

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

In the Matter of)	
)	
)	
2000 Biennial Regulatory Review)	WT Docket No. 01-14
Spectrum Aggregation Limits)	
For Commercial Mobile Radio Services)	
)	
)	
)	

REPORT AND ORDER

Adopted: November 8, 2001

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By the Commission: Chairman Powell issuing a separate statement; Commissioner Copps dissenting and issuing a statement.

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I. INTRODUCTION

1. In this Report and Order, we complete our reexamination of the need for the Commercial Mobile Radio Service (“CMRS”) spectrum aggregation limit, or “spectrum cap,”¹ and cellular cross-interest² rules as part of our 2000 biennial review of the Commission’s regulations, pursuant to section 11 of the Communications Act of 1934, as amended (“Communications Act”).³ Upon careful review of the record and publicly available evidence, we will “sunset” the spectrum cap rule effective January 1, 2003. The period between now and the sunset date will allow the markets to adjust and permit the Commission to consider, in conjunction with the United States Department of Justice (“DOJ”), substantive and processing guidelines for this agency’s case-by-case review of transactions that would raise concerns similar to those that the spectrum cap was designed to address.

2. We further decide today, on the basis of the current state of competition in CMRS markets, to raise the spectrum cap to 55 MHz in all markets during the transition period. We believe that this change should address certain carriers’ concerns about near-term spectrum capacity constraints in the most constrained urban areas during the period until the rule is eliminated and reliance solely on case-by-case review of CMRS spectrum aggregation is initiated. In addition, we eliminate the cellular cross-interest rule in Metropolitan Statistical Areas (“MSAs”) in recognition that the cellular carriers in these areas no longer enjoy significant first-mover advantages. We decide to retain the cellular cross-interest rule in Rural Service Areas (“RSAs”), where the cellular incumbents generally continue to dominate. However, we will entertain and be inclined to grant waivers of the rule for those RSAs that exhibit market conditions under which cellular cross-interests may be permissible without significant likelihood of substantial competitive harm. We will reassess the continued need for the cellular cross-interest rule in RSAs during the 2002 biennial review.

II. EXECUTIVE SUMMARY

3. In our oversight of CMRS spectrum aggregation, we have traditionally relied on prophylactic rules of general applicability. Under the current CMRS spectrum cap, no licensee in the broadband Personal Communications Services (“PCS”), cellular service, or Specialized Mobile Radio (“SMR”) service regulated as CMRS may have an attributable interest in more than 45 MHz of spectrum in these services with significant geographic overlap in an MSA, or more than 55 MHz in an RSA.⁴ The current

¹ 47 C.F.R. § 20.6.

² *Id.* § 22.942.

³ 47 U.S.C. § 161. This proceeding is the second biennial review of the CMRS spectrum aggregation limits. See 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, *Report and Order*, 15 FCC Rcd 9219 (1999) (“*First Biennial Review Order*”), *aff’d*, *Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd 22072 (2000) (“*2000 Spectrum Cap Recon Order*”), *appeal pending sub nom. Cingular Wireless LLC v. FCC*, No. 01-1006 (D.C. Cir., filed Jan. 5, 2001). In September 1999, we generally found that these spectrum aggregation limits were still necessary to safeguard competition in CMRS markets, although we made certain modifications to each of them to provide more flexibility in permissible investment and partnering arrangements among carriers. See *First Biennial Review Order*, 15 FCC Rcd at 9223 ¶ 6.

⁴ See 47 C.F.R. § 20.6(a). This rule is described in more detail in section III.A, *infra*.

cellular cross-interest rule prohibits a licensee for one cellular channel block in a Cellular Geographic Service Area (“CGSA”), or a party that controls or owns a controlling or otherwise attributable interest in such a licensee, from holding a direct or indirect ownership interest of more than five percent in a licensee for the other channel block in an overlapping CGSA.⁵

4. As tools for review of the potential anti-competitive effects of spectrum aggregation, both a spectrum cap rule (or a cross-interest rule) and case-by-case review present certain advantages. In many circumstances, rules may provide for greater certainty, faster processing, and expenditure of fewer industry and agency resources. However, a bright-line approach can be inflexible, potentially permitting problematic transactions and precluding transactions that would serve the public interest. While possibly requiring greater resources on the part of both transacting parties and the reviewing agency, case-by-case review and enforcement mechanisms allow greater regulatory flexibility and greater attention to the actual circumstances of a particular transaction or alleged misconduct. Moreover, a substantial degree of certainty and efficiency can be maintained under a case-by-case approach that employs appropriate guidelines or that is based on established precedent.

5. Under our biennial review, we examine whether regulations that apply to the operations and activities of providers of telecommunications service are “no longer necessary in the public interest as the result of meaningful economic competition.”⁶ With regard to the product market for mobile telephony, we find that there is “meaningful economic competition” in urban markets generally, but that rural markets are much less competitive than urban markets, with most rural counties having three or fewer competitors currently offering such services in any portion of the county. We, therefore, go on to consider under section 11 whether the spectrum cap and cellular cross-interest rules remain necessary or whether competitive market forces together with other regulatory tools can better serve the public interest.

6. On balance, and in light of the strong growth of competition in CMRS markets since the initiation of the spectrum cap, we decide today that we should move from the use of inflexible spectrum aggregation limits to case-by-case review of spectrum aggregation and enforcement of other safeguards applicable to such carriers based on evidence of misconduct. However, because it is important that case-by-case analysis ensure that the great benefits of competition in CMRS markets continue to be realized, and because we do not currently have a developed body of precedent in case-by-case review for these markets to guide both us and transacting parties, we determine that a sunset period is necessary in order to consider appropriate processing and substantive guidelines, to reallocate or enhance Commission resources, and to give the market time to adjust and prepare for the change in an orderly way. We further determine that a transition period that ends January 1, 2003, should be sufficient. Thus, the CMRS spectrum cap is eliminated, effective January 1, 2003. In the interim, we raise the spectrum cap to 55 MHz in all markets for the duration of its existence.

7. With respect to the cellular cross-interest rule, we determine that the rule is no longer necessary in MSAs because the cellular duopoly conditions that prompted the rule’s adoption no longer exist. Thus, under current market conditions in MSAs, there is no reason to treat the aggregation of cellular spectrum any differently than other aggregation of CMRS spectrum. We further determine that no transition period is necessary to eliminate this rule. By contrast, in RSAs, the record, though limited on this point, indicates that competition to the incumbent cellular licensees is not as developed as in MSAs. Thus, based on the record in this proceeding, it appears that a combination of interests in cellular licensees would more likely result in a significant reduction in competition. We, therefore, retain the cellular cross-

⁵ See *id.* § 22.942(a). This rule is described in more detail in section III.B, *infra*.

⁶ 47 U.S.C. § 161.

interest rule in RSAs, subject to waiver of the rule for those RSAs that exhibit market conditions under which cellular cross-interests may be permissible without a significant likelihood of substantial competitive harm. We will reassess the continued need for this rule as part of the next biennial review.

8. Finally, we amend the divestiture provision of the cellular cross-interest rule⁷ to conform to the divestiture provision of the spectrum cap rule⁸ and clarify the requirements governing divestiture trusts.

III. BACKGROUND

A. CMRS Spectrum Cap

9. *CMRS Spectrum Aggregation Limit.* The CMRS spectrum cap, set forth at section 20.6 of the Commission's rules, provides:

No licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS . . . shall have an attributable interest in a total of more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area, except that in Rural Service Areas (RSAs), . . . no licensee shall have an attributable interest in a total of more than 55 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any RSA.⁹

No more than 10 MHz is attributed to an entity when calculating SMR spectrum under the cap.¹⁰ A total of 180 MHz of spectrum designated for services that could be regulated as CMRS is subject to the 45/55 MHz spectrum cap: 120 MHz of broadband PCS spectrum, 50 MHz of cellular spectrum, and 10 MHz of attributable SMR spectrum.¹¹

10. The Commission's rules provide that controlling interests are attributable.¹² Non-controlling ownership interests of twenty percent or more (forty percent if held by a small business or rural telephone company, or certain passive institutional investors), including general and limited partnership interests, voting and non-voting stock interests, or any other equity interest, also are attributable.¹³ Officers and directors are attributed with their company's holdings, as are persons who manage certain operations of licensees, and licensees that enter into certain joint marketing arrangements with other licensees.¹⁴ Debt does not constitute an attributable interest for purposes of the spectrum cap, and securities conferring potential future equity interests (such as warrants, options, or convertible debentures) are not considered

⁷ See 47 C.F.R. § 22.942(c).

⁸ See *id.* § 20.6(e).

⁹ *Id.* § 20.6(a).

¹⁰ See *id.* § 20.6(b).

¹¹ See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Notice of Proposed Rulemaking*, 16 FCC Rcd 2763, 2764 ¶ 2 (2001) (“*NPRM*”).

¹² See 47 C.F.R. § 20.6(d)(1).

¹³ See *id.* § 20.6(d)(2), (3), (4), (6).

¹⁴ See *id.* § 20.6(d)(7), (9), (10).

attributable until they are converted or exercised.¹⁵

11. Determining whether a “significant overlap” exists is necessary because of the use of different licensing and service areas for cellular, broadband PCS, and SMR spectrum.¹⁶ When a PCS license and a cellular or SMR license are involved, a significant overlap exists when ten percent or more of the population of the designated PCS licensed service area is within the CGSA or SMR service area(s) in question.¹⁷

12. *History of the CMRS Spectrum Cap.* The CMRS spectrum cap was established in 1994, in anticipation of PCS licensing, and in recognition that direct competition was likely to develop among cellular, broadband PCS, and SMR.¹⁸ Previously, the Commission had imposed service-specific limitations on the aggregation of broadband PCS spectrum and on cellular/PCS cross-ownership.¹⁹ In adopting the CMRS spectrum cap to complement these latter two rules, the Commission found that an overall cap applicable to cellular, broadband PCS, and SMR spectrum would add certainty to the marketplace without sacrificing the benefits of pro-competitive and efficiency-enhancing aggregation.²⁰ The Commission

¹⁵ See *id.* § 20.6(d)(5).

¹⁶ For spectrum cap purposes, the relevant geographic area for cellular spectrum is the CGSA, *i.e.*, the composite 32 dBu service area contour within which the cellular system is entitled to protection from interference. See *id.* § 22.911. For broadband PCS spectrum, the relevant area is the licensed service area, which can be either a Major Trading Area (“MTA”) or a Basic Trading Area (“BTA”). See *id.* § 24.202. (BTAs and MTAs are based on copyrighted material owned by Rand McNally & Company). SMR service is licensed by economic areas (“EAs”) or by MTAs for auctioned licenses or on a site-by-site basis for pre-auction incumbent licensees. See *id.* §§ 90.661, 90.667, 90.681, 90.693.

¹⁷ See *id.* § 20.6(c). Where both MSA and RSA areas are included in a single PCS licensed area, those areas within MSAs where total spectrum exceeds 45 MHz and those areas within RSAs where total spectrum exceeds 55 MHz are considered in the calculation. See *2000 Spectrum Cap Recon Order*, 15 FCC Rcd at 22081 ¶ 22. Where only PCS licenses are involved, however, this analysis does not apply, and any overlap between BTA-licensed and MTA-licensed spectrum is considered significant. Situations involving overlap of CGSAs generally currently do not arise because, as discussed below, such holdings generally are prohibited under the cellular cross-interest rule. See 47 C.F.R. § 22.942.

¹⁸ See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Third Report and Order*, 9 FCC Rcd 7988, 8100-01 ¶¶ 238-40 (1994) (“*CMRS Third Report and Order*”).

¹⁹ See Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, 8 FCC Rcd 7700, 7728 ¶ 61, 7745 ¶ 106 (1993) (limiting broadband PCS licensees to 40 MHz of total spectrum allocated to broadband PCS; limited cellular licensees to no more than 10 MHz of broadband PCS spectrum in their cellular service areas); Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4984 ¶ 67 (1994) (revising PCS/cellular cross-interest rule to allow cellular licensees to increase their holdings of broadband PCS spectrum from 10 MHz to 15 MHz after January 1, 2000).

²⁰ See *CMRS Third Report and Order*, 9 FCC Rcd at 8100-07. In seeking to prevent excessive aggregation of spectrum, the Commission included the broadband PCS and cellular spectrum under the cap because those services accounted for a large majority of the spectrum used to provide CMRS. *Id.* at 8108 ¶ 259. SMR spectrum was included because SMR operators had the potential to offer services nearly identical to those offered with cellular and broadband PCS licenses, and therefore might seek to accumulate SMR and broadband PCS spectrum to limit entry by other providers. *Id.* at 8109 ¶ 261. In contrast, other services, such as narrowband PCS and paging, were excluded from the cap because there was little risk that an entity could use narrowband allocations to exert undue market power over CMRS as a whole. *Id.* at 8111 ¶ 267. Satellite
(continued....)

explained that, if licensees were to aggregate sufficient amounts of CMRS spectrum, it would be possible for them, unilaterally or in combination, to exclude efficient competitors, to reduce the quantity or quality of services provided, or to increase prices to the detriment of consumers.²¹ The Commission determined that the imposition of a cap on the amount of covered spectrum that a single entity could control in any one geographic area would limit the ability of any entity to increase prices artificially.²² The Commission also found that a cap on broadband PCS, SMR, and cellular spectrum holdings would prevent licensees from artificially withholding capacity from the marketplace.²³ The Commission concluded that a 45 MHz cap provided a "minimally intrusive means" for ensuring that the mobile communications marketplace remained competitive and preserved incentives for efficiency and innovation.²⁴

13. In 1996, in light of the U.S. Court of Appeals for the Sixth Circuit's ruling in *Cincinnati Bell Telephone Co. v. FCC* remanding the cellular/PCS cross-ownership restriction,²⁵ the Commission eliminated the service-specific limitations on the aggregation of broadband PCS spectrum and on cellular/PCS cross-ownership, and decided to rely solely on the 45 MHz CMRS spectrum cap to ensure that multiple service providers would be able to obtain broadband PCS spectrum and thereby facilitate the development of competitive markets for wireless services.²⁶ The Commission analyzed potential market concentration and again found that a 45 MHz spectrum cap was sufficient "to avoid excessive concentration of licenses and promote and preserve competition" while "maintaining incentives for innovation and efficiency."²⁷

14. In the *First Biennial Review Order*, the Commission decided substantially to retain the CMRS spectrum cap, together with the cellular cross-interest rule, but ordered modifications to reflect circumstances in rural areas and to permit passive institutional investors to acquire greater non-attributable interests in CMRS carriers.²⁸ The Commission concluded that the spectrum cap remained a simple and effective means of mitigating the competitive consequences of the spectrum-related barriers to entry in CMRS markets, and found that the 45 MHz limit struck the proper balance (in non-rural areas) between preserving opportunities for competitive entry and permitting carriers to achieve economies of scope and scale. The Commission did, however, raise the cap to 55 MHz in RSAs. This decision was based on findings that the potential consumer benefits in rural areas from competitive, facilities-based entry were

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services were excluded from the cap because of significant differences between those services and the services found subject to the cap. *Id.* at 8112 ¶ 269.

²¹ *See id.* at 8104 ¶ 248

²² *See id.*

²³ *See id.* at 8108 ¶ 258.

²⁴ *See id.* at 7999 ¶ 16.

²⁵ *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995).

²⁶ *See* 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, *Report and Order*, 11 FCC Rcd 7824, 7869 ¶ 94 (1996) ("*CMRS Spectrum Cap Report and Order*"), *aff'd*, 12 FCC Rcd 14031 (1997) ("*BellSouth MO&O*"), *aff'd sub nom. BellSouth Corp. v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999).

²⁷ *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869 ¶¶ 94-95.

²⁸ *See First Biennial Review Order*, 15 FCC Rcd at 9249 ¶ 66.

likely to be limited by the economics of offering service to lower-density populations.²⁹ The Commission also amended the spectrum cap rule to provide that equity interests of up to forty percent held by passive institutional investors are not attributable.³⁰ At the same time, the Commission adopted a waiver process to meet the spectrum requirements for third-generation (“3G”) and other advanced wireless services until additional spectrum for next-generation applications could be allocated.³¹

B. Cellular Cross-Interest Rule

15. *Cellular Cross-Interest Rule.* Section 22.942 of the Commission’s rules limits the ability of parties to have interests in cellular carriers on different channel blocks in a single geographic area.³² To the extent licensees on different channel blocks have any degree of overlap between their respective CGSAs, the rule prohibits any entity with an attributable interest in one licensee from having a direct or indirect ownership interest of more than five percent in the other licensee.³³ An attributable interest is defined generally to include an ownership interest of twenty percent or more, as well as any controlling interest.³⁴ However, an entity may have non-controlling and otherwise non-attributable direct or indirect ownership interests of less than twenty percent in licensees for different channel blocks in overlapping CGSAs.³⁵ Divestiture of interests as a result of a transfer of control or assignment of authorization must occur prior to consummating the transfer or assignment.³⁶

16. *History of the Cellular Cross-Interest Rule.* The cellular cross-interest rule was adopted in 1991,³⁷ when cellular licensees were the predominant providers of mobile voice services. In adopting this rule, the Commission stated that “in a service area where only two cellular carriers are licensed per market,

²⁹ See *id.* at 9256-57 ¶ 84.

³⁰ See *id.* at 9265 ¶ 103.

³¹ See *id.* at 9255-56 ¶ 82 (describing factors that will be reviewed when considering a request for permanent waiver of the spectrum cap to provide advanced wireless services). As discussed in the *First Biennial Review Order*, the Commission will consider granting a waiver of the cap if an applicant can credibly demonstrate in a particular geographic area that the applicable limit is having a significant adverse effect on its ability to provide advanced wireless services. See *id.*

³² 47 C.F.R. § 22.942.

³³ See 47 C.F.R. § 22.942(a).

³⁴ See *id.* § 22.942(d)(1), (2). Section 22.942(d) contains other rules to determine attributable interests. See *id.* § 22.942(d)(3)-(9).

³⁵ See *id.* § 22.942(b).

³⁶ See *id.* § 22.942(c).

³⁷ See Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185, 6228-29 ¶¶ 103-06 (1991) (“*Cellular First Report and Order*”). The original cellular rules restricted cellular cross-ownership by limiting ownership of cellular A block licenses to non-wireline carriers and ownership of cellular B block licenses to wireline carriers. These restrictions were lifted for cellular unserved area licenses in 1989 and for all cellular licenses in 1994. See Amendment of the Commission’s Rules for Rural Cellular Service, *Order on Reconsideration of Second Report and Order*, 4 FCC Rcd 5377 (1989); Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Services, *Report and Order*, 9 FCC Rcd 6513 (1994).

the licensee on one frequency block in a market should not own an interest in the other frequency block licensee in the same market.”³⁸ Thus, the Commission adopted restrictions on a party's ability to hold ownership interests in both cellular licensees in the same geographic area “[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems.”³⁹ In the *First Biennial Review Order*, the Commission determined that the cellular cross-interest rule was still required to protect against substantial anticompetitive threats from common ownership between the two cellular carriers in any given geographic area. The Commission found that cellular carriers served approximately eighty-six percent of nationwide mobile telephone subscribers at the end of 1998, and determined that the percentage was less than seventy in only a few major metropolitan markets.⁴⁰ However, because competition from other services had increased on the whole since the rule's inception in 1991, the Commission relaxed the rule's attribution standards to the current limits described above.⁴¹

C. Notice of Proposed Rulemaking

17. In the *NPRM* in this proceeding,⁴² the Commission initiated a reexamination of the need for CMRS spectrum aggregation limits as part of our 2000 biennial regulatory review of the Commission's telecommunications regulations. Section 11 of the Communications Act requires the Commission, every two years, to review all regulations that apply to “the operations or activities of any provider of telecommunications service” and to “determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.”⁴³ The *NPRM* initiated the Commission's second comprehensive review of the CMRS spectrum cap and cellular cross-interest rules, the two regulations that currently limit the aggregation of broadband CMRS spectrum.

18. The *NPRM* requested public comment, including the submission of specific market data and studies, to assist the Commission's determination of whether the CMRS spectrum aggregation rules are no longer necessary in the public interest and, if they are necessary, whether our existing spectrum limits should be modified.⁴⁴ First, comment was requested on whether spectrum aggregation limits, including the cellular cross-interest rule, continue to enhance meaningful competition in today's CMRS marketplace.⁴⁵ In this regard, comment was sought on the development of meaningful economic competition, as well as the potential competitive consequences of consolidation that may occur without spectrum aggregation limits.⁴⁶ Next, comment was requested on spectrum management and other regulatory considerations, particularly in the context of spectrum suitable for broadband CMRS.⁴⁷ Under this inquiry, the Commission sought to

³⁸ *Cellular First Report and Order*, 6 FCC Rcd at 6628 ¶ 103.

³⁹ *Id.* at 6628 ¶ 104.

⁴⁰ *First Biennial Review Order*, 15 FCC Rcd at 9232 ¶ 25, 9251 ¶ 71.

⁴¹ *Id.* at 9252-53 ¶¶ 74-75.

⁴² *NPRM*, 16 FCC Rcd at 2764 ¶ 1.

⁴³ 47 U.S.C. § 161(a)(1), (2).

⁴⁴ *See NPRM*, 16 FCC Rcd at 2771 ¶ 13.

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See id.*

examine any costs that the spectrum aggregation limits may impose on the development of advanced wireless services, the possible benefits of prophylactic standards, and whether these standards promote efficiency.⁴⁸ In addition, comment was sought on how recent international developments should affect our public interest determination.⁴⁹

19. We also sought comment on the implications for our processes of DOJ's antitrust law enforcement responsibilities.⁵⁰ We asked whether we should defer to DOJ in CMRS license transfers, and, if so, what form such deference should take.⁵¹ Specifically, we asked whether all transfers resulting in consolidation of spectrum below a certain threshold should be exempt from section 310(d) competitive analysis.⁵² We acknowledged that antitrust laws may place adequate focus on mergers that threaten to curtail actual competition. Therefore, we asked whether we may, and should, refrain from independent review of the competitive effects of a transaction that is subject to some specified level of DOJ review, and if so, what that level should be.⁵³

20. The *NPRM* also requested comment on whether specific attributes of the CMRS spectrum cap and cellular cross-interest rules should be modified, if those rules are generally retained, to allow some of the benefits that may arise from additional cross-ownership interests.⁵⁴ To the extent that certain revisions would reduce any costs of the rules or promote public interest objectives, we sought comment on how to implement them without significantly increasing barriers to entry for new competitors or reducing benefits to wireless consumers.⁵⁵

21. In response to the *NPRM*, the Commission received fifteen comments and fifteen reply comments from a total of twenty-five parties. Those parties, and the abbreviated names used in this Report and Order, are set forth in Appendix A. In addition, Appendix A identifies and provides short-form references for the economic and technical analyses submitted as attachments to several of the comments and reply comments.

IV. DISCUSSION

A. Standard for Decision

1. Section 11 of the Communications Act

22. The 1996 Act significantly amended the Communications Act of 1934 to permit and encourage

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.* at 2775, ¶ 20.

⁵¹ *See id.*

⁵² *See id.*; 47 C.F.R. § 310(d).

⁵³ *See NPRM*, 16 FCC Rcd at 2771 ¶ 13.

⁵⁴ *See id.* at 2787 ¶ 46.

⁵⁵ *See id.* at 2787-90 ¶¶ 46-57.

competition in various communications markets.⁵⁶ Congress anticipated that the development of competition would lead market forces to reduce the need for regulation.⁵⁷ Section 11 of the Communications Act, which was added by the 1996 Act, provides that every two years the Commission shall review all regulations that apply to “the operations or activities of any provider of telecommunications service” and “determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.”⁵⁸ Section 11 further provides that in carrying out this review, the Commission “shall repeal or modify any regulation it determines to be no longer necessary in the public interest.”⁵⁹

23. Consistent with section 11, the Commission stated in the *NPRM* that its fundamental inquiry is whether, as a result of meaningful economic competition among providers of telecommunications services, spectrum aggregation limits are no longer necessary in the public interest.⁶⁰ The Commission sought comment on what constitutes “meaningful economic competition” under section 11, and to what degree the relevant competitive conditions have changed since the Commission’s last biennial review of these rules.⁶¹ If meaningful economic competition were found to exist, the Commission asked whether this would mean that spectrum aggregation limits have served their purpose and are no longer in the public interest, or whether public interest considerations nevertheless would warrant continued use of spectrum aggregation limits.⁶²

24. Commenters differ on how section 11 should be applied and whether there might be public interest reasons to retain spectrum aggregation limits if meaningful economic competition exists. For example, Cingular and Verizon argue that section 11 places the burden on proponents of the spectrum cap to show why retention of the cap is in the public interest, and on the Commission to show why the spectrum cap and cellular cross-interest rules are necessary.⁶³ On the other hand, Leap argues that section 11 places

⁵⁶ See Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) (“1996 Act”), introductory statement (Act was intended “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”).

⁵⁷ See Joint Managers’ Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) at 1 (stating that the 1996 Act would establish a “pro-competitive, deregulatory national policy framework”).

⁵⁸ 47 U.S.C. § 161(a)(2). Section 11 states:

(a) BIENNIAL REVIEW OF REGULATIONS. – In every even-numbered year (beginning with 1998), the Commission -- (1) shall review all regulations issued under this Act in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and (2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.

(b) EFFECT OF DETERMINATION. – The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.

⁵⁹ *Id.* § 161(b).

⁶⁰ See *NPRM*, 16 FCC Rcd at 2770 ¶ 12.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See Verizon Comments at 5-7; Cingular Reply Comments at 3-4; see also AT&T Comments at 4-5.

the burden on opponents of the cap to demonstrate why it should be modified.⁶⁴ Leap argues that section 11 does not establish a presumption that a rule is no longer necessary and does not disturb the basic principle under the Administrative Procedure Act (“APA”) that an agency must justify its actions.⁶⁵ WorldCom argues that section 11 requires the Commission affirmatively to determine that a rule is not necessary in order to eliminate the rule, and that section 11 does not establish a presumption that the spectrum aggregation rules are no longer necessary.⁶⁶ CTIA argues that whatever the precise requirements for deletion of a rule pursuant to section 11, no special burden is imposed on those seeking elimination of the rule.⁶⁷ Thus, CTIA contends that meaningful economic competition is a “sufficient – but not necessary – condition for eliminating a particular regulation.”⁶⁸

25. We conclude that we need not, for purposes of this proceeding, go beyond the plain meaning of the text of section 11 of the Communications Act. The language places an obligation on the Commission to “determine” if the regulation in question “is no longer necessary in the public interest as the result of meaningful economic competition.”⁶⁹ The Communications Act then explicitly provides that “the Commission *shall* repeal or modify” any regulation that it determines is no longer necessary in the public interest as the result of meaningful economic competition.⁷⁰ The statutory language does not impose any particular burdens on the opponents or proponents of a particular rule, but rather places the burden on the Commission to make the requisite determinations. In exercising its obligation under section 11, the language suggests that the Commission must examine why the rule was “necessary” in the first place and whether it is necessary any longer. Thus, in making the determination whether a rule remains “necessary” in the public interest once meaningful economic competition exists, the Commission must consider whether the concerns that led to the rule or the rule’s original purposes may be achieved without the rule or with a modified rule.

26. The primary public interest purpose underlying the original adoption of the spectrum aggregation limits was to promote pro-competitive ends in CMRS markets. In initially setting the spectrum cap in 1994, the Commission’s goal was to “discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency.”⁷¹ The Commission found that its “goal of preventing anticompetitive outcomes” could be accomplished by creating a cap on broadband PCS, cellular, and SMR licensees, which would “prevent licensees from artificially withholding capacity from the market.”⁷² Consistent with this goal, the Commission stated that the spectrum cap sought “to promote diversity and

⁶⁴ See Leap Reply Comments at 34-35.

⁶⁵ See *id.*; see generally Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

⁶⁶ See WorldCom Reply Comments at 4-6.

⁶⁷ See CTIA Comments at 4-9.

⁶⁸ See *id.* at 5.

⁶⁹ 47 U.S.C. § 161(a)(2). Section 11(a) requires the Commission to determine “whether any of these regulations are no longer in the public interest because competition between providers renders the regulation no longer meaningful.” See Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113, at 69 (1996).

⁷⁰ 47 U.S.C. § 161(b) (emphasis added).

⁷¹ *CMRS Third Report and Order*, 9 FCC Rcd at 8105 ¶ 251, 8100 ¶ 238.

⁷² *Id.* at 8108 ¶ 258.

competition in mobile services, by recognizing the possibility that mobile service licensees might exert undue market power or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum.”⁷³ Furthermore, the absence of a spectrum cap could undermine other statutory goals related to the promotion of competition, “such as the avoidance of excessive concentration of licenses and the dissemination of licenses among a wide variety of applicants.”⁷⁴ In addition, the Commission found that the cap not only promoted competition, but also benefited the public interest by allowing review of CMRS acquisitions in an administratively simple manner and lending certainty to the marketplace.⁷⁵ In 1996 and 1999, the Commission reaffirmed the primary public interest purpose of promoting pro-competition ends in the CMRS markets.⁷⁶ In adopting the cellular cross-interest rule, the Commission acted “[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems.”⁷⁷

2. Meaningful Economic Competition

27. In the case of the spectrum cap and cellular cross-interest rules, our inquiry focuses on the state of competition in the consumer markets for CMRS.⁷⁸ At the same time, we recognize that spectrum is an input in CMRS markets. Indeed, this recognition prompted adoption of the spectrum cap as a means of ensuring CMRS competition in the first place.⁷⁹ Although participants in the mobile telephony and CMRS spectrum markets are largely the same entities under current conditions, this could change if leasing arrangements become more common.⁸⁰ Again, we emphasize that the markets with which we are

⁷³ *Id.* at 8100 ¶ 239, 8110 ¶ 264.

⁷⁴ *Id.* at 8104 ¶ 248, 8108 ¶ 260.

⁷⁵ *Id.* at 8105 ¶ 251.

⁷⁶ See *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869 ¶ 94; *First Biennial Review Order*, 15 FCC Rcd at 9221, 9249 ¶¶ 1, 66. In 1996, the Commission also found that the spectrum cap, in addition to other tools at its disposal, furthered the goals of section 309(j) of the Communications Act. See *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7873-74 ¶ 102. We note that there are other tools to achieve goals other than competition, including case-by-case review, as well as prescribing license area designations and bandwidth assignments, and using bidding credits to create opportunities for new entrants.

⁷⁷ *Cellular First Report and Order*, 6 FCC Rcd at 6628 ¶ 104.

⁷⁸ In doing so, we consider not only competition among providers of CMRS, but also competition between these providers and providers of other telecommunications services, including wireline services. See *infra* paras. 36-37.

⁷⁹ See, e.g., *CMRS Third Report and Order*, 9 FCC Rcd at 8100-01, 8105 ¶¶ 238, 240, 251; *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869 ¶ 94; *Cellular First Report and Order*, 6 FCC Rcd at 6628 ¶ 104; *First Biennial Review Order*, 15 FCC Rcd at 9221, 9242, 9249 ¶¶ 1, 48, 66.

⁸⁰ See Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, 15 FCC Rcd 24178 (2000) (setting forth the Commission’s plans for facilitating secondary markets for radio spectrum, including leasing). See also Sprint and Virgin Announce Joint Venture, *News Release*, Sprint PCS (rel. Oct. 5, 2001) (announcing mobile virtual network operator (“MVNO”) arrangement between Sprint PCS and the Virgin Group); 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, *Sixth Report*, FCC 01-192, at 35 (rel. July 17, 2001) (“*Sixth Annual CMRS Competition Report*”) (stating that in 2000, “the top 20 resale providers had just over 3 million subscribers which is an increase of 100 percent over 1999”).

principally concerned are the output markets for services, and that conditions in the input markets provide only a partial proxy measure of competition in the output markets. Nonetheless, in the context of the output market, the state of control over the spectrum input is a relevant factor.

28. In evaluating CMRS markets, we consider both actual and potential competition. In general, potential competition can be as important as actual competition in promoting desirable outcomes. In the case of CMRS, however, it appears that actual competition among those firms already providing service has been the most significant factor in the gains that have been achieved in recent years.⁸¹ There remains relatively little potential for additional entry into urban markets in the near term, because most licenses for currently allocated spectrum have been constructed and put into service. In rural markets, a significant number of licenses have not yet been put into service, but demographic and geographic conditions generally appear to render additional large-scale entry economically difficult to support. As additional CMRS-suitable spectrum becomes available, the overall effect on the CMRS marketplace of potential competition could change.

3. Necessity for Rules in the Public Interest

29. In determining whether our spectrum aggregation limits remain necessary in the public interest, we consider the original purposes for which the rules were promulgated. The purpose underlying the spectrum aggregation limits was to promote competition in CMRS markets.⁸² An important consideration in determining the necessity for regulation is the availability of other, less burdensome tools to achieve these ends. In the case of the CMRS spectrum aggregation limits, these tools include case-by-case review of transactions by the Commission and DOJ, as well as our ability to shape the initial distribution of licenses through the service rules adopted with respect to specific auctions. In addition, the Commission is also obligated, pursuant to section 332(c)(1)(C) of the Communications Act, to continue to review (as it has done six times already) the state of competition among CMRS providers. Specifically, this provision states:

The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition.⁸³

Our most recent report, issued this year, has guided our decision in this proceeding, and future reports will continue to provide a useful tool for overseeing the changes, if any, in competitive market conditions. Moreover, we also have at our disposal various enforcement tools to ensure that CMRS carriers, which are common carriers under section 332(c) and key provisions of Title II of the Communications Act, do not engage in conduct that is anti-competitive or otherwise harm consumers due to excess concentration of

⁸¹ See *infra* paras. 31-32, 34-35, 38.

⁸² See, e.g., *CMRS Third Report and Order*, 9 FCC Rcd at 8100-01, 8105 ¶¶ 238, 240, 251; *CMRS Spectrum Cap Report and Order*, 11 FCC Rcd at 7869 ¶ 94; *Cellular First Report and Order*, 6 FCC Rcd at 6628 ¶ 104; *First Biennial Review Order*, 15 FCC Rcd at 9221, 9242, 9249 ¶¶ 1, 48, 66.

⁸³ 47 U.S.C. § 332(c)(1)(C).

spectrum.⁸⁴

B. Analysis of Competition in the Mobile Telephony Markets

30. We begin our analysis by considering the state of economic competition. Various indicators confirm the presence of meaningful economic competition in markets for CMRS. As we described in the *Sixth Annual CMRS Competition Report*,⁸⁵ and as commenters generally agree,⁸⁶ mobile telephony markets have experienced and continue to experience strong growth, increased competition, and active innovation. We also find it important that competition in these markets has progressed dramatically, not only since 1994, but since our last biennial review.

31. *Number of Competitors and Concentration.* One basic indicator of meaningful economic competition is that most Americans have a choice of obtaining CMRS from several different providers of service.⁸⁷ As of the end of 2000, about ninety-one percent of U.S. residents lived in a county that was served, at least in part, by three or more different mobile telephony providers, and seventy-five percent of the U.S. population lived in a county where five or more providers offered service.⁸⁸ Furthermore, over

⁸⁴ See *id.* §§ 332(c), 201, 202, 208; see also Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, *First Report and Order*, 15 FCC Rcd 17414, 17423 ¶ 20 (2000); Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857, 16865-66 ¶¶ 15-18 (1998) (finding that sections 201 and 202 codify the "bedrock consumer protection obligations of a common carrier" and that the Commission "has never previously refrained from enforcing sections 201 and 202 against common carriers, even when competition exists in a market."). We also note that the Commission's Consumer Information Bureau ("CIB") recently released its first quarterly report on the numbers and types of consumer complaints and inquiries CIB has received. See FCC Consumer Information Bureau Releases First Report on Complaints and Inquiries Processed, Data Will Help Commission, Companies and Public to Track Trends, *News Release*, Oct. 23, 2001, available at <http://www.fcc.gov/cib/news/firstreport.html> (last visited Nov. 20, 2001).

⁸⁵ *Sixth Annual CMRS Competition Report*, FCC 01-192. Although the Commission noted that it could not warrant the accuracy or completeness of the individual data in the *Sixth Annual CMRS Competition Report*, all of which were taken from publicly available sources (*see id.* at 5 n.20), we find that, cumulatively, these data are more than adequate to inform our evaluation of meaningful economic competition.

⁸⁶ See AT&T Comments at 2; Chadmoore Comments at 2; Cingular Comments at 23-28; CTIA Comments at 14-20; Schwartz and Gale Comments on behalf of CTIA at 9-10, 21-28; Nextel Comments at 1; Verizon Comments at 8-12; Gertner and Shampine Declaration on behalf of Verizon at 5-7; Cingular Reply Comments at 4-5; CTIA Reply Comments at 2-3; Verizon Reply Comments at 5-6. *But see* Leap Comments at 5-8; Leap Reply Comments at 28-29 (arguing that the CMRS marketplace is more competitive than in the past, but not yet optimally competitive); Sprint Comments at 4 (arguing that additional competitive entry due to the spectrum cap); TDS Comments at 5-6 (remarking on "spectacular growth" of PCS and SMR service, but warning of threat to competition posed by "rise of national carriers"); WorldCom Comments at 6 (agreeing that the CMRS marketplace is increasingly competitive today, but arguing that increasing consolidation may jeopardize these gains); Southern LINC Reply Comments at 6-7 (competition in the cellular and broadband PCS market sectors has increased, but the digital SMR market is currently dominated by one provider).

⁸⁷ See AT&T Comments at 2; Cingular Comments at 26-27; CTIA Comments at 15-16; Schwartz and Gale Comments on behalf of CTIA at 22, 24-26, Tbls. 3-4; Verizon Comments at 10; Gertner and Shampine Declaration on behalf of Verizon at 7.

⁸⁸ See *Sixth Annual CMRS Competition Report*, FCC 01-192, at 24-25. Because our analysis was limited to publicly available sources of information, this coverage percentage is based on the number of operators (continued....)

133 million people lived in counties with six or more mobile telephony providers, an increase of thirty-five percent over the previous year, and thirty-four million people lived in counties served by seven or more providers, a one-year increase of 170 percent.⁸⁹ By contrast, when the spectrum cap was first promulgated in 1994, in all but the few markets where Nextel had then launched service, consumer choice was limited to two cellular providers.

32. Measures of market concentration in the record show a substantial continuing decline in concentration in most local CMRS markets. We find that considerable entry has occurred and that meaningful competition is present, particularly given the presence of such earmarks of competition as falling prices, increasing output, and improving service quality and options. Specifically, concentration in CMRS markets, as measured by subscriber share, is falling.⁹⁰ Calculations submitted by economist John Hayes in both this record and the previous biennial review proceeding show that Herfindahl-Hirschman Indices (“HHIs”)⁹¹ in the twenty-five largest markets, calculated based on estimated subscribed customers, have fallen by an average of fifteen to twenty-five percent over the last two years.⁹² This downward trend in concentration may be attributed in part to the continued construction of new entrants’ networks, which has made these mobile telephony providers more viable competitors.⁹³

33. On the other hand, other measures of market concentration reveal moderate to high concentration levels. Using CMRS spectrum share as the capacity measure, we have calculated HHIs of 1,270 to 1,801 for the fifty most populous MSAs, and 1,246 to 2,405 for a sampling of eighty counties in RSAs.⁹⁴ These figures are generally consistent with the capacity-based HHI calculations submitted by

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serving any portion of a particular county. Consequently, some counties included in this analysis may have only a small amount of coverage from a particular provider.

⁸⁹ See *Sixth Annual CMRS Competition Report*, FCC 01-192, at 25.

⁹⁰ Under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission, 57 Fed. Reg. 41552 (dated Apr. 2, 1992, as revised, Apr. 8, 1997) (“*DOJ/FTC Merger Guidelines*”), “market shares will be calculated using the best indicator of firms’ future competitive significance.” See *DOJ/FTC Merger Guidelines* at § 1.41. Thus, market shares may be based on measures of current output (in the case of CMRS, measures such as subscribers, revenue or minutes, for example) or measures of current capacity (in the case of CMRS, measures such as total quantity of spectrum available or quantity of spectrum held where service has been launched, for example). Parties have submitted both output-based and capacity-based data in the record, and we find both approaches to be informative.

⁹¹ The HHI is calculated by summing the squares of the individual market shares of all the market participants. The HHI gives a proportionately greater weight to the market shares of the larger firms, given their relative importance in competitive interactions.

⁹² Compare Hayes Comments on behalf of Sprint at Table 1 (calculating HHIs between 1,739 and 3,963 as of January 2001) with *First Biennial Review Order*, 15 FCC Rcd at 9236-37 ¶ 36 (citing Hayes’ calculation of HHIs between 2,569 and 4,511 for the same MSAs as of January/February 1999). We note that Hayes relies on data regarding the number of subscribers per firm per city that are estimated using a sampling method that has been only briefly described. While the reported HHI levels may be considered uncertain, however, there is no reason to believe that the reported change in HHIs over time is biased.

⁹³ See Hayes Comments on behalf of Sprint at 4.

⁹⁴ Under the analysis in the *DOJ/FTC Merger Guidelines*, a market is considered moderately concentrated with a post-merger HHI between 1000 and 1800, and highly concentrated with a post-merger HHI above 1800. See *DOJ/FTC Merger Guidelines* at § 1.5. In the fifty most populous MSAs, HHIs range from a low of 1,270 in Phoenix to a high of 1,801 in Rochester, New York. To evaluate concentration in RSAs, we (continued....)

various commenters.⁹⁵ We emphasize, however, that caution is appropriate in employing such measures, whether they reveal a positive or negative indication of concentration.⁹⁶ Although more concentrated markets can be less competitive and more vulnerable to anticompetitive activity than less concentrated markets, moderate to high concentration is not necessarily a threat to competition. For example, we have previously found that “an HHI analysis alone is not determinative and does not substitute for our more detailed examination of competitive considerations.”⁹⁷ In the case of CMRS markets, for example, limits to economies of scale, technological compatibility issues, difficulties in finding a willing seller at a reasonable price, and capital market constraints limit consolidation. Moreover, antitrust review by the DOJ and section 310(d) review by the Commission continue to serve as protection against levels of consolidation that would impair competition. Furthermore, HHI measures function as indicators of the likely competitive situation – guidelines to which other information is added, as under the DOJ/Federal Trade Commission (“FTC”) approach – rather than as the single factor upon which to make competitive judgments, including the judgment of whether to retain the spectrum cap rule. As the *DOJ/FTC Merger Guidelines* state, “[b]ecause the specific standards set forth in the guidelines must be applied to a broad range of possible factual circumstances, mechanical application of those standards may provide misleading answers to the economic questions raised under antitrust laws.”⁹⁸

34. Based on the record before us and publicly available evidence, however, there appears to be a disparity in the amount of actual competition existing in MSAs versus RSAs. In MSAs, eighty-six percent of counties have four or more facilities-based CMRS providers serving some portion of the county, while in RSAs, twenty-four percent of counties have four or more facilities-based CMRS providers. Further, in over half of RSA counties, two or fewer licensed mobile telephony carriers are currently providing service.⁹⁹ Because these numbers include carriers that may be offering service in only a small portion of a

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sampled the fifty counties in RSAs with populations closest to the average RSA county population of 26,981, as well as the thirty RSA counties with populations closest to 10,000. In the fifty average population RSA counties, HHIs range from 1,246 in Del Norte County, California, to 2,405 in George County, Kansas. For the thirty RSA counties with populations closest to 10,000, HHIs range from 1,471 in Alger County, Michigan, to 2,200 in Metcalfe County, Kentucky. The fifty most populous MSAs were selected as the sample because commenters focused their analyses on the largest MSAs. See *infra* note 95. Because the record does not include evidence on concentration in RSAs, we prepared our own data for these areas based upon Commission records. To represent the data as fairly as possible, we took a statistical sampling.

⁹⁵ See Schwartz & Gale Comments on behalf of CTIA at Tbl. 2 (calculating HHIs in ten largest MSAs between 1,263 and 1,641 based on owned spectrum, and between 1,705 and 2,050 based on built spectrum); see also Economists, Inc. Comments on behalf of AT&T at 9-10, Tbls. 1-2; Strategic Policy Comments on behalf of Cingular at App. A (calculating hypothetical HHIs based on spectrum holdings).

⁹⁶ See Cingular Comments at 18-19, 33-34; Strategic Policy Comments on behalf of Cingular at 19-20; Schwartz and Gale Comments on behalf of CTIA at 15; Economists, Inc. Comments on behalf of AT&T at 23-24; Verizon Reply Comments at 18; Gertner and Shampine Reply Declaration on behalf of Verizon at 15-16; Cramton Reply Declaration on behalf of Leap at 13-14.

⁹⁷ See WorldCom, Inc. and MCI Comm. Corp., *Memorandum Opinion and Order*, 13 FCC Rcd 18025, 18084 (1998). See also *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715-16 (D.C. Cir. 2001); WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE*, chs. 8-11, pp. 347-349 (Revised Ed., Harcourt Brace Jovanovich 1988).

⁹⁸ See *DOJ/FTC Merger Guidelines* at § 0.

⁹⁹ Based upon our research and publicly available sources, for RSA counties there are two or fewer providers in fifty-six percent of counties while for MSA counties there are two or fewer providers in five percent of counties.

county,¹⁰⁰ they may overstate the amount of actual facilities-based competition, especially in RSAs.¹⁰¹ Moreover, our licensing records show that gaps in the footprints of the nationwide carriers tend to be greater in RSAs than in MSAs. Of the fifty most populous MSAs, forty have five licensed nationwide carriers, not counting Nextel,¹⁰² and the other ten have four.¹⁰³ In a sampling of fifty average population RSA counties, by contrast, sixteen have five nationwide carriers, sixteen have four, and eighteen have fewer than four. In a sampling of thirty less populated RSA counties, eight have five nationwide carriers, nine have four, and thirteen have fewer than four.¹⁰⁴ Therefore, consumers in rural areas appear to have fewer choices in terms of providers, pricing plans, and service offerings than consumers in MSAs. Commenters generally agree that rural markets have significantly less competition than metropolitan areas in large part due to population density and economics.¹⁰⁵

35. *Benefits to Consumers of Competition.* As the CMRS marketplace has developed, consumers in both MSAs and RSAs have realized the benefits of competition in the form of increased output, lower prices, and increased diversity of service offerings. For example, from 1993 to 2000, the number of subscribers using mobile phones jumped 584 percent, the amount of revenue the sector generated climbed 384 percent, and the number of people employed in the industry grew 364 percent.¹⁰⁶ In addition, as we described in the *Sixth Annual CMRS Competition Report*,¹⁰⁷ and as commenters generally agree,¹⁰⁸ prices

¹⁰⁰ See *supra* note 88.

¹⁰¹ Our PCS construction requirements require only that licensees offer adequate service to a specified percentage of the population within their licensed area, not that they cover the entire licensed area or any particular portion of that area. See 47 C.F.R. § 24.203. Because most MTAs and BTAs include both MSA and RSA areas, carriers generally can satisfy their construction requirements most economically by building out their networks extensively in MSAs, and little or not at all in RSAs.

¹⁰² Nextel is excluded from this comparison because information regarding Nextel's licensing in and service to RSAs is not readily available.

¹⁰³ If the licenses in Auction No. 35 are awarded to the high bidders, each of the six nationwide carriers will have a license in each of the fifty most populous MSAs except for Cingular in Phoenix, Arizona. We note that an agreement recently has been reached between the government, Auction 35 high bidders, and Nextwave. See Statement of FCC Chairman Michael Powell on Conclusion of Discussions on Nextwave Licenses, *News Release*, Nov. 16, 2001, available at <http://www.fcc.gov/Speeches/Powell/Statements/2001/stmkp140.html> (last visited Nov. 20, 2001).

¹⁰⁴ These representative areas were the same ones used to calculate sample HHIs. See *supra* note 94.

¹⁰⁵ See NTCA Comments at 3-4; RTG/OPASTCO Comments at 4; TDS Comments at 8; UTStarcom Comments at 1; CTIA Reply Comments at 28; Sprint Reply Comments at 8-10; TDS Reply Comments at 6-7; Economists, Inc. Comments on behalf of AT&T at 18; Gertner and Shampine Reply Declaration on behalf of Verizon at 5.

¹⁰⁶ Cellular Telecommunications and Internet Association, Semi-Annual Mobile Telephone Internet Survey, available at <http://www.wow-com.com/industry/stats/surveys/> (last visited Nov. 21, 2001). From December 2000 to September 2001, mobile telephony markets experienced an increase in subscribership of approximately eleven percent to an estimated total subscribership of 121,700,000. *Id.* Although the rate of subscribership growth appears to have slowed recently, this slowing largely reflects the larger subscriber base and the general economic slowdown nationwide.

¹⁰⁷ Although we do not have access to comprehensive pricing data for both MSA and RSA markets, and publicly available pricing studies utilize different methodologies, we have found that the data from all these sources consistently and "clearly show that the average price of mobile telephony service has fallen since the (continued....)

in mobile telephony markets are falling at an accelerating rate. During 2000, the cellular telephone component of the Consumer Price Index (“CPI”) produced by the United States Department of Labor decreased by 12.3 percent, while the overall CPI increased by 3.4 percent.¹⁰⁹ In comparison, the cellular telephone component of the CPI from December 1997 to January 1999 decreased by 9.1 percent (8.4 percent annualized), while the overall CPI increased by 1.9 percent.¹¹⁰ Several studies indicate that the entrance of new competitors into mobile telephony markets continues to reduce prices.¹¹¹ Furthermore, mobile telephony service providers are offering new and innovative pricing plans.¹¹² Most of the major carriers offer nationwide flat-rate, digital pricing plans, and several large carriers now offer regional flat-rate, digital pricing plans as well.¹¹³ Further, several carriers provide international roaming services to their customers.¹¹⁴ Mobile telephony providers are also offering technologically innovative services including Short Message Service (“SMS”), email, and web-based applications.¹¹⁵ In addition, “churn ...

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[*Fifth Annual CMRS Competition Report*, 15 FCC Rcd 17660 (2000)], continuing the trend of the last several years.” See *Sixth Annual CMRS Competition Report* at 27-28.

¹⁰⁸ See CTIA Comments at 18-21; CTIA Reply Comments at 10-11; Strategic Policy Reply Comments on behalf of Cingular at 5; Sprint Comments at 4; Gertner and Shampine Declaration on behalf of Verizon at 5-7, 15, 19; Gertner and Shampine Reply Declaration on behalf of Verizon at 2, 5-8; Verizon Comments at 9, 11-12; WorldCom Comments at 5-6; Schwartz and Gale Comments on behalf of CTIA at 26-27, Table 5; Chadmoore Comments at 2; see also, Leap Comments at 8-9; Cramton Declaration on behalf of Leap at 5, 10-12, 14-19 (discussing how a niche provider, such as Leap, lowers the price of local plans when it enters a market).

¹⁰⁹ *Sixth Annual CMRS Competition Report*, FCC 01-192, at 28.

¹¹⁰ See 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, *Fourth Report*, 14 FCC Rcd 10145, 10166-67 (1999) (“*Fourth Annual CMRS Competition Report*”).

¹¹¹ *Sixth Annual CMRS Competition Report*, FCC 01-192, at 27-28.

¹¹² See Gertner and Shampine Declaration on behalf of Verizon at 5 and 7, Sprint Comments at 4.

¹¹³ *Sixth Annual CMRS Competition Report*, FCC 01-192, at 29. However, these pricing plans are not available to customers that are not located in a particular carrier’s facilities-based service area.

¹¹⁴ AT&T, Nextel, and VoiceStream offer international roaming services. See *Sixth Annual CMRS Competition Report*, FCC 01-192, at 29-30; see also AT&T Wireless International Calling, available at http://www.attws.com/personal/intl_calling/ (last visited Nov. 20, 2001); Nextel Global Offerings, available at http://www.nextel.com/phone_services/worldwide/index.shtml (last visited Nov. 20, 2001). VoiceStream also has introduced an international roaming plan. See VoiceStream WorldClass Roaming, available at <http://www.voicestream.com/worldclass/default.asp> (last visited Nov. 20, 2001).

¹¹⁵ See *Sixth Annual CMRS Competition Report*, FCC 01-192, at 46-47; CTIA Comments at 19. Among other providers, US Cellular Corporation and Dobson Communications offer SMS, email, and information services. See U.S. Cellular Mobile Messaging, available at http://www.uscc.com/uscellular/SilverStream/Pages/h_faq_details.html?Type=2 (last visited Nov. 20, 2001); Dobson Cellular Systems Messaging Services, available at <http://www.dobsoncellular.com> (visited Nov. 20, 2001). Leap Wireless in May 2001 introduced its Telephone Entertainment Network under the brand name Slice. Slice service delivers “voice clips” (including local news and events, sports, weather, traffic, and more before calls connect) straight to the customer’s wireless phones. See Leap Wireless New Innovations, available at http://www.leapwireless.com/services/content/services_newinnovations_2.html (last visited Nov. 20, 2001). AT&T and Nextel offer electronic mail, selected web site access, and SMS. See AT&T 2-Way Text Messaging Service, available at http://www.attws.com/personal/txt_msg (last visited Nov. 20, 2001); Nextel Wireless Web Services, available at http://www.nextel.com/phone_services/wirelessweb/index.shtml (last visited Nov. 20, (continued....))

and continued expansion of mobile networks into new and existing markets demonstrate a high level of competition for mobile telephony customers.”¹¹⁶

36. To a certain degree, mobile telephony services have begun to compete with wireline services. For some, wireless service is no longer a complement to wireline service but has become the preferred method of communication. According to a recent survey by the Yankee Group, about three percent of mobile telephony subscribers rely on their wireless phone as their only phone.¹¹⁷ In another survey conducted in January 2000, twelve percent of respondents said they purchased a mobile phone instead of installing an additional wireline phone.¹¹⁸ In a survey performed for the Consumer Electronics Association, three in ten mobile phone users, and forty-five percent of mobile phone users aged eighteen to thirty-four years old, stated they would rather give up their home telephone than their mobile phone.¹¹⁹ In some areas, mobile phone use has begun to erode wireline revenue due to “technology substitution,” that is, the substitution of new technologies for existing ones.¹²⁰ BellSouth, for example, stated in February 2001 that it was exiting the payphone business in part due to business lost to mobile phones.¹²¹

37. A few mobile carriers have begun offering service plans designed to compete directly with

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2001); Nextel Mobile Messaging, *available at* http://www.nextel.com/phone_services/mobilemessaging/index.shtml (last visited Nov. 20, 2001). Cingular offers SMS, information services, and selected website access. *See* Cingular My Wireless Window Service Description, *available at* <http://www.mywirelesswindow.com/features> (last visited Nov. 20, 2001). Sprint offers email, selected access to websites, information services and web connection. *See* Sprint PCS Wireless Web, *available at* <http://www.sprintpcs.com/wireless/index.html> (last visited Nov. 20, 2001). Verizon offers email, selected access to websites, information services and web connection, and SMS. *See* Verizon Wireless Internet and Data, *available at* http://www.verizon.com/internet_data/index.html (last visited Nov. 20, 2001). VoiceStream offers SMS and wireless web connections. *See* VoiceStream iStream, *available at* <http://www.voicestream.com/products/services/istream/overview.asp>; VoiceStream Ping Pong, *available at* <http://www.voicestream.com/products/services/pingpong.asp> (last visited Nov. 20, 2001). Southern LINC offers selected website access and email. *See* Southern LINC My LINC, *available at* <http://www.southernlinc.com/mylinc.asp> (last visited Nov. 20, 2001).

¹¹⁶ *Sixth Annual CMRS Competition Report*, FCC 01-192, at 21.

¹¹⁷ *See* Judy Saries, *Wireless Users Hanging Up On Landline Phones*, NASHVILLE BUS. J., Feb. 2, 2001. CTIA estimates that number could be as high as 5 percent, based on a February 2000 survey it sponsored. *Consumers Replacing Landline Phones with Wireless*, KNIGHT RIDDER/TRIBUNE BUS. NEWS, Jan. 10, 2001, *available at* 2001 WL 2837499.

¹¹⁸ *See Sixth Annual CMRS Competition Report*, FCC 01-192, at 34; *see also* Callie Nelson, *Replacing Landline with Wireless: How Far Can It Go?*, IDC, Dec. 2000 (citing IDC’s *Personal Wireless Communications User Survey*, 2000).

¹¹⁹ *See Sixth Annual CMRS Competition Report*, FCC 01-192, at 32; *see also* Will Wireless Phones Make Traditional Home Telephones Obsolete?, News Release, Consumer Electronics Association, Apr. 6, 2000.

¹²⁰ *See Sixth Annual CMRS Competition Report*, FCC 01-192, at 32; *see also* Andrew Backover, *AT&T Loss Reflects Long-Distance Shift Consumers Turn To Calling Cards, Wireless*, USA TODAY, Jan. 30, 2001, at B3.

¹²¹ *See Sixth Annual CMRS Competition Report*, FCC 01-192, at 32; *see also* BellSouth Announces Plans For Public Communications Unit, News Release, BellSouth, Feb. 2, 2001.

wireline local telephone service.¹²² For example, Leap, through its Cricket subsidiary, now offers its Comfortable Wireless mobile telephone service in over a dozen markets.¹²³ Leap's service allows subscribers to make unlimited local calls and receive calls from anywhere in the world for a flat rate of approximately \$30 per month.¹²⁴ In November 2000, Leap also claimed that sixty percent of its customers use their wireless phones as their primary phone.¹²⁵ US Cellular, ALLTEL, and Rural Cellular Corporation similarly offer flat-rate or nearly flat-rate service plans in select markets.¹²⁶ Several CMRS providers have received Eligible Telecommunications Carrier status, enabling them to receive universal service funding in certain states, and some carriers are using cellular or broadband PCS spectrum to offer fixed wireless services.¹²⁷

38. Consumers have also derived benefits in recent years from combinations as some operators have expanded their licensed service areas through acquisitions and swaps to create nationwide service providers. There are currently six nationwide mobile telephony operators: AT&T, Cingular, Nextel, Sprint, Verizon, and VoiceStream.¹²⁸ The Commission has concluded previously that mobile telephony service providers with nationwide service areas can achieve certain economies of scale and increased efficiencies compared to operators with smaller service areas.¹²⁹

39. *Barriers to Entry.* One potential threat to the continued existence of meaningful economic competition in CMRS markets is the barrier to entry posed by the limited availability of spectrum. Ease of entry is an important factor when determining if firms in a given product and geographic market will be able to exercise market power.¹³⁰ "[E]ntry is . . . easy if entry would be timely, likely, and sufficient in its

¹²² See *Sixth Annual CMRS Competition Report*, FCC 01-192, at 33. One analyst argues that recent price reductions give mobile wireless services price parity with wireline, at least at pricing around \$130 per month, which includes intralata and interlata calls as well as calling card charges. See Daniel J. Berninger, *Telephony Unplugged: Wireless Achieves Price Parity with Wireline*, available at <http://slides.pulver.com/slides/login.asp> (last visited Nov. 20, 2001).

¹²³ See *Sixth Annual CMRS Competition Report*, FCC 01-192, at 34; Cricket Service Areas, available at <http://www.cricketcommunications.com/areas.asp> (last visited Nov. 20, 2001); see also Cramton Declaration on behalf of Leap at 7-8, 10.

¹²⁴ See Cramton Declaration on behalf of Leap at 7-8. The monthly fee for Leap's service varies slightly by service area. See *id.*

¹²⁵ See *Sixth Annual CMRS Competition Report*, FCC 01-192, at 34; Deborah Young, *Usurping Wired Services: Lofty Goal, But ...*, WIRELESS REV., Nov. 1, 2000, available at 2000 WL 7119447; see also Cramton Declaration on behalf of Leap at 8.

¹²⁶ See *Sixth Annual CMRS Competition Report*, FCC 01-192, at 34.

¹²⁷ *Id.* at App. A at A-5-6.

¹²⁸ A mobile telephony provider that is called "nationwide" does not necessarily hold licenses, have service areas, or offer pricing plans that cover the entire land area of the United States. Firms that are considered nationwide offer facilities-based service in at least some portion of the western, midwestern, and eastern United States. See *Sixth Annual CMRS Competition Report*, FCC 01-192, at 13 n.62.

¹²⁹ *Fourth Annual CMRS Competition Report*, 14 FCC Rcd at 10159-60, 10175.

¹³⁰ Entry does not necessarily have to occur to preclude the exercise of market power. In certain circumstances, the threat of entry is sufficient to discipline the market. See BAUMOL, PANZAR & WILLIG, *supra* note 97, at 317-318.

magnitude, character and scope to deter or counteract the competitive effects of concern.”¹³¹ In particular, we note that antitrust authorities “will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.”¹³² Unfettered market competition forces prices to the level of production costs. Markets function optimally only if one or more firms are able to enter a market or expand current production swiftly and effectively in response to the elevation of prices (or degradation of service) by one or more firms attempting to exercise market power.¹³³ Therefore, in evaluating the state of the market we consider whether barriers to entry exist and, if so, how pronounced these barriers to entry are, with the ultimate goal of determining whether potential entry would be timely, likely, and sufficient to discipline the market.

40. The requirement to obtain access to spectrum constitutes a barrier to facilities-based entry into the CMRS marketplace because the supply of suitable spectrum is limited. Facilities-based mobile telephony service cannot be offered without access to suitable spectrum, and a government license is required to use spectrum to provide CMRS.¹³⁴ Some commenters argue that, because CMRS spectrum allocations have been made, this barrier to entry has been reduced.¹³⁵ Other commenters, however, argue that it is typically difficult to acquire the spectrum necessary to enter a CMRS market.¹³⁶ Leap, in particular, emphasizes that the finite amount of spectrum suitable for CMRS is an “insurmountable barrier to entry.”¹³⁷ We find that the limited amount of spectrum suitable for CMRS available today creates a significant barrier to entry, at least in MSAs. Most of the spectrum currently subject to the cap either has been assigned or is being considered for assignment to the high bidder at auction. In most cases, the high bidder is either an existing market participant or its affiliate. Although some of this spectrum is currently unused or underused, the total pool of such spectrum is finite, and the amount that is not controlled by a provider that has launched service, particularly in MSAs, is small.

41. Some commenters argue that availability of spectrum is not a significant barrier to entry because other spectrum, not covered by the cap, is a viable substitute for the provision of mobile telephony services. Specifically, commenters identify spectrum allocated for Mobile Satellite Service (“MSS”), big Low Earth Orbit (“LEO”) satellite service, Multipoint Multichannel Distribution Service and Instructional Television Fixed Service (“MDS/ITFS”), Wireless Communications Service (“WCS”), and CMRS other than cellular, broadband PCS, and SMR, as well as spectrum that has been (or is soon likely to be)

¹³¹ *DOJ/FTC Merger Guidelines* at § 3.0.

¹³² *Id.* § 3.2.

¹³³ *See id.* § 3.0.

¹³⁴ We note that we are considering in another proceeding potential measures to facilitate access to spectrum by means of lease or other arrangement with an existing licensee. *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Notice of Proposed Rulemaking*, 15 FCC Rcd 24203 (2000). Even if adopted, however, these measures would not change the requirement of access to suitable spectrum.

¹³⁵ *See CTIA Comments* at 22; *Schwartz and Gale Comments on behalf of CTIA* at 9; *Cingular Comments* at 22-23; *Verizon Comments* at 8, 15; *Gertner and Shampine Declaration on behalf of Verizon* at 3; *Cingular Reply Comments* at 22.

¹³⁶ *See Leap Reply Comments* at 8; *Cramton Reply Declaration on behalf of Leap* at 10-11; *Sprint Reply Comments* at 6; *WorldCom Comments* at 6.

¹³⁷ *Leap Comments* at 12; *Leap Reply Comments* at 3, 8; *Cramton Reply Declaration on behalf of Leap* at 10-11.

reallocated from television Channels 52-59 and 60-69.¹³⁸ Much of this spectrum, however, either is not currently allocated for mobile terrestrial use,¹³⁹ is subject to technical and use restrictions that prevent offering of full mobile telephony services,¹⁴⁰ or has insufficient capacity to support significant mobile telephony competition.¹⁴¹ We believe the spectrum bands that are most likely to support additional competition to the services offered over cellular, broadband PCS, and SMR spectrum in the reasonably near future are the 1.7 and 2.1 GHz bands that are being considered for mobile allocation in our so-called “3G” proceeding, and the bands reallocated from television Channels 60-69. However, this spectrum is still at least several months away from being assigned,¹⁴² and after assignment it will take time for

¹³⁸ Specifically, economists for Cingular propose including 70 MHz of spectrum at 2GHz (MSS from Broadcast Satellite Service), 36 MHz of 700 MHz from Channels 60-69 (including 6 MHz Guard Band), 33 MHz of Big LEOs, 196 MHz of MMDS/ITFS, 48 MHz of Channels 52-59, and 30 MHz of WCS. See Strategic Policy Comments on behalf of Cingular at 12, 16-17, App. A, A1-A4; Cingular Comments at 21-22; see also Economists, Inc. Comments on behalf of AT&T at 6, 8-10, Tbls. 1-2 (proposing that the potential market could be expanded to include as much as 225 MHz of spectrum and that the market definition eventually must consider wireline services).

¹³⁹ See generally 47 C.F.R. § 2.106. But see Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band, Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service, *Notice of Proposed Rulemaking*, 16 FCC Rcd 15532 (2001) (seeking comment, *inter alia*, on whether terrestrial mobile services can be employed in these frequency bands and whether eligibility should be limited to incumbent mobile satellite licensees).

¹⁴⁰ See Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile-Satellite Services, *First Report and Order and Memorandum Opinion and Order*, ET Docket No. 00-258, FCC 01-256, ¶¶ 19-30 (rel. Sep. 24, 2001) (adding a mobile allocation to the 2500-2690 MHz band, but recognizing that the Commission must explore in a separate future proceeding the service rules that will apply to permit mobile operations in the band); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5308 ¶ 19 (2000) (prohibiting cellular system architectures in the 700 MHz Guard Bands in order to provide interference protection to public safety operations); Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service, *Report and Order*, 12 FCC Rcd 10785, 10833 ¶ 89 (1997) (stating that out-of-band emission limits adopted likely would make mobile operations in the WCS spectrum technologically infeasible).

¹⁴¹ See Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2777-78 ¶ 88 (1997) (declining to include narrowband radio services in the spectrum cap because “it is highly unlikely that one entity could ever accumulate as much as 5 MHz in any given geographic market”).

¹⁴² The auction for spectrum reallocated from Channels 60-69 is scheduled to begin on June 19, 2002. See Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Scheduled for June 19, 2002, *Public Notice*, DA 01-2394 (rel. Oct. 15, 2001), available at <http://www.fcc.gov/wtb/auctions/31/> (last visited Nov. 20, 2001) (“*Channels 60-69 PN*”). A proceeding for reallocation of “3G” spectrum from federal government use is currently pending. See 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, ET Docket No. 00-258, *Notice of Proposed Rulemaking*, 16 FCC Rcd 596 (2001) (“*3G NPRM*”); see also 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, ET Docket No. 00-258, *Memorandum Opinion and Order and* (continued....)

incumbent users to be relocated and following that for licensees to build out their networks.¹⁴³ Thus, although we expect that 3G and Channels 60-69 spectrum will offer some potential for near-term entry over the next few years, the availability of spectrum suitable for CMRS remains a barrier to entry in the near term.

42. Nonetheless, there are factors that moderate concern regarding the spectrum access barrier to entry. In particular, the need for direct access to spectrum is not absolute because carriers can compete in the provision of CMRS without direct access to spectrum through resale,¹⁴⁴ or a mobile virtual network operator (“MVNO”) arrangement.¹⁴⁵ However, it is not clear that these options have more than a limited role today.¹⁴⁶ The transition period we adopt today also helps to minimize the problem of spectrum access because, while future allocations do not respond to the needs of the marketplace today, we expect that additional spectrum will be available at the end of the transition period, or shortly thereafter.

43. Although access to spectrum does not appear to be a substantial barrier to entry in RSAs, as in these areas there is typically a significant amount of unused spectrum, the other costs of serving high-cost and low-density areas may make it unlikely that competition in RSAs will increase to a level rivaling that of MSAs.¹⁴⁷ Specifically, the cost of building out a network with pervasive coverage is likely to be higher in

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Further Notice of Proposed Rulemaking, FCC 01-224 (rel. Aug. 20, 2001 (“3G Further Notice”); 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, ET Docket No. 00-258, *First Report and Order and Memorandum Opinion and Order*, FCC 01-256 (rel. Sept. 24, 2001) (“3G First Report and Order”). As discussed below, we are hopeful that this spectrum will be assigned within a framework of approximately twelve to twenty-four months. See *infra* para. 76.

¹⁴³ See generally, Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Order on Reconsideration of the Third Report and Order*, FCC 01-258 (rel. Sep. 17, 2001) (“Channels 60-69 Order on Reconsideration”); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Third Report and Order*, 16 FCC Rcd 2703 (2001); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 20845 (2000); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *First Report and Order*, 15 FCC Rcd 476 (2000); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Notice of Proposed Rulemaking*, 14 FCC Rcd 11006 (1999).

¹⁴⁴ See 47 C.F.R. § 20.12(b)(1) (prohibiting restrictions on resale by certain cellular, broadband PCS, and SMR providers unless the provider can demonstrate that the restriction is reasonable). We note that the provision will sunset on November 24, 2002. *Id.* § 20.12(b)(3).

¹⁴⁵ An MVNO arrangement is one in which “a network operator acts as a wholesaler of airtime to another firm, which then markets itself to users just like an independent operator with its own network infrastructure.” Tom Standage, *The Internet, untethered*, THE ECONOMIST, Oct. 11, 2001, at 16. We note, however, that resale and MVNO carriers are likely to be less effective than facilities-based competitors in disciplining the market and encouraging innovation because they are dependent on the underlying carrier’s wholesale price and service platform.

¹⁴⁶ We note that the top 20 resellers account for approximately three percent of total wireless subscribers, and WorldCom (ten times larger than the next largest reseller) accounts for approximately 65 percent of subscribers among the top 20 resellers. See RCR Top 20 Resellers, RCR WIRELESS NEWS, Jan. 8, 2001, at 18; see also Cellular Telecommunications and Internet Association, Semi-Annual Mobile Telephone Internet Survey, available at <http://www.wow-com.com/industry/stats/surveys/> (last visited Nov. 21, 2001).

¹⁴⁷ See *First Biennial Review Order*, 15 FCC Rcd at 9257 ¶ 84.

rural than in urban areas (especially for digital networks on 1.9 GHz PCS spectrum with lower power handsets), and revenue potential is lower. Thus, the potential revenue from initiating or expanding service in an RSA may not be sufficient to cover the costs of building out the network, including any opportunity costs associated with directing resources to rural buildout instead of enhancing the carrier's network in urban areas. In addition, it would likely be time-consuming for a new entrant to access sufficient capital, build out its network to a sufficient degree to effectively market its services, and attract a sufficient subscriber base to discipline the market. Although we do not have sufficient record evidence to evaluate the likely development of the market in RSAs, the underlying economics appear to make it unlikely that competition in RSAs will evolve in the near term to rival that in MSAs.

44. *Other Issues.* Various commenters discuss the potential for CMRS providers to foreclose entry by anticompetitive warehousing of spectrum.¹⁴⁸ Some commenters argue that it is unlikely that carriers have an incentive to warehouse spectrum because the cost of acquiring spectrum and meeting the Commission's buildout requirements is high.¹⁴⁹ Other commenters, however, argue that CMRS providers have an incentive to warehouse spectrum either by purchasing more spectrum than can be used or by investing in inefficient technologies.¹⁵⁰ Even if a carrier did not deliberately set out to foreclose competition, Leap contends that the profits from doing so may be an attractive side effect of spectrum aggregation.¹⁵¹ We do not have evidence that firms are currently holding excess spectrum in order to deter entry or that the benefits of excluding competitors would exceed the cost of acquiring spectrum and the free-rider problem of several incumbents benefiting from one incumbent's expenditure. However, it is at least a threshold possibility that because the supply of suitable spectrum is limited, firms in CMRS markets might choose to overinvest in spectrum in order to deter entry, depending on the costs of doing so.¹⁵²

45. One commenter also suggests that collusion among CMRS providers may warrant ongoing consideration. Leap notes that pricing plans for CMRS offerings are similar among the national carriers, and price comparisons of these plans can easily be performed, facilitating price coordination.¹⁵³ Further,

¹⁴⁸ In itself, it is not necessarily anticompetitive for a firm to acquire or retain control over spectrum that it does not need immediately. To the contrary, because of the finite amount of suitable CMRS spectrum, it may be a prudent business decision under some circumstances for firms to hold spectrum in anticipation of future needs. A firm could act anticompetitively, however, if it holds spectrum that it does not need – either by permitting it to go unused or by utilizing it inefficiently – primarily to prevent a competitor or potential competitor from using that spectrum.

¹⁴⁹ See Cingular Comments at 29, 32; Cingular Reply Comments at 21-22; Verizon Comments at 8; Gertner and Shampine Reply Declaration on behalf of Verizon at 3-6.

¹⁵⁰ See Leap Comments at 11, 29; Cramton Declaration on behalf of Leap at 25; UTStarcom Comments at 2; Leap Reply Comments at 22-24; Cramton Reply Declaration on behalf of Leap at 11; Consumer Groups Reply Comments at 2 (expressing concern that by raising or eliminating the spectrum cap rule large mobile wireless providers that are affiliated with wireline companies will have the opportunity “to lock up spectrum and keep at bay those who would compete with their wireline businesses”); Newcomb Reply Comments (arguing that carriers find it easier to add more channels to existing cells than to reorganize their systems to maximize spectral efficiency).

¹⁵¹ See Leap Comments at 12. Leap further argues that the greater an individual provider's share of a market, the greater the provider's potential profits from warehousing spectrum. See *id.* at 10-12, 29; see also Cramton Declaration on behalf of Leap at 25; Cramton Reply Declaration on behalf of Leap at 24.

¹⁵² See JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 324-28 (MIT Press 1988).

¹⁵³ See Cramton Reply Declaration on behalf of Leap at 8-9.

Leap argues that experience in the marketplace shows carriers behaving in a largely oligopolistic fashion by offering largely identical products at prices far above their marginal costs.¹⁵⁴ However, AT&T argues that anticompetitive collusion is unlikely in CMRS markets because these markets have well-capitalized actual and potential competitors, and demand is increasing.¹⁵⁵ Further, according to AT&T, it is relatively easy for existing competitors to add capacity in response to any price increase, and therefore firms cannot profitably reduce output and sustain a high price for a significant period of time.¹⁵⁶ Cingular and Verizon argue that the large number of competitors and the complexities of the various pricing plans make coordination unlikely.¹⁵⁷ Although the record does not indicate that tacit collusion is occurring or is likely to occur, CMRS markets do meet many of the criteria that make tacit collusion sustainable.¹⁵⁸ Moreover, tacit collusion becomes more likely as the number of competitors is reduced.¹⁵⁹

46. *Conclusion.* In light of all the factors discussed above, we find that there is meaningful economic competition in CMRS mobile telephony generally. Evidence in MSAs regarding the current state of these markets clearly shows that the presence of multiple competitors is effectively restraining prices, promoting innovation and diversity, and increasing output. Based on the information available, competition in RSAs appears to be less robust than in MSAs. Finally, to the extent that competitive concerns are raised in a particular proposed assignment or transfer of control application, as discussed below, we believe they can be addressed through means other than the spectrum cap.

C. Repeal and Interim Modification of the Spectrum Cap

47. Currently, we evaluate the competitive effects of the acquisition of CMRS spectrum primarily through the general application of numerical thresholds such as the spectrum cap. We could, however, fulfill our duties under section 310(d) and other statutory provisions through case-by-case review of individual transactions. In light of our finding of meaningful economic competition above, we conclude that long-term retention of the spectrum cap rule is no longer necessary in the public interest, and we therefore move to repeal that rule. At the same time, we conclude that it is necessary in the public interest to retain the rule for a limited transition period to allow the market to adjust and enable us to consider guidelines for case-by-case review of CMRS spectrum aggregation transactions. Finally, during the transition period, we modify the rule by increasing the spectrum cap to 55 MHz in all areas.

¹⁵⁴ See Leap Comments at 5; see also Newcomb Reply Comments (arguing that “Leap’s contention that consumers will not obtain innovative services from dominant carriers is probably correct”).

¹⁵⁵ See AT&T Comments at 10-11.

¹⁵⁶ See *id.* at 11-12.

¹⁵⁷ See Cingular Reply Comments at 20; Verizon Comments at 8, 14-15; Gertner and Shampine Declaration on behalf of Verizon at 3, 7-8, 20.

¹⁵⁸ Specifically, the nationwide carriers may be characterized as having relatively homogeneous products, prices are public and uniform, firms have extensive multimarket contact, detection of cheating would be easy, and credible retaliation strategies exist. See TIROLE, *supra* note 152, at 240-43.

¹⁵⁹ See Richard Selten, *A Simple Model of Imperfect Competition Where 4 Are Few and 6 Are Many*, 2 INT’L. J. OF GAME THEORY 141-201 (1973); Alexis Jacquemin & Margaret E. Slade, *Cartels, Collusion, and Horizontal Merger*, in HANDBOOK OF INDUSTRIAL ORGANIZATION, Vol. 1, at 415-463 (Richard Schmalensee & Robert Willig eds., 1989); George Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44-61 (1964); see also *FTC v. H.J. Heinz Co.*, 246 F.3d at 715-16, 724-25.

1. Move from Prophylactic Rule to Case-by-Case Review

48. Background. With respect to the appropriate regulatory tool for reviewing potential effects on competition in CMRS markets, proponents of the current spectrum cap generally favor a bright-line approach, arguing that a bright line promotes regulatory certainty and significantly reduces the processing time of transfer and assignment applications.¹⁶⁰ Leap argues that determining how to apply the rule in a particular case is easier than gathering the information that transacting parties may be required to submit under a case-by-case approach, such as potentially sensitive customer and market share information.¹⁶¹ Generally, opponents of the current spectrum cap argue that case-by-case review is preferable to a prophylactic approach because the case-by-case approach is more flexible and reduces the possibility of blocking transactions that are actually in the public interest or, alternatively, permitting transactions that are not in the public interest.¹⁶²

49. Discussion. We conclude that it is appropriate to move in the very near future from reliance on a prophylactic rule of general application to pure case-by-case review. In assessing the choice of an appropriate tool, we recognize that different costs and benefits can be associated with bright-line rules and case-by-case review with respect to degree of flexibility, predictability of outcome, likelihood of rejecting beneficial (or approving harmful) transactions, ability to account for the particular attributes of a transaction or market, speed of decision-making, and resource demands on the Commission and carriers.

50. 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.¹⁶³ 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, *a priori* limits on spectrum aggregation that may prevent transactions that are in the public interest. As discussed below, we commit ourselves to increasing Commission resources available to review spectrum aggregation transactions and to considering appropriate guidelines for review of future transactions, in order to continue to provide parties with a reasonable degree of certainty and transparency as well as to minimize the administrative costs of case-by-case review.

51. We do not agree with commenters who suggest that the spectrum cap rule should be retained to promote technologically efficient use of spectrum.¹⁶⁴ As discussed above, the Commission's purpose in

¹⁶⁰ See Leap Comments at 30-31; WorldCom Comments at 7; Leap Reply Comments at 14-15.

¹⁶¹ See Leap Reply Comments at 13-14.

¹⁶² See CTIA Comments at 45; Schwartz and Gale Comments on behalf of CTIA at 5-6, 11-15; Economist, Inc Comments on behalf of AT&T at 22-25; AT&T Comments at 10.

¹⁶³ We reject the argument of CTIA that the difficulty of applying the attribution and overlap provisions of our current rules is a reason to abandon the spectrum aggregation limits. See CTIA Comments at 31-34. Whether we apply a bright-line rule or use case-by-case analysis to determine which transactions are in the public interest, determinations regarding appropriate attribution and overlap must be made and may be complex.

¹⁶⁴ See Leap Comments at 9-10, 16-19, 27-29; Cramton Declaration on behalf of Leap at 5, 20-21; Kelley Declaration on behalf of Leap at 26-28; UTStarcom Comments at 2; Leap Reply Comments at 23-24; Newcomb Reply Comments; Southern LINC Reply Comments at 9; Consumer Groups Reply Comments at 2 (arguing that "lifting the cap reinforces spectrum inefficiency"); see also ComSpace Reply Comments at 1-2 (continued....)

adopting the spectrum cap was to promote competition in CMRS markets.¹⁶⁵ We are not persuaded that it is in the public interest to interfere with the competitive market's creation of incentives regarding choice of technology. Similarly, we do not agree with commenters who argue that the spectrum cap rule should be retained to further opportunities for resale or roaming arrangements.¹⁶⁶ Our case-by-case review will allow us the flexibility to consider any such concerns raised with respect to specific applications.

52. 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.¹⁶⁷ 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.¹⁶⁸ 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, as explained below, 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.

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(discussing ComSpace's air interface technology); ArrayCom Reply Comments at 3-4 (discussing ArrayCom's "smart" antennas).

¹⁶⁵ See *supra* para. 26.

¹⁶⁶ See WorldCom Comments at 8-9 (arguing that removal of the spectrum cap rule "will inevitably result in further industry consolidation, which in turn will result in fewer choices and less incentive for facilities-based CMRS providers to offer lower wholesale rates to resellers"); TDS Comments at 6; TDS Reply Comments at 4 (arguing that lifting or eliminating the spectrum cap rule could allow nationwide carriers to acquire local competitors which in turn could allow the nationwide providers to impose discriminatory roaming terms on the customers of non-affiliated regional carriers); Southern LINC Reply Comments at 16 (arguing that if the spectrum cap rule is eliminated, the Commission may face greater pressures to impose rules and act as arbiter of disputes with respect to roaming).

¹⁶⁷ See Leap Comments at 2-3, 5-6, 8, 10; Cramton Declaration on behalf of Leap at 4-7, 22-24; NTCA Comments at 7; UTStarcom Comments at 2; WorldCom Comments at 3, 8; Newcomb Reply Comments; Leap Reply Comments at 24-25; Cramton Reply Declaration on behalf of Leap at 23; Southern LINC Reply Comments at 9-10; Consumer Groups Reply Comments at 2; *see also* Chadmoore Comments at 1-2 (arguing that cap should be increased only if other action is taken to promote the entry of small businesses).

¹⁶⁸ See RTG/OPASTCO Comments at 6 (arguing that elimination of the spectrum cap will provide economic incentives for new carriers to enter rural markets and that "rural consumers particularly stand to gain from the elimination of the spectrum cap" because eliminating limits on spectrum aggregation will allow rural carriers to utilize the "economies of scale which they might come to possess without the cap"); CTIA Comments at 29, 46-49; CTIA Reply Comments at 27 (arguing that the spectrum cap is "neither required nor useful as a tool to ensure that small businesses participate in the wireless business" and that the attribution rules of the spectrum cap limit or deny small businesses access to capital from other market participants and inhibit their ability to form nationwide affiliations with other carriers); AT&T Comments at 12-14; Economists, Inc. Comments on behalf of AT&T at 20-21 (arguing that the spectrum cap's attribution rules distort efficient business arrangements and deprive new entrants of access to capital and management expertise that could otherwise help them to compete competitively); Cingular Reply Comments at 11 (arguing that elimination of the spectrum cap will increase the competitive opportunities for small and rural companies by allowing them the flexibility to compete in neighboring markets and enter new lines of business).

53. Finally, we note the arguments of several parties that, if we eliminate or increase the spectrum cap, we should take certain other actions to ensure competition in all segments of the CMRS marketplace.¹⁶⁹ The merits of these proposals are beyond the scope of this proceeding, irrespective of our decisions today with regard to the spectrum cap; however, we note that a flexible case-by-case approach will allow us to consider specific circumstances and impacts of individual applications.

2. Case-by-Case Review

54. The public policy objectives that we first articulated in 1994 with respect to review of CMRS spectrum acquisitions remain applicable today. The spectrum cap rule was originally designed to “discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency.”¹⁷⁰ The Commission has also stated that the spectrum cap promotes competition in CMRS markets, allows efficient administration of CMRS spectrum acquisitions, and provides regulatory certainty to the marketplace.¹⁷¹ Although we decide today that the spectrum cap rule is no longer necessary in the public interest, we must still achieve the objectives that the spectrum cap was intended to promote. We believe that these objectives can now be better achieved in the context of secondary market transactions through case-by-case review, properly performed. Furthermore, to the extent that the initial distribution of spectrum through auction is an issue in the future, that is also amenable to case-by-case review, in the sense that we can shape the initial distribution through the service rules adopted with respect to specific auctions.

55. With or without the spectrum cap rule, we have an obligation to ensure that acquisitions of CMRS spectrum do not have anticompetitive effects that render them contrary to the public interest. Specifically, section 310(d) of the Communications Act requires us not to approve any transfer, assignment, or disposal of a license, or attendant rights unless we find that the public interest, convenience, and necessity will be served thereby.¹⁷² Moreover, as discussed above, although strong competitive forces are evident in today’s CMRS industry, we recognize the possibility that significant additional consolidation of control over spectrum could have serious anticompetitive effects.¹⁷³ Thus, we intend to perform case-by-

¹⁶⁹ See Southern LINC Reply Comments at 13-15 (arguing that the Commission should streamline complaint process and police markets more closely for anticompetitive practices); NTCA Comments at 5-6 (arguing that the Commission should license spectrum in smaller geographic areas, require carriers holding spectrum licenses that include both rural and urban areas to partition or disaggregate unused spectrum well before the end of the license period, and impose buildout requirements based on geographic area covered); RCA Reply Comments at 2-3 (arguing that the Commission should adopt a “fill-in” policy for unused spectrum in rural areas similar to that in place for cellular licensees).

¹⁷⁰ *CMRS Third Report and Order*, 9 FCC Rcd at 8105 ¶ 251.

¹⁷¹ See *CMRS Third Report and Order*, 9 FCC Rcd at 8105 ¶ 251. In the *First Biennial Review Order*, the Commission restated the central principles underlying our approach to analyzing the aggregation of CMRS spectrum. We reiterate and rely on those principles here: (1) the operation of market forces generally better services the public interest than regulation; (2) we intend to foster vigorous competition in all telecommunications markets, consistent with the central Congressional mandate of the 1996 Act; (3) we seek to secure the benefits of modern telecommunications services, including wireless services, for all areas of our Nation, including high-cost and rural areas; and (4) our regulations must promote, rather than impede, the introduction of innovative services and technological advances. See *First Biennial Review Order*, 15 FCC Rcd at 9230-31 ¶ 22.

¹⁷² 47 U.S.C. § 310(d).

¹⁷³ See *supra* Section IV.B.

case review of CMRS spectrum aggregation transactions in order to fulfill our statutory mandates to promote competition, ensure diversity of license holdings, and manage the spectrum in the public interest.¹⁷⁴

We determine that, in order to ensure that this review is performed in a manner that serves the public interest, it is necessary to retain the spectrum cap rule until January 1, 2003, to enable us and the market to prepare for case-by-case review, including our consideration of processing and/or substantive guidelines for this process.

56. *Performing Case-by-Case Review.* Although, as discussed above, we determine that long-term retention of the spectrum cap rule is no longer necessary to serve the procompetitive purposes for which it was adopted, we recognize that application of this prophylactic rule has conferred certain advantages. In particular, the spectrum cap rule has provided parties with guidance regarding what transactions we would likely consider to be in the public interest, enabled parties to structure their transactions to fall within the rule, and provided processing guidance for Commission staff. From August 2000 to August 2001, the Wireless Telecommunications Bureau disposed of assignments and transfers of control involving approximately 1,305 licenses (other than *pro forma* applications) currently covered by the CMRS spectrum cap. The overwhelming majority of these transfers and assignments were processed within ninety days.

57. If we were to repeal the spectrum cap immediately, without anything further, we would have neither objective guidelines nor a body of precedent to guide the review process. Therefore, we would run the risks both that our review would fail to produce accurate and consistent results, and that, without benefit of either objective standards or directly applicable precedent, applications would not be decided on a timely basis. To perform meaningful and timely review of spectrum aggregation transactions without the spectrum cap, we may need to develop effective guidelines for this process, as well as ensure that sufficient resources are devoted to the task.¹⁷⁵ One commenter emphasized the importance of regulatory certainty and speed of review to enable them to plan efficiently, invest with confidence, and reassure providers of capital.¹⁷⁶ A transition period is necessary so that we can continue to meet these needs.

58. As we develop the contours of our case-by-case regime during the transition period, we will consider what form of guidelines might best balance the virtues of certainty and flexibility in this review process. For example, procedural guidelines could specify timing benchmarks and the types of information that applicants will be expected to provide. It may also be useful to applicants and Commission staff to identify substantive factors and benchmarks that would make us more or less likely to take a closer look at a proposed transaction. For example, some of these factors could track those in the *DOJ/FTC Merger Guidelines*, such as measures of concentration in a market.¹⁷⁷ We also will consider the most appropriate process for developing potential guidelines, including whether notice and comment procedures are necessary or helpful. We emphasize, however, that we do not intend to adopt guidelines to reinstate a

¹⁷⁴ See 47 U.S.C. §§ 301, 303, 309(j), 310(d).

¹⁷⁵ Although the goals of our review of telecommunications transactions differ in some respects from those of the DOJ, *see infra* paras. 63-64, these standards and procedures could perform much the same administrative function that the *DOJ/FTC Merger Guidelines* do for those agencies.

¹⁷⁶ See Leap Comments at 30-31; Leap Reply Comments at 14-15.

¹⁷⁷ See *DOJ/FTC Merger Guidelines* at §1.5. CTIA argues that, to the extent the Commission develops internal processing guidelines for evaluating wireless transactions, “it should look to the same criteria used by [DOJ] in its antitrust analysis – the Merger Guidelines, and rely on the kind of information and methodologies utilized by DOJ in conducting its competition analyses.” Letter from Diane J. Cornell, CTIA, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated Nov. 1, 2001.

bright-line rule.

59. *Relationship of Commission's and DOJ's Processes.* With respect to competitive issues, applicants may currently be required to satisfy both our review process and that of DOJ.¹⁷⁸ In the *NPRM*, we asked whether, and under what circumstances, in our review of transfer/assignment applications we should defer to DOJ's review of competitive issues in a transaction.¹⁷⁹ A number of parties, generally those that favor retaining the spectrum cap, argue that the Commission cannot leave all competitive review of CMRS markets to DOJ.¹⁸⁰ Sprint argues that the Commission bears a special responsibility under the Communications Act for CMRS markets, different from the antitrust authority of DOJ under the antitrust statutes.¹⁸¹ Unlike DOJ or FTC, Sprint asserts, the Commission is under explicit statutory mandates to promote economic opportunity; avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants; foster rapid deployment of new technologies, products, and services that benefit the public; and promote the efficient use of the spectrum.¹⁸² Further, the Communications Act obligates the Commission to promote competition, while DOJ is authorized only to stop proposed transactions that would substantially lessen competition.¹⁸³ Therefore, Sprint argues, we have an independent role in competitive review and are not duplicating the work of the antitrust agencies by performing competitive analysis.¹⁸⁴

60. WorldCom argues that we have authority to prevent certain anticompetitive acquisitions that DOJ does not, such as the acquisition of licenses at auction, license swaps, and spectrum leases.¹⁸⁵ Further, WorldCom argues that the Commission has an independent responsibility to review competitive effects of transactions because DOJ's review standard does not encompass overall public interest considerations.¹⁸⁶ Leap argues that the Commission should continue to analyze the competitive effects of

¹⁷⁸ DOJ investigates proposed mergers and acquisitions to determine whether they may substantially affect competition under sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and section 7 of the Clayton Act, 15 U.S.C. § 18. See Letter from Charles A. James, Assistant Attorney General, U.S. Department of Justice, to Michael K. Powell, Chairman, Federal Communications Commission, dated Nov. 7, 2001, at 2 (“*DOJ Nov. 7, 2001 Letter*”). Although the FTC has concurrent jurisdiction with the DOJ over mergers in many industries, it lacks jurisdiction over mergers involving telecommunications common carriers. See Sections 7 and 11(a) of the Clayton Act, 15 U.S.C. §§ 18, 21(a); Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2).

¹⁷⁹ *NPRM*, 16 FCC Rcd at 2775 ¶ 20.

¹⁸⁰ See Leap Comments at 32; Cramton Declaration on behalf of Leap at 32; Leap Reply Comments at 4-5, 10, Cramton Reply Declaration on behalf of Leap at 11-13; Sprint Reply Comments at 5-7; WorldCom Reply Comments at 12-13; Southern LINC Reply Comments at 13-14.

¹⁸¹ See Sprint Reply Comments at 6-7.

¹⁸² See Sprint Comments at 1; Sprint Reply Comments at 6-7 (citing 47 U.S.C. § 309(j)).

¹⁸³ See Sprint Reply Comments at 7.

¹⁸⁴ See Sprint Reply Comments at 6-7.

¹⁸⁵ See WorldCom Reply Comments at 13; Letter from Robert S. Koppel, Vice President, Wireless Regulatory Affairs, WorldCom, to Lauren Kravetz, Commercial Wireless Division, Federal Communications Commission, dated Aug. 14, 2001.

¹⁸⁶ See WorldCom Reply Comments at 13.

license transfers and assignments because many transactions fall below the reporting threshold of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR”),¹⁸⁷ and, in light of the recent increase in these thresholds, fewer transactions are now reportable than before.¹⁸⁸ Further, Leap argues that DOJ has limited resources, resulting in review of only a subset of the transactions reported under HSR and virtually none of the transactions that need not be reported.¹⁸⁹

61. Some parties that favor eliminating the spectrum cap argue that the Commission’s competitive analysis duplicates review by DOJ and, therefore, is unnecessary and creates delay and uncertainty.¹⁹⁰ These parties generally believe that the Commission should review transfers and assignments only pursuant to specific obligations imposed by the Communications Act, *e.g.*, the public interest standard of section 310(d) and for compliance with our rules, and that competitive review of CMRS transactions should be performed exclusively by the antitrust agencies.¹⁹¹ VoiceStream/Western argue that DOJ is better equipped than the Commission to investigate competitive harm, but that section 310(d) of the Communications Act provides the means for the Commission also to investigate competitive issues as a supplement to DOJ’s responsibilities.¹⁹²

62. Discussion. We find that, under the statutory regime set out by Congress, the Commission has

¹⁸⁷ 15 U.S.C. § 18(a).

¹⁸⁸ *See* Leap Comments at 32. Pursuant to HSR, 15 U.S.C. § 18(a), premerger notification is required if a transaction meets either of two thresholds: (1) one of the parties to the transaction has annual sales or assets of more than \$100 million and the other party \$10 million, and as a result of the acquisition, the acquiring person will hold voting securities or assets worth in the aggregate more than \$50 million; or (2) the total value of the transaction exceeds \$200 million. When notification is required, a transaction may not legally be completed until notification has been accomplished and a thirty-day waiting period has expired (fifteen days for cash tender offers or acquisition from bankruptcy). Generally, DOJ staff should determine within five business days of receipt of an HSR filing (three days for a cash tender offer or bankruptcy acquisition) whether the transaction raises competitive issues that need to be investigated. If DOJ requests additional information during the waiting period, the waiting period is extended for an additional thirty days (ten days for cash tender offers or bankruptcy acquisitions) from the date that both parties have complied with the “second request.” If, as in the majority of cases, DOJ decides not to proceed further with the case, a “no action” letter typically will be issued to the filing parties.

¹⁸⁹ *See* Leap Comments at 32-33; Cramton Declaration on behalf of Leap at 32; Cramton Reply Declaration on behalf of Leap at 12-13 (arguing that antitrust authorities “do not (always) act with precision” and “will typically allow mergers that reduce potential competition”). We note that DOJ has jurisdiction to review any transaction pursuant to sections 1 and 7 of the Clayton Antitrust Act. *See* 15 U.S.C. §§ 12, 18; *see also DOJ Nov. 7, 2001 Letter* at 4 n.5 (stating that although DOJ “might still investigate non-reportable transactions that raise competitive concerns, and bring a Complaint in appropriate circumstances, it is possible that some smaller, potentially problematic transactions could be completed without the Department ever becoming aware of them”).

¹⁹⁰ *See* Cingular Comments at 33; Strategic Policy Comments on behalf of Cingular at 3, 18-20; CTIA Comments at 38-45; AT&T Comments at 15. We note, however, that the statements submitted by AT&T’s economists do not necessarily agree with AT&T’s position. The economists state that the Commission could perform the competitive analysis using the *DOJ/FTC Merger Guidelines*, and that the Commission is not necessarily duplicating the work of DOJ or the FTC. *See* Economists, Inc. Comments on behalf of AT&T at 25-26.

¹⁹¹ AT&T Comments at 15-16; Cingular Comments at 34; CTIA Comments at 45; CTIA Reply Comments at 31.

¹⁹² VoiceStream/Western Reply Comments at 3.

an obligation, distinct from that of DOJ, to consider as part of the Commission's public interest review the anticompetitive effects of acquisitions of CMRS spectrum, including those that occur in the secondary market. The U.S. Court of Appeals for the District of Columbia Circuit has found that the Commission must consider antitrust and competition effects in making its public interest determinations under the Communications Act.¹⁹³

63. Further, our independent statutory obligations in this area are sufficiently different from those of DOJ that it would be difficult for us to fulfill them were we to defer generally to competitive assessments made by DOJ. For example, our unique spectrum management responsibilities, including those under sections 151, 301, 303, and 309(j) of the Communications Act,¹⁹⁴ are affected by the level of competition that exists in CMRS markets. In addition, while the Commission has never chosen to exercise it, the Commission has independent authority under sections 7 and 11 of Clayton Act¹⁹⁵ to disapprove the acquisition of common carriers engaged in wire or radio communications or radio transmissions of energy in any line of commerce in any section of the country where the effects of such an acquisition may substantially lessen competition, or tend to create a monopoly.

64. There are also significant differences between the two agencies' procedural responsibilities. Unlike DOJ, we have an independent statutory obligation to make a public interest determination that is judicially reviewable, on the record, pursuant to the APA,¹⁹⁶ with regard to all applications for transfer or assignment of licenses.¹⁹⁷ By contrast, DOJ does not review all CMRS-related transactions,¹⁹⁸ is permitted to exercise prosecutorial discretion in choosing which cases to pursue, and is not required to state the reasons that underlie its decision to abandon individual cases. Were we to defer all competitive review to DOJ, we would sometimes be compelled to defer to DOJ's silence on particular matters, providing no basis for judicial review.

65. It may, however, be appropriate for us to rely, at least in part, on DOJ's analysis in certain

¹⁹³ *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (finding that the requirements of Clayton Act and Communications Act are satisfied when Commission "seriously considers" the antitrust consequences of proposed action and that the Commission must consider "antitrust policy as an important part" of its "public interest calculus").

¹⁹⁴ Section 151 of the Communications Act requires us to regulate commerce in communications so as to make as many communications services as possible available to as many people in the country as possible. 47 U.S.C. § 151. Section 301 of the Communications Act establishes our responsibility for spectrum management. *Id.* § 301. Section 303 of the Communications Act provides us with broad licensing authority over channels of radio transmission. *Id.* § 303. With respect to auctioned spectrum, which most of the spectrum covered by the cap is, Section 309(j) directs us to promote rapid and universal deployment, broad dissemination of licenses, and efficient use of spectrum. *Id.* § 309(j).

¹⁹⁵ 15 U.S.C. §§ 18, 21(a).

¹⁹⁶ 5 U.S.C. § 551 *et seq.*

¹⁹⁷ *See* 47 U.S.C. § 310(d).

¹⁹⁸ With the recent increase in the HSR reporting threshold, *see supra* note 188, fewer transactions will be reported and, thus, fewer reviewed. We note that the increase in the HSR reporting threshold means that a number of smaller transactions that would have been reviewed under the former threshold will now not be reported to DOJ. Therefore, unless DOJ's attention is somehow called to such a transactions and it chooses to exercise its independent authority under the Sherman Antitrust Act or Clayton Act, there would be no DOJ review of these smaller transactions.

cases where DOJ has fully examined the competitive effects of a particular acquisition and determined its effect on the relevant market(s) – for example, cases where DOJ and the transacting parties have entered into a Consent Decree. We intend during our transition period to case-by-case review to explore appropriate circumstances in which we might either rely on DOJ's conclusions or engage in greater coordination with DOJ with respect to these issues so as to minimize duplication of effort between the agencies, process applications as efficiently as possible, and minimize the burden on applicants for Commission approval of transfers and assignments.

66. *Transition Period.* We conclude that a transition period, pursuant to which a modified spectrum cap will remain in effect until January 1, 2003, is in the public interest so that applicants and the Commission can prepare for case-by-case review of all transactions. In addition to giving us the opportunity to consider guidelines, as discussed above, a transition period will also help carriers prepare for the additional burdens that case-by-case review could impose on their resources. In particular, we believe this preparation may be especially important for small businesses. While we believe that opportunities for small businesses can be fully protected through a case-by-case approach,¹⁹⁹ we recognize, as does Leap, that advancing one's positions in a case-by-case regime could require the preparation of more detailed applications, which could require resources that small businesses may not be immediately prepared to commit.²⁰⁰ In addition, regulatory certainty and speed of processing are likely to be particularly important to small businesses, which typically are less able to withstand extended or costly administrative processes. This demand for resources would be especially great if we were to change immediately to a case-by-case process without first considering effective standards and procedures. We intend to take the special needs of small businesses into account in considering our guidelines for the review of CMRS spectrum acquisitions.²⁰¹

67. At the same time, we find that in the interim, continued application of the spectrum cap, modified as discussed below, will not result in significant distortions in the market or delay in the introduction of beneficial services.²⁰² In fact, in only relatively few instances is any party at the spectrum cap.²⁰³ As discussed below, we believe increasing the spectrum cap to 55 MHz will provide a meaningful

¹⁹⁹ See *supra* para. 52.

²⁰⁰ See Leap Comments at 31.

²⁰¹ See SBA Comments at 3 (arguing that if the Commission lifts spectrum aggregation limits, it must propose alternatives that will minimize the impact while serving the Commission's regulatory goals).

²⁰² In particular, despite the assertions of several commenters to the contrary (see Verizon Comments at 20; Gertner and Shampine Declaration on behalf of Verizon at 8, 15; Verizon Reply Comments at 23-24; Lynch Declaration on behalf of Verizon at 7-11; CTIA Reply Comments at 21-22; Schwartz and Gale Comments on behalf of CTIA at 3), the record contains little factual evidence that the current spectrum aggregation limits are imposing significant capacity constraints, frustrating the achievement of economies of scale or scope, or impeding innovation. See Leap Comments at 15-16; Cramton Declaration on behalf of Leap at 26-27; Kelley Declaration on behalf of Leap at 5-6; WorldCom Reply Comments at 6-7; Leap Reply Comments at 32; Cramton Reply Declaration on behalf of Leap at 16-17; Sprint Reply Comments at 3-5.

²⁰³ In the fifty most populous MSAs, our records indicate that in only four instances is a carrier currently at the spectrum cap, and in a survey of eighty sample RSAs we found only seven instances of a party reaching the cap. In MSAs, AT&T is attributed with 45 MHz of spectrum in Dallas, Texas, New Orleans, Louisiana, and Nashville, Tennessee; Verizon is attributed with 45 MHz of spectrum in Baltimore, Maryland. In RSA counties, AT&T is attributed with 55 MHz of spectrum in Boyle, Kentucky, McDowell, West Virginia, Pike, Ohio, and Metcalfe, Kentucky; entities controlled by Thomas Sullivan and Gerald Vento in Logan, Kentucky and Metcalfe, Kentucky; and VoiceStream in Brown, Minnesota and Geary, Kansas.

margin to relieve capacity constraints that some carriers may face now or are likely to encounter within the next fourteen months.²⁰⁴ Thus, we will generally presume that transactions complying with the 55 MHz spectrum cap will not cause undue risk of market concentration. At the same time, while we anticipate that most transactions that are within the cap will not raise competitive concerns, we retain the discretion to review the competitive effects of transactions that are within the spectrum cap if an interested party provides specific evidence that such a transaction will create an undue risk of market concentration, or if the Commission staff independently finds such evidence.²⁰⁵ In any instance in which permitting a carrier to exceed 55 MHz would be in the public interest due to capacity constraints or otherwise, the waiver process remains available.²⁰⁶

68. We conclude that sunseting the cap on January 1, 2003, will provide a sufficient period of time for the Commission and industry to prepare for reliance solely on case-by-case review of CMRS spectrum aggregation transactions. Moreover, two blocks of spectrum that will be usable for CMRS are likely to be allocated and assigned within this approximate timeframe or soon thereafter. First, we currently have pending a proceeding in which we have proposed to allocate additional spectrum for the provision of 3G and other advanced services.²⁰⁷ Second, 30 MHz of spectrum being vacated by television Channels 60-69 is scheduled to be auctioned beginning June 19, 2002.²⁰⁸ Accordingly, the spectrum cap rule will cease to be effective on January 1, 2003. We believe that setting a date certain for repeal of this rule provides stability to the market, and that this period gives all parties sufficient time to prepare for the change.

3. Modification to the Spectrum Cap During the Transition Period

69. Having determined that the CMRS spectrum cap should be eliminated, but that a transition period is necessary before we switch to a pure case-by-case approach to analyzing CMRS assignments and transfers of control, we next consider whether to make changes to the existing rule during the transition period. We conclude that an increase in the spectrum cap to 55 MHz in MSAs is appropriate at this time. This modification will provide carriers in MSAs some additional freedom to acquire spectrum during the

²⁰⁴ See *infra* para. 73. We therefore disagree with Cingular's argument that a transition period as proposed by Sprint is an attempt to gain a competitive or financial advantage over other CMRS providers. See Cingular Reply Comments at 25; see also Strategic Policy Reply Comments on behalf of Cingular at 3-4.

²⁰⁵ See *First Biennial Review Order*, 15 FCC Rcd at 9245 n.138.

²⁰⁶ See 47 C.F.R. § 1.925 (setting forth general standard for waiver); *First Biennial Review Order*, 15 FCC Rcd at 9256 ¶ 82 (stating that Commission will consider waivers "to the extent that a carrier can credibly demonstrate that in a particular geographic area the spectrum cap is currently having a significant adverse effect on its ability to provide 3G or other advanced services").

²⁰⁷ See *supra* note 142, citing *3G NPRM*; *3G Further Notice*; see also *3G First Report and Order*, FCC 01-256, at ¶ 19 (determining that spectrum at 2500-2690 MHz would not be reallocated for this purpose). We note that additional spectrum currently allocated for federal government use may also become available, along with the spectrum currently under consideration at 1710-1755 MHz, 2110-2150 MHz, and 2160-2165 MHz. See *3G NPRM*, 16 FCC Rcd at 613-19 ¶¶ 39-57.

²⁰⁸ See *Channels 60-69 PN*. We note, however, that use of this spectrum for CMRS in many geographic areas may be impractical until the incumbents are relocated, which could take a substantial period of time. See 47 C.F.R. §§ 337(e), 309(j)(14) (allowing television broadcasters in Channels 60-69 to continue operations until December 31, 2006 and providing procedures for seeking extension of that date); *Channels 69-69 Order on Reconsideration*, FCC 01-258 (granting additional flexibility to facilitate voluntary clearing of incumbent broadcasters in the 746-806 MHz spectrum band).

transition at relatively minimal competitive risk. We also conclude that because the spectrum cap in RSAs is already at 55 MHz, no modification in RSAs is appropriate during the sunset period.²⁰⁹

a. MSAs

70. The current CMRS spectrum cap restricts parties to attributable interests in 45 MHz of covered spectrum in MSAs. In the *NPRM*, we requested comment on whether this threshold should be modified.²¹⁰ Below we first address the efficiency effects of the rule and then address the competitive effects.

71. *Efficiency Effects of the Spectrum Cap.* Advocates of raising the spectrum cap generally make two types of efficiency arguments. The first is a long-run argument that the 45 MHz ceiling prevents service providers from achieving minimum efficient scale, *i.e.*, that level of output at which long-run average costs reach a minimum.²¹¹ This means that non-trivial economies of scale are going unrealized. The second argument is that in the short run under the current ceilings, the quantity of service demanded exceeds, or will soon exceed, the quantity that firms can supply efficiently.²¹² That is, demand for service is, or will be, such that firms will be forced either not to offer certain services at all, or to distort their input choices in order to satisfy demand. This input distortion, for example, might consist of over-investing in cell-splitting and smart antennas because additional spectrum input cannot be acquired.

72. We agree that both the short-run and long-run efficiency problems, to the extent they are present, would constitute harms imposed by the current rule, and easing them would be a benefit of raising the CMRS cap. Based on the specific information and data in the record, however, we find that most providers are not constrained *today* by the current cap in most markets, and that it is unlikely that total demand for voice and data services will grow so rapidly over the next year or two that capacity constraints will become a serious, across-the-board problem during that time. We also believe that less than 45 MHz is required to achieve minimum efficient scale in the provision of service today.²¹³

73. We do agree, however, that it may be the case that some carriers are capacity-constrained in certain urban markets with high population density. And we agree that it is possible – if not likely – that demand for voice and data services will grow so rapidly over the next fourteen months that the current 45 MHz cap would cause significant efficiency costs. Such costs, of course, while initially imposed on the operators, would eventually be passed on at least in part to consumers of mobile telephony services in the

²⁰⁹ In addition, we make certain clarifying and streamlining changes to the divestiture provisions of the spectrum cap and cellular cross-interest rules, both in MSAs and RSAs. *See infra* Section IV.E.

²¹⁰ *See NPRM*, 16 FCC Rcd at 2775-76 ¶ 22.

²¹¹ *See RTG/OPASTCO Comments* at 6; *AT&T Comments* at 8; *Economists, Inc. Comments* on behalf of AT&T at 15; *Strategic Policy Comments* on behalf of Cingular at 5; *Schwartz and Gale Comments* on behalf of CTIA at 28.

²¹² *See CTIA Comments* at 27, 29-30; *Schwartz and Gale Comments* on behalf of CTIA at 17-18, 28-33; *AT&T Comments* at 9-10; *Economists, Inc. Comments* on behalf of AT&T at 13-18; *Verizon Comments* at 18-22; *Gernter and Shampine Declaration* on behalf of Verizon at 8, 17-18; *Cingular Reply Comments* at 11; *Strategic Policy Comments* on behalf of Cingular at 5-6, 15-16.

²¹³ *See Kelley Declaration* on behalf of Leap at 8-11, 26 (stating that Leap offers its Cricket service with as little as 10 MHz of spectrum); *Gertner and Shampine Declaration* on behalf of Verizon at 7 (stating that firms can offer voice service with less than 45 MHz of spectrum); *Schwartz and Gale Comments* on behalf of CTIA at 18, 29 (stating that mobile voice service requires less than 45 MHz of spectrum).

form of higher prices, poorer service, or lack of innovation.²¹⁴ An increase in the cap to 55 MHz, where it is now for rural areas, can help to prevent such potential efficiency losses.

74. *Competitive Effects of Relaxing the Spectrum Cap.* There are several reasons that an increase in the cap in MSAs to 55 MHz does not pose undue risk of anticompetitive consequences during the transition period, but that any greater increase would run an unacceptable risk of significantly reducing competition. First, a 10 MHz increase in the cap means that, as with the 45 MHz cap, there must in principle be at least four competitors in each geographic market. While the current cap permits four competitors with equal (45 MHz) spectrum holdings, the 55 MHz cap will permit three firms holding 55 MHz and a fourth holding 15 MHz. Although a firm with 15 MHz may be capacity-constrained in some geographic areas, it will often be able to help discipline its larger competitors. Second, we note that raising the cap to 55 MHz increases the maximum possible input-based HHI by only 350 points, from 2,500 to 2,850. While not insignificant, this increase appears unlikely to foster unilateral pricing power in the current marketplace. Third, mobile telephony operators typically experience high fixed costs and low marginal costs of production. Low marginal costs mean that producers can potentially achieve high profits by reducing their prices, and therefore can render tacit agreements to charge high prices difficult to sustain.²¹⁵

75. We also note that, as is the case today, we reserve the right to subject transactions involving significant geographic overlap but resulting in consolidation below the new ceiling to further scrutiny. There may be circumstances under which a transfer or assignment could raise competitive concerns notwithstanding compliance with the spectrum cap, for example, elimination of significant actual competition. We will generally presume that transactions complying with the 55 MHz cap do not cause undue risk of market concentration unless specific evidence to the contrary is presented by either interested parties or through review by Commission staff.²¹⁶

76. Furthermore, any concern about the possible competitive impact of moderately increased concentration is also materially reduced by the possibility of additional allocations of spectrum over the next two years that will greatly increase the amount of spectrum available for CMRS applications. In particular, our Advanced Wireless Services proceeding is considering options for substantial new allocations of spectrum for terrestrial, fixed, and mobile services.²¹⁷ These options include the 1710-1755 MHz band, which has already been transferred from federal government use, and the 2110-2150, 2160-2165 MHz Emerging Technologies band. Licensing of these bands is likely within the next two years. Clearance of incumbent users in each case is unlikely to be difficult, since they are primarily fixed operators and thus multiple options for relocation are available. Although provision of service on these bands is not imminent,²¹⁸ we believe this quantity of spectrum and the relative certainty that it will become available shortly after the end of the transition period should meaningfully discourage anticompetitive behavior during the period.

77. *Balancing of Efficiency and Competitive Effects of the Spectrum Cap.* On balance, we find

²¹⁴ See Gertner and Shampine Declaration on behalf of Verizon at 15-17.

²¹⁵ See DENNIS W. CARLTON & JEFFREY M. PERFLOFF, *MODERN INDUSTRIAL ORGANIZATION*, Ch. 6 (2d Ed., Harper Collins 1994).

²¹⁶ See *First Biennial Review Order*, 15 FCC Rcd 9245 n.138.

²¹⁷ See *supra* note 142.

²¹⁸ See *supra* para. 41.

that we should increase the CMRS spectrum cap to 55 MHz in MSAs. The potential harm from increasing the cap to 55 MHz appears to be outweighed by the corresponding potential benefits, which include facilitating improved operations, network design, and innovation. We believe any increase of less than 10 MHz might not provide significant relief to firms that may be capacity-constrained, because there may be indivisibilities in the secondary market for spectrum that make acquisition in increments smaller than 10 MHz unlikely. (For example, carriers at 40 MHz may in effect be constrained by the 45 MHz cap because they can acquire, at most, 5 MHz of additional spectrum and such a small block of spectrum may not be available.) Regarding the effect of mergers or acquisitions up to the new cap, we note that many of these may not be acquisitions of ongoing businesses, but rather of bare licenses or licenses with only certain physical assets. In the 50 largest MSAs, for example, there is an average of roughly 40 MHz of unlaunched spectrum licenses. In the ten largest MSAs, there is an average of roughly 30 MHz. Consolidation of this unused spectrum into an existing business would not reduce actual competition, although it might have an effect on potential competition.

78. If a firm is capacity-constrained even at the 55 MHz limit, it may submit a waiver request. We find that waivers provide a reasonable solution for carriers that may need spectrum above the relaxed spectrum aggregation limit during the period until the rule sunsets. Therefore, to the extent that a carrier can demonstrate that in a particular geographic area the spectrum cap is currently having a significant adverse effect on its ability to provide CMRS, we will consider granting a waiver of the cap for that geographic area. We urge carriers requesting waivers to clearly identify what additional services they would provide if the spectrum cap rule were waived, and why such services cannot be provided without exceeding the cap. In evaluating a waiver request, the Commission will also take into account any potential adverse effects of granting the waiver, such as diminution of competition, as well as the potential benefits from the provision of additional services.²¹⁹

b. RSAs

79. As discussed above, CMRS markets in rural areas are significantly different from the markets in urban areas. In particular, RSAs typically have many fewer competitors offering two-way mobile service, and many fewer nationwide service providers, than do MSAs. Indeed, in seventy-six percent of RSA counties, no more than one broadband PCS provider is competing with the cellular incumbents in any part of the county.²²⁰ In the *First Biennial Review Order*, we increased the spectrum cap to 55 MHz in RSAs on the ground that allowing rural cellular and broadband PCS carriers to form partnerships in certain overlapping areas would allow these carriers to achieve economies of scope that might facilitate deployment, while entailing little opportunity cost because the economics of serving rural areas made it unlikely that a large number of independent competitors would emerge in any event.²²¹ In the *NPRM*, we asked whether, in light of the continued lagging development of competition in rural areas, we should consider further changes to the spectrum aggregation limits in these markets.²²² In particular, we asked commenters to describe any benefits to rural customers that had accrued from the previous increase in the spectrum cap in terms of lower prices, availability of digital services, or otherwise.²²³

²¹⁹ See generally 47 C.F.R. § 1.925.

²²⁰ See *supra* para. 34.

²²¹ *First Biennial Review Order*, 15 FCC Rcd at 9256-57, ¶ 84.

²²² *NPRM*, 16 FCC Rcd at 2782-83, ¶ 39.

²²³ *Id.*

80. RTG/OPASTCO, CTIA, and Cingular argue that the spectrum cap inhibits competition in rural areas due to the high cost of providing service across large geographic areas, and that the most cost-effective means of bringing broadband PCS and SMR services to rural subscribers is to provide existing rural cellular providers the ability to acquire additional spectrum to offer such services.²²⁴ UTStarcom, on the other hand, argues that removal of the spectrum cap in rural markets is likely to reduce competition and increase costs of mobile wireless service in those areas, given the smaller number of competitors in rural areas.²²⁵ NTCA and RCA argue that spectrum in rural areas is currently going unused, and that if the spectrum cap and cellular cross-interest rules are eliminated, the Commission should take other actions to ensure that small rural companies have the ability to obtain spectrum and that consumers in rural areas have access to advanced services.²²⁶

81. Based on the record before us, we conclude that, given the market conditions prevailing in rural areas during the transition period, 55 MHz remains the appropriate level for the spectrum cap in these areas until the cap is eliminated in favor of case-by-case review. Given the smaller population and demand for service in RSAs, it is highly unlikely that the current spectrum cap is causing any capacity constraint or similar inefficiency. We therefore conclude that during the sunset period we should continue to keep the spectrum cap at 55 MHz in RSAs.

D. Partial Repeal of the Cellular Cross-Interest Rule

82. In the *NPRM*, we sought comment on the possible repeal of the cellular cross-interest rule.²²⁷ Alternatively, we asked whether the rule could be modified so that it would not apply in certain circumstances in which other regulations would provide adequate safeguards.²²⁸ We suggested the possibility of continuing to apply the rule only in markets where there are a limited number of competitors to the existing cellular providers.²²⁹ Accordingly, we sought comment on whether there was a need to maintain any cellular-specific restrictions in more urban areas, where there are generally a larger number of competitive choices for consumers.²³⁰ While noting that cellular providers maintained large market shares in MSAs, we asked whether cellular/cellular combinations remain more anticompetitive than cellular/PCS or PCS/PCS combinations in MSAs.²³¹ Commenters were asked to provide empirical evidence and/or studies on the relative competitive and buildout status of cellular, SMR, and broadband PCS carriers on a

²²⁴ See RTG/OPASTCO Comments at 4-6; Cingular Reply Comments at 6; CTIA Reply Comments at 27-28. See also Economists, Inc. Comments on behalf of AT&T at 18 (discussing that the Commission has recognized that some rural areas may not be economically served by PCS).

²²⁵ See UTStarcom Comments at 1.

²²⁶ See NTCA Comments at 2-7 (arguing that the Commission should license spectrum in smaller geographic areas, require carriers holding spectrum licenses that include both rural and urban areas to partition or disaggregate unused spectrum well before the end of the license period, and impose buildout requirements based on geographic area covered); RCA Reply Comments at 2-3.

²²⁷ *NPRM*, 16 FCC Rcd at 2789 ¶ 54.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

market-by-market as well as comprehensive basis.²³²

83. The majority of commenters who address the issue recommend elimination of the cellular cross-interest rule, particularly in MSAs. Cingular, Verizon, VoiceStream/Western, CTIA, CICC, and RTG/OPASTCO argue that the rule should be eliminated in its entirety.²³³ These commenters argue that the rule is unnecessary, outdated, and inequitable, noting that PCS licensees are not subject to a similar rule.²³⁴ Moreover, they argue that meaningful competition now exists and the rule is not necessary to prevent harmful consolidation.²³⁵ Sprint argues that, if the spectrum cap rule is retained, the cellular cross-interest rule should be eliminated in MSAs, though retained in RSAs, because in most MSAs, consumers have numerous choices.²³⁶ TDS argues that the cross-interest rule remains a valuable competitive safeguard, particularly because there are still cellular markets in rural areas in which no broadband PCS provider has initiated service.²³⁷ NTCA, RCA, and Chadmoore argue that in the event that the spectrum cap or cellular cross-interest rules are modified or eliminated, the Commission must take other actions to ensure opportunities for small businesses and provision of service to underserved areas.²³⁸

1. Elimination of Cellular Cross-Interest Restriction in MSAs

84. We conclude that the cellular cross-interest rule is no longer necessary in urban markets, given the presence of numerous competitive choices for consumers in such markets. We therefore repeal the rule in MSAs in order to provide relief from capacity constraints and in recognition of the fact that the cellular incumbents in MSAs no longer enjoy significant first-mover advantages. Unlike the case of the spectrum cap, we find that no transition period is necessary to eliminate the cellular cross-interest restriction in MSAs.

85. In the *First Biennial Review Order*, we concluded that the cellular cross-interest rule was still necessary, given the strong market position held by the two cellular carriers in virtually all markets.²³⁹ The two cellular carriers held the vast majority of subscribers in all markets and were the only providers of

²³² *Id.* at 2776 ¶ 23.

²³³ See Cingular Comments at 40-42; Verizon Comments at 15-16; VoiceStream/Western Reply Comments at 1-2, 5; RTG/OPASTCO Comments at 1, 8-9; CICC Comments at 1, 5-6, 8; CTIA Comments at 14 n.45.

²³⁴ See Verizon Comments at 15-16; RTG/OPASTCO Comments at 8; CICC Comments at 5; Cingular Comments at 40-42; Cingular Reply Comments at 19.

²³⁵ Cingular Comments at 40-41; Verizon Comments at 16; RTG/OPASTCO Comments at 8; VoiceStream/Western Reply Comments at 2.

²³⁶ Sprint Reply Comments at 8-10.

²³⁷ TDS Comments at 7-8; TDS Reply Comments at 8.

²³⁸ NTCA Comments at 5-6 (arguing that if the rules are removed, the public interest will best be served if the Commission were to impose conditions to insure that customers in rural areas will have equal access to advanced services); Chadmoore Comments at 1-3 (reservedly supporting modification of the rules with the condition that “meaningful provision is made for the entry of small businesses in the wireless industry”); RCA Reply Comments at 2-3 (arguing that the Commission should adopt a “fill-in” policy for unused spectrum in rural areas similar to that in place for cellular licensees).

²³⁹ *First Biennial Review Order*, 15 FCC Rcd at 9251 ¶ 70.

mobile telephony service in many markets.²⁴⁰ We therefore found that the rule was still needed to prevent these incumbents from merging or having significant cross-ownership interests.²⁴¹ We recognized, however, that the cellular carriers' relative market position was diminishing in certain markets as broadband PCS and digital SMR service providers attracted more subscribers and began service in more areas of the country, particularly urban markets.²⁴² We then noted that we would reassess the need for a separate cellular cross-interest rule as part of our year 2000 biennial review, by which time we expected that the market positions of the two cellular carriers and broadband PCS and digital SMR service providers would have narrowed further.²⁴³

86. We find today that cellular carriers no longer possess market power in MSAs, and that the services offered by cellular and broadband PCS providers in these markets are indistinguishable to consumers. In MSAs, eighty-six percent of counties have four or more facilities-based CMRS providers that are offering service in some part of the county.²⁴⁴ Forty of the fifty most populous MSAs have six nationwide carriers, counting Nextel, with the remaining ten MSAs having five nationwide carriers.²⁴⁵ The significant drop in HHI calculations based on estimated subscribers in the top twenty-five MSAs from January 1999 to January 2001 is further indication that any market power that cellular carriers may have been able to exercise in the past has diminished in these urban markets.²⁴⁶ Moreover, as CTIA points out, the cellular providers' share of mobile telephony nationwide had declined to seventy percent by the end of 2000.²⁴⁷ In addition, most cellular carriers in MSAs have deployed digital technology extensively throughout their networks, and from a customer's perspective, digital service in the cellular band is virtually identical to digital service in the PCS band.²⁴⁸

87. Accordingly, we find no reason to view the combination of cellular licensees in these markets less favorably than combinations of other CMRS licensees. Moreover, because we find that combinations of cellular carriers in MSAs are not presumptively anticompetitive today, and because restrictions on such combinations may be contributing to capacity constraints,²⁴⁹ it would be inappropriate to continue applying

²⁴⁰ *Id.*

²⁴¹ *Id.* at 9252 ¶ 73.

²⁴² *Id.* at 9251 ¶¶ 70-71.

²⁴³ *Id.* at 9251 ¶ 70.

²⁴⁴ *See supra* para. 34.

²⁴⁵ *See id.*

²⁴⁶ *See supra* para. 32.

²⁴⁷ *See* Letter from Diane J. Cornell, CTIA, to Magalie Roman Salas, Secretary, Federal Communications Commission, dated Oct. 30, 2001 (“*CTIA Oct. 30, 2001 Ex Parte*”).

²⁴⁸ *See generally Sixth Annual CMRS Competition Report*, FCC 01-192, at 13; CICC Comments at 3-5.

²⁴⁹ In this regard, we note that cellular licenses may be particularly likely to experience capacity constraints because they alone are required to offer analog mobile service pursuant to the Advanced Mobile Phone Service (“AMPS”) standard pursuant to 47 C.F.R. § 22.933. *See* Sprint Comments at 9; *see also* Year 2000 Biennial 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, *Notice of Proposed Rulemaking*, 16 FCC Rcd 11169 (2001) (requesting comment on whether we should eliminate the AMPS requirement).

this rule on a transitional basis.

2. Retention of Cellular Cross-Interest Restriction in RSAs

88. We conclude, however, based on the record before us, that it would not be appropriate at this time to eliminate the cellular cross-interest rule in rural markets. We therefore retain the rule in RSAs, subject to waiver of the prohibition where it is shown that the proposed cross-interest would not create a significant likelihood of substantial competitive harm. We will, however, reassess the need for a cellular cross-interest restriction in RSAs as part of our next biennial review in 2002, by which time we may have more comprehensive information regarding the state of competition in rural markets.

89. CMRS markets in rural areas are different from the markets in urban areas, in that, generally, the cellular providers seem to enjoy first-mover advantages and to dominate the marketplace. In seventy-six percent of RSA counties, no more than one broadband PCS provider is competing with the cellular incumbents in any part of the county.²⁵⁰ Indeed, fifty-six percent of RSA counties have two or fewer facilities-based providers of mobile telephony offering service, presumably in most instances the two cellular licensees.²⁵¹ In addition, it is our understanding that, in some areas, any competitors to the cellular incumbents are serving only a small portion of the county, particularly in the western United States, where many states have large rural counties.²⁵² It is also significant that cellular carriers still control 70 percent of mobile telephony markets nationwide as of year-end 2000,²⁵³ and this share is likely to be smaller in MSAs and larger in RSAs. In the absence of a record to the contrary,²⁵⁴ these facts suggest that the cellular carriers generally dominate the rural markets. Moreover, due to the economics of serving rural areas, potential entry by new competitors is likely to be difficult.²⁵⁵ Thus, based on the record in this proceeding, it appears that a combination of interests in cellular licensees in rural areas would more likely result in a significant reduction in competition. In this regard, we note that unlike the spectrum cap rule, the cellular cross-interest rule addresses not the aggregation of spectrum, but the competitive position of the two cellular licensees. Without more comprehensive information in the record, however, we are unable to conclude that repeal of the cellular cross-interest rule in RSAs is appropriate at this time.

90. In addition, the cellular cross-interest rule in RSAs is well tailored to the harm that it seeks to prevent. Because the rule places cellular carriers in RSAs under no special constraints in obtaining PCS spectrum, and in most RSAs there is ample unused PCS spectrum available, the rule does not prevent cellular carriers from increasing their capacity or offering advanced services. The ability of cellular carriers in rural areas to obtain PCS spectrum may provide an additional opportunity to consumers in RSAs to have access to the same advanced services offered to consumers in MSAs.²⁵⁶ We therefore conclude that we should continue to forbid a cellular licensee in an RSA from holding an attributable interest in the cellular licensee on the other channel block in an overlapping CGSA. To the extent that it

²⁵⁰ See *supra* paras. 34, 79.

²⁵¹ See *supra* note 99.

²⁵² See *supra* para. 34.

²⁵³ See *CTIA Oct. 30, 2001 Ex Parte*.

²⁵⁴ The record contains neither anecdotal information nor data on the state of competition in RSAs.

²⁵⁵ See *supra* para. 34.

²⁵⁶ See, e.g., RTG/OPASTCO Comments at 6.

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, such a situation can be addressed through waiver of the cross-interest prohibition.²⁵⁷

91. Further, we reject TDS's arguments that the benchmark for attributable ownership interests under the cellular cross-interest rule should be increased from five to 20 percent, as under the spectrum cap rule, and that we should include a provision for waiver in the case of a passive minority investor in a licensee that has a single majority shareholder.²⁵⁸ TDS, which supports retention of the spectrum cap and the cellular cross-interest rule (in both MSAs and RSAs), argues that because of the evolution of mobile telephony since the inception of the cellular cross-interest rule, there currently may be situations in which attributable ownership interests of greater than five percent would pose "no actual threat to competition."²⁵⁹ In the *First Biennial Review Order*, we found that given the continued dominance of the cellular incumbents in CMRS markets, allowing a party with a controlling interest in one cellular licensee to hold up to twenty percent ownership of the other licensee in the same market would pose a substantial threat to competition.²⁶⁰ Specifically, significant cross-interests between the two largest service providers in RSAs generally would create a significant incentive for the two not to compete with one another as vigorously as otherwise. For the reasons discussed above, we conclude that market conditions in RSAs have not changed sufficiently to generally permit such cross-holdings of cellular interests today. We will, however, entertain requests for waiver in appropriate circumstances. Thus, we decline to make TDS's suggested revisions to the cellular cross-interest rule.

92. In the *NPRM*, we sought comment on whether the cellular cross-interest rule should be modified to account for the possible disaggregation of cellular spectrum.²⁶¹ For example, we asked whether the cellular cross-interest rule should be replaced by a cellular spectrum cap of 35 MHz so as to permit combination of a 25 MHz cellular license with up to 10 MHz of cellular spectrum on the other channel block in the same geographic area.²⁶² We did not receive any comment on this issue. In light of the absence of comment to guide our deliberations, and in light of the lack of applications for disaggregation of cellular spectrum,²⁶³ we decline to modify the rule at this time. Given the lack of record

²⁵⁷ See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Third Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 11857, 11860-62 ¶¶ 6-12 (2000); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Band and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600, 18619 ¶ 32 (1997).

²⁵⁸ TDS Comments at 7-11; TDS Reply Comments at 8; see 47 C.F.R. § 20.6 Note 3.

²⁵⁹ TDS Comments at 9-11.

²⁶⁰ *First Biennial Review Order*, 15 FCC Rcd at 9252-53 ¶¶ 73-76.

²⁶¹ *NPRM*, 16 FCC Rcd at 27-28, ¶ 55; see Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, *Second Report and Order*, 15 FCC Rcd 10432 (2000) (amending rules to permit disaggregation of cellular spectrum).

²⁶² *NPRM*, 16 FCC Rcd at 2789-90 ¶ 55.

²⁶³ A search of our licensing records indicates that no applications to disaggregate cellular spectrum have been filed.

evidence regarding this issue, we believe it is more appropriate at this time to address any such requests on a case-by-case basis.

E. Clarification and Streamlining of Divestiture Provisions

93. The current spectrum cap and cellular cross-interest rules impose different time frames for divestiture of interests. The cellular cross-interest rule requires that a divestiture transaction be consummated prior to consummating the transaction that gives rise to the need to divest.²⁶⁴ The spectrum cap rule, however, considers parties to be in compliance with the divestiture provisions if, prior to consummating the primary transaction, an application is filed to transfer control of or assign any interest that would conflict with the rule.²⁶⁵ Based on our experience over the past two years, particularly in reviewing applications that combined cellular and PCS divestitures in one transaction, we believe that the required timing of divestiture under these two rules should be harmonized.

94. Rather than tighten the divestiture provision in section 20.6, we conclude that the better approach is to afford parties more leeway in the timing of divestiture transactions by revising section 22.942 of our rules to permit a transaction that causes a conflict with this rule to close as long as an application (or other request for Commission approval) has been filed that, if granted and the transaction is consummated, would remove the conflict. In choosing this more lenient course, however, we note that there may be circumstances in which a party that must divest an interest to comply with the spectrum cap and/or cellular cross-interest restriction should not be allowed a full 180 days to consummate a divestiture transaction.²⁶⁶ Divestiture transactions, by definition, occur to relieve potential anti-competitive effects of additional concentration. Therefore, because of specific competitive consequences of individual transactions, we may decide on a case-by-case basis that it would serve the public interest to shorten the consummation and notification period to minimize the amount of time that such overlap occurs.²⁶⁷

95. We also take this opportunity to clarify certain issues with respect to placing licenses (or interests in licenses) into a divestiture trust. As a preliminary matter, we will revise section 22.942 of our rules to state explicitly that divestiture of licenses or interests pursuant to this rule is permitted via divestiture trust.²⁶⁸ In the *First Biennial Review Order*, we stated that a licensee may divest to a trust if the

²⁶⁴ Section 22.942(c) states, “Divestiture of interests as a result of a transfer of control or assignment of authorization must occur prior to consummating the transfer or assignment.” 47 C.F.R. § 22.942(c).

²⁶⁵ Section 20.6(e)(4)(i) states:

Parties holding controlling interests in broadband PCS, cellular, and/or SMR licensees that conflict with the attribution threshold or geographic overlap limitations set forth in this section will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the conflicting licensee . . . by which, if granted, such parties no longer would have an attributable interest in the conflicting license. 47 C.F.R. § 20.6(e)(4)(i).

²⁶⁶ Section 1.948(d) of our rules requires that transactions that require Commission approval be consummated and the Commission be notified within 180 days of the public notice of approval. 47 C.F.R. § 1.948(d).

²⁶⁷ For this reason, we have followed this course in a number of recent divestiture transactions. *See, e.g., Applications of GTE Corporation, Vodafone AirTouch plc, and Bell Atlantic Corporation, Order*, 15 FCC Rcd 11608, 11610-11 ¶¶ 6-8 (WTB 2000).

²⁶⁸ We currently allow divestiture of cellular interests into a divestiture trust and want to remove any question regarding our policy in this regard.

trust will be of limited duration (six months or less) and the terms of the trust are approved by the Commission prior to the transfer of the assets to the trust.²⁶⁹ Further, we stated that: (1) the divesting party must not have any interest in or control of the trustee; (2) the trust agreement must clearly state that there will be no communications with the trustee regarding the management or operation of the subject facilities; and (3) the trustee must have the authority to dispose of the license(s) as he or she sees fit.²⁷⁰

96. Based on our experience over the past two years reviewing such trust arrangements, we believe that certain clarifications are appropriate to our policy on divestiture trusts. First, with respect to communications between the trustee and the beneficiary (*i.e.*, the divesting party), we recognize that the nature of communication required between the trustee and the beneficiary will differ depending on the nature of the trust property. For example, if the trust property is merely equity in a licensee that the beneficiary formerly held, very little communication between the trustee and the beneficiary will be necessary. If, however, the trustee is holding an entire business and managing operations, the beneficiary must have the freedom, and the responsibility, to respond to inquiries from the trustee, but must not be given additional knowledge about the operations of the divested property that could be used to influence the operations that the beneficiary retained in the affected market(s). Second, to enable us to keep track of the progress toward ultimate divestiture, we clarify that our policy is to require, in individual transactions, trustees to report to the Commission every sixty days on the status of attempts to transfer the trust property to a third party. Third, we clarify that material revisions to an approved trust agreement that relate to the types of provisions we have identified herein or in the *First Biennial Review Order* require prior Commission approval. Fourth, we clarify that, in the case of an approved divestiture trust, the trust property will be attributed during the period held in trust to the trustee, and because of the protections that are required of such trusts, not to the beneficiary.²⁷¹

V. CONCLUSION

97. Pursuant to the mandate in section 11 of the Communications Act, we hereby take the actions described above in this Report and Order with respect to the CMRS spectrum aggregation limit and the cellular cross-interest rule.

VI. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

98. As required by the Regulatory Flexibility Act,²⁷² the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) of the possible impact on small entities of the action taken in this Report and Order. The FRFA is set forth in Appendix C.

²⁶⁹ *First Biennial Review Order*, 15 FCC Rcd at 9269 ¶ 117. We also delegated authority to the Wireless Telecommunications Bureau to review and approve particular trust arrangements. *Id.*

²⁷⁰ *Id.*

²⁷¹ This differs from a situation in which a license or interest in a license is held in trust for purposes other than divestiture. Under these other circumstances, where it is assumed that no protections are in place to shield the beneficiary from receiving information regarding the operations of the property in trust, we will attribute the license (or interest) to both the trustee and the beneficiary.

²⁷² 5 U.S.C. § 603.

B. Paperwork Reduction Act Analysis

99. This Report and Order has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, and does not contain any new or modified information collections subject to Office of Management and Budget Review.

VII. ORDERING CLAUSES

100. Accordingly, IT IS HEREBY ORDERED, pursuant to the authority of sections 1, 4(i), 11, 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 161, 303(r), and 309(j), that this Report and Order IS ADOPTED, and sections 20.6 and 22.942 of the Commission's Rules, 47 C.F.R. § 20.6, 22.942, ARE AMENDED as set forth in Appendix B, effective 30 days after publication of a summary in the Federal Register.

101.

102. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A**List of Parties Filing Comments in WT Docket No. 01-14****A. Comments**

1. AT&T Wireless Services, Inc. (“AT&T”)
2. Cellular Telecommunications & Internet Association (“CTIA”)
3. Chadmoore Wireless Group, Inc. (“Chadmoore”)
4. Cingular Wireless LLC (“Cingular”)
5. Coalition of Independent Cellular Carriers (“CICC”)
6. Leap Wireless International, Inc. (“Leap”)
7. National Telephone Cooperative Association (“NTCA”)
8. Nextel Communications, Inc. (“Nextel”)
9. Office of Advocacy, U.S. Small Business Association (“SBA”)
10. Rural Telecommunications Group / Organization for the Promotion and Advancement of Small Telecommunications Companies (“RTG/OPASTCO”)
11. Sprint PCS (“Sprint”)
12. Telephone and Data Systems, Inc. (“TDS”)
13. UTStarcom
14. Verizon Wireless (“Verizon”)
15. WorldCom, Inc. (“WorldCom”)

B. Reply Comments

1. ArrayComm, Inc. (“ArrayComm”)
2. AT&T
3. CTIA
4. Cingular
5. ComSpace Corporation (“ComSpace”)
6. Consumers Union/Consumer Federation of America (“Consumer Groups”)
7. Donald R. Newcomb (“Newcomb”)
8. Leap
9. Rural Cellular Association (“RCA”)
10. Sprint
11. Southern LINC (“Southern LINC”)
12. TDS
13. Verizon
14. VoiceStream Wireless Corporation / Western Wireless Corporation (“VoiceStream/Western”)
15. WorldCom

C. Economic Analyses

1. Cramton, Peter, Declaration (attached to Leap Comments) (“Cramton Declaration”)
2. Cramton, Reply Declaration (attached to Leap Reply Comments) (“Cramton Reply Declaration”)
3. Economists, Inc. Comments (attached to AT&T Comments) (“Economists, Inc. Comments”)
4. Gertner, Robert H. and Shampine, Allan L., Declaration (attached to Verizon Comments) (“Gertner and Shampine Declaration”)

5. Gertner and Shampine, Reply Declaration (attached to Verizon Reply Comments) (“Gertner and Shampine Reply Declaration”)
6. Hayes, John B., “CMRS HHIs from Customer Share Data: An Update” (attached to Sprint Comments) (“Hayes Comments”)
7. Schwartz, Marius and Gale, Dr. John M., “Are Spectrum Limits Needed to Preserve Competition?” (attached to CTIA Comments) (“Schwartz and Gale Comments”)
8. Strategic Policy Research, “White Paper on Elimination of the Spectrum Cap” (attached to Cingular Comments) (“Strategic Policy Comments”)
9. Strategic Policy Research, Reply Comments (attached to Cingular Reply Comments) (“Strategic Policy Reply Comments”)

D. Technical Analyses

1. Kelley, Mark, Declaration (attached to Leap Comments) (“Kelley Declaration”)
2. Lynch, Richard J., Declaration (attached to Verizon Reply Comments) (“Lynch Declaration”)

APPENDIX B**FINAL RULES****AMENDMENTS TO THE CMRS SPECTRUM CAP RULE**

Part 20 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 20 – COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 160, 251-54, 303, and 332 unless otherwise noted.

2. Section 20.6 is amended by revising paragraphs (a) and (e) and adding a new paragraph (f) as follows:

Sec. 20.6 CMRS spectrum aggregation limit.*(a) Spectrum limitation.*

No licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS (see 47 C.F.R. § 20.9) shall have an attributable interest in a total of more than 55 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area.

(e) Divestiture.

(4) (A) Parties holding controlling interests in broadband PCS, cellular, and/or SMR licensees that conflict with the attribution threshold or geographic overlap limitations set forth in this section will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the conflicting licensee (*see* Sec. 1.948 of this chapter; *see also* Sec. 24.839 of this chapter (PCS)) by which, if granted, such parties no longer would have an attributable interest in the conflicting license. Divestiture may be to an interim trustee if a buyer has not been secured in the required period of time, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the license as it sees fit. Where parties to broadband PCS, cellular, or SMR applications hold less than controlling (but still attributable) interests in broadband PCS, cellular, or SMR licensee(s), they shall submit a certification that the applicant and all parties to the application have come into compliance with the limitations on spectrum aggregation set forth in this section.

(f) Sunset.

This rule section shall cease to be effective January 1, 2003.

AMENDMENTS TO THE CELLULAR CROSS-INTEREST RULE

Subpart H of Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Subpart H – Cellular Radiotelephone Service

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 222, 303, 309, and 332.

2. Section 22.942 is amended by revising paragraphs (a) and (c) to read as follows:

Sec. 22.942 Limitations on interests in licensees for both channel blocks in RSAs.

(a) *Controlling Interests.* A licensee, an individual or entity that owns a controlling or otherwise attributable interest in a licensee, or an individual or entity that actually controls a licensee for one channel block in a CGSA may not have a direct or indirect ownership interest of more than 5 percent in the licensee, an individual or entity that owns a controlling or otherwise attributable interest in a licensee, or an individual or entity that actually controls a licensee for the other channel block in an overlapping CGSA, if the overlap is located in whole or in part in a Rural Service Area (RSA), as defined in 47 CFR 22.909.

(c) *Divestiture.* Divestiture of interests as a result of a transfer of control or assignment of authorization must occur prior to consummating the transfer or assignment.

(1) Parties needing to divest controlling or otherwise attributable interests set forth in this section will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the conflicting interest (*see* Sec. 1.948 of this chapter) or other request for Commission approval by which, if granted, such parties no longer would have an attributable interest in the conflicting interest. Divestiture may be to an interim trustee if a buyer or acquirer of the interest has not been secured in the required period of time, as long as the buyer or acquirer of the interest has no interest in or control of the trustee, and the trustee may dispose of the interest as it sees fit. Where parties to such applications or requests for Commission approval hold less than controlling (but still attributable) interests, they shall submit a certification that the applicant or acquirer of the interest and all parties to the application or request for Commission approval have come into compliance with the limitations on interests in licensees for both channel blocks set forth in this section.

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended, (“RFA”),¹ an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the Notice of Proposed Rule Making (“NPRM”) in this proceeding.² The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.³

A. Need for, and Objectives of, the Report and Order

2. In the NPRM in this proceeding, as part of our biennial regulatory review pursuant to section 11 of the Communications Act,⁴ we solicited comment on whether we should retain, modify, or eliminate the commercial mobile radio services (“CMRS”) spectrum cap⁵ and the cellular cross-interest rule.⁶ In asking these questions, the NPRM looked at recent competitive changes in CMRS markets, reexamined the public interest objectives that the spectrum aggregation limits were designed to achieve, and asked whether there were alternatives to the existing rules that would avoid any potential public interest costs.

3. This Report and Order concludes that the CMRS spectrum cap is no longer necessary in the public interest as the result of meaningful economic competition in CMRS markets. Accordingly, we provide for the elimination or “sunset” of the spectrum cap rule effective January 1, 2003. We will no longer rely on this prophylactic rule in our approach to the aggregation of CMRS spectrum, but instead we will examine spectrum aggregation on a case-by-case basis, along with enforcement of safeguards in cases of misconduct. During the transition period, we will consider substantive and processing guidelines to guide this agency’s case-by-case review of transactions that would raise concerns similar to those that the spectrum cap was designed to address. We further decide, on the basis of the current state of competition in CMRS markets, to raise the spectrum cap to 55 MHz in all markets during the transition period. We believe that this change should address certain carriers’ concerns about near term capacity constraints in the most constrained urban areas during the period until the rule is eliminated and reliance solely on case-by-case review of CMRS spectrum aggregation is initiated, while not posing an undue risk of anti-competitive consequences during the transition period.

4. We also eliminate the cellular cross-interest rule in Metropolitan Statistical Areas (“MSAs”) without a transition period, in recognition that the cellular carriers in these areas no longer enjoy significant first-mover advantages. However, based on the current record, we retain the cellular cross-interest rule in Rural Service Areas (“RSAs”), where it appears that the cellular incumbents continue generally to dominate the market. We will reassess the continued need for the cellular cross-interest rule in RSAs

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Notice of Proposed Rulemaking*, 16 FCC Rcd 2763, 2793-97 (Appendix) (2001) (“NPRM”).

³ See 5 U.S.C. § 604.

⁴ 47 U.S.C. § 161.

⁵ 47 C.F.R. § 20.6.

⁶ *Id.* § 22.942.

during the 2002 biennial review.

B. Summary of Significant Issues Raised by Public Comments In Response to the IRFA

5. The Office of Advocacy of the U.S. Small Business Administration (“SBA”) and the National Telephone Cooperative Association (“NTCA”) filed comments in response to the IRFA. The SBA asserts that the Commission failed to (1) clearly state its regulatory objectives, (2) describe the impact its proposed rules would have on small businesses, and (3) propose alternatives designed to minimize this impact.⁷ We disagree.

6. First, the deregulatory goal of this biennial regulatory review proceeding is clear. The Communications Act requires the Commission to review certain of its rules biennially and determine whether those rules are no longer necessary in the public interest as a result of meaningful economic competition. Subsequent to making those determinations, the Commission is directed to “repeal or modify any regulation it determines to be no longer in the public interest.”⁸ Pursuant to that mandate, the Commission has reviewed whether competitive or other developments in CMRS markets warrant elimination or modification of any Commission regulations. In particular, in this proceeding, we reviewed whether to retain, modify or eliminate two regulations that currently limit the aggregation of broadband CMRS spectrum: (1) the CMRS spectrum cap and (2) the cellular cross-interest rule. The *NPRM* addressed possible modifications to the spectrum cap and cellular cross-interest rules, including, among other things: (1) increasing the amount of spectrum that a single entity may hold in a given geographic area beyond 45/55 MHz; (2) modifying the spectrum cap’s ten percent population overlap threshold and/or attribution rules; (3) eliminating or modifying the rule that limits attributable Specialized Mobile Radio (“SMR”) spectrum to 10 MHz; (4) altering the cellular cross-interest rule’s provisions as they relate to disaggregation of spectrum and/or post-licensing divestiture; and (5) modifying the ownership attribution standards under both rules.⁹ Finally, we note that by its nature, the Commission’s statutory biennial regulatory review obligation contemplates a somewhat open-ended review of the Commission’s rules with an eye toward deregulation.

7. Second, the *NPRM* sufficiently described the impact the Commission’s proposed rules would have on small businesses, as required by the RFA.¹⁰ SBA states, “the Commission should explain whether lifting the spectrum cap would tend to discourage small business new entry or drive existing small businesses from the marketplace.”¹¹ Again, we note that the Commission’s statutory biennial regulatory review requires the Commission to review certain of its rules biennially and determine whether those rules are no longer necessary in the public interest as a result of meaningful economic competition. In the *NPRM*, we stated:

⁷ See SBA Comments at 1.

⁸ 47 U.S.C. § 161. Section 11 of the Communications Act states: “The Commission (1) shall review all regulations issued under this Act in effect at the time of the review that apply to operations or activities of any provider of telecommunications service; and (2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service. The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.” *Id.*

⁹ *NPRM*, 16 FCC Rcd. at 2793 ¶ 2.

¹⁰ See 5 U.S.C. § 603(a)-(c).

¹¹ SBA Comments at 5.

Since [September 1999], there have been international and economic developments that have significantly affected CMRS markets. For example, consolidation within the CMRS industry in an effort to create national service footprints has tended to reduce the number of smaller entities providing broadband CMRS on a purely local level. As part of this 2000 biennial review, we seek to develop a record regarding whether the CMRS spectrum cap and cellular cross-interest rule continue to make regulatory and economic sense in CMRS markets in the current-, mid-, and long-term. In doing so, we generally request comment on whether retention, modification, or elimination of the CMRS spectrum cap and/or cellular cross-interest rule is appropriate with respect to small businesses that are licensees in the cellular, broadband PCS and/or SMR services. We seek comment on whether there continues to be a need for these rules to ensure that new entrants, including small businesses, have access to spectrum licenses both at auction and in the secondary market. We inquire whether these bright-line rules continue to create efficiencies and reduce transaction costs for small business. We consider the impact on small businesses if we were to adopt alternative approaches that rely more heavily on case-by-case review. We also seek specific comment on various aspects of these rules that particularly affect small business, such as the [sic] whether our September 1999 decision to increase attribution standards to 40 percent has benefited small businesses.¹²

The above-quoted language demonstrates that we raised and addressed the very issues SBA claims were absent in the *NPRM*. We believe we sufficiently raised questions to obtain comment on these issues. For instance, we note that the above language asks whether “there continues to be a need for these rules to ensure that new entrants, including small businesses, have access to the spectrum licenses both at auction and in the secondary market.” Accordingly, the *NPRM* met the RFA’s requirements.¹³

8. Finally, SBA states that “the Commission should raise and explore alternative ways to encourage nationwide networks, alleviate spectrum shortages, or safeguard competition, and analyze how these alternatives would affect entities with varied resources.”¹⁴ As noted in the above-quoted language, the *NPRM* raised a series of issues concerning small entities, affording such entities adequate opportunity to comment on these issues. In addition, as previously noted, biennial regulatory review by its nature contemplates a somewhat open-ended review of the Commission’s rules with an eye toward deregulation, as opposed to a more targeted rulemaking. The deregulatory nature of the *NPRM* focuses on whether to retain, modify or eliminate two rules – the CMRS spectrum cap and the cellular cross-interest rule – because they may no longer be necessary in the public interest as a result of meaningful economic competition. Therefore, within the context of its biennial regulatory review, we believe the *NPRM* raised and explored the possible alternatives (*i.e.*, whether to retain, modify or eliminate the two rules). In addition, the *NPRM* sought comment on alternative courses of action if the Commission does eliminate the spectrum cap.

¹² *NPRM*, 16 FCC Rcd at 2796-97 ¶ 13.

¹³ 5 U.S.C. § 603(b)-(c).

¹⁴ SBA Comments at 4.

9. NTCA argues that “[t]he unconditional raising or lifting of the spectrum cap will likely result in further consolidation within the CMRS industry and diminish the opportunities for smaller entities to provide broadband CMRS service.”¹⁵ Notably, NTCA does not, in its comments on either the body of the *NPRM* or the IRFA, oppose modifying or eliminating either the spectrum cap or the cellular cross-interest rule. Nor does NTCA identify any specific inadequacy in the IRFA. Rather, as an “alternative to its proposed rule changes,” NTCA urges the Commission to take several actions unrelated to our spectrum aggregation limits: (1) license spectrum according to smaller geographic service territories, (2) take actions to increase the availability of spectrum to small carriers on the secondary market, and (3) enforce strict construction requirements against CMRS licensees.¹⁶

10. The alternatives that NTCA advocates are beyond the scope of this proceeding. Specifically, we consider the size of geographic licensing areas in the context of establishing licensing rules for particular bands of spectrum. We are considering in another proceeding potential measures to facilitate the availability of spectrum in secondary markets.¹⁷ Any potential changes in our construction requirements, or establishment of construction requirements for newly assigned spectrum, are also best considered separately from spectrum aggregation limits. As discussed below, we have considered in this Report and Order alternatives to eliminating the spectrum cap rule, and have adopted measures to minimize the impact of our decision on small entities.¹⁸

11. No other comments were submitted specifically in response to the IRFA.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

12. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by our rules.¹⁹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small organization,” “small business,” and “small governmental jurisdiction.”²⁰ The term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²¹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”²² Nationwide, as of 1992, there were

¹⁵ NTCA Comments at 7.

¹⁶ *Id.* at 7-9.

¹⁷ See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Notice of Proposed Rulemaking*, 15 FCC Rcd 24203 (2000).

¹⁸ See *infra*, Section E.

¹⁹ 5 U.S.C. § 603(b)(3).

²⁰ 5 U.S.C. § 601(6).

²¹ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

²² 5 U.S.C. § 601(4).

approximately 275,801 small organizations.²³ “Small governmental jurisdiction” generally means “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.”²⁴ As of 1992, there were approximately 85,006 such jurisdictions in the United States.²⁵ This number includes 38,978 counties, cities, and towns; of these, 37,566, or ninety-six percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (ninety-one percent) are small entities. According to SBA reporting data, there were 4.44 million small business firms nationwide in 1992.²⁶

13. The rule changes adopted in this Report and Order will affect small businesses that currently are or may become licensees in the cellular, broadband Personal Communications Service (“PCS”) and/or SMR services. The Commission estimates the following number of small entities may be affected by the proposed rule changes:

14. Cellular Radiotelephone Service. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.²⁷ According to the Bureau of the Census, only twelve radiotelephone firms from a total of 1,178 such firms, which operated during 1992, had 1,000 or more employees.²⁸ Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA’s definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Telecommunications Industry Revenue* data, 808 carriers reported that they were engaged in the provision of either cellular service or PCS, which are placed together in the data. We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA’s definition. Consequently, we estimate that there are fewer than 808 small cellular service carriers that may be affected by the policies adopted in this Report and Order.

15. Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross

²³ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

²⁴ 5 U.S.C. § 601(5).

²⁵ 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

²⁶ See U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 2D, Employment Size of Firms.

²⁷ 13 C.F.R. § 121.201, NAICS code 513322.

²⁸ U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5 (1995) (1992 Census, Series UC92-S-1), NAICS code 513322.

revenues of less than \$40 million in the three previous calendar years.²⁹ Subsequently, the Commission defined an additional classification – “very small business” – for blocks C and F for entities that, together with their affiliates, have had average gross revenues of not more than \$15 million for the preceding three calendar years.³⁰ These regulations defining “small entity” in the context of broadband PCS auctions and licensing have been approved by the SBA.³¹

16. The Commission has held six auctions of broadband PCS licenses to date. No small businesses within the SBA-approved definition bid successfully for licenses in the first of these auctions, Auction No. 4, in which the Commission made available licenses in blocks A and B. In Auction No. 5, the initial C block auction, eighty-nine (89) winning bidders qualified as small entities, winning 493 licenses. In the next C block auction, Auction No. 10, seven (7) winning bidders qualified as small entities, winning eighteen (18) licenses. A total of ninety-three (93) small and very small business bidders won approximately forty percent of the 1,479 licenses for blocks D, E, and F in the next broadband PCS auction, Auction No. 11.³² In Auction No. 22, forty-eight (48) bidders claiming small or very small business status won 277 of the 347 licenses offered. In Auction No. 35, the most recent broadband PCS auction, twenty-nine (29) of the thirty-five (35) winning bidders qualified as small or very small businesses and won 247 licenses. Accordingly, a maximum of 266 small entities have been awarded or placed high bids on licenses in broadband PCS block auctions to date.³³

17. Specialized Mobile Radio (SMR). Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined “small business” for purposes of auctioning 900 MHz SMR licenses, 800 MHz SMR licenses for the upper 200 channels, and 800 MHz SMR licenses for the lower 230 channels on the 800 MHz band as a firm that has had average annual gross revenues of \$15 million or less in the three preceding calendar years.³⁴ The SBA has approved this small business size standard for the 800 MHz and 900 MHz auctions.³⁵ The auction of the 1,020 geographic area licenses for the 900 MHz SMR band began on December 5, 1995, and was completed on April 15, 1996. Sixty (60) winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small businesses under the \$15 million size standard. The

²⁹ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-84 ¶¶ 115, 5606-10, ¶¶ 172-80 (1994). see also 47 C.F.R. § 24.720(b).

³⁰ 47 C.F.R. § 24.720(b)(2); see 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, *Report and Order*, 11 FCC Rcd 7824, 7852 ¶ 60 (1996).

³¹ See, e.g., Letter from Aida Alvarez, Administrator, U.S. Small Business Administration, to Amy J. Zoslov, Chief, Auctions & Industry Analysis Division, Wireless Telecommunications Bureau, dated Dec. 2, 1998 (approving very small business definition); Letter from Philip Lader, SBA Administrator to William Kennard, FCC General Counsel, dated Nov. 9, 1994 (approving small business definition). See also, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 435, ¶ 57 (1994).

³² FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71,744 (rel. Jan. 14, 1997).

³³ This number is a maximum in that it has not been adjusted to reflect those small entities that may have won licenses in more than one auction. Moreover, some spectrum won by small entities may have been made available, and been won, in more than one auction.

³⁴ *Id.* § 90.814(b)(1).

³⁵ See Letter to Tom Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, Small Business Administration, dated Aug. 10, 1999.

auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten (10) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.

18. The lower 230 channels in the 800 MHz SMR band are divided between General Category channels (the upper 150 channels) and the lower 80 channels. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels (plus three (3) 800 MHz licenses for the upper 200 channels from a previous auction) began on August 16, 2000, and was completed on September 1, 2000. At the close of the auction, 1,030 licenses were won by bidders. Eleven (11) winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. The auction of the 2,800 geographic area licenses for the lower 80 channels of the 800 MHz SMR service began on November 1, 2000, and was completed on December 5, 2000. Nineteen (19) winning bidders for geographic area licenses for the lower 80 channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. We, therefore, estimate that there are up to 100 geographic area licensees that are small entities in the 800 MHz and 900 MHz SMR bands. In addition, there are 1,144 incumbent site-by-site SMR licensees on the 800 and 900 MHz bands.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

19. The rules in this Report and Order do not impose any additional reporting, recordkeeping or other compliance measures.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

20. In this proceeding, we considered whether to retain, modify, or, alternatively, to eliminate the CMRS spectrum cap and cellular cross-interest rules. We also asked whether there were alternatives to these rules that could avoid any potential public interest costs. We have weighed the benefits of such alternative means of reviewing CMRS spectrum aggregation, specifically considering whether to continue using prophylactic rules or to review spectrum aggregation issues on a case-by-case basis.

21. As an alternative to eliminating the spectrum cap rule, we considered continuing to apply a prophylactic approach to the potential anti-competitive effects of CMRS spectrum aggregation. We recognized that different costs and benefits can be associated with bright-line rules and case-by-case review with respect to degree of flexibility, predictability of outcome, likelihood of rejecting beneficial (or approving harmful) transactions, ability to account for the particular attributes of a transaction or market, speed of decision-making, and resource demands on the Commission and carriers.³⁶ On balance, and in light of the growth of both competition and consumer demand in the CMRS market, 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. We are persuaded that competition is now robust enough in CMRS markets that it is no longer appropriate to impose overbroad, *a priori* limits on spectrum aggregation that may prevent transactions that are in the public interest.³⁷

³⁶ See *supra* Report and Order at ¶ 49.

³⁷ See *supra* Report and Order at ¶ 50.

22. We believe our provision for a transition period prior to January 1, 2003, for eliminating the spectrum cap will minimize the impact of our decision on small businesses. We note that several commenters argue against eliminating or increasing the spectrum cap on the ground that the cap preserves opportunities for entrepreneurs and providers of niche services.³⁸ As other commenters point out, however, 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.³⁹ 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. Nevertheless, although we believe that opportunities for small businesses can be fully protected through a case-by-case approach, we recognize that advancing one’s positions in a case-by-case regime could require resources that small businesses may not be immediately prepared to commit. Furthermore, regulatory certainty and speed of processing are likely to be particularly important to small businesses, which typically are less able to withstand extended or costly administrative processes. Therefore, in considering the adoption of guidelines and procedures, we will take account of the needs of small businesses. We fully expect that case-by-case review, properly performed, will offer large and small businesses alike the benefits of flexibility and attention to the specific details of a particular transaction. We also commit ourselves to vigorous enforcement of safeguards against anti-competitive activity.⁴⁰

23. During the transition period, we raise the spectrum cap to 55 MHz in all geographic areas. We considered and rejected the alternative of leaving the spectrum cap at 45 MHz in MSAs because we determined that a 45 MHz cap may over the next fourteen months impose capacity constraints, and ensuing costs to consumers, on carriers in certain urban markets. We also determined that a moderate increase in the spectrum cap, under current market conditions, does not pose an undue risk of anti-competitive conduct during the transition period. Finally, we note that we will continue to review the competitive consequences of transactions that are at or below the spectrum cap if specific evidence of competitive concerns is presented either by interested parties or through review by Commission staff.

³⁸ See Leap Comments at 2-3, 5-6, 8, 10; Cramton Declaration on behalf of Leap at 4-7, 22-24; NTCA Comments at 7; UTStarcom Comments at 2; WorldCom Comments at 3, 8; Newcomb Reply Comments; Leap Reply Comments at 24-25; Cramton Reply Declaration on behalf of Leap at 23; Southern LINC Reply Comments at 9-10; Consumer Groups Reply Comments at 2; *see also* Chadmoore Comments at 1-2 (arguing that cap should be increased only if other action is taken to promote the entry of small businesses).

³⁹ See RTG/OPASTCO Comments at 6 (arguing that elimination of the spectrum cap will provide economic incentives for new carriers to enter rural markets and that “rural consumers particularly stand to gain from the elimination of the spectrum cap” because eliminating limits on spectrum aggregation will allow rural carriers to utilize the “economies of scale which they might come to possess without the cap”); CTIA Comments at 29, 48-49; CTIA Reply Comments at 27 (arguing that the spectrum cap is “neither required nor useful as a tool to ensure that small businesses participate in the wireless business” and that the attribution rules of the spectrum cap limit or deny small businesses access to capital from other market participants and inhibit their ability to form nationwide affiliations with other carriers); AT&T Comments at 12-14 (arguing that the spectrum cap’s attribution rules distort efficient business arrangements and deprive new entrants of access to capital and management expertise that could otherwise help them to compete competitively); Cingular Reply Comments at 11 (arguing that elimination of the spectrum cap will increase the competitive opportunities for small and rural companies by allowing them the flexibility to compete in neighboring markets and enter new lines of business).

⁴⁰ See *supra* Report and Order at ¶¶ 29, 50.

24. With respect to the cellular cross-interest rule, we determine that the rule is no longer necessary or appropriate in MSAs because the cellular duopoly conditions that prompted the rule's adoption no longer exist. Thus, under current market conditions in MSAs, there is no reason to treat the aggregation of cellular spectrum any differently than other aggregation of CMRS spectrum. In RSAs, by contrast, the record, though limited on this point, indicates that competition to the incumbent cellular licensees is not as developed as in MSAs. Thus, based on the record in this proceeding, it appears that a combination of interests in cellular licensees would more likely result in a significant reduction in competition. We, therefore, retain the cellular cross-interest rule in RSAs, subject to waiver of the rule for those RSAs that are shown to exhibit market conditions under which cellular cross-interests may be permissible without a significant likelihood of substantial competitive harm.

Report to Congress: The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

RE: 2000 Biennial Regulatory Review – Spectrum Aggregation Limits For Commercial Mobile Radio Services, Report and Order (WT Docket No. 01-14)

Let me begin by highlighting what I think our task is in this and other biennial review proceedings. Although sometimes it is very easy to get lost in the weeds of particular rules, it is important to recall the overall objectives of the congressional mandate before us and consider our actions in its light.

The central purpose of communications policy is stated succinctly in the preamble of the Telecommunications Act of 1996:

An Act to *promote competition* and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.¹

To fulfill this purpose, Congress created section 11 and the biennial review standard, by which it commanded the Commission to “determine” whether a rule is “no longer necessary in the public interest as the result of meaningful economic competition.”² These two things – the purpose of the 1996 Act and section 11’s mandate – when read together evidence faith that a healthy, competitive market can secure public benefits just as ably as government rules. They also command the Commission to vigilantly and constantly advance that proposition.

Much has been made about whether the market for commercial mobile radio services (CMRS) is *sufficiently* competitive. By any standard, however, this is the most competitive market in the communications industry. This is demonstrated by our findings that there is growth and increasing output, lower and declining prices, increasing innovation, consumer churn and service provider substitutability. These facts are surely proof of a highly competitive market.

I think it is fanciful to suggest that all of the benefits of this competitive market have flowed solely as a consequence of the spectrum cap rule. Certainly, we can always quibble about the usefulness and need for more evidence and more data, but the facts are stubborn and they show this is a healthy and competitive marketplace. I cannot imagine a more exemplary set of competitive conditions to justify elimination of a rule under section 11 than those present before us in this proceeding. For those who would not find it appropriate to repeal this regulatory ownership restriction (in a little more than a year from now), it is even more difficult to imagine any circumstances that would justify deregulation under section 11.

In many ways, advocates of the rule’s continuance present a false choice. They urge, if you keep the rule, all of the wonderful benefits of competition we see now will continue to exist, but if you eliminate the rule, nothing will result other than disastrous consolidation and concentration. However, that point of view not only represents a lack of faith in the competitive marketplace, but also completely disregards the fact that Congress provided other vehicles to consider and police those anti-competitive activities they fear.

Specifically, section 310(d) of the Communications Act clearly requires the Commission to affirmatively conclude with respect to every assignment and transfer application that the public interest is

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (preamble) (emphasis added).

² 47 U.S.C. § 161(a)(2).

satisfied.³ One can certainly have a debate about which is the administratively optimal way to consider that question – by prophylactic rules or case-by-case review – but, clearly, the objective of each approach is the same. By our action today sunseting the spectrum cap rule, we in no way undermine the continued importance of our public interest obligations under section 310(d).

We have chosen not to immediately eliminate the spectrum cap rule for prudential reasons. The sunset is a conscious and measured approach to make sure that we have a period of time to ensure that we have the resources and the guidelines to effectively, under section 310(d), evaluate mergers to determine if they are in the public interest.

I find it ironic that in the broadcast area, in which we have the same public interest standard, some have sufficient faith in the standard to insist that we go above and beyond the bright-line rules and conduct case-specific analysis. But somehow here, such a review is summarily dismissed as ineffective. I also note that vivid forecasts of inevitable anticompetitive harm assumes that the antitrust authorities will have no interest whatsoever in policing the kinds of disastrous consequences that are predicted. To the contrary, as the Chief of the Department of Justice's Antitrust Division has stated for the record in this proceeding, the DoJ has evaluated numerous transactions involving CMRS license transfers and several investigations have resulted in complaints and consensual final judgments requiring divestitures to preserve competition. DoJ has pledged that it will continue to review mergers in the wireless industry to determine if they will have anticompetitive consequences in violation of section 7 of the Clayton Act and has assured us it will also continue to safeguard competition through its enforcement activities in the industry.⁴

I agree that Congress has set out a number of important public interest objectives that we are charged with advancing. However, not every objective must be embodied in each and every rule. The Commission has multiple tools to pursue its public interest objectives. For example, we have continued influence through spectrum allocation policies and service rules, including auction-specific ones, that are all designed to pursue some of these sacred public interest obligations that are before us. I take the view that the public interest objectives of the statute are important, but they are achieved by a mosaic of policies and rules in the aggregate that can be applied to the facts and circumstances before us at any given time.

I think it is too remarkable to suggest that any one rule must bear the full weight of every possible public policy objective in order to be meritorious. If that were so, we would only need one *über-rule* to achieve all of the policies that it is associated with. I think it is legitimate to consider what role a particular rule played in the overall objective and not somehow require that it bear the weight of all of the goals that were trying to be achieved at the time it was promulgated. The spectrum cap rule, as of January 1, 2003, will have simply outlived its usefulness as a regulatory tool. We should now cede to the competitive market and the wonderful consumer benefits that spring from it, yet with our remaining tools, we will diligently monitor, police and scrutinize any trends or transactions that will reverse these benefits.

It is for the above reasons, and with confidence, that I vote in support of the sunseting of the spectrum cap rule and the movement to more tailored case-specific analysis.

³ 47 U.S.C. § 310(d).

⁴ Letter from Charles A. James, Assistant Attorney General, November 7, 2001.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS
Dissenting

RE: 2000 Biennial Regulatory Review – Spectrum Aggregation Limits For Commercial Mobile Radio Services, Report and Order (WT Docket No. 01-14).

This is a somewhat lengthy but deeply felt response to the action this Commission is about to take. The development of the wireless industry is one of the true success stories of the telecommunications industry and good government policy. The spectrum cap, almost every wireless industry leader has told me, played an important role in making this happen. If the cap is to be repealed, there must be a comprehensive finding of the need for repeal and an analysis of the conditions that require such action and the public interest benefits to be derived therefrom. In almost every market in the country, companies have not reached the cap. In those areas where spectrum scarcity might develop over the next few years, surely the Commission could use waivers or lift current limits and do so without in the process stifling competition, encouraging industry consolidation and short-changing hard-pressed American consumers. Let's not kid ourselves -- this is, for some, more about corporate mergers than it is about anything else. Just look at what the analysts are talking about as the specter of spectrum cap renewal approaches: their almost exclusive focus is on evaluating the candidates for corporate takeovers and handicapping the winners and losers in the spectrum bazaar we are about to open.

Today's Commission approach is "Ready, Fire, Aim." We have not adequately analyzed spectrum exhaustion scenarios in the short or near-term. We have not adequately evaluated the prospects for economic concentration and the potential for wireless monopolies. We have not performed the extensive public interest evaluation required by statute and expected by Congress and which would include impacts upon small business, rural consumers, ownership diversity, efficient use of the spectrum and the encouragement of new technologies. Instead we simply remove the cap. And while we are encouraged to think of this as a measured action – raising the cap now and repealing it completely in 2003 – today's action is, in reality, tantamount to immediate repeal. This is because it takes some time for the players to jockey into position to reap the spectral harvest.

Spectrum is a publicly owned resource. It is therefore not surprising that Congress gave the Commission very specific responsibilities related to spectrum. In both the Budget Act and the Telecommunications Act of 1996, Congress instructed the Commission to promote competition, the efficient and intensive use of spectrum, diverse control of spectrum by a wide variety of entities, and to create simple rules and certainty in the marketplace.

The Commission responded to these responsibilities, in part, through the spectrum cap. The cap prevents concentration of spectrum that threatens competition, gives companies an incentive to maximize their spectral efficiency, and works to promote diversity of control, serving as an easy and transparent method of doing Congress's will. The Commission repeatedly has found the cap to be in the public interest. Yet today the Commission eliminates the cap.

The majority properly does not rely on any argument of spectrum exhaustion. There is no record evidence that companies have even reached the current spectrum cap in all but a few markets. I believe that increasing or altering the cap rather than eliminating it could alleviate future needs. Instead, the majority conducts its public interest analysis by examining only whether the cap is necessary to promote competition. I believe that statutory directives, previous Commission action, and the public interest require us to determine whether the cap supports not only competition, but also efficiency, diversity, simplicity, and certainty in the market. Because I believe that the cap is necessary in the public interest to support these Congressionally mandated goals, and especially because I am troubled by the prospect of dangerous concentration through mergers, I support continuation of the cap.

I would have been open to addressing the cap on a market-by-market basis in a manner that could have addressed the particular challenges of rural America as well as the particular circumstances of other markets. I also would have been open to exploring increasing the cap to a level that would have met our statutory responsibilities while providing more flexibility to wireless companies. But the stark choice presented to me is whether to eliminate the cap or to keep the cap. I must therefore respectfully dissent because I believe that eliminating the cap is contrary to the public interest.

The Commission Must Find “Meaningful Competition” and Conduct a Public Interest Inquiry To Fulfil Its Biennial Review Responsibilities

One important purpose of the Telecommunications Act of 1996 is to facilitate the elimination of unnecessary regulation. To this end, Congress instructed the Commission to review its rules on a biennial basis and “determine whether any . . . regulation [of a provider of telecommunications service] is no longer necessary in the public interest as the result of meaningful economic competition between providers of [that] service.”¹ This created a two-step process for the Commission when we review a regulation under this provision. First we must determine if there is “meaningful competition” in the relevant market. Then we must determine whether the existence of “meaningful competition” means that the regulation in question is “no longer necessary in the public interest.”

It seems that if there is not “meaningful competition” our inquiry is concluded. Congress, however, does not define “meaningful competition” for the Commission. The term “meaningful” is different from other adjectives used to modify competition elsewhere in the law and in our regulations. The majority here does not define “meaningful competition” before determining that “meaningful competition” is present in the CMRS market.

Even if we get past the initial determination of the existence of “meaningful competition,” Congress directs the Commission to eliminate a regulation only if it finds that such elimination serves the “public interest.” Congress did not limit this public interest inquiry in any way. The 1996 Act certainly does not say that for Biennial Review purposes “public interest” only means “promotes competition.” The Act also nowhere even hints that “public interest” only refers to the policies originally referred to in creating the underlying regulation, even though the majority sees this in the “plain meaning” of the statute.² “Public interest” here is left unmodified and therefore must be interpreted to mean the traditional Commission public interest standard. To the extent that the majority has analyzed the spectrum cap using a different interpretation of our public interest responsibility, I believe that it has acted contrary to Congressional direction.

Our Biennial Review responsibility in this proceeding, therefore, is first to determine whether there is “meaningful competition” in the CMRS market. If we find such competition, we must ask ourselves whether eliminating the spectrum cap is in the public interest, taking into account that the Commission heretofore has consistently and repeatedly found that the spectrum cap serves the public interest.

¹ 47 U.S.C. § 161(a)(2).

² Majority at ¶ 25.

The Commission Has Not Adequately Analyzed the Nature of Competition in the CMRS Market

I do not believe that the Commission has gathered data of adequate type, quality, or granularity in its effort to fulfill its statutory responsibility to analyze “meaningful competition” in the CMRS market. This is not the fault of Commission staff, who worked hard with the informational resources they had. It is, rather, that the Commission did not have access to the information needed to fulfill our Biennial Review responsibilities. The wireless industry, as noted above, is a great success story. CMRS providers give customers a wide variety of services and technologies. Careful study may well have demonstrated the presence of the kind of “meaningful competition” that Congress requires – certainly we see large numbers of competitors in large urban markets, and there are industry reports of declining prices in these large urban markets. However, even if we can point to strong anecdotal evidence of competition in selected major markets, the Commission is still obligated to seek concrete, nationwide, independent data on the record and to use this data to explore the issue with rigor and precision before taking action.

The majority argues that the presence of a level of competition that supports eliminating the cap in all markets can be inferred from evidence such as (1) an increased number of CMRS subscribers, corporate revenue, and industry employees; (2) the number of companies offering service in some locations; and (3) decreasing prices.

While more complete data and analysis of these and other topics could be the basis for a decision that I could support, I believe that the record evidence relied upon by the majority is in some cases insufficient and that this evidence has at times only a tenuous relationship to “meaningful competition.” For example, the majority does not explore the relationship between increasing numbers of customers, corporate revenue, and industry employees and competition except to say that consumers have benefited from “increased output.”³ Increasing demand does not necessarily mean strong competition.

Additionally, while the majority points to large numbers of competing companies in some markets, it also admits that the CMRS market is characterized by “moderate to high concentration levels.”⁴ Commenters go further, offering economic studies that state that the average Herfindahl-Hirshman Indices (HHIs) for even the top 25 wireless markets are “well above the level considered to be ‘highly concentrated’ by antitrust authorities.”⁵ The majority also explains that “[w]e find that the limited amount of spectrum suitable for CMRS available today creates a significant barrier to entry, at least in MSAs.”⁶ Is a highly concentrated market consistent with “meaningful competition?” What does the presence of a “significant barrier to entry” mean for the continuance of “meaningful competition?” If spectrum is aggregated after the cap is eliminated will this barrier to entry mean that “meaningful competition” will disappear? The majority does not explore these questions adequately.

³ *Id.* at ¶ 35.

⁴ *Id.* at ¶ 33. It is important to note that these concentration levels are present with the spectrum aggregation limits intact. The majority does not explore the consequences for lifting the limits on HHI, as I believe it was required to do. Additionally, the decreases in HHI-measured concentration that the majority relies upon, *id.* at 32, occurred while the limits were in place.

⁵ Leap Reply Comments at p. 28.

⁶ Majority at ¶ 40.

Critically, the majority states that “consumers in rural areas appear to have fewer choices in terms of providers, pricing plans, and service offerings than consumers in MSAs [Metropolitan Statistical Areas].⁷ According to the majority, “*in over half of RSA [Rural Service Area] counties, two or fewer licensed mobile telephony carriers are currently providing service* . . . [b]ecause these numbers include carriers that may be offering service in only a small portion of a county, they may overstate the amount of actual facilities-based competition, especially in RSAs.”⁸ Is there “meaningful competition” in these counties? The majority does not seem to have explored this question in relation to the first step of the Biennial Review standard (although it raises the issue in relation to the cellular cross interest rule). Without addressing these important questions, the Commission has not fulfilled its Congressionally mandated responsibilities.

Instead of exploring the state of competition in rural areas adequately, the majority relies on the assertion that “about ninety-one percent of U.S. residents lived in a county that was served, at least in part, by three or more different mobile telephony providers.”⁹ The data that this artfully drafted sentence relies on, however, demonstrate that it should not be the basis for overturning previous Commission action by removing the aggregation limits. In response to the release of these data in the *CMRS Report*, the Rural Telecommunications Group revealed that:

“[T]he FCC trumpeted the news that 91 percent of the U.S. population has access to three or more mobile telephony operators (cellular, broadband PCS and/or digital SMR). The full Report paints a far more sober picture. The FCC explains that its analysis overstates the total coverage in terms of both geographic areas and populations covered. The FCC noted that it counted a county as ‘covered’ if a mobile provider was offering service in any portion of the county. Even where it concluded that multiple providers served a county, it did not mean they were offering service to the same portion of the county. Finally, the Report noted that the FCC included the entire population and square mileage of a county as ‘covered’ if a wireless provider offered service in any portion of the county. This incredibly inflated view of mobile coverage in the U.S. cannot form the basis for future public policy, especially that affects Rural America.”¹⁰

The Commission should not base its decision to eliminate a long-standing rule, created in order to fulfil the statutory instructions of Congress, on evidence of this sort. Such reliance invites legal challenge.

Finally, the majority relies on evidence of decreasing prices in the CMRS market,¹¹ citing the Commission’s *Sixth Annual CMRS Competition Report*.¹² However, in that Report, the Commission states that “[i]t is difficult to identify sources of information that track mobile telephone prices in a comprehensive manner.”¹³ The Report indicates that “[b]ecause [the studies that the Commission could

⁷ *Id.* at ¶ 34.

⁸ *Id.* at ¶ 34.

⁹ *Id.* at ¶ 31.

¹⁰ Press Release of Rural Telecommunications Group (July 19, 2001). Note that the Rural Telecommunications Group issued a correction to this press release that did not change the quoted passage.

¹¹ Majority at ¶ 35.

¹² In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Sixth Report (2001).

¹³ *Id.* at 27 (2001).

identify] use different methodologies and market samples, their findings vary and are comparable only in the broadest terms.”¹⁴ Also, critically, the *Report* indicates that “[d]ata are not currently available for smaller markets.”¹⁵ I am hesitant to rely on evidence of this sort.

The Commission could conduct a detailed study of competition in the CMRS market. This would require issuing a Notice of Inquiry requesting comparable, geographically specific data on a wide range of topics, followed by detailed economic analysis of this information. If such a study had been performed we might not have legitimate disagreements about whether competition is strong and ubiquitous enough to support a nationwide elimination of the cap. The result could be that “meaningful competition” exists in both urban and rural CMRS markets. But I do not have access to adequate record evidence on this issue, and I cannot support eliminating the spectrum cap on the basis of an insufficient record.

Eliminating the Spectrum Cap Is Not In The Public Interest

The majority, having concluded that “meaningful competition” exists, next argues that eliminating the spectrum cap is in the public interest. “[I]n making the determination whether a rule remains ‘necessary’ in the public interest once meaningful competition exists,” the majority states, “the Commission must consider whether the concerns that led to the rule or the rule’s original purpose may be achieved without the rule or with a modified rule.”¹⁶ The majority states that “[t]he primary public interest purpose underlying the original adoption” of spectrum aggregation limits was the promotion of competition in the CMRS market.¹⁷

As discussed above, Congress did not limit the Commission’s public interest responsibilities in the Telecommunications Act to the original purposes for which the rules were promulgated. If Congress had wanted to do so, it clearly could have by stating that the Commission must “determine whether any such regulation is no longer necessary *for the original purposes for which the regulation was promulgated* as the result of meaningful economic competition between providers of [a given] service.” But it did not, instead choosing to require the Commission to consider the broader “public interest.”

In performing the public interest inquiry, it is of course useful to consider the original purposes of the spectrum cap. The purpose underlying the spectrum aggregation limits was not merely to promote competition in the CMRS market, despite the majority’s almost complete focus on this single purpose. In creating the spectrum cap, the Commission explicitly stated that it intended to fulfill its requirements under Section 309(j) of the Act, and the Budget Act.¹⁸

As discussed above, spectrum is a publicly owned resource. Because of this, Congress gave the Commission very specific instruction related to spectrum. Section 309(j) states that: “[T]he Commission

¹⁴ *Id.* at 28 (2001).

¹⁵ *Id.*

¹⁶ Majority at ¶ 25.

¹⁷ *Id.* at ¶ 26.

¹⁸ *See*, In the matter of Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap, Report and Order, 11 FCC Rcd. 7824, 7874 (1996) (“*CMRS Spectrum Cap Report and Order*”); In the matter of Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd. 7988, 8104 (1994) (“*CMRS Third Report and Order*”).

shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 1 of this Act and the following objectives:

- “[T]he development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
- “[P]romoting economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- “[E]fficient and intensive use of the electromagnetic spectrum.”¹⁹

In addition, Congress stated that “[i]n prescribing regulations pursuant to [the above sections], the Commission shall . . . prescribe . . . bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunities for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services”²⁰ In an earlier provision, Congress also stated that “the Commission shall consider, consistent with section 1 of this Act, whether [actions to manage the spectrum made available to private mobile services] will (1) promote the safety of life and property; (2) improve the efficiency of spectrum and reduce the regulatory burdens of spectrum users . . . ; [or] (3) encourage competition and provide services to the largest feasible number of users”²¹

The Commission responded to these responsibilities, in part, through the spectrum cap. In the *CMRS Third Report and Order*, the Commission stated that “[w]e are adopting this cap as a minimally intrusive means of ensuring that the mobile communications marketplace remains competitive and retains incentives for efficiency and innovation.”²² Rules limiting aggregation, the Commission stated, “seek to promote diversity and competition in mobile services, by recognizing the possibility that mobile service licensees might exert undue market power or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum.”²³

The Commission specifically explained that the purposes of the cap extended beyond promoting competition by stating that “[t]he lack of a spectrum cap could undermine other goals of the Budget Act,

¹⁹ 47 U.S.C. § 309(j)(3).

²⁰ *Id.* at § 309(j)(4).

²¹ *Id.* at § 332(a). It is worth noting that §332(c)(1)(C) states that “promot[ing] competition” may be the basis of a public interest finding only if the Commission is acting under §332(c)(1)(A)(iii) in assigning common carrier duties. This does not extend to public interest analysis related to §332(a).

²² *CMRS Third Report and Order* at 8100.

²³ *Id.* The Commission also found that “If firms were to aggregate sufficient amounts of spectrum it is possible that they would unilaterally or in combination exclude efficient competitors, reduce the quantity or service available to the public, and increase prices to the detriment of consumers. We believe that the imposition of a cap on the amount of spectrum a single entity can control in an area will limit the ability to increase prices artificially.” *Id.*

such as the avoidance of excessive concentration of licenses and the dissemination of licenses among a wide variety of applicants.”²⁴ In addition, the Commission stated that “we think that setting a cap furthers the public interest by promoting competition in CMRS services, allowing review of CMRS acquisitions in an administratively simple manner, and lending certainty to the marketplace.”²⁵

The Commission explained the multifold reasons for the spectrum cap in the *CMRS Spectrum Cap Report and Order* as well, stating that “[o]ur 45 MHz spectrum cap also furthers the goal of diversity of ownership that we are mandated to promote under Section 309(j). Section 309(j) directs us, in specifying eligibility for licenses and permits, to avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants. The statute further states that in prescribing regulations, the Commission must, *inter alia*, prescribe area designations and bandwidth assignments that promote economic opportunity for a wide variety of applicants.”²⁶

As described by Congress and the Commission, therefore, the purposes of the spectrum cap include: (1) promoting competition; (2) promoting efficient and intensive use of the publicly owned spectrum; (3) promoting innovation; (4) promoting diversity of ownership and the dissemination of licenses among a wide variety of applicants; (5) allowing review of CMRS acquisitions in an administratively simple manner; and (6) lending certainty to the marketplace. If the Commission has not acted to promote each of these purposes in its public interest review, along with other relevant public interest factors, it has not fulfilled Congress’s instructions and its Biennial Review responsibilities. Assertions regarding the primacy of one factor, sentiment on the unimportance of other factors that were specifically enumerated by Congress and relied upon by the Commission, or broad-brush claims about the ability of other Commission policies and rules to achieve these mandated purposes, do not mask this legal insufficiency.

I believe that the spectrum cap is still in the public interest, given the information we have before us. First, the cap promotes competition. In meeting with the CMRS industry over the past few months, I have repeatedly asked whether the spectrum cap promoted competition in the wireless industry. The answer was almost always yes. The Commission explained the economic rationale behind the cap in the *CMRS Spectrum Cap Report and Order*. As we explained there, the cap promotes competition by preventing anti-competitive horizontal concentration. Some concentration can create efficiencies and economies that are good for competition and for consumers. But, “at some point . . . horizontal concentration starts to work against those goals because it results in fewer competitors, less innovation and experimentation, higher prices and lower quality, and these disadvantages outweigh any advantages in terms of economies and efficiency.”²⁷

Congress recognized that the CMRS market is particularly susceptible to dangerous concentration by specifically instructing the Commission to protect against concentration in its rules. The “highly concentrated” nature of the market as indicated by Herfindahl-Hirshman Indices may be evidence that Congress was correct in its apprehension. The Commission has determined in the past that there are several factors that create a significant risk that the concentration indicated here by HHI is not misleading. It identified “significant barriers to entry,” such as limited spectrum availability, and the cost of obtaining licenses, and noted the inherent advantage of incumbents over new entrants. In sum, the Commission

²⁴ *Id.* at 8104.

²⁵ *Id.* at 8105.

²⁶ *CMRS Spectrum Cap Report and Order* at 7874.

²⁷ *Id.* at 7869.

concluded that there was “little potential for new entrants to discipline the behavior of the incumbents in the absence of the spectrum cap.” I believe that the basic nature of the CMRS market has not changed and that barriers to entry persist. In the absence of solid economic proof that this is not the case (as discussed above), I believe that the spectrum cap is in the public interest.

It is interesting to note that in anticipation of the cap being lifted financial and industry experts are reporting on a large set of potential mergers, predicting significant consolidation and labeling smaller competitors as “munch bait” if the cap is eliminated. This should give us pause.

The majority recognizes the presence of barriers to entry, but argues that a case-by-case review of mergers will protect competition. In the absence of public guidelines that the Commission would use in analyzing mergers, however, I cannot determine whether this would be the case or not. The Commission could have developed these guidelines before issuing this Order, but chose not to do so. The Commission could even have committed to publishing guidelines before the date when the cap is eliminated in 2003, but it chose not to do so.

It is important to note that Congress passed the Telecommunication Act and the Budget Act knowing that the Commission’s and the Department of Justice’s merger review processes existed. The fact that it found it necessary to require the Commission to create additional protections beyond these review processes must be read as a Congressional determination that these existing protections were not sufficient. Additionally, Congress specifically gave the Commission – not the Department of Justice – the responsibility to protect the interests outlined above. If the Commission relies on the DOJ review process or evaluation criteria alone, it will fail to meet its statutory responsibilities and will fail to recognize Congress’s determination that DOJ review is not adequate. We should not substitute our judgment for that of Congress.

Congress also mandated that the Commission promote the efficient and intensive use of publicly owned spectrum. Wireless companies have an incentive to invest in spectrally efficient protocols and technologies when the spectrum cap is in place. This is because they find greater value in achieving efficiency from their spectrum assets, and cannot merely continue to employ spectrally inefficient technologies if buying more spectrum is the less expensive option. Even if this does not result in efficiency from an individual company’s micro perspective, Congress specifically found that it was important to promote overall spectrum efficiency, and we are not positioned to question Congressional judgment on this decision.

The cap also serves the public interest by promoting innovation, encouraging diversity of ownership and the dissemination of licenses among a wide variety of applicants, allowing review of CMRS acquisitions in an administratively simple manner, and lending certainty to the marketplace, as Congress demanded. Even if the majority believes that eliminating the cap and relying on a case-by-case review of mergers promotes competition, it has not explained how it will address these other values.

Congress thought that the CMRS market was particularly susceptible to concentration, inefficient use of spectrum, and insufficient diversity of ownership. Knowing that the Commission’s and DOJ’s merger review processes were in place, it chose to instruct the Commission to do more. The Commission did this with the spectrum cap, and found that the cap was in the public interest several times, most recently in the last Biennial Review.²⁸ The cap is still in the public interest, and it should be maintained.

²⁸ In the last Biennial Review, the Commission again found that the cap was necessary to fulfil the instructions of Congress. “In re-evaluating the rule in the CMRS Spectrum Cap Report and order, the Commission set out the economic arguments why a 45-MHz aggregation limit strikes an appropriate balance (continued....)”

Conclusion

The wireless industry has been tremendously successful. I believe that this is due, in part, to the spectrum cap. Before we eliminate the cap, I believe that the Commission should undertake an intensive study of the CMRS marketplace so that we can determine where “meaningful competition” is present and where it is absent. Armed with this information, we could chose a method of fulfilling our statutory mandates that would be best suited to the marketplace. With what we know today, however, I must conclude that eliminating the cap is not in the public interest and leaves our ability to fulfil Congressional instructions in doubt.

The Commission, however, is deciding today to eliminate the spectrum cap. I hope that we will be vigilant as we go forward to meet the responsibilities that Congress gave us. Without the spectrum cap this will have to be done through the less effective and more burdensome method of case-by-case review. I believe that each review must not only examine competitive implications, but also the implications of a merger for the promotion of spectral efficiency and diversity of spectrum control so that a wide variety of entities have access to spectrum. I believe that we need to establish merger guidelines that will allow us to do this before the spectrum cap is eliminated. In their absence, I want all applicants to know that I will be reviewing their applications using the approach I have discussed herein.

Finally, I hope that we will conduct a proceeding to gather more information on the CMRS market. With adequate data our able FCC economists and attorneys, who have already worked hard on this issue, can help us address our statutory responsibilities.

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between the concern about undue market concentration and the benefits of spectrum aggregation. No commentator has persuaded us that this economic analysis is not still valid.” In the matter of 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Report and Order, 15 FCC Rcd 9219, 9254-55 (1999). “We are also concerned that raising the cap to a higher level . . . could lead to unacceptable concentration of these markets.” In the matter of 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Report and Order, 15 FCC Rcd 9219, 9256 (1999).