

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
)
1998 Biennial Regulatory Review) WT Docket No. 98-205
Spectrum Aggregation Limits for)
Wireless Telecommunications Carriers)
)
)
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)

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: October 17, 2000

Released: November 8, 2000

By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a statement; Commissioner Powell issuing a statement.

I. INTRODUCTION

1. In this Order on Reconsideration ("Order"), we address two petitions for reconsideration and one petition for clarification of our Biennial CMRS Spectrum Cap Order in this proceeding, in which we revised the "spectrum cap" rule pertaining to Commercial Mobile Radio Service ("CMRS") licensees.

2. In September 1999, we issued our Biennial CMRS Spectrum Cap Order in which we determined, based on the record before us and the market analysis we conducted, that the public interest currently was best served by retaining the CMRS spectrum cap rule (with some modification), set forth in Section 20.6 of the Commission's rules. Two petitions before us, filed by BellSouth Corporation ("BellSouth") and the Cellular Telecommunications Industry Association ("CTIA") in November 1999, seek reconsideration of that order, challenging our decision to retain the CMRS spectrum cap. On the basis of these petitions and the record filed in response, we deny those petitions for reconsideration. As we noted in the Biennial CMRS Spectrum Cap Order, however, we do plan to revisit issues pertaining to the CMRS

1 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, Report and Order, 15 FCC Rcd 9219 (1999) ("Biennial CMRS Spectrum Cap Order").

2 47 C.F.R. § 20.6.

3 Biennial CMRS Spectrum Cap Order, 15 FCC Rcd at 9221-23 (¶¶ 1-2, 5-6), 9229-49 (¶¶ 20-65), 9253-57 (¶¶ 77-85).

spectrum cap later this year as part of our year 2000 Biennial Review.⁴ We also grant a third petition filed jointly by Western Wireless Corporation and VoiceStream Wireless Corporation (“Western Wireless/VoiceStream”), which requests a limited clarification of the modifications we adopted in the *Biennial CMRS Spectrum Cap Order* regarding the operation of the spectrum cap with respect to overlapping CMRS markets.

II. BACKGROUND

3. In 1994, in the *CMRS Third Report and Order*, the Commission first adopted the spectrum aggregation limit – a “spectrum cap” – applicable to all CMRS providers.⁵ Specifically, the Commission determined that the goals of preserving competitive opportunities in the CMRS marketplace could best be achieved by adopting a “bright-line” spectrum cap that limited to 45 MHz (of 180 MHz) the total amount of cellular, broadband PCS, and digital SMR spectrum in which an entity could have an attributable interest in any geographic area.⁶ By limiting the spectrum that any one provider could obtain, the spectrum cap prevented excessive concentration of licenses and promoted dissemination of licenses to a wide variety of applicants.⁷ Limiting the possible aggregation also encouraged licensees to make more efficient the use of their spectrum.⁸ The Commission adopted, as a “bright line” test, a cap that allowed for significant but not excessive aggregation and added certainty to the marketplace without sacrificing the benefits of pro-competitive and efficiency-enhancing aggregation.⁹ In 1996, the Commission reaffirmed the basic tenets of the CMRS spectrum cap in the *1996 CMRS Spectrum Cap Order*.¹⁰

4. In September 1999, we released our *Biennial CMRS Spectrum Cap Order*.¹¹ We concluded – after analysis of both spectrum allocation and competitive market conditions – that the spectrum cap, with some modification, continued to be a necessary and efficient means to promote and protect competition.¹² Specifically, we determined that the 45 MHz spectrum cap should remain in place

⁴ *Id.* at 9232 (¶ 26).

⁵ *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 (1994) (“*1994 CMRS Spectrum Cap Order*”).

⁶ *1994 CMRS Spectrum Cap Order*, 9 FCC Rcd at 7999 (¶ 16), 8100 (¶ 238), 8104-05 (¶¶ 248, 250).

⁷ *Id.* at 8104 (¶ 248), 8108 (¶ 260).

⁸ *Id.* at 8104 (¶ 249).

⁹ *Id.* at 8104-05 (¶¶ 248, 250).

¹⁰ *See* In the Matter of Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission’s Cellular/PCS Cross-Ownership Rule, WT Docket 96-59, GN Docket 90-314, *Report and Order*, 11 FCC Rcd. 7824, 7864-87 (¶¶ 86-132) (“*1996 Spectrum Cap Order*”) (1996), *recon.* 12 FCC Rcd 14031 (1997) (*BellSouth MO&O*), *aff’d sub nom. BellSouth Corp. v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999).

¹¹ *See generally* *Biennial CMRS Spectrum Cap Order*.

¹² *See id.*, 15 FCC Rcd at 9221-23 (¶¶ 1-2, 5-6), 9229-49 (¶¶ 20-65), 9253-57 (¶¶ 77-85).

except in rural areas, defined as Rural Service Areas (RSAs), where we raised the cap to 55 MHz.¹³ In reaching our determination to retain the spectrum cap, we extensively examined the current state of competition in CMRS markets.¹⁴ We found that, although competition was increasing, there remained significant concern about the effects of undue concentration in the present state of development of the CMRS markets. We also noted that there were the significant barriers to entry because of the fixed amount of CMRS spectrum available and because would-be market entrants had to obtain license rights in order to enter.¹⁵ We concluded that the 45 MHz aggregation cap (in most areas), which allows for at least four mobile service providers in each area, struck an appropriate balance between the efficiencies and economies of aggregation and the risk of undue concentration.¹⁶

5. We also reaffirmed the public interest benefits of the spectrum cap. We determined that, by promoting competition among existing licensees as well as entry of new participants, the CMRS spectrum cap created significant benefits for consumers, among them lower prices, improved quality of services, product innovation, and product differentiation.¹⁷ We specifically found that the spectrum cap rule had encouraged the development of multi-modal handsets, the creation of partnerships resulting in better roaming packages, and the upgrading of networks and service offerings with the conversion to digital systems.¹⁸ We also determined that the cap promoted more efficient use of the spectrum.¹⁹ In addition, we concluded that the “bright-line” test afforded by the CMRS spectrum cap rule was an efficient means to promote and protect competition by promoting regulatory certainty and regulatory efficiency.²⁰ We intended, however, that the “bright-line” rule be sufficiently flexible to accommodate justifiable departures from the rule. Accordingly, we established and clarified a specific waiver process that would enable carriers with a demonstrable need for additional spectrum – for “third generation” (“3G”) and other advanced services – to obtain such spectrum.²¹ Recognizing the speed in which the industry was changing, we noted that we would be making additional spectrum available in upcoming auctions, and stated that we would be revisiting the issues pertaining to retaining, raising, or eliminating the CMRS spectrum cap during the year 2000 biennial review.²²

6. In November 1999, BellSouth, CTIA, and Western Wireless/VoiceStream filed petitions

¹³ *Id.* at 9253-57 (¶¶ 77-85). Cellular markets comprise Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs). 47 C.F.R. § 22.909.

¹⁴ *Biennial CMRS Spectrum Cap Order*, 15 FCC Rcd at 9229-42 (¶¶ 20-48).

¹⁵ *Id.* at 9231-36 (¶¶ 23, 25, 27, 31, 35), 9251 (¶ 71).

¹⁶ *Id.* at 9254-55 (¶ 80).

¹⁷ *Id.* at 9235-36 (¶ 33), 9239-40 (¶ 42, 44), 9242 (¶ 48), 9248 (¶ 62).

¹⁸ *Id.* at 9248 (¶ 62).

¹⁹ *Id.* at 9249 (¶ 65).

²⁰ *Id.* at 9242-46 (¶¶ 49-58).

²¹ *Id.* at 9243 (¶ 52), 9255 (¶ 82).

²² *Id.* at 9232 (¶ 26), 9255 (¶ 82).

for reconsideration or clarification of the *Biennial CMRS Spectrum Cap Order*.²³ Two parties filed comments to these petitions and one party filed reply comments.²⁴

III. DISCUSSION

7. Background. BellSouth and CTIA contend, in separate petitions for reconsideration, that the *Biennial CMRS Spectrum Cap Order* denies U.S. carriers the assurances they need to plan for, invest in, and deploy new services, including 3G and advanced services,²⁵ and that the cap disadvantages U.S. carriers in competing with foreign carriers.²⁶ They also assert that the waiver process established in the order creates regulatory uncertainty and delay, and would require businesses to release confidential information to competitors and the general public.²⁷ In addition, BellSouth challenges the competitive market analysis in the order.²⁸ CTIA specifically seeks reconsideration of the Commission's denial of its forbearance petition.²⁹ In comments, GTE Services Corporation ("GTE") supports both petitions,³⁰ while the Personal Communications Industry Association ("PCIA") opposes them.³¹

8. Western Wireless/VoiceStream seek only a limited clarification of the revised spectrum cap rule, which raised the cap from 45 MHz to 55 MHz in RSAs, as that rule applies to a particular PCS license area that overlaps cellular license areas comprised of both MSAs and RSAs.³² Neither GTE nor PCIA commented on the Western Wireless/VoiceStream petition.

9. Discussion. For the reasons set forth below, we deny BellSouth's and CTIA's petitions. As we explained in the *Biennial CMRS Spectrum Cap Order* and above, the spectrum cap continues to promote competition among existing licensees as well as entry of new participants, thereby encouraging efficient use of the spectrum and creating significant benefits to consumers. We grant the request by Western Wireless/VoiceStream, however, for clarification of how the spectrum cap rule applies in overlapping CMRS markets.

²³ See generally Petition for Reconsideration of BellSouth Corporation ("BellSouth Petition"); Petition for Reconsideration of the Cellular Telecommunications Industry Association ("CTIA Petition"); Joint Petition for Limited Clarification of Western Wireless Corporation and VoiceStream Wireless Corporation ("Western Wireless/VoiceStream Petition").

²⁴ Petitioners and the commenting parties are listed in the Appendix, *infra*.

²⁵ BellSouth Petition at 14-18; CTIA Petition at 3, 8-10.

²⁶ BellSouth Petition at 14-18.

²⁷ *Id.*; CTIA Petition at 3, 8-10.

²⁸ BellSouth Petition at 2-14 and Reply at 4-6.

²⁹ CTIA Petition at 2-8, 10-11.

³⁰ See generally Comments of GTE (filed March 2, 2000) ("GTE Comments").

³¹ See Opposition of the Personal Communications Industry Association to the Petitions for Reconsideration (filed March 2, 2000) ("PCIA Comments") at 4-10.

³² Western Wireless/VoiceStream Petition at 1-4.

10. *The CMRS spectrum cap and the provision of 3G and other advanced services.* In the *Biennial CMRS Spectrum Cap Order*, we determined that retention of the spectrum cap (with some modification) currently best serves the public interest, as outlined above. This determination was based on the record and our market analysis. The generalized assertions in BellSouth's and CTIA's petitions for reconsideration simply do not provide any basis for us to disturb that considered decision. In addition, we observe that the auctions of the broadband PCS C and F block and 700 MHz band spectrum will make additional spectrum available for 3G and advanced services. Finally, we note again that we plan to revisit issues related to the CMRS spectrum cap in our year 2000 biennial review commencing later this year, and will consider any new submissions or additional arguments for revising or eliminating the spectrum cap at that time.

11. In their petitions, BellSouth and CTIA each present only general assertions that more spectrum must be made available to meet future needs associated with the deployment of 3G and other advanced services. We examined similar generalized assertions in the *Biennial CMRS Spectrum Cap Order* and were not persuaded then that the "bright-line" CMRS spectrum cap rule should be eliminated. Specifically, we were not persuaded by commenters (including BellSouth, CTIA, and others³³) who claimed that the cap was a constraining factor on the ability of carriers to develop 3G and other advanced services because their comments did not provide concrete evidence regarding the amount of spectrum needed for 3G technologies or when carriers would need access to that spectrum.³⁴ We observed that few carriers had aggregated spectrum up to the limit and that carriers that had reached the maximum under the cap were not making use of their entire spectrum allocations.³⁵ In addition, we pointed out that we had received no showing that raising the cap would allow realization of significant efficiencies.³⁶ In the petitions for reconsideration before us, neither BellSouth nor CTIA provides additional arguments or evidence challenging these points. Moreover, neither commenter has demonstrated the need for additional spectrum in particular markets that would cause it to exceed the spectrum cap.

12. Further, we do not find persuasive BellSouth's and CTIA's contentions regarding the alleged inadequacy of the waiver process with respect to 3G and other advanced services, and how that places U.S. carriers at a competitive disadvantage vis à vis foreign carriers. In our *Biennial CMRS Spectrum Cap Order* we provided flexibility in the spectrum cap rule to allow carriers to present the Commission with concrete evidence of the need for additional CMRS spectrum for the provision of 3G and other advanced services that would cause them to exceed the spectrum cap. Accordingly, we set forth a specific waiver process designed to address such needs for those cases in which a carrier could justify our departure from the rule.³⁷ Contrary to BellSouth's and CTIA's contentions, we believe the "bright-line" rule creates more regulatory certainty than uncertainty, as we explained in the *Biennial CMRS Spectrum Cap Order*.³⁸ Further, by providing specific waiver guidelines, we best ensure that carriers are on full

³³ See, e.g., BellSouth Biennial Review Comments at 10-11; CTIA Biennial Review Comments at 3, 5, 10; GTE Biennial Review Comments at 19-22; and SBC Biennial Review Comments at 10-11.

³⁴ *Biennial CMRS Spectrum Cap Order*, 15 FCC Rcd at 9247-48 (¶ 61).

³⁵ *Id.* at 9232 (¶ 26), 9249 (¶ 65).

³⁶ *Id.* at 9249 (¶ 65).

³⁷ *Id.* at 9253-56 (¶¶ 78-83).

³⁸ See *id.* at 9242-46 (¶¶ 49-58), 9255 (¶ 81).

notice of the standard by which we will review and evaluate the petitions. We are not persuaded by BellSouth's argument that the process requires a company to "lay open for public scrutiny its business plans."³⁹ The waiver process only requires that a carrier seeking waiver of a rule credibly demonstrate, with particularity, the basis on which departure from the rule would serve the public interest.

13. Finally, as noted above, upcoming auctions will make additional spectrum available for provision of 3G and advanced services. We have scheduled an auction of broadband PCS spectrum this Fall that should assist carriers – both incumbent carriers and new entrants – in gaining access to more spectrum that can be used for these services.⁴⁰ In addition, under our *700 MHz Band Order* issued earlier this year, we are making other spectrum available that can be used for advanced services.⁴¹ Carriers planning to provide various new services such as 3G, including BellSouth and others, will have the opportunity in that auction to obtain additional spectrum to augment their existing services and systems.⁴² We have also determined that the 30 MHz of spectrum being auctioned in the 700 MHz band would not be subject to the CMRS spectrum cap, in large measure so that carriers like BellSouth and other providers with significant needs for additional spectrum would not be constrained by the cap.⁴³

14. *Market analysis.* BellSouth contends that the competitive analysis in the *Biennial CMRS*

³⁹ BellSouth Petition at 15.

⁴⁰ An auction of C and F block broadband PCS licenses, Auction No. 35, is scheduled to begin later this year. See Public Notice, "C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000" (DA 00-2259 (rel. Oct. 5, 2000)). In our recently released order on this auction, we lifted the "entrepreneur" eligibility restrictions for bidding for and obtaining licenses for some portions of the C block spectrum and for all of the F block spectrum. See In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration* (FCC 00-313) (rel. Aug. 29, 2000), at ¶¶ 16-29. These changes will enable all carriers, including larger, non-entrepreneurial carriers, to obtain additional CMRS spectrum. We also determined that the C block spectrum would be auctioned in blocks of 10 MHz (in some cases, the blocks will be 15 MHz), and could be aggregated into larger blocks. *Id.* at ¶¶ 12-15, 27-29). Division of the spectrum in this manner will allow almost all carriers in almost all markets to bid for additional spectrum and still comply with the spectrum cap (absent disaggregation). See *id.* at ¶ 60.

⁴¹ See In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476 (FCC 00-5) (rel. Jan. 7, 2000) ("*700 MHz Band First R&O*"), *recon. granted in part and denied in part*, In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions of Part 27 of the Commission's Rules, WT Docket No. 99-168, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* (FCC 00-224) (rel. June 30, 2000). We stated in our *Biennial CMRS Spectrum Cap Order* that we would be allocating new spectrum soon after the issuance of that order. *Biennial CMRS Spectrum Cap Order*, 15 FCC Rcd at 9255-56 (¶ 82). The *700 MHz Band First R&O* is our first order addressing newly allocated spectrum. The service rules have been structured to support wideband applications implemented with next generation technologies. *700 MHz Band First R&O*, 15 FCC at 477-78 (¶ 2).

⁴² See *700 MHz Band First R&O*, 15 FCC Rcd at 497 (¶ 50).

⁴³ *Id.* at 497-98 (¶¶ 51-53). As we noted, however, our decision not to include this spectrum under a spectrum cap was premised on retaining the CMRS spectrum cap on the 180 MHz of broadband CMRS spectrum (available to cellular, broadband PCS, and digital SMR providers) so as to maintain that competitive market structure. *Id.* at 498 (¶ 53).

Spectrum Cap Order does not justify retention of the CMRS spectrum cap. BellSouth alleges that the order fails to adequately define either the product or geographic markets when assessing market concentration. We disagree with BellSouth. We find that the market definitions and competitive market analysis in the *Biennial CMRS Spectrum Cap Order* were reasonable.

15. BellSouth's petition does not persuade us that we have defined too narrowly the CMRS product market.⁴⁴ As we explained, our focus on competitive conditions in the market for mobile voice telephone services is appropriate.⁴⁵ Consumers obtain their mobile telephone services principally from cellular, PCS, or digital SMR carriers.⁴⁶ Our finding that mobile voice services constitute a separate product market is consistent with previous decisions by the Commission in which it has defined interconnected mobile voice services as a separate product market and concluded that consumers obtain such service principally from broadband PCS, cellular, and digital SMR licensees, even though CMRS licensees may also provide other types of communications services.⁴⁷

16. We also reject BellSouth's argument that we should have used Metropolitan Trading Areas (MTAs)⁴⁸ instead of Metropolitan Statistical Areas (MSAs)⁴⁹ to define the relevant geographic market.⁵⁰ As we have previously explained, a properly defined geographic market aggregates those consumers with similar choices regarding a particular good or service.⁵¹ Cellular service areas, which comprise both MSAs and RSAs, are most likely to best meet this definition. Cellular providers generally serve local geographic markets where consumers are likely to exhibit similar demand patterns and share similar communities of interest and a common set of vendors.⁵² MTAs, on the other hand, would not be

⁴⁴ See BellSouth Petition at 4-5.

⁴⁵ See *Biennial CMRS Spectrum Cap Order*, 15 FCC Rcd at 9240-41 (¶¶ 45-46).

⁴⁶ *Id.* at 9241 (¶ 46).

⁴⁷ See *id.* These services may include, for example, trunked dispatch, paging/messaging services, and two-way mobile data services. We note also that our determination is consistent with analyses conducted by the U.S. Department of Justice when reviewing large mergers of telecommunications companies. *Id.*

⁴⁸ Blocks A and B of broadband PCS are licensed by MTAs, while blocks C, D, E, and F are licensed by basic trading areas (BTAs), which are considerably smaller. See generally 47 C.F.R. §§ 202, 229.

⁴⁹ Cellular markets comprise both MSAs and RSAs. See generally 47 C.F.R. § 909.

⁵⁰ See BellSouth Petition at 5-10.

⁵¹ See, e.g., Applications of NYNEX Corporation and Bell Atlantic Corporation, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 20016 (¶ 54) (1997). See also Applications of Pittencieff Communications, Inc. Transferor, and Nextel Communications, Inc. Transferee, For Consent to Transfer Control of Pittencieff Communications, Inc. and its Subsidiaries, *Memorandum Opinion and Order*, 13 FCC Rcd 8935, 8951 (¶ 37) (WTB 1997).

⁵² For instance, we noted in our order that carriers conduct local market strategies that govern the terms most consumers obtain service, and that pricing can be tailored to local market conditions. *Biennial CMRS Spectrum Cap Order*, 15 FCC Rcd at 9240-41 (¶ 45).

appropriate for our competitive analysis.⁵³ MTAs cover much larger, regional license areas that comprise many MSAs and RSAs. Indeed, we note that markets based on MSAs more accurately reflect the number of choices actually available to consumers in a particular area. In many MSAs, consumers can choose from among two cellular licensees and several other licensees using either different PCS blocks (A through F) or digital SMR. In contrast, in other parts of the same MTA, *e.g.*, within a particular RSA, consumers currently may only have two choices, both involving cellular service; in yet another RSA within the same MTA, consumers may again have two choices, but from different cellular carriers with different offerings.⁵⁴ We also note that our assessment of competition in CMRS markets relied on information submitted in the record, which was based on MSAs, not MTAs.⁵⁵

17. In addition, we reject BellSouth's contention that we relied inappropriately on "historical" market share data in our analysis in the *Biennial CMRS Spectrum Cap Order* given the dynamic nature of the CMRS industry and future competition from new entrants.⁵⁶ While we agree in principle that use of historical or contemporaneous data on market performance potentially could understate the potential competitive impact of new entrants in a dynamic industry and overstate the risks of anticompetitive behavior, we nonetheless determined that our concerns about possible consolidation of the CMRS spectrum warranted retention of the spectrum cap, at least in the near future.⁵⁷ There are also significant risks associated with relying on projections of competitive developments in markets as dynamic as these. In our competitive analysis, we relied on the most recent market data available, including market share data based

⁵³ We reject BellSouth's argument that because the spectrum cap rule compares cellular coverage areas with PCS license areas (either MTAs or BTAs, which are considerably smaller) for purposes of determining "significant overlap," the Commission should focus its CMRS market concentration analysis on geographic areas the size of MTAs. PCS license areas have never been the starting point for the competitive analysis that provides the basis for the Commission's spectrum cap rule. Instead, since first instituting the CMRS spectrum cap in 1994, the Commission's concern largely has been to prevent incumbent cellular carriers (licensed by MSAs and RSAs) from obtaining undue market power by obtaining too much spectrum through PCS licenses. *See generally* 1994 *CMRS Spectrum Cap Order*, 9 FCC Rcd 7988, 8100-01 (¶¶ 238-41), 8104-05 (¶¶ 248-51) (1994); 1996 *Spectrum Cap Order*, 11 FCC Rcd 7824, 7864-65 (¶¶ 86-87), 7869-76 (¶¶ 94-107). In determining in 1994 how to define the geographic area in which a cap would apply, the Commission decided to look to standardized geographic areas, *i.e.*, MTAs and BTAs, rather than other approaches such as actual service areas, because using standardized areas was less likely to create an administrative burden when implementing the rule. 1994 *CMRS Spectrum Cap Order*, 9 FCC Rcd at 8115-16 (¶ 279); In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, *Further Notice of Proposed Rulemaking*, 9 FCC Rcd 2863, 2884 (¶¶ 99-100, 102) (1994). As we explain above, MTAs are too large to accurately reflect consumer choices in our competitive market analysis.

⁵⁴ Indeed, BellSouth's analysis makes this point explicitly where it compares concentration in an MTA and each of four constituent MSAs within that MTA. *See* BellSouth Petition, Attachment A. In each of the four MSAs, consumers obtain service from only a subset of the carriers competing somewhere within the MTA, and these choice sets vary from MSA to MSA. *Id.* Since all consumers within the entire MTA do not face similar choices, the MTA should not be regarded as the relevant geographic market for these purposes.

⁵⁵ *See, e.g.,* *Biennial CMRS Spectrum Cap Order*, 15 FCC Rcd at 9237-38 (¶ 38); *see generally id.* at 9232-42 (¶¶ 27-48).

⁵⁶ *See* BellSouth Petition at 10-14.

⁵⁷ *Biennial CMRS Spectrum Cap Order*, 15 FCC Rcd at 9239 (¶ 41).

on the number of subscribers licensees had in 1998 and 1999.⁵⁸ We also relied on other analyses in reaching our determination that the spectrum cap continued to serve the public interest. In particular, we explained that broadband PCS was still in the early stages of deployment and that reconsolidation in the CMRS sector could reverse recent competitive successes in CMRS markets and raise competitive concerns.⁵⁹ We find the competitive analyses in the *Biennial CMRS Spectrum Cap Order* reasonable given the record before us pertaining to CMRS markets and our extensive analysis of those CMRS markets. We also believe that our decision to revisit the rule in the 2000 Biennial Review provides the appropriate framework for considering any changes in market conditions that may occur.

18. *Forbearance.* CTIA challenges our decision to deny its request that the Commission forbear from applying the spectrum cap to CMRS carriers, pursuant to Section 10 of the Act.⁶⁰ Specifically, CTIA alleges that our decision to retain the cap is inconsistent with our obligation to take a deregulatory approach to wireless services and that our order is flawed because it treats wireless carriers differently from other communications carriers, such as those providing cable and long distance services.⁶¹ PCIA counters that CTIA is merely rearguing its unsuccessful forbearance petition and that different government regulation is needed because barriers to entry in the wireless sector, which include the need for a governmentally-granted license of spectrum, are higher.⁶²

19. We deny CTIA's request for reconsideration. In our *Biennial CMRS Spectrum Cap Order*, we found that none of the three prongs of the Section 10 forbearance test had been met.⁶³ We need not reiterate here the underlying analysis in that order. CTIA raises no new arguments that would cause us to reconsider our analysis, and therefore we deny its request for reconsideration.

20. *Clarification of application of rule in overlapping areas.* Western Wireless/VoiceStream request that the Commission clarify what they contend to be an ambiguity in the spectrum cap rule that has resulted from our decision in the *Biennial CMRS Spectrum Cap Order* to raise the CMRS spectrum cap to 55 MHz in rural areas. Specifically, they seek clarification concerning how the population overlap provision in Section 20.6(c) is to be applied in cases in which an entity holds a broadband PCS license in an MTA, and also holds cellular licenses in both MSA license area(s) (which are subject to the 45 MHz cap) and RSA license area(s) (which are subject to the new 55 MHz cap) that overlap with the MTA.⁶⁴

21. Section 20.6(c) states, in pertinent part, that overlapping cellular and PCS interests trigger scrutiny under the cap only where a "significant overlap" exists in the population covered by both the cellular and the PCS licenses. A "significant overlap" is defined as occurring when at least 10 percent of

⁵⁸ *Id.* at 9236-38 (¶¶ 36-38).

⁵⁹ *Id.* at 9236-39 (¶¶ 34-42).

⁶⁰ 47 U.S.C. § 160.

⁶¹ *See generally* CTIA Petition.

⁶² PCIA Comments at 5-7.

⁶³ *Biennial CMRS Spectrum Cap Order*, 15 FCC Rcd at 9271-73 (¶¶ 121-27).

⁶⁴ Western Wireless/VoiceStream Petition at 3. The cellular license areas are Cellular Geographic Service Areas ("CGSAs"), defined in Section 22.911 of the Commission's rules. 47 C.F.R. § 22.911.

the population of the PCS licensing area is also within one or more cellular licensing areas attributable to the same licensee.⁶⁵ Thus, if a licensee holds a 30 MHz PCS license and one or more 25 MHz cellular license(s) whose population, in total, exceeds the 10 percent overlap threshold, and the cellular license(s) are in MSAs, the spectrum cap is violated because the aggregate amount of cellular and PCS spectrum held, 55 MHz, exceeds the 45 MHz cap for non-rural areas. Under the recent amendment to the spectrum cap rule, however, a licensee may hold an overlapping 30 MHz PCS license and a 25 MHz cellular license located in one or more RSAs, regardless of the amount of overlap, because the applicable cap for rural areas is 55 MHz.

22. Western Wireless/VoiceStream seek clarification of how the 10 percent overlap is calculated if the licensee holds attributable interests of 55 MHz of spectrum in *both* MSA and RSA licenses, inquiring whether one counts the population in both the MSA and the RSA licensing areas or only the population in the overlapping MSA licensing area(s). We clarify the rule as follows: the total population of *each* overlapping cellular licensing area that exceeds the cap – *i.e.*, each cellular license area in MSA(s) that exceeds the 45 MHz cap and each cellular license area in RSA(s) that exceeds the 55 MHz cap – should be included in the overlap calculation. Thus, where a licensee holds both MSA and RSA cellular licenses that overlap with a PCS licensing area, a “significant overlap” occurs when the population of overlapping cellular license areas *exceeding* the applicable cap, when totaled, encompass 10 percent or more of the population of the PCS area.⁶⁶

IV. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106, the Petition for Reconsideration of the *Biennial CMRS Spectrum Cap Order* filed by BellSouth Corporation (“BellSouth”) in WT Docket No. 98-205 IS DENIED.

24. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106, the Petition for Reconsideration of the *Biennial CMRS Spectrum Cap Order* filed by the Cellular Telecommunications Industry Association (“CTIA”) in WT Docket No. 98-205 IS DENIED.

25. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and section 1.2 of the Commission’s rules, 47 C.F.R. § 1.2, the Joint Petition for Limited Clarification of the *Biennial CMRS Spectrum Cap Order* filed by Western Wireless Corporation and VoiceStream Wireless Corporation (“Western Wireless/VoiceStream”) in WT Docket No. 98-205 IS GRANTED as set forth above.

⁶⁵ 47 C.F.R. § 20.6(c).

⁶⁶ For example, assume that a licensee holds a 30 MHz PCS license and two cellular licenses, one in a MSA and one in a RSA, that overlap geographically with the licensee’s MTA. Assume further that the MTA population is 10 million, of whom 800,000 (8 percent) reside in the MSA cellular service area and 400,000 (4 percent) reside in the RSA cellular service area. The “significant overlap” test is not met because the population of the cellular market(s) that exceed the cap, the population in the MSA only, totals 8 percent of the MTA population, which does not exceed the 10 percent threshold. *See also* In the Matter of Western PCS II Licensee Corporation Request for Waiver of Section 20.6 of the Commission’s Rules in the Denver MTA, *Order*, 14 FCC Rcd 19345, 19346-47 (¶ 4) (1999).

26. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX**Petitions and Comments on Reconsideration of *Biennial CMRS Spectrum Cap Order*
(WT Docket No. 98-205)****Petitioners:**

1. BellSouth Corporation
2. Cellular Telecommunications Industry Association
3. Western Wireless Corporation and VoiceStream Wireless Corporation (joint filing)

Comments:

1. GTE Services Corporation
2. Personal Communications Industry Association

Reply:

1. BellSouth Corporation

STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH
Concurring in Part, Dissenting in Part

Re: 1998 Biennial Review, Spectrum Aggregation Limits for Wireless Carriers, Memorandum Opinion and Order on Reconsideration, WT Docket No. 98-205

As set forth in my separate statement in the underlying order, I continue to believe that the spectrum cap has outlived whatever usefulness it may have once had.⁶⁷ Therefore, I would have granted these petitions for reconsideration and eliminated the caps. I look forward to the opportunity presented by this year's biennial review proceeding to re-examine this important issue.

Nonetheless, I support today's order to the extent that it clarifies the application of our existing rules.

⁶⁷ See Separate Statement of Commissioner Harold Furchtgott-Roth in 1998 Biennial Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, 15 FCC Rcd 9219 (1999).

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL**Re: 1998 Biennial Review, Spectrum Aggregation Limits for Wireless Carriers, Memorandum Opinion and Order on Reconsideration, WT Docket No. 98-205**

I tend to agree with Commission Furchtgott-Roth that the spectrum cap has outlived its usefulness. However, I voted to approve last year's biennial review order and I, therefore, support the denial of the reconsideration petitions that failed to raise anything new or specific (probably because they were filed almost a year ago).

We have seen a lot of changes just in the past year, including consolidation of carriers into multiple near-nationwide footprints, very capable processing and oversight of new combinations and overlaps by the Department of Justice, and hot demand for so-called "3G" spectrum abroad without new allocations here (yet). I too look forward to the opportunity presented by this year's biennial review proceeding to re-justify, modify or eliminate these rules.