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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
2000 Biennial Regulatory Review - Spectrum )  
Aggregation Limits for Commercial Mobile )  
Radio Services )  
)

WT Docket No. 01-14

REPLY COMMENTS OF SOUTHERN LINC

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## EXECUTIVE SUMMARY

Southern Communications Services, Inc., d/b/a Southern LINC, believes that the spectrum cap should be raised to allow Commercial Mobile Radio Service ("CMRS") providers to acquire an incremental amount of spectrum such as 5 MHz or, at most, 10 MHz. This approach will give the Federal Communication Commission ("Commission") the opportunity to determine the effect on competition of raising the cap. If the spectrum cap is raised, and competition in *all* CMRS markets continues to flourish, the Commission can then decide whether it is appropriate to further increase the spectrum cap or eliminate the spectrum cap regulations.

By raising the spectrum cap instead of eliminating it, the benefits that result from the spectrum cap regulations will continue. Specifically, the spectrum cap regulations: (1) guarantee that a certain number of competitors remain in the market; (2) encourage licensees to conserve spectrum; (3) enable new carriers to enter the market; and (4) provide a bright line rule that facilitates review under Section 310(d) of the Communications Act.

If the Commission decides to modify or eliminate the spectrum cap regulations, then the Commission must fully utilize its other regulatory tools to ensure that effective competition remains in all segments of the CMRS market. The Commission must continue to carefully review applications to determine whether the public will benefit from each license assignment and transfer. In addition, the Commission should use its powers under Sections 201 and 202 of the Communications Act to investigate whether a licensee is engaging in predatory pricing, charging monopolistic prices, or discriminating against smaller companies. Sections 201 and 202 should be stringently enforced if the spectrum

cap regulations are modified or eliminated to ensure that companies do not engage in these practices, particularly in markets that are concentrated. In addition, the Commission should initiate a Notice of Proposed Rule Making to strengthen its enforcement rules so that all carriers comply with the Commission regulations. This effort will ensure that no one carrier can detrimentally affect competition or act in an anti-competitive manner.

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	)	

**REPLY COMMENTS OF SOUTHERN LINC**

**I. INTRODUCTION**

Southern Communications Services, Inc., d/b/a Southern LINC ("Southern") hereby respectfully submits these Reply Comments in the above-captioned matter.<sup>1</sup> The Federal Communications Commission ("FCC or Commission") has commenced this Notice of Proposed Rule Making ("NPRM") to determine whether competitive or other developments in the Commercial Mobile Radio Service ("CMRS") market<sup>2</sup> warrant the elimination or modification of the regulations that limit the amount of spectrum that a licensee can acquire in any geographic area in the cellular, broadband PCS, or SMR services (commonly referred to as the "spectrum cap regulations"). Southern acknowledges, as some parties have suggested, that the dynamic

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<sup>1</sup> *In the Matter of 2000 Biennial Regulatory Review - Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, *Notice of Proposed Rule Making*, (Released January 23, 2001) (*NPRM*).

<sup>2</sup> The CMRS market combines the markets for cellular, PCS, and SMR service into one market. As discussed below, individual markets within the greater CMRS market have different competitive characteristics.

nature of the wireless market requires the ability to acquire more than the current 45 MHz of spectrum. Nevertheless, Southern does not believe that the evidence presented thus far warrants immediate and complete elimination of the spectrum cap regulations. As set forth below, Southern recommends that if the Commission does proceed to address the spectrum cap regulations in the near future, it should do so through incremental adjustments to the cap. Through incremental adjustments, competitors can acquire additional spectrum beyond the existing 45/55 MHz limits, while the Commission can determine the subsequent effects on competition in the CMRS market. If the spectrum cap is increased, and competition continues to flourish, the Commission can then decide whether to further increase the spectrum cap or eliminate the spectrum cap regulations in a later regulatory review. If the Commission decides to eliminate the spectrum cap entirely and, as a direct result of this proceeding, competition decreases to levels that adversely affect consumers, then the Commission will find it extremely difficult – if not impossible – to reimpose limitations on spectrum ownership.

Although Southern supports an increase in the spectrum cap, the Commission must still exercise its statutory responsibilities to ensure that *all* CMRS markets remain competitive. Southern is particularly concerned that some CMRS market segments, such as the trunked SMR dispatch service segment, have not remained competitive despite the enforcement of the spectrum cap regulations.

## **II. BACKGROUND**

Southern operates a state-of-the-art digital wide-area SMR system covering 127,000 square miles and serving over 200,000 customers in Georgia, Alabama, the panhandle of Florida, and southeastern Mississippi. It provides the most comprehensive geographic coverage of any wireless service in Alabama and Georgia. Its system is not limited to major metropolitan areas

and highway corridors but serves the extensive rural territory within its footprint as well. In fact, Southern serves areas of Florida, Georgia, Mississippi, and Alabama that are not served by any other advanced wireless dispatch provider. In part because of this expansive and reliable coverage, Southern's service is widely used by statewide public safety agencies, school districts, rural local governments, public utilities, and emergency services such as ambulance companies. The continued viability and growth of Southern's system is important to all of its current and potential customers but is particularly important to the public safety community that uses it on a daily basis. Commercial entities and other government entities in both urban and rural areas also utilize Southern's system, which operates in the 800 MHz bands using Motorola's iDEN technology and offers dispatch, interconnected voice, Internet access, and data transmission services.

### **III. DISCUSSION**

Quite simply, the regulation of spectrum is probably the single most important activity that the Commission undertakes with regard to the CMRS industry. The Commission has forborne rate regulation of the CMRS industry, and it has also forborne the application of other consumer protection types of regulations because of the competitive nature of the marketplace. Overall, availability of spectrum is limited, and the Government generally controls access to it and dictates how it may be used. Without access to spectrum, companies cannot compete for customers in the marketplace, no matter their service offering. It is the allocation of spectrum by government decree that differentiates the wireless industry from the multitude of other industries, particularly with regard to market entry.

Given the importance of spectrum and the Commission's key role in controlling access to it, the Commission must not address the issue of spectrum access in a vacuum, without regard to

issues raised in other proceedings, including the availability of 3G spectrum<sup>3</sup> and the possibility of a secondary market for spectrum.<sup>4</sup> Instead of focusing in isolation on the spectrum aggregation limits for the cellular, PCS, and SMR carriers, the Commission should focus on an overall regulatory framework for spectrum management that takes into account the multiplicity of issues involving spectrum and the mobile wireless industry. Ideally, this regulatory framework would eliminate “historical baggage” and bring consistency to the management of spectrum. Only within such a framework will the Commission be able to strike a balance among competing goals: minimizing regulations, maintaining competition, and ensuring public benefits.

With regard to the specific issues raised in this NPRM, the Commission has requested comments on whether spectrum aggregation limits should be modified or eliminated, including the spectrum cap.<sup>5</sup> Fifteen parties filed comments addressing this issue. Southern is sympathetic to companies who seek to obtain additional spectrum. Indeed, Southern would like to see the Commission make additional spectrum available that is suitable for SMR and usable with existing technology.<sup>6</sup> Southern believes that the spectrum cap regulations have served a useful

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<sup>3</sup> *In the Matter of Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, Petition for Rulemaking of Cellular Telecommunications Industry Association Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT-2000, Amendment of the U.S. table for Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile Satellite Service*, ET Docket No. 00-258, RM-9920, RM 9911, Notice of Proposed Rule Making and Order, (Released January 5, 2001).

<sup>4</sup> *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Notice of Proposed Rule Making, (Released November 27, 2000).

<sup>5</sup> NPRM at ¶ 1.

<sup>6</sup> While the Commission has made CMRS spectrum “fungible,” true fungibility is only possible when technology exists to make it so. For example, technology is not available in the

purpose in assuring, albeit only in the cellular and PCS markets, that there are a number of viable competitors offering service to the public. Southern also believes that a case has been made that some relief from the current spectrum cap limits may be appropriate. Accordingly, the best approach would be to modify the spectrum cap incrementally rather than completely eliminating it. By increasing the amount of spectrum carriers can acquire gradually, the Commission can determine the resulting effect on competition before eliminating the spectrum cap restrictions altogether. Therefore, Southern supports the proposal of the Coalition of Independent Cellular Carriers (the "Coalition") to increase the spectrum cap to "allow private enterprises to initiate new technologies and invest new capital while preventing the growth of monopoly power."<sup>7</sup> In doing so, Southern does not believe that the spectrum cap should be raised immediately to 70 MHz as proposed by the Coalition.<sup>8</sup> Southern believes the Commission should increase the spectrum cap by a more modest, incremental amount such as 5 MHz or, at the most, 10 MHz to allow licensees to provide additional service and to ascertain how this change will affect competition.

**A. The Spectrum Cap Has Promoted Competition In Some CMRS Markets**

Two things are striking regarding the relationship between the spectrum cap and competition. The first is that the spectrum cap established the underlying structure of the competitive CMRS marketplace by allowing the entry of multiple competitors into each geographical market from the outset. Meaningful competition exists because of the spectrum

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marketplace to enable carriers outside the 800 MHz SMR bands to offer push-to-talk, one-to-one, one-to-many dispatch service in combination with interconnected cellular telephone in one handset.

<sup>7</sup> Comments of The Coalition of Independent Cellular Carriers at 7 (*Coalition Comments*).

<sup>8</sup> *Id.*

cap, and to eliminate it is to eliminate a key underpinning of the competitive market, in turn putting the CMRS market at great risk of falling backwards into an oligopoly. Indeed, in this respect, Southern concurs with the comments of the Office of Advocacy, U.S. Small Business Administration that the Commission itself has not indicated that spectrum aggregation limits have ceased to serve the public interest by promoting competition.<sup>9</sup>

Competition in CMRS does exist. Many commentators believe that since the Commission last considered the necessity of spectrum cap regulations,<sup>10</sup> the CMRS market has evolved and competition has increased.<sup>11</sup> The Cellular Telecommunications & Internet Association pointed out that the cost of mobile wireless services has decreased while companies continue to provide new and innovative services.<sup>12</sup> Cingular Wireless stated that since January of 1998, the percentage of the U.S. population that can receive coverage from at least five mobile telephone licensees has risen from 57 percent to 69 percent.<sup>13</sup>

Southern generally agrees that competition has increased in the cellular and PCS segments of the CMRS market, which have been most directly affected by spectrum cap regulations. The second striking thing about the relationship between the spectrum cap and

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<sup>9</sup> Comments of the Office of Advocacy, U.S. Small Business Administration at 2 n.5.

<sup>10</sup> *In the Matter of Amendment of 1998 Biennial Regulatory Review - Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Cellular Telecommunications Industry Association's Petition for Forbearance from the 45 MHz CMRS Spectrum Cap, Amendment of Parts 20 and 24 of the Commission's Rules-Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, WT Docket No. 98-205, WT Docket No. 96-59, GN Docket No. 93-252, *Report and Order* 15 FCC Rcd 9219 (1999) ("*Spectrum Cap Order*").

<sup>11</sup> Comments of Cellular Telecommunications & Internet Association at 15 (*CTIA Comments*); Comments of Cingular Wireless LLC at 25-27 (*Cingular Comments*); Comments of Sprint PCS at 3-6 (*Sprint Comments*); Comments of Verizon Wireless at 8-12 (*Verizon Comments*).

<sup>12</sup> *CTIA Comments* at 15.

competition, however, is that the existence of the cap has not ensured competition in all *segments* of the CMRS market.<sup>14</sup> A more detailed analysis of the CMRS market shows that while competition in the cellular and PCS markets is increasing, the digital SMR market is now "dominated by one provider."<sup>15</sup> This dominance has resulted because Commission regulations do not prohibit one competitor from owning all the spectrum available for service in the SMR market.<sup>16</sup> At the same time, the Commission has not blocked consolidation in the SMR market on grounds of diminished competition and subsequent loss of public benefits. Thus, while spectrum cap regulations assure that a certain *number* of competitors will exist in each cellular and PCS market, one competitor can control all the SMR spectrum in each market – which is rapidly becoming the case. The growth in competition in the cellular and PCS markets camouflages the lack of competition in the SMR market. While spectrum cap regulations have

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<sup>13</sup> *Cingular Comments* at 26.

<sup>14</sup> In discussing the CMRS industry, Cingular claimed that all SMR service providers, up to ten in some markets, should be included in the analysis of the number of market competitors. *Cingular Comments* at 27. This statement about the number of SMR competitors is misleading. In actuality, there are only four effective SMR competitors who can offer direct competition to cellular and PCS carriers by providing interconnected telephony services: Southern LINC, Nextel (including Nextel Partners), Pacific Wireless, and Chadmoore (which Nextel is acquiring). Many SMR licensees are licensed at only one site within a large geographic market, and thus their SMR spectrum holdings are negligible. The ability of such licensees to compete with CMRS providers is highly constrained because they lack capacity, significant market coverage, and they use analog technology.

<sup>15</sup> *In the Matter of Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 00-193, *Notice of Proposed Rule Making* 15 FCC Rcd 21628, 21633 ¶ 11 (2000).

<sup>16</sup> The Commission, interestingly, allows a carrier's total amount of SMR spectrum to count for a maximum of 10 MHz for spectrum cap purposes. 47 C.F.R. § 20.6(b).

been an important tool for assuring a certain *number* of competitors in the cellular/PCS markets, they alone do not guarantee competition in every segment of the CMRS markets.<sup>17</sup>

**B. The Spectrum Cap Regulations Should Not Be Eliminated Because Of The Benefits That Result From Them**

The public benefits from spectrum cap regulations. As Leap Wireless ("Leap") and The Telephone and Data Systems stated in their comments, spectrum cap regulations provide benefits that might not occur if they were completely eliminated.<sup>18</sup> Spectrum cap regulations guarantee that a certain number of competitors remain in the market. The Commission found that consolidation of the CMRS markets to as few as three competitors would adversely affect competition.<sup>19</sup> Currently, the telecommunications industry is going through a period of consolidation.<sup>20</sup> Southern is concerned that if spectrum cap regulations were eliminated, as a number of commentors requested,<sup>21</sup> one licensee in the cellular or PCS bands could acquire enough spectrum to exercise market dominance – as now exists in the SMR band – and engage in anti-competitive behavior such as predatory pricing.<sup>22</sup>

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<sup>17</sup> For example, the trunked SMR dispatch market is a separate sub-market of the CMRS market. Trunked SMR dispatch is the only service that is capable of providing customers with both advanced, digital dispatch and interconnected voice in the same handset. In the trunked SMR dispatch service, a single competitor has acquired most of the spectrum.

<sup>18</sup> Comments of Leap Wireless International, Inc at 8-10, 27-29 (*Leap Comments*); Comments of Telephone and Data Systems, Inc. at 5 (*Telephone and Data Comments*).

<sup>19</sup> *Telephone and Data Comments* at 4; *Spectrum Cap Order* at 9240 ¶ 44.

<sup>20</sup> *Leap Comments* at 12; Comments of Worldcom, Inc. at 6-7 (*Worldcom Comments*); Also See *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fifth Report*, 15 FCC Rcd 17660, 17669 (2000).

<sup>21</sup> Comments of AT&T Wireless Services, Inc. at 17; *Cingular Comments* at 42; *CTIA Comments* at 49; Comments of Nextel Communications, Inc. at 1; Comments of The Rural Telecommunications Group and the Organization for the Promotion and Advancement of Small Telecommunications Companies, at 1; *Verizon Comments* at 28.

<sup>22</sup> See also *Leap Comments* at 10-12.

The spectrum cap regulations also encourage innovative solutions by licensees to conserve spectrum.<sup>23</sup> Under the current FCC regulations, a licensee is allowed to use 45 MHz of spectrum. Therefore, a licensee will be motivated to use the 45 MHz of spectrum as efficiently as possible since it is unable to acquire additional spectrum. Licensees are encouraged to seek technological solutions that will maximize spectrum efficiency. Indeed, given the limited amount of spectrum allocated to SMR that is usable with existing technology, Southern has been forced to manage every channel it possesses with the greatest efficiency possible.

Not only do the spectrum cap regulations encourage innovation and promote competition, but they also have "enabled the entry of new and . . . highly innovative carriers into the CMRS marketplace," which produces significant benefits for the public.<sup>24</sup> When new carriers enter the market, they often focus on serving small niche markets that the larger CMRS providers overlook. Society benefits from small niche markets being served because: (1) through servicing these small niche markets, a new carrier can develop innovative products that are reliable, convenient, and less expensive than their larger counterparts; and (2) as the small niche markets grow, the economy grows.<sup>25</sup> Not only do new carriers provide competition; they also create innovative products and develop new markets.

When considered in conjunction with auctions, the potential elimination of the spectrum cap does not bode well for regional and niche players that seek to enter a market or that seek additional spectrum within a market. Smaller players who lack national networks cannot justify the massive investment that would be required to purchase spectrum in a world without the

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<sup>23</sup> *Leap Comments* at 27-29.

<sup>24</sup> *Leap Comments* at 8.

<sup>25</sup> See Clayton Christensen, Tohamas Craig, and Stuart Hart, *The Great Disruption*, Foreign Affairs, March/April 2001 at 80.

spectrum cap. This is true, in spite of the desirability of their services to their target markets and in spite of the fact that they may be profitable business enterprises competing with extremely debt-laden unprofitable companies for spectrum.

Another advantage to the spectrum cap is that it provides a bright line rule that facilitates review under Section 310(d) of the Communications Act.<sup>26</sup> Therefore, Southern agrees with Leap and the Telephone and Data Systems that the public generally benefits from the spectrum cap regulations.<sup>27</sup> By increasing the spectrum cap, rather than eliminating it, the public will still receive the benefits of the spectrum cap while the Commission evaluates the changing marketplace.

**C. Spectrum Cap Regulations Should Not Be Eliminated Because The CMRS Market Is Still Highly Concentrated And The Trend Is Moving Towards The Consolidation Of Carriers Into A Few National Players**

Even though competition has increased in the CMRS market overall, it is still highly concentrated.<sup>28</sup> Sprint found that the average Herfindahl-Hirschman Index ("HHI")<sup>29</sup> in the top 25 markets has dropped from 5000 in January of 1996 to 2611 in January of 2001.<sup>30</sup> Although the HHI has fallen, an HHI of 2611 indicates that the top 25 CMRS markets are still highly concentrated. In addition, nearly one-third of the U.S. population receives coverage from less

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<sup>26</sup> *Leap Comments* at 30-31.

<sup>27</sup> *Leap Comments* at 8-10, 27-29; *Telephone and Data Comments* at 5.

<sup>28</sup> See *Sprint Comments* at 3-6.

<sup>29</sup> The Department of Justice and the Federal Trade Commission use the HHI to measure market concentration. When the HHI decreases, it indicates that the market is less concentrated than before. An HHI of over 1800 suggests that the market is "highly concentrated." 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41558 (September 10, 1992).

<sup>30</sup> *Sprint Comments* at 5.

than 5 CMRS providers.<sup>31</sup> If spectrum cap regulations are eliminated, the competitive gains that have been made over the past few years in the cellular and PCS markets could be eliminated as well. Therefore, Southern believes that instead of eliminating spectrum cap regulations, they should be modified to allow for an incremental increase in the amount of spectrum a CMRS provider can acquire. If the spectrum cap is increased incrementally, the Commission will be able to see the effect that raising the spectrum cap has on the cellular, PCS, and SMR markets. Southern believes that the Commission can increase the spectrum cap by as much as 5 MHz or perhaps even 10 MHz. Even an increase of 1.5 MHz would benefit CMRS providers. Cingular requested a waiver of the spectrum cap to acquire an additional 1.5 MHz of spectrum,<sup>32</sup> while BellSouth sought a waiver of .5 MHz of spectrum.<sup>33</sup> However, immediately increasing the spectrum cap by as much as 25 MHz, as proposed by the Coalition, could detrimentally affect competitive CMRS markets.

Southern agrees with concerns raised by commentators regarding the trend over the last couple of years of consolidation of carriers across markets to form huge national carriers.<sup>34</sup> With few – if any – markets left to acquire *across* the country as they barrel towards the nirvana of greater operating efficiencies, it is obvious that these national carriers would further consolidate *within* markets if the spectrum cap were eliminated. It may come to pass that only one national CDMA carrier, one national TDMA carrier, and one national GSM carrier may remain absent the

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<sup>31</sup> *Leap Comments* at 6.

<sup>32</sup> *Wireless Telecommunications Bureau Seeks Comment on Cingular Wireless LLC's Request for Waiver to Exclude 1.5 MHz of SMR Spectrum from the CMRS Spectrum Cap*, Public Notice, DA 01-665 (released March 14, 2001).

<sup>33</sup> *BellSouth Corporation v. FCC* 162 F.3d 1215, 1220 (D.C. Cir. 1999).

<sup>34</sup> *Telephone and Data Comments* at 6, *Worldcom Comments* at 6-7.

cap – with the new spectrum policy ensuring an end to the growth currently enjoyed by regional carriers and niche players, if not their ultimate demise.

**D. The Spectrum Cap Limits Should Be Increased Incrementally To Allow For The Development Of Third Generation Wireless Services**

Cingular and Verizon stated that the provision of third generation wireless services ("3G services") could be detrimentally affected by the spectrum cap regulations.<sup>35</sup> Cingular is concerned that "it may not even be *possible* to provide the more spectrum-intensive high-speed Internet access and streaming video services to multiple subscribers on a commercial basis within 45 MHz of spectrum."<sup>36</sup> Verizon believes that that CMRS providers have had to deploy most of their spectrum to meet the demand for mobile voice services so that little spectrum remains available for the widespread deployment of other spectrum intensive applications, such as broadband services.<sup>37</sup> Although Verizon and Cingular state that they need additional spectrum for 3G services, a great deal of uncertainty still surrounds those services. What services will consumers desire, when will the market for these services evolve, and most importantly, how spectrum-intensive will these new services be, are all important questions that have yet to be answered. While some 3G advocates would say "build it and they will come," the market for these services (still very vaguely defined) is likely to remain a work in progress and suited to a more incremental approach. In addition, given the current economic climate, the investment community may prove a harder "sell" when seeking financing for immediate, full-blown national deployment of 3G systems and services. An approach that incrementally increases spectrum cap limits will allow licensees to roll-out initial types of 3G services and, at the same time, will allow

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<sup>35</sup> *Cingular Comments* at 40; *Verizon Comments* at 18.

<sup>36</sup> *Cingular Comments* at 40.

<sup>37</sup> *Verizon Comments* at 18.

the Commission to monitor the competitive health of the market. If consumers desire the 3G services, and competition continues to thrive, then the Commission can decide whether to further increase the spectrum cap or eliminate the spectrum cap regulations altogether.

**E. If The Spectrum Cap Regulations Are Eliminated, The Commission Must Fully Utilize Its Other Regulatory Tools To Ensure That Markets Remain Competitive**

Should the Commission raise the spectrum cap or eliminate the cap entirely, it must then use its other regulatory tools to ensure that there is effective competition in all segments of the CMRS market. The main regulatory tool at the Commission's disposal is its ability to review all license assignments and transfers to ensure that the "public interest, convenience, and necessity will be served."<sup>38</sup> In applying the public interest test under Section 310(d), the Commission asks four questions: (1) whether the transaction would result in a violation of the Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of the Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Act or interfere with the objectives of that and other statutes; and (4) whether the transaction promises to yield affirmative public interest benefits.<sup>39</sup>

In determining whether the transaction will yield affirmative public interest benefits, the Commission "must weigh any harmful and beneficial effects to determine whether, on balance, the transaction is likely to enhance competition in the relevant markets."<sup>40</sup> This review consists

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<sup>38</sup> 47 U.S.C. § 310(d).

<sup>39</sup> *In re Applications of Neoworld License Holdings, Inc. and Hughes Electronics Corporation and Wilmington Trust Company, Liquidating Trustee*, DA 00-1092, *Memorandum Opinion and Order*, 15 FCC Rcd. 13410, 13413 ¶ 8 (2000).

<sup>40</sup> *Id.* at 13416 ¶ 16.

of determining the relevant market, assessing the effect on competition in that market, and analyzing whether transaction-specific public interest benefits will accrue.

A few commentors stated that the powers vested in the Commission, the Department of Justice and the Federal Trade Commission give the Federal Government the necessary regulatory tools to properly review the transfer of licenses.<sup>41</sup> Southern believes that this *may* be true, depending on how the regulatory tools are used. Southern would urge the Commission to continue its role of carefully reviewing applications to determine whether the public will benefit from the assignment or transfer of the licenses. In particular, the Commission must determine the effect on competition that the transfer or assignment of licenses will have in each market where the applicant conducts its business.<sup>42</sup>

Because market dominance is evidenced by anti-competitive market behavior, such as refusals to deal and predatory pricing, the Commission must undertake greater efforts to police CMRS markets that are concentrated, particularly if spectrum cap regulations are eliminated. In this regard, a regulatory tool that the Commission can utilize is its ability to require CMRS providers to charge just and reasonable rates, to engage in reasonable practices and not to discriminate.

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<sup>41</sup> *AT&T Comments* at 15-17; *Cingular Comments* at 30-34; *CTIA Comments* at 37-46; *Verizon Comments* at 14.

<sup>42</sup> For example, in a 310(d) review, it is important for the Commission to recognize that the CMRS market is not just one market but that there are sub-markets within the CMRS market. One such sub-market is trunked SMR dispatch service. Southern submits that there is still a market for true dispatch service and because trunked SMR dispatch service is a separate market, the Commission's 310(d) responsibilities, to carefully investigate and determine whether a proposed transfer or assignment of SMR spectrum serves the public interest, should include an assessment of whether the transfer will promote competition in the trunked SMR dispatch market.

Sections 201 and 202 of the Communication Act provide the Commission with the power to investigate whether a licensee is engaging in predatory pricing, charging monopolistic prices, or discriminating against smaller companies.<sup>43</sup> Southern believes that Sections 201 and 202 should be stringently enforced if the spectrum cap regulations are modified or eliminated. Southern is concerned that, if the spectrum cap regulations are modified or eliminated companies could engage in these prohibited practices, particularly if one carrier is able to dominate a market by acquiring a dominant amount of spectrum. Therefore, if the Commission decides to modify or eliminate the spectrum cap regulations, the Commission needs to take an active role in enforcing Sections 201 and 202 to ensure that competition remains robust.

In addition to investigating violations of Sections 201 and 202, the Commission should also streamline the complaint process for carriers. To do so effectively, Southern suggests issuing a Notice of Proposed Rule Making to address the shortcomings that exist in the current process. The current complaint process is burdensome and unpredictable for the complaining party. Furthermore, complainants are not given the opportunity to conduct meaningful discovery in order to build their cases. If a complaint is actually filed, the resolution process is lengthy. Even under the Commission's expedited docket, months can pass before a complaint works its way through the bureaucracy – to say nothing of preliminary negotiations and potential appeals. Because they face such an arduous process that may result in relief only after any relief would be

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<sup>43</sup> Section 201 states that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable." 47 U.S.C. § 201. Section 202 of the Communications Act states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services . . . or to make or give any undue or unreasonable preference." 47 U.S.C. § 202.

meaningful, parties are discouraged from ever filing complaints, in turn limiting the Commission's ability to enforce the provisions of Sections 201 and 202.

**F. Elimination Of Spectrum Cap Rules And Subsequent Diminishment Of Competition Could Require Less Regulatory Forbearance**

Elimination of the spectrum cap presents a regulatory trade-off for both the CMRS industry and the Commission. As Sprint PCS points out in its comments, the spectrum cap has proven to be an important factor in the Commission's deregulatory approach to the CMRS industry by engendering confidence that the CMRS industry *is* and *will remain* competitive.<sup>44</sup> Elimination of the spectrum cap and a subsequent diminishment of competition in the CMRS marketplace could put the Commission in a position where it could no longer justify regulatory forbearance because of the corrective forces provided by a vigorously competitive marketplace. Regulatory forbearance has, by and large, benefited the CMRS industry. It has allowed carriers greater flexibility in bringing products and services to market, in interacting with their customers, and in establishing business relationships with other carriers. Thus, regulatory forbearance has not only encompassed regulations that affect carriers' interaction with consumers – rates, terms and conditions of service, billing, anti-cramming measures – it has also encompassed regulations that govern carriers' interactions with each other. For instance, the Commission is currently considering in a proceeding whether to impose automatic roaming rules on the CMRS industry.<sup>45</sup> Many parties filed in opposition to such rules, citing the presence of multiple options for roaming partners in any given market and the operation of market forces as reasons why mandatory rules were unnecessary. In a consolidated marketplace, the Commission

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<sup>44</sup> *Sprint Comments* at 7-8.

<sup>45</sup> See *In the Matter of Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 00-193, *Notice of Proposed Rule Making*, (Released November 1, 2000).

may face greater pressures to impose such rules and find itself having to act as a frequent arbiter of disputes between carriers in such matters.

#### **IV. CONCLUSION**

Southern believes that the Commission should raise the spectrum cap gradually so that it can determine how competition in the CMRS marketplace is affected. If competition in the cellular, PCS, and SMR markets increases, then the Commission can decide whether the spectrum cap should be further raised or if the regulations should be eliminated. In addition, Southern requests that if the Commission decides to modify or eliminate the spectrum cap regulations, the Commission should initiate a Notice of Proposed Rule Making to strengthen its enforcement rules so that all carriers comply with the Commission regulations. This will ensure that no one carrier can detrimentally affect competition or act in an anti-competitive manner.

**WHEREFORE, THE PREMISES CONSIDERED,** Southern respectfully asks the Commission to consider these Reply Comments and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,



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Dated: May 14, 2001

**CERTIFICATE OF SERVICE**

I, W. Anderson do hereby certify that on this 14th day of May, 2001, a single copy (unless otherwise noted) of the foregoing "Reply Comments of Southern LINC" was mailed to the following:

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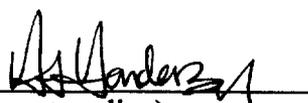
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