

---

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of )  
 )  
Implementation of the Commercial Spectrum ) WT Docket No. 05-211  
Enhancement Act and Modernization of the )  
Commission's Competitive Bidding Rules and )  
Procedures )

To: The Commission

**REPLY COMMENTS OF CINGULAR WIRELESS LLC**

**J. R. CARBONELL  
CAROL L. TACKER  
MICHAEL P. GOGGIN  
CINGULAR WIRELESS LLC  
1818 N Street, NW  
Washington, DC 20036  
(202) 419-3055**

*Its Attorneys*

June 5, 2006

---

## TABLE OF CONTENTS

DISCUSSION.....	1
I. LEAP’S SPECTRUM CAP AND UNJUST ENRICHMENT PROPOSALS ARE BARRED FROM CONSIDERATION.....	2
A. The Proposals Constitute an Untimely Petition for Reconsideration, Barred by Section 405.....	2
B. Leap’s Spectrum Cap Proposal is Beyond the Scope of the Proceeding.....	3
II. THE SPECTRUM CAP PROPOSAL IS CONTRARY TO THE PUBLIC INTEREST.....	4
CONCLUSION.....	9

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of )  
)  
Implementation of the Commercial Spectrum ) WT Docket No. 05-211  
Enhancement Act and Modernization of the )  
Commission's Competitive Bidding Rules and )  
Procedures )

To: The Commission

**REPLY COMMENTS OF CINGULAR WIRELESS LLC**

Cingular Wireless LLC hereby replies to the September 20, 2006 comments filed by Leap Wireless International, Inc. in response to the *Second Further Notice of Proposed Rulemaking* in this proceeding.<sup>1</sup>

**DISCUSSION**

The principal argument Leap makes in its comments is that the Commission should hobble the ability of incumbent wireless operators to make use of spectrum by imposing an 80 MHz spectrum cap on them (and only them) in all future auctions. Leap's proposal is nothing more than an attempt to manipulate the Commission's processes for its own benefit. Its proposal constitutes an untimely petition for reconsideration; it is outside the scope of the notice of proposed rulemaking; and it is contrary to the public interest and should be rejected on the merits.

---

<sup>1</sup> *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket 05-211, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 06-52 (April 25, 2006) (relevant portions referred to as *Second R&O* or *Second Further Notice*, as appropriate), *modified on reconsideration, Order on Reconsideration of the Second Report and Order*, FCC 06-78 (June 2, 2006).

## **I. LEAP'S SPECTRUM CAP AND UNJUST ENRICHMENT PROPOSALS ARE BARRED FROM CONSIDERATION**

### **A. The Proposals Constitute an Untimely Petition for Reconsideration, Barred by Section 405**

Leap's argument for a spectrum cap and its call for reinstating the 5-year unjust enrichment rule are both barred by 47 U.S.C. § 405 as an untimely petition for reconsideration, filed more than 90 days after the statutory deadline.<sup>2</sup> Leap acknowledges that it made these arguments in comments filed in the previous phase of the proceeding that led to the adoption of the *Second R&O* — it even attaches a copy of those earlier comments. The Commission did not adopt Leap's spectrum proposal when it adopted the *Second R&O*; accordingly, Leap had an opportunity — and an obligation — to challenge the Commission's failure to adopt this policy in a petition for reconsideration. To the extent Leap believes that the Commission should rescind the changes that it made to its unjust enrichment rules in the *Second R&O*, it was obliged to bring this up in a petition for reconsideration as well. The *Second Further Notice* did not reopen all of the decisions in the *Second R&O*; it sought comment on specific issues unrelated to Leap's proposals.<sup>3</sup> Comments such as Leap's "are effectively untimely requests for reconsideration of issues that were already addressed by the Commission," and must be denied.<sup>4</sup>

---

<sup>2</sup> Petitions for reconsideration of rulemaking decisions must be filed within 30 days of Federal Register publication. In this case, the deadline was June 5, 2006. Leap's comments were not filed until September 20, 2006, over three months too late.

<sup>3</sup> The fact that the *Second Further Notice* sought comment on the same general subject area as it had addressed in the *Second R&O* does not necessarily "reopen" the decisions made in the latter order. *See generally CTIA v. FCC*, 2006 U.S. App. LEXIS 24256, \*13-\*20 (D.C. Cir. Sept. 26, 2006).

<sup>4</sup> *Ultra-Wideband Transmission Systems*, ET Docket 98-153, *Second Report and Order and Second Memorandum Opinion and Order*, 19 F.C.C.R. 24558, 24585 (2004).

## **B. Leap’s Spectrum Cap Proposal is Beyond the Scope of the Proceeding**

The Administrative Procedure Act requires an agency to give serious consideration to comments and proposals responsive to the notice of proposed rulemaking in a given proceeding, including those that are a logical outgrowth of the specific proposals set forth in the notice.<sup>5</sup> An agency need not, however, consider proposals that range far from the subject matter of the proceeding. Indeed, it would be reversible error for an agency to adopt rules that are not fairly comprised within the scope of the notice, for the public would not have had a fair opportunity to comment on them.<sup>6</sup>

Leap’s spectrum cap proposal goes well beyond the outermost boundaries of the *Second Further Notice*. The Commission’s rulemaking notice does not in any way “fairly apprise interested persons” that the agency is considering the adoption of rules concerning a spectrum cap that would prevent incumbent wireless licensees from bidding in auctions.<sup>7</sup> The Commission summarized the scope of this proceeding as follows: “[W]e issue this Second Further Notice to consider whether we should modify further our general competitive bidding rules governing benefits reserved for designated entities.”<sup>8</sup> At no point in the course of the *Second Further Notice* did the Commission suggest that it was considering the adoption of rules that would place limits on the ability of non-designated entities to participate in auctions. Yet, that is what Leap urges the Commission to adopt. The Commission should refuse to entertain this out-of-bounds proposal.

---

<sup>5</sup> *Northeast Maryland Waste Disposal Authority v. EPA*, 383 F.3d 936, 952 (D.C. Cir. 2004); *National Black Media Coalition v. FCC*, 822 F.2d 277, 282-83 (2d Cir. 1987) (*NBMC II*).

<sup>6</sup> *Northeast Maryland*, 383 F.3d at 952.

<sup>7</sup> *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) (*NBMC I*), quoted in *NBMC II*, 822 F.2d at 283.

<sup>8</sup> *Second Further Notice* at ¶ 53 (footnotes omitted, emphasis added).

## II. THE SPECTRUM CAP PROPOSAL IS CONTRARY TO THE PUBLIC INTEREST

Leap has asked the Commission to adopt a unique form of spectrum cap: It would apply to all CMRS licensees in areas where they are incumbents, but only insofar as they seek to acquire spectrum in an FCC auction. If an incumbent CMRS licensee is a bidder, or has an attributable interest in a bidder, an 80 MHz limit would apply to the total of the incumbent's current spectrum plus the spectrum for which it is bidding.<sup>9</sup> To the extent this proposal was properly before the Commission, it should be rejected as contrary to the public interest.

In recent years, the Commission has, after extensive consideration, repeatedly determined that the public interest is not served by spectrum caps.<sup>10</sup> Leap urges the Commission to turn its back on these considered policy decisions and to adopt a new spectrum cap that will severely hamper the ability of consumers to obtain advanced wireless services and the ability of wireless service providers to obtain the spectrum needed to offer advanced services. The public interest would be disserved by doing so.

Some of the major factors underlying the elimination of the CMRS spectrum cap were that consumers have benefited from competition “in the form of increased output, lower prices, and increased diversity of service offerings,”<sup>11</sup> that “mobile telephony services have begun to compete with wireline services,”<sup>12</sup> and that “[c]onsumers have also derived benefits in recent years from combinations as some operators have expanded their licensed service areas through

---

<sup>9</sup> Leap Comments at 3.

<sup>10</sup> See, e.g., *Advanced Wireless Service*, WT Docket 02-353, *Report and Order*, 18 F.C.C.R. 25162 (2003); *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 (2001) (*Spectrum Cap Sunset Order*).

<sup>11</sup> *Spectrum Cap Sunset Order*, 16 F.C.C.R. at 22685.

<sup>12</sup> *Id.* at 22686. The Commission noted that Leap was one of the carriers “offering service plans designed to compete directly with wireline local telephone service.” *Id.* at 22687.

acquisitions and swaps to create nationwide service providers.”<sup>13</sup> Considering these and other factors, the Commission squarely rejected Leap’s arguments in favor of a spectrum cap and decided to move to a case-by-case evaluation of competition. It reasoned:

On balance, and in light of the growth of both competition and consumer demand in CMRS markets, we conclude that case-by-case review, accompanied by enforcement of sanctions in cases of misconduct, is now preferable to the spectrum cap rule because it gives the Commission flexibility to reach the appropriate decision in each case, on the basis of the particular circumstances of that case. The development of competition among CMRS carriers since the 1999 biennial review is an important factor underlying this conclusion. We are persuaded that competition is now robust enough in CMRS markets that it is no longer appropriate to impose overbroad, *priori* limits on spectrum aggregation that may prevent transactions that are in the public interest.<sup>14</sup>

The Commission specifically considered and rejected arguments by Leap and others concerning the effect on designated entities of eliminating the spectrum cap, stating:

We also are not persuaded by arguments that the spectrum cap rule should be retained to preserve opportunities for entrepreneurs and providers of niche services. As other commenters point out, the spectrum cap rule does nothing in and of itself to create opportunities for entrepreneurs, and may actually harm small businesses by limiting their access to existing carriers as sources of capital and management expertise. Furthermore, to the extent the spectrum cap does create some potential opportunities for entrepreneurs, we find this benefit is insufficient to outweigh the benefits of moving away from a bright-line rule approach, particularly in light of the other tools we have to help preserve opportunities for small businesses — our ability to carry out case-by-case review of transactions and our ability to shape the initial distribution of licenses through the service rules adopted with respect to specific auctions. Moreover, . . . we intend to take into account the special needs of small businesses as we consider processing guidelines, and we believe that individualized review will benefit small businesses as well as large.<sup>15</sup>

---

<sup>13</sup> *Id.* at 22687-88.

<sup>14</sup> *Id.* at 22693-94 (footnote omitted).

<sup>15</sup> *Id.* at 22694-95 (footnote omitted).

The Commission made clear that the case-by-case review of competitive effects will apply not only to spectrum acquisitions through secondary market transactions, but also to acquisitions of spectrum through auctions, which the Commission said it could accomplish by “shap[ing] the initial distribution through the service rules adopted with respect to specific auctions.”<sup>16</sup>

Case-by-case review is a far more precise tool than a spectrum cap. It allows the Commission to limit a carrier’s access to spectrum only where there are serious concerns about market failure, taking into account all of the other sources of spectrum currently or potentially available. It also has the benefit of allowing carriers to acquire spectrum without arbitrary limits where those concerns are not present. The Commission has shown itself willing and able to conduct such reviews and order divestitures where it determines them to be necessary.<sup>17</sup>

A spectrum cap, on the other hand, is a blunt instrument that cuts off spectrum access at an arbitrary point, based on a generalized assessment of spectrum availability that is frozen in time, without consideration of the spectrum usage of others in the same area, the availability of other spectrum, the technological needs of the various carriers, or the demands of the public. In short, a spectrum cap is a simplistic approach that harms the efficient use of spectrum and disadvantages customers.

As the Commission noted in its recent report on wireless competition, in the time since the sunset of the CMRS spectrum cap was announced, “national operators have sought to . . .

---

<sup>16</sup> *Id.* at 22696.

<sup>17</sup> *See, e.g., Nextel Partners, Inc. and Sprint Nextel Corp.*, 21 F.C.C.R. 7358 (2006); *SBC Communications Inc. and AT&T Corp.*, 20 F.C.C.R. 18290 (2005); *Verizon Communications Inc. and MCI, Inc.*, 20 F.C.C.R. 18433 (2005); *Nextel Communications, Inc. and Sprint Corp.*, 20 F.C.C.R. 13967 (2005); *Western Wireless Corp. and ALLTEL Corp.*, 20 F.C.C.R. 13053 (2005); *AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, 19 F.C.C.R. 21522 (2004).

increase the capacity of their existing networks.”<sup>18</sup> This is necessary not only to continue handling expanding mobile telephone traffic, but also to accommodate new services — high-speed downloads of television shows, movies, and music, as well as high-speed Internet access.<sup>19</sup> Competition among the major national carriers is no longer simply about price and coverage; it is now about overall reliability and the quality and speed of 3G digital services, as their television commercials make clear. And providing these broadband services to an expanding user base while maintaining reliability of both 3G and telephone services requires access to spectrum.

Imposing arbitrary limits on access to spectrum, as Leap urges, will lead to inefficiency and impede competition, hurting consumers. The Commission has repeatedly recognized that the public interest is not served by rules that would impede competition that can benefit a broad spectrum of consumers for the benefit of less-efficient competitors.<sup>20</sup> The Commission properly sunset the spectrum cap as not serving the public interest. It is even less consonant with the

---

<sup>18</sup> *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*, WT Docket 06-17, *Eleventh Report*, FCC 06-142, ¶ 55 (Sept. 29, 2006).

<sup>19</sup> *See id.* at ¶ 107 (“Beyond the 2G digital technologies, mobile telephone carriers have been deploying next-generation network technologies that allow them to offer mobile data services at higher data transfer speeds and, in some cases, to increase voice capacity.”)

<sup>20</sup> *See, e.g., Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, *Memorandum Opinion and Order*, 20 F.C.C.R. 19415, ¶¶ 61-83 (2005) (granting forbearance from Section 251(c) unbundling in areas where there is substantial facilities-based competition over the objections of non-facilities-based competitors using unbundled facilities); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 96-98 *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16978, ¶¶ 273-296 (2003) (*Triennial Review Order*) (exempting incumbent LECs from the need to provide unbundled access to fiber-to-the-home loops and hybrid loops, given competition from cable), *aff’d in relevant part, remanded in part, vacated in part, sub nom. USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

public interest now, when there is far more spectrum on the table (*e.g.*, AWS, 700 MHz), more potential bidders, and a wider variety of potential uses for the spectrum.

Leap's proposal is designed to do one thing, and only one thing: reduce the number of incumbent bidders at spectrum auctions. Leap's proposal would apply only to acquisition of spectrum at auction, not to acquisitions through other means. As a result, it will not ultimately affect consolidation in the wireless industry, but it will tilt the auctions strongly against incumbents, leaving non-incumbents able to snap up spectrum at below-market prices without having to compete against the parties who value that spectrum most highly. It also would avoid interfering with the ability of the subsidized speculators to sell that spectrum later to the most logical buyer — an incumbent licensee needing additional spectrum to provide advanced services — because Leap's proposal is not a limit on spectrum holdings, but only on ability to bid at an auction.

This self-serving proposal will do nothing but delay the efficient, optimal use of spectrum, increase costs, and hurt consumers, while providing speculators with a windfall in the form of an enhanced opportunity to profit by gaming the system. The Commission clearly should reject this attempt to manipulate its processes for private gain as contrary to the public interest.

## CONCLUSION

For the reasons stated, the Commission should reject Leap's proposals.

Respectfully submitted,

CINGULAR WIRELESS LLC

By: /s/ Michael P. Goggin  
J. R. Carbonell  
Carol L. Tacker  
Michael P. Goggin  
1818 N Street, NW  
Washington, DC 20036  
(202) 419-3055

*Its Attorneys*

October 20, 2006