claims to have so dramatically affected often include long distance, supplementary services such as call waiting and voicemail, and much larger local calling areas.[37]

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34 Leap is not the only entrant offering service in "Leap markets." Based on CTIA's market research, none of the ten markets has fewer than five providers while Leap is the eighth firm to enter one market and the seventh firm in five other markets. In these circumstances, it would be folly to claim a substantial causal link between Leap's entry and the observed price declines since December 1998.

35 Cramton at ¶22, Table 1.

36 *Wireless Week*, Airtime Pricing available at <www.wirelessweek.com>.

37 Cingular currently includes free long distance, call waiting, three-way calling, and unlimited weekend and evening minutes with its $69.99 900 anytime minutes plan in Nashville, Chattanooga, and Memphis. See <www.bellsouth.com/NASApp/wireless/app/prodserv/rateplans?svc_area_id=NAC>, <www.bellsouth.com/NASApp/wireless/app/prodserv/rateplans?svc_area_id=CHC>, <www.bellsouth.com/NASApp/wireless/app/prodserv/rateplans?svc_area_id=MEC> accessed 5/1/01. Qwest currently includes free long distance and 1000 weekend minutes in its $49.99 700 anytime minutes plan and its $79.99 1100 anytime minutes plan in Tucson and Salt Lake City. See https://www.uswestwireless.com/learn/plans/>, accessed May 1, 2001. Verizon currently includes free long distance in its $75.00 1200 anytime minutes plan (Digital Choice) in

Entry by firms into markets that were previously served by two cellular incumbents has certainly increased competition, but Leap's claim that its recent entry into some markets is the major cause of price declines in those markets does not withstand scrutiny.

It is also worth noting that Dr. Cramton's report mischaracterizes the results of an OECD study by Boylaud and Nicoletti[38] as suggesting that an increase in new entrants' market shares in the U.S. would reduce prices significantly. Dr. Cramton cites the study as showing that "a 10 percent increase in the market share of new entrants reduces mobile prices by 8.6 percent when controlling for all other factors..."[39] Boylaud and Nicoletti, however, did not have market shares for mobile communications providers and instead used an index variable that was 0 for monopoly markets, 50 for duopoly markets, and 100 for "competitive markets"—which is taken to include all markets with more than two competitors.[40] By these measures, U.S. mobile communications markets are already competitive, and have been for some time. The study does not support Dr. Cramton's characterization regarding the effect of additional entry.[41]

Greensboro. See <http://www.app.airtouch.com.../customize.intro?p_section= plans_pricing>, accessed May 1, 2001.

38 Oliver Boylaud and Giuseppe Nicoletti, Regulation, Market Structure and Performance in Telecommunications, OECD Economics Department Working Paper No. 237 (released April 20, 2000) ("Boylaud and Nicoletti").

39 Cramton ¶26.

40 The authors make no distinction between markets once there are more than two mobile providers. See Boylaud and Nicoletti ¶24 and Table 6.

41 The authors' study of mobile markets encompasses the years 1993 through 1997 (not 1991-1997 as cited by Cramton) when the index was 100 for the U.S. and they report that there are up to six competitors in US markets in 1998. Boylaud and Nicoletti at 29, Table 2. Dr. Cramton also cites the study inappropriately on a different point. He cites the study (at ¶39) as finding that "entry and the development of competition leads to higher productivity and greater service quality.... To the extent that removal of the spectrum cap would lower competition, incumbent carriers would have a smaller incentive to use

2. Sprint PCS' Suggestion That The Decision To Remove The Spectrum Cap Be Linked To Forbearance Should Be Rejected.

While Sprint PCS alleges that the CMRS industry will become more consolidated and therefore less competitive (a contention addressed in Section II), it does not seek to retain the cap on that basis.[42] Rather, Sprint PCS would retain the cap with certain modifications until after the 3G auctions. In Sprint PCS's judgment, retaining the cap until then will allow the Commission to be confident that the CMRS industry will remain competitive, which in turn may cause the Commission to view more favorably requests for forbearance from Title II obligations for CMRS providers.[43] While CTIA certainly supports forbearance, there simply is no principled justification for retaining the cap until the Commission decides to forbear from Title II regulations. Indeed, the CMRS business is more competitive today than is required by the spectrum cap alone (there are six nationwide competitors). Retarding the further competitive development of the entire CMRS industry by imposing costly regulation is too high a price to pay for forbearance.

3. The Cap Does Not Promote The Competitive Process.

Competitors have clear reasons for advocating the cap that do not dovetail with economic efficiency or consumer interests: to prevent their rivals from realizing efficiencies of scale or scope that would make them stronger competitors, and to reduce their own cost of acquiring

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spectrum efficiently." Boylaud and Nicoletti, however, assess only the effect of product-market competition on labor productivity, not on spectrum use. Moreover, they find that productivity increases when competition increases from monopoly to duopoly, or from duopoly to three or more mobile providers. Again, this says nothing about the effects of adding competitors in the U.S., which already has six national competitors.

42 See Sprint PCS Comments at 6.

43 Id. at 6-8.

spectrum by limiting rivals' ability to bid for it. The Commission's long-established policy and precedent hold that it is the Commission's role to protect competition, not competitors, and thus these arguments must be rejected.[44] NTCA, for example, complains that "[r]ural carriers have found it extremely difficult to effectively compete in recent Commission spectrum auctions," because the larger carriers "have the financial resources to be able to bid in and win these auctions."[45] Whatever legitimate externality the NTCA might be raising, the cap itself certainly is not intended to equalize one company's competitive advantage over other specific companies. The mere existence of a disparity of means among competitors to acquire assets, that is, the fact that some companies are more efficient than others, does not make it appropriate for the Commission to promulgate or retain rules to make it easier for certain companies to compete in the market.[46]

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44 See Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company, *Memorandum Opinion and Order*, 12 FCC Rcd 22280, ¶16 (1997) (noting that "[o]ur statutory duty is to protect efficient competition, not competitors.") citing SBC Communications, Inc. v. FCC, 56 F.3d 1484, 1491-92 (D.C. Cir. 1995) (finding that the Commission may not "subordinate the public interest to the interest of 'equalizing competition among competitors.'"); Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 776 (D.C. Cir. 1974) (holding that the Commission's duty as imposed by law is not met by "focusing first on competitors, next on competition, and then on the public interest." The Commission should not be "thinking about competition...with the objective of equalizing competition among competitors.").

45 NTCA Comments at 3.

46 See Application of Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. for Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corporation, and Application of Alascom, Inc. for Review of Authorization to Acquire and Operate a Fiber Optic Cable System between Alaska and Oregon for the Provision of Interstate-Switched and Private Line Service, *Order and Authorization*, File Nos. WPC-7037 et al. and WPC-6520, 11 FCC Rcd 732, ¶56 and n.98 (1995) (citing Hawaiian Telephone at 776; Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5891-92 (1991)).

Arguments against removing the cap essentially seek to exploit the regulatory process in a way that will permit these opponents to obtain spectrum, either at auction, in the secondary markets or both, at an artificially low price by limiting rivals' ability to bid for such spectrum.[47] For example, Sprint PCS advocates maintaining the cap through the 3G auctions, and applying it to that spectrum on a proportionate basis, and sunsetting the cap after the auction.[48] Its objection to lifting the cap now is that the only effect "would be to allow for industry consolidation – and in the process, allow the CMRS market to become *less* competitive."[49] As demonstrated above, the cap is not necessary for that purpose; Sprint PCS' request would serve only to limit the extent of its rivals' participation in the 3G auction, making the *auction* less competitive.

Similarly, on behalf of Leap, Dr. Cramton states that "[t]he Commission must determine whether consumers would be better off when an incumbent carrier expands its in-region spectrum holdings beyond 45 MHz, or when new carriers such as Leap enter the market..."[50] This is a dangerous path, as it would require the Commission to substitute its judgment for that of consumers as to which providers would make better use of spectrum. The Commission must

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47 Leap Comments at 8-9; Sprint PCS Comments at 8-12; WorldCom Comments at 12-14.

48 Sprint PCS Comments at 8-12.

49 Id. at 6. The antitrust laws view with substantial skepticism claims by competitors that a particular transaction between its rivals would reduce competition, since if that were true, the complainant (along with all rivals in the market) would benefit from an increase in price. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (plaintiff lacked standing to challenge agreement among rivals to limit competition). A more plausible explanation of a complaining rival is that it fears that consolidation would enable its rivals to compete more effectively. See Cargill v. Monfort of Colo., 479 U.S. 104 (1986) (plaintiff lacked standing to challenge merger that resulted in stronger, more efficient competitor).

50 Cramton ¶24; see also Leap Comments at 8-10.

resist calls to pick winners and should leave spectrum assignment to market transactions, especially given that Section 310(d) review and the antitrust authorities can prevent specific consolidations that would be anticompetitive.

WorldCom asserts that, in contrast to facilities-based wireless providers, it is the largest reseller of CMRS and thus "by far the largest *consumer* of wireless services in the United States. As a result, WorldCom's interest in maintaining the Commission's spectrum aggregation limits aligns closely with the interests of individual consumers – *i.e.*, the retention of a vibrant and competitive CMRS market...."[51] While perhaps superficially appealing, the argument is incorrect. WorldCom is *not* a final consumer of wireless services, but a reseller. As such, its profit depends on the margin between the wholesale price at which it buys from facilities-based providers and the retail price at which it sells to consumers. Though WorldCom certainly has an interest in obtaining the lowest possible wholesale price, it is not necessarily interested in removing regulatory impediments to retail competition. Thus, WorldCom loses from a merger between two facilities-based operators that creates a stronger retail competitor. WorldCom also loses if a merger allows the new entity to undertake more retailing functions itself (by achieving increased economies of scale in marketing and other consumer-oriented functions) and to reduce its reliance on WorldCom as a reseller. On the other hand, WorldCom gains where the cap artificially constrains a facilities-based competitor from providing quality services. In short, it is incorrect to view WorldCom as a proxy for the interests of final consumers.

Given that WorldCom's interests are those of a reseller, these interests should not dictate Commission policy. Indeed, the Commission has stated that "once broadband PCS licenses have

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[51] WorldCom Comments at 1 (emphasis in original).

built out their networks and are competing with cellular carriers, market forces will eliminate the need for explicit resale regulation."[52] This conclusion is plainly correct, for even as the FCC's resale requirements are sunsetting, resale activity under new brand names with novel approaches to consumers are appearing.[53] Thus, retaining the cap to promote the fortunes of resellers is certainly not justified.[54]

III. THE CAP IS NOT ONLY UNNECESSARY, IT IS CAUSING ECONOMIC DISTORTIONS.

As Drs. Schwartz and Gale demonstrated in their paper, the correct public policy question is whether the cap is necessary. If not, the conclusion is clear: the cap should be eliminated and there need be no additional demonstration that it actually is threatening harm.[55] CTIA's comments confirmed this policy approach as a requirement of law under the Communications Act.[56] Thus, those commenters who assert that it is acceptable to keep a needless regulation because they perceive no widespread evidence of harm are wrong on at least two counts.

This Commission, under the leadership of Chairman Powell, has clearly explained its intention to rid the books of unnecessary regulation and allow market forces to control.

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52 Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *First Report and Order*, 11 FCC Rcd 18455, ¶2 (1996).

53 See Silvia Ascarelli, "Virgin Group Seeks U.S. Partner For Virtual Wireless Operation" The Wall Street Journal, May 8, 2001.

54 Similarly, while WorldCom understandably would like to apply the cap "proportionally" to any new CMRS spectrum made available by the Commission (WorldCom Comments at 12-14), its incentive to do so as a means of reducing the number of likely bidders it would compete against is rather transparent. Its argument must be rejected.

55 See Schwartz and Gale at 7-8, 16.

56 See CTIA Comments at 4-9; see also Verizon Wireless Comments at 5-7; AT&T Wireless Comments at 4; Cingular Wireless Comments at 23-24.

Chairman Powell already has expressed concern that the CMRS spectrum cap may have outlived its utility.[57] That concern is borne out by a review of the industry and its upcoming challenges, as discussed below.

A. The Cap Does Not Promote Economically Efficient Input Choices.

Some of the commenters suggest that the cap is beneficial because it induces spectrum conservation by firms at or near the cap.[58] Sound economic policy, however, does not promote one input choice over another, particularly by introducing artificial shortages.[59] The spectrum cap plainly effectuates an avoidable scarcity. There is no particular efficiency to be presumed from forcing licensees to increase capital inputs over spectrum. As Drs. Schwartz and Gale explained, "investments to economize on spectrum should be guided by spectrum's true opportunity cost, not by its artificial scarcity induced by the cap."[60] Inefficient substitution of

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57 See Opening Statement of Commissioner Michael K. Powell Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce, at 5, October 26, 1999 (noting that the 2000 Biennial Review would aggressively focus on the wireless industry "as an area where competition has clearly emerged and where most regulation has become unnecessary"); 1998 Biennial Regulatory Review, *Report and Order*, 15 FCC Rcd 9219 (1999) ("First Biennial Review Order"), Separate Statement of Commissioner Powell ("I was expecting - in view of the public interest guidance in section 11 and the optimistic outlook for competition in the CMRS industry - a repeal or significant modification of the spectrum cap.").

58 Leap Comments at 9-10. See also Leap Comments at 16-20.

59 Some degree of spectrum scarcity for wireless services has occurred through other Commission policies, principally those policies that dedicate certain frequencies to specific uses and/or users on an exclusive basis as well as those that inhibit efficient secondary markets for spectrum. To its credit, the Commission is revisiting these policies to consider their removal. See generally Principles for Promoting the Efficient Use of Spectrum By Encouraging the Development of Secondary Markets, *Policy Statement*, FCC 00-401, (rel. Dec. 1, 2000).

60 Schwartz and Gale at 30-31. See also AT&T Wireless Comments at 9 ("there is nothing economically efficient about arbitrarily limiting one input and forcing users to 'innovate'

inputs raises firms' costs, delays and/or deters the introduction of new services, and ultimately increases the prices consumers would otherwise pay.

In recognition of these costs, the Commission generally has eschewed imposing direct technical standards on spectral efficiency :

> As a general matter, whenever spectrum is exclusively assigned and licensees cannot expect to obtain additional spectrum at a price significantly below its market value, we believe that a mandatory efficiency standard is unnecessary. Under these conditions, licensees can be expected to invest voluntarily in efficient technology up to the socially optimal level, and a mandatory standard would either have no effect (if it is at or below the voluntary level) or impose unjustified costs that exceed any resulting gain.[61]

Indisputably, these conditions obtain here.

Leap nevertheless asserts that its own particular technology choice—CDMA—is the most spectrally efficient and therefore, Leap suggests, any wireless provider selecting a different technological approach is inefficient. The apparent conclusion Leap wants the Commission to draw is that any non-CDMA supplier who might be constrained by the cap should somehow not be permitted to expand. Leap also appears to want the Commission to immediately require all analog uses of wireless spectrum to be enjoined in order to promote spectrum conservation, without any apparent concern for the tens of millions of cellular analog users who rely on this technology.

There are a number of errors in this argument. First, as already noted, the Commission has commendably eschewed the role of dictating technology choices, recognizing that the market

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by adjusting other inputs – in this case more expensive transmission and receiving hardware").

[61] 39 GHz Report and Order and Second NPRM, 12 FCC Rcd 18600, ¶61 (1997).

will produce efficient outcomes.[62] Certainly, Leap has put forth no evidence substantiating its claim that the Commission should now depart from this practice and favor one type of digital technology over any other.

Second, Leap ignores the fact that Commission policy requires cellular carriers to support analog technology.[63] Thus, as a matter of both law and fact, incumbent carriers are not starting with a clean slate. They and their customers have invested in particular handsets, network equipment, and other assets that are designed to work with a particular technology. Other CMRS providers also have an interest in offering roaming services to their customers using AMPS networks.[64] For cellular carriers, entirely scrapping this investment in order to switch immediately to the latest and more spectrum-efficient technology may amount to premature obsolescence and be economically inefficient. Indeed, it is a common—and economically efficient—marketplace choice for capital and technologies of different vintages to co-exist in an industry, reflecting the fact that firms made their investments at different times. Exhorting all

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62 See, e.g., Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, *Notice of Proposed Rulemaking*, ET Docket No. 00-258, FCC 00-455, ¶21 (rel. Jan. 5, 2001) ("Advanced Services NPRM") ("The Commission traditionally has taken a flexible approach to standards and generally does not mandate a particular type of technology, leaving such an outcome to the marketplace"); Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order, 8* FCC Rcd 7700, ¶137 (1993) ("PCS Second Report and Order") (imposing a technological framework would stifle the introduction of new technology); Amendment of Subpart C of Part 100 of the Commission's Rules and Regulations Regarding Technical Standards for the Direct Broadcast Satellite Service, MM Docket No. 85-32, *Report and Order,* 60 Rad. Reg. 2d (P&F) 1539, ¶¶7-11 (1986).

63 See 47 C.F.R. § 22.901(d).

64 See Sprint PCS Comments at 10. In contrast, Leap has chosen not to offer roaming to its customers.

suppliers to scrap their embedded technology and worse yet, doing so by government fiat, is surely the wrong policy choice.[65]

B. Arguments Insisting That The Cap Is Not Actually A Constraint Should Be Disregarded.

Leap argues that the cap is not serving as a true constraint. This is simply a mistake of fact. As Drs. Gertner and Shampine note, market analysts report that at least one national carrier holds (or has some relationship with the holder) 45 MHz of spectrum in 20 of the top 50 MSAs, and at least one carrier holds 40 MHz in 32 of the top 50 MSAs.[66]

Leap also argues that claims of capacity constraints should not be credited because: "[e]ven as they claim capacity constraints, the large incumbent carriers continue to solicit more customers."[67] But there is no inconsistency here. Rational businesses do not wait until they have exhausted a valued input and only then start looking to expand. Even if carriers are not capacity constrained in most markets today (and as noted below, capacity constraints are in fact already binding in some markets), they may experience spectrum constraints over the relevant horizon. It is both prudent and economical for them to invest in additional spectrum in anticipation of future demands and requirements. Thus, carriers continue to solicit customers but need

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65 Sprint PCS recognizes that with or without the FCC's AMPS requirement, the spectrum cap penalizes cellular carriers that use part of their spectrum to support AMPS. Sprint PCS submits that some relief from the cap proportionate to the amount of spectrum dedicated to AMPS service is appropriate. Sprint PCS Comments at 9-10. Rather than carve out special exceptions and risk even further unintended consequences, the FCC should simply remove the spectrum cap immediately for all carriers and allow each to make its own decisions about its inputs and its technology choices.

66 Gertner and Shampine ¶27. See also Merrill Lynch, "Wireless Spectrum: Re-Auction Wrap-up,", at 8 (Jan. 31, 2001) (setting forth similar estimates).

67 Leap Comments at 15.

additional spectrum in order to ensure their continued ability to serve customers at the same quality of service. Wireless demand has grown dramatically in terms of both customers and minutes used per customer.[68]

Moreover, in the most densely populated areas, there have been reports of busy networks (especially at peak times) and dropped calls because CMRS networks are straining capacity. Access to spectrum is key to ensuring that CMRS providers can provide quality services to their customers. As CTIA demonstrated in its Comments, greater spectrum flexibility is needed to enable U.S. carriers to offer new, innovative services and technologies, and to maintain the United States' technological leadership in the world.

Some of the commenters also argue that retaining the cap will not impair the development and introduction of advanced wireless services. Leap argues that (1) advanced wireless services spectrum requirements might be met through existing CMRS allocations, (2) the increase in capacity requirements for new services will be offset by new technology, and (3) there is no particular social benefit to incumbent market participants integrating into advanced wireless services.

While certainly most industry observers and experts expect the next generations of wireless technologies to be more spectrally efficient, Leap provides no basis for its rather unique assertion that *no* additional spectrum will be required. Indeed, Leap is widely contradicted. To begin with, the FCC has already commenced proceedings to allocate additional spectrum in

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68 CTIA's Wireless Industry Indices, Semi-Annual Data Survey Results, at 23 (Table 5), 143 (Table 79) (rel. Nov. 2000).

recognition of this imminent requirement.[69] The Commission's actions are predicated upon the ITU's extensive study and subsequent recommendation that at least 160 MHz be allocated for these new services. The equipment suppliers who face the challenge of supplying these needs have similarly recommended substantial allocations be made in the U.S.[70] And certainly the companies already providing today's wireless services believe that additional spectrum is crucial to the provision of future services.[71]

Leap argues that there is no particular public policy reason to permit current wireless participants to participate in future services. This argument contravenes globally shared knowledge and opinion about the likely shape and scope of advanced broadband wireless services, and indeed about telecommunications generally. Leap's argument denies the

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69 See generally Advanced Services NPRM; Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, *Notice of Proposed Rulemaking and Order*, ET Docket 00-258 (rel. Jan. 5, 2001); Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement*, 14 FCC Rcd 19868 (1999).

70 See, e.g., Nokia Comments filed in ET Docket 00-258 at 3 ("It is our belief that 2x15 MHz [30 MHz] per license at a minimum is required to facilitate cost effective product implementation and allow for ubiquitous deployment of 'full' 3G services"); Nortel Networks Comments in ET Docket 00-258 at 3-4 (advocating 160 MHz of additional spectrum is needed to meet advanced wireless needs, on a phased in basis, with "a minimum block size per operator of 20 MHz, consisting of corresponding 10 MHz paired blocks"); Ericsson Comments in ET Dkt. No. 00-258 at 6-7, 13 (at least 160 MHz of additional spectrum is needed for advanced wireless services in all regions by the year 2010, with much of that spectrum needed in the US before that date, along with 30 MHz license blocks).

71 See, e.g., Verizon Wireless Comments at 17-22; Cingular Wireless Comments at 34-38.

substantial economies of scale and scope that obtain for wireless services,[72] and in doing so, contravenes all expertise in the field.[73]

The Commission itself has repeatedly acknowledged the presence of these efficiencies, and has appropriately adjusted its licensing policies to permit firms to capture such efficiencies.[74] In its initial licensing scheme for PCS, the Commission recognized that "participation by cellular operators in PCS offers the potential to promote the early development of PCS by taking advantage of cellular providers' expertise, economies of scope between PCS and cellular service, and existing infrastructures," and thus cellular participation in PCS would actually "foster a competitive market environment...."[75] In establishing its auction plan, the Commission also predicted that:

> Bidders are likely to be willing to pay more for two geographically contiguous PCS licenses than two equivalent non-contiguous licenses, and a single bidder may be willing to pay more for two licenses than would separate bidders.

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72 Leap Comments at 25-26 (denying both demand side and supply side efficiencies and remarkably asserting "there are relatively few efficiencies to be realized from the combination of wireless voice and data").

73 Upon closer scrutiny, Leap itself does not really support such a blanket denial. Rather it misconstrues Mr. Kelley's affidavit, which states simply that older, circuit-switched networks designed for voice are not well suited, and certainly not as efficient as packet-switched networks for transmission of data. That is a very different proposition than the one Leap asserts, since packet switched networks can readily handle voice as well as data and indeed for many purposes do not and cannot distinguish between voice and data applications.

74 The Notice recognizes that there are likely significant economies of scale and scope. Notice ¶34.

75 PCS Second Report and Order ¶104. See also Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, ¶103 (1994).

The Commission's predictions were subsequently proven to be correct; at least two independent econometric analyses confirmed this based upon evidence from the FCC auctions demonstrating local and global synergies. See Moreton and Spiller, "What's in the Air: Interlicense Synergies in the Federal Communications Commission's Broadband Personal Communication Service Spectrum Auctions," 41 J. Law & Econ. 677, 687-88, 708 (1998); Lawrence M. Ausubel, Peter Cramton, R. Preston McAfee, and John McMillan, Synergies in Wireless Telephony: Evidence from the Broadband PCS Auctions, 6 J.Econ.& Management Strategy 497 (1997).[76]

In addition, many commenters other than Leap believe that there are substantial scope economies between existing mobile voice service and future advanced wireless services.[77] It is unsurprising, then, that each of the major wireless carriers has announced its efforts to test and develop advanced wireless technology. Their investments have been extensively documented by the FCC in its most recent report to Congress.[78] These efficiencies serve consumer interests.

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76 Consistent with his academic work, in his consulting piece for Leap Dr. Cramton never challenges the proposition that substantial efficiencies exist. In fact, his entire discussion of the benefits of the cap are contingent on the assumption that the CMRS markets are not competitive—a factual assumption which is incorrect and which Dr. Cramton himself does not believe to be true here (This CMRS "competition has lead to clear gains for consumers through lower prices and greater choices'). Id. ¶8. The benefits he perceives all relate back to the auctioning of PCS spectrum, leaving him with only the assertion that the cap is needed as an "insurance policy." Id. He similarly assumes away the fact that additional spectrum will be required, based solely upon the companion affidavit of Mark Kelley. As discussed above, Mr. Kelley's thoughts on the need for additional spectrum are fairly unique.

77 See, e.g., Verizon Wireless Comments at 17-22; Cingular Wireless Comments at 34-38; AT&T Wireless Comments at 6-7; Sprint PCS Comments at 11 (FCC should increase the cap in its advanced wireless allocation order "so that cap constrained carriers can acquire additional 3G spectrum and can begin using the spectrum immediately").

78 Fifth CMRS Report at 17700-17705.

Leap also overlooks the fact that its spectrum needs are much lower not only because it uses exclusively digital technology but also because it serves far fewer subscribers. It is not terribly surprising that Leap, whose Cricket service commanded a total of 190,000 customers in all of its markets as of December 31, 2000,[79] requires less spectrum than, for example, Verizon in New York City. Further, Leap has made clear that it is targeting a discrete set of users and services: consumers looking to substitute a CMRS phone for a fixed landline phone and willing to prepay. (Leap's advertising promotes its Cricket service as "[a]n affordable wireless alternative to traditional landline phone service").[80] Further, these target customers are very likely interested in the service primarily for local calls since Leap prices Cricket's long distance service at 15¢ per minute, rather high relative to other advertised long distance rates. Its data services are similarly described as local in nature, and seem to involve only low- to medium-speed applications.[81]

CTIA does not suggest that Leap's approach has some inherent value lower than those of larger regional or national carriers or any other CMRS provider. But by the same token, Leap's expressed disavowal of 45 MHz as 'more spectrum than it knows what to do with' should not be superimposed upon other carriers with differing plans. This contest among technology and market approaches should be welcomed, not ended by the regulatory fiat imposed by the spectrum cap.

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79 <http://www.leapwireless.com/bcindex.html>.

80 Id.

81 See id. ("Leap's approach to data is similar to the one used for Cricket. * * * We expect to expand our family of services to deliver simple, local, relevant products...").

IV. REMOVING THE CAP WILL NOT IMPEDE, AND IS LIKELY TO PROMOTE, THE FURTHER DEVELOPMENT OF CMRS COMPETITION IN RURAL AREAS.

Some commenters argue that removal of the cap will have unique consequences in rural areas. NRTC and NTCA, for example, insist that larger carriers may be licensed to serve rural areas but are failing to build out their systems. But there is no evidence that the licensing of larger carriers in MTAs has somehow foreclosed competitive growth in rural areas. As CTIA noted in its Comments, larger carriers have substantial incentives to ally themselves with rural carriers to extend their coverage and reduce their roaming costs.[82] The presence of the cap in fact limits the ability of large carriers to fund smaller companies by operation of the attribution rules and the uncertainties they create.[83] Moreover, there are a number of new wireless companies that are rolling out service across the U.S., including rural areas.[84] These companies include, for example, Blackfoot Communications and 3 Rivers Wireless, serving a variety of Montana communities,[85] PinPoint, with a small PCS footprint in Nebraska,[86] Cellular South, which through cellular and PCS systems serves rural markets in Mississippi, Alabama, and Florida,[87] Amica Wireless in central Illinois[88] and NPI Wireless in lower Michigan.[89]

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82 See CTIA Comments at 48-49.

83 Id.

84 A number of these can be identified or reached by their website links on <http://www.wirelessadvisor.com>.

85 <http://www.blackfoot.net/communications/coveragemain.html>.

86 <http://www.pnpt.com/pcs/>.

87 See <http://www.cellularsouth.com/calling_plans/analog_map.html>; <http://www.cellularsouth.com/calling_plans/digital_south_map.html>.

88 <http://www.amicawireless.com/pages/coverage.htm>.

Furthermore, the argument that larger carriers might somehow "hoard" spectrum in rural areas simply misapprehends the dynamics of these areas. As reported correctly by a publication sponsored by the National Telephone Cooperative:

> When constructing the wireless infrastructure in a rural or semi-rural area, carriers often build with the knowledge that growth will not quickly drive additional cell sites. The service costs are higher in rural communities than in urban areas because of the lower population densities, and the fixed costs often are higher. In larger markets, network elements (e.g., switches, cell sites) may average 80%-90% average capacity utilization, and growth is met by placing new network elements in an optimal location. In smaller markets, it may take several years to reach a high level of capacity utilization.[90]

Thus, the issue in rural areas is one of population density and economics, rather than the "availability of spectrum" claimed by NTCA in its Comments (at 4).[91]

Fundamentally, rural carriers rely heavily upon roaming revenues, and they have had to confront substantial decreases in per minute revenues for several years due to the influx of additional carriers in their service areas.[92] These roaming revenues, on a per minute basis, have

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89 <http://www.npiwireless.com/coverage.htm>.

90 National Telephone Cooperative, "Managing Wireless Capacity" Rural Telecommunications" (July/August 2000),Vol. 19, No. 4; at 28-35.

91 Even if there were perceived issues regarding buildouts, these could be directly addressed by the Commission's rules governing buildouts. See 47 C.F.R. §§ 22.946, 22.947; 47 C.F.R. § 24.203. The cap itself bears no direct relevance to how quickly larger carriers (or smaller carriers) construct their rural systems.

92 See, e.g., Wireless Week, Aug. 5, 2001, at 24 "Mingling Without Really Merging;" (noting that roaming fees account for about 43 percent of Dobson's total revenue and quoting Dobson executive as describing roaming as "a key part of our strategy").

experienced significant decline.[93] Whatever rural carriers' arguments may be for some special assistance, the spectrum cap itself is not the answer.

V. THE ALLEGED "BRIGHT-LINE" BENEFITS OF THE CAP ARE ILLUSORY.

The proponents of retaining the spectrum cap cling to the notion that the spectrum cap is a "bright line" that provides certainty and eases the Commission's regulatory burden by avoiding case-by-case review of transactions.[94] These arguments have no basis in fact. As demonstrated by CTIA in its comments, the spectrum cap in application is anything but a "bright line."

Further, the spectrum cap does not ease the Commission's regulatory burden, nor does it provide useful "certainty" to CMRS providers. CMRS providers are only certain that acquisitions above the cap are prohibited; the Commission has made quite clear that transactions below the cap will not automatically be approved—in other words, the spectrum cap does not provide a "safe harbor," and therefore provides no certainty of any benefit to CMRS providers.[95] Indeed, the Commission's recent decision approving the VoiceStream-DT merger includes a discussion of CMRS competition concerns notwithstanding the fact that the cap was not implicated by the combination.[96] Plainly, the Commission's resources are not preserved by the

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93 See Merrill Lynch, Linda J. Mutschler, Nacemah Lajoie, "The Next Generation IV" at 40-42 (Mar. 10, 2000).

94 Leap Comments at 19, 31-32; WorldCom Comments at 7.

95 As Verizon observes, "the notion that the spectrum cap confers a benefit on carriers by reducing the burden of securing approval of CMRS acquisitions makes no sense.... The only 'market certainty' generated by the spectrum aggregation limits is that CMRS providers are unable to acquire the spectrum that will be necessary..." Verizon Wireless Comments at 23-24.

96 See VoiceStream Wireless Corporation and Deutsche Telekom AG, IB Docket No. 00-187, *Memorandum Opinion and Order*, FCC 01-142, ¶¶79-92 (rel. April 27, 2001) (FCC analyzes allegations of competitive harm as a result of the proposed transaction notwithstanding the fact the "the Applicants have certified that...grant of the application

cap, because transactions are reviewed for CMRS competition concerns in any event.[97] There is no rational basis for retaining the cap to preserve administrative efficiency.

Finally, contrary to arguments made by the cap's proponents, the theoretical availability of waivers of the spectrum cap is not a suitable alternative to lifting the cap.[98] As the relative dearth of waiver requests demonstrates, the Commission's waiver process—requiring detailed economic or engineering data for a particular market[99]—is of no practical use. To make the showing sought by the Commission, parties would be required to divulge their specific future business plans to the public and their competitors, including where they perceive future demand to be most significant, and where they consider their networks to be most vulnerable.[100] Notwithstanding such disclosure, there is no guarantee that the waiver request would be granted. Because of these inherent shortcomings, carriers likely forego the opportunity to enter into efficiency-enhancing transactions that would require waiver of the spectrum cap.

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would not violate the CMRS spectrum aggregation rule, and we agree with the Applicants' assessment." (citations omitted) Id. at ¶79). See also First Biennial Review Order ¶56 n.138; Applications of SBC Communications Inc. and BellSouth Corporation, WT Dkt. 00-81, *Memorandum Opinion and Order*, DA 00-2223, ¶24 (rel. Sept. 29, 2000).

97 To conserve resources, the Commission can consider (as it often does) the competitive analysis performed by the DOJ in its antitrust review of a particular transaction.

98 See, e.g., Leap Comments at 20; WorldCom Comments at 10-12.

99 See First Biennial Review Order ¶82.

100 See id. (requiring that CMRS providers "credibly demonstrate that in a particular geographic area the spectrum cap is currently having a significant adverse affect on its ability to provide 3G or other advanced services").

VI. REVIEW OF PROPOSED MERGERS AND ACQUISITIONS BY THE FCC AND THE FEDERAL ANTITRUST AGENCIES IS SUFFICIENT TO PROTECT COMPETITION.

Concentration beyond some level under certain conditions can produce market power. Such concerns, however, are properly addressed through antitrust review and the Commission's Section 310(d) process, applying the same competition analysis used to review horizontal mergers in other industries. As demonstrated in CTIA's comments, the CMRS business is far from an infant industry. Licenses have been obtained, systems have been constructed, and services have been made available to consumers by new entrants for several years, with increasing shares of both minutes and subscribers.[101] To the extent that the cap was beneficial in the context of the transition of these new entrants from nascence to established providers of service, that transition is complete.[102] In these circumstances, the antitrust authorities and the FCC are quite capable of preventing undue concentration without the inherent costs of a cap. Review and enforcement under these laws will prohibit anticompetitive acquisitions but allow those that are efficient.

Leap raises several objections to the use of case-by-case analysis by the FCC and federal antitrust authorities to ensure that the CMRS business remains competitive. As to the FCC, Leap is concerned that the FCC will not be able to review joint ventures or other arrangements that do not transfer control of licenses but that pose a threat to competition.[103] First, Congress has

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101 CTIA Comments at 15-22.

102 Thus, Leap's suggestion that antitrust review of transactions would not sufficiently protect competition because the CMRS business is an "emerging market" (Leap Comments at 33) is factually incorrect.

103 Leap Comments at 31-32.

carefully established the extent of FCC jurisdiction under Section 310(d), and Leap has not offered any basis for second-guessing that legislative judgment. Second, the types of arrangements described by Leap in any event fall within the reach of the antitrust laws.

Leap expresses several concerns as to the efficacy of antitrust review of transactions. As an initial matter, Leap is concerned that some spectrum transactions would fall below the HSR reporting threshold of $50 million and therefore would not be reportable.[104] However, transactions that fall outside of the HSR reporting thresholds nonetheless remain within the jurisdiction of the Clayton and Sherman Acts. Just as transactions were investigated prior to the enactment of Hart Scott Rodino in 1976, the antitrust agencies may investigate *sua sponte*, or concerned consumers, wholesalers and/or competitors can seek governmental or private actions.

Leap also doubts whether the DOJ and FTC have the resources to provide full review to every spectrum transaction that may pose competitive concerns.[105] While the antitrust agencies' resources are of course not unlimited, two points must be noted. First, even if some transactions may not receive full antitrust review, it does not follow that the preferable default is to block such transactions, as the cap does now.[106] Second, Leap suggests that the antitrust agencies may

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104 Id. at 32.

105 Id. at 32-33.

106 The risk of allowing such transactions is mitigated by the increased importance of national CMRS providers that typically set prices on a national basis rather than exploiting differences in competitive conditions in specific local markets. For example, AT&T offers identical local plans in the ten markets in which it operates with the most competitors (seven or eight: Tucson, AZ, Jacksonville, FL, Austin, TX, Atlanta, GA, Seattle, WA, Phoenix, AZ, Denver, CO, Charlotte, NC, Sacramento, CA, and Salt Lake City, UT) and in the ten markets in which it operates with the fewest competitors (three to five: Bellingham, WA, Omaha, NE, Yakima, WA, Eugene, OR, Lincoln, NE, Logan, UT, Port Angeles, WA, Johnston, PA, Wheeling, WV, and Steubenville, OH.). See local calling plans at: <http://attwireless.com/personal/explore>.

neglect a large portion of potentially anticompetitive transactions because, it claims, in 1999 the DOJ issued "second requests" in less than five percent of all pre-merger notifications, and filed suit in less than half a percent. However, the fact that the DOJ did not issue a second request as to a particular merger is by no means evidence that the merger was in fact anticompetitive but escaped attention. Rather, it is more likely that the DOJ determined that the great majority of transactions posed no competitive problems. This is an important advantage of case-by-case review over a *per se* prohibition such as the cap.

Finally, Leap is concerned that antitrust review cannot address potential competition. Leap argues that "it remains unclear even whether the Clayton Act prohibits mergers that will restrict only *potential* [as opposed to actual] competition."[107] The suggestion that the Clayton Act may not prohibit mergers that restrict only potential competition is simply wrong. The Clayton Act prohibits any merger whose effect "may be substantially to lessen competition" and the agencies have challenged some mergers deemed to reduce potential competition, and they have considered (but did not ultimately bring) such challenges in additional cases. As an example of the former, the Division blocked the purchase of one of three orbital slots that can be used to offer direct broadcast satellite multichannel video programming services by a group of cable television companies. The Department believed that the potential competition offered by an independent company using the third orbital slot should be preserved.[108]

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107 Leap Comments at 33; Cramton ¶60.

108 See U.S. Department of Justice Antitrust Division Annual Report FY 1999, Merger Enforcement Program, at 10. <http://www.usdoj.gov/atr/public/4523.pdf>. ("In *United States v. Primestar*, the Division challenged an acquisition that raised the risk that the cable industry would be able to impede competition from a new technology. Cable television companies, which for many years have dominated markets for the distribution of multichannel video programming, are beginning to face competition from firms using

Moreover, CTIA respectfully suggests that Leap is confusing potential competition *theory* under the antitrust jurisprudence with a wholly different concept, that is, that it may be difficult to measure the competitive significance of spectrum that has been assigned but perhaps not yet fully or even partially built out. The latter is far more a matter of how to measure an individual firm's market share and the extent of its entry, a point conceptually different than the longstanding debate on whether or not firms outside a relevant market should be included in market analysis.[109]

The contention that a cap is superior is false. A cap permits one to avoid the hard competitive analysis, and does not ensure a reasoned pro-competitive outcome.

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new technology to distribute programming through high-powered satellites. The Division sued to block an effort by five of the nation's largest cable companies, acting through their joint venture Primestar, to acquire one of only three orbital slots available to provide such high-power direct broadcast satellite service. The parties abandoned the transaction before trial").

109 See generally Ameritech Corp. and SBC Communications, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 14712, ¶64 (1999) ("Under the actual potential competition doctrine, a merger between an existing market participant and a firm that is not currently a market participant, but that would have entered the market but for the merger, violates antitrust laws if the market is concentrated and entry by the nonparticipant would have resulted in deconcentration of the market or other pro-competitive effects." (citations omitted)).

VII. CONCLUSION

The record in this proceeding demonstrates that the CMRS spectrum cap is unnecessary and worse, counterproductive. CTIA therefore respectfully urges the Commission to move promptly to repeal it.

Respectfully submitted,

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May 14, 2001

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 14th day of May, 2001 copies of the foregoing Reply Comments of the Cellular Telecommunications & Internet Association were delivered by hand, unless otherwise indicated, to the following parties:

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