



Federal Communications Commission
Washington, D.C. 20554

DA 96-1407

August 29, 1996

Mr. John Beasley
BellSouth Corporation
1155 Peachtree Street, NE, Suite 1800
Atlanta, GA 30309

Re: BellSouth Wireless, Inc. Request for Waiver in Auction No. 11

Dear Mr. Beasley:

This letter responds to the "Request for Waiver" filed on behalf of BellSouth Wireless, Inc. ("BellSouth") on July 30, 1996 in conjunction with its short-form application to participate in the D and E block broadband Personal Communications Services ("PCS") auction. BellSouth requests a waiver of Section 20.6(a) of the Commission's rules (47 C.F.R. § 20.6) regarding the Commercial Mobile Radio Service ("CMRS") spectrum aggregation limit. For the reasons stated below, we deny BellSouth's request.

A licensee in broadband PCS, cellular or SMR services regulated as CMRS is limited to an attributable interest in no more than 45 MHz of licensed broadband, PCS, cellular, and Specialized Mobile Radio ("SMR") services regulated as CMRS in any geographical area. 47 C.F.R. § 20.6(a). SMR licensees that provide interconnected service are considered to be CMRS providers. 47 C.F.R. § 20.9(a)(4).

A request for waiver of the broadband PCS rules must demonstrate either "that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case; and that a grant of the waiver is otherwise in the public interest;" or "that unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest." 47 U.S.C. § 24.819(a)(i) and (ii).

BellSouth seeks this waiver to permit it to bid for two 10 MHz broadband PCS licenses in the broadband PCS D and E auction in those Basic Trading Areas ("BTAs") in which affiliates of BellSouth hold attributable interests in cellular and 900 MHz SMR licenses. According to BellSouth, it holds an attributable interest in RAM Mobile Data USA Limited Partnership ("RAM Mobile"). BellSouth states RAM Mobile will be the licensee for at least one 900 MHz SMR channel block in each of the Major Trading Areas ("MTA") of interest to BellSouth in the PCS auction. BellSouth asserts that failure to grant the waiver will preclude it from acquiring both the D and E block licenses in those BTAs in which it holds an attributable interest in RAM Mobile for spectrum cap purposes. Accordingly,

BellSouth seeks a waiver to exclude attribution of RAM Mobile's spectrum.

BellSouth contends that the public interest will not be served by strict adherence to the spectrum cap. BellSouth asserts RAM Mobile only uses its 900 MHz SMR spectrum for two-way delivery of mobile data and that RAM Mobile's network cannot send or receive two-way switched voice service.¹ BellSouth claims that RAM Mobile's exclusive mobile data service should not be included in the 45 MHz CMRS spectrum aggregation limit because this service does not compete substantially with cellular and broadband PCS. BellSouth cites several instances where Commission proceedings have distinguished between voice and data-only SMR licensees in applying rules that were also applicable to cellular and PCS licenses.¹

The focus of BellSouth's argument for granting its request is that RAM Mobile's network does not compete with real time, two-way switched voice service. This assertion appears to be based on the mistaken assumption that the underlying purpose of the CMRS spectrum cap is only to ensure competition in voice transmission. In the *CMRS Third Report and Order*, the Commission stated that the spectrum cap was established due to concerns that excessive aggregation of spectrum by any one of several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents.² The Commission was concerned that licensees controlling too much CMRS spectrum could cause anti-competitive horizontal concentration in the CMRS business.³ Thus, the 45 MHz CMRS spectrum cap was established after thorough analysis by the Commission and was set at a level where the efficiencies and economics of horizontal concentration would be in the public interest, but not at so high a level as to create noncompetitive conditions.⁴

Although the Commission has distinguished between non-covered SMR and covered SMR in some contexts, it has not done so in the context of the spectrum cap. For instance, the Commission's ruling not to apply resale policy to data-only SMR licensees was based in part on a determination that applying the resale policy to those licensees could lead to

¹ See e.g. *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, FCC 96-263, *First Report and Order* (released July 12, 1996) (*CMRS Resale Report and Order*).

² See *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8100-8110 (1994) (*CMRS Third Report and Order*).

³ *Id.* at 8105.

⁴ *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Radio Service Spectrum Cap*, WT Docket 96-59, FCC 96-278, *Report and Order*, ¶¶ 94-107 (released June 24, 1996) (*DEF Block Report and Order*).

licensees eliminating their interconnection with the public switched network.⁵ The effect of a licensee aggregating a portion of the CMRS spectrum in the *CMRS Resale Report and Order* was not addressed.

Although we are denying BellSouth's request to waive the attribution of its SMR interest for spectrum cap purposes, we note that BellSouth has not addressed whether Section 20.6's divestiture provision addresses its concern. That provision allows a party holding controlling or attributable interests in broadband PCS, cellular, and/or SMR licenses to apply for additional spectrum in those services that, if granted, would exceed the 45 MHz spectrum cap, provided that it subsequently divests sufficient spectrum to come into compliance with the cap. The divestiture provision is subject to certain conditions which may or may not apply to BellSouth. Even if BellSouth does not meet the conditions of Section 20.6, however, BellSouth is free to seek a waiver of the divestiture provision, if appropriate, and we will consider its request in that context. We note that such a request would be made part of the record in the Commission's *Notice of Proposed Rule Making* regarding PCS broadband disaggregation and the impact of disaggregation on the 45 MHz spectrum cap.⁶

In any event, the Commission's evaluation of the spectrum cap is ongoing. As noted by BellSouth, its parent corporation BellSouth Corporation ("BellSouth Corp.") has filed a petition for reconsideration of the *CMRS Resale Report and Order* which requests the inclusion of only covered SMR services in the CMRS aggregation limit. BellSouth Corp. has made a similar request in its petition for reconsideration of the Commission's *DEF Block Report and Order* modifying the competitive bidding and ownership rules for PCS service. Either of these proceedings would serve as a more appropriate forum for any reconsideration of the 45 MHz CMRS spectrum cap.

For the reasons stated above, BellSouth's request IS HEREBY DENIED. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.

Sincerely,



Kathleen O'Brien Ham
Chief, Auctions Division
Wireless Telecommunications Bureau

⁵ *CMRS Resale Report and Order* ¶ 19.

⁶ See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, FCC 96-287, *Notice of Proposed Rule Making* (released July 15, 1996).