
**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services)	WT Docket No. 02-381
)	
2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services)	WT Docket No. 01-14
)	
Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and to Facilitate Capital Formation)	WT Docket No. 03-202
)	

To: The Commission

COMMENTS OF CINGULAR WIRELESS LLC

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December 29, 2003

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SUMMARY

Cingular opposes the adoption of new rules or policies designed to *require* incumbent carriers to provide service in rural areas. Absent evidence of a market failure, the Commission should not deviate from its “market-oriented approach to spectrum policy that, where possible, has allowed economic forces to determine build-out of wireless facilities and the provision of wireless services.” Adopting rules requiring the deployment of CMRS in certain rural areas is inconsistent with this principle and violates basic economic principles. There is no evidence of a CMRS market failure and, indeed, none was provided in response to the *NOI*. To the contrary, the Commission has found the CMRS industry to be highly competitive and has recognized that there is effective competition in rural areas. In a competitive market, services will be provided where there is a return on capital invested. Requiring carriers to deploy where this basic economic criterion is not met creates inefficiencies and could potentially force certain carriers to exit areas currently served or the marketplace, thereby decreasing competition.

The Commission recently adopted rules to facilitate spectrum leasing. These rules should address any concern regarding access to spectrum in underserved areas and should be given an opportunity to work before the Commission intervenes. Further, as the Commission’s Spectrum Policy Task Force noted, the merits of easements/underlays in existing services should not be addressed until the success of the Commission’s Secondary Markets initiative can be evaluated. A robust and effective secondary market – one that provides for opportunities such as spectrum leasing and joint operating arrangements – is the best solution for more efficient use of spectrum in rural areas.

Moreover, rather than adopt regulations that may cause carriers to act inefficiently, the Commission should eliminate barriers to the effective functioning of the marketplace. In particular, the cellular cross-ownership prohibition contained in Section 22.942 should be repealed and any policies that discourage infrastructure sharing should be eliminated.

The Commission should avoid adopting new regulations that would inhibit the natural functioning of the CMRS market. In particular, the Commission should not adopt new performance requirements designed to *require* additional deployment by incumbent licensees in rural areas. Such requirements would undermine auction integrity and jeopardize many business plans that were created based on the existing build-out and performance obligations.

The Commission also should refrain from drawing distinctions between urban and rural areas in the CMRS industry. Although many rural markets may have fewer competitors than urban markets, nationwide pricing plans and advertising places competitive pressure on rural carriers. Thus, the rural/urban distinction is largely meaningless.

Finally, the Commission should streamline the cellular unserved area procedures to allow the remaining unserved area within cellular geographic service area boundaries to automatically revert to the incumbent licensee’s CGSA, except for unserved areas greater than 50 square miles in size. This proposal will expedite service to rural areas.

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COMMENTS

Cingular Wireless LLC (“Cingular”), by its attorneys, hereby submits comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding which seeks comments regarding possible approaches for facilitating the deployment of additional wireless services in rural areas.¹ This *NPRM* is premature. The Commission previously sought comment on this issue in a *Notice of Inquiry*,² yet the record failed to demonstrate any need for a

¹ *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities For Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Notice of Proposed Rulemaking*, 18 F.C.C.R. 20802 (2003) (hereinafter “*NPRM*”).

² *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities For Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Notice of Inquiry*, 17 F.C.C.R. 25554 (2002).

continuation of the inquiry. Moreover, in light of the recent adoption of rules to promote spectrum leasing in secondary markets.³ These rules were adopted “with the belief that secondary markets would also facilitate investment in rural areas”⁴ and should be given an opportunity to work before Commission intervention in the marketplace.

I. MARKET FORCES ARE SUFFICIENT TO PROMOTE THE DEPLOYMENT OF WIRELESS SERVICE IN RURAL AREAS

The Commission has a long-standing policy of relying on the marketplace, rather than regulation, whenever possible to accomplish its objectives:⁵

[W]e believe that trusting in the operation of market forces generally better serves the public interest than regulation. The Commission should consider imposition of regulation when there is an identifiable market failure and imposition of the regulation would serve the public interest because it is targeted to correct that

³ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 20604 (2003) (hereinafter “R&O” or “FNPRM”), *R&O summarized*, 68 Fed. Reg. 66252 (Nov. 25, 2003), *FNPRM summarized*, 68 Fed. Reg. 66232 (Nov. 25, 2003).

⁴ See *NPRM* at ¶ 3.

⁵ See, e.g., *Telephone Company-Cable Television Cross-Ownership Rules*, CC Docket No. 87-266, *Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry*, 7 F.C.C.R. 300, 305 (1991) (noting that “Market demand, rather than governmental edict, should stimulate the construction and use of advanced telecommunications networks, including broadband networks”); *R&O* at ¶ 2 (noting that spectrum leasing policies should “continue our evolution toward greater reliance on the marketplace”); *2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket 02-277, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620, ¶ 537 (2003); *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 F.C.C.R. 6685, 6637 (2002); *Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19898, 19902 (1999); *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 F.C.C.R. 10030, 10036 (1999); see also 47 U.S.C. §§ 160, 161.

failure. Even in those situations, the Commission should endeavor to craft narrowly any regulation to impose only the minimum restraint on the market necessary to achieve the public interest.⁶

There is no evidence of a CMRS market failure that would warrant the imposition of regulations designed to spur the deployment of services in rural areas. To the contrary, the Commission has recognized that “there is effective competition in the CMRS marketplace as a whole, including rural areas.”⁷ The most recent report on CMRS competition determined that there was “effective competition in the CMRS marketplace”⁸ and “CMRS providers are competing effectively in rural areas”⁹ The report concluded that:

while there are several large, established carriers in the CMRS industry, they have no guarantee of maintaining their market share, and they are faced with consumers that would readily leave carriers that attempted to raise prices or diminish service quality.¹⁰

Given the effectiveness of marketplace forces, the Commission should not attempt to *force* further deployment in rural areas. The adoption of additional performance requirements

⁶ 1998 Biennial Regulatory Review — Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, *Notice of Proposed Rulemaking*, 13 F.C.C.R. 25132, 25135 (1998).

⁷ *NRPM* at ¶ 6.

⁸ *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services*, WT Docket No. 02-379, *Eighth Report*, 18 F.C.C.R. 14783, ¶ 12 (2003). The report also specifically noted that effective CMRS competition existed in rural areas, at least in part because “nationwide and urban price trends have acted to constrain prices in rural areas, even where the total number of operators may be lower. *Id.* at ¶ 13.

⁹ *Id.* at ¶ 120; *accord id.* at ¶ 13.

¹⁰ *Id.* at ¶ 4.

for incumbent services – whether imposed at renewal or at some other time¹¹ – would interfere with marketplace forces by requiring carriers to deploy services in a fiscally unsound manner or cease providing service in marginally profitable areas to avoid costly and unprofitable expansion obligations. Carriers deploy services in areas where the revenue generated outweighs the cost of deployment. Imposing a rule that is inconsistent with this principle would violate the most basic economic principles. As the Commission noted, carriers must operate “at a competitive and efficient scale of operation”¹² and, absent subsidies, inefficient deployment could drive carriers “out of business, causing a loss of service and other inconvenience to consumers.”¹³

Rather than adopt regulations that may require carriers to act inefficiently, the Commission should eliminate barriers to the effective functioning of the marketplace. The *Secondary Markets* docket represented the first step in this direction. There, the Commission

¹¹ *NPRM* at ¶¶ 31-46. Although new mandatory build-out and performance criteria designed to force deployment in rural areas should not be adopted for existing services, additional, “optional” performance criteria may spur deployment in rural areas. *See id.* at ¶¶ 35-41. Cingular thus supports the amendment of existing build-out obligations to *permit* licensees to satisfy these obligations by making a substantial service showing. Cingular supports the Commission’s flexible build-out approach that would permit existing licensees to satisfy *either* a population-based, geography-based, or substantial service obligation, *provided* that the licensee retains the ability to satisfy its existing build-out obligations. In other words, the carrier should have the flexibility to meet a lesser standard, but should not be required to satisfy a more stringent build-out requirement.

¹² *Id.* at ¶ 6.

¹³ *See id.* at ¶ 6. The Commission should avoid requiring carriers to deploy or expand wireless services in rural areas simply because these areas do not have wireless service. There must be some economic reason for deploying service in an area. Although the Commission may desire the deployment of wireless and advanced services in rural areas, the Commission should not lose sight of the fact that basic wireline telephone service still is not available everywhere. *See Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 4775, 4785-86 (2003).

attempted to eliminate uncertainty regarding the ability of CMRS carriers to lease spectrum. The new leasing rules were adopted “with the belief that secondary markets would facilitate investment in rural areas.”¹⁴ The Commission should refrain from adopting any regulations designed to spur deployment in rural areas until it has had the opportunity to evaluate the success of its *Secondary Markets* initiative.¹⁵

Given the recent findings regarding CMRS competition in rural areas, the Commission also should eliminate the cellular cross-ownership prohibition.¹⁶ The rule prohibits any entity from having a direct or indirect ownership interest of more than 5 percent in one cellular RSA license when it has an attributable interest in the other cellular RSA license. Although the prohibition originally applied to all cellular licenses, it was limited to cellular RSA licenses in 2001 because “a combination of interests in cellular licensees in rural areas would more likely result in a significant reduction in competition.”¹⁷ The Commission theorized that “[t]o the extent that it can be shown that an RSA exhibits market conditions under which a specific cellular cross-interest would not create a significant likelihood of substantial competitive harm,

¹⁴ See *R&O* at ¶¶ 36, 43, 45; *NPRM* at ¶ 3.

¹⁵ The Commission should not deviate from its conclusion, as well as the recommendation of the Spectrum Policy Task Force, that the government should not be involved with gathering extensive information regarding spectrum leases. Compare *FNPRM* at ¶¶ 221-229 with *R&O* at ¶ 193; *Principles for Promoting Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, Policy Statement*, 15 F.C.C.R. 24173, 24193-94 (2000). Nor should the Commission be in the business of compiling a database of “white space.” See *NPRM* at ¶ 23. Economic incentives, in conjunction with secondary markets, will encourage private entities to make known any white space.

¹⁶ See 47 C.F.R. § 22.942.

¹⁷ *2000 Biennial Regulatory Review: Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, *Report and Order*, 16 F.C.C.R. 22668, 22706-10 (2001).

such a situation can be addressed through waiver of the cross-interest prohibition.”¹⁸ Waivers, however, place a high burden on applicants. This burden may discourage transactions that would otherwise serve the public interest. The better approach would be to eliminate the prohibition and allow the market to function properly.¹⁹ The Commission would retain its authority to approve or deny transactions based on competitive considerations on a case-by-case basis.

Additionally, the Commission should remove any impediments to infrastructure sharing.²⁰ Infrastructure sharing is another element of an effective CMRS market and “helps lower capital costs and thus extend the coverage of providers.”²¹ By reducing capital costs, infrastructure sharing may entice carriers to extend service into rural areas where they would not otherwise deploy. In particular, the Commission should clarify that infrastructure sharing does not trigger control issues under *Intermountain Microwave*.²² Instead, control issues associated with infrastructure sharing should be analyzed pursuant to the new standards adopted in the *Secondary Markets* docket.²³

¹⁸ *Id.* at 22709.

¹⁹ Although there may be fewer competitors in a rural market, nationwide advertising and pricing plans provided by licensees outside the rural market still exert competitive pressure on the rural licensees. *See* Comments of Dobson Communications Corporation, WT Docket No. 02-381 at 4-6 (Feb. 3, 2003).

²⁰ This practice is becoming common in the European Union and has been utilized domestically. *See NPRM* at ¶¶ 100-03.

²¹ *Id.* at ¶ 104.

²² 12 F.C.C.2d 559 (1963).

²³ *See R&O* at ¶¶ 46-81.

Each of the aforementioned steps will help ensure that the CMRS marketplace functions efficiently. The Commission should not undermine these efforts by adopting new regulations or policies that interfere with the marketplace, such as (i) the adoption of new performance requirements designed to *require* additional deployment by incumbent licensees in rural areas, or (ii) the creation of easements or underlays for the provision of unlicensed services on existing CMRS spectrum in rural areas.²⁴

Incumbent CMRS licensees purchased licenses – either in private transactions or pursuant to auction – based on a number of valuation criteria. One of the central factors in the valuation process was build-out obligations. In determining how much to pay for a license, prospective purchasers had to determine how long it would take for a system to become profitable. This analysis required a valuation of the Commission’s build-out obligations and relied upon the renewal expectancy associated with CMRS licenses. Altering these obligations in an adverse manner after an auction would undermine auction integrity. Accordingly, the Commission properly refrained from imposing new, mandatory build-out requirements on incumbent licensees.²⁵

The imposition of additional build-out or other performance obligations would wreak havoc on these business plans and could drive a number of smaller carriers out of the market. The Commission would be setting dangerous precedent that build-out obligations are fluid,

²⁴ Consistent with its forbearance policy in competitive markets, the Commission should not require carriers to deploy specific technologies. The marketplace should dictate technology winners and losers, not the Commission.

²⁵ See *NPRM* at ¶¶ 35 (“we intend to keep our current construction requirements”), 38 (“We intend to retain our current construction benchmarks . . .”).

which in turn would inhibit capital formation in CMRS markets.²⁶ As Cingular previously explained, “[u]ncertain or ill-defined rights make it difficult for both buyers and sellers to value properties; they cause markets to work less efficiently.”²⁷ The Commission risks market failure when it allocates rights that may be subject to significant change by regulators in the future.

For similar reasons, the Commission should forbear from creating easements and underlays in rural markets.²⁸ Rural CMRS licensees should be permitted to lease any of their exclusive spectrum which, in turn, would generate revenue for additional deployment and service improvements in rural areas. Moreover, unlicensed overlays within supposedly exclusive spectrum bands destroy such incentives and preclude the development of spectrum-sharing arrangements through market forces.²⁹ Parties would be less inclined to enter into leases that require payments for spectrum usage. Instead, parties would avail themselves of existing underlays or seek the creation of new easements that would permit the usage of spectrum for free. As the Spectrum Policy Task Force concluded, easements/underlays should not be considered for existing services until the effectiveness of secondary markets can be evaluated.³⁰

²⁶ Consistent with this analysis, the Commission should not adopt a new “usage” definition for incumbent services. Cingular has no objection, however, to renewal performance requirements that are adopted *prior* to licensing new services. These requirements could then be factored into license valuation.

²⁷ See Cingular Wireless LLC Comments, ET Docket 02-135 at 7 (Jan. 27, 2003) (“SPTF Comments”).

²⁸ Cingular has previously argued against the implementation of easements and underlays. See SPTF Comments at 14-38. These comments are incorporated by reference.

²⁹ See Cingular Wireless LLC Comments, WT Docket 00-230 at 10 (Dec. 5, 2003).

³⁰ See *Spectrum Policy Task Force Report*, ET Docket No. 02-135 at 47, 53, 55-57, 66-67 (Nov. 15, 2002) (“SPTF Report”). Further, the Commission should refrain from implementing underlays/easements until it has compiled extensive noise floor data and completed

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In sum, the CMRS market is competitive in rural areas and Commission intervention is unnecessary. Rather than adopt new policies and rules mandating the deployment of service in rural areas, the Commission should let the marketplace operate without interference. The recent adoption of rules designed to promote secondary markets should be sufficient to address any FCC concerns regarding the ability of interested parties to access spectrum in underserved areas. A robust and effective secondary market – one that provides for opportunities such as spectrum leasing and joint operating arrangements – is the best solution for more efficient and pervasive use of spectrum in rural areas.

II. THE DISTINCTION BETWEEN URBAN AND RURAL AREAS IS LARGELY IRRELEVANT FOR CMRS

In response to the Commission’s inquiry regarding the appropriate definition of a “rural area,”³¹ Dobson Communications Corporation – a leading provider of CMRS in rural markets – previously concluded that the distinction between rural and urban markets is meaningless for the CMRS industry:

[A]s the CMRS industry has matured, competition in rural areas has developed sufficiently to make meaningless any competitive distinction between urban and rural areas. Although many rural markets may have fewer facilities-based carriers than the average urban market, rural markets should be viewed as part of a broader unified nationwide market for wireless services.³²

comprehensive field tests. SPTF Report at 5, 28; Report of the Interference Protection Working Group at 18-19 (Nov. 15, 2002) (“Interference Report”); *Establishment of an Interference Temperature Metric to Quantify and Manage Interference*, ET Docket No. 03-237, *Notice of Inquiry and Notice of Proposed Rulemaking*, FCC 03-289 at ¶¶ 4, 7 (Nov. 28, 2003); SPTF Comments at 31-36.

³¹ *NPRM* at ¶¶ 10-12.

³² Comments of Dobson Communications Corporation, WT Docket No. 02-381 at 4 (Feb. 3, 2003).

Cingular agrees and urges the Commission to heed Dobson's advice: "The Commission will not succeed in promoting the deployment of wireless services in rural areas by creating small service areas in which rural carriers can provide stand-alone wireless service."³³ Accordingly, the Commission should refrain from adopting new definitions of rural areas.

III. THE CELLULAR UNSERVED AREA PROCESS SHOULD BE STREAMLINED

As Cingular proposed in the *Part 22 Biennial Review* docket and in response to the *NOI*,³⁴ the Commission should streamline the cellular unserved area procedures to allow the remaining unserved area in cellular geographic service areas ("CGSAs") to automatically revert to the incumbent licensee's CGSA, except for unserved areas greater than 50 square miles in size.³⁵ Although the Commission has indicated that it plans to address the cellular unserved area issue via reconsideration in that docket,³⁶ the issue should be resolved expeditiously. If this docket is on a faster track than the Biennial Reconsideration, the Commission should address the issue here. The proposal is directly relevant to the rural docket because it would allow

³³ Reply Comments of Dobson Communications Corporation, WT Docket No. 02-381 at 1 (Feb. 19, 2003).

³⁴ *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, WT Docket No. 01-108, *Notice of Proposed Rulemaking*, 16 F.C.C.R. 11169 (2001) ("Part 22 Biennial Review"); Cingular Reply Comments, WT Docket No. 02-381 at 6-7 (Feb. 3, 2003).

³⁵ Cingular Part 22 Biennial Review Comments, WT Docket No. 01-108, at 24-25 (July 2, 2001). Areas greater than 50 square miles would be subject to a one-time filing window and subsequent auction.

³⁶ See *NPRM* at ¶ 27.

incumbent licensees to serve rural areas more quickly by permitting them to expand without prior site-specific FCC approval.

CONCLUSION

For the foregoing reason, the Commission should not adopt any new policies or regulations that require additional CMRS deployment in rural areas. There has been no market failure and, therefore, Commission intervention is unnecessary. Moreover, the recent adoption of rules regarding the creation of secondary markets should address any concerns regarding the ability of interested parties to access spectrum in underserved areas. Finally, the Commission should eliminate any barriers – real or perceived – to the effectiveness of the CMRS marketplace.

Respectfully submitted,

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